Federal Register

Monday,
November 17, 2008

Part II

Department of Labor

Wage and Hour Division

29 CFR Part 825

The Family and Medical Leave Act of 1993; Final Rule

DEPARTMENT OF LABOR

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: Final rule.

SUMMARY: This document provides the text of final regulations implementing the Family and Medical Leave Act of 1993 (''FMLA''), the law that provides eligible employees who work for covered employers the right to take job-protected, unpaid leave for absences due to the birth of the employee's son or daughter and to care for the newborn child; because of the placement of a son or daughter with the employee for adoption or foster care; in order to care for a son, daughter, spouse, or parent with a serious health condition; or because of the employee's own serious health condition that makes the employee unable to perform the functions of his or her job. The final regulations also address new military family leave entitlements included in amendments to the FMLA enacted as part of the National Defense Authorization Act for FY 2008, which provide additional job-protected leave rights to eligible employees of covered employers who provide care for covered servicemembers with a serious injury or illness and because of qualifying exigencies arising out of the fact that a covered military member is on active duty or has been notified of an impending call or order to active duty in support of a contingency operation.

EFFECTIVE DATE: These rules are effective on January 16, 2009.

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 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 regulations may be directed to the nearest Wage and Hour Division (WHD) District Office. Locate the nearest office by calling the WHD'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 WHD's Web site for a nationwide listing of WHD District and Area Offices at: *http://www.dol.gov/esa/contacts/whd/america2.htm*.

SUPPLEMENTARY INFORMATION:

I. Background

A. What the FMLA Provides

The Family and Medical Leave Act of 1993, Public Law 103–3, 107 Stat. 6 (29 U.S.C. 2601 *et seq.*), was enacted on February 5, 1993, and became effective for most covered employers on August 5, 1993. As enacted in 1993, FMLA entitled eligible employees of covered employers to take job-protected, unpaid leave, or to substitute appropriate accrued paid leave, for up to a total of 12 workweeks in a 12-month period for the birth of the employee's son or daughter and to care for the newborn child; for the placement of a son or daughter with the employee for adoption or foster care; to care for the employee's 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.

On January 28, 2008, President Bush signed into law H.R. 4986, the National Defense Authorization Act for FY 2008 (''NDAA''), Public Law 110–181. Section 585(a) of the NDAA expanded the FMLA to allow eligible employees of covered employers to take FMLA-qualifying leave ''[b]ecause of any qualifying exigency (as the Secretary [of Labor] 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.'' *See* 29 U.S.C. 2612(a)(1)(E) (referred to herein as ''qualifying exigency leave''). The NDAA also provided that ''an eligible employee who is the spouse, son, daughter, parent, or next of kin of a covered servicemember shall be entitled to a total of 26 workweeks of leave during a [single] 12-month period to care for the servicemember.'' *See* 29 U.S.C. 2612(a)(3)–(4) (referred to herein as ''military caregiver leave''). In addition to establishing these two new leave entitlements (referred to together throughout this document as the ''military family leave provisions''), section 585(a) of the NDAA included conforming amendments to incorporate the new military family leave entitlements into the FMLA's current statutory provisions relating to the use of FMLA leave and to add certain new terms to the FMLA's statutory definitions. The NDAA amendments were enacted January 28, 2008. The amendments require the Secretary of Labor to define ''any qualifying exigency'' through regulation. *See* 29 U.S.C. 2612(a)(1)(E).

To be eligible for FMLA leave, an employee must have been employed for at least 12 months by the employer and for at least 1,250 hours of service with the employer during the 12 months preceding the leave, and be employed at a worksite at which the employer employs at least 50 employees within 75 miles of the worksite. *See* 29 U.S.C. 2611(2). Employers covered by the FMLA must maintain any preexisting group health coverage for an eligible employee during the FMLA 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 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 is administered by the U.S. Department of Labor and applies to private sector employers of 50 or more employees, public agencies and certain federal employers and entities, such as the U.S. Postal Service and Postal Regulatory Commission. Title II is administered by the U.S. Office of Personnel Management and 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.[1] Title IV

[1] 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.'' *See http://www.dol.gov/esa/whd/fmla/fmla/1995Report/family.htm*. In 1999, the

(also administered by the Department of Labor) 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. Regulatory History

The FMLA required the Department to issue initial regulations to implement Titles I and IV of the FMLA within 120 days of enactment, or by June 5, 1993, with an effective date of August 5, 1993. The Department issued a Notice of Proposed Rulemaking (''NPRM'') on March 10, 1993 (58 FR 13394), inviting comments until March 31, 1993, on a variety of questions and issues. After considering the comments received 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, the Department issued an interim final rule on June 4, 1993 (58 FR 31794), which became effective on August 5, 1993, and which also invited further public comment on the interim regulations. Based on this second round of public comments, the Department published final regulations on January 6, 1995 (60 FR 2180), which 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.

On December 1, 2006, the Department published a Request for Information (''RFI'') in the **Federal Register** (71 FR 69504) requesting the public to comment on its experiences with, and observations of, the Department's administration of the law and the effectiveness of the FMLA regulations. The RFI's questions and areas of focus were derived from stakeholder meetings, a number of rulings of the U.S. Supreme Court and other federal courts, the Department's 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 the Congress on the FMLA's costs and benefits.[2] The Department received more than 15,000 comments in response to the RFI from workers, family members, employers, academics, and other interested parties.[3] 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)).

On February 11, 2008, the Department published an NPRM in the **Federal Register** (73 FR 7876) inviting public comments for 60 days on proposed changes to the FMLA's implementing regulations. The proposed changes were based on the Department's experience of nearly 15 years administering the law, the two previous Department of Labor studies and reports on the FMLA issued in 1996 and 2001, several U.S. Supreme Court and lower court rulings, and a review of the public comments received in response to the RFI. The NPRM also sought public comment on issues to be addressed in final regulations to implement the 2008 amendments to the FMLA providing for military family leave pursuant to section 585(a) of the NDAA. The Department's NPRM included a description of the relevant military family leave statutory provisions, a discussion of issues the Department had identified under those provisions, and a series of questions seeking comment on subjects and issues for consideration in developing the final regulations.

In response to the NPRM, the Department received 4,689 comment submissions (the majority via the Federal eRulemaking Portal at *http://www.regulations.gov*) during the official comment period from a wide variety of individuals, employees, employers, trade and professional associations, labor unions, governmental entities, Members of Congress, law firms, and others. Two submissions attached the views of some of their individual members: The American Federation of Teachers (528 individual comments) and MomsRising.org (4,712 individual comments). Additional comments submitted via the Regulations.gov eRulemaking Portal after the comment period closed were not considered part of the official record and were not considered. (Comments may be viewed on the Regulations.gov Web site at *http://www.regulations.gov/fdmspublic/component/main?main=DocketDetail&d=ESA-2008-0001*.)

Nearly 90 percent of the comments received in response to the NPRM were either: (1) Very general statements; (2) personal anecdotes that do not address any particular aspect of the proposed regulatory changes; (3) comments addressing issues that are beyond the scope or authority of the proposed regulations, ranging from repeal of the Act to expanding its coverage and benefits; or (4) identical or nearly identical ''form letters'' sent in response to comment initiatives sponsored by various constituent groups, such as the American Postal Workers Union and several of its affiliated local unions, the Associated Builders and Contactors, MomsRising.org, the National Organization of Women, the Society for Human Resource Management, Teamsters for a Democratic Union, and Women Employed. The remaining comments reflect a wide variety of views on the merits of particular sections of the proposed regulations. Many include substantive analyses of the proposed revisions. The Department acknowledges that there are strongly held views on many of the issues presented in this rulemaking, and it has carefully considered all of the comments, analyses, and arguments made for and against the proposed changes.

The major comments received on the proposed regulatory changes are summarized below, together with a discussion of the changes that have been made in the final regulatory text in response to the comments received. In addition to the more substantive comments discussed below, the Department received some minor editorial suggestions (*e.g.*, suggested grammatical revisions and correction of misspelled words), some of which have been adopted and some of which have not. A number of other minor editorial changes have been made to improve the clarity of the regulatory text.

II. Summary of Comments on Changes to the FMLA Regulations

This summary begins with a general overview of how the new military

Department updated the employee and establishment surveys conducted in 1995 and published a report in January 2001, ''Balancing the Needs of Families and Employers: Family and Medical Leave Surveys, 2000 Update.'' *See http://www.dol.gov/esa/whd/fmla/fmla/toc.htm*.

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

[3] Comments are available for viewing at 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*.

family leave entitlements have been incorporated into the existing FMLA regulatory framework, followed by a section-by-section presentation of the major comments received on the Department's other proposed revisions. As proposed in the NPRM, the section headings in the final rule have been reworded from a question into the more common format of a descriptive title, and several sections have been restructured and reorganized to improve the accessibility of the information. In addition, proposed sections of the regulations have been renumbered in the final rule to allow for the addition of new regulatory sections addressing the military family leave entitlements as described below.

Incorporation of New Military Family Leave Entitlements Into the FMLA Regulations

In crafting these final regulations on military family leave, the Department was mindful of the special circumstances underlying the need for such leave. In recognition of the military families who may have the need to take FMLA leave under these new entitlements, the Department worked to finalize these regulations as expeditiously as possible. In addition, because many of the NDAA provisions providing for military family leave under the FMLA adopt existing provisions of law generally applicable to the military, the Department engaged in extensive discussions with the Departments of Defense and Veterans Affairs before finalizing these regulations. The Department also consulted with a number of military service organizations. These discussions focused on creating regulatory requirements under the FMLA that reflect an understanding of and appreciation for the unique circumstances facing military families when a servicemember is deployed in support of a contingency operation or injured in the line of duty on active duty, as well as providing appropriate deference to existing military protocol. The Departments of Defense and Veterans Affairs are fully cognizant of the central role each of them will play in ensuring that military families are able to avail themselves of the new entitlements when needed and to comply with the statutory and regulatory requirements for the taking of job-protected leave under the FMLA when a servicemember is deployed or seriously injured or ill. The Department also acknowledges the critical role employers play in helping the men and women serving in the military, especially those in the National Guard and Reserves. In workplaces around the country, employer support is vital to the implementation of the military family leave provisions in a manner that recognizes and contributes to the success of the members of the military and their families.

In the NPRM, the Department specifically requested comments on whether the new military family leave entitlements should be incorporated into the broader FMLA regulatory framework, or whether completely separate, stand-alone regulatory sections should be created for one or both of the new entitlements. The Department proposed to adopt many of the same or similar procedures for taking military family leave as are applied to other types of FMLA leave and suggested a number of sections to which conforming changes would need to be made in order to reflect these new leave entitlements. For example, the Department cited §§ 825.100 and 825.112(a) as sections that would need to be updated to reflect the military family leave entitlements. Among other items, the Department also suggested that the poster and general notice discussed in proposed § 825.300(a), the eligibility notice in proposed § 825.300(b), and the designation notice in proposed § 825.300(c) would need to incorporate appropriate references to the military family leave entitlements. The Department also requested comments on any other regulatory sections that should be revised in light of the military family leave entitlements.

After reviewing the public comments, the Department concurs with the majority of comments that stated that the procedures used when taking military family leave should be the same as those used for other types of FMLA leave whenever possible. The Department believes that this approach is beneficial to both employees and employers—each of whom should find it easier to apply the same or similar procedures for taking and administering FMLA leave regardless of the qualifying reason. Accordingly, the Department has, when feasible, incorporated a discussion of the new military family leave entitlements into the proposed regulatory provisions that concern the taking of FMLA leave for other qualifying reasons. The Department also has created four new regulatory sections—numbered as §§ 825.126, 825.127, 825.309 and 825.310—which address specific employee and employer responsibilities for purposes of military family leave.

The Department received a few comments regarding the incorporation of the military family leave entitlements into the proposed FMLA regulatory framework. The National Partnership for Women & Families and MomsRising.org both stated:

> Because the military leave provisions have different time requirements, different certification requirements, and different definitions than the rest of the FMLA, we strongly recommend that the regulations for these provisions not be incorporated in the rest of the FMLA regulations. Rather, these regulations should have their own sections within the FMLA regulations and can refer to the rest of the FMLA when necessary. This organization will reduce confusion and will allow DOL to issue the military leave regulations much more promptly.

The Pennsylvania Governor's Office of Administration also recommended ''that the regulations for [the military family leave entitlements] be separate from the FMLA regulations.''

On the other hand, a number of commenters urged that the Department, as much as possible, incorporate the new regulations regarding military servicemember leave into the existing FMLA regulations. For example, TOC Management Services argued:

> The DOL should take its cue from Congress, which chose to incorporate the provisions of H.R. 4986 into the existing FMLA statutes * * *. By organizing the statutes this way, Congress has clearly shown an intent to have the new FMLA provisions be an integrated part of the FMLA; not a stand-alone provision within the other FMLA provisions. Although carving out a section to address the new military servicemember leave provisions would be the most convenient option for the DOL, it would ultimately lead to confusion. Employees and employers reading through the regulations to determine their leave rights/obligations may not be aware that there is an entirely separate section dealing with military servicemember leave. For instance, an employee may read § 825.112 to determine whether they qualify for leave to care for their injured servicemember spouse and end their inquiry after reading through that section. It would be confusing to have an entirely different section regarding qualifying reasons for leave that relates only to military servicemembers. To the extent possible, the DOL should follow Congress's lead in incorporating the new provisions into the existing ones.

Similarly, the Illinois Credit Union League stated that, ''[because] the military and medical provisions are companion regulations, they should be incorporated into one statutory scheme to ensure consistency. To act otherwise would be to assure a regulatory legal patchwork * * *.'' WorldatWork also suggested that the Department ''should incorporate the notice provisions provided in this section with the notice provisions provided elsewhere in the FMLA regulations. Consistency will help in administration.''

The Department has decided to incorporate, wherever feasible, the new military family leave entitlements into the proposed FMLA regulations governing the taking of job-protected leave for other qualifying reasons. The Department believes that completely separating the military family leave provisions from the provisions governing the taking of other types of FMLA leave would create unnecessary confusion and complexity for employees and employers. By integrating the military family leave provisions into the proposed FMLA regulations where applicable and appropriate, employees and employers will be better able to understand their rights and obligations under the new entitlements. Because Congress chose to incorporate the new entitlements into the existing FMLA statutory framework rather than create a new entitlement separate from the rest of the FMLA, ensuring that the totality of the FMLA regulations reflects the new military family leave provisions is both necessary and consistent with congressional intent.

In most cases, these changes are modest technical changes that acknowledge the military leave entitlements in the context of the FMLA. For example, some references to certification in the regulations have been altered to clarify whether they refer only to ''medical certifications'' of a serious health condition or if they refer also to ''certifications'' under the military family leave provisions. In some places, certain references to an employee's entitlement to 12 workweeks of leave are changed to simply reference the employee's leave entitlement, including the entitlement of up to 26 workweeks for military caregiver leave. Minor changes such as this occur in §§ 825.101, 825.112, 825.122, 825.124, 825.200, 825.202–825.207, 825.213, 825.300, 825.301, 825.305–825.308, 825.400, and 825.500. In some instances, the changes are more substantial, such as in the notice provisions in §§ 825.302 and 825.303, and the general description of the FMLA in § 825.100. In addition, several new terms related to the military family leave provisions have been added to the definitions in § 825.800. Where significant, the specific changes required to incorporate the new military family leave entitlements into the proposed FMLA regulations are discussed in greater detail in the section-by-section analysis of the final regulations which follows.

The Department also recognizes that the NDAA amendments to the FMLA created certain new concepts that are applicable only to the taking of military family leave. Accordingly, the final rule includes four new regulatory sections, numbered §§ 825.126, 825.127, 825.309, and 825.310, which address those unique aspects of the military family leave entitlements. These four sections are discussed in greater detail below in the section-by-section analysis. Generally speaking, §§ 825.126 and 825.127 discuss an employee's entitlement to qualifying exigency and military caregiver leave respectively. Sections 825.309 and 825.310 of the final rule cover the certification requirements for taking qualifying exigency and military caregiver leave respectively. The proposed FMLA provisions beginning with § 825.309 and ending with § 825.311 have been renumbered in the final rule as §§ 825.311–825.313 to allow for the addition of these two new military family leave certification provisions.

Section-by-Section Analysis of Final Regulations

Section 825.100 (The Family and Medical Leave Act)

The Department proposed no substantive changes to this section. Section 825.100 in the final rule is amended to include a description of the military family leave provisions in the general discussion of the FMLA. Section 825.100(a) reflects that the FMLA has been amended, and also adds the new qualifying reasons for taking leave. Section 825.100(b) adds the serious injury or illness of a covered servicemember for whom the employee is eligible to provide care under the FMLA as another reason that precludes an employer from recovering health benefits from an employee who does not return to work. Section 825.100(d) now includes references to military caregiver leave and qualifying exigency leave in the overview of certification.

Section 825.101 (Purpose of the Act)

The Department proposed no substantive changes to this section. Section 825.101(a) in the final rule is amended to include a reference to the military family leave provisions in the general discussion of the purpose of the FMLA.

Sections 825.102–825.103 (Reserved)

The NPRM proposed to delete and reserve §§ 825.102 (Effective date of the Act) and 825.103 (How the Act affected leave in progress on, or taken before, the effective date of the Act), because they are no longer needed. The final rule reserves these sections.

Section 825.104 (Covered Employer)

The Department proposed no changes to this section, which discusses employer coverage under the FMLA, and received no comments on this section. The final rule adopts the section as proposed.

Section 825.105 (Counting Employees for Determining Coverage)

The Department proposed no substantive changes to this section, which addresses how to count employees for purposes of determining coverage. The only change proposed was to update the dates used in the example in paragraph (f). The final rule adopts the section as proposed.

TOC Management Services stated that it believes the rule is confusing because it states in paragraph (c) that there is no employer/employee relationship when an employee is laid off. It noted that there may be a continuing obligation to that employee, such as under a collective bargaining agreement, because the employee has an expectation of recall in the event that business picks up again. It also stated that many employers mistakenly use the word ''layoff'' when the action truly is an administrative termination or downsizing and the employee has no expectation of recall.

The Department has not heard from any other commenters that this rule is confusing. Moreover, the fact that an employer may have continuing contractual obligations to an individual on layoff does not mean that it has a current employer-employee relationship with that person within the meaning of the FMLA. Employees who are laid off typically are eligible for unemployment insurance benefits, which demonstrates the lack of an ongoing employer/employee relationship as it is commonly understood. Therefore, the Department is not making any changes to the section and is adopting the rule as proposed.

Section 825.106 (Joint Employer Coverage)

Section 825.106 addresses joint employment. The proposed rule added a new paragraph at § 825.106(b)(2) to address joint employment in the specific context of a Professional Employer Organization (''PEO''). PEOs are unlike traditional placement or staffing agencies that supply temporary employees to clients. PEOs operate in a variety of ways, but typically provide payroll and administrative benefits services for the existing employees of an employer/client. The proposed rule stated that PEOs that contract with clients merely to perform administrative

functions are not joint employers with their clients; however, where the PEO has the right to hire, fire, assign, or direct and control the employees, or benefits from the work they perform, such a PEO would be a joint employer.

The commenters generally applauded the Department's recognition of the differences between PEOs and traditional staffing agencies, but they had a number of suggestions for further improvements and clarifications. *See, e.g.*, Strategic Outsourcing, Inc.; TriNet Group; National Association of Professional Employer Organizations (''NAPEO''); American Federation of Labor and Congress of Industrial Organizations (''AFL–CIO''); and Fulbright & Jaworski. *But see* Harrill & Sutter (stating proposed change is completely unnecessary and probably harmful because companies will begin to call themselves PEOs regardless of facts). Based on the comments received, the Department has made a number of additional changes, as described below.

First, many of the commenters expressed concern regarding the proposed rule's focus on a PEO's ''right'' to make certain employment decisions rather than the ''actual'' role it exercises when evaluating whether the PEO is a joint employer. They were concerned particularly in light of the fact that several states' laws require PEOs to reserve such rights in their contracts with client employers. The commenters had different suggestions for further clarification on this point. For example, NAPEO noted that PEOs ''contractually assume or share certain employer obligations and responsibilities.'' Therefore, NAPEO conceded that the ''reality of PEO arrangements is that PEOs do co-employ client worksite employees.'' NAPEO recommended, however, that the regulation designate PEO clients as the primary employers for FMLA purposes. *See also* TriNet Group. Both NAPEO and TriNet Group stated that PEOs do not create the jobs for which they provide administrative services; rather, the client employer creates those jobs and the PEO has no authority to move an employee to another client. Therefore, they believed that the primary employer duty of job restoration should be the responsibility of the entity that creates the job opportunity. The AFL–CIO similarly stated that ''it makes no sense to consider PEOs as primary employers. In fact, designating the PEO as the primary employer for purposes of job restoration threatens to deprive employees of their key post-leave FMLA right.'' *See also* Greenberg Traurig (PEOs do not fit the model of a primary employer because they do not hire and place employees at a work location and thus should not be responsible for reinstatement).

On the other hand, Strategic Outsourcing, Inc. objected to NAPEO's per-se rule designating the clients of PEOs as the primary employers, stating that the PEO industry has changed throughout its history and will continue to evolve, and that there is great variety among PEOs as to the scope of services they deliver. ''[A]ny per-se rule that fails to take into account the unique facts of each case will inevitably result in improper application of the FMLA.'' Therefore, Strategic Outsourcing, Inc. asked the Department to focus on the economic realities of the situation, both to determine whether a joint employment relationship exists and, if so, to determine which employer is the primary employer. ''Such an approach would allow for the multifarious forms PEOs take, and would avoid making the application of the FMLA dependent on state law and nuances of contractual terms.'' Fulbright & Jaworski similarly noted that the FMLA borrows the definition of ''employ'' from the FLSA, which utilizes an economic realities analysis. Moreover, it disagreed with NAPEO's suggestion, stating that PEOs that do not exercise control over a client's employees and that do not hire and fire should not be considered joint employers. *See also* Duane Morris (disagreeing with NAPEO's assertion that PEOs are always joint employers); Greenberg Traurig (suggesting that the regulation follow the case law ''which emphasizes that it is the economic realities of the relationship and actual practices that determine the employer/employee relationship''); Kunkel Miller & Hament (referencing a number of court decisions holding that PEOs/employee leasing companies were not joint employers).

Jackson Lewis concluded that the joint employment concept ''is entirely inapposite to the relationship between a PEO and its client companies'' because, although a PEO assumes a number of employer responsibilities, it does not have the day-to-day control over the employees, cannot meaningfully affect the terms and conditions of their employment, and does not benefit from the work of those employees. Proskauer Rose similarly stated that, although each relationship must be evaluated in its totality, with no single factor controlling, ''the joint employer doctrine should rarely, if ever, be applied to PEOs,'' and that the right to hire and fire ''should be irrelevant to the joint employer analysis unless the PEO actually exercises that right.'' In contrast, the Equal Employment Advisory Council emphasized that the proposed language (stating that where the 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'') makes a ''critical'' point that ''must be retained, since an organization maintaining one or more of these types of control indeed would be a 'joint employer' under the FMLA and other laws.''

Some of these commenters also addressed the issue of how employers must count their employees, if the PEO is a joint employer, to determine whether there are 50 employees within 75 miles. *See, e.g.*, Proskauer Rose, Greenberg Traurig, and NAPEO. They noted that the size of the average PEO client (17 employees) falls squarely within the statutory exception to coverage, and they stated that a small company that would otherwise be exempt from the FMLA should not be deprived of the exception just because it partners with a PEO.

Finally, a number of commenters stated that the Department used confusing terminology in the proposed rule that did not keep clear the distinction between a traditional temporary placement or staffing agency and an employee leasing agency or PEO. *See, e.g.*, American Staffing Association.

The Department agrees with the commenters that suggested that the economic realities analysis is the proper standard for assessing whether a PEO is a joint employer. *See* § 825.105(a). The FMLA incorporates the FLSA definition of ''employ,'' which is ''to suffer or permit to work.'' 29 U.S.C. 2611(3), incorporating 29 U.S.C. 203(g). As the Supreme Court has repeatedly recognized, that definition is strikingly broad. *See, e.g.*, *Rutherford Food Co.* v. *McComb*, 331 U.S. 722, 730 (1947). Whether an employment relationship exists must be determined in light of the economic realities of the situation. *Goldberg* v. *Whitaker House Cooperative, Inc.*, 366 U.S. 28, 33 (1961). An economic realities analysis does not depend on ''isolated factors but rather upon the circumstances of the whole activity.'' *Rutherford Food Co.*, 331 U.S. at 730. The Department also applied this economic realities principle when it promulgated regulations to clarify the definition of ''joint employment'' under the Migrant and Seasonal Agricultural Worker Protection Act, 29 U.S.C. 1802(5), which also incorporates the FLSA definition of ''employ.'' *See* 62 FR 11734 (Mar. 12, 1997); 29 CFR Part 500.

Therefore, the final rule modifies § 825.106(b)(2) of the proposed rule by

adding a sentence to clarify that the ''determination of whether a PEO is a joint employer also turns on the economic realities of the situation and must be made based upon all the facts and circumstances.'' The final rule retains the proposed sentence clarifying that a PEO is not a joint employer if it simply performs administrative functions, such as those related to payroll and benefits and updating employment policies. The final rule modifies the proposed sentence pertaining to the right to hire, fire, assign, or direct and control to clarify that ''such rights may lead to a determination that the PEO would be a joint employer with the client employer, depending upon all the facts and circumstances.'' The final rule also adds a sentence at the end of § 825.106(c) to clarify that, unlike the situation involving traditional placement agencies, the client employer most commonly would be the primary employer in a joint employment relationship with a PEO.

With regard to how to count employees in the joint employment context, some of the comments demonstrated confusion about which employees an employer must count. There appeared to be a misperception that if a PEO jointly employs its client employers' employees, each client employer therefore also must jointly employ (and count) both the office staff of the PEO and the employees of the PEO's other unrelated clients. That would only be true, however, if the economic realities showed that the PEO office staff or the employees of the other unrelated clients were economically dependent on the client employer, something which is unlikely. Therefore, the final rule adds a new sentence in § 825.106(d) to clarify employee counting in the PEO context.

Finally, the final rule makes minor editorial changes in response to the comments noting that the terminology used was confusing with regard to leasing agencies. The Department deleted that terminology, and the final rule refers only to temporary placement agencies and PEOs, the two main categories of employment agencies. Of course, the labeling or categorization of a particular employer does not control the outcome; all the facts and circumstances in each situation must be evaluated to assess whether joint employment exists and, if so, which employer is the primary employer.

Section 825.107 (Successor in Interest Coverage)

No changes were proposed in this section of the current rule, and no substantive comment was received. The final rule adopts this section as proposed.

Section 825.108 (Public Agency Coverage)

The Department proposed no changes to this section, which addresses what constitutes a ''public agency'' for purposes of coverage. The current regulation states that, 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's ''Census of Governments'' will be determinative. In contrast, the regulations implementing the Fair Labor Standards Act use this test as just one factor in determining what constitutes a separate public agency. *See* 29 CFR § 553.102. Because the FMLA incorporates the FLSA's definition of ''public agency'' (*see* 29 U.S.C. 2611(4)(A)(iii), incorporating 29 U.S.C. 203(x)), the proposal asked whether the FMLA regulation should be conformed to the test in the FLSA regulations. The final rule makes this regulation consistent with the FLSA regulation.

Very few commenters addressed this issue. The AFL–CIO stated that the ''FLSA test is more appropriate'' because the FLSA factors include employment-specific criteria rather than relying primarily on governance and taxation issues as the Census does. In contrast, Catholic Charities, Diocese of Metuchen stated that a change was not necessary because the Census test was ''sufficient for determining whether a public agency is a separate and distinct entity.'' It stated that, because the test focuses on whether the agency has independent fiscal powers and looks at the type of governing body that the agency has and the functions that this body performs, the factors are clear and concise and less subjective than the FLSA case-by-case determination. *See also* Harrill & Sutter (no need for an amendment because, although the FMLA definition of ''public agency'' incorporates the FLSA definition, the definition of ''employer'' is broader and refers simply to conduct affecting commerce); Robert Jusino (agencies should promulgate their rules by using standardized tests and definitions unless the FLSA multiple factors tests is significantly superior).

The final rule amends this section to be consistent with the FLSA regulation, pursuant to which the Census is just one factor. Because the FMLA incorporates the FLSA's definition of ''public agency,'' the Department believes that the regulatory tests should be consistent. Moreover, as the AFL–CIO noted, the FLSA test allows employment-related factors to play a greater role than they do in the Census analysis, which the Department believes is appropriate.

Section 825.109 (Federal Agency Coverage)

The NPRM proposed to update the existing regulations that identify the Federal agencies covered by Title I of the FMLA and the Department of Labor's regulations to reflect changes in the law resulting from the Congressional Accountability Act of 1995, 2 U.S.C. 1301, and a nomenclature change in the Postal Regulatory Commission required by section 604(f) of the Postal Accountability and Enhancement Act, Public Law 109–435, Dec. 20, 2006, 120 Stat. 3242. No substantive comments were received on this section and it is adopted in the final rule as proposed.

Section 825.110 (Eligible Employee)

Section 825.110 addresses the requirement that employees are eligible to take FMLA leave only if they have been employed by the employer for at least 12 months and have at least 1,250 hours of service in the 12-month period preceding the leave. The proposed rule added a new paragraph at § 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 also proposed a new paragraph (b)(2) setting forth two exceptions to the five-year rule for: (1) A break in service resulting from an employee's fulfillment of National Guard or Reserve military service obligations; and (2) where a written agreement, including a collective bargaining agreement, exists concerning the employer's intention to rehire the employee after the break in service. In those situations, the proposed rule provided that prior employment must be counted regardless of the length of the break in service. The proposed rule also stated, in paragraph (b)(4), that an employer may consider employment prior to a break in service of more than five years, provided that it does so uniformly with respect to all employees with similar breaks. The proposed rule stated in paragraph (c)(2) that an employer must credit an employee returning from his or her National Guard or Reserve obligation with the hours of service that would have been performed but for the military service when evaluating the 1,250-hour requirement, and paragraph (b)(2)(i) stated that the period of the military service also must be counted toward the

12-month requirement. Proposed paragraph (d) clarified that an ineligible employee on non-FMLA leave may become eligible for FMLA leave while on leave (by meeting the 12-month requirement), and that any portion of the leave taken for a qualifying reason after the employee becomes eligible would be protected FMLA leave. The proposed rule also deleted portions of current paragraphs (c) and (d), based upon the Supreme Court's decision in *Ragsdale* v. *Wolverine World Wide, Inc.*, 535 U.S. 81 (2002), because they improperly ''deemed'' employees eligible for FMLA leave. Finally, the proposal moved the notice provisions in current paragraph (d) to § 825.300(b) and deleted current paragraph (e), which relates to counting periods of employment prior to the effective date of the FMLA. The final rule adopts the changes made in the proposed rule with one modification that extends the period for breaks in service from five years to seven years.

Many commenters addressed various aspects of the proposed rule. Numerous employee representatives opposed the proposed five-year cap on breaks in service in order for prior employment to count toward the 12-month requirement. They asserted that the proposal was contrary to the statutory text, which does not have any time limit for the 12-month requirement; that the legislative history is clear that the months of employment do not need to be consecutive; and that the current regulation is appropriate and therefore any change would be arbitrary and contrary to the remedial purpose of the law. *See, e.g.*, AFL–CIO; American Postal Workers Union; Maine Department of Labor; Legal Aid Society—Employment Law Center; Sargent Shriver National Center on Poverty Law; and Harrill & Sutter. The AFL–CIO stated that most employers retain records for seven years as a routine business practice, and that employees also might have records for longer than five years. It further stated that employer objections regarding the administrative burdens associated with combining previous periods of employment were not credible in light of the advances in electronic compilation and retrieval of data. Therefore, the AFL–CIO suggested that, if any limit is imposed, it should be lengthened to seven years to conform to standard recordkeeping practices. The American Postal Workers Union similarly commented that a five-year cap strikes the wrong balance between employees' need for FMLA leave and employers' ability to identify prior periods of service. It stated that in most cases there will be no question whether an employee had a period of prior service sufficient to qualify the employee for protection, and that the increasing use of electronic recordkeeping will minimize the burden on employers. The National Partnership for Women & Families, the Coalition of Labor Union Women, and Women Employed all emphasized that the proposed change would cause particular hardships for women, who more frequently take extended time off to raise children or to care for ill family members and then return to their jobs; the National Partnership suggested six or seven years might have a less harmful effect. The Cleveland-Marshall College of Law, Employment Law Clinic, commented that an employer is not required to rehire a separated employee; therefore, the issue arises only if the employer has made a conscious decision to rehire a former employee after determining that the burden of hiring an employee who qualifies for FMLA rights sooner is outweighed by the value that the former employee would have to the employer.

Numerous employers expressed the opposite view and stated that having some cap on the length of the gap was at least a step in the right direction. For example, the Equal Employment Advisory Council (''EEAC'') noted that with the passage of time, manufacturing methods, technology, equipment, customers, marketing methods and product lines may change dramatically, and an employee who has been gone for a number of years is functionally no different from a new employee. Therefore, EEAC commented that having an established cutoff beyond which a break in service will be ignored balances the interests of employers and employees and allows employers to focus benefits on employees who exhibit loyalty. However, EEAC and many other employers stated that allowing a five-year gap was too long. They suggested that the Department should allow a gap of three years, because that would be consistent with the length of the FMLA record keeping requirement and, thus, there would be appropriate documentation available. They commented that allowing a five-year gap would cause administrative problems by putting pressure on employers to retain records for that longer period, which would be burdensome and yet of little practical value to employees because so few would return to their employer after that long a gap. *See, e.g.*, EEAC; Chamber of Commerce of the United States of America (the ''Chamber''); HR Policy Association; Fisher & Phillips; Food Marketing Institute; and Catholic Charities, Diocese of Metuchen.

Other employers suggested that there should be an even shorter period. For example, the National Coalition to Protect Family Leave stated that the eligibility determination should be based simply upon continuous service for a 12-month period, and it opposed any aggregation of service other than pursuant to the two exceptions in paragraph (b)(2). *See also* College and University Professional Association for Human Resources; Spencer Fane Britt & Browne; Metropolitan Transportation Authority (NY); and National Business Group on Health. Jackson Lewis commented that the Department should reject an absolute time period, and instead look to each employer's normal ''break in service'' policies applicable to seniority, eligibility for benefits, and accrual of paid leave time; however, if an absolute limit is necessary, it suggested a cap of two years. Jackson Lewis regarded it as unfair that a returning employee who left employment five years ago would be entitled to FMLA leave before a colleague who had recently devoted 12 consecutive months of service to the company, and that the unfairness would be compounded unless the rules also accounted for FMLA leave taken in the last few months of that individual's previous employment.

Some employers stated that allowing a five-year gap brings clarity to the decision and strikes the right balance between allowing an employee to count previous periods of employment and protecting an employer from the burden of tracking former employees for potentially long periods of time. They viewed the proposal as consistent with the Act, which does not require the 12 months of employment to be consecutive, but which also recognizes that there must be balance and that the goals must be accomplished in a way that takes account of employers' legitimate interests. *See, e.g.*, Burr & Forman; TOC Management Services; Retail Industry Leaders Association; Association of Corporate Counsel's Employment and Labor Law Committee; Society of Professional Benefit Administrators; Cummins Inc.; Domtar Paper Company.

Finally, a number of employers suggested that the Department should clarify that employers are required to maintain employee records for only three years and provide further guidance on what it means that the employee is responsible for putting forth some proof of the prior

employment for the earlier years. *See, e.g.*, the Chamber; College and University Professional Association for Human Resources; Hewitt Associates; Retail Industry Leaders Association; Fisher & Phillips. Hewitt Associates asked: What would happen if the employer actually has the data from the earlier years; what if the data would be difficult to retrieve; and how can an employer challenge the employee's proof? Vercruysse Murray & Calzone asked whether it would be sufficient for an employee to merely assert, by affidavit or otherwise, that he or she was employed for a specific period of time five years ago, or to present a document evidencing previous employment, even though that document may not contain sufficient information to establish the actual duration of the previous employment. EEAC suggested that employees should be required to provide proof such as pay stubs, W–2 forms, or other documentary evidence beyond the employee's mere word that he or she is a former employee. In contrast, the AFL–CIO commented that an employee should only have to prove prior employment where the employer does not have records, because it stated that most employers keep employment and tax records for several years beyond the three years the FMLA requires.

Only a few commenters addressed the two exceptions to the five-year rule in proposed § 825.110(b)(2), which are applicable where the break in service is for National Guard or Reserve service or where there is a written agreement regarding the employer's intention to rehire the employee. Those commenters generally agreed with or did not oppose the exceptions. *See, e.g.*, HR Policy Association; National Coalition to Protect Family Leave; EEAC. Burr & Forman stated that the military exception is unnecessary because the same administrative burdens apply when an employee is gone for over five years for military reasons, and the proposed rules already provide sufficient protection by counting military service both toward the 12-month requirement and toward the 1,250 hour requirement in determining employee eligibility.

With regard to proposed § 825.110(c)(2), which counts the hours the employee would have worked for the employer but for the National Guard or Reserve service, EEAC stated that it should be deleted because it was beyond the Department's authority to legislate FMLA eligibility for employees who have been absent for military service and thus lack the minimum 1,250 hours of service within the previous year, as statutorily required. EEAC recognized that the Department's proposal codifies guidance previously issued concluding that, because the Uniformed Services Employment and Reemployment Rights Act (''USERRA'') entitles returning service members to the rights and benefits they would have had if they had been continuously employed, they are entitled to count the time. EEAC disagreed, however, with the Department's reconciliation of the two statutes.

Several commenters addressed the clarification in proposed § 825.110(d) providing that an employee who is on non-FMLA leave may become eligible for FMLA leave while on leave (by meeting the 12-month requirement), and that any portion of the leave taken for a qualifying reason after the employee becomes eligible would be protected FMLA leave, while any leave taken before the employee passed the 12-month mark would not be FMLA leave. The AFL–CIO approved of this clarification, which is consistent with the court's decision in *Babcock* v. *Bell South Advertising and Publishing Corporation*, 348 F.3d 73 (4th Cir. 2003), stating that this is the interpretation of the regulation that best effectuates the 12-month eligibility requirement of the FMLA. *See also* Society of Professional Benefit Administrators (agreeing that the proposal would clarify a very confusing issue for employers); Domtar Paper Company.

Other commenters opposed the proposal and suggested that eligibility for FMLA leave should attach only to leave that actually begins after the employee meets the 12-month and 1,250-hour requirements, regardless of whether and when the employee gives notice by requesting leave, and should not attach to a block of leave or intermittent leave that begins before the employee becomes eligible and continues after the employee becomes eligible. *See, e.g.*, National Coalition to Protect Family Leave; EEAC; National Business Group on Health; and Food Marketing Institute. EEAC stated that, in situations where employers provide more generous leave benefits than the FMLA requires by providing leave for those who lack the minimum 12 months of service, the employer then must provide future FMLA benefits that it would not otherwise be required to provide. It stated this ''creates a perverse incentive for employers (1) not to provide leave in excess of the FMLA requirements and (2) to act swiftly to terminate employees before they become eligible for FMLA protection.'' EEAC also noted that it results in an employee with only nine months of service who is allowed to take three months of approved leave becoming eligible for three more months of leave at the 12-month mark, while an employee with nine years of service is eligible for only three months total. *See also* Spencer Fane Britt & Browne; Vercruysse Murray & Calzone (also commenting that the proposal would create significant administrative burdens for employers because they would have to revisit employees' eligibility for FMLA leave during the middle of their non-FMLA leave, and when an employee reaches 12 months of service the employer will have to issue an Eligibility Notice a second time). This commenter also asked what happens if the employer's policies do not require group health benefits to be continued during the period of a non-FMLA absence. Hewitt Associates stated that employers might fear that replacing an employee during the first non-FMLA portion of the leave would run afoul of the FMLA's prohibition against interfering with an employee's right to take leave, thereby effectively extending the FMLA's protections through the first non-FMLA portion of the leave and providing an employee with greater than 12 weeks of leave. Therefore, Hewitt Associates suggested that the Department clarify that the employee would have no expectation of, or right to, these FMLA non-interference protections during the first non-FMLA phase of the leave. Finally, Jackson Lewis urged the Department to provide that any non-FMLA leave that would otherwise qualify counts towards an employee's annual entitlement of 12 weeks of FMLA leave.

A number of the commenters also asked the Department to create consistency between the language in § 825.110(d), which states that eligibility is determined when the leave commences, and § 825.110(e), which states that the determination of whether an employer has 50 employees within 75 miles is made when the employee gives notice of the need for leave. *See, e.g.*, National Coalition to Protect Family Leave; Associated Builders and Contractors; International Franchise Association. The National Coalition to Protect Family Leave stated that it applauded the Department's interest in promoting as much advance notice of an employee's need for leave as possible to allow both the employer and the employee to plan, but it believed that the statute requires the 50/75 eligibility determination to be made when the employee actually takes leave rather than when advance notice is given. On the other hand, EEAC stated that it ''understands the Department's

reasoning for selecting a different date,'' and it simply sought clarification that the employer could reevaluate the 50/75 determination at the beginning of each new FMLA leave year, consistent with other provisions.

Finally, a number of commenters applauded the Department for the deletions from existing § 825.110(c) and (d) in response to the Supreme Court's decision in *Ragsdale. See, e.g.*, EEAC; HR Policy Association; and Association of Corporate Counsel's Employment and Labor Law Committee. The National Association of Letter Carriers, however, objected to the deletion of the requirement that the employer must project when an employee will become eligible for leave or advise the employee when the employee becomes eligible, stating that the requirement minimizes disputes.

With regard to the cap in proposed § 825.110(b)(1) on gaps in service in order for the prior employment to count toward an employee's 12-month requirement, the final rule modifies the proposal by extending the permissible gap to seven years. The court in *Rucker* v. *Lee Holding Co.*, 471 F.3d 6 (1st Cir. 2006), in permitting the five year gap at issue in that case, recognized that the statutory language is ambiguous as to whether previous periods of employment count toward the 12-month requirement, and it stated that the appropriate way to resolve this important policy issue was through agency rulemaking. The Department believes that a seven-year cap draws an appropriate balance between the interests of employers and employees. It recognizes and gives effect to the legislative history's clear statement that the 12 months of employment need not be consecutive, while limiting the burden on employers of attempting to verify an employee's claims regarding prior employment in the distant past. In light of the legislative history, the Department rejects the comments suggesting that no gap should be permitted. By allowing a gap of up to seven years, the rule takes account of the comments noting that employees sometimes take extended leaves from the workforce to raise children or to care for ill family members and emphasizing that women are particularly likely to fill this role. The final rule also recognizes that many employers keep records for seven years for tax or other standard business reasons; thus, allowing a seven-year gap will not impose a burden on those employers. The FMLA, however, only requires employers to keep records for three years, and the burden of proving eligibility is always on the employee. Accordingly, if an employer retains records only for the required three years, it may base its initial determination of the employee's eligibility for leave on those records. If it therefore advises the employee in the eligibility notice that the employee is not eligible for FMLA leave, the employee will have to submit sufficient proof of his or her periods of employment in years four through seven to demonstrate eligibility. Such proof might include W–2 forms; pay stubs; a statement identifying the dates of prior employment, the position the employee held, the name of the employee's supervisor, and the names of co-workers; or any similar information that would allow the employer to verify the dates of the employee's prior service. Any application for employment the employee had completed also might provide additional relevant information.

The final rule also adopts the two exceptions to the cap set forth in paragraph (b)(2) for breaks in service resulting from an employee's fulfillment of National Guard or Reserve military service obligations and breaks where a written agreement exists concerning the employer's intention to rehire the employee after the break in service. The final rule also adopts the provision in paragraph (b)(4) stating that an employer may consider prior employment falling outside the cap, provided that it does so uniformly with respect to all employees with similar breaks. There were very few comments addressing these provisions and they generally were supportive. The Department believes these exceptions are quite limited and will not impose any burden on employers. The final rule does make conforming changes in paragraphs (b)(2) and (b)(4) to reflect the change from five years to seven years.

The final rule also includes the proposed provisions regarding counting the time an employee would have worked for the employer but for the employee's fulfillment of National Guard or Reserve military obligations toward the 12-month and 1,250-hour requirements. USERRA requires that service members who conclude their tours of duty and are reemployed by their employer must receive all benefits of employment that they would have obtained if they had remained continuously employed, except those benefits that are considered a form of short-term compensation, such as accrued paid vacation. Therefore, the Department believes that USERRA requires this outcome.

The final rule clarifies in § 825.110(d), as did the proposed rule, that an employee may attain FMLA eligibility while out on a block of leave when the employee satisfies the requirement for 12 months of employment. Some commenters indicated that this would result in newly-hired employees being treated more favorably than long-term employees. Any such peculiar situations that may occur, however, are not the result of the FMLA, but rather would result from the employer's own policies. An employer that voluntarily allows a new employee with no FMLA rights to go out on leave for a family or medical condition could similarly voluntarily allow a more senior employee with the same condition to extend a leave beyond the legally required 12 weeks. Nothing in the FMLA prohibits an employer from treating employees who have exhausted their FMLA rights more favorably than the law requires. Moreover, the Department believes that this clarification of the current rule is the best interpretation of the statutory language, which defines an ''eligible employee'' as one ''who has been employed for at least 12 months.'' 29 U.S.C. 2611(2)(A). Because an employee remains employed while out on employer-provided leave, the employee becomes eligible under the statutory definition upon reaching the 12-month threshold. Of course, as the proposed and final rules also clarify, any leave that employers voluntarily provide before an employee attains eligibility under the FMLA is not FMLA leave. Therefore, the FMLA protections do not apply to such leave, and employers may apply their normal policies to such leave. Employers may not, however, count any such non-FMLA leave toward the employee's 12-week FMLA entitlement. Finally, as the Department explained in Opinion Letter FMLA2006–4–A (Feb. 13, 2006), the FMLA only requires an employer to ''maintain'' group health insurance coverage at the same level and under the same conditions as prior to the FMLA leave; it does not require an employer to provide insurance if it did not do so at the commencement of the FMLA leave.

The final rule also adopts the proposed changes in paragraphs (c) and (d), deleting the ''deeming'' provisions. In light of the Supreme Court's decision in *Ragsdale*, the Department believes that it does not have regulatory authority to deem employees eligible for FMLA leave who do not meet the 12-month/1,250-hour requirements, even where the employer fails to provide the required eligibility notices to employees or provides incorrect information. As noted in § 825.300(e), however, such failures may have the effect of interfering with, restraining or denying the employee the exercise of FMLA

rights and result in harm, in which case the employee would have statutory remedies. Section 825.300(b) also requires employers to provide employees with an eligibility notice, and if the employee is not yet eligible for leave, the notice must inform the employee of the number of months the employee has been employed by the employer or other reason why the employee is ineligible.

Finally, the Department is making no changes in § 825.110(e), which states that the determination of whether an employer employs 50 employees within 75 miles is made when the employee gives notice of the need for leave. The Department continues to believe that retaining the standard in the current rule encourages as much advance notice of an employee's need for leave as possible and allows both the employer and the employee to plan for the absence. This is consistent with the statutory requirement that, when the need for leave is foreseeable, employees must provide at least 30 days' advance notice or such notice as is practicable if the leave must begin in less than 30 days. Therefore, consistent with the proposed rule, the Department is making no changes to this provision.

Section 825.111 (Determining Whether 50 Employees Are Employed Within 75 Miles)

The NPRM proposed one change to § 825.111(a)(3) of the current rule, relating to the location of an employee's worksite when the employee is jointly employed by two or more employers and is stationed at a fixed worksite for at least one year. The proposed rule stated that after one year at the fixed worksite, the employee's worksite for purposes of determining employee eligibility is the actual physical place where the employee works, rather than the primary employer's office from which the employee is assigned or reports. The proposed change responded to the court's decision in *Harbert* v. *Healthcare Services Group, Inc.*, 391 F.3d 1140 (10th Cir. 2004), in which the court held that the current regulation is arbitrary and capricious as applied to an employee with a long-term fixed worksite. The court held that the current regulation contravened the plain meaning of the term ''worksite''; contradicted Congressional intent that employers with fewer than 50 employees within 75 miles who could cover for an absent employee should not have to provide FMLA leave; and created an arbitrary distinction between sole and joint employers. Although the court acknowledged the legislative history stating that the term ''worksite'' should be construed in the same manner as the term ''single site of employment'' under the Worker Adjustment and Retraining Notification (''WARN'') Act and its implementing regulations, the court held that that definition ''governs only employees without a fixed place of work.''

The final rule adopts the proposed rule, stating in § 825.111(a)(3) that, for purposes of determining an employee's eligibility, the worksite of a jointly employed employee 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 commenters expressed a variety of divergent views about the proposed change. The National Coalition to Protect Family Leave supported the proposed change to follow the court's decision in *Harbert*, stating that it concurred with the court's reasoning that there should be a distinction ''between a jointly employed employee who is assigned to a fixed worksite, versus a jointly employed employee who has no fixed worksite and changes worksites, be it regularly or irregularly.'' Vercruysse Murray & Calzone stated that the proposed 12-month rule establishes the same type of arbitrary standard struck down by the court, and that the standard ''should be whether or not the leased employee is assigned to a *fixed worksite*, not *how long* the leased employee has been assigned to a fixed worksite.'' Thus, only if the leased employee's worksite is variable should the worksite be the location from which the employee receives his or her assignments or reports. Burr & Forman stated that the 12-month period is too short and recommended that an employee's worksite change from the primary employer's office to the customer's premises only after the temporary employee has worked on the premises for two years, to reduce the burden on small, start-up employers that use a significant number of temporary employees and would have to count them when determining the eligibility of their own direct employees.

Jackson Lewis commented that the Department's proposal was ''ineffective and misguided'' and it urged the Department to define ''worksite'' as ''the physical location where the person works, both for single and jointly employed workers.'' Jackson Lewis noted that the purpose behind the requirement for 50 employees within 75 miles was to protect employers that cannot readily replace absent workers who are assigned to smaller, remote locations. It stated that the length of time that a jointly employed employee has been working at a small, remote location has nothing to do with whether his or her primary employer can find a replacement employee; it also found it anomalous that an employee assigned to such a location for a short period of time may remain entitled to FMLA leave (because that employee's worksite is the primary employer's office), while an employee assigned for more than a year is less likely to receive FMLA leave.

The AFL–CIO opposed the proposed modification for different reasons, stating that the current regulation is a permissible construction of the statute, as the dissent found in *Harbert.* It stated that defining the worksite in a joint employment situation as the primary employer's office appropriately maintains the focus on the entity most likely to have the ability to find a replacement worker. It added that shifting the worksite after 12 months to the physical location where the employee performs his or her work does not effectuate the statutory purpose behind the 50/75 rule, since that worksite belongs to an employer who bears no responsibility for hiring and transferring the employee. The AFL–CIO concluded that the proposal creates an arbitrary distinction between jointly employed employees who have a fixed worksite for at least a year and those who do not, resulting in an employee who is eligible for FMLA leave on one day becoming ineligible for leave the next day because the worksite has shifted to a new location where the employee cannot satisfy the 50/75 rule. The AFL–CIO agreed, however, that the current rule creates a reasonable distinction between sole and joint employers, which is in harmony with the purpose of the Act, because it alleviates the burden on small businesses to find replacement workers in situations where they would not normally bear that burden. The National Partnership for Women & Families similarly opposed this change, stating that the legislative history of the FMLA shows clearly that the term ''worksite'' was to be defined as it is under the WARN Act. It stated that while ''the WARN Act regulations do not specifically address situations where employees are placed in a temporary worksite long term, there is no sound reason to consider these employees differently than other temporary employees.'' It further stated that the Department has not explained why one year should be the cut off, and asserted that it is contradictory to count the

assigning employer as the primary employer with the majority of FMLA responsibilities but to count the worksite of the employee as that of the employer to which he or she is assigned.

Hewitt Associates requested further guidance regarding the worksite of ''virtual'' or telecommuting employees under the rule, particularly for employees who work out of their home and may receive assignments from various locations. Catholic Charities, Diocese of Metuchen wanted clarity regarding the example in § 825.111(a)(2), which states that construction workers sent from New Jersey to Ohio to work at a construction site opened in Ohio would continue to have the headquarters in New Jersey as their ''worksite.'' This commenter stated the regulations should clarify whether the ''worksite'' of these workers might eventually change from New Jersey to Ohio if these workers are employed in Ohio for a long period of time.

The commenters' divergent views reflect the difficulty of crafting a simple resolution that fits perfectly in all situations. The Department continues to believe that its proposed rule, which modifies the current rule only with regard to jointly employed employees who have been assigned to a fixed worksite for at least 12 months, is the best solution. The general definition of ''worksite'' remains the same and, in accordance with the legislative history, it is consistent with the WARN Act standards. The Department does not believe it would be appropriate to adopt the Jackson Lewis suggestion that the definition for all employees should be the actual physical location of their work, because the WARN Act's regulatory definition for employees with no fixed worksite refers to such employees' home base, from which their work is assigned, or to which they report. The Department also does not believe it is appropriate to adopt the suggestion of Vercruysse Murray & Calzone that how long the employee has been assigned to a fixed site is irrelevant, because a series of one-week or one-month assignments do not constitute fixed worksites.

Because the WARN Act regulation is silent, however, as to joint employment and long-term fixed worksites, the proposal created an exception for those few cases where an employee who is jointly employed is assigned to a fixed worksite for more than one year. As the *Harbert* court held, the plain meaning of the term ''worksite,'' the general FMLA principle that an employer with fewer than 50 employees within 75 miles should not have to find temporary replacements for employees on leave, and the interest in having consistency between sole and joint employers counsel in favor of a different rule in that situation. When a temporary employee has worked for a secondary employer for such an extended length of time, the employer depends upon the temporary employee to the same degree as it does its direct employees, and it faces the same difficulties in obtaining a fully adequate replacement employee. Therefore, the final rule adopts the proposed rule's change with regard to jointly employed employees who have physically worked for at least one year at a facility of a secondary employer, in which case the worksite is that location.

Finally, with regard to the commenters' requests for clarification, both the proposal and the final rule add the term ''telecommuting'' in § 825.111(a)(2) to the existing rule's use of the term ''flexiplace.'' This further clarifies that ''virtual'' employees who work out of their home do not have their personal residence as their worksite; rather, they are considered to work in the ''office to which they report and from which assignments are made.'' Because the current definition of ''worksite'' remains unchanged for employees who are not jointly employed, the worksite for construction employees who travel from their headquarters to a construction site remains their home base, *i.e.*, the company's headquarters.

Section 825.112 (Qualifying Reasons for Leave, General Rule)

The Department proposed no substantive changes to this section, which addresses the qualifying reasons that entitle an eligible employee to take FMLA leave. The proposal did, however, move several paragraphs of the current rule to other sections to improve the organization (for example, to place all provisions that address leave taken for the birth of a child in one section, and all provisions related to leave for adoption or foster care in another section). The final rule adopts the rule as proposed with additional modifications to reflect the military leave entitlements.

Very few commenters addressed this section. WorldatWork stated that it agreed with the proposed reorganization, both specifically with regard to this section as well as with regard to other sections that were similarly reorganized to put a particular topic in one spot. WorldatWork noted that it will make the regulations much easier to read and make it easier to find relevant topics. In contrast, Harrill & Sutter opposed the change, stating that people have been working with the FMLA regulations for 13 years, and a change is going to lead to more confusion. TOC Management Services again commented that the Department should eliminate the statement that the employer/employee relationship ends when an employee is placed on layoff status and clarify the statement made in § 825.112(c) that an employee must be recalled or otherwise be re-employed before being eligible for FMLA leave.

The Department believes that the reorganization of sections to put information related to particular topics in one spot is an improvement. Many commenters approved of the reorganization overall, without commenting on specific sections. *See, e.g.*, National Coalition to Protect Family Leave; the Chamber; Equal Employment Advisory Council. Thus, the Department does not believe that this reorganization will lead to confusion. Furthermore, as explained previously with regard to § 825.105, the Department believes that the employment relationship ends for purposes of the FMLA when an employee is laid off. Proposed § 825.112(c) is identical to paragraph (f) of the current regulation. The Department is not aware of any confusion regarding this section and other commenters did not identify problems with its implementation. Therefore, the Department is adopting the rule as proposed. In addition, in § 825.112(a), new paragraphs (a)(5) and (a)(6) have been added to reflect the two new qualifying reasons for taking leave under the military family leave provisions.

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

The FMLA 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 defined in the Act and Congress did not establish any ''bright-line'' rules of what conditions were covered.

The appropriate meaning of the term ''serious health condition'' has been the topic of debate for many years. The Department's Report on the RFI (*see* 72 FR at 35563–70 (June 28, 2007)) and the NPRM (*see* 73 FR 7885–89 (Feb. 11, 2008)) both contained a discussion of this debate and the positions taken by the courts and the Department in opinion letters in defining ''serious health condition.'' The proposed rule

reorganized the structure of the regulations defining ''serious health condition'' for clarity, but maintained the substance of the current regulation's definition with some modifications to clarify the time period in which continuing treatment following a period of incapacity must take place and the frequency of periodic treatment for chronic conditions. The Department concluded, after extensive consideration, that there was no alternative approach to the existing regulatory definition that would more effectively cover the types of conditions Congress intended to cover under the FMLA without also including some conditions that many believe should not be covered.

An overwhelming majority of comments from employers and employer groups voiced disappointment that the proposed rule failed to address their concerns that the rule is an overly broad definition of serious health condition. *See, e.g.*, U.S. Postal Service; Food Marketing Institute; National Association of Convenience Stores; National Association of Manufacturers. For example, the National Restaurant Association commented that it ''does not believe that the intent of Congress in enacting FMLA was to include such minor illnesses within its coverage. Unfortunately, however, the DOL proposals, while acknowledging this area of concern, fail to address the issue.'' Hoffinger Industries commented, ''a definitive, more precise definition of Serious Health Condition should be developed that will not allow an employee to transform a short-term acute condition into a qualifying serious health condition.'' The Equal Employment Advisory Council said it was ''disappointed that the Department is not proposing to * * * narrow * * * the definition of 'serious health condition' * * *. In our view, this provision grants FMLA coverage in many, many situations in which a health condition is not actually 'serious.' '' The Retail Industry Leaders Association commented, ''[t]he definition of a serious health condition has provided FMLA coverage for many non-serious conditions where Congress intended no such coverage * * *. RILA member companies are disappointed that the DOL has retained essentially the current definition of serious health condition.'' The Chamber commented, ''[t]hese minor changes fall well short of the revisions necessary to clarify the current definition of serious health condition, which employers believe is overbroad and inconsistent with the intent behind the Act.''

Comments from employee representatives generally favored the proposal's retention of the current definition of ''serious health condition,'' but did not support the few proposed changes to the definition. For example, the AFL–CIO commented, ''[w]e support the Department's substantive treatment of serious health condition because it does not—despite the urging of many employers—rewrite the definition against Congress's intent * * * [but the changes proposed interfere] with the legitimate decisions of health care providers * * * [and] will likely result in a financial hardship for a significant number of employees.'' The National Partnership for Women & Families supported the Department's decision not to make ''major changes'' to the definition of serious health condition, but expressed concern that the Department lacked data to show the effect of the changes it did propose. The National Postal Mail Handlers Union and the Coalition of Labor Union Women objected to the proposed changes because they believed the changes would result in employees being required to have additional medical appointments. Finally, the Communications Workers of America supported the retention in the proposed rule of an objective test to define ''serious health condition,'' but objected to the additional requirements the Department proposed for defining continuous treatment and chronic serious health conditions.

Section 825.113 (Serious Health Condition)

Proposed § 825.113, ''Serious health condition,'' provided the general rules and accompanying definitions governing what constitutes a serious health condition. Proposed § 825.113(a) provided the basic definition of what constitutes a serious health condition currently found in § 825.114(a). Proposed § 825.113(b) incorporated the definition of ''incapacity'' from current § 825.114(a)(2)(i). Proposed § 825.113(c) incorporated the definition of ''treatment'' found in current § 825.114(b) with minor editorial changes. The final rule makes no changes to the proposed text for these three paragraphs.

Proposed § 825.113(d) incorporated language from current § 825.114(c), which addresses the types of treatments and conditions not ordinarily expected to be covered by the definition of a serious health condition. The language states, in part: ''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.'' This provision has been the focus of longstanding debate as to whether the conditions enumerated can or cannot be serious health conditions. The NPRM contained a discussion of the history of both the Department's and the courts' interpretation of this language. 73 FR 7886–87 (Feb. 11, 2008). In the NPRM, the Department maintained that this provision merely illustrates the types of conditions that would not *ordinarily* qualify as serious health conditions. *Id.* at 7886. The Department also stated its belief that this language (1) does not categorically exclude the listed conditions; and (2) does not create its own definition separate and apart from the objective regulatory definition of serious health condition in current § 825.114(a) (and proposed §§ 825.113(a), 825.114, 825.115). *Id.* The Department received significant comments from both employer and employee groups regarding the retention of this provision in the regulations, which are discussed below. The final rule makes no substantive changes to proposed § 825.113(d).

In their comments, a number of employer groups agreed with the Department's view that the list should be preserved because it serves a baseline purpose as explanatory language similar to that in a preamble. For example, Southwest Airlines commented that ''[i]t is clear that the list is not a per se rule of exclusions, but rather provides helpful, useful examples of minor conditions that in the absence of complications do not qualify as serious health conditions under the FMLA. The list aids all who are involved in the medical certification process and with the administration of FMLA leaves.''

Many employer groups, however, differed as to when a non-serious health condition can become a serious health condition. The Society for Human Resource Management and the National Coalition to Protect Family Leave both argued that ''the situations where any condition on this list rises to the level of a serious health condition should be construed narrowly'' and suggested that the Department ''add language to the regulation specifying that some sort of serious complication must result in order for an otherwise 'non-serious' health condition to be considered a serious health condition.'' The U.S. Postal Service and the Chamber both expressed concern that the rule as proposed would result in continued confusion on the part of both employers and the courts as to when otherwise minor conditions rise to the level of serious health conditions. The Chamber

urged the Department to ''explicitly exclude minor ailments from the definition of serious health condition, even where such conditions may require a regimen of continuing, supervised treatment.''

Comments received from employees and employee groups overwhelmingly supported the Department's decision to retain the existing definition of serious health condition instead of creating a per se list of covered conditions. The AARP and the National Partnership for Women & Families both commented that the current definition of serious health condition allows employees the opportunity to be covered by the FMLA depending on how the specific illness affects that particular employee, rather than depending on how the illness affects individuals generally. *See also* American Association of University Women. The Communications Workers of America commented that ''an objective test provides the fairest way to define the statute's coverage of [serious health conditions], especially because every individual's experience with a medical condition or disease can vary widely.''

PathWaysPA addressed the Department's decision to retain the list of conditions that ordinarily are not serious health conditions in proposed § 825.113(d) and argued that the provision was surplusage. This commenter stated that ''no 'list' of conditions should be defined as unable to qualify for FMLA certification.'' The AFL–CIO agreed with the Department's interpretation in the NPRM of this provision, stating that ''employers have long complained that certain illnesses should never qualify as serious health conditions and have argued that Section 825.114(c) supports such a restrictive definition. Courts have rejected this argument * * *. The Department has taken an important step towards foreclosing argument on this point by explaining in the NPRM that the definition of serious health condition does not 'categorically exclude' the 'common ailments and conditions' enumerated * * *.''

The Department carefully considered the comments received on the definition of serious health condition and has concluded that there is no regulatory alternative that would address the concerns raised by the business community regarding coverage of what some perceive to be minor ailments without excluding absences that should be FMLA-protected. The final rule reflects the Department's conclusion that the objective test defining what constitutes a serious health condition under the FMLA (in both the proposed and final versions of §§ 825.113(a), 825.114, and 825.115) is the controlling regulatory standard, and the list of common ailments such as colds and flu (in proposed and final § 825.113(d)) is helpful as identifying ailments that ordinarily will not qualify for FMLA leave because they generally will not satisfy these regulatory criteria.

On a different matter, the Associated Builders and Contractors and the Navy Federal Credit Union commented that the phrase ''resulting from stress'' should be removed from the last sentence of proposed § 825.113(d). The Society for Human Resource Management and the National Coalition to Protect Family Leave agreed, commenting that ''[t]he cited phrase improperly suggests that stress alone can cause mental illness * * *. Also, by placing allergies in sequence, it suggests that mental illness can be developed from allergies.'' The Department has deleted the phrase ''resulting from stress'' in § 825.113(d) of the final rule to clarify that a mental illness, regardless of its cause, can be a serious health condition under the FMLA if all the regulatory requirements are met. No other changes to the text of § 825.113 have been made in the final rule.

Section 825.114 (Inpatient Care)

Section 825.114 of the proposed rule defined what constitutes inpatient care, adopting language from the current regulations. The definition of ''inpatient care'' in current § 825.114(a)(1) incorporates a definition of ''incapacity,'' which was removed from proposed § 825.114 and replaced by a cross-reference to the stand-alone definition of ''incapacity'' in proposed § 825.113(b).

The Equal Employment Advisory Council commented, ''[w]e hope that setting 'incapacity' apart will emphasize for both employees and health care providers that actual inability to work is a fundamental prerequisite for FMLA protection.'' There were no substantive comments on this section of the proposal, and the Department made no changes to the proposed text of this section in the final rule.

Section 825.115 (Continuing Treatment)

Proposed § 825.115 defined ''continuing treatment'' for purposes of establishing a serious health condition, incorporating the five different definitions contained in current § 825.114(a)(2)(i)–(v) with some changes. Proposed § 825.115(a) (''Incapacity and treatment'') incorporated language from current § 825.114(a)(2)(i), which provides that the continuing treatment requirement is satisfied 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 course of a prescription medication, or two visits to a health care provider. The proposal made one change to the current definition, specifying in proposed § 825.115(a)(1) that the two visits to a health care provider must occur within 30 days, unless extenuating circumstances exist. The Department indicated in the NPRM that it did not believe the 30-day time limit should be applied to proposed § 825.115(a)(2) (treatment on one occasion resulting in regimen of continuing treatment), but invited comments on the issue. Proposed § 825.115(b), titled ''Pregnancy or prenatal care,'' incorporated language from current § 825.114(a)(2)(ii) without change except for a cross-reference to the new consolidated section in proposed § 825.120, addressing leave for pregnancy and childbirth. Proposed § 825.115(c), ''Chronic conditions,'' retained the definition in current § 825.114(a)(2)(iii) with one change, specifying that the term ''periodic treatment'' be defined as treatment two or more times a year. Proposed § 825.115(d), ''Permanent or long-term conditions,'' incorporated language from current § 825.114(a)(2)(iv) without change. Proposed § 825.115(e), ''Conditions requiring multiple treatments,'' incorporated 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. The Department did not receive substantive comments regarding proposed § 825.115(b), (d), or (e) and the final rule adopts these sections as proposed. The Department has made additional changes to § 825.115(a) and (c), which are discussed below.

Although the Department did not propose to change the period of incapacity required to satisfy the ''incapacity and treatment'' definition of continuing treatment in proposed § 825.115(a), many employers and employer groups urged the Department to expand the period of incapacity from the current requirement of ''more than three consecutive calendar days.'' The

Society for Human Resource Management, the National Coalition to Protect Family Leave, and other employer groups commented that the current requirement for a period of incapacity of more than three consecutive calendar days has played a significant role in permitting otherwise minor medical conditions to satisfy the definition of serious health condition. These commenters suggested that extending the period of incapacity to five consecutive scheduled work days or seven consecutive calendar days would significantly reduce the instances in which these minor ailments receive FMLA protection. The Pennsylvania Governor's Office of Administration also suggested a five consecutive day period of incapacity, commenting specifically on the difficulty it has encountered in trying to protect three-day absences. The Chamber commented that ''[t]he brevity of the three-day period creates significant administrative burdens for employers'' and suggested that the period be extended to five business days or seven calendar days. The Society for Human Resource Management, the National Coalition to Protect Family Leave, and others suggested that a longer period of incapacity would be consistent with the waiting period employed in many short-term disability plans. Additionally, the Society for Human Resource Management and others stated that the final rule should clarify that ''more than three consecutive, calendar days'' refers to whole or complete calendar days.

Employee groups, on the other hand, strongly supported maintaining the ''more than three calendar days'' minimum requirement for incapacity. For example, 9to5, the National Association of Working Women commented, ''[t]he current definition reflects the practical reality that serious health conditions requiring family or medical leave can sometimes be of a fairly short duration * * * such as pneumonia, acute appendicitis, or kidney stones.'' The National Partnership for Women & Families supported the Department's decision to maintain the standard of more than three ''calendar days'' rather than ''workdays.''

After reviewing the comments, the Department continues to believe it is more appropriate to keep the basic regulatory requirement of a minimum period of incapacity of ''more than three consecutive calendar days'' than to adopt a ''work day'' or ''business day'' test or to increase the number of calendar days required. In the Department's view, a test based on calendar days of incapacity measures the severity of an illness better than a test based on days absent from work. This is particularly true for employees who do not work a traditional, fixed five-day week. The Department recognizes the legitimate employer concerns about the ability to verify employee incapacity over weekends, but to increase the minimum number of days of incapacity required would invariably exclude some employees the statute currently protects. The final rule does make one minor clarification, as suggested by the Society for Human Resource Management and others, that the test cannot be met by partial days. To eliminate any possible misunderstanding of the existing requirement, the word ''full'' is added to the test in the final rule (*i.e.*, a period of incapacity of more than three consecutive, ''full'' calendar days).

Many employer groups offered different views about the proposed change in § 825.115(a)(1) that the two treatments occur within 30 days. Those employer groups opposed to it urged that the regulations require that the minimum of two treatments occur during the ''more than three day'' period of incapacity. Several groups, including the Society for Human Resource Management and the National Coalition to Protect Family Leave, commented that the Department should reconsider its position and adopt the Tenth Circuit's ruling in *Jones* v. *Denver Public Schools*, 427 F.3d 1315 (10th Cir. 2005), that the two visits must occur within the period of incapacity. The Society for Human Resource Management and the National Coalition to Protect Family Leave stated, ''[u]nder the Department's proposal, the employer's hands would be tied for 30 days, which would create uncertainty for all parties * * *.'' They also stated, however, that if the 30-day requirement becomes part of the final regulations, the 30-day period should run from the first day the employee is incapacitated and the second visit should always be at the direction of the health care provider. The Portland (OR) Office of Management and Finance commented that the proposal would ''allow employees to obtain FMLA protection simply by scheduling a second doctor's appointment.'' The Pennsylvania Governor's Office of Administration commented that the 30-day period would force employers to retroactively designate leave as FMLA-protected. Other employers, however, supported the proposed 30-day period for the two treatments. The National Association of Manufacturers, the National Roofing Contractors Association, AT&T, and other employer groups commented that the proposal would clarify what is currently a vague area in the rules. *See also* National Business Group on Health.

A number of employee groups, for different reasons, opposed the proposed requirement in § 825.115(a)(1), that the two treatments occur within 30 days. The AFL–CIO commented that the 30-day period was arbitrary and would prove a significant obstacle to employees seeking FMLA leave. Commenters including the Association of Professional Flight Attendants, the National Postal Mail Handlers Union, and the National Treasury Employees Union offered the examples of conditions that would incapacitate employees for more than three days, but generally do not require follow-up appointments within 30 days. The National Employment Lawyers Association noted that it can often take more than 30 days to schedule an appointment with a specialist and suggested that a three to six months time period would be more appropriate. Finally, the American Postal Workers Union objected to any temporal limitation on treatment appointments, arguing that any limitation was inconsistent with the statute, which requires only continuing treatment by a health care provider.

A number of employee and employer groups asked for clarification of the ''extenuating circumstances'' exception to the 30-day rule and suggested that a definition of ''extenuating circumstances'' should be included in the regulatory text. The Society for Human Resource Management and the National Coalition to Protect Family Leave asserted that leaving ''extenuating circumstances'' undefined would result in ''extensive litigation.'' *See also* Hewitt Associates. The National Partnership for Women & Families commented that the preamble example of scheduling difficulties as extenuating circumstances was not reflected in the regulation. *See also* Association of Professional Flight Attendants; National Postal Mail Handlers Union. The National Retail Federation recommended deleting the ''extenuating circumstances'' exception altogether.

Employee and employer groups also generally agreed with the Department's decision not to apply a 30-day time limit to § 825.115(a)(2), which addresses treatment by a health care provider on at least one occasion that results in a regimen of continuing treatment (*e.g.*, a course of prescription medication). *See, e.g.*, Society for Human Resource Management. The American Postal Workers Union asserted that applying a 30-day time frame under § 825.115(a)(2)

would be unreasonable. The National Association of Manufacturers commented that in situations covered under § 825.115(a)(2), the treatment visit with the health care provider should take place during the initial period of incapacity. Vercruysse Murray & Calzone commented that employees should be required to receive the regimen of continuing treatment during the initial period of incapacity because to permit the regimen of treatment to commence after the employee returns to work would allow employees to retroactively qualify for FMLA leave.

Finally, some commenters asked whether a phone call or email contact with a health care provider could qualify as a visit or treatment under either prong of § 825.115(a). *See, e.g.*, Spencer Fane Britt & Browne; Society for Human Resource Management, Northern California Human Resources Association, Legislative Affairs Committee.

The Department continues to believe that the proposed ''30-day'' limit in § 825.115(a)(1) is useful because the current regulation, § 825.114(a)(2)(i)(A), provides no guidance as to the time frame during which the two treatments by a doctor must occur. The Department recognizes that many of the comments from employers and employer groups favor the adoption of the ruling by the United States Court of Appeals for the Tenth Circuit in *Jones* v. *Denver Public Schools*, 427 F.3d 1315 (10th Cir. 2005), that both treatments must occur during the period of the incapacity in order for the condition to qualify as a serious health condition. Nonetheless, the Department believes a 30-day test is a more appropriate guideline than a test limited to just the period of incapacity because it is consistent with usual treatment plans, and guards against employers making quick judgments that deny FMLA leave when employees otherwise should qualify for the law's protections. To clarify when the 30-day period begins, § 825.115(a)(1) of the final rule states that the 30-day period begins with the first day of incapacity. By starting the 30-day period on the first day of incapacity, the final rule provides a clearly defined period during which the continuing treatment must occur.

Some employer groups expressed the concern that under the proposed rule an employee retroactively would be able to transform a minor condition into a serious health condition by going to a health care provider for the first time as much as 30 days after the initial incapacity in an effort to foreclose any proposed disciplinary action. The Department notes that a single visit to a health care provider will not satisfy the requirements of § 825.115(a) unless the health care provider determines that additional treatment (either visits or a regimen of treatment) is medically necessary, and therefore employees will not be able to ''transform'' a condition into a FMLA-protected serious health condition as suggested by these commenters. Nonetheless, a new paragraph (3) of § 825.115(a) has been added to the final rule to provide that the first visit (in the case of § 825.115(a)(1)) and the only visit (in the case of § 825.115(a)(2)) must occur within seven days of the first day of incapacity. As with the requirement for two treatment visits within 30 days, the Department believes that the need to make an initial visit to a health care provider within seven days of the day on which the incapacity begins is an appropriate indicator of the seriousness of the medical condition. The Department considered whether the first visit should be required during the initial period of incapacity. As some employer commenters pointed out, the initial treatment visit will normally occur during the incapacity and the treatment regimen (such as prescription medication) will be prescribed at that time. *See, e.g.*, National Association of Manufacturers. The Department is cognizant, however, that it can often take several days to get an appointment with a health care provider, particularly in rural areas and communities with limited numbers of providers, and therefore believes that a seven-day outer limit for the first visit or only visit is more appropriate. Additionally, in response to comments about whether a phone call or email contact with the health care provider qualifies as treatment, § 825.115(a)(3) also clarifies that treatment means an in-person visit to a health care provider for examination, evaluation, or specific treatment, and does not include, for example, a phone call, letter, email, or text message.

The 30-day test is intended to gauge the health care provider's assessment of the severity of the illness. Accordingly, in response to comments from employers who suggested that employees may schedule follow-up appointments simply to meet the test of a second visit, a new paragraph (4) is added to § 825.115(a) of the final rule to clarify that the health care provider, and not the employee or the patient, must make the determination as to whether a second visit during the 30-day period is needed. The Department anticipates that in many cases the health care provider will determine at the initial treatment visit whether an additional visit is required and, if so, when it should occur. There will, however, be some situations in which the health care provider initially determines that such follow-up treatment is not necessary, but because the condition does not resolve or deteriorates, the health care provider later determines that an additional treatment visit is needed within the 30-day time period. Providing the other requirements of the definition are met, the Department intends the final rule to cover all situations in which the health care provider determines that additional treatment is necessary within the 30-day period.

Finally, in response to the comments from both employer and employee groups regarding the ''extenuating circumstances'' exception to the 30-day limit, the final rule includes a new paragraph (5) in § 825.115(a) that provides an explanation of ''extenuating circumstances.'' The new paragraph provides that the term ''extenuating circumstances'' means circumstances that prevent the follow-up visit from occurring as planned by the health care provider, and includes an example of such circumstances.

As discussed in the NPRM, the Department did not propose substantive changes to the construction of chronic serious health conditions under the regulations. *See* 73 FR 7888–89 (Feb. 11, 2008). The Department, however, did propose in § 825.115(c) to define the term ''periodic treatment,'' which is used in the definition of a chronic serious health condition, as treatment ''at least twice a year.''

Several employers and employer groups supported defining ''periodic visits'' as ''at least twice a year.'' *See, e.g.*, TOC Management Services; National Association of Manufacturers; Southwest Airlines. The U.S. Postal Service called the proposal ''reasonable'' and commented that ''the potential benefit of such monitored medical care strikes a comfortable balance with the minimal burden involved.''

Other employer commenters suggested requiring more frequent treatment than twice per year. The Portland (OR) Office of Management and Finance suggested that the Department consider requiring biannual visits for employees with no more than two days of absence per month and quarterly visits for employees absent more frequently. A labor attorney, Scott MacDonald, suggested that treatment ''at least once every four months'' would be more appropriate and that if the twice per year standard were maintained it should be clarified as ''at least once

every six months.'' The Southern Company and the Society for Human Resource Management suggested that the appropriate standard should be four treatment visits per year. Catholic Charities, Diocese of Metuchen and the National Association of Convenience Stores suggested that treatment only twice per year indicates that the condition is not serious. *See also* Illinois Credit Union League. Finally, Spencer Fane Britt & Browne argued that requiring only two treatment visits per year ''will render just about any condition to be a 'chronic' one and totally eliminates the need for the condition to be 'serious' in nature.'' They suggested that chronic conditions should not be separately included in the definition of serious health condition and that incapacity due to such conditions should only be covered when it exceeds three calendar days as required by § 825.115(a).

On the other hand, many employees and employee groups viewed the requirement of treatment visits of ''at least twice a year'' as excessive. The AFL–CIO commented that after an initial series of treatment visits at the onset of a chronic condition, many individuals may only visit their health care providers once per year. The National Postal Mail Handlers Union commented that requiring a second visit in a year, regardless of whether the employee's condition has changed, would impose an unnecessary burden on both the employee and the health care system. The National Partnership for Women & Families also expressed concern about the additional cost the proposed requirement would impose on employees. *See also* A Better Balance: The Work and Family Legal Center.

The Department recognizes employers' concerns regarding requiring only two treatment visits per year, and their desire for some clearer way to assess the seriousness of a chronic health condition, but is concerned that imposing some greater standard could effectively render ineligible many employees who are entitled to the protections of the law. On the other hand, the Department does not agree with comments from employee groups that because many chronic conditions are stable and require limited treatment, the twice per year standard is unreasonable since that effectively ignores the requirement for ''periodic'' visits in the current regulations. The need for two treatment visits per year is a reasonable indicator that the chronic condition is a serious health condition. The Department believes the requirement for two visits per year thus strikes a reasonable balance between no minimum frequency at all, as supported by many employee groups, or four or more times per year, as suggested by many employer groups, for employees who use FMLA leave for chronic serious health conditions. As with the requirement of two treatment visits within 30 days under § 825.115(a), the determination of whether two treatment visits per year are necessary is a medical determination to be made by the health care provider. Because the need for treatment visits is a function of the condition, the Department does not agree with comments suggesting the rule will increase the burden or cost to employees. The Department also notes that ''two visits to a health care provider'' every year is not the sole criterion in the regulations for determining a covered chronic serious health condition.

As discussed in the NPRM, the legislative history of the Act clearly indicates that Congress intended to cover chronic serious health conditions (73 FR 7888, Feb. 11, 2008); the Department therefore specifically rejects the suggestion that chronic serious health conditions should not be separately included in § 825.115.

Sections 825.116–825.118 (Reserved)

The proposed rule moved the provisions in current § 825.116 defining the phrase ''needed to care for'' a family member to § 825.124, which is discussed below. The proposal moved the provisions in current § 825.117 regarding the ''medical necessity'' for taking and scheduling intermittent or reduced schedule leave to §§ 825.202 and 825.203, which are discussed below. Current § 825.118 defining ''health care provider'' was renumbered as § 825.125 in the proposed rule. Sections 825.116–825.118 were designated as ''reserved'' in the proposal to reflect these organizational changes. The final rule adopts the proposed organizational changes.

Section 825.119 (Leave for Treatment of Substance Abuse)

The Department proposed no substantive changes in this new section, which consolidates in a single location the provisions in current §§ 825.112(g) and 825.114(d) related to substance abuse. It reaffirms that FMLA leave is available for the treatment of substance abuse when it qualifies as a serious health condition, but not for an absence because of the employee's use of the substance, and that the FMLA does not prevent an employer from taking action against an employee for violating the employer's uniformly-applied substance abuse policy. The final rule adopts the rule as proposed.

Very few commenters addressed this reorganization. TOC Management Services suggested that the rule should clarify that an absence because of a family member's use of the substance, rather than for treatment, also does not qualify for FMLA leave. The National Retail Federation stated that the clarification regarding permitted employment actions for violation of a substance abuse policy was helpful. Robert Jusino commented that an employer should be barred from taking adverse action against an employee for breaking company policy.

The Department continues to believe that the rule, which is simply a consolidation of existing sections, is clear and sets forth the appropriate distinction between an absence for treatment for a serious health condition and an absence because of an employee's use of the substance. The general lack of comments supports that view. Therefore, the final rule is adopted as proposed.

Section 825.120 (Leave for Pregnancy or Birth)

The current regulations contain guidance pertaining to pregnancy and birth throughout a number of different sections. Proposed § 825.120 collected the existing guidance from these various regulatory sections into one comprehensive section. Proposed § 825.120(a)(1), titled ''[g]eneral rules,'' restated language from current § 825.112(b) that both the mother and father are entitled to FMLA leave for the birth of their child. Proposed § 825.120(a)(2) restated language from current § 825.201 explaining that FMLA-protected leave following the birth of a healthy child (''bonding time'') must be completed within a year from the birth. Proposed § 825.120(a)(3) incorporated 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). Proposed § 825.120(a)(4) combined 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)(5) summarized a husband's right to take leave when needed to care for his pregnant spouse because of her serious

health condition. Proposed § 825.120(a)(6) was added to make clear 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. Finally, proposed § 825.120(b) combined language from current §§ 825.203(b) and 825.204(a), which provides that intermittent or reduced schedule leave may only be taken to care for a healthy newborn child with the employer's agreement, and, in such cases, the employer may temporarily transfer the employee to an alternative position that better accommodates the leave schedule. *See* 29 U.S.C. 2612(b)(1). The final rule adopts § 825.120 as proposed with one minor clarification discussed below. Additionally, the final rule clarifies language in the regulatory text of § 825.120(a)(2).

The U.S. Postal Service commented that proposed § 825.120(a)(5), regarding a father's right to use FMLA leave to provide care for his spouse in connection with the pregnancy or birth, overstates these rights. The Department has modified the language of this provision to clarify that a husband is entitled to FMLA-protected leave if he is needed to care for his spouse who is incapacitated due to her pregnancy (*e.g.*, if the pregnant spouse is unable to transport herself to a doctor's appointment). As stated in the NPRM (73 FR 7888 (Feb. 11, 2008)), and as with all care for covered family members under the FMLA (*see* current § 825.116(a) and final § 825.124(a)), such care may include providing psychological comfort and reassurance. This provision merely codifies a husband's right to FMLA leave to care for his pregnant spouse under the current regulations—it neither expands nor contracts that right. As with any leave to care for a covered family member with a serious health condition, the employer has the right to request medical certification to verify the employee's need for leave. The wording of this provision has been changed in the final rule from ''father'' to ''husband'' to clarify that FMLA leave to care for a pregnant woman is available to a spouse and not, for example, to a boyfriend or fiancé who is the father of the unborn child.

On a related note, Southwest Airlines suggested that the 12-week combined limit on leave to care for a healthy newborn taken by spouses employed by the same employer in § 825.120(a)(3) should apply equally to unmarried parents who work for the same employer. The Department notes that this provision is based on section 102(f) of the statute, which was intended to eliminate employer incentives to refuse to hire married couples and applies only to ''a husband and wife.'' *See* 29 U.S.C. 2612(f); S. Rep. No. 103–3, at 28 (1993); H. Rep. No. 103–8, at 38 (1993).

No other changes have been made to § 825.120 in the final rule.

Section 825.121 (Leave for Adoption or Foster Care)

The Department also proposed a single consolidated section on FMLA rights and obligations with regard to adoption and foster care in proposed § 825.121. The current regulations contain guidance pertaining to adoption and foster care throughout a number of sections. Proposed § 825.121(a)(1) provided that leave for adoption or foster care may begin prior to the actual birth or adoption. Proposed § 825.121(a)(2) contained language from current § 825.201 explaining that FMLA-protected leave for adoption or foster care must be completed within a year from the placement. Proposed § 825.121(a)(3) incorporated 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. *See* 29 U.S.C. 2612(f). Proposed § 825.121(a)(4) was added to clarify that both spouses may each take their full 12 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), ''Use of intermittent and reduced schedule leave,'' combined language from current §§ 825.203(b) and 825.204(a), which provides that intermittent or reduced schedule leave after placement of a healthy child for adoption or foster care may only be taken with the employer's agreement and, in such cases, an employer may temporarily transfer the employee to an alternative position that better accommodates the leave. *See* 29 U.S.C. 2612(b)(2). Proposed § 825.121(b) also clarified 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.

The Department received very few comments on this provision. The final rule clarifies language in the regulatory text at § 825.121(a)(2). Otherwise, the final rule adopts § 825.121 as proposed.

Section 825.122 (Definitions of Spouse, Parent, Son or Daughter, Next of Kin of a Covered Servicemember, Adoption, Foster Care, Son or Daughter on Active Duty or Call to Active Duty Status, Son or Daughter of a Covered Servicemember, and Parent of a Covered Servicemember)

The proposed rule, at § 825.122, made minor changes to the definition of ''parent'' in current § 825.113, clarifying that a parent can be a biological, adoptive, step or foster mother or father, as well as an individual who stood *in loco parentis* to the employee. The proposal also added a definition of ''adoption,'' incorporated the statement in current § 825.112(d) that the source of the adoption is not relevant to FMLA leave eligibility, and moved the current rule's definition of ''foster care'' from § 825.112(e) to this section. In the definition of ''son or daughter'' in § 825.122(c), the proposal also specified that an adult child must be incapable of self-care because of a disability ''at the time leave is to commence.'' This addition was intended to eliminate the confusion about coverage that is caused when eligibility decisions are based on facts and circumstances that occur after the leave commences. Finally, the proposed rule stated in § 825.122(f) that an employer could require an employee to provide documentation to confirm a family relationship, such as a sworn, notarized statement or a submitted and signed tax return.

The final rule makes the clarifying changes to the definition of ''parent,'' adds the definition of ''adoption,'' and moves the definition of ''foster care,'' as set forth in the proposal. The final rule clarifies in paragraph (c) that whether an adult child has a disability is based upon the facts as they exist when the leave commences, as proposed. Paragraph (c) also makes clear that the definition of ''son or daughter'' is for purposes of FMLA leave taken for birth or adoption, or to care for a family member with a serious health condition. The final rule does not adopt the changes proposed in paragraph (f) to the documentation necessary to confirm the necessary family relationship, but rather retains the current regulation and moves the text to new paragraph (j). Lastly, to address terms that are unique to the military family leave provisions, the final rule contains definitions of ''next of kin of a covered servicemember'' in paragraph (d), ''son or daughter on active duty or call to active duty status'' in paragraph (g), ''son or daughter of a covered servicemember'' in paragraph (h), and, ''parent of a covered

servicemember'' in paragraph (i), respectively.

A number of commenters addressed the change in proposed § 825.122(c) stating that an adult child must be incapable of self-care because of a disability ''at the time that FMLA leave is to commence.'' The preamble to the proposed rule explained that the clarifying change was made in response to the court's decision in *Bryant* v. *Delbar*, 18 F.Supp.2d 799 (M.D. Tenn. 1998), in which the court analyzed whether an adult child had a disability for FMLA coverage purposes based on facts and circumstances that occurred well after the leave commenced. The Department stated that a coverage decision should not take into account such after-the-fact developments.

A few commenters supported this clarification, including the Equal Employment Advisory Council; Retail Industry Leaders Association; and TOC Management Services. A few other commenters found the proposal unclear. For example, the National Treasury Employees Union (''NTEU'') described the Department's preamble as going farther than the proposed regulation, because the preamble stated that ''the new language is intended to specify that 'the determination' of whether an adult child has a disability is to be made at the time leave is to commence.'' NTEU opposed such a change, because the need for leave to care for a qualifying adult child might arise on relatively short notice, and it thought the ''proposal would make it too easy for an employer to deny FMLA rights by insisting on immediate pre-leave certification of three difficult facts: That the adult child needs care for a serious health condition, is incapable of self-care, AND has a disability within the meaning of the Americans with Disabilities Act.'' The AFL–CIO stated that it was concerned that the regulation could be read to mean that, where an employee takes non-FMLA leave to care for an adult child who ''does not have a disability when the leave commences, the employee does not have the right to convert the absence into FMLA leave if the adult child subsequently satisfies the definition.'' It wanted clarification that subsequent leave might qualify as FMLA leave, consistent with the Department's clarification that an employee who has not worked 12 months for the employer at the start of the leave has the right to treat the leave as FMLA-qualifying once the employee meets the 12-month eligibility requirement. *See* § 825.110(d).

Proposed § 825.122(f) added a notarized statement or submitted tax return as reasonable documentation to establish the family relationship. A number of commenters objected to the proposed change from the current regulation, which states that an employee may confirm the requisite family relationship with a simple statement. For example, the AFL–CIO stated that the regulations have allowed a simple statement for 15 years, and in the ''absence of any evidence that simple non-notarized statements have proven problematic, this change is nothing more than one more hurdle for employees to qualify for FMLA leave.'' NTEU described the additional requirement as ''needless'' and an ''obstacle'' and stated that it ''imposes a substantial new burden on an employee needing to care for a family member.'' The National Partnership for Women & Families similarly commented that ''DOL has not offered any data or rationale as to why this change is necessary, nor has it received widespread complaints regarding abuse of the definition of family member. This change could simply serve to make it more difficult for certain employees to take leave and should not be made.'' *See also* AARP; Family Caregiver Alliance; American Association of University Women.

Many of the same commenters objected on privacy grounds to submitting a tax return, and they questioned whether an employer could require a tax return even if the employee had provided other documentation. In addition, Hewitt Associates expressed concern about the use of an employee's tax return to establish the family relationship. In light of ''the heightened sensitivity around data privacy, the use of a tax return to prove a family relationship will likely require careful employer safeguards for such a limited purpose. Furthermore, such a provision may need to be reconciled with the tax code, particularly 26 U.S.C. 6103 which concerns the confidentiality of tax returns.'' Hewitt Associates also noted that, although the preamble to the proposed rule suggested that a tax return might be helpful with regard to establishing an *in loco parentis* relationship, such a document actually would be ineffective where the employee is requesting leave for an *in loco parentis* parent, because that relationship was established when the employee was a child. Given the availability of other forms of documentation, Hewitt Associates suggested eliminating this clause from the regulations. A number of individual employee commenters also opposed this provision, stating that it was an unnecessary invasion of personal privacy. *See, e.g.*, Tom Landis; Cindy Whitmore; Nathan Grant.

A few employers favored the proposed changes. *See, e.g.*, National Association of Manufacturers; AT&T; Pennsylvania Governor's Office of Administration. They did not indicate, however, that there had been any problem or abuse involving the current rule's simple statement requirement. The Equal Employment Advisory Council (''EEAC'') offered a rationale for the requirement for a notarized statement, commenting that it ''underscores the gravity of claiming federal protection for an absence from work and also confirms for employees that an actual family relationship must exist.'' EEAC acknowledged, however, that ''most employees would not even think of lying to their employer about a family relationship to obtain leave,'' but stated that the proposed change would help ''employers to combat the potential for abuse by the few who would.''

With regard to the proposed change clarifying that an adult child must be incapable of self-care because of a disability ''at the time FMLA leave is to commence,'' the Department did not intend to suggest that the employer's final determination as to whether the adult child was covered had to be made on the date the leave commenced, and that an employee could not subsequently communicate further information, such as in response to an employer request for a medical certification or if the child's condition changed. The intent of the proposal, as explained in the preamble, was to avoid a situation where the decision regarding whether there was coverage at one point in time was affected by events that did not occur until a much later date.

Thus, the focus is on the adult child's condition at the time of the parent's leave. The current rule states that a child who is 18 or older must be incapable of self-care ''because of a physical or mental disability,'' and it further defines the term ''disability'' as a ''physical or mental impairment that substantially limits one or more of the major life activities of an individual.'' The current rule cites the EEOC regulations implementing the ADA (at 29 CFR 1630.2) defining those terms, including the term ''substantially limits,'' which relates generally to the nature, severity, duration and long-term impact of the impairment. The proposal did not make any changes in this area from the current rule.

Therefore, for example, if a 25-year-old son breaks a leg in a car accident and is expected to recover in a short period of time, he would not normally be incapable of self-care because of a

physical or mental disability. The proposal clarifies that any leave the parent took to care for the adult child would not be FMLA-protected if the disability standard is not met. If the 25-year-old later suffered a stroke that left him with substantial and permanent mobility impairments, he likely would meet the regulatory standard. At that point, any subsequent leave the parent took to care for the adult child who is incapable of self-care due to a physical or mental disability would be protected by the FMLA. However, that protection would not extend retroactively to the parent's leave taken when the 25-year-old son had only a broken leg.

The Department believes that the proposed regulatory text, which refers to an adult child incapable of self-care due to a disability ''at the time FMLA leave is to commence,'' clarifies the requirements. That language mirrors the language in § 825.110(d), which addresses whether an employee has 12 months of service ''as of the date the FMLA leave is to start.'' Therefore, the Department is adopting the proposal as written, to clarify that circumstances that occur later affecting an adult child's disability status do not affect whether previous leave qualifies for FMLA protection.

Paragraph (c) in the final rule provides that if the FMLA leave is taken for birth or adoption, or to care for a family member with a serious health condition, then ''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.

The Department has decided not to adopt the proposal's requirement for a notarized statement regarding the family relationship. Given the absence of evidence of actual problems with the current rule's simple statement requirement, and the comments stating that it would cause needless expense and delay for employees to have to obtain a notarized statement and intrusion into personal privacy to provide a tax return, the Department has decided to retain the current rule. Of course, an employer can require an employee to assert in the statement that the requisite family relationship exists. In other words, the employer may require the employee to state that he or she wants leave to care for a spouse, a son or daughter, or a parent, as defined in the regulations. This assertion will ensure that the employee fully understands that one of the specific family relationships must exist in order to qualify for FMLA leave.

In addition, to reflect the military family leave provisions, § 825.122 now contains a definition of ''next of kin of a covered servicemember'' in paragraph (d), with a cross-reference to § 825.127(b)(3), which also contains this definition of ''next of kin of a covered service member'' and provides examples and further detail. Section 825.122 of the final rule also contains a definition of ''son or daughter on active duty or call to active duty status'' with a corresponding cross-reference to § 825.126(b)(1), which contains this definition, as well as a definition of ''son or daughter of a covered servicemember'' with a corresponding cross-reference to § 825.127(b)(1), which contains this definition. In addition, final § 825.122 includes a definition of ''parent of a covered servicemember'' in paragraph (i), with a corresponding cross-reference to § 825.127(b)(2) containing this definition. These definitions are discussed in more detail in the preamble accompanying §§ 825.126 and 825.127.

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

The Department proposed no substantive changes to this section, which implements the statutory requirement that an individual must be unable to perform the functions of a job in order to qualify for FMLA leave. The proposal stated, as the current rule does, that an individual must be ''unable to work at all'' or be unable to perform ''one or more of the essential functions of the job'' in order to qualify, and that an employer may provide a statement of the employee's essential functions to the employee's health care provider. The proposal also clarified in paragraph (b) that a sufficient medical certification must specify what functions the employee is unable to perform. The final rule adopts the proposed rule, but clarifies that a certification will be sufficient if it specifies what functions of the position the employee is unable to perform such that an employer can determine whether the employee is unable to work at all or is unable to perform any one of the essential functions of the employee's position.

A few commenters addressed the unchanged definition in this section. The Chamber stated that the Department should change the rule so that an employee qualifies for FMLA leave only when the employee is unable to work at all or unable to perform the majority of his or her essential functions. This commenter described it as a ''loophole'' that employees can take leave when their condition prohibits them from performing only one aspect of the job and they are able to perform many other essential functions. The National Coalition to Protect Family Leave suggested that the Department change the definition to ''unable to perform the essential functions of the employee's position, unless modified by the employer to accommodate a temporary restriction.'' *See also* Associated Builders and Contractors; International Franchise Association; Jackson County (MO) Department of Corrections. The National Coalition to Protect Family Leave stated that employers should be allowed to require an employee to work in either the same job minus the restricted duties or in some other position, whether or not a part of a formal ''light duty'' program. This commenter approved of the clarification that the certification must specify what essential function the employee cannot perform. Southwest Airlines and the Equal Employment Advisory Council also supported this change. The Illinois Credit Union League stated that there should be consistency between the use of the term ''function'' and ''essential functions,'' but it emphasized that an employer should not be required to identify essential job functions, because employers are not required to draft job descriptions, and essential functions may change.

The National Association of Letter Carriers objected to the requirement that the health care provider specify the particular functions the employee cannot perform, stating that this is more onerous than section 103 of the Act, which requires only a statement that the employee is unable to perform the functions of the position. *See also* National Treasury Employees Union. Another commenter, Scott MacDonald, Esq., noted that unless the employer includes all of the essential functions on the form, it will be impossible for the medical care provider to indicate whether the employee is unable to perform any of them.

The Department believes that the proposed rule, which made only a minor change to the current rule, is the best interpretation of the statutory provision authorizing FMLA leave when an employee is ''unable to perform the functions of the position of such employee.'' 29 U.S.C. 2612(a)(1)(D). The Department continues to believe that if an employee cannot perform one or more essential functions of the job, the Act gives that employee the right to take leave, even if the employer is willing to provide a light duty job or modify the job in a way that would allow the employee to continue working. While

employers may not require employees to perform modified or light duty work in lieu of taking FMLA leave, employees may voluntarily agree to such arrangements. *See also* § 825.220(d). The Department believes that the additional clarification in this section that a sufficient medical certification must identify the function(s) that the employee cannot perform will not be burdensome, that it is consistent with medical certification requirements of current and proposed § 825.306, and that it is a reasonable interpretation of the statutory requirements that a certification provide both appropriate medical facts regarding the employee's condition and a statement that the employee is unable to perform the functions of the position. *See* 29 U.S.C. 2613(b)(3) and (4)(B). In response to the concern of some commenters, the Department notes that the rule gives employers the option of providing a list of essential functions when it requires a medical certification; an employer is not required to do so. Finally, in order to explain why the term ''functions'' and not ''essential functions'' is used in paragraph (b), the final rule clarifies that a certification will be sufficient if it provides information regarding the functions the employee is unable to perform so that an employer can then determine whether the employee is unable to perform one or more essential functions of the job. This revision reflects the fact that the determination of whether a particular job duty is an essential function is a legal, not a medical, conclusion, and is in accord with the medical certification requirements in § 825.306 and the Department's prototype medical certification form.

Section 825.124 (Needed To Care for a Family Member or a Covered Servicemember)

The FMLA 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). The legislative history indicates that the ''phrase 'to care for' * * * [is to] be read broadly to include both physical and psychological care.'' S. Rep. No. 103–3, at 24 (1993); H.R. Rep. No. 103–8, at 36 (1993). The statute also provides leave to care for a covered servicemember. 29 U.S.C. 2612(a)(3). The current regulations define the phrase ''needed to care for'' a family member in § 825.116. The proposed rule moved this section to § 825.124 without making any substantive changes, other than to clarify that the employee need not be the only individual, or even the only family member, available to provide care to the family member with a serious health condition. The final rule adopts this provision as proposed, with minor revisions to reflect the new military caregiver leave entitlement.

A number of employers commented that employees should only be entitled to FMLA leave to care for a family member when they are actually providing care. For example, the Manufacturers Alliance/MAPI and the Metropolitan Transportation Authority (NY) commented that if an employee has arranged for others to care for the family member, the employee is not needed to provide care and should not be entitled to FMLA leave. Southwest Airlines commented, ''[l]eave to care for a family member should not include, for example, an employee who lives out of state from the family member and who does not travel to the family member needing the care during the employee's entire FMLA leave. The logical meaning of 'to care for' a family member, whether it be physical or psychological care, is active caregiver participation by the employee needing the leave.''

The Equal Employment Advisory Council recommended ''that the Department further revise this section by reiterating in § 825.124(c), with a cross reference to § 825.202 and § 825.203, that in order to qualify for intermittent leave to care for a family member, that leave must be *medically necessary*.'' (Emphasis in original.) Burr & Forman commented that the regulations should clarify that FMLA leave cannot be used to perform the job duties of either the ill family member (during the period in which the ill family member seeks treatment) or another family member (who then provides care to the ill family member).

On the other hand, AARP and many employee groups supported the Department's clarification that employees may take FMLA leave to care for a family member even if they are not the only caregiver available. The Family Caregiver Alliance commented that, in many cases, having more than one caregiver available for support and relief helps ensure the health and safety of the caregivers, as well as the care receiver. The National Partnership for Women & Families commented that the legislative history makes clear that Congress anticipated that both parents may take leave to care for a child, or that multiple siblings may take leave to care for a parent, and that such leave may be taken on either an overlapping or sequential basis.

Finally, Working America/Working America Education Fund included with its comments a number of short quotes from its members that help put a human face on the wide variety of situations in which employees need to care for a family member: ''As a Hospice social worker, I have found FMLA to be extremely important to allow family members to care for loved ones in their final days.'' ''I have a friend who first took care of one dying parent and then was the sole caretaker of her second, remaining terminally ill parent. She took FMLA to care for her remaining parent and did not lose her sanity or her job.'' ''I had to use the FMLA a few times after my mother developed Alzheimers. We live 200 miles apart. I needed to go see her occasionally so that she didn't forget me and that I didn't just let go of her as well.'' ''* * * I am a widowed mother of five children. If one of them were to become seriously ill, I would need to take care of them.'' These examples illustrate the difficulty in trying to include in the regulations prescriptive requirements for family leave when that leave may be needed in many different circumstances.

The Department acknowledges the difficulties employers face in meeting the FMLA's requirements to provide employees with the opportunity to use leave to care for family members. Nonetheless, the Department continues to believe that the FMLA does not permit adding requirements for family leave, such as a requirement that the employee furnish information about the availability of other caregivers. An employee is entitled to use FMLA leave to care for a spouse or covered family member, assuming the eligibility and procedural requirements are met, no matter how many other family members, friends, or caregivers may be available to provide this care. However, as a number of employer commenters stated, such FMLA leave may be taken only to care for the family member with a serious health condition or the covered servicemember with a serious illness or injury. An employee may not use FMLA leave to work in a family business, for example. No regulatory changes are necessary to address this, however, as both the statute and §§ 825.112(a)(3) and 825.124 make clear that FMLA leave is available only ''to care for'' a covered relative.

Finally, in order to qualify for intermittent leave to care for a family member or covered servicemember, the intermittent leave must be medically necessary as required by the statute. 29 U.S.C. 2612(b)(1). The cross-reference in § 825.124(c) to §§ 825.202–825.205 for the rules governing the use of intermittent or reduced schedule leave addresses this matter sufficiently.

Section 825.125 (Definition of Health Care Provider)

The proposed rule, at § 825.125, modified the definition of ''health care provider'' by clarifying the status of physician assistants (''PAs''). The proposal added PAs to the list of recognized health care providers and deleted the requirement that they operate ''without supervision by a doctor or other health care provider.'' The proposal made corresponding changes to proposed § 825.115 (Continuing treatment) and § 825.800 (Definitions). The current rule's definition of ''health care provider'' (at § 825.118) does not expressly mention PAs. However, as the preamble to the proposed rule noted, they generally fall within the current definition under § 825.118(b)(3), which includes 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. The final rule adopts the proposed rule's definition of ''health care provider.''

Most of the commenters that addressed this issue supported the proposed change. For example, the American Academy of Physician Assistants (''AAPA'') noted that the current regulations cause confusion because PAs are not named as health care providers, and yet they are usually covered as providers because the ''overwhelming majority of private and public insurance plans reimburse medical care by PAs.'' The AAPA stated that PAs are covered providers of physician services through Medicare, Medicaid, Tri-Care, Federal Employee Health Benefit plans and most private insurance plans; they may diagnose and treat injured workers through nearly all state workers' compensation programs; and the Department of Transportation regulations define PAs as ''medical examiners'' for purposes of performing the medical exam and signing the certificate of physical examination for truck drivers. The AAPA also stated that the current regulatory references to a PA working ''under direct supervision of a health care provider'' cause confusion because they suggest that the FMLA imposes supervisory requirements that are not required by state law. Finally, the AAPA stated that clarifying the status of PAs will avoid disruption in the continuity of care for workers who seek FMLA-related medical treatment or certification from a PA. Other commenters also expressed approval for the proposed change. *See* National Retail Federation; Retail Industry Leaders Association; HIV-Policy Collaborative; and Redfield Medical Clinic.

The Metropolitan Transportation Authority (NY) opposed the change, stating that it does not believe that a PA ''has sufficient training or expertise to make the medical determinations necessary under the Act.'' The Society of Professional Benefit Administrators commented that the change ''will have a significant impact on plans by ratcheting up the potential for physician billing abuse,'' and ''would serve to disclose employees [sic] medical information to scrutiny by non-professionals which may have the potential of infringing on a patient's right to privacy and interfere in their relationships with their doctors.'' The American Association of Occupational Health Nurses suggested adding occupational and environmental health nurses, who are registered nurses, as health care providers because they interface with workers, human resource personnel, safety personnel and others in administering the FMLA in many workplaces.

The Department believes that the express inclusion of PAs in the definition of ''health care provider'' is an appropriate clarification, not a significant change. As the AAPA noted, PAs generally already are included within the definition because the vast majority of group health plans accept them when substantiating a claim for benefits. Moreover, other government agencies recognize them as providers of health care services. Both of these facts demonstrate that PAs do have the necessary training to make the determinations required by the Act. The Department does not believe that this clarification will have an impact on potential billing abuse or the disclosure of medical information. Therefore, the final rule includes PAs as health care providers in § 825.125(b)(2), and it makes conforming changes in §§ 825.115 and 825.800. The final rule does not add occupational and environmental health nurses to the list of health care providers. Registered nurses are not currently included on the list, and the rulemaking record does not demonstrate that these registered nurses should be treated differently than other nurses.

Section 825.126 (Leave Because of a Qualifying Exigency)

The NDAA provides a new qualifying reason for taking FMLA leave which allows eligible employees of covered employers to take leave for any qualifying exigency arising out of the fact that a spouse, son, daughter, or parent is on active duty or has been notified of an impending call or order to active duty in support of a contingency operation. The Department has organized the discussion of this new leave entitlement into two major categories: (1) An employee's entitlement to qualifying exigency leave; (2) the specific circumstances under which qualifying exigency leave may be taken.

Entitlement to Qualifying Exigency Leave

Under the NDAA, an eligible employee of a covered employer may take leave for a qualifying exigency arising out of the fact that the employee's spouse, son, daughter, or parent 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. 29 U.S.C. 2612(a)(1)(E). Specifically, the statute defines ''active duty'' as duty under both a ''call or order to active duty'' and under a provision of law referred to in 10 U.S.C. 101(a)(13)(B). 29 U.S.C. 2611(14). In the NPRM, the Department proposed to add the NDAA's definition of ''active duty'' to proposed § 825.800 by cross-referencing 10 U.S.C. 101(a)(13)(B). The Department suggested that the statutory definition did not require additional clarification and thus did not further explain the various provisions of law that are specifically referenced in 10 U.S.C. 101(a)(13)(B).

The Department has added the statutory definition of ''active duty'' to § 825.800 in the final rule as proposed. In addition, in response to public comments requesting that the Department further explain the types of active duty service by the spouse, son, daughter, or parent of an employee that would trigger an entitlement to qualifying exigency leave, § 825.126(b)(2) of the final rule specifically enumerates the provisions of law referred to in 10 U.S.C. 101(a)(13)(B): Sections 688, 12301(a), 12302, 12304, 12305, and 12406 of Title 10 of the United States Code, chapter 15 of Title 10 of the United States Code, and any other provision of law during a war or during a national emergency declared by the President or Congress. This section of the regulations also makes clear that these existing provisions of military law refer only to duty under a ''call or order to active duty'' by members of the Reserve components and the National Guard, and also to certain retired members of the Regular Armed Forces and retired Reserve. Consistent with the statutory definition, this leave entitlement does

not extend to family members of the Regular Armed Forces on active duty status because members of the Regular Armed Forces either do not serve ''under a call or order to active duty'' or are not identified in the provisions of law referred to in 10 U.S.C. 101(a)(13)(B). The final rule also provides that a ''call or order to active duty'' for purposes of leave taken because of a qualifying exigency refers to a Federal call to active duty, as opposed to a State call to active duty.

Many of the public comments received by the Department with regard to the military family leave provisions did not discuss the definition of ''active duty'' for purposes of qualifying exigency leave. A number of commenters, however, recognized the limiting nature of the statutory definition provided by Congress. *See* Society for Human Resource Management; Bank of the Commonwealth. The law firm of Spencer Fane Britt & Browne noted that this limited definition was logical:

> In case of the Regular Armed Forces, those servicemembers are employed by the Federal government itself as a conscious career choice and have accepted the terms and conditions of that employment. In the case of Reservists and the National Guard, those individuals may work elsewhere, but are willing to serve the Federal government if necessary and are willing to allow their lives to be disrupted by a call to active duty. They have not, however, accepted the terms and conditions of employment with the Federal government except as it may be necessary in connection with a call to active duty. It is the unexpected disruption to their lives that appears to be the focus of exigency leave.

This view is consistent with the statement of Representative Jason Altmire on the floor of the U.S. House of Representatives, who introduced the provision providing leave for a qualifying exigency:

> [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.

153 Cong. Rec. H15326 (*see* daily ed. Dec. 12, 2007).

Several commenters urged the Department to provide additional detail and explanation in the final rule as to the statutory references contained in the NDAA, noting that most employers are not familiar with the specific statutory references and that both employees and employers would likely be confused without an explanation of who is covered. *See* National Coalition to Protect Family Leave; National Association of Manufacturers; Colorado Department of Personnel & Administration; Willcox & Savage. The Bank of the Commonwealth noted that without specific guidance there is a risk of discrimination complaints being brought by servicemembers in military towns. In contrast, the Equal Employment Advisory Council concurred with the Department's original position that the definition of ''active duty'' needed no further clarification.

The Department also concludes that the statutory language found in 10 U.S.C. 101(a)(13)(B) is unambiguous. Congress expressly incorporated an existing provision of law regarding active duty when defining an employee's entitlement to qualifying exigency leave under the FMLA. As such, Congress provided that leave for a qualifying exigency is intended for use by employees who have a spouse, son, daughter, or parent called to active duty as a part of the Reserve components and the National Guard, or as certain retired members of the Regular Armed Forces and retired Reserve Employees who have a spouse, son, daughter, or parent on active duty status as a member of the Regular Armed Forces are not entitled to qualifying exigency leave.

Had Congress intended qualifying exigency leave to extend to family members of those in the Regular Armed Forces, it would have provided a different statutory definition that referenced alternative provisions of Title 10 to define ''active duty.'' For example, a definition of ''active duty'' that cited to both 10 U.S.C. 101(a)(13)(A) and (B), rather than to (B) only, would have provided clear coverage to all members of the Armed Forces. Alternatively, a reference to the provisions of 10 U.S.C. 101(d) would have also provided a broader definition of ''active duty.'' In comparison, the provisions of the NDAA allowing an eligible employee to take leave to care for a ''covered servicemember'' (also referred to as ''military caregiver leave'') do provide a broader definition of the military service covered by that leave entitlement. In that instance, the NDAA defines a ''covered servicemember,'' in part, as ''a member of the Armed Forces (including National Guard or Reserves).'' This distinction further highlights the limitation Congress imposed for who should be eligible to take qualifying exigency leave.

The Department also concurs with the commenters that more specific guidance regarding the statutes listed under 10 U.S.C. 101(a)(13)(B) would be helpful. The Department understands that most employers and employees will be unfamiliar with the military terminology used by the NDAA in establishing the new FMLA military family leave entitlements. For this reason, the final rule does not simply rely on a statutory cross-reference to establish the definition of the term ''active duty.'' Rather, the final rule provides in § 825.126(b)(2) a brief explanation of each of the statutes listed in 10 U.S.C. 101(a)(13)(B) to provide more detailed guidance on the definition of ''active duty.''

Some commenters asked about situations where a State (*e.g.*, a governor) calls the National Guard or Reserve to active duty. Spencer Fane Britt & Browne urged the Department to ''[c]larify that a call to active duty is a *Federal* call to active duty as opposed to a *State* call to active duty of a State's own National Guard or state militia.'' The Department agrees that the exclusion of State calls to active duty is clear in the NDAA. The statutes referred to in 10 U.S.C. 101(a)(13)(B) refer exclusively to Federal calls to active duty in support of a contingency operation. The final rule therefore clarifies that a call to active duty for purposes of leave taken because of a qualifying exigency refers to a Federal call to active duty. State calls to active duty are not covered unless under order of the President of the United States pursuant to one of the provisions of law identified in § 825.126(b)(2).

The NDAA also provides a definition of the term ''contingency operation.'' The statute defines the term as having the same meaning given such term in section 10 U.S.C. 101(a)(13). 29 U.S.C. 2611(15). In the NPRM, the Department considered adding the definition of ''contingency operation'' in proposed § 825.800 as defined in the NDAA and cross-referencing 10 U.S.C. 101(a)(13). The Department suggested that the definition did not require additional clarification.

The Department has added the statutory definition of ''contingency operation'' to § 825.800 in the final rule as proposed. In addition, in response to public comments requesting greater clarity, § 825.126(b)(3) of the final rule defines ''contingency operation'' by fully restating the statutory language of 10 U.S.C. 101(a)(13). Specifically, this statutory reference provides that a military operation qualifies as a contingency operation if it (1) is designated by the Secretary of Defense as an operation in which members of the armed forces are or may become involved in military actions, operations, or hostilities against an enemy of the United States or against an opposing

military force; or (2) results in the call or order to, or retention on, active duty of members of the uniformed services under section 688, 12301(a), 12302, 12304, 12305, or 12406 of Title 10 of the United States Code, chapter 15 of Title 10 of the United States Code, or any other provision of law during a war or during a national emergency declared by the President or Congress. The provisions listed under (2) above are the same as those used to define ''active duty'' and generally refer to members of the National Guard and Reserve. In addition, this section specifies that the active duty orders of a covered military member will generally specify if the covered military member is serving in support of a contingency operation by citation to the relevant section of Title 10 of the United States Code and/or by reference to the specific name of the contingency operation.

As with the comments received by the Department with regard to the definition of ''active duty,'' many of the comments regarding the definition of ''contingency operation'' urged the Department to be as specific as possible in the final regulations. In fact, some of the comments addressed both terms together. *See* Food Marketing Institute; Colorado Department of Personnel & Administration; Bank of the Commonwealth; Society for Human Resource Management.

As with the definition of ''active duty'' in § 825.126(b)(2), the final rule in § 825.126(b)(3) references the specific statutes listed in 10 U.S.C. 101(a)(13). Because a covered military member's active duty orders will generally specify whether he or she is serving in support of a contingency operation by reference to the appropriate section of Title 10 of the United States Code and/or by reference to the specific name of the contingency operation, the Department believes that it will be fairly easy for employees and employers to determine whether a particular covered military member's active duty status qualifies the family member for qualifying exigency leave by examining the covered military member's active duty orders. As discussed in relation to § 825.309, which addresses certification requirements for qualifying exigency leave, a copy of such orders must be provided to an employer upon the first request when an employee requests leave because of a qualifying exigency. Furthermore, the certification section provides that an employer can verify a covered military member's active duty status in support of a contingency operation with the Department of Defense.

As the military operations that qualify family members of covered military members for qualifying exigency leave under FMLA may change over time, the Department does not believe that it is helpful to provide further specificity in the final regulations regarding the operations that currently qualify as contingency operations. Furthermore, because the Secretary of Defense may designate military operations as contingency operations, the Department believes that the Department of Defense, and not the Department of Labor, is in the best position to determine which operations qualify. Requiring a copy of a covered military member's active duty orders, or other appropriate documentation from the military, when qualifying exigency leave is first requested will permit an employer to verify a covered military member's duty in support of a contingency operation without requiring revision to the FMLA regulations each time the list of contingency operations is revised by the Department of Defense.

In addition, in the NPRM the Department noted that the military leave provisions of the NDAA did not alter the FMLA's existing definitions of ''son or daughter.'' Specifically, the Department asked for comments on the application of the FMLA's current definition of ''son or daughter'' to the new military family leave entitlements. Under the current FMLA definition, a son or daughter must either be (1) under 18 years of age; 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 explained that applying this definition for purposes of leave taken for a qualifying exigency would severely restrict the availability of the leave and would appear to contradict the intent of Congress. The Department sought comment on whether it would be appropriate to define the term ''son or daughter'' differently for purposes of FMLA leave taken because of a qualifying exigency.

The final rule does not alter the FMLA's definition of ''son or daughter,'' but rather establishes a separate definition of ''son or daughter on active duty or call to active duty status'' for the purpose of leave for a qualifying exigency. Section 825.126(b)(1) defines a ''son or daughter on active duty or call to active duty status'' as an employee's biological, adopted, or foster child, stepchild, legal ward, or a child for whom the employee stood in loco parentis, who is on active duty or call to active duty status, and who is of any age. *See also* §§ 825.122 and 825.800.

The Department received a large number of comments requesting that the Department apply a broader definition of ''son or daughter'' for purposes of leave for a qualifying exigency in order to adhere to the intent of law. *See* Senator Dodd and Representative Woolsey *et al.*; Catholic Charities, Diocese of Metuchen; National Partnership for Women & Families; TOC Management Services. The National Association of Manufacturers did not object to the Department providing a new definition for ''son or daughter,'' as long as the Department clarified that the definition applies only to the military provisions. In contrast, Infinisource, Inc., asserted that the NDAA ''did not explicitly expand'' the definition of ''son or daughter'' and thus it should not be altered for purposes of military family leave.

The Department agrees with the overwhelming majority of comments that the existing FMLA definition of ''son or daughter'' could not have been intended to apply to the qualifying exigency leave provision. Using the existing FMLA definition of ''son or daughter'' would eviscerate the qualifying exigency leave provision because for all practical purposes a parent would not be able to take leave for a qualifying exigency if the parent's son or daughter were deployed overseas as a member of the National Guard or Reserve because the majority of such sons or daughters would not be under age 18 and those older would most likely not be incapable of self-care due to a disability. This is clearly not the result intended by Congress. The NDAA allows an employee to take leave for circumstances ''arising out of the fact that the spouse, or a son, daughter, or parent of the employee is on active duty.'' Therefore, it is more consistent with the intent of the military leave amendments to define ''son or daughter on active duty or call to active duty status'' as an employee's biological, adopted, or foster child, stepchild, legal ward, or a child for whom the employee stood in loco parentis, who is on active duty or call to active duty status, and who is of any age. This definition applies specifically only to qualifying exigency leave and does not alter the definition of son or daughter for purposes of taking FMLA leave for other qualifying reasons.

Types of Qualifying Exigencies

In describing qualifying exigency leave, the NDAA simply states that leave can be taken ''[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.'' 29 U.S.C. 2612(a)(1)(E).

In the NPRM, the Department presented a lengthy discussion regarding the appropriate definition of qualifying exigency and posed a number of specific questions arising from that discussion. The Department reproduced in the NPRM the only statements made in Congress specifically addressing qualifying exigency leave. Three Members of the U.S. House of Representatives made brief statements on the House floor. Representative Jason Altmire, who introduced the provision providing for qualifying exigency leave, stated:

> 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 * * *.

153 Cong. Rec. H5132 (*see* daily ed. May 16, 2007) (statement of Representative Altmire).

> [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 * * *.

153 Cong. Rec. H15323 (*see* daily ed. Dec. 12, 2007) (same).

> 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. H15341 (*see* daily ed. Dec. 12, 2007) (same).

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 (*see* daily ed. May 17, 2007) (statement of Representative Udall).

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 arrangement 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 (*see* daily ed. May 17, 2007) (statement of Representative Miller).

Based on these Congressional statements, the Department expressed an initial view that, given the statute's inclusion of the word ''qualifying,'' not every exigency would entitle a military family member to leave. The Department further stated in its proposal that the NDAA requires a nexus between the eligible employee's need for leave and the covered military member's active duty status and specifically solicited comment on the degree of nexus that should be required.

The Department asked for comment on whether the types of qualifying exigencies should be limited to those items of an urgent or one-time nature arising from deployment as opposed to routine, everyday life occurrences. The Department suggested that leave for qualifying exigencies should be limited to non-medical related exigencies since the leave entitlement for qualifying exigencies was 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 also sought comment on whether it would be appropriate to develop a list of pre-deployment, deployment, and post-deployment qualifying exigencies. The Department asked whether particular types of exigencies should qualify, such as making arrangements for child care, making financial and legal arrangements to address the covered military member's absence, attending counseling related to the active duty of the covered military member, 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 covered military member, and attending to affairs caused by the missing status or death of a covered military member. Finally, the Department sought comment on whether there were any other exigencies that should qualify and whether any list developed by the Department should be a *per se* list of qualifying exigencies.

Section 825.126(a) of the final rule defines qualifying exigency by providing a specific and exclusive list of reasons for which an eligible employee can take leave because of a qualifying exigency. These reasons are divided into seven general categories: (1) Short-notice deployment, (2) Military events and related activities, (3) Childcare and school activities, (4) Financial and legal arrangements, (5) Counseling, (6) Rest and recuperation, (7) Post-deployment activities, and (8) Additional activities.

For Short-notice deployment, § 825.126(a)(1) allows qualifying exigency leave to address any issue that arises from the fact that a covered military member is notified of an impending call or order to active duty seven or less calendar days prior to the date of deployment. Leave taken for this purpose can be used for a period of seven calendar days beginning on the date the covered military member is notified of an impending call or order to active duty.

For Military events and related activities, § 825.126(a)(2) allows qualifying exigency leave to attend any official ceremony, program, or event sponsored by the military and to attend family support and assistance programs and informational briefings sponsored or promoted by the military, military service organizations, or the American Red Cross that are related to the active duty or call to active duty status of a covered military member.

For Childcare and school activities, § 825.126(a)(3) allows an eligible employee to take qualifying exigency leave to arrange childcare or attend certain school activities for a biological, adopted, or foster child, a stepchild, or a legal ward of the covered military

member, or a child for whom the covered military member stands 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. Qualifying exigency leave may be taken under this section (1) to arrange for alternative childcare when the active duty or call to active duty status of a covered military member necessitates a change in the existing childcare arrangement; (2) to provide childcare on an urgent, immediate need basis (but not on a routine, regular, or everyday basis) when the need to provide such care arises from the active duty or call to active duty status of a covered military member; (3) to enroll the child in or transfer the child to a new school or day care facility when enrollment or transfer is necessitated by the active duty or call to active duty status of a covered military member; and (4) to attend meetings with staff at a school or a day care facility, such as meetings with school officials regarding disciplinary measures, parent-teacher conferences, or meetings with school counselors, when such meetings are necessary due to circumstances arising from the active duty or call to active duty status of a covered military member.

For Financial and legal arrangements, § 825.126(a)(4) allows qualifying exigency leave to make or update financial or legal arrangements to address the covered military member's absence while on active duty or call to active duty status, such as preparing and executing financial and healthcare powers of attorney, transferring bank account signature authority, enrolling in the Defense Enrollment Eligibility Reporting System (''DEERS''), obtaining military identification cards, or preparing or updating a will or living trust. It also allows leave to act as the covered military member's representative before a federal, state, or local agency for purposes of obtaining, arranging, or appealing military service benefits while the covered military member is on active duty or call to active duty status and for a period of 90 days following the termination of the covered military member's active duty status.

For Counseling, § 825.126(a)(5) allows qualifying exigency leave to attend counseling provided by someone other than a healthcare provider for oneself, for the covered military member, or for the biological, adopted, or foster child, a stepchild, or a legal ward of the covered military member, or a child for whom the covered military member stands 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, provided that the need for counseling arises from the active duty or call to active duty status of a covered military member.

For Rest and recuperation, § 825.126(a)(6) provides qualifying exigency leave to spend time with a covered military member who is on short-term, temporary rest and recuperation leave during the period of deployment. Eligible employees may take up to five days of leave for each instance of rest and recuperation.

For Post-deployment activities, § 825.126(a)(7) allows qualifying exigency leave to attend arrival ceremonies, reintegration briefings and events, and any other official ceremony or program sponsored by the military for a period of 90 days following the termination of the covered military member's active duty and to address issues that arise from the death of a covered military member while on active duty status, such as meeting and recovering the body of the covered military member and making funeral arrangements.

Finally, § 825.126(a)(8) provides qualifying exigency leave for Additional Activities, which allows leave to address other events which arise out of the covered military member's active duty or call to active duty status provided that the employer and employee agree that such leave shall qualify as an exigency, and agree to both the timing and duration of such leave.

The Department received a wide array of comments regarding how to define ''qualifying exigency.'' Several commenters requested a *per se* list, or at least as exhaustive a list as possible. *See* National Business Group on Health; Jackson Lewis; Catholic Charities, Diocese of Metuchen; Association of Corporate Counsel's Employment and Labor Law Committee; Equal Employment Advisory Council. Jackson Lewis argued that without a *per se* list administering such leave would be extremely difficult because employers would be forced to ''interrogate employees regarding the circumstances surrounding their requests for qualifying exigency leave.'' ORC Worldwide requested a *per se* list, but suggested that it be non-exhaustive. In contrast, other commenters stated that a *per se* list would not be practicable or provide employers enough flexibility, but that examples or flexible criteria would be helpful. *See* TOC Management Services; the Chamber; National Association of Manufacturers. Others urged the Department to reject the use of a *per se* list, and instead to provide general guidelines or broad categories and examples or non-exhaustive lists of the types of situations that would be qualifying exigencies. *See* National Military Family Association; National Partnership for Women & Families, in joint comments with the National Military Family Association; Senator Dodd and Representative Woolsey *et al.* Senator Dodd and Representative Woolsey *et al.* suggested specific categories:

> (1) Military events and meetings; (2) childcare and childcare arrangements; (3) counseling for self, family and children, (4) legal, financial and other critical household obligations; and (5) family needs and obligations related to the servicemember's departure, return, or period leave * * *.

Others did not specifically suggest or reject the idea of a *per se* list, but requested that the Department provide a clear definition. *See* Burr & Forman; Colorado Department of Personnel & Administration; Infinisource.

The comments were equally divided as to whether qualifying exigencies should be limited to one-time events or should include recurring or routine events also. The National Partnership for Women & Families, in joint comments with the National Military Family Association, urged the Department to include both urgent and routine events as qualifying exigencies, stating that ''[t]here is nothing in the statute that limits this leave solely to urgent matters.'' Infinisource, the National Coalition to Protect Family Leave, the Society for Human Resource Management, Delphi, and Jackson Lewis urged the Department to limit it to urgent, one-time, non-routine exigencies. These commenters also suggested that it not include medical exigencies. Delphi, the National Coalition to Protect Family Leave, and the Society for Human Resource Management also emphasized that causation should be an important factor in defining qualifying exigency.

The comments were more consistent as to the timing of the exigencies that should qualify. Most commenters who addressed this issue agreed that qualifying exigencies should include events that occur pre-deployment, during deployment, and post-deployment. *See* National Military Family Association; National Partnership for Women & Families, in joint comments with the National Military Family Association; Association of Corporate Counsel's Employment and Labor Law Committee. The exception was the National Business Group on Health, which

referred only to exigencies pre- and post-deployment, but not during deployment.

The Department believes it is critical that employees fully understand their rights and employers fully understand their obligations under this new leave entitlement. Accordingly, the final rule specifically identifies the circumstances under which qualifying exigency leave may be taken. The Department believes this approach is preferable because it provides the clearest guidance to both employees and employers regarding the circumstances under which qualifying exigency leave may be taken. By organizing the list of qualifying exigencies into categories covering Short-notice deployment, Military events and related activities, Childcare and school activities, Financial and legal arrangements, Counseling, Rest and recuperation, Post-deployment activities, and Additional activities, the final rule reflects the broad areas of common exigencies highlighted by many commenters.

At the same time, the Department also recognizes the need to provide some flexibility for both employees and employers to address unforeseen circumstances. The Department understands that there may be additional circumstances beyond those specified in the Department's final rule for which the use of qualifying exigency leave might be appropriate. For this reason, § 825.126(a)(8) of the final rule allows job-protected leave to address other events which arise out of the covered military member's active duty or call to active duty status in support of a contingency operation, provided that the employer and employee agree that such leave shall qualify as an exigency, and agree to both the timing and duration of such leave. This provision ensures that employees have the ability to take job-protected FMLA leave for unforeseen circumstances, but also requires effective communication between employees and employers regarding such leave so that it does not adversely impact or burden the employer's business operations.

While many members of the National Guard and Reserve receive their orders as far as several months in advance, thereby allowing abundant time to plan for the covered military member's absence, there may be some situations where some members of the National Guard and Reserve receive their notices or orders only a few days in advance. The Department recognizes that in these circumstances, a number of personal arrangements must be made by the covered military member and his or her family member in a very short period of time. Section 825.126(a)(1) of the final rule therefore allows leave to address any issue that arises from the fact that a covered military member is notified of an impending call or order to active duty seven or less calendar days prior to the date of deployment. Leave taken for this purpose can be used for a period of seven calendar days beginning on the date the covered military member is notified of an impending call or order to active duty. During this seven day period, an employee may take FMLA leave without demonstrating that the need for leave otherwise qualifies as an exigency under one of the other provisions of § 825.126(a). The employee also may take FMLA leave during this seven day period for any other exigency specifically enumerated in the other provisions of § 825.126(a). For example, if an employee's spouse receives orders to active duty in support of a contingency operation on October 5, and will be deployed on October 9, the employee would be eligible for leave under this section on October 5, 6, 7, 8, 9, 10, and 11 and may take such leave in order to make or update financial or legal arrangements, to spend time with the military member, or for any other reason related to the call or order to active duty. Leave taken by the employee outside of these seven days must qualify under one of the other exigencies listed in § 825.126(a).

Section 825.126(a)(2) of the final rule allows qualifying exigency leave for military events and related activities to attend any official ceremony, program, or event sponsored by the military and to attend family support or assistance programs and informational briefings sponsored or promoted by the military, military service organizations, or the American Red Cross that are related to the active duty or call to active duty status of a covered military member. This provision is self-explanatory. The Department believes that activities sponsored by the military, a military service organization, or the American Red Cross which relate to the active duty or call to active duty status of the military member are precisely the types of activities Congress intended to cover when extending job-protected FMLA leave to the family members of covered military members. Among other things, this provision is intended to cover leave taken for arrival and departure ceremonies, pre-deployment briefings, briefings for the family during the period of deployment, and post-deployment briefings which occur while the covered military member is on active duty or call to active duty status.

The Department received a large number of comments regarding the use of exigency leave to arrange for and provide childcare. Several commenters distinguished between arranging or planning for childcare, where the need is directly caused by the covered military member's call to active duty status, and routine situations, such as a babysitter canceling, or having to arrive late or leave early to drop off or pick up a child, arguing that the former should qualify as an exigency while the latter should not. *See* Equal Employment Advisory Council; National Association of Manufacturers; National Coalition to Protect Family Leave. In contrast, the National Partnership for Women & Families, in joint comments with the National Military Family Association, and Senator Dodd and Representative Woolsey *et al.* urged the Department to permit a broader set of childcare related circumstances to be qualifying exigencies, such as: Finding child care, enrolling in new schools, changing a work schedule to pick up or drop off children, arranging for summer care, attending school functions, attending counseling for the child, and transporting the child to and from medical or tutoring appointments and afterschool activities.

Section 825.126(a)(3) of the final rule allows qualifying exigency leave for a broad array of childcare and school activities in accord with the floor statements by the Members of the U.S. House of Representatives who sponsored this provision. In formulating the list of childcare and school activities that are qualifying exigencies, the Department identified childcare and school activities that require attention because the covered military member is on active duty or call to active duty status, rather than routine events that occur regularly for all parents. Section 825.126(a)(3)(i) allows qualifying exigency leave to arrange for alternative childcare when the active duty or call to active duty status of a covered military member necessitates a change in the existing childcare arrangement. This could include, for example, leave to enroll a child in a summer camp or similar kind of summer day care at the end of the school year if a covered military member is still on active duty or call to active duty status. It would also cover circumstances where the absence of a covered military member because of active duty status disrupts the preexisting childcare arrangement, such as when the covered military member is no longer present to transport a child to and/or from childcare and the employee must take qualifying exigency leave to make new arrangements.

Section 825.126(a)(3)(ii) allows qualifying exigency leave to provide

childcare on an urgent, immediate need basis (but not on a routine, regular, or everyday basis) when the need to provide such care arises directly or indirectly from the active duty or call to active duty status of a covered military member. This provision would permit, for example, an eligible employee to take leave to care for the child of a covered military member on active duty if the child has become sick and needs to be immediately picked up from daycare or school. The employee could provide immediate childcare on a temporary basis, but would be expected to find alternative childcare if the child's illness continues.

Section 825.126(a)(3)(iii) allows an employee to enroll in or transfer a child to a new school or day care facility when enrollment or transfer is necessitated by the active duty or call to active duty status of a covered military member. Such leave may be used, for example, to enroll a child into a new school or day care facility during the school year when the child has moved or relocated due to the active duty or call to active duty status of a covered military member.

Lastly, § 825.126(a)(3)(iv) allows qualifying exigency leave to attend meetings with staff at a school or a daycare facility, such as meetings with school officials regarding disciplinary measures, parent-teacher conferences, or meetings with school counselors, when such meetings are necessary due to circumstances arising from the active duty or call to active duty status of a covered military member. The Department has heard firsthand from military family organizations how children are impacted by the absence of a parent who is on active duty and believes that it is appropriate to permit family members of these covered military members to take FMLA leave in order to attend school meetings when such meetings are necessary due to circumstances arising from the active duty or call to active duty status of a covered military member. The Department does not, however, intend for this leave to be used to meet with staff at a school or daycare facility for routine academic concerns.

The Department received many comments regarding the ability to take leave to make financial and legal arrangements. Several commenters stated that making financial or legal arrangements to address the covered military member's leave should be included. *See* U.S. Postal Service; National Coalition to Protect Family Leave; Association of Corporate Counsel's Employment and Labor Law Committee; Senator Dodd and Representative Woolsey *et al.*. The National Coalition to Protect Family Leave suggested that the final determination ''should be subject to an overriding case-by-case determination by the employer,'' and also suggested that preparation of the following legal documents should be qualifying exigencies: ''last will and testament, living trust, financial and health care powers of attorney, safety deposit box, beneficiary designations on financial accounts and insurance plans/policies, signatory authorizations on bank accounts, [and] change of address on mail delivery so that bills and other important communications are forwarded to the appropriate person.'' TOC Management Services emphasized that there should be a nexus between the financial or legal arrangement and the covered military member's deployment. As an example, it pointed to an employee who needs leave to go to a bank only open during work hours when the employee's deploying spouse's signature is necessary to withdraw money, in which case there is a sufficient nexus, versus an employee who needs leave to shop for a new car that is needed because of the spouse's deployment, in which case there is not a sufficient nexus. Senator Dodd and Representative Woolsey *et al.* suggested that leave should be allowed to prepare a will, refinance a mortgage, or designate a power of attorney, as well as to address legal or financial situations that arise during or after deployment. In addition, the National Partnership for Women & Families, in joint comments with the National Military Family Association, suggested that the Department should include ''[a]cting as servicemember's representative in front of federal or state agencies or the military in order to obtain benefits'' as an example of a qualifying exigency.

As suggested by the floor statements of Representatives Jason Altmire, Tom Udall, and George Miller, the Department agrees that Congress intended employees to be able to take qualifying exigency leave to make certain financial or legal arrangements. Therefore, § 825.126(a)(4)(i) allows qualifying exigency leave to make or update financial or legal arrangements to address the covered military member's absence while on active duty or call to active duty status, such as preparing and executing financial and healthcare powers of attorney, transferring bank account signature authority, enrolling in the Defense Enrollment Eligibility Reporting System (''DEERS''), obtaining military identification cards, or preparing or updating a will or living trust. While this list of examples is not exclusive, it does illustrate that leave under this provision is intended to address issues directly related to the covered military member's absence, and not routine matters such as paying bills. Section 825.126(a)(4)(ii) allows such leave to be taken to act as the covered military member's representative before a federal, state, or local agency for purposes of obtaining, arranging, or appealing military service benefits while the covered military member is on active duty or call to active duty status, and for a period of 90 days following the termination of the covered military member's active duty status.

Many commenters discussed the inclusion of counseling as a qualifying exigency. Fisher & Phillips stated that ''attending counseling related to the service member's active duty is a medical issue, and * * * this form of leave is not designed for medical issues.'' Similarly, the Illinois Credit Union League stated that ''counseling should not constitute an example of an exigency, as it is a recurrent activity and is medically related.'' On the other hand, the National Partnership for Women & Families, in joint comments with the National Military Family Association, offered that attending counseling for children, for oneself, or for the covered military member should be listed as examples of qualifying exigencies. The U.S. Postal Service also listed ''attending counseling related to the covered military member's active duty'' as a non-medical exigency. Senator Dodd and Representative Woolsey *et al.* commented that a ''servicemember deploys to Iraq, leaving behind a wife, children, and parents. This deployment places a significant mental strain on each of these individuals, and these family members should be permitted to use leave to attend mental health counseling, alone or as a group.''

The Department expects that most counseling will fall under the existing FMLA but recognizes that there may be circumstances wherein military families may seek counseling that is non-medical in nature. Section 825.126(a)(5) allows qualifying exigency leave to attend counseling provided by someone other than a healthcare provider for oneself, for the covered military member, or for the biological, adopted, or foster child, a stepchild, or a legal ward of the covered military member, or a child for whom the covered military member stands 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, provided that the need for counseling arises from the active duty or call to active duty status of a covered military member. This provision is intended to cover counseling not already covered by the FMLA because the provider is not recognized as a health care provider as defined in §§ 825.125 and 825.800. For example, this could include counseling provided by a military chaplain, pastor, or minister, or counseling offered by the military or a military service organization that is not provided by a health care provider. In any instance where the need for counseling arises from a serious health condition, the employer has a right to require a WH–380 certification. *See* § 825.305.

A few comments expressed concern about allowing qualifying exigency leave for rest and recuperation and similar leave. The Chamber recommended that ''an employer should not be required to provide an employee a 45-day non-emergency leave of absence to vacation with a military service member who is on a Rest and Recuperation (''R&R'') leave overseas.'' *See also* ORC Worldwide; HR Policy Association. The Independent Bakers Association, in contrast, suggested that ''R&R should be included'' as an exigency ''as it does occur during active duty.''

Given the importance of fostering strong relationships among military families, and the limited opportunities available for covered military members to spend time with their families while on active duty, the Department believes it is appropriate for qualifying exigency leave to be used for a limited time while a covered military member is on leave from active duty. Section 825.126(a)(6) of the final rule allows qualifying exigency leave for rest and recuperation to spend time with a covered military member who is on short-term, temporary leave while on active duty in support of a contingency operation. This temporary leave covers rest and recuperation leave taken during the period of deployment. The final rule limits the use of leave under this provision to a period of up to five days of leave for each instance of rest and recuperation.

The Department also received comments regarding coverage of certain post-deployment activity. The National Military Family Association urged the Department to ''make clear that post-deployment goes beyond the service member's return home'' and suggested, for example, that ''the spouse of a National Guard member should be able to use FMLA leave to attend a post-deployment reintegration weekend, sponsored by the unit, 90 days after the unit returned home.'' Senator Dodd and Representative Woolsey *et al.* noted that ''[p]rior to and up to 90 days following the deployment, the military will likely provide a number of deployment briefings or screenings aimed at providing servicemembers and their families with information related to the deployment, as well as mental and physical health screenings[,]'' and that the participation of family members in such briefings ''is critical.'' The Military Family Research Institute at Purdue University expressed concern that ''there is little acknowledgement that the post-deployment period also requires completion of a substantial set of logistical tasks, as well as substantial personal adjustments and extensive training.'' This commenter stated further that:

> Service members in both the active and reserve components are required to attend reintegration briefings and mandatory assessments of physical and mental health following return from deployment, and family members are encouraged to attend many of the reintegration activities, some of which are held away from home and may require overnight stays. In the reserve component, service members are placed on active duty for the purpose of attending these activities * * * it would be appropriate to consider this active duty related to a contingency operation * * *. [I]t would be in the best interest of families for the regulation * * * to acknowledge that post-deployment reintegration training and assessments are important * * * [and] have a great deal to do with the well-being of service members and family members.

The Department recognizes the importance of post-deployment activities for military families. Section 825.126(a)(7) allows leave to attend arrival ceremonies, reintegration briefings and events, and any other official ceremony or program sponsored by the military for a period of 90 days following the termination of the covered military member's active duty status. This provision also allows an employee to take leave to address issues that arise from the death of a covered military member on active duty, such as meeting and recovering the body of the covered military member and making funeral arrangements. The Department is mindful of the statutory language of the NDAA that leave for a qualifying exigency must arise out of the fact that a covered military member ''is'' on active duty or has been notified of an impending call to active duty status in support of a contingency operation. The present tense used in the statutory language places certain limitations on the Department's ability to allow for activities that occur once the covered military member is no longer on active duty. A reasonable reading of the statute, however, allows for a limited number of post-deployment activities, the need for which immediately and foreseeably arise once the servicemember is on active duty or has been notified of an impending call to active duty status in support of a contingency operation. Providing an unlimited post-deployment leave entitlement, however, would strain the statutory limitation and could impose unreasonable burdens on employers years after the period of active duty has ended.

Relying on the comments by the National Military Family Association and Senator Dodd and Representative Woolsey *et al.*, the Department believes a period of 90 days following the covered military member's return from active duty status is a sufficient amount of time to cover relevant post-deployment activities. The Department also notes that as part of the Yellow Ribbon Reintegration Program, which was established by the NDAA, the Department of Defense (''DOD'') will provide reintegration programs for National Guard and Reserve members and their families at approximately 30-, 60-, and 90-day intervals following demobilization, release from active duty, or full-time National Guard Duty. Because the Yellow Ribbon Reintegration Program was also established by the NDAA, it is appropriate that the reintegration programs created under the Yellow Ribbon Reintegration Program be included as events for which employees can take leave under the military family leave provisions. The 90-day time frame in § 825.126(a)(7) is intended to cover any programs considered to be 90-day reintegration programs sponsored by the DOD. Programs that are a part of the DOD's 90-day reintegration event should be considered a qualifying exigency under § 825.126(a)(7) even when such programs may fall a few days outside the period of 90 days following the termination of the covered military member's active duty.

Section 825.127 (Leave To Care for a Covered Servicemember With a Serious Injury or Illness) (i.e., ''Military Caregiver Leave'')

Section 585(a) of the NDAA amends the FMLA to allow an eligible employee who is the spouse, son, daughter, parent, or next of kin of a ''covered servicemember'' to take 26 workweeks of leave during a 12-month period to care for the servicemember. The provisions in the NDAA providing for military caregiver leave became effective

January 28, 2008. In order to provide guidance to employees and employers about this new leave entitlement as soon as possible, the NPRM sought public comment on a number of issues related to the development of regulations to implement the military caregiver leave provisions, and stated that the next step in the rulemaking process would be to issue final regulations. In the interim, the Department has required that employers act in good faith in providing military caregiver leave under the new legislation by using existing FMLA-type procedures as appropriate. In order to address issues unique to the taking of this leave, the final rule creates a new § 825.127, which explains: (1) An employee's entitlement to military caregiver leave; and (2) the specific circumstances under which military caregiver leave may be taken.

Entitlement to Military Caregiver Leave

Under the NDAA, an eligible employee who is the spouse, son, daughter, parent, or next of kin of a covered servicemember shall be entitled to a total of 26 workweeks of leave during a ''single 12-month period'' to care for the servicemember. The NPRM requested comment on a number of issues relating to an eligible employee's entitlement to such leave. For example, the Department sought public comment on the definition of a ''covered servicemember,'' as well as on the scope of injuries or illnesses for which care may be provided under the new leave entitlement. The Department also sought public comment on the required family relationship between the employee seeking to take military caregiver leave and the covered servicemember, including how the Department should define the terms ''next of kin'' and ''son or daughter'' for purposes of such leave.

Section 825.127(a) of the final rule explains that an eligible employee may take FMLA leave to care for a covered servicemember with a ''serious injury or illness'' incurred in the line of duty on active duty for which the servicemember is (1) undergoing medical treatment, recuperation, or therapy; or (2) otherwise in outpatient status; or (3) otherwise on the temporary disability retired list. This section incorporates the NDAA's statutory definition of a ''covered servicemember'' and clarifies that the definition of a ''covered servicemember'' includes current members of the Regular Armed Forces, current members of the National Guard or Reserves, and members of the Regular Armed Forces, the National Guard and the Reserves who are on the temporary disability retired list (''TDRL''). Under the final regulations, *former* members of the Regular Armed Forces, *former* members of the National Guard and Reserves, and members on the permanent disability retired list are not considered covered servicemembers. Section 825.127(b) of the final regulations defines who may take leave to care for a ''covered servicemember.'' This section sets forth definitions for ''son or daughter of a covered servicemember,'' ''parent of a covered servicemember'' and ''next of kin''—all of which are new terms applicable only to the taking of military caregiver leave by an eligible employee.

Who Is a Covered Servicemember

In order for an eligible employee to be entitled to take FMLA leave to care for a servicemember, the NDAA requires that the servicemember be a ''covered servicemember'' who is receiving treatment for a ''serious injury or illness'' that ''may render the member medically unfit to perform the duties of the member's office, grade, rank, or rating.'' A ''covered servicemember'' is defined by statute as a member of the Armed Forces, including a member of the 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.'' 29 U.S.C. 2611(16). A ''serious injury or illness'' is defined by the NDAA as an injury or illness incurred by the covered servicemember 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. 29 U.S.C. 2611(19).

In light of the NDAA's focus on a servicemember's ability to perform his or her military duties when determining whether the servicemember is a ''covered servicemember'' with a ''serious injury or illness,'' the Department sought comments on whether eligible employees were entitled to take FMLA leave 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. The Department asked how, in such circumstances, one would determine whether the injury or illness renders, or may render, the former servicemember medically unfit to perform the duties of the member's office, grade, rank, or rating, when the servicemember is no longer in the military.

The majority of the comments received by the Department on this issue took the position that the clear statutory language of the NDAA amendments does not provide for the taking of military caregiver leave for a servicemember whose injury or illness manifests itself after the servicemember has left military service. For example, the National Association of Manufacturers stated that ''by statutory definition, a 'serious injury or illness' is one 'that may render the member medically unfit to perform the duties of the member's office, grade, rank, or rating'. A person who is discharged from the service is no longer a 'member' of the service and is not included in the definition.'' Jackson Lewis concurred with this view stating that the statutory language ''requires that the condition render the servicemember 'medically unfit to perform the duties of the member's office, grade, rank, or rating.' This language suggests the condition must present while the servicemember is still active in the military.'' Jackson Lewis presented, as a ''practical matter,'' the additional complications that would result in the FMLA medical certification process if such coverage was permitted:

> Given the complications that have arisen in the past 15 years over the certification process for serious health conditions, imagine the difficulty of requiring physicians and employers to determine, potentially years later, whether a condition was triggered in the line of duty and whether its belated presentation renders the service member unfit to perform his or her office, grade, or rank from months or years prior.

Id. The U.S. Postal Service stated that the NDAA provisions ''clearly limit the definition of 'covered servicemember' to those who are current members of the Armed Forces. Accordingly, a servicemember who resigns or retires from the Armed Services is not a covered servicemember.'' This commenter recognized, however, that a ''retired servicemember would nonetheless be covered if he or she were on the Temporary Disability Retired List.''

A minority of commenters took the position that FMLA leave should be available to care for a covered servicemember whose injury or illness manifests itself after the servicemember has left military service. Senator Dodd and Representative Woolsey *et al.* stated: ''Congress certainly did not intend to disqualify injuries that servicemembers incurred in the line of duty, simply because those injuries did not develop or were not diagnosed until after they left the service.'' The National Partnership for Women & Families, in joint comments with the National

Military Family Association, also asserted that ''nothing'' in the NDAA indicates that ''retired or discharged servicemembers'' should be denied coverage.

The Department concludes that the statutory language providing for military caregiver leave does not extend the right to take FMLA leave to providing care to retired military servicemembers (unless such individuals are on the temporary disability retired list) or to discharged military servicemembers. While Congress expressly provided that leave could be taken to care for a servicemember on the temporary disability retired list, Congress did not include language indicating its desire to include other discharged or retired members of the Armed Forces, National Guard, or Reserves as ''covered servicemembers.'' Moreover, the standard provided by Congress for determining if a covered servicemember has a serious injury or illness (*i.e.*, whether the condition ''may render the member medically unfit to perform the duties of the member's office, grade, rank, or rating'') cannot be readily applied to those who are no longer serving in the Regular Armed Forces, National Guard or Reserves. Accordingly, § 825.127(a) of the final rule provides that the term ''covered servicemember'' does not include individuals retired or discharged from service, unless they are placed on the temporary disability retired list.

In addition to requiring that the member of the military for whom care is needed has a serious injury or illness, the NDAA also requires that the member be (1) undergoing medical treatment, recuperation, or therapy; (2) otherwise in outpatient status; or (3) on the temporary disability retired list. *See* 29 U.S.C. 2611(16). In the NPRM, the Department suggested that, since determining whether a member of the military is in ''outpatient status'' or on the temporary disability retired list for a serious illness or injury would likely be relatively straightforward, no further clarification of those portions of the definition of covered servicemember would be needed. As to whether a servicemember was ''undergoing medical treatment, recuperation, or therapy'' for a serious injury or illness, the Department's initial view, as stated in the NPRM, was that all treatment, recuperation, or therapy provided to a servicemember for a serious injury or illness, and not just that provided by the military, should be covered. However, the Department sought public comments on this issue. Additionally, the Department asked whether there should be a temporal proximity requirement between the covered servicemember's injury or illness and the treatment, recuperation, or therapy for which care is required. The Department also asked if it should rely on a determination made by the Department of Defense (''DOD'') as to whether a servicemember is undergoing medical treatment, recuperation, or therapy for a serious injury or illness.

Comments from employers and employer groups regarding the coverage of servicemembers who receive treatment, recuperation or therapy from a non-military source were mixed. The U.S. Postal Service believed that allowing coverage for an illness or injury treated solely by a private health care provider, wholly outside the system of care provided by the military, is ''inconsistent'' with the definitions provided in the NDAA and is also ''contrary to the express language of the [NDAA] and to its legislative history.'' On the other hand, the Equal Employment Advisory Council stated that certification provided by the DOD should be sufficient to certify a ''serious injury or illness'' so long as the military branches are ''capable'' of providing the certification regardless of whether the treatment, recuperation, or therapy is being supplied by an Armed Forces or a ''civilian provider.''

The National Partnership for Women & Families, in joint comments with the National Military Family Association, believed any treatment, recuperation, or therapy, and not just that provided by the military, should qualify. They argued that: (1) The statute makes no distinction between servicemembers treated by the military and those who are not; (2) servicemembers are, in fact, treated by both the military and private facilities; and (3) wounded servicemembers may not be located near a military treatment facility (which will make it more difficult for the servicemembers and their family members). The Military Family Research Institute at Purdue University also argued that care provided by non-military sources should be covered, noting that ''[m]embers of the reserve component are expected to receive some or all of their care from providers in civilian communities.''

Both the DOD and the Department of Veterans Affairs (''VA'') have informed the Department that individuals who would be deemed ''covered servicemembers'' under the NDAA do not receive care solely from DOD health care providers, and that such ''covered servicemembers'' also may receive care from either VA health care providers or DOD TRICARE military health system authorized private health care providers.[4] It is the Department's understanding based on discussions with the DOD and the VA that members of the National Guard and Reserves and servicemembers on the temporary disability retired list are more likely to receive care from DOD TRICARE authorized private health care providers than from DOD or VA health care providers, especially if the servicemember resides in a rural or remote area.

After due consideration of the comments, and taking into account the information provided by the DOD and VA regarding the current provision of medical care to servicemembers intended to be covered by the NDAA, the Department believes that military caregiver leave should not be limited to caring for only those servicemembers who receive medical treatment, recuperation or therapy from a DOD health care provider. Accordingly, § 825.127 of the final rule does not require that a servicemember be receiving medical treatment, recuperation, or therapy from a DOD health care provider in order to be a ''covered servicemember.'' As discussed more fully under § 825.310 addressing certification for military caregiver leave, the final rule provides that a request to take military caregiver leave may be supported by a certification that is completed by any one of the following health care providers: (1) A DOD health care provider; (2) a VA health care provider; (3) a DOD TRICARE network authorized private health care provider; or (4) a DOD non-network TRICARE authorized private health care provider. As part of a sufficient certification, these health care providers may be asked to certify that the servicemember is undergoing medical treatment,

[4] TRICARE is the health care program serving active duty service members, National Guard and Reserve members, retirees, their families, survivors and certain former spouses worldwide. As a major component of the Military Health System, TRICARE brings together the health care resources of the uniformed services and supplements them with networks of civilian health care professionals, institutions, pharmacies and suppliers to provide access to high-quality health care services while maintaining the capability to support military operations. To be eligible for TRICARE benefits, one must be registered in the Defense Enrollment Eligibility Reporting System (DEERS). *See http://tricare.mil/mybenefit/home/overview/WhatIsTRICARE.* The Military Health System is a partnership of medical educators, medical researchers, and healthcare providers and their support personnel worldwide. This DOD enterprise consists of the Office of the Assistant Secretary of Defense for Health Affairs; the medical departments of the Army, Navy, Marine Corps, Air Force, Coast Guard, and Joint Chiefs of Staff; the Combatant Command surgeons; and TRICARE providers (including private sector healthcare providers, hospitals, and pharmacies). *See http://mhs.osd.mil/aboutMHS.aspx.*

recuperation, or therapy for a serious injury or illness.

With respect to whether there should be a temporal proximity requirement between the covered servicemember's injury or illness and the treatment, recuperation, or therapy for which care is required, most employers and employer groups argued that such a requirement should be imposed. The Equal Employment Advisory Council, the Illinois Credit Union League, the International Public Management Association for Human Resources (in joint comments with the International Municipal Lawyers Association), and the Pennsylvania Governor's Office of Administration all believed that there should be a ''one year'' temporal proximity requirement. The International Public Management Association for Human Resources, in joint comments with the International Municipal Lawyers Association, wrote that providing a time-frame will ''bring needed certainty to the law,'' and that, ''[f]or long-term recoveries, employees remain entitled to the 12 weeks of leave provided under the FMLA.'' AT&T argued that the DOD or the VA ''should also determine if there should be a temporal proximity requirement between the servicemember's injury or illness and the treatment, recuperation or therapy.''

On the other hand, the College and University Professional Association for Human Resources wrote that ''[n]othing in the statutory language appears to support a temporal limitation between injury and treatment, but the NDAA does require the servicemember be 'a member of the Armed Forces'. This seems to suggest that the individual must have some continued connection to the military.'' The Association of Corporate Counsel's Employment and Labor Law Committee also did not advocate a temporal proximity requirement because it viewed such a time limitation as ''artificial'' and argued it could deny leave to family of servicemembers who are undergoing care for an injury caused in the line of duty. This commenter argued, however, that ''because it is important to establish a causal connection between the care provided and the military service, we do believe that the Department should limit the definition to include only care provided by the Armed Forces, including Veterans hospitals and those to whom the Armed Forces has delegated the task of providing health care.'' This commenter viewed the latter type of limitation ''to be much more fair to employees than a temporal proximity requirement as it is more closely aligned with the goals of the statute—to provide leave to family members when their loved one is seeking treatment for an injury sustained in the line of duty.''

Employee groups also generally argued against the imposition of any temporal proximity requirement. The National Partnership for Women & Families, in joint comments with the National Military Family Association, stated that ''[a]s long as a health care provider certifies that the servicemember's injury or illness led to the treatment, recuperation or therapy, the leave should qualify under the injured servicemember FMLA provisions.'' Finally, Senator Dodd and Representative Woolsey *et al.,* also stated that the Department should not impose a temporal proximity requirement because ''the relevant question is whether the servicemember, at the time of diagnosis or treatment, might not be able to perform the duties that he or she had when he or she was on active duty, in light of the diagnosed injury or illness.''

Given that the entitlement to military caregiver leave is limited to providing care to current members of the Regular Armed Forces, the National Guard, and Reserves or those on the temporary disability retired list, the Department does not believe that a temporal proximity requirement is necessary. As long as the servicemember's injury or illness is a serious one which may render the member medically unfit and was incurred in the line of duty on active duty, and the servicemember is a current member of the Armed Forces, the National Guard, or Reserves undergoing medical treatment, recuperation or therapy, in outpatient status, or on the temporary disability retired list because of the injury or illness, an eligible family member may take FMLA leave to provide care to the servicemember. In most cases, the Department believes that the need to care for the servicemember and the date of the onset of injury or illness will be close in time. While the Department recognizes that the NDAA includes servicemembers who are on the temporary disability retired list, the Department notes that an individual may remain on the temporary disability retired list no longer than five years before he or she is either returned to active duty service or assigned permanent disability (in which case the individual would no longer be a ''covered servicemember'' under the NDAA). *See http://www.tricare.mil/mhsophsc/mhs_supportcenter/glossary/Tg.htm.* Moreover, because the NDAA provides that an eligible employee may only take FMLA leave during a ''single 12-month period'' to care for a covered servicemember with a particular serious injury or illness, the Department does not believe that further limiting the time period between the date of the injury or illness and the need to provide care is necessary.

The Department also received comments that addressed whether the military caregiver leave provisions only extend to family members providing care to members of the National Guard and Reserves, or whether eligible employees also may take such leave to care for members of the Regular Armed Forces with a serious injury or illness. Commenters, including Spencer Fane Britt & Browne, the National Coalition to Protect Family Leave, and the Society for Human Resource Management, noted that the NDAA provision defining the term ''serious injury or illness'' provides that ''[t]he term 'serious injury or illness', in the case of a member of the Armed Forces, including a member of the National Guard or Reserves, means an injury or illness incurred by the member in line of duty on *active duty* in the Armed Forces * * *'' 29 U.S.C. 2611(19) (emphasis added). These commenters asked the Department to reconcile the language of this provision which specifically includes both Regular Armed Forces and members of the National Guard and Reserves with the requirement that the injury or illness be incurred while on ''active duty''—a term which is also defined by the NDAA and, as discussed above with respect to qualifying exigency leave, is limited to members of the National Guard and Reserves.

While these commenters noted that the NDAA definition of ''active duty'' is limited to National Guard and Reserve members, the commenters argued that, in the context of military caregiver leave, ''Congress obviously did not intend to limit [such] leave to only those in the National Guard or Reserve.'' The law firm of Willcox & Savage contended that Congress' inclusion of the term ''active duty'' in the definition of ''serious injury or illness'' creates an ''internal and irreconcilable inconsistency'' because limiting the definition of ''active duty'' to the National Guard and Reserves is not ''consistent'' with the language ''including a member of the National Guard and Reserves'' in the definition of serious injury or illness. Like Spencer Fane Britt & Browne and the National Coalition to Protect Family Leave, Willcox & Savage believed that the Department should ''clarify'' this ''internal irreconcilable inconsistency'' in its final regulations.

The Department agrees that applying the NDAA's definition of ''active duty''

to the provisions regarding military caregiver leave renders other language in those provisions superfluous. Specifically, applying the narrow definition of ''active duty'' found in section 585(a)(1) of the NDAA (29 U.S.C. 2611(14)) would undermine the specific statutory language in the military caregiver leave provisions defining a covered servicemember as ''a member of the Armed Forces, including a member of the National Guard and Reserves'' (29 U.S.C. 2611(16)) and defining a ''serious injury or illness'' in the case of a ''a member of the Armed Forces, including a member of the National Guard and Reserves'' (29 U.S.C. 2611(19)). As the law firm of Willcox & Savage wrote, the inclusion of the specific language ''including a member of the National Guard and Reserves'' in the NDAA's definition of ''serious injury or illness'' suggests that Congress intended broader coverage for military caregiver leave than for qualifying exigency leave. Unlike qualifying exigency leave, where the need for FMLA leave to address pre-deployment, during deployment, and post-deployment situations may be unique to National Guard and Reserve families who are typically not accustomed to having their family member deployed, the need for FMLA leave to care for a seriously injured or ill servicemember is the same whether the servicemember is a member of the Regular Armed Forces or the National Guard or Reserves. Accordingly, the Department has concluded that the better reading of the NDAA provisions providing for military caregiver leave extends such leave to family members providing care to members of the Regular Armed Forces, as well as members of the National Guard and Reserves, with a serious injury or illness. Section 825.127(a) reflects this conclusion.

Several commenters, including Spencer Fane Britt & Browne and the National Coalition to Protect Family Leave, also argued that the inclusion of the term ''active duty'' in the definition of ''serious injury or illness'' indicates that the injury or illness must be incurred while the servicemember is serving under a call to active duty under one of the statutory provisions cited in 10 U.S.C. 101(a)(13)(B), and that this language meant that injuries or illnesses incurred by National Guard or Reserve members who have not actually been called to active duty by the federal government should not be considered a ''serious injury or illness'' for the purpose of taking FMLA leave. The Society for Human Resource Management also asserted its belief that ''caregiver leave apparently was not intended to cover illnesses/injuries incurred by National Guard or Reserve members who have not actually been called to active duty by the federal government, *e.g.*, where a State has a state-related emergency and the National Guard is called to duty by the Governor of the State.''

For the reasons discussed immediately above, the Department has decided not to apply the NDAA definition of ''active duty'' to the provisions regarding military caregiver leave because to do so renders other language in those provisions superfluous. Additionally, the Department believes it is important to remember that the NDAA military caregiver leave provision amending the FMLA was based upon the recommendation of the July 2007 Report of the President's Commission on Care for America's Returning Wounded Warriors, ''Serve, Support, Simplify: Report of the President's Commission on Care for America's Returning Wounded Warriors'' (2007) (commonly referred to as either the Wounded Warriors Report or the Dole-Shalala Report). This report addressed the need for care of wounded warriors serving in the National Guard or Reserves as well as those serving in the Regular Armed Forces. Finally, consultations with the DOD have indicated that the NDAA statutory definition of ''active duty'' applicable to qualifying exigency leave is not one commonly used by the military when determining whether a servicemember has incurred an injury or illness in the line of duty. In light of this information, and after due consideration of the comments regarding the definition of ''active duty'' in the context of military caregiver leave, the Department believes that the DOD, or its authorized health care representative, is in the best position to determine whether an injury was ''incurred in line of duty on active duty in the Armed Forces'' since those terms are terms of art used by the military in other contexts. Accordingly, as discussed in greater detail below with respect to the certification requirements for taking military caregiver leave, the Department has provided that an employer may request that an employee seeking to take military caregiver leave obtain appropriate certification that a servicemember's serious injury or illness was incurred in line of duty on active duty. This approach allows an employer to verify that a particular injury qualifies for FMLA leave under the military caregiver leave provisions while providing appropriate deference to the military's existing processes for determining whether an injury was incurred in line of duty on active duty in the Armed Forces.

Who Is Entitled To Take Military Caregiver Leave

With respect to who may take military caregiver leave, the NDAA provides that such leave is available to an eligible employee who is the ''spouse, son, daughter, parent, or next of kin of a covered servicemember.'' The Department sought comments on two specific issues related to who is entitled to take military caregiver leave. First, the Department asked whether the existing FMLA definition of ''son or daughter'' should be applied to military caregiver leave. Second, the Department asked a series of questions regarding how it should interpret ''next of kin'' as that term does not apply to other types of FMLA leave.

Under the existing FMLA definition of son or daughter, a son or daughter must either be (1) under 18 years of age 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). Applying this definition to the military caregiver leave entitlement would mean that most, if not all, adult children would not be entitled to take military caregiver leave to care for a parent who is a covered servicemember. This is so even though the same adult child could care for their parent (covered servicemember) if the parent's serious injury or illness also qualified as a serious health condition under the FMLA. Recognizing that applying the current definition of ''son or daughter'' for purposes of military caregiver leave would severely undermine the clear intent of the NDAA military caregiver provisions, the Department sought comment on whether it would be appropriate to define the term ''son or daughter'' differently for purposes of FMLA leave taken to care for a covered servicemember.

The majority of commenters—whether employer- or employee-focused—believed it would be appropriate for the Department to apply a different definition of ''son or daughter'' for leave taken to care for a covered servicemember. For example, the National Partnership for Women & Families, in joint comments with the National Military Family Association, the National Coalition to Protect Family Leave, the National Retail Federation, the Pennsylvania Governor's Office of Administration, and the Legal Aid Society-Employment Law Center, all agree that the term ''son or daughter''

should be defined to include adult children for purposes of military family leave.

The comments submitted by Senator Dodd and Representative Woolsey *et al.* stressed that it is appropriate and ''in fact crucial'' that the Department define ''son or daughter'' differently for military caregiver leave:

> As DOL itself commented, it is absurd to extend leave only to those sons or daughters of injured servicemembers who are under the age of 18 or ''incapable of self-care.'' Moreover, Congress demonstrated its intent for the terms ''son'', ''daughter'', and ''parent'' to have unique meanings under the military family provisions of the FMLA, because it designated the ''employee'' as the ''son, daughter, [or] parent'' of ''a covered service member'', whereas the originally enacted FMLA provisions *inversely* designate the ''employee'' as a person who takes leave to ''care for [his or her] * * * son or daughter, or parent''.

The National Association of Manufacturers also commented that applying the FMLA definition of ''son or daughter'' to the military family leave provisions would not fulfill the intent of the law. Additionally, TOC Management Services wrote that limiting the leave for children less than 18 years of age would ''essentially defeat the spirit of the law.'' While agreeing that a different definition of son or daughter should be applied to the military caregiver leave provisions, the National Coalition to Protect Family Leave recommended ''[t]he definition of 'son or daughter' should be retained 'as is' for all other forms of FMLA leave, including FMLA leave due to the serious health condition of a son or daughter.''

The Department agrees with these commenters. Applying the existing FMLA definition of ''son or daughter'' to the military caregiver leave provision would significantly undermine the NDAA's extension of FMLA leave to the son or daughter of a covered servicemember. Under nearly all circumstances, doing so would mean that an adult son or daughter would not be able to take leave to care for a covered servicemember parent. The Department does not believe such a result was intended. Accordingly, § 825.127(b)(1) of the final rule establishes a separate definition of ''son or daughter of a covered servicemember'' for the purpose of military caregiver leave. Section 825.127(b)(1) defines a ''son or daughter of a covered servicemember'' as ''the covered servicemember's biological, adopted, or foster child, stepchild, legal ward, or a child for whom the covered servicemember stood in loco parentis, and who is of any age.'' *See also* §§ 825.122 and 825.800. The Department also notes that this definition is not intended to apply to leave taken for other FMLA-qualifying reasons.

The law firm of Spencer Fane Britt & Browne requested that the Department also clarify the definition of ''parent'' for purposes of military caregiver leave. The firm argued that a parent should only be entitled to take military caregiver leave to care for a covered servicemember son or daughter when the son or daughter is under the age of 18, or 18 years or older and incapable of self-care because of a mental or physical disability, because those restrictions currently apply to leave taken by a parent to care for a child with a serious health condition. To allow otherwise would be ''inherently unfair to employees with adult children who are not serving in the military,'' according to this commenter. The Department does not agree with Spencer Fane Britt & Browne's proposal to define ''parent'' in such a manner for purposes of military caregiver leave. However, this commenter's proposal did raise an issue that the Department believes must be addressed in the final regulations. Under the existing FMLA definition of parent, a 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. 29 U.S.C. 2611(7). However, in the context of military caregiver leave, the parent who seeks to take leave is the parent of the covered servicemember, not the parent of the employee. Accordingly, § 825.127(b)(2) establishes a separate definition of ''parent of a covered servicemember'' for the purpose of military caregiver leave. Section 825.127(b)(2) defines ''parent of a covered servicemember'' as the ''covered servicemember's biological, adoptive, step or foster father or mother, or any other individual who stood in loco parentis to the servicemember.'' See also §§ 825.122 and 825.800. This term does not include parents ''in law.''

The NDAA also provides that a covered servicemember's ''next of kin'' is eligible to take FMLA leave to care for the servicemember and defines the term ''next of kin'' as the ''nearest blood relative'' of a covered servicemember. 29 U.S.C. 2611(18). In the NPRM, the Department sought comments on a number of issues relating to who should qualify as an eligible next of kin, including (1) whether the Department should adopt for FMLA purposes a list of individuals the DOD generally considers to be the ''next of kin'' of a servicemember; (2) whether a servicemember's next of kin should be limited to a single individual or include relatives of close consanguinity; (3) whether a covered servicemember could designate his or her next of kin for FMLA purposes, including whether the Department should deem the servicemember's Committed and Designated Representative (''CADRE'') as the next of kin for FMLA purposes; and (4) whether an employer should be able to confirm an employee's status as the next of kin.

Comments from employees and groups representing employees generally argued in favor of creating a definition of next of kin that was as comprehensive as possible. For example, the National Partnership for Women & Families, in joint comments with the National Military Family Association, proposed using a combination of the DOD list provided in the NPRM, state law definitions, and the Department of Veterans Affairs definition of domestic partners and partners, and also permitting more than one individual to take leave as a servicemember's next of kin. *See also* Legal Aid Society-Employment Law Center. Similarly, comments from Senator Dodd and Representative Woolsey *et al.* asked the Department to define the term next of kin in an ''expansive and flexible'' manner.

Comments from employers largely urged the Department to adopt a rule that would ''simplify'' the administration of military caregiver leave and provide ''clarity.'' U.S. Postal Service; *see also* University of Texas System; WorldatWork. Many employers and employer representatives, however, either expressed concern about the appropriateness of relying on the DOD list for this purpose or argued that the DOD list should only be adopted to the extent that it complied with the statutory requirement that a servicemember's next of kin be a blood relative. *See, e.g.*, National Coalition to Protect Family Leave; Association of Corporate Counsel's Employment and Labor Law Committee; Hewitt Associates; Equal Employment Advisory Council; *but see* Independent Bakers Association and Public Management Association for Human Resources in joint comments with the International Municipal Lawyers Association (supporting use of DOD list). Employers and employer groups also urged the Department to avoid relying on state law interpretations to define a servicemember's next of kin because such an approach would be overly burdensome to employers with multi-state operations and might be perceived as unfair since an individual's eligibility

for FMLA leave would vary state by state. *See, e.g.*, National School Boards Association; Fisher & Phillips; Association of Corporate Counsel's Employment and Labor Law Committee; TOC Management Services; HR Policy Association; Spencer Fane Britt & Browne.

Many commenters representing employers asked the Department to specify that only one individual is eligible to take military caregiver leave as a servicemember's next of kin, with several noting the potential burden of allowing multiple individuals to take 26 weeks of leave. *See, e.g.*, Association of Corporate Counsel's Employment and Labor Law Committee; National Association of Manufacturers; Burr & Forman. On the other hand, the National Coalition to Protect Family Leave and the Society for Human Resource Management urged the Department to avoid a ''literal interpretation of 'nearest blood relative' '' and to adopt a ''more practical interpretation'' such as by defining next of kin as the ''nearest blood relative willing and able to care for the injured service member.'' The law firm of Spencer Fane Britt & Browne supported allowing multiple individuals to serve as next of kin provided that all such individuals were the same level of relationship to the servicemember.

A majority of commenters were in favor of permitting a servicemember to designate his or her next of kin in some circumstances. Senator Dodd and Representative Woolsey *et al.* stated that ''most of all, the intent of Congress was for the servicemember, and not the government'' to choose the family member who is in the ''best position'' to serve as his or her next of kin. These Members stressed that ''whatever approach'' the Department chooses, a servicemember ''should not be compelled'' to rely on a next of kin who lives far away, is estranged from the servicemember, or is not equipped to tend for the servicemember. *See also* National School Boards Association (permit servicemember to designate any one person as next of kin); Spencer Fane Britt & Browne (make list of next of kin subject to any CADRE designation). The National Partnership for Women & Families, in joint comments with the National Military Family Association, supported recognizing a servicemember's designation of his or her next of kin, although they argued that any such designation should ''not mean that other family members cannot take leave.'' The National Coalition to Protect Family Leave, the Society for Human Resource Management, and the Chamber were in favor of relying on a servicemember's CADRE designation as long as the NDAA's ''statutory restrictions with respect to blood relatives'' were retained. Southwest Airlines suggested that designation be allowed as an ''alternative'' and ''only'' in the event that the covered servicemember does not have a nearest blood relative who falls within a specified next of kin list.

Several commenters, including the Equal Employment Advisory Council, the National Partnership for Women & Families in joint comments with the National Military Family Association, and the U.S. Postal Service, stated that employers should be able to seek confirmation of next of kin status in accordance with the existing FMLA procedures for documenting other types of familial relationships. Other commenters requested that the Department establish unique procedures for confirming an employee's next of kin status. *See, e.g.*, Society for Human Resource Management and Spencer Fane Britt & Browne (both suggesting verification by DOD in most cases).

Section 825.127(b)(3) of the final rule defines a servicemember's ''next of kin'' as the servicemember's nearest blood relative, other than the covered servicemember's spouse, parent, son, or daughter, in the following order of priority: blood relatives who have been granted legal custody of the servicemember by court decree or statutory provisions, brothers and sisters, grandparents, aunts and uncles, and first cousins, unless the covered servicemember has specifically designated in writing another blood relative as his or her nearest blood relative for purposes of military caregiver leave under FMLA, in which case the designated individual shall be deemed to be the covered servicemember's next of kin. The final rule permits an employer to confirm an employee's status as a covered servicemember's next of kin through the procedures for confirming familial relationships set forth in § 825.122(j).

The Department believes that the final rule provides the flexibility intended by Congress when providing that a servicemember's next of kin may take military caregiver leave while also giving meaning to the statutory requirement that the next of kin be the servicemember's ''nearest blood relative.'' In the first instance, this approach provides employees and employers with a clear rule to apply by defining a list of familial relationships, in order of priority, which will qualify an individual as a servicemember's nearest blood relative. As suggested by a number of commenters, this list incorporates those portions of the DOD list of next of kin that reflect blood relationships and does not rely on the interpretation of state law. The list also adds a servicemember's aunts, uncles and first cousins as eligible next of kin based on the suggestions of commenters. The Department has decided against relying on state law interpretations of next of kin because it believes both employers and employees will be best served by a consistent definition that does not vary by the location of the employer, the employee or the covered servicemember.

The final rule also makes clear that the next of kin of a covered servicemember is a relative other than the spouse, parent, son, or daughter of the covered servicemember, as those individuals are separately covered by the express terms of the statute. A number of commenters suggested that a person who is not the servicemember's spouse, son, daughter, or parent should only be considered ''next of kin'' if ''none'' of the foregoing family members are available to provide care. AT&T; *see also* Spencer Fane Britt & Browne. Because an employee is not required to certify that he or she is the ''only'' individual available to provide care for a family member when taking FMLA leave for other qualifying reasons, the Department declines to impose such a requirement when an employee requests leave as a servicemember's next of kin.

The final rule also provides that all family members sharing the closest level of familial relationship to the servicemember shall be considered the servicemember's next of kin, unless the servicemember has specifically designated an individual as his or her next of kin for military caregiver leave purposes. In the absence of a designation, where a servicemember has three siblings, all three siblings will be considered the servicemember's next of kin. The Department notes that in such a case all siblings are equally close to the covered servicemember in terms of consanguinity and the Department believes that it would be inappropriate to force the injured servicemember to choose a caregiver from among his or her siblings. The Department believes this approach is preferable to specifically incorporating a ''willing and able component'' into the definition of ''next of kin'' because the Department believes it would be difficult for an employee to prove—and for an employer to verify—that, in fact, the employee is the only next of kin ''willing and able'' to provide care to the covered servicemember. The Department does not anticipate that

permitting multiple individuals to serve as ''next of kin'' will prove overly burdensome for employers since it is unlikely that all such individuals will work for the same employer or request leave at the same time.

The final rule also recognizes that, in some circumstances, a servicemember may consider, and so designate, another blood relative to be his or her ''nearest blood relative'' based on the closeness of their personal relationship. As suggested by many of the comments, the Department believes that such individuals should be considered the servicemember's next of kin for military caregiver leave purposes. Because the statute defines a servicemember's next of kin as the ''nearest blood relative'' without specifying whether nearness should be determined by blood or other relationship, the Department believes that the term ''next of kin'' may appropriately include any one blood relative designated by the servicemember as the next of kin based on closeness of relationship. Allowing a servicemember to designate his or her next of kin for military caregiver leave purposes, but limiting the availability of such a designation to one individual strikes an appropriate balance between those comments that suggested that only one individual should be eligible to take FMLA leave as next of kin and those that urged the Department to recognize the servicemember's choice of caregiver.

The final rule provides that an employer who wants proof of an individual's status as a covered servicemember's ''next of kin''—either to confirm that the employee and servicemember share one of the familial relationships specified in § 825.127(b)(3) or to confirm that the employee has been specifically designated as the servicemember's next of kin—may seek reasonable documentation of the familial relationship from the employee under § 825.122(j). Where an employee is seeking to take leave as a servicemember's designated next of kin, such documentation may take the form of a simple statement from the servicemember indicating that the employee has been designated as the servicemember's next of kin for purposes of military caregiver leave. In those cases where the servicemember has not specifically designated a next of kin for military caregiver leave purposes, a simple statement from the employee or other documentation outlining the employee's familial relationship to the servicemember will suffice.

The Department has taken this approach because it believes that it is beneficial to both employees and employers to adopt, wherever possible, similar procedures for administering military caregiver leave and leave taken for other FMLA qualifying reasons. Furthermore, the Department believes that the procedures for confirming family relationships should be no more burdensome when an employee seeks to take FMLA leave to care for a covered servicemember than when an employee seeks to take FMLA leave for some other qualifying reason. Adopting the same approach for confirming familial relationships for all types of FMLA leave also adequately addresses employers' concerns about potential misuse of FMLA leave by employees. Under § 825.216(d) of the final rule, an employee who fraudulently obtains FMLA leave from an employer is not protected by the FMLA's job restoration or maintenance of health benefits provisions. This provision is unchanged from the current regulations and serves as a check on an employee's ability to seek FMLA leave based on a fraudulent assertion of familial relationship.

Circumstances Under Which Military Caregiver Leave May Be Taken

The NDAA provides eligible employees with a total of 26 workweeks of leave during a ''single 12-month period'' to care for a covered servicemember. 29 U.S.C. 2612(a)(3). In the NPRM, the Department sought comment on how this new leave entitlement should be administered, including whether such leave was a one-time entitlement and whether eligible employees may take more than one period of military caregiver leave to care for multiple covered servicemembers with a serious injury or illness, or the same covered servicemember with multiple serious injuries or illnesses. The Department also sought comment on how the ''single 12-month period'' should be determined. Finally, the Department sought comment on how military caregiver leave should be designated, particularly when such leave also might qualify as leave to care for a family member with a serious health condition.

Section 825.127(c) of the final rule explains that an eligible employee may take no more than 26 workweeks of military caregiver leave in any ''single 12-month period.'' This section also provides that the 26-workweek entitlement is to be applied as a per-servicemember, per-injury entitlement, meaning that an eligible employee may take 26 workweeks of leave to care for one covered servicemember in a ''single 12-month period'' and then take another 26 workweeks of leave in a different ''single 12-month period'' to care for another covered servicemember or to care for the same covered servicemember with a subsequent serious injury or illness. The final rule provides that the ''single 12-month period'' begins on the first day the eligible employee takes military caregiver leave and ends 12 months after that date, and explains how to calculate an employee's FMLA leave entitlement during this ''single 12-month period'' when an employee requests military caregiver leave and leave for another FMLA-qualifying reason. Section 825.127(c)(4) provides that an employer should designate leave that qualifies as both military caregiver leave and leave taken to care for a family member with a serious health condition as leave to care for a covered servicemember in the first instance.

Most of the comments received agreed that the 26-workweek entitlement for military caregiver leave is different than the 12-workweek entitlement for other FMLA-qualifying reasons in that the 26 weeks is not a yearly entitlement that ''renews'' each year. *See, e.g.*, The Southern Company; Catholic Charities, Diocese of Metuchen; Equal Employment Advisory Council; and Colorado Department of Personnel & Administration. A majority of the comments relied on the clause in section 585(a)(2)(B)(3) of the NDAA that military caregiver leave ''shall only be available during a single 12-month period'' (29 U.S.C. 2612(a)(3)) as evidence that Congress intended the 26 weeks to be a one-time entitlement. *See, e.g.*, Society for Human Resource Management; Association of Corporate Counsel's Employment and Labor Law Committee; U.S. Postal Service; Berens & Tate. Commenters varied, however, on whether this ''one-time entitlement'' would nonetheless allow an eligible employee to take multiple periods of 26 workweeks of leave in order to care for different covered servicemembers or to care for a single servicemember who suffers multiple serious injuries or illnesses.

In its comments, the Society for Human Resource Management contended that the military caregiver leave must be a ''one-time opportunity'' because the sentence restricting leave to ''a single 12-month period'' would not have been necessary otherwise. Additionally, this commenter pointed to the immediately preceding sentence in the statute that states the 26 weeks of leave may be taken ''during a 12-month period'' and wrote: ''This is different from regular FMLA leave which may be taken 'during *any* 12-month period'. The use of the word 'a' as opposed to 'any'

strongly suggests that Congress intended to differentiate caregiver leave from all other types of FMLA leave regarding its availability.'' (Emphasis in original.) The Association of Corporate Counsel's Employment and Labor Law Committee also argued that Congress intended the military caregiver leave provisions of the NDAA to be a ''one-time entitlement'' and stated that ''if this was not the intent, Congress would not have included the phrase 'single twelve-month period' in this section.'' The law firm of Berens & Tate argued that permitting eligible employees to take leave in separate 12-month periods for separate covered servicemembers would have a ''devastating'' impact on employers and would create an ''enormous problem'' for employers trying to staff their workforce, especially during times of war.

On the other hand, comments submitted on behalf of Senator Dodd and Representative Woolsey *et al.* stated that the extension of FMLA leave for ''those caring for injured servicemembers has often been referred to as a 'one-time entitlement', but leave would be available *once per servicemember, per injury*.'' (Emphasis in original.) The National Partnership for Women & Families, in joint comments with the National Military Family Association, and a few employers, also argued that the Department should permit eligible employees to take more than one period of military caregiver leave if such leave was needed to care for more than one covered servicemember with a serious injury or illness, or to care for the same covered servicemember who sustains a second serious injury or illness. One such commenter, AT&T, provided the following example:

> For example, if the service member is injured and requires care while he/she recuperates, the family member would be entitled to 26 weeks within a 12-month period. However, after recovery if the service member is re-deployed and suffers another injury, assuming it occurs after the previous 12-month period had expired, the family member could possibly be entitled to an additional 26 weeks at that time.

The Department agrees that the military caregiver leave provisions, while a one-time entitlement, should be applied on a per-covered-servicemember, per-injury basis. As to the per-servicemember component, the Department agrees with the law firm of Willcox & Savage that to apply the statute otherwise would ''negate its central purpose.'' The Department believes that the entitlement should also extend per-injury based on the ''reality,'' as noted in the joint comments from the National Partnership for Women & Families and the National Military Family Association, that servicemembers are injured and treated and then re-injured again on active duty. This per injury entitlement is limited to *subsequent* serious injuries and illnesses. This means, for example, if a covered servicemember incurs a serious injury or illness during his or her first deployment and then incurs another serious injury or illness during a second deployment, an eligible employee would be entitled to two separate 26-workweek entitlements during separate ''single 12-month periods'' to care for the covered servicemember. Alternatively, if the covered servicemember incurs a serious injury or illness and subsequently manifests a second serious injury or illness at a later time, an eligible employee would be entitled to an additional 26-workweek entitlement to care for the covered servicemember in a separate ''single 12-month period.'' In each of these examples, in order for the eligible employee to receive an additional 26-workweek entitlement for a covered servicemember's subsequent injury, the covered servicemember must still be a member of the Armed Forces, or the National Guard or Reserves, including those on the temporary disability retired list. However, the per-injury entitlement does not mean that an eligible employee receives multiple 26-workweek entitlements for multiple injuries incurred and simultaneously manifested by a covered servicemember in a single incident. For example, if a covered servicemember incurs a serious leg injury and a serious arm injury in an accident, an eligible employee would not be entitled to separate 26-workweek entitlements for each serious injury. Additionally, if a covered servicemember experiences a later aggravation or complication of his or her earlier serious injury or illness for which an eligible employee took 26 workweeks of leave, the employee would not be entitled to an additional 26 workweeks of leave for the aggravation or complication of the initial serious injury or illness. Finally, if an eligible employee is caring for a covered servicemember whose serious injury or illness extends beyond the employee's 26-workweek leave entitlement, the employee is not eligible for an additional 26-workweek entitlement to continue to care for the covered servicemember. The Department notes, however, that in this situation the covered servicemember's other eligible family members could take such leave. Additionally, even after an employee has exhausted his or her military caregiver leave entitlement, the employee may be entitled to use his or her normal 12-week FMLA leave entitlement to provide care to the servicemember due to the same injury or illness. The Department believes, given the reason the military caregiver provision was enacted we must capture those instances, hopefully rare, when such circumstances arise to ensure leave to care for these servicemembers is available despite the burden the per-covered-servicemember, per-injury interpretation may place on some employers. The Department notes further that the statute and thereby the final rule provide that an eligible employee is limited to no more than 26 weeks of FMLA leave in any ''single 12-month period,'' even where such leave is requested to care for multiple servicemembers.

A number of commenters asked the Department to make clear that an employee cannot ''carry-over'' unused weeks of military caregiver leave from one 12-month period to another. The Equal Employment Advisory Council recommended ''that the regulations clarify that an eligible employee who takes leave to care for a covered servicemember, but does not use the entire 26-workweek entitlement, be required to forfeit the balance of his or her remaining servicemember leave entitlement at the end of the single 12-month period.'' The Colorado Department of Personnel & Administration also recommended that the Department make ''clear'' that there is no ''carryover'' of the leave from year to year. The Department agrees with these comments. Therefore, § 825.127(c)(1) of the final rule provides that once an eligible employee begins taking leave to care for a covered servicemember with a particular serious injury or illness, he or she may take up to 26 workweeks of leave during the 12 months following the first date leave is taken. If the employee does not use his or her entire entitlement during this ''single 12-month period,'' the remaining workweeks of leave are forfeited. However, because the final rule also permits an eligible employee to take 26 workweeks of leave in different ''single 12-month periods'' to care for multiple servicemembers or to care for the same servicemember with a subsequent serious injury or illness, this section also makes clear that an employee may be eligible to take additional periods of 26 workweeks of leave in subsequent ''single 12-month periods'' if the leave is to care for a different covered servicemember or to

care for the same servicemember with a subsequent serious injury or illness.

In the NPRM, the Department also sought comment on how the ''single 12-month period'' should be measured and whether an employer should be permitted to choose a method for establishing the ''single 12-month period,'' as an employer is able to do for other FMLA-qualifying reasons. The Department also sought comment on how this provision should be implemented if different methods are used to establish the 12-month period for leave taken to care for a covered servicemember versus leave for other FMLA-qualifying reasons. Finally, the Department asked for comment on how an employee's leave entitlement should be calculated when an employee takes military caregiver leave and FMLA leave for other qualifying reasons during the ''single 12-month period'' used for military caregiver leave.

Section 825.127(c)(1) of the Department's final regulations states that the ''single 12-month period'' for military caregiver leave begins on the first day the eligible employee takes military caregiver leave and ends 12 months after that date, regardless of the method used by the employer to determine the employee's 12 workweeks of leave entitlement for other FMLA-qualifying reasons. This section further provides that an eligible employee is entitled to a combined total of 26 workweeks of military caregiver leave and leave for any other FMLA-qualifying reason in a ''single 12-month period,'' provided that the employee may not take more than 12 workweeks of leave for any other FMLA-qualifying reason.

A majority of the commenters agreed that an employee's leave balance for military caregiver leave should be calculated from the date on which the eligible employee is first needed to care for the covered servicemember (*i.e.*, the date when an eligible employee first takes leave). Senator Dodd and Representative Woolsey *et al.* stated that the 12-month period should begin when the employee ''first utilizes'' military family leave, ''even if'' the employer establishes the 12-month period for standard FMLA leave on a different basis. Similarly, the College and University Professional Association for Human Resources noted that unlike leave for other FMLA-qualifying reasons in which an employer may choose the type of leave year, there ''is no such flexibility'' with respect to military caregiver leave, and that ''[b]ecause such leave is a one-time entitlement, the leave year must be measured forward from the first day of leave. This is the only way to ensure the employee may use his or her full 26 weeks.''

However, other commenters stated that an employer should be able to choose the 12-month period for this type of leave, as is the case with leave taken for other FMLA qualifying reasons. The City of Medford (OR) commented that the Department should allow an employer to establish the 12-month period ''in the same manner that it does for employees currently on FMLA leave.'' Similarly, the International Franchise Association stated that the Department ''must make it clear'' that an employer is entitled to apply its normal 12-month period in calculating military caregiver leave.

The Department has determined that the most appropriate method for establishing the ''single 12-month period'' for purposes of military caregiver leave is a period that commences on the date an employee first takes leave to care for a covered servicemember with a serious injury or illness. Establishing the ''single 12-month period'' based on the date of the covered servicemember's injury or illness instead of from the employee's first leave to care for the servicemember might limit the employee's ability to utilize the 26-week entitlement because the employee may not commence caring for the servicemember until a much later date. Similarly, applying the employer's normal FMLA leave year to leave to care for a covered servicemember would also result in employees being unable to utilize their 26-week entitlement if the employee's first use of leave did not coincide with the commencement of the employer's FMLA leave year.

In choosing this method, the Department is cognizant of the concerns expressed by employers and human resource professionals regarding the complexity and administrative burden of tracking leave under two different 12-month leave periods. However, the Department does not believe that the potential administrative burden caused by a relatively short period of overlapping 12-month periods outweighs the possibility that other approaches might diminish an eligible employee's entitlement of up to a full 26 weeks of military caregiver leave. As the law firm Spencer Fane Britt & Browne noted, an employer ''will only face such an execution challenge for a period of a year or so (or until there is no overlap between the two 12-month periods) for each employee who takes [covered servicemember] leave.'' The Department realizes that under the per-servicemember, per-injury interpretation, it is possible that an eligible employee may have more than one entitlement of 26 weeks with a single employer. However, the Department believes these occurrences will be rare and for most eligible employees the 26 weeks of military caregiver leave will be a one-time entitlement.

A number of commenters asked that the Department provide examples of how employers should ''reconcile'' the use of leave to care for a covered servicemember with other FMLA leave if two different leave years are used. The following example explains how an employer would calculate an employee's entitlement to military caregiver leave when it utilizes a calendar year method for other FMLA qualifying reasons:

The employer uses the calendar year method (January 2009–December 2009) for determining an employee's leave balance for FMLA leave taken for all qualifying reasons other than military caregiver leave. An employee first takes military caregiver leave in June 2009. Between June 2009 and June 2010 (the ''single 12-month period'' for military caregiver leave), the employee can take a combined total of 26 workweeks of leave, including up to 12 weeks for any other qualifying FMLA reason if he has not yet taken any FMLA leave in 2009.

If, however, the employee had already taken five weeks of FMLA leave for his own serious health condition when he began taking military caregiver leave in June 2009, he would then be entitled to no more than seven weeks of FMLA leave for reasons other than to care for a covered servicemember during the remainder of the 2009 calendar year (*i.e.*, the 12 weeks yearly entitlement minus the five weeks already taken). Although his entitlement to FMLA leave for reasons other than military caregiver leave is limited by his prior use of FMLA leave during the calendar year, the employee is still entitled to take up to 26 weeks of FMLA leave to care for a covered servicemember from June–December 2009.

Beginning in January 2010, the employee is entitled to an additional 12 weeks of FMLA leave for reasons other than to care for a covered servicemember. If the employee takes four weeks of FMLA leave for his own serious health condition in January 2010, this would reduce both the number of available weeks of FMLA leave remaining in calendar year 2010 (*i.e.*, the 12 weeks yearly entitlement minus the four weeks already taken) and the number of weeks of FMLA leave available for either military caregiver leave or other FMLA qualifying reasons during the ''single 12-month period'' of June 2009–June 2010.

Once the employee exhausts his or her 26-workweek entitlement, he or she may not take any additional FMLA leave for any reason until the ''single 12-month period'' ends. Thus, for example, if the employee took 20 workweeks of military caregiver leave from June–December 2009, four workweeks of leave in January 2010 for his or her own serious health condition, and another two

workweeks of military caregiver leave in March 2010, the employee will have exhausted his or her 26-workweek entitlement for the ''single 12-month period'' of June 2009–June 2010. While the employee would still have eight weeks of FMLA leave available in calendar year 2010, the employee could not take such leave until after June 2010, when the ''single 12-month period'' ends.

The Department also sought comment in the NPRM on how to designate leave that may qualify as both military caregiver leave and leave to care for a spouse, parent, or child with a serious health condition. Specifically, the Department asked whether the employer or employee should be able to determine how such leave is counted and whether such leave should be subject to retroactive designation in any circumstance.

The Department has decided that the same designation rules should apply to leave taken to care for a covered servicemember and leave taken for other FMLA-qualifying reasons. Section 825.300(d)(1) of the final rule provides that, 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. The final rule extends this requirement, as well as the rules regarding retroactive designation, to the designation of military caregiver leave in § 825.127(c)(4). This section of the final rule also provides that, in the case of leave that qualifies as both military caregiver leave and leave to care for a family member with a serious health condition, the employer must designate such leave as military caregiver leave in the first instance.

The Department received a multitude of comments addressing the initial designation of leave that may qualify as both military caregiver leave and leave to care for a family member with a serious health condition. Comments submitted on behalf of Senator Dodd and Representative Woolsey *et al.* stated that an employee should have the right to choose whether the leave counts as leave taken to care for a family member with a serious health condition or military caregiver leave. While the Society for Human Resource Management argued that the employee should be the individual who determines whether he or she is applying for military caregiver leave or leave for any other FMLA-qualifying reason, to ''minimize the potential for disputes,'' this commenter also asked the Department to require an employee to specifically apply for military caregiver leave through the use of ''specific language.'' The Association of Corporate Counsel's Employment and Labor Law Committee argued that when leave may count as either military caregiver leave or leave taken to care for a spouse, parent, or child with a serious health condition, the employer should be able to determine how much leave should be designated, ''including allowing the two types of leave to run concurrently.'' This commenter wrote that if this approach is not adopted, the ''default'' should be to apply the military caregiver leave first. The law firm Jackson Lewis also believed ''the best practical solution'' is to apply military caregiver leave first, because ''[o]therwise, there is the potential for additional administrative uncertain[t]y in what is already a confusing, two track time-table for calculating the different types of leave.'' The National Partnership for Women & Families, in joint comments with the National Military Family Association, argued that ''[l]eave that qualifies under both provisions of the FMLA should count towards both leave ceilings simultaneously; if retroactive designation is required in order to accomplish the simultaneous use of leave, retroactive designation should be allowed.''

The Department believes that in the case of military caregiver leave, as with other types of FMLA leave, it is the employer's responsibility to designate the leave, paid or unpaid, as FMLA-qualifying, and to give notice of the designation to the employee. For military caregiver leave that also qualifies as leave taken to care for a family member with a serious health condition, the final rule provides that an employer must designate such leave as military caregiver leave first. The Department believes that applying military caregiver leave first will help to alleviate some of the administrative issues caused by the running of the separate ''single 12-month period'' for military caregiver leave. The final rule also prohibits an employer from counting leave that qualifies as both military caregiver leave and leave to care for a family member with a serious health condition against both an employee's entitlement to 26 workweeks of military caregiver leave and 12 workweeks of leave for other qualifying reasons. The Department has taken this approach because designating and counting one block of leave against two different leave entitlements would impose additional, unnecessary burdens on employees. For example, in order to appropriately designate such leave as both military caregiver leave and leave taken because of a serious health condition, an employee might be required to provide two separate certifications when taking one block of leave.

As to retroactive designation of leave, the majority of employers and employer groups commented that the Department should allow the employer to change the initial designation of the leave retroactively. For example, the Society for Human Resource Management, the National Coalition to Protect Family Leave, and Spencer Fane Britt & Browne argued that an employer should be permitted, but not required, with the consent of an employee, to retroactively change the following: (1) A military caregiver leave designation to another applicable FMLA leave designation if doing so would be more favorable to the employee; or (2) another applicable FMLA leave designation to a military caregiver leave designation if doing so would be more favorable to the employee. A few commenters representing employers, however, expressed concern that permitting retroactive designation could complicate calculation of the ''single 12-month period.'' For example, Jackson Lewis noted that if leave is retroactively designated as leave for a serious health condition when it was first approved as military caregiver leave, it is unclear whether the ''single 12-month period'' would begin on the date the leave was first designated as military caregiver leave or when the military caregiver leave is set to begin. Jackson Lewis noted that the same problem would be present if the leave was first designated as leave for a serious health condition and then later designated as military caregiver leave. Finally, comments submitted on behalf of Senator Dodd and Representative Woolsey *et al.* stated that an employee should have the right to change the designation retroactively.

The Department believes that an employer should be permitted to retroactively designate military caregiver leave pursuant to § 825.301(d) in the same situations under which retroactive designation is permitted for other types of FMLA leave. Given the circumstances surrounding the need for military caregiver leave, the Department is aware that an employer may not have enough information from an employee to designate leave until after the leave has commenced and/or ascertain whether the leave qualifies as military caregiver leave or leave for a family member with a serious health condition under the FMLA. At the same time, the Department recognizes the comments submitted by Jackson Lewis and the ''complications'' that could arise by the

substitution of one type of leave for another given the ''single 12-month period'' under military caregiver leave and the Department's requirement that this period be measured from the day the employee first needs leave—regardless of the employer's normal 12-month period for other FMLA-qualifying leave. Thus, as is the case for other types of FMLA leave, an employer may retroactively designate leave as military caregiver leave in appropriate circumstances, but is not required to do so.

The Department also requested comments on the NDAA provisions permitting an employer to limit the aggregate amount of leave to which eligible spouses employed by the same employer may be entitled in some circumstances. The NDAA 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. Because the NDAA did not alter the existing 12-week limitation that applies to leave taken by spouses employed by the same employer for leave taken for the birth or placement of a healthy child or to care for a parent with a serious health condition, the Department sought comment on how this new limitation on the leave entitlement of spouses employed by the same employer would interact with the existing limitation, particularly if different 12-month periods are used to determine eligibility for leave taken to care for a covered servicemember and leave for other reasons. The Department received few comments on these provisions of the NDAA.

Section 825.127(d) of the final rule incorporates the NDAA's statutory limitation on the amount of leave spouses employed by the same employer may take during the ''single 12-month period'' by providing that 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 26 weeks of leave during the ''single 12-month period'' described in § 827.127(c) if the leave is taken for birth of the employee's son or daughter or to care for the healthy child after birth, for placement of a healthy son or daughter with the employee for adoption or foster care, or to care for the child after placement, to care for the employee's parent with a serious health condition, or to care for a covered servicemember with a serious injury or illness. This section also clarifies that this limitation—like the existing 12-week limitation on leave taken by spouses employed by the same employer for other FMLA qualifying reasons—applies 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, as is the case for the existing 12-week limitation, if one spouse is ineligible for FMLA leave, the other spouse would be entitled to a full 26 weeks of FMLA leave to care for a covered servicemember.

The Department is aware this approach may result in two different 12-month periods being used to calculate the 26-workweek limitation and the 12-workweek limitation, and that in some circumstances, spouses employed by the same employer may be eligible to take more than 26 workweeks of FMLA leave in succession as a result. The Department does not believe, however, that the potential administrative burden caused by a relatively short period of overlapping 12-month periods outweighs the possibility that other approaches might diminish the spouses' entitlement to up to a combined total of 26 workweeks of military caregiver leave and their entitlement to a combined total of 12 workweeks of FMLA leave for other qualifying reasons.

Subpart B—Employee Leave Entitlements Under the Family and Medical Leave Act

Section 825.200 (Amount of Leave)

Section 825.200 explains the basic leave entitlement provided under the Act, and provides instructions for how to determine the 12-month period during which the FMLA leave entitlement may be used, and how to calculate the amount of leave used. Eligible employees are entitled to a set number of ''workweeks'' of FMLA leave, and an employee's normal ''workweek'' prior to the start of the FMLA leave is the basis for determining how much leave an employee uses when taking leave on an intermittent or reduced leave schedule basis.

The only change that the Department proposed in this section was to clarify how to count holidays in cases where an employee takes leave in increments of less than a full workweek. Specifically, the Department proposed to clarify in § 825.200(f) (§ 825.200(h) in the final rule) that, if an employee needs less than a full week of FMLA leave, and a holiday falls within that 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. The Department did not propose any change in the treatment of holidays which occur during a full week of FMLA leave, and which are counted against the employee's FMLA entitlement. This is a clarification and does not represent a change in the Department's enforcement position. The Department has adopted the proposed clarification.

Many commenters, including the National Coalition to Protect Family Leave and the Chamber of Commerce of the United States of America (the ''Chamber''), supported the proposed clarification of the treatment of holidays falling during a partial week of FMLA leave as appropriate and instructive. *See also* Hewitt Associates; National Business Group on Health; American Association of Occupational Health Nurses; City of Medford (OR). The AFL–CIO also supported the proposed clarification as consistent with the statutory mandate to count ''only the leave actually taken.'' *See* 29 U.S.C. 2612(b)(1). However, the AFL–CIO and other groups, such as the National Partnership for Women & Families, opposed the continuation of the current rule that holidays are counted against an employee's FMLA entitlement when they fall within full workweeks of leave, asserting that it is inconsistent with the method of counting holidays when less than a full week of leave is used. *See also* National Treasury Employees Union. In these commenters' view, holidays should never be counted because employees are not required to be at work on those days, and therefore should not have to use FMLA leave.

Other commenters argued that holidays should count against an employee's FMLA entitlement even when less than a full week of leave is used. For example, the Equal Employment Advisory Council opposed the proposed change as administratively burdensome and vulnerable to employee abuse, and recommended instead that holidays which fall during a partial week of leave be charged as FMLA leave when the employee has taken FMLA leave on the days before and after the holiday. Jackson Lewis suggested that employees be charged FMLA leave for all holidays, regardless of when they fall, and that employees should have to provide medical evidence of health on the holiday if they do not want the day charged as FMLA

leave. Burr & Forman argued that the proposed rule makes leave calculation unnecessarily more complex by excluding such holidays, especially for employers who have ''holiday shutdowns,'' and could result in arbitrarily allowing some employees a greater length of time in which to take intermittent leave. *See also* Illinois Credit Union League.

The Department acknowledges employer concerns regarding not counting holidays against the FMLA entitlement when FMLA leave is taken in less than a full workweek, but believes that the proposed clarification is consistent with the statutory intent that leave be measured in terms of ''a total of 12 workweeks of leave'' but that it may also be taken ''intermittently or on a reduced leave schedule'' when medically necessary or by agreement. *See* 29 U.S.C. 2612(a), (b)(1). Holidays regularly occur during normal workweeks, and should be counted when they fall within weekly blocks of leave. On the other hand, the Department believes that where leave is taken in less than a full workweek, the employee's FMLA leave entitlement should only be diminished by the amount of leave actually taken. The Department believes that maintaining the existing rule, together with the proposed clarification, is the most reasonable and practical approach.

The Department made one additional change to § 825.200(c) of the final regulation in response to a request by Hewitt Associates to provide additional examples of how to calculate an employee's leave entitlement when the employer uses the ''rolling backward leave year,'' as permitted by § 825.200(b)(4). The Department agrees that additional explanation of this method of calculating the leave year would be helpful, and has therefore expanded the example currently found in § 825.200(c). Moreover, an additional example of the ''rolling leave year'' calculation can be found in Wage and Hour Opinion Letter No. FMLA–2005–3–A (Nov. 17, 2005).

The Department also made a number of changes to § 825.200 in the final rule to reflect the new military family leave provisions. Paragraph (a) is amended to make clear that the 12 workweeks of FMLA leave entitlement does not apply to military caregiver leave, for which 26 workweeks of leave in a ''single 12-month period'' may be taken. A new § 825.200(a)(5) is added to include qualifying exigency leave in the list of qualifying reasons for leave limited to a total of 12 workweeks. In addition, a new paragraph (f) is added to explain and detail the amount of time available under the military caregiver leave entitlement, specifically that an eligible employee's leave entitlement is limited to a total of 26 workweeks of leave during a ''single 12-month period'' to care for a covered servicemember with a serious injury or illness. Lastly, a new paragraph (g) is added to explain the limitations on the total amount of leave that can be taken during the ''single 12-month period'' described in paragraph (f).

Section 825.201 (Leave To Care for a Parent)

The Department proposed to reorganize this and other sections in order to make the regulations more clear and accessible. The text of current § 825.201, which covers when leave for the birth or placement for adoption or foster care of a child must conclude, has been incorporated into new §§ 825.120 and 825.121, as discussed above. Proposed § 825.201 now covers only leave taken to care for a parent, and highlights the statutory limitations on taking such leave in situations when both a husband and wife work for the same employer and seek leave 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, which were previously set forth in § 825.202. The final rule adopts the proposed changes.

The Department received very few comments on this section, and none opposed the proposed reorganization. Those comments that the Department did receive concerned issues specifically addressed by the statute. For example, Hewitt Associates requested that the Department provide additional explanation regarding the ''same employer'' limitation when a husband and wife both seek leave to care for a parent. Southwest Airlines requested that the Department extend the ''same employer'' limitation to unmarried couples, not just to spouses. The Department notes that the effect of the restrictions on FMLA leave for spouses employed by the same employer are determined case-by-case and the restrictions themselves are statutory and beyond the Department's authority to alter. *See* 29 U.S.C. 2612(f). The final rule also includes a cross-reference to § 825.127(d), which addresses the spousal limitation for military caregiver leave.

Section 825.202 (Intermittent Leave or Reduced Leave Schedule)

The Department proposed to reorganize this and other sections in order to make the regulations more clear and accessible, but did not propose significant changes to the substance. We proposed to consolidate leave provisions relating to intermittent or reduced schedule leave in cases of medical necessity and for the birth or placement of a child into a new § 825.202 (from current §§ 825.203 and 825.117), and to shift issues of scheduling, counting, and certification requirements for such leave into other sections, with appropriate cross-references. *See* proposed § 825.120 (Leave for pregnancy or birth), § 825.121 (Leave for adoption or foster care), § 825.203 (Scheduling of intermittent or reduced schedule leave), § 825.205 (Increments of leave for intermittent or reduced schedule leave), and § 825.306 (Content of medical certification). The NPRM also proposed to move language from current § 825.203(b) governing the use of intermittent or reduced schedule leave after the birth, adoption, or placement of a child, to proposed § 815.202(c), entitled ''Birth or placement,'' together with cross-references to proposed §§ 825.120 and 825.121, which also deal with pregnancy, birth, adoption, and foster care placement. Finally, we proposed adding the subheadings ''Definition,'' ''Medical necessity,'' and ''Birth or placement'' to § 825.202(a), (b), and (c), respectively. The final rule adopts § 825.202 as proposed, with two minor changes to § 825.202(b). The final rule also incorporates appropriate references to military caregiver leave and includes a new paragraph (d) providing for intermittent or reduced schedule leave for a qualifying exigency.

Proposed § 825.202(b) defines ''medical necessity'' for intermittent leave, combining existing language from current § 825.117 and illustrations from current § 825.203(c). It also includes a cross-reference to proposed § 825.306, which explains what constitutes sufficient information on the medical certification form. As noted above, most commenters generally supported the reorganization of the regulations. The Equal Employment Advisory Council also noted that the reorganization served as a ''clarification of threshold requirements'' for intermittent leave. The Department has adopted the proposed changes.

In addition to the changes proposed in the NPRM, the Department has determined that the parenthetical phrase in the first sentence of proposed § 825.202(b) ''(as distinguished from voluntary treatments and procedures)'' is confusing and unnecessary, and therefore has deleted it from the final rule. Under the FMLA, it is a threshold requirement that there be a medical need for leave due to a serious health

condition, regardless of whether the underlying medical procedure was viewed as ''voluntary'' or ''required.'' Other language regarding ''voluntariness'' was initially included in the definition of ''serious health condition'' in the Interim Final Rule published in 1993, 58 FR 31794, 31817 (June 4, 1993), but was deleted from the Final Regulations issued in 1995. As the Department explained at that time, ''[t]he term 'voluntary' was considered inappropriate because all treatments and surgery are voluntary.'' 60 FR 2180, 2195 (Jan. 6, 1995).

The Department has also adopted the suggestion of two commenters, the Society for Human Resource Management and the National Coalition to Protect Family Leave, to modify the third sentence of § 825.202(b). Specifically, both groups suggested that the Department delete the word ''related'' from the phrase ''treatment of a related serious health condition,'' which they viewed as unnecessary and potentially problematic. The Department agrees and has made the proposed change. Both groups also suggested that the Department delete the ''recovery'' clause at the end of the same sentence, since ''recovery'' is already included elsewhere as part of the definition of ''incapacity'' in proposed § 825.113(b). The Department declines to make this change, since the language simply carries forward existing rights and criteria for using intermittent or reduced schedule leave (from current regulatory text at § 825.203(c)) and appears to be clear and well-understood by all parties.

Lastly, a new paragraph (d) is added to the final rule to address intermittent or reduced schedule leave for qualifying exigency leave.

Section 825.203 (Scheduling of Intermittent or Reduced Schedule Leave)

In addition to reorganizing this section as noted above, the Department proposed in the NPRM to clarify that employees who take intermittent leave for planned medical treatment when medically necessary have a statutory obligation to make a ''reasonable effort'' to schedule such treatment so as not to disrupt unduly the employer's operations. Section 825.117 of the current regulations requires merely that ''[e]mployees needing intermittent FMLA leave or leave on a reduced leave schedule must attempt to schedule their leave so as not to disrupt the employer's operations,'' which the Department believes does not fully describe the employee's obligation under the law. *See* 29 U.S.C. 2612(e)(2) (requiring that employees who need foreseeable leave for planned medical treatment must ''make a reasonable effort to schedule the treatment so as not to disrupt unduly the operations of the employer''). The Department has adopted the proposed change. *See also* § 825.302(e).

Most commenters welcomed this clarification. *See* National Coalition to Protect Family Leave; TOC Management Services; American Foundry Society; National Association of Wholesaler-Distributors. The National Association of Wholesaler-Distributors commented that the proposal ''accurately implements the language of the FMLA and clarifies that an employee who needs intermittent or reduced schedule leave for planned medical treatment must make a 'reasonable effort' to schedule the leave so that the leave does not unduly disrupt the employer's business.'' Some commenters, such as the Equal Employment Advisory Council and Hewitt Associates, asked the Department to provide a definition of ''reasonable effort.'' The Equal Employment Advisory Council suggested, for example, that an employee be required to prove that a doctor's office is not open on Saturday in order to justify a weekday doctor visit. Jackson Lewis asked for ''a vehicle to hold employees accountable'' for meeting their obligations in this regard.

The Department believes that the statutory standard ''reasonable effort'' does not require further definition. In general, employees must try to arrange treatment on a schedule that accommodates the employer's needs, but such treatment schedules may not always be possible, depending on the nature of the employee's medical condition, the urgency, nature, and extent of the planned treatment, and the length of the recovery time needed. The scheduling of planned medical treatment is ultimately a medical determination within the purview of the health care provider. While the employee must make a reasonable effort in scheduling the leave, if the health care provider determines that there is a medical necessity for a particular treatment time, the medical determination prevails. If it is just a matter of scheduling convenience for the employee, the employee must make a reasonable effort not to disrupt unduly the employer's business operations.

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

Section 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 NPRM proposed no substantive changes in this section, but added subheadings of (a) ''Transfer,'' (b) ''Compliance,'' (c) ''Equivalent pay and benefits,'' (d) ''Employer limitations,'' and (e) ''Reinstatement of employee'' for clarity. The Department also solicited comments on whether this regulatory provision should be changed and, if so, how, noting that many commenters who responded to the December 2006 RFI wanted the option to transfer or otherwise alter the duties of employees using unscheduled or unforeseeable intermittent leave, in addition to those who request foreseeable leave for planned medical treatment. *See* 72 FR 35608 (June 28, 2007).

A significant number of commenters representing employers, including the Equal Employment Advisory Council, the National Coalition to Protect Family Leave, and the Society for Human Resource Management, supported allowing employers to transfer employees who take any intermittent leave, regardless of the purpose or foreseeability of the need for leave. *See also* TOC Management Services; Food Marketing Institute; National Retail Federation; Metropolitan Transportation Authority (NY); Spencer Fane Britt & Browne. These commenters argued that some employees are frequently absent on short notice, which the commenters claimed can be disruptive and can make scheduling extremely difficult, and contended that their ability to manage these absences would be enhanced if they could transfer such employees. The Association of American Railroads argued that ''unforeseeable use of intermittent leave is, if anything, a more appropriate circumstance for transfer or reassignment because unforeseeable absences may undermine the employer's ability to carry out its business.'' The U.S. Postal Service contended that Congress did not intend to permit unforeseeable intermittent leave for chronic conditions, and that employers should be free to transfer employees who frequently use unscheduled, intermittent leave, in addition to those who seek foreseeable leave for planned medical treatment as provided in the statute.

Commenters representing employees and employee groups were uniformly opposed to any expansion of the employer's right to transfer employees who take intermittent FMLA leave for reasons other than planned medical treatment. *See, e.g.*, Communications Workers of America; National Federation of Federal Employees; and

National Partnership for Women & Families. The AFL–CIO contended that such a change would run contrary to the plain language of the statute, which expressly permits transfers in cases of intermittent or reduced schedule leave ''that is foreseeable based on planned medical treatment.'' 29 U.S.C. 2612(b)(2). The AFL–CIO asserted that this implies a prohibition on transfers in any other situation. The National Treasury Employees Union agreed, contending that the Department is without authority to expand this provision since Congress itself determined the scope of the transfer option and chose to limit it to cases involving ''planned medical treatment.''

The AFL–CIO and the National Partnership for Women & Families both argued that the distinction also makes sense from a policy standpoint, since an employer would be able to plan for an employee's absences due to planned medical treatment, but would be unable to do so where an employee needs unforeseeable intermittent leave. Both the AFL–CIO and the Communications Workers of America also expressed concern that allowing employers to transfer employees in such situations might increase the possibility of retaliation by employers.

The Department believes that by expressly permitting transfers in cases of intermittent or reduced schedule leave ''that is foreseeable based on planned medical treatment,'' 29 U.S.C. 2612(b)(2), the statutory language strongly suggests that this is the only situation where such transfers are allowed. Additionally, the statute clearly requires that such transfers be temporary in nature, and that the employee be reinstated to the original position upon completion of the recurring leave period. *See* 29 U.S.C. 2612(b)(2), 2614(a)(1). The Department acknowledges that this standard may seem to discount the fact that some employees may take intermittent leave regularly, frequently, and predictably—even if unforeseeably—and do so on the advice or recommendation from their physician, which some would argue is akin to planned medical treatment. *See* Report on the Department of Labor's Request for Information, Chapters IV, VIII, and XI, 72 FR at 35571, 35608, and 35619 (June 28, 2007). While this may be the case, the Department finds no statutory basis to permit transfers to an alternative position for those taking unscheduled or unforeseeable intermittent leave. Accordingly, the Department declines to expand the situations in which an employer may temporarily transfer an employee to an alternative position.

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

Section 825.205 explains how to count increments of leave in cases of intermittent or reduced schedule leave. The Department did not propose any substantive changes to this section, but did propose to move language from current § 825.203(d) to paragraph (a) of this section, and to add the title ''Minimum increment.'' It also proposed to renumber current paragraphs (b) through (d) as § 825.205(b)(1), (2), and (3) for purposes of clarity, and to add the title ''Calculation of leave'' to paragraph (b), but did not propose any changes to the text of those sections. The preamble to the NPRM discussed the extensive comments the Department had received in response to the Request for Information ''expressing concerns about the size of the increments of intermittent leave that may be taken;'' the impacts of the use of unscheduled intermittent leave, particularly on time-sensitive business models; the many suggestions to the record to 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) and conversely, the commenters who defended the current rule on minimum increments of leave. The preamble to the NPRM also requested comment on whether to create an exception to the minimum increment rule in situations where physical impossibility prevents an employee from commencing work mid-way through a shift, and asked for comment on whether and how to clarify the application of FMLA leave to overtime hours. The final rule incorporates the proposed changes with additional clarifications, as well as new language addressing physical impossibility, calculation of leave, overtime, and a cross-reference to the special rules for intermittent or reduced schedule leave taken by employees of schools, as described in more detail below.

Paragraph (a) of proposed § 825.205 set forth the general rule from current § 825.203(d) that employers may account for intermittent or reduced schedule leave in the smallest increments used by their payroll systems to account for absences or use of leave, so long as it is one hour or less. The Department again received many comments from employers expressing their concerns about the size of increments of intermittent leave that may be taken, especially when such leave is unforeseeable. At the same time, we also received many comments from employees stressing the importance of their ability to take such leave in small amounts of time when suffering from serious health conditions, or when caring for family members with serious health conditions.

Employers and their representatives argued that it was difficult to manage their workforce needs adequately when employees were permitted to take very small amounts of leave (*e.g.*, in minutes), when they may have policies for the use of other forms of leave in larger increments, especially when other employees were required to fill in for those who were absent, and that larger increments of leave would reduce the current administrative and staffing burdens placed on employers. *See, e.g.*, National Association of Manufacturers; Domtar Paper Company; Society for Human Resource Management; National Newspaper Association; and Food Marketing Institute. Both the Equal Employment Advisory Council and the Chamber cited members who track leave in increments as small as six minutes, which they contend is especially difficult for FMLA administration. The National Coalition to Protect Family Leave asserted that the current regulation penalizes employers with sophisticated payroll systems capable of tracking the increments of leave down to one minute. The Chamber argued that increasing the minimum increment would greatly ease recordkeeping burdens on employers, reduce the opportunity for abuse of FMLA leave, and improve predictability for employers. The National Association of Manufacturers stated that a larger increment would lower the incidence of what it believes to be employees improperly using FMLA leave to cover late arrivals. These employers argued strongly that the minimum increment should be enlarged, and suggested various minimums ranging from two hours to four hours or a half day. *See, e.g.*, the Chamber (half day or 1 hour); Equal Employment Advisory Council (half day); National Association of Manufacturers (four-hour or two-hour increments); Domtar Paper Company (four hours); Society for Human Resource Management (half day or two hours); National Coalition to Protect Family Leave (same). Indeed, the Delphi Corporation pointed out that an employee could use FMLA leave to cover late arrivals of almost two hours per day, every day, without ever exhausting the employee's annual leave entitlement. The Equal Employment Advisory Council similarly noted that ''[a]n employee in fact could take one day off a week as intermittent leave and still have plenty of FMLA leave left at

the end of the year.'' Finally, some commenters sought clarification of the ''one hour or less'' language in both the current and proposed regulation. The National Coalition to Protect Family Leave requested that the Department clarify that ''in all cases, regardless of an employer's payroll system'' an employer may track leave in increments of ''at least an hour.'' The National Coalition believed it is ''arbitrary'' to require employers to track leave in the smallest increments that its payroll system tracks when that system may not be used to track FMLA or other leave usage. They noted that the current requirement by the Department penalizes employers who have more sophisticated payroll systems that can track payroll in increments as small as one minute, as compared to employers who do not use such systems.

By contrast, employee organizations opposed any increase in the increment of intermittent leave, arguing that it would harm employees by forcing them to take more leave than is medically necessary and would unfairly diminish their FMLA entitlement. *See, e.g.*, National Partnership for Women & Families; American Association of University Women; AFL–CIO; American Association of Occupational Health Nurses. 9to5 cited the example of an employee using intermittent FMLA leave in two-hour increments to take her daughter to cancer treatments, and contended that requiring such an employee to use leave in half-day or larger increments would unnecessarily diminish her FMLA entitlement. They also asserted that the longer absences might be even more disruptive to the workplace than shorter ones. The Communications Workers of America argued that employers are not burdened by being required to account for FMLA leave in the same increment used for other absences, but that employees would be burdened by increasing the increment of intermittent leave.

The Department has carefully considered all comments on this issue, and has decided to adopt § 825.205 as proposed with additional clarifying language. Both the current and proposed standard permit employers to limit the increment of leave for FMLA purposes to the shortest period of time the employer uses to account for other types of use of leave, provided it is one hour or less. The current regulation at § 825.203(d) provides: ''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.'' As explained above, the Department moved essentially this same language to proposed § 825.205(a) which provided: ''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.'' As the Department stated in the preamble to the current regulations in 1995: ''In providing guidance on this issue in the Interim Final Rule, it seemed appropriate to relate the increments of leave to the employer's own recordkeeping system in accounting for other forms of leave or absences * * * however, this section will be clarified to provide explicitly that the phrase 'one hour or less' is dispositive.'' 60 FR 2202 (Jan. 6, 1995). The preamble to the current regulation further stated that the ''employer's own recordkeeping system in accounting for other forms of leave or absences * * * controls with regard to increments of FMLA leave of less than one hour.'' *Id.*

Because the comments indicate some confusion in practice between the current § 825.203(d) regulatory language, as carried over to proposed § 825.205(a), and the preamble discussion of current § 825.203(d), the Department adopts the final rule with the following modifications. The Department restates its original view that ''one hour or less is dispositive.'' Employers are not required to account for FMLA leave in increments of six minutes or even fifteen minutes simply because their payroll systems are capable of doing so, and the regulatory language in the final § 825.205(a) does not so require. What matters is how the employer actually accounts for the leave. The final regulation eliminates the confusing and inconsistent references to either payroll systems or recordkeeping systems and eliminates the term ''absences'' to further lessen any confusion and focuses on ''use of leave.'' The final regulation adjusts the proposed language to make clear the employer must account for the intermittent or reduced schedule leave under FMLA ''using an increment no greater than the shortest period of time that the employer uses to account for use of other forms of leave provided it is not greater than one hour.'' Accordingly, while employers may choose to use a smaller increment to account for FMLA leave than they use to account for other forms of leave, they may not use a larger increment for FMLA leave. Thus, if an employer uses different increments to account for different types of leave (*e.g.*, accounting for sick leave in 30-minute increments and vacation leave in one-hour increments), the employer could not account for FMLA leave in an increment larger than the smallest increment used to account for any other type of leave (*i.e.*, 30 minutes). Additionally, under no circumstances can an employer account for FMLA leave in increments of greater than one hour, even if such increments are used to account for non-FMLA leave. Employers may choose to account for FMLA leave taken in any increment not to exceed one hour as long as they account for leave taken for other reasons in the same or larger increment. The Department has also modified the final rule to recognize policies which account for use of leave in different increments at different points in time, thus, permitting employers to maintain a policy that leave of any type may only be taken in a one-hour increment during the first hour of a shift (*i.e.*, a policy intended to discourage tardy arrivals). As a further point of clarity, the final rule changes the current and proposed rules' language of ''provided it is one hour or less'' to ''provided it is not greater than one hour.'' The Department emphasizes that in all cases employees may not be charged FMLA leave for periods during which they are working. For example, if an employee needs FMLA leave due to the flare-up of a condition 30 minutes before the end of the employee's shift, the employee may not be charged with more than 30 minutes of FMLA leave, even if the employer otherwise uses one hour as its shortest increment of leave, because the employee has already worked the first 30 minutes of the last hour of his or her shift. If such a flare up occurred at the beginning of a shift, however, the employee could be required to take up to one hour of FMLA leave in accordance with the employer's leave policy, provided the employee does not work during that hour.

The final rule also makes explicit that employers may use a smaller increment to account for FMLA leave, a flexibility that was implicit in the permissive wording of the current regulation. Finally, the final rule provides additional flexibility in accounting for FMLA leave by allowing for leave systems that utilize different increments at different points of time while adhering to the principle in the current regulation that FMLA leave users may not be charged leave in a larger increment than users of non-FMLA leave. The Department remains committed, however, to the one hour outer limit on use of FMLA leave and

therefore declines to adopt any of the comments recommending intermittent leave be accounted for in larger increments such as two-hour, four-hour, or half or full-day increments.

The Department has made one other revision in the final rule to reorganize the text in proposed § 825.205 by moving the final three sentences from proposed paragraph (a) into paragraph (b) in the final rule, where related concepts for the calculation of the amount of FMLA leave used are addressed. The final rule also restores a cross-reference in paragraph (b) to the special rules for intermittent or reduced schedule leave taken by employees of schools, §§ 825.601 and 825.602.

In the NPRM, the Department also sought 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. In an opinion letter, the Department had previously taken the position that where a flight attendant's need for three hours of intermittent FMLA leave caused her to miss her normal flight assignment, only the three hours needed could be charged against her FMLA entitlement, with the remainder of the absence being charged to another form of paid or unpaid leave. Wage and Hour Opinion Letter FMLA–42 (Aug. 23, 1994). In the preamble, the Department questioned whether this interpretation was appropriate, because it may expose employees to disciplinary action based on the additional hours of non-FMLA unprotected leave that they must take.

Employers and employer groups strongly supported the creation of such an exception. *See, e.g.*, the Chamber; Equal Employment Advisory Council; National Coalition to Protect Family Leave; Society for Human Resource Management; Southwest Airlines; Hewitt Associates. Commenters representing transportation employers in particular supported a physical impossibility exception to the minimum increment of leave rule. The Association of American Railroads supported the creation of an exception but suggested that it should apply not just where it is impossible for the employee to return to the workplace but also where it is ''unreasonable,'' ''impracticable,'' or barred by a collective bargaining agreement; it also argued that the exception should include workers in fixed locations such as train dispatchers who work in a station or office. The Chicago Transit Authority argued that the exception should apply to all ''fixed time work assignments, such as scheduled public transit runs,'' and that the minimum time increment should be the length of the employee's scheduled run. This, it argued, would protect the employee's entire absence, and also allow employers to better plan for and arrange assignments for entire blocks of work.

Spencer Fane Britt & Browne suggested that the exception should be expanded to apply in three situations: (1) Where it is physically impossible for the employee to complete the assigned shift; (2) where another employee was called in to cover the absence; and (3) ''where an employee is chronically late to work allegedly because of an FMLA chronic condition.'' In all three cases, Spencer Fane contended that it is ''inherently unfair'' and ''disruptive'' to permit the FMLA leave-taker to return to work mid-shift. The New York City (NY) Law Department suggested that the exception should apply to positions requiring 24/7 coverage where there must always be someone working, and that the employee should be charged FMLA leave for the entire shift even if only a few minutes of leave are needed.

Most commenters on behalf of employees, on the other hand, opposed creating any exception to the minimum increment rule, and argued that the 1994 opinion letter was correct. *See, e.g.*, National Partnership for Women & Families; Center for WorkLife Law. The American Train Dispatchers Association argued that such a change would ''allow the carriers to charge [transportation] employees for time that they do not use for FMLA-related purposes, in contravention of the statute's language and intent,'' and cited the example of an engineer who needed four hours of intermittent FMLA leave to accompany his wife to chemotherapy, but would be charged instead for the entire length of the engine's trip—up to eight or ten hours. In its view, this result would violate 29 U.S.C. 2652, which provides that FMLA rights ''shall not be diminished'' by collective bargaining agreements or employment benefit plans or programs. The AFL–CIO and the Communications Workers of America questioned whether employees were being subject to discipline in such situations and argued that the statutory prohibition against interference would prohibit employers from imposing discipline on employees who return from intermittent leave and are ready to work, regardless of whether the rest of the shift is counted as FMLA leave or some other form of leave. The Communications Workers of America also argued that air carriers already routinely handle such situations in cases of non-FMLA leave by reassigning workers, allowing them to cover for each other, or assigning them to alternative work schedules or alternative administrative work. The Center for WorkLife Law argued that the term ''physical impossibility is vague and overbroad,'' and the creation of such an exception ''will have a significant and unnecessary negative effect on caregivers.'' In its view, foreseeable leave can almost always be handled in advance by assigning the employee to an alternative route or shift; and employees should always be allowed to resume work mid-shift if they can reach the worksite.

After reviewing the comments, the Department has decided to include an exception for physical impossibility, which is set forth in § 825.205(a)(2) of the final rule. The Department believes that the existing policy exposes employees to the risk of discipline in situations in which an employee's need for a short FMLA-protected absence from work actually results in a much longer absence because of the unique nature of the worksite. Whether it is a train that is 300 miles away, or a plane over the Atlantic Ocean, or a ''clean room'' in a laboratory that must remain sealed for the entire workshift, some workplaces exist that prevent employees from joining (or leaving) the work mid-way through the ''shift.'' Thus, a three-hour FMLA absence may result in an employee's inability to work for eight hours, or until the end of the shift or route. Where this occurs, the Department believes that the entire period of absence should be considered FMLA leave and should be protected under the Act. The Department does not believe that a physical impossibility exception contravenes 29 U.S.C. 2612(b) or any other provision of the Act because only the amount of leave used will be counted against the employee's FMLA leave entitlement and the FMLA does not require employers to provide alternative work to employees when the employee is unable to return to his or her same or equivalent position due to physical impossibility.

The Department intends the exception to be applied narrowly. The exception is limited to situations in which an employee is physically unable to access the worksite after the start of the shift, or depart from the workplace prior to the end of the shift. Moreover, within those situations, the exception is limited to the period of time in which the physical impossibility remains. Thus, although the exception may apply to a flight attendant, train conductor, ferry

operator, bus driver, or truck driver whose worksite is on board an airplane, train, boat, bus, or truck or a laboratory technician whose workplace is inside a ''clean room'' that must remain sealed for a certain period of time, the exception will only apply until the vehicle has returned to the departure site or while the clean room remains sealed. For example, the physical impossibility exception will apply to a flight attendant until such time as he or she is able to rejoin his or her crew at the departure point, which likely is a longer period of time for a flight attendant who is scheduled to fly cross-country than it is for one who is scheduled to fly a shuttle between Washington and New York. Similarly, a physical impossibility will generally exist for a longer period of time when a driver works for an inter-city bus company than it would when a driver works for a metropolitan transit system. In both cases, the physical impossibility remains until the bus returns to the terminal; such a return, however, may take place much more frequently in the latter example.

Employers may not use this new exception to prevent employees taking intermittent FMLA leave from commencing work late or leaving work early when there is no physical impossibility preventing the employee from accessing or leaving the workplace during the ''shift.'' Additionally, even where physical impossibility prevents the employee from accessing the workplace, if the employee is assigned alternative work (*e.g.*, pursuant to a collective bargaining agreement or employer policy) only the amount of leave actually taken may be counted against the employee's FMLA leave entitlement. The Department recognizes that employers may provide alternative work, particularly where there is advance notice of the need for leave, and nothing about this exception prevents employers from providing such work. Employers also have an obligation not to discriminate between employees who take FMLA leave and other forms of leave; for example, if they routinely offer alternative work to employees returning from short periods of non-FMLA leave, such as sick leave or jury duty, then they must also offer such work to employees returning from short periods of FMLA leave.

The Department did not propose any changes to § 825.205(b), which deals with calculation of leave. However, a number of commenters reported that they or their clients have difficulty calculating leave entitlement and leave usage, especially for employees who use intermittent leave, work overtime, or work part-time, seasonal or irregular schedules. *See, e.g.*, Burr & Forman; TOC Management Services; Equal Employment Advisory Council; Food Marketing Institute; the Chamber; National Coalition to Protect Family Leave; National Newspaper Association. The American Postal Workers Union, Clerk Division, Chicago Region, complained that seasonal fluctuations in work hours can lead to employees receiving different amounts of FMLA-protected leave depending on the time of year in which the leave is taken.

The Department has made several revisions to the section entitled ''Calculation of leave'' to address issues that arise when an employee's schedule varies. The first clarifies that the method for determining the amount of FMLA leave taken by an employee is to compare the number of hours actually worked by the employee in a FMLA workweek to the number of hours the employee would have worked in that workweek, but for the FMLA leave taken. The difference is the amount of FMLA leave taken. That amount is divided by the number of hours the employee would have worked had the employee not taken leave of any kind, including FMLA leave. The result represents the proportion (percentage) of a FMLA workweek that the employee has taken. The resulting percentage may be converted to hours for tracking purposes; any such conversion must equitably reflect the employee's leave allotment. An employee does not ''accrue'' FMLA-protected leave at any particular hourly rate; an eligible employee is entitled to 12 workweeks of leave (or 26 workweeks in the case of military caregiver leave) and the total number of hours contained in those workweeks is necessarily dependent on the specific hours that would have been worked by the employee. The Department has also changed the rule for calculating an employee's leave entitlement when an employee works a schedule that varies so much from week-to-week that no ''normal'' schedule or pattern can be discerned, and the employer cannot determine with any certainty how many hours the employee would have worked, but for the taking of the FMLA leave. In such circumstances, the Department believes that calculating a weekly average over the 12 months prior to the leave period (rather than just the prior 12 weeks as required under the current rule) should give a truer picture of the employee's actual average workweek.

In the preamble to the proposed rule, the Department clarified its position on when overtime hours not worked due to a serious health condition could be counted against an employee's FMLA leave entitlement. 73 FR 7894 (Feb. 11, 2008). The issue of overtime is not addressed in the current regulations, but was discussed in the 1995 preamble to the current rule. *See* 60 FR 2202 (Jan. 5, 1995) (preamble accompanying current § 825.203). Many commenters requested both that the Department's position be clarified and that it be included in the regulatory text, rather than just addressed in the preamble. *See, e.g.*, Society for Human Resource Management; National Coalition to Protect Family Leave; TOC Management Services. The Department agrees, and has added a new § 825.205(c), which addresses when overtime hours not worked due to FMLA leave can be counted against an employee's FMLA entitlement. Consistent with the discussion in the preamble to the proposal, the final rule states that where an employee would normally be required to work overtime, but cannot do so because of a FMLA-qualifying condition, the employee may be charged FMLA leave for the hours not worked. This new regulatory section is not a change in policy but is simply intended to clarify in the regulations the Department's existing policy.

Employer commenters generally supported the proposed clarification. *See, e.g.*, Pennsylvania Governor's Office of Administration; Domtar Paper Company; Society for Human Resource Management; National Coalition to Protect Family Leave; TOC Management Services. For example, the U.S. Postal Service claimed that ''the ambiguity in the current regulatory language regarding overtime has hindered efforts to bring uniformity'' in this area; it embraced the clarification as ''eminently sensible,'' and ''not only fair, but also necessary.''

Some commenters argued that employers should not be restricted to only counting mandatory or required overtime hours not worked against an employee's FMLA entitlement. For example, the Society for Human Resource Management and the National Coalition to Protect Family Leave argued that employees should be charged FMLA leave in circumstances in which an employer rotates overtime on a volunteer basis among its employees but employees are subject to possible disciplinary action for failing to ''volunteer.'' Spencer Fane Britt & Browne argued that employers should be able to charge employees FMLA leave for all overtime hours not worked even where the overtime at issue is voluntary, and that failing to do so will hurt employee morale.

Groups representing employees also generally agreed with the Department's desire to clarify the treatment of overtime, but felt that the preamble discussion was not as clear as it might have been. The AFL–CIO simplified the proposed test to ''whether the employee is required to work the overtime,'' and noted that the key distinction is between voluntary and mandatory overtime, notwithstanding the Department's ''apparent rejection of that distinction.'' It also asked for more examples, as did the National Partnership for Women & Families and National Federation of Federal Employees. The Department agrees that the appropriate focus is whether the employee would have been required to work the overtime hours but for the taking of FMLA leave, and has added an example to the proposed rule to illustrate this principle. The American Postal Workers Union commented that the proposed clarification will compound rather than moderate the administrative complexity of the rule. Rather than focusing on whether the employee was required to work, it suggested that employees only be charged FMLA leave for overtime hours which ''were part of the employee's regular schedule,'' as opposed to voluntary, ad hoc or ''as needed'' hours.

Many Postal Service employees also opposed being charged any FMLA leave for overtime hours not worked. For example, the American Postal Workers Union Clerk Division, Chicago Region expressed a concern that being charged for overtime hours could diminish an employee's entitlement below 12 workweeks, and could be arbitrary and unfair if the amount of leave charged was to vary according to seasonal overtime requirements. The Department points out that overtime is factored into the FMLA entitlement because both the entitlement and the leave usage rate are based on the employee's required (*i.e.*, scheduled) hours of work. The Department believes it is fair, therefore, that overtime not worked be counted against the FMLA entitlement when the employee would have been required to work the overtime hours but for the use of FMLA leave.

Finally, employers may not discriminate in the assignment of mandatory overtime between employees who take FMLA leave and others. For example, an employer cannot schedule only FMLA leave takers for required overtime in order to deplete their FMLA leave entitlement, while allowing other employees to volunteer for overtime.

Section 825.206 (Interaction With the FLSA)

No changes were proposed to this section beyond updating the cross-references to the FLSA regulations revised in 2004 for salaried executive, administrative, professional, or computer employees under 29 CFR Part 541, and no comments were received on it. The final rule adopts § 825.206 as proposed with revisions to address the new types of leave available under the NDAA amendments.

Section 825.207 (Substitution of Paid Leave)

Section 825.207 addresses the interaction between unpaid FMLA leave and employer-provided paid leave and echoes the statutory language that paid leave may be substituted for unpaid FMLA leave. In the NPRM the Department proposed to change its position on the substitution of paid vacation and personal leave and to allow employers to apply their normal leave policies to the substitution of all types of paid leave for unpaid FMLA leave. The Department thus proposed to delete current paragraphs (b), (c), (e), and (h) of this section. The proposal redesignated current paragraphs (f) and (g) as proposed paragraphs (b) and (c). The Department proposed to modify its discussion of FMLA-qualifying leave that is covered by an employer's disability benefit plan in paragraph (d), and to move its discussion of FMLA-qualifying leave that is covered by workers' compensation to a new paragraph (e). Finally, the Department proposed to redesignate current § 825.207(i), which addresses the interaction between public employees' use of compensatory time off and FMLA leave, as paragraph (f) and to remove the prohibition against substitution of accrued compensatory time for unpaid FMLA leave. The final rule includes all of the proposed changes and makes additional modifications in paragraphs (a), (d), and (e), as discussed below.

Proposed § 825.207(a) clarified that ''substitution'' of paid leave for FMLA purposes means that the unpaid FMLA leave and the paid leave provided by an employer run concurrently. The Department also proposed in this section to allow employers to apply their normal policies for taking paid leave when an employee substitutes paid leave for unpaid FMLA leave regardless of the type of paid leave substituted. The proposal differed from current § 825.207, which prohibits employers from imposing any limits on the substitution of paid vacation or personal leave. Under the current regulation, employers may restrict the substitution of paid sick or medical leave under the FMLA to situations in which they would otherwise provide such paid leave, but are not permitted to restrict the substitution of paid vacation or personal leave in any manner. Employers are also permitted under the current rule to restrict the substitution of paid family leave to circumstances for which they would normally provide family leave. The proposal required that employees who seek to substitute accrued paid leave of any kind for unpaid FMLA leave must comply with the terms and conditions of the employer's normal leave policy. It also proposed new language clarifying that employers are required to notify employees of any additional requirements for the use of paid leave (*e.g.*, paid leave only being available in full day increments or upon completion of a specific leave request form), and stated that if employees do not or cannot meet those requirements, they remain entitled to unpaid FMLA leave as guaranteed by the statute. The Department also proposed new language intended to ensure that employers do not discriminate between FMLA leave users and others in the provision of paid leave.

Employee representatives generally opposed the proposed revision of this section on two grounds—first, they claimed that it would hurt employees, who often cannot afford to take unpaid leave, and second, they believed that it conflicted with Congressional intent regarding the substitution of paid leave. *See, e.g.*, National Partnership for Women & Families; AFL–CIO; American Association of University Women; Family Caregiver Alliance; Sargent Shriver National Center on Poverty Law; Women Employed; American Postal Workers Union; and Communications Workers of America. A Better Balance: The Work and Family Legal Center claimed that as many as three out of four eligible workers cannot afford to take leave without pay, and that it can be very difficult for employees to understand and navigate employer paid leave policies. Community Legal Services/AIDS Law Project of Pennsylvania argued that the ability to utilize paid leave for FMLA reasons is critical to low wage employees, who often live paycheck to paycheck and cannot afford any delay in pay, whereas it makes little difference to employers, since they will have to make the accrued leave payments eventually.

The National Partnership for Women & Families and the AFL–CIO, among others, also argued that the proposed change is contrary to Congress's intent

and to the Department's own prior interpretation of the FMLA. They argued that the plain language of 29 U.S.C. 2612(d)(2)(A) permits employees to substitute (or employers to require substitution of) ''any of the accrued paid vacation leave, personal leave, or family leave of the employee * * * for any part'' of their unpaid FMLA leave. They further argued that this language supersedes any employer policies restricting the use of such leave when substituted for FMLA leave, and that the Department properly construed the law in its current regulations to override such limitations. *See* AFL–CIO; National Partnership for Women & Families. By contrast, they argued, Congress expressly permitted employers to set their own rules governing sick and medical leave, and to require employees to comply with such rules, by providing in subsection (B) that ''nothing in this title shall require an employer to provide paid sick or paid medical leave in any situation in which such employer would not normally provide any such paid leave.'' 29 U.S.C. 2612(d)(2)(B). In their view, ''the text and structure of the FMLA make abundantly clear that Congress intended that no limitations be placed on employees' ability to substitute paid vacation or personal leave while on FMLA leave.''

Other groups representing unionized employees, such as the International Association of Machinists & Aerospace Workers *et al.*,[5] the American Train Dispatchers Association, and the Communications Workers of America, argued that any change in this provision could cause a real hardship to workers, especially in transportation and other industries. They asserted that collective bargaining agreements frequently require employees to select or ''bid'' for their vacation up to a year in advance, that winning bids are usually determined by seniority, and that time off may be restricted or completely foreclosed during peak summer and holiday travel periods. They argued that the proposed regulation would have the effect of disallowing the substitution of paid vacation leave for unpaid FMLA leave if an employee happens to need FMLA leave before or after his or her pre-selected vacation period, or on an emergency basis. They also noted that many agreements require substantial advance notice for using personal leave. In such settings, they argued, it would be almost impossible to substitute paid leave for unforeseeable medical emergencies, premature childbirth, or for unforeseeable intermittent leave needed as a result of a chronic condition.

Many commenters agreed with the Department's statement in the NPRM that the differing treatment of ''medical leave,'' ''family leave,'' ''sick leave,'' and ''vacation leave'' in current § 825.207 was confusing and made it difficult for both employers and employees to know when paid leave may or may not be substituted for unpaid FMLA leave. *See, e.g.*, TOC Management Services; Equal Employment Advisory Council; the Chamber; Hewitt Associates. Additionally, employers and employer representatives strongly supported the Department's proposal that they be allowed to apply their normal leave rules when paid leave of any type is substituted for unpaid leave under FMLA. *See, e.g.*, Hewitt Associates; American Foundry Society; College and University Professional Association for Human Resources; Domtar Paper Company. The National Coalition to Protect Family Leave commented that the Department's current regulation treats FMLA leave takers more favorably than employees using non-FMLA leave, and that all employees seeking to use paid leave voluntarily provided by employers should be required to comply with the terms and conditions of the paid leave policy. The National Coalition to Protect Family Leave asserted that this is consistent with the main statutory goal of the FMLA, that nothing in the FMLA be construed so that it would ''discourage'' employers from ''adopting or retaining'' more generous leave policies. It further noted that employers may choose to waive restrictions on leave use in order to facilitate the substitution of paid leave, but should not be required to do so.

The National Association of Manufacturers supported the change, noting that ''[t]here is perhaps no other single proposal that would permit employers to streamline the leave process while, at the same time, controlling abuses of the system.'' However, this commenter asked what would happen if an employer's paid leave policy required the use of a full day of leave and an employee wished to substitute paid leave for a two-hour FMLA absence—could the employer require the employee to use a full day of paid leave or would the employer be required to provide the employee with two hours of paid leave? *See also* Retail Industry Leaders Association. The Equal Employment Advisory Council also supported the proposal and agreed that it is a ''more accurate interpretation of the statutory language'' and ''correctly implements Congressional intent'' regarding the substitution of paid leave. However, they opposed any additional notice requirements, urging that a simple cross-reference to an employee handbook or Intranet site should be adequate notice of the employer's paid leave policy. Finally, they also specifically supported the Department's proposed clarification of the term ''substitution'' as meaning that paid leave and unpaid FMLA leave run concurrently.

The Department has carefully considered all the comments regarding the proposed change to its position on the substitution of paid leave and has decided to adopt the regulation as proposed. The language in both paragraphs of 29 U.S.C. 2612(d)(2), as well as its legislative history, makes clear that 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* 29 U.S.C. 2612(d)(2)(A) & (B); H.R. Rep. No. 103–8, Pt. 1, at 38 (1993); S. Rep. No. 103–3, at 27–28 (1993). Accrued paid leave is often subject to limits on its use. As explained in the NPRM, and for the reasons discussed below, the Department believes that the better interpretation of section 102(d)(2)(B) is that it was intended to emphasize the limits on the situations in which an employer must allow the substitution of paid sick or medical leave, but does not preclude requiring compliance with the normal procedural rules pursuant to which the leave was accrued for paid personal or vacation leave. For example, it clarifies that an employer is not obligated to allow an employee to substitute paid sick leave for unpaid FMLA leave in order to care for a child with a serious health condition if the employer's normal sick leave rules allow such leave only for the employee's own illness. *See* current § 825.207(c) (explaining that employers are not required to allow substitution of paid medical or sick leave to care for a family member if the employer does not normally allow the use of medical or sick leave for that purpose; employers are also not required to provide paid sick or medical leave for serious health conditions that are not normally covered by their medical or sick leave plans).

The Department has never read the substitution provision as literally as the employee commenters urge. Indeed, the current regulations recognize that employers may place restrictions on the use of ''family leave,'' a type of leave referenced in section 102(d)(2)(A) of the

[5] Comments submitted by the law firm of Guerrieri, Edmond, Clayman & Bartos on behalf of the International Association of Machinists & Aerospace Workers, the Transportation Communications International Union, the Transport Workers Union, and the United Transportation Union.

Act, without any explicit limitation on an employer's ability to restrict its substitution. *See* current § 825.207(b) (noting that employers may enforce restrictions in family leave plans that limit the use of such leave to particular family members). This restriction is supported by the legislative history, which states that ''[t]he term 'family leave' is used [in the section] to refer to paid leave provided by the employer covering the particular circumstances for which the employee is seeking leave * * *.'' H.R. Rep. No. 103–8, Pt. 1, at 38 (1993); *see also* S. Rep. No. 103–3, at 27 (1993). Under the current regulations, the Department has also always permitted substitution of paid time off (''PTO''), a type of leave not referenced in the statute. *See* current § 825.207(e).

The legislative history of the substitution provision indicates that Congress understood that employers commonly restrict the situations in which employees may take paid sick, medical, and family leave. As explained in the Senate Committee Report, ''nothing in the act requires an employer to provide paid sick leave or medical leave in any situation in which the employer does not normally provide such leave.'' S. Rep. No. 103–3, at 27–28 (1993); *see also* H.R. Rep. No. 103–8, Pt. 1, at 38 (1993). As the comments make clear, employers also often place procedural requirements (as opposed to limiting the reasons) on an employee's ability to take personal or vacation leave. The legislative history does not indicate that Congress intended to prohibit employers from applying their normal procedural requirements for the use of paid leave to requests to substitute any type of paid leave (including personal or vacation leave) for FMLA leave. As noted in the NPRM, this interpretation is consistent with the Department's recognition in opinion letters that both an employee's right to use paid leave and an employer's right to require substitution are subject to the terms 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 * * *. [An] employer could not require [an] employee to substitute [vacation] leave that is not yet available to the employee to use under the terms of the employer's leave plan.''); 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.'').

Therefore, an employee's right to substitute accrued paid leave is limited by the terms and conditions pursuant to which the applicable leave is accrued, as long as those terms are non-discriminatory. An employer may limit substitution of paid sick, medical or family leave to those situations for which the employer would normally provide such paid leave (*e.g.*, such policies may restrict the use of paid leave only to the employee's own health condition or to specific family members). Employers must allow substitution of paid vacation, personal leave, or ''paid time off'' for any situation covered by the FMLA. In all cases, however, the normal procedural rules subject to which the leave was accrued apply—unless waived by the employer—regardless of the type of paid leave substituted. For example, if an employer's paid sick leave policy prohibits the use of sick leave in less than full day increments, employees would have no right to use less than a full day of paid sick leave regardless of whether the sick 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 paid personal leave for unpaid FMLA leave would need to provide two days' notice. Employers, of course, may choose to waive such procedural rules and allow an employee's request to substitute paid leave in these situations, but they are not required to do so. Additionally, employers may choose to waive procedural requirements even in the absence of an employee request to do so.

Where an employer's paid leave policy requires the use of such leave in an increment of time larger than the amount of FMLA leave requested by an employee, if the employee wishes to substitute paid leave for unpaid FMLA leave, the employee must take the larger increment of leave required under the paid leave policy unless the employer chooses to waive that requirement. The employer is not required to permit the employee to substitute paid leave for the smaller increment of unpaid FMLA leave. Thus, in the previously cited example by the National Association of Manufacturers, where the employee takes two hours of FMLA leave and requests to substitute paid leave which must normally be used in full-day increments, the employer must grant the two hours of unpaid FMLA leave, but may choose to deny the substitution of paid leave, or to waive its normal minimum increment and allow the employee to substitute paid leave for the two-hour FMLA absence. The employee has the right to take two hours of unpaid FMLA leave, but under the terms of the employer's paid leave policy does not have a right to substitute paid leave unless he or she chooses to take the full day of leave (thus fulfilling the requirements of the employer's paid leave policy). The FMLA guarantees only unpaid leave, not payment for that leave. Paid leave is offered by employers as a matter of employer policy and may be limited by an employer's nondiscriminatory policies.

Where an employee chooses to take a larger increment of leave in order to be able to substitute paid leave for unpaid FMLA leave, the entire amount of leave taken shall count against the employee's FMLA entitlement. This is consistent with the rule in cases where it is physically impossible for an employee to commence work late or leave work early, as set forth in final § 825.205(a)(2) above. In both situations, the entire amount of leave actually taken is protected under the FMLA and may be counted against the employee's FMLA entitlement.

In order to assist employees in understanding and complying with this interpretation, § 825.207(a) requires that employers notify employees of any additional requirements for the use of paid leave. In response to comments, the Department has clarified in the final rule that this information must be included with the rights and responsibilities notice required under § 825.300(c). At the employer's option, this information may be included in the text of the rights and responsibilities notice itself, or the employer may attach a copy of the paid leave policy to the notice, or provide a cross-reference to a leave policy in an employee handbook or other source available to employees, where paid leave policies are customarily set forth.

The Department proposed to delete current § 825.207(b) and (c), which provide different rules for substitution of different kinds of paid leave, and which have been superseded by proposed paragraph (a). Current § 825.207(f) and (g) were redesignated as proposed § 825.207(b) and (c). Proposed paragraph (b) confirmed that if paid leave is not substituted for unpaid FMLA leave, the employee remains entitled to all accrued paid leave, while

proposed paragraph (c) explained that paid leave used for purposes not covered by the FMLA could not count against the employee's FMLA leave entitlement. The final rule adopts these changes.

The Department proposed several revisions to current § 825.207(d), which addresses the interaction between paid disability benefits and unpaid FMLA leave. Specifically, the Department proposed to move language from current § 825.207(d)(1), providing that employers may apply more stringent requirements for receipt of disability payments, to new § 825.306(c). We proposed to retain 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. In addition, the Department proposed to add a new provision stating that although neither the employer nor the employee may require the substitution of paid leave in such circumstances, they may voluntarily agree, where state law permits, to supplement the disability plan benefits with paid leave. The Department also proposed to move paragraph (d)(2) of this section, which deals with the interaction of unpaid FMLA leave with a workers' compensation absence, to a new paragraph (e).

Commenters generally supported the proposed revisions to § 825.207(d), but some requested that the Department modify it further. Several commenters including TOC Management Services and Bracewell & Giuliani suggested that this section be broadened to apply to disability leave for any serious health condition, not just for childbirth. The Department notes that it has always read the provision as applying to paid disability leave due to any serious health condition. *See also Repa* v. *Roadway Express, Inc.*, 477 F.3d 938, 941 (7th Cir. 2007) (holding that the restriction in § 825.207(d)(1) on substitution of paid leave for FMLA leave covered under a disability leave plan is not limited to leave for childbirth). Accordingly, the final regulation removes the reference to childbirth and refers simply to disability leave to make clear that the provision applies to any disability leave that is FMLA-qualifying, whether the disability is caused by childbirth or another serious health condition.

The National Association of Manufacturers was generally supportive of the proposal permitting an employer to supplement disability benefits with paid leave, but asked for clarification on how to calculate use of FMLA leave in a case where the employee is receiving disability benefits equivalent to two-thirds of his or her pay, and the employer and employee agree to use paid leave to supplement those benefits so that the employee receives his or her full pay. This commenter asked whether the employee's FMLA leave usage is determined by the amount of leave taken, or the amount of paid leave used (*i.e.*, is 100 percent of the disability leave counted against the employee's FMLA entitlement, or only one third of the time). In response, the Department wishes to clarify that paid disability leave due to a FMLA-qualifying serious health condition is counted against an employee's FMLA leave entitlement, regardless of whether the employee is using accrued paid leave to supplement the disability benefits. Any supplemental payments are the result of a voluntary agreement between employer and employee. The amount of leave protected under the FMLA, and thus counted against the employee's FMLA leave entitlement, is determined by the amount of leave taken due to the serious health condition, not the amount of paid leave (if any) used to supplement the disability payments. For example, if an employee needs six weeks of leave for surgery and recovery due to a FMLA-qualifying serious health condition and the leave is covered by the employer's disability benefit plan, which replaces two-thirds of the employee's income during the leave, and assuming that the employee has not otherwise exhausted his or her FMLA entitlement, the full six weeks of leave would be FMLA-protected and would count against the employee's FMLA entitlement. Neither party can require substitution of accrued paid leave because the disability leave is not unpaid. The employer and the employee may, however, agree to use accrued paid leave to supplement the amount paid under the disability plan, if permitted by state law and by the plan itself.

The Department has also clarified the final regulatory text in § 825.207(d) to delete the term ''running concurrently.'' The Department has deleted this term in order to avoid causing confusion with the new language in § 825.207(a) specifying that the ''substitution'' of paid leave means paid leave running concurrently with FMLA leave. Employees on paid disability leave due to a FMLA-protected condition are not on unpaid FMLA leave and therefore the statutory provision for the substitution of paid leave does not apply.

The Department proposed to delete current § 825.207(e), which provides that employers cannot place any limitations on substitution of paid vacation or personal leave for FMLA purposes, for the reasons discussed above. The NPRM proposed to redesignate current paragraph (d)(2), which addresses serious health conditions that are caused by on-the-job illnesses or injuries covered under workers' compensation, as a new § 825.207(e).

Several commenters including TOC Management Services, Vercruysse Murray & Calzone, and Bracewell & Giuliani requested that the Department add language to proposed § 825.207(e) that would permit employers to supplement workers' compensation benefits with additional pay, by agreement and where allowed by state law, as the Department proposed to do with disability benefits. As these commenters explained, many states limit workers' compensation benefits to two-thirds of the employee's salary, and many employees would welcome the opportunity to supplement their income in this way. In these commenters' view, such an agreement would allow the employee to recoup the equivalent of 100 percent of his or her regular salary, and to be treated the same as someone who is receiving disability benefits. The Department agrees that it is appropriate to allow employers and employees to voluntarily agree to supplement workers' compensation benefits with accrued paid leave and has therefore added language to § 825.207(e) providing for such agreements, where state law permits. As with the disability benefit supplementation discussed above, any such payment must be by agreement and is neither required or affected by the FMLA. The Department wishes to emphasize to employers and employees that the utilization of paid leave in this context is by agreement and is not considered a ''substitution'' of paid leave. As discussed above in connection with the supplementation of disability benefits, the full amount of workers' compensation leave taken due to a FMLA-protected serious health condition would be counted against the employee's FMLA leave entitlement regardless of whether any paid leave is used to supplement such benefits.

For the reasons noted above, the Department has also eliminated the term ''running concurrently'' in § 825.207(e) and replaced it with a statement that workers' compensation leave may be counted against the employee's FMLA entitlement. As discussed previously, the concept of ''substitution'' of paid leave under the FMLA is not applicable in this context because the employee's leave is not unpaid. However, if the workers' compensation benefits cease for any reason and the employee is still

on leave, the substitution provision may become applicable at that time.

The NPRM proposed to delete current § 825.207(h), which states that where paid leave is substituted for unpaid FMLA leave and the employer's procedural requirements for taking paid leave are less stringent than the requirements of the FMLA, employees cannot be required to comply with the higher FMLA standards. As explained in the NPRM, this section conflicts with section 102(e) of the FMLA, 29 U.S.C. 2612(e), which requires employees to provide 30 days' notice for foreseeable leave whenever possible, and with section 103 of the FMLA, 29 U.S.C. 2613, which permits employers to require certification of the need for any FMLA leave for a serious health condition.

Finally, in proposed § 825.207(f) the Department proposed to revise current § 825.207(i) to allow the substitution of compensatory time accrued by public agency employees under the Fair Labor Standards Act (FLSA) for unpaid FMLA leave. Comments on this issue were mixed. The National Federation of Federal Employees commented that the proposal would benefit employees by providing them with another option in lieu of using unpaid leave. However, it questioned whether the Department has the statutory authority to permit such substitution, because compensatory time is not one of the forms of leave referenced in the statute's substitution of paid leave provision. *See* 29 U.S.C. 2612(d)(2). The AFL–CIO opposed the change for the same reason, citing the Department's initial position and *Christensen* v. *Harris County*, 529 U.S. 576 (2000), for its conclusion that compensatory time is a form of overtime pay rather than a form of accrued paid leave which may be substituted under the FMLA. It argued that the proposed change is not authorized by *Christensen*, and that the Department should retain the current rule. Public employers, on the other hand, supported the change as an example of improved consistency and equity. *See, e.g.*, Colorado Department of Personnel & Administration; City of Medford (OR); Alaska Department of Administration; City of American Canyon (CA); Pennsylvania Governor's Office of Administration.

The Department believes that the proposed revision is not prohibited by the Act and is consistent with the United States Supreme Court's decision in *Christensen*, 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. In addition, the Department agrees with the commenters that substitution of compensatory time for otherwise unpaid FMLA leave 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.

Section 825.208 (Reserved)

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

Section 825.209 (Maintenance of Employee Benefits)

No changes were proposed to this section. The Department received no comments on this section and the final rule adopts this section as proposed.

Section 825.210 (Employee Payment of Group Health Benefit Premiums)

Section 825.210 addresses an employee's obligation to pay his or her share of group health plan premiums while on FMLA leave. The Department proposed to revise paragraph (f) of this section by deleting the word ''unpaid,'' because an individual who is simultaneously taking FMLA leave and receiving payments as a result of a workers' compensation injury is not on unpaid leave. *See* § 825.207(e). In addition, the Department proposed to make several technical corrections by changing the cross-references at the end of § 825.210(d) and (f) to reflect the renumbering of other sections dealing with employer notice and workers' compensation. The internal cross-reference at the end of § 825.210(f) was deleted as unnecessary.

The Department received no comments on this section and the final rule adopts the section as proposed.

Section 825.211 (Maintenance of Benefits Under Multi-Employer Health Plans)

No changes were proposed to this section. The Department received no comments on this section and the final rule adopts this section as proposed.

Section 825.212 (Employee Failure To Make Health Premium Payments)

Section 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 and timely notice to the employee. The Department proposed to add language to 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 the employer may be liable for harm suffered by the employee as a result of the violation if it fails to do so. This proposal is a clarification and does not represent a change in the Department's enforcement position.

Few comments were received on this section. The American Association of University Women supported the clarification, which they termed ''common sense.'' The Chamber requested that language be added to clarify that employers will not be held liable for medical costs incurred during a lapse in coverage prior to the employee's return to work, while the National Retail Federation expressed concern regarding the employer's ability to recoup the cost of maintaining the employee's insurance coverage. The Department believes that the proposed addition is clear in stating that employers may only be held liable for their failure to restore an employee's health insurance upon the employee's return from FMLA leave. As explained in the NPRM, employers have a variety of alternatives to terminating an employee's health insurance when the employee fails to make premium payments, such as payroll deductions or other deductions after the employee returns to work, to the extent recovery is allowed under applicable laws, or as set forth in revised § 825.213 below. Accordingly, the final rule adopts § 825.212 as proposed.

Section 825.213 (Employer Recovery of Benefit Costs)

This section explains what process an employer may follow to recoup insurance premiums from an employee when the employee does not return from leave in certain circumstances. The Department proposed to move language from current § 825.310(h) to this section, in order to combine it with other issues involving repayment of health premiums. This language provides that where an employer requires medical certification that an employee's failure to return to work was due to the continuation, recurrence, or onset of a serious health condition, so that the employee does not have to repay the employer for health insurance premiums paid during FMLA leave, the employee must bear the cost of any such certification, and associated travel costs. The Department received no comments

on this section and adopts § 825.213 as proposed.

Section 825.214 (Employee Right To Reinstatement)

The Department proposed organizational changes and minor clarifications to § 825.214. We proposed to add a heading titled ''[g]eneral rule'' to emphasize that the section sets forth the general rule on reinstatement obligations under the FMLA, to move language from current § 825.214(b) on limitations on reinstatement to § 825.216(c), and to combine such language with language from § 825.216(d) on concurrent workers' compensation absences during FMLA leave. The Department did not receive any significant comments on these proposed changes and adopts the proposed changes without modification.

Section 825.215 (Equivalent Position)

The Department proposed only minor organizational changes to paragraphs (a), (b), (e), and (f) of this section, as outlined below. We did not propose any changes to paragraphs (c)(1) and (d). The only substantive proposed change was in paragraph (c)(2), to allow an employer to disqualify an employee from a bonus or other payment based on the achievement of a specified goal such as hours worked, products sold, or perfect attendance, where the employee has not met the goal due to FMLA leave, unless the bonus or payment is otherwise paid to employees on an equivalent non-FMLA leave status. The proposal included as an example an employee who used paid vacation leave for a non-FMLA purpose and received the payment and stated that in such a situation, an employee who substituted paid vacation leave for FMLA leave also must receive the payment.

The Department adopts the organizational changes to paragraphs (a), (b), (e), and (f) without modification. Proposed paragraph (c)(2) is adopted with a slight modification to the language for clarification purposes. An employer may disqualify an employee from a bonus or other payment based on the achievement of a specified goal, such as hours worked, products sold, or perfect attendance, where the employee has not met the goal due to FMLA leave unless otherwise paid to employees on an equivalent leave status for a reason that does not qualify as FMLA leave. Thus, the Department has changed the phrase ''unless otherwise paid to employees on an equivalent non-FMLA leave status'' to ''unless otherwise paid to employees on an equivalent leave status for a reason that does not qualify as FMLA leave.'' The final rule uses the same example as in the proposal. The final rule also modifies paragraph (c)(1) to include the same limitation on the employer's ability to deny a pay increase.

The Department proposed to title paragraph (a) ''[e]quivalent position'' and paragraph (b) ''[c]onditions to qualify.'' The Department did not receive any significant comments on these proposed minor changes. Paragraph (a) establishes that 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. The regulation further states that the equivalent position must involve the same or substantially similar duties and responsibilities, which must entail substantially equivalent skill, effort, responsibility, and authority. The Equal Employment Advisory Council maintained that ''virtually identical'' as used in the regulation means the ''same,'' which renders the use of the term ''equivalent'' in the statute meaningless. It suggested that the Department replace the term ''virtually identical'' with ''equivalent,'' ''comparable,'' or ''substantially similar.'' The National Retail Federation suggested that the term ''substantially similar'' be used rather than ''virtually identical.'' According to this commenter, retail employers often have only one or two of any particular position in a store and finding an equivalent position can be difficult. The Department declines to change the term ''virtually identical'' in paragraph (a). The Department believes that the standards articulated in paragraph (a) give effect to the statute's requirement that an employer restore the employee to the same or equivalent position. The Department wishes to note that ''virtually identical'' speaks to pay, benefits and working conditions including privileges, perquisites and status while ''substantially similar'' speaks to an employee's duties and responsibilities. *See* current and proposed § 825.215(a).

Employers, employer organizations, and law firms representing employers generally supported the proposal in paragraph (c)(2) to allow employers to deny bonuses based on the achievement of a specified goal to employees who failed to meet the goal because of FMLA leave. Many commenters, including the Chamber, Southwest Airlines, College and University Professors Association, National Business Group on Health, and AT&T, stated that the current regulation is unfair and has caused many employers to curtail or eliminate incentive bonuses and awards programs, particularly those based on attendance. They welcomed the proposed change as remedying an inequitable situation and suggested that the change would likely result in increased employee morale. One commenter, Schreiber Foods, stated that this change would help employee morale because employees on FMLA leave would not be treated more favorably than other employees. Several commenters stated that they believed that the current regulation is unfair to employees who do not miss any days of work because it gives the same perfect attendance bonus to employees who have been absent for up to 12 weeks on FMLA leave. *See, e.g.*, Schreiber Foods, Principle Business Enterprises, Manufacturers Alliance, and National Business Group on Health. Similarly, the National Association of Manufacturers and AT&T emphasized that the current regulation unfairly allows employees on FMLA leave to receive more favorable treatment than employees who take non-FMLA leave and are disqualified from attendance and similar bonuses.

Several employer commenters requested further clarification on how the proposed regulation would apply. La-Z-Boy Midwest requested that the Department clarify that it can continue to award perfect attendance bonuses to employees who have used vacation leave. The law firm Vercruysse Murray & Calzone took issue with the regulatory requirement that employers may not disqualify employees on FMLA leave from bonuses or awards for achievement of a specified goal where such bonuses or awards are paid to employees on an equivalent non-FMLA leave status. According to this commenter, this exception ''virtually swallows the proposed rule'' because employees may choose to take FMLA leave concurrently with paid vacation or personal time-off leave, which most employers do not count against perfect attendance bonuses. *Id.* Further, according to this commenter, it is not clear under the proposed regulation what happens when an employee takes FMLA leave and a portion of the leave is covered by a paid leave program but the other portion is not covered by any paid leave program.

Employee organizations and unions generally opposed the proposed change. Working America/Working America Education Fund stated that the proposed change would discourage employees from taking FMLA leave or penalize employees if they do take FMLA leave, which it contended would violate the statute. The AFL–CIO and the National Partnership for Women &

Families both referenced Wage and Hour Opinion Letter FMLA–31 (Mar. 21, 1994), which stated that denying a perfect attendance award to an employee who took FMLA leave when the employee would otherwise qualify for the award is tantamount to interfering with the employee's exercise of FMLA rights. A Better Balance: The Work and Family Legal Center commented that the proposed change runs counter to the principle in § 825.220(c) which prohibits employers from using FMLA leave as a negative factor in employment actions and counting such leave against employees under ''no fault'' attendance policies. The National Partnership for Women & Families noted that the majority of employees take FMLA leave because they have to address their own or a family member's serious health condition, and that employees in such time of need should not be penalized with loss of income for taking leave that federal law entitles them to take. The Hastings College of Law's Center for WorkLife Law suggested that the term ''equivalent non-FMLA leave status'' in the proposed regulation is open to different interpretations, but that, whichever interpretation is followed, it will likely result in a small number of employees who would fall within this exception and thus only a small number of employees will not be disqualified from bonuses or awards for taking FMLA leave. This commenter suggested that a more equitable alternative compliant with the basic principles of the FMLA would be to pro-rate the bonuses or awards.

The Department believes that proposed paragraph (c)(2) provides a fairer result for all employees than the current regulation and therefore adopts the proposed change. Allowing an employer to disqualify employees taking FMLA leave from bonuses or awards for the achievement of a specified goal unless the bonus is awarded to employees on an equivalent leave status for a reason that does not qualify as FMLA leave puts employees who take FMLA leave on equal footing with employees who take leave for non-FMLA reasons. The Department does not view this as interference because employees taking FMLA leave are not being treated differently than employees taking equivalent non-FMLA leave. Accordingly, employees taking FMLA leave neither lose any benefit accrued prior to taking leave, nor accrue any additional benefit to which they would not otherwise be entitled. *See* 29 U.S.C. 2614(a)(2) and (3). The revised regulation does not contradict the principle in § 825.220(c) that prohibits employers from using the taking of FMLA leave as a negative factor in employment actions or counting FMLA leave under ''no fault'' attendance policies. Penalizing an employee for taking FMLA leave under a ''no fault'' attendance policy is distinct from disqualifying an employee from a bonus or award for attendance because the former faults an employee for taking leave itself whereas the latter denies a reward for achieving the job-related performance goal of perfect attendance. The Department notes that employers are free to prorate such bonuses or awards in a non-discriminatory manner; nothing in these regulations prohibits employers from doing so.

The Department clarifies that safety awards, like attendance awards, are predicated on the achievement of a specified job-related performance goal, and therefore safety awards are to be treated similarly as attendance awards under the revised regulation. Having concluded that both attendance and safety awards are more appropriately characterized as being based on the achievement of a work goal, the Department has concluded that its prior distinction between bonuses or awards based on performance and those premised on the absence of an occurrence is no longer useful. Bonuses that are not premised on the achievement of a goal, such as a holiday bonus awarded to all employees, may not be denied to employees because they took FMLA leave.

In response to the commenters' concerns, the Department reiterates that bonus or awards programs based on the achievement of a specified goal must be administered without discriminating against employees who exercise their FMLA leave rights. For this reason, the proposal specifically prohibits an employer from disqualifying an employee from a bonus or other payment if such bonus or payment is given to employees on an ''equivalent non-FMLA leave status.'' However, as the comments illustrate, the term ''equivalent non-FMLA leave status'' is ambiguous and therefore the Department has modified this language to use the term ''equivalent leave status for a reason that does not qualify as FMLA leave'' instead. Equivalent leave status refers, for example, to vacation leave, paid time-off, or sick leave. Leave for a reason that does not qualify as FMLA leave refers, for example, to vacation or sick leave that is not for an FMLA purpose (*i.e.*, the vacation or sick leave is not also FMLA leave). Thus, for example, if an employer policy does not disallow an attendance bonus to an employee who takes vacation leave, the employer cannot deny the bonus to an employee who takes vacation leave for an FMLA purpose (*i.e.*, substitutes paid vacation leave for FMLA leave). However, if an employer's policy is to disqualify all employees who take leave without pay from such bonuses or awards, the employer may deny the bonus to an employee who takes unpaid FMLA leave. If an employer does not count vacation leave against an attendance bonus but does count unpaid leave against the attendance bonus, the employer may deny the bonus to an employee who takes 12 weeks of FMLA leave, two weeks of which the employee substitutes paid vacation leave, but ten of which the employee takes as unpaid FMLA leave. The Department believes that this is the fairest result in keeping with the FMLA's requirements. Because this non-discrimination principle is equally applicable to pay increases, the final rule changes § 825.215(c)(1) to state that pay increases based upon seniority, length of service or performance need not be granted to employees on FMLA leave unless otherwise granted to employees on an equivalent leave status for a reason that does not qualify as FMLA leave.

The Department proposed no substantive changes to paragraphs (e) and (f) of this section. The NPRM proposed changing the heading of paragraph (e) to ''[o]ther issues related to equivalent terms and conditions of employment,'' and adding a heading titled ''[d]e minimis exception'' to paragraph (f). The NPRM also proposed moving the final sentence of current paragraph (f), which reminded 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, to § 825.216(a)(1) where related issues are discussed, for organization and clarification purposes. The Department did not receive any significant comments on these proposed minor changes and adopts the proposed changes to paragraphs (e) and (f) without modification.

Section 825.216 (Limitations on an Employee's Right to Reinstatement)

The Department proposed minor changes to § 825.216. The NPRM proposed incorporating into paragraph (a)(1) the last sentence from current § 825.215(f), which states that restoration to a job slated for lay-off would not meet the requirements of an equivalent position. This was proposed for organizational and clarification purposes, but no substantive change

was intended. Similarly, the Department proposed to re-order current paragraph (b) as paragraph (a)(3) for purposes of organizational structure and clarity. The Department proposed re-lettering current paragraph (c) as paragraph (b). The Department proposed 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. No substantive changes were intended. The Department proposed moving language from current § 825.312(g) and (h) that address the fraudulent use of FMLA leave and outside employment during FMLA leave, respectively, and therefore address limitations on reinstatement, to § 825.216 to proposed paragraphs (d) and (e), respectively. The Department did not receive any significant comments on these proposed changes and adopts the proposed changes without modification.

Sections 825.217–825.219 (Explanation of Key Employees and Their Rights)

The Department proposed minor changes to § 825.217(b) to update the reference to the definition of ''salary basis'' 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 adopts the proposed changes to § 825.217 without modification.

The Department received very few comments on this proposed change. The National Retail Federation suggested that the Department use the term ''information technology employee'' rather than ''computer employee.'' The Department declines to change the term used because the FLSA regulations use the term ''computer employees'' and the Department specifically references the FLSA regulations in this section. The Department intends that the term ''computer employee'' as used in this section shall have the same meaning it has in the FLSA regulations.

Although no change was proposed to the definition of ''key employee,'' both the National Retail Federation and the Illinois Credit Union League urged the Department not to rely exclusively on the salary test to determine whether an employee is a ''key employee.'' However, the regulation simply reflects the statutory definition of a ''key employee'' as a salaried eligible employee who is among the highest paid 10 percent of the employees employed within 75 miles. *See* 29 U.S.C. 2614(b)(2). Therefore, the requested change would require a statutory amendment.

The Department did not propose any changes to §§ 825.218 or 825.219 and the final rule adopts them without modification.

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

The Department did not propose any changes to paragraph (a). The Department proposed to modify paragraph (b) in § 825.220 by adding new language setting forth the remedies for interfering with an employee's rights under the FMLA. The Department proposed to specifically reference retaliation in paragraph (c) in order to clarify that the prohibition against interference includes a prohibition against retaliation as well as a prohibition against discrimination. The Department also proposed to clarify in paragraph (c) that the statutory prohibition against interference applies to employees or prospective employees who have exercised or attempted to exercise FMLA rights. The Department proposed to clarify that the waiver provision in paragraph (d) that states ''[e]mployees cannot waive, nor may employers induce employees to waive, their rights under FMLA'' applies only to prospective FMLA rights; it does not prevent employees from settling past FMLA claims without Department or court approval. The Department also proposed to modify the language in paragraph (d) regarding light duty by deleting the final sentence of current paragraph (d) that states ''[i]n such a circumstance, 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 adopts the proposed changes to paragraphs (b) and (c) without modifications. The Department adopts proposed paragraph (d) regarding waiver with a modification to the language to make clear that the waiver prohibition does not prevent the settlement or release of FMLA claims by employees based on past employer conduct without the approval of the Department or a court. The Department also adopts proposed paragraph (d) regarding light duty with modification to the language for clarification. The final rule clarifies that the waiver prohibition does not prevent an employee's voluntary and uncoerced acceptance of a light duty assignment while recovering from a serious health condition and the employee's acceptance of the light duty assignment does not constitute a waiver of the employee's prospective rights, including the right to be restored to the same position the employee held when the FMLA leave commenced or an equivalent position. Thus, an employee who voluntarily returns to a light duty position retains the right to job restoration to the same or equivalent position until the end of the 12-month period that the employer uses to calculate FMLA leave.

The Department did not receive a significant number of comments on the proposal in paragraph (b) to add new language setting forth the remedies for interfering with an employee's rights under the FMLA. The AFL–CIO supported the Department's proposal. The Department adopts the proposal without modification.

In regards to proposed § 825.220(c), the Department indicated in the proposed rule that it had received several comments requesting that the Department strengthen or clarify the regulatory provisions implementing the Act's prohibitions on interference and discrimination. 73 FR 7900 (Feb. 11, 2008). In accordance with such comments, the Department proposed in paragraph (c) to state explicitly that the Act's prohibition on interference in 29 U.S.C. 2615(a)(1) includes claims that an employer has discriminated or retaliated against an employee for having exercised his or her FMLA rights. Section 2615(a)(1) makes it unlawful for an employer to interfere with, restrain, or deny the exercise of or the attempt to exercise any right provided for under the Act. Although section 2615(a)(2) of the Act also may be read to bar retaliation (*see Bryant* v. *Dollar General Corp.*, 538 F.3d 394 (6th Cir. 2008)), the Department believes that section 2615(a)(1) provides a clearer statutory basis for § 825.220(c)'s prohibition of discrimination and retaliation. *See Colburn* v. *Parker Hannifin Corp.* 429 F.3d 325, 331 (1st Cir. 2005) (recognizing retaliation as a form of interference prohibited by § 2615(a)(1) of the Act and 29 CFR 825.220(c)). The Department did not receive any comments on this proposed clarification and adopts the proposal without modification.

The Department proposed to clarify that the waiver provision in paragraph

(d) that states ''[e]mployees cannot waive, nor may employers induce employees to waive, their rights under FMLA'' applies only to prospective FMLA rights. Courts have disagreed as to whether this language prohibits only the prospective waiver of FMLA rights, or also prohibits the retrospective settlement or release of FMLA claims based on past employer conduct, such as through a settlement or severance agreement, without Department or court approval. *Compare Taylor* v. *Progress Energy*, 493 F.3d 454 (4th Cir. 2007), *cert. denied*, — U.S. —, 2008 WL 2404107 (June 16, 2008) (interpreting Department's regulation to prevent employees from 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 prohibits prospective waiver of rights only and not retrospective settlement of claims). The Department disagrees with the Fourth Circuit's interpretation of the regulation. Therefore, in the interest of clarity, the Department proposed to make explicit in paragraph (d) of this section that employees and employers are permitted to agree voluntarily to the settlement of past claims without having first to obtain the permission or approval of the Department or a court.

Nearly all the employers, employer organizations, and law firms representing employers who commented on this issue supported the Department's proposed clarification. The Equal Employment Advisory Council stated that, while the current regulation ''clearly allows'' waivers in settling past claims, they supported the Department's proposal to make it more explicit. *See also* Association of Corporate Counsel's Employment and Labor Law Committee. Several commenters, including the Chamber, Domtar Paper Company, the National Federation of Independent Business, Hewitt Associates, and HR Policy Association, emphasized the economic and efficiency benefits to all parties of allowing settlements without Department or court approval. Several commenters such as the National Restaurant Association, the Manufacturers Alliance, and HR Policy Association, emphasized the importance of this regulation for severance agreements. The law firm Burr & Forman requested additional clarification of the term ''past'' in the proposal and specifically requested that severance agreements, including those where the employee may or may not know of any FMLA claims, be permitted without Department or court approval.

Employee organizations opposed the proposed clarification. Several commenters, including A Better Balance: The Work and Family Legal Center, Human Rights Campaign, Sargent Shriver National Center on Poverty Law, and Family Caregiver Alliance, emphasized the unequal position of employees and employers in settling cases or signing severance agreements, with employees' immediate financial needs forcing employees to forego their FMLA rights and thereby allowing employers to escape FMLA liability. According to these commenters, requiring Department or court approval is an important means of addressing this inequality. They argued that allowing settlements or severance agreements without Department or court approval would hamper enforcement of the FMLA. In addition, many of the commenters, including the AFL–CIO, the National Partnership for Women & Families, the ACLU, and Women Employed, reiterated many of the reasons relied on by the Fourth Circuit in *Taylor* to support their recommendation that the Department not allow unsupervised waivers of past FMLA claims. Specifically, they argued that the Department's proposal contradicts the Department's position in the 1995 regulation, based on statements in the 1995 preamble. These commenters urged the Department to reject the proposal because private settlement of prospective or retrospective claims undermines Congressional intent in imposing minimum labor standards. They maintained that the FMLA should be interpreted consistently with the FLSA, which prohibits employees from waiving their rights without Department or court approval, instead of with Title VII and other anti-discrimination laws which allow unsupervised settlements. They also contended that employers have an incentive to deny FMLA benefits if they can settle violation claims for less than the cost of complying with the statute.

The Department's interpretation of the waiver provision is well known from its participation in *Taylor*. The Department has never interpreted current § 825.220(d) as prohibiting the unsupervised settlement or release of claims based on past employer conduct and has never enforced it as such. This interpretation is consistent with the statute. Nothing in the text of the FMLA requires Department or court approval of a settlement or release of FMLA claims based on past employer conduct or prohibits waiver of FMLA claims based on past employer conduct. The statute is silent on this issue. The enforcement provision in FMLA does not reference the supervised settlement provision in section 16(c) of the FLSA, 29 U.S.C. 216(c). Instead, FMLA's enforcement provision directs the Secretary to receive, investigate, and attempt to resolve FMLA complaints in the same manner that the Secretary receives, investigates, and attempts to resolve complaints under sections 6 and 7 of the FLSA (29 U.S.C. 206 and 207). 29 U.S.C. 2617(b)(1). Consistent with this statutory authorization, the Secretary has established an administrative process pursuant to which the Wage and Hour Division investigates and attempts to resolve FMLA complaints in the same way that it handles FLSA complaints. The supervised settlement practice, however, is unique to the FLSA. *See Barrentine* v. *Arkansas Best Freight Sys.*, 450 U.S. 728, 740 (1981); *Brooklyn Sav. Bank* v. *O'Neil*, 324 U.S. 697, 706–07 (1945). The judicial prohibition against private settlements under the FLSA is based on policy considerations unique to the FLSA. The FLSA is a remedial statute setting the floor for minimum wage and overtime pay. It was intended to protect the most vulnerable workers, who lacked the bargaining power to negotiate a fair wage or reasonable work hours with their employers. The judicially-imposed restrictions on private settlements under the FLSA have not been read into other employment statutes that reference the FLSA and should not be read into the FMLA. Even the Age Discrimination in Employment Act (''ADEA''), which explicitly references section 16(c) of the FLSA (29 U.S.C. 216(c)), *see* 29 U.S.C. 626(b), has not been interpreted as requiring supervised settlements. Like the ADEA, the FMLA is not primarily focused on pay, and protects all segments of the workforce, from low wage workers to highly paid professionals.

Because of the perceived ambiguity in the 1995 regulation, the Department now clarifies that it intends, as it has always intended, for the waiver prohibition to apply only to prospective FMLA rights. The Department notes that it intended under the proposal to allow employees to enter severance agreements releasing FMLA claims based on past employer conduct, in addition to allowing settlement of FMLA claims in situations where the employee has filed a claim against the employer. The Department has never interpreted the waiver provision as applying to the settlement of claims or

to the release of FMLA claims in severance agreements based on past employer conduct, whether known or unknown to the employee at the time of entering the severance agreement. In the interest of further clarity, the Department has modified the language in the final rule. By changing the language from settling past FMLA claims to settling or releasing FMLA claims based on past conduct by the employer, the Department intends to make clear that an employee may waive his or her FMLA claims based on past conduct by the employer, whether such claims are filed or not filed, or known or unknown to the employee as of the date of signing the settlement or the severance agreement. Thus, an employee may sign a severance agreement with his or her employer releasing the employer from all FMLA claims based on past conduct by the employer. An employee may also settle an FMLA claim against his or her employer without Department or court approval. The Department believes this promotes the efficient resolution of FMLA claims and recognizes the common practice of including a release of a broad array of employment claims in severance agreements.

The Department also proposed to modify the language in § 825.220(d) regarding light duty. The current regulation states that the waiver prohibition does not prevent an employee's voluntary and uncoerced acceptance of a light duty assignment while recovering from a serious health condition. The regulation further states that ''[i]n such a circumstance, 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 opinion letter issued by the Department that 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).

Given the apparent confusion over this provision, the Department proposed to delete this sentence. In support of the proposal, the Department stated that the current regulation does not serve the statute's purpose to provide job protection when FMLA leave is taken. 73 FR 7901 (Feb. 11, 2008). Deleting this language would ''ensure that employees retain their right to reinstatement for a full 12 weeks of leave instead of having that right diminished by time spent in a light duty position.'' *Id.* The Department stated that it wished 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.'' *Id.* The Department invited comments on whether the deletion of this language would negatively impact an employee's ability to return to his or her original position from a voluntary light duty position. *Id.* The Department adopts the proposal with clarifying modifications.

It is clear from the comments that the proposal was interpreted in different ways by different groups. Employee organizations and unions, as well as several employer organizations, interpreted the proposal to protect an employee's right to reinstatement while in a light duty position, regardless of the amount of time the employee works in the light duty position. In other words, these commenters read the proposal as preserving the employee's right to reinstatement to the employee's original position or an equivalent position while in a voluntary light duty position, regardless of how long that period may be. Based on this interpretation, employee organizations and unions were supportive. *See* AARP, National Partnership for Women & Families, the National Federation of Federal Employees, MomsRising.org. The AFL–CIO cited the Department's statement in the preamble to the proposed rule—''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''—and concluded that the proposed change would not negatively impact an employee's ability to return to his or her original position. *See also* A Better Balance: The Work and Family Legal Center. The AFL–CIO recommended, however, that the Department include the language cited above in the text of the regulation.

Several employer commenters interpreted the proposal similarly and expressed disapproval. The Southern Company, American Health Care Association/National Center for Assisted Living, and Hewitt Associates, stated that the proposed modification of this regulation would discourage employers from offering light duty positions because the reinstatement right is not exhausted during a period of light duty, which creates an open-ended right to reinstatement. These commenters argued that holding the position open for an indeterminate amount of time would be too burdensome to employers and therefore employers would be less likely to offer light duty positions. Under the current version of the regulation, the employer has certainty that the employee is entitled to the original (or an equivalent) position for only 12 weeks. Under the proposal as they interpreted it, the employer will no longer have this certainty.

In contrast, several employers and employer organizations and law firms interpreted the Department's proposal as not protecting an employee's right to reinstatement while in a light duty position. The National Coalition to Protect Family Leave and the Society for Human Resource Management commented that, in most instances, employers would like to return employees to their original position as soon as the employee is able to do so and therefore the Department's proposed change should have no impact on an employee's reinstatement rights. They noted, however, that this may not be the case where an employee has been unable to perform his or her original position for an extended period of time and the employer has filled that original position with another employee. These comments appear to interpret the proposal as providing no right to reinstatement to the employee's original position from a light duty position. The National Retail Federation interpreted the proposal in the same manner and suggested that the proposal will discourage employees from accepting light duty positions when returning from FMLA leave because the employee is no longer on FMLA leave when he or she returns to a light duty position, and therefore is no longer entitled to a right to reinstatement to the same or equivalent position.

Other commenters simply expressed uncertainty as to the correct interpretation of the proposal and the Department's intention. *See* Spencer Fane Britt & Browne, Tennessee Valley

Chapter of the Society for Human Resource Management, and the National Association of School Boards. The law firm Spencer Fane Britt & Browne and Tennessee Valley Chapter of the Society for Human Resource Management questioned how the Department would interpret the employee's reinstatement rights under the proposal: Would an employee have reinstatement rights the entire time the employee works in a light duty position or would an employee have no reinstatement rights? These commenters urged the Department to adopt the interpretation that an employee who accepts a light duty position has no reinstatement rights. The law firm Spencer Fane Britt & Browne argued that an employee waives his or her right to reinstatement each day that the employee works in the light duty position. According to this commenter, interpreting the proposed regulation otherwise would permit an employee to be guaranteed reinstatement for an indefinite period of time, including a longer period than the FMLA otherwise allows.

The Department intended its proposal to protect an employee's right to restoration to the position the employee held when the FMLA leave commenced or to an equivalent position while in a light duty assignment. An employee who takes FMLA leave has a right to be restored to the same position the employee held when the FMLA leave commenced or an equivalent position. 29 U.S.C. 2614(a)(1). An employee may not prospectively waive this right. Therefore, when an employee voluntarily accepts a light duty assignment, the employee does not waive his or her restoration right while working in the light duty assignment. Likewise, the time the employee works in the light duty assignment does not count as FMLA leave. Thus, the employee's right to restoration is essentially held in abeyance during the period of time an employee performs a light duty assignment pursuant to a voluntary agreement between the employee and the employer. At the conclusion of the voluntary light duty assignment, the employee has the right to be restored to the position the employee held at the time the employee's FMLA leave commenced or to an equivalent position, provided that the employee is able to perform the essential functions of such a position. If the voluntary light duty assignment ends before the employee is able to perform the essential functions of such a position, the employee may use the remainder of his or her FMLA leave entitlement and would be eligible to return to the same position the employee held when the FMLA leave first commenced or to an equivalent position, provided that the employee is able to perform the essential functions of such a position at the end of his or her FMLA leave. For example, if an employee takes four weeks of FMLA leave and voluntarily accepts a light duty assignment that the employer has offered for ten weeks, at the conclusion of that ten week period, the employee either returns to the same position the employee held when the FMLA leave commenced or to an equivalent position, or, if the employee is unable to return to that position the employee may use the remainder of his or her FMLA leave. At the conclusion of the employee's FMLA leave, the employee would have a right to be restored to the same position the employee held when the original FMLA leave commenced or to an equivalent position as long as the employee is able to perform the essential functions of the position. The Department notes that whenever an employee performs his or her own job for less than a full schedule, the employee is using intermittent or reduced schedule leave and is not performing light duty for purposes of FMLA.

However, when an employee has already used his or her full 12 weeks of FMLA leave entitlement in a 12-month period and then voluntarily accepts a light duty position because the employee is unable to resume working in his or her original position, that employee no longer has a right under the FMLA to restoration. If an employee exhausts his or her FMLA leave entitlement and is still unable to perform the essential functions of his or her original or equivalent position, the employee no longer has an FMLA right to restoration.

The Department recognizes that in the case of open-ended light duty assignments, this could potentially lead to an employee's right to restoration to his or her original position extending for an indefinite period. In order to address the administrative difficulties such an open-ended restoration right would present, the final rule provides that an employee's right to restoration while in a light duty assignment expires at the end of the 12-month leave year period that the employer uses to calculate FMLA leave. The Department believes that this is a reasonable limitation that is consistent with the statute's reference to a 12-month period for leave purposes. For example, where an employer uses a calendar year to calculate FMLA leave, and an employee takes four weeks of FMLA leave and returns in September to a light duty assignment that is not limited in duration and which neither the employer nor the employee chooses to end, the employee has a right to restoration that extends through the end of that calendar year, but would not extend beyond that calendar leave year.

While this new provision in the final rule could potentially create a disincentive for employers to offer light duty positions because it provides a more open-ended right to reinstatement than the current regulation allows, nothing prevents employers from offering light duty positions for a finite period of time. Because the employer provides the light duty position on a voluntary basis, just as the employee accepts it on a voluntary basis, an employer may impose time limits as part of the offer of a light duty assignment. In addition, because the light duty assignment is voluntary, the employer or the employee may end the assignment at any time. If the employer offers the light duty assignment for a limited period of time or decides to end the assignment at any point, and the employee is not able to return to the same or equivalent position at the conclusion of that period of time, the employee may use the remainder of his or her FMLA leave, after which the employee has a right to restoration to the same position the employee held when the FMLA leave first commenced or an equivalent position. If, however, the employee is unable to resume work after exhausting his or her 12 weeks of leave in a 12-month period, the employer's FMLA obligation to restore the employee to the original position ceases. At that point, the employer may, for example, permanently assign the employee to a different position or terminate the employee.

Several of the employer commenters reiterated the request made in response to the Request for Information, 72 FR 35605 (June 28, 2007), that employers be allowed to require employees to accept a light duty position that is consistent with the employee's medical restrictions in lieu of the employee taking FMLA leave. *See* American Foundry Society, Schreiber Foods, the Chamber, College and University Professional Association for Human Resources, Berens & Tate, and Spencer Fane Britt & Browne. As explained in the preamble to the proposed rule, 73 FR 7900 (Feb. 11, 2008), the Department does not believe that such a requirement comports with the statutory right to take 12 weeks of FMLA leave for a serious health condition. The FMLA guarantees employees 12 weeks of unpaid leave for the reasons enumerated in the statute; it does not permit employers to require

employees to work a light duty position rather than taking FMLA leave.

Other employer commenters requested that the time an employee works in a light duty assignment count against the employee's 12-week FMLA leave entitlement. *See* National Business Group on Health and Equal Employment Advisory Council. The National Business Group on Health pointed to the hardship that an employee working a light duty position imposes both on the employer and on other employees who are forced to take on the responsibilities of the employee who is not performing the functions of his or her original position as justification for counting the light duty time as FMLA leave. The Equal Employment Advisory Council distinguished a light duty position that the employer creates for a particular employee recovering from a serious health condition from a light duty position that already exists and that the employer allows the employee to fill. The Equal Employment Advisory Council recommended that, where the employer created a light duty position for a particular employee, the time spent working in this light duty position should count against the employee's FMLA entitlement because the employee is functionally still on leave; time spent in a light duty position that already exists should not count against the employee's FMLA entitlement. Employee commenters, including Community Legal Services, Inc./AIDS Law Project of Pennsylvania, the Coalition of Labor Union Women, and Catherine Scott, emphasized the importance of not counting the time an employee works in a light duty position against an employee's 12-week leave entitlement.

The Department continues to reject the employers' suggestion on this issue. The time an employee works in a voluntary light duty position does not count against the employee's FMLA entitlement. The Department acknowledges that allowing an employee to work a light duty position may cause certain burdens to the employer. However, the FMLA does not require an employer to offer a light duty position; the employer does so voluntarily. The distinction between a light duty position created for a particular employee and a light duty position that already exists is irrelevant for FMLA purposes because, under the FMLA, the employer offers a light duty position on a voluntary basis.

Subpart C—Employee and Employer Rights and Obligations Under the Act

Section 825.300 (Employer Notice Requirements)

The NPRM proposed to consolidate the employer notice requirements, which appear in current §§ 825.300, 825.301, 825.110 and 825.208, into one comprehensive section addressing an employer's notice obligations. Current § 825.300 addresses the requirement that employers post a notice on employee rights and responsibilities under the law and, where a significant portion of the employer's workers are not literate in English, provide the notice in a language in which the employees are literate. This section also addresses the civil money penalty provision in the law for employers who willfully violate the posting requirement. Current § 825.301 requires an employer to include information about the FMLA in any written guidance such as an employee handbook or other document that the employer provides to its employees. In the case of an employee's request for FMLA leave, current § 825.301 also requires the employer to provide the employee with a written notice that details the specific expectations and obligations of the employee and the consequences of a failure to meet these obligations. Additional notice requirements, such as notifying employees of their FMLA eligibility and designation of their FMLA leave, appear elsewhere in current §§ 825.110 and 825.208.

Proposed § 825.300 consolidated these employer notice requirements under the major topics of ''general,'' ''eligibility,'' and ''designation'' notices, and ''consequences of failing to provide notice.'' The final rule adopts the consolidated format, but makes additional changes to further clarify employer obligations to provide notice to employees as outlined below. The Department continues to believe that a key component of making the FMLA a success is effective communication between employees and employers. Enhanced communication increases employee awareness of rights and responsibilities and facilitates the smooth administration of the FMLA. The Department anticipates that this consolidated format and the notice requirements contained herein will further this goal.

Several commenters strongly supported consolidating the employer notice requirements into one general area of the regulations. The Equal Employment Advisory Council (''EEAC'') noted that, ''[b]y identifying specifically the 'general', 'eligibility' and 'designation' notice requirements, the proposal clarifies for both employers and employees their respective obligations under the FMLA.'' The City of Portland (OR) agreed that ''[p]lacing all of the notice requirements in consecutive sections is an improvement'' but felt employee notice requirements should precede the employer notice sections. *See also* WorldatWork; the Chamber. While not agreeing with all the proposed rule changes, Jackson Lewis agreed with ''the 'theme' of shared responsibility that permeates the Proposed Regulations. By increasing the emphasis on employers' 'general notice' obligations *and* employees' obligations to give adequate and timely notice * * * the DOL's proposal prepares the groundwork for a more reasonable exercise of FMLA rights and obligations.''

General Notice Requirements

Proposed § 825.300(a) addresses the general notice requirements that appear in current §§ 825.300 and 825.301(a). Proposed § 825.300(a)(1) retained the requirement from the current rule that every covered employer post and keep posted in conspicuous places on its premises where notices to employees and applicants are usually posted a notice providing information about the FMLA. The Department proposed to allow electronic posting of the general notice so long as it otherwise met all of the requirements of the section, and sought comment on whether the electronic posting alternative would be workable and would ensure that employees and applicants obtain the required FMLA information. Additionally, the Department proposed in paragraph (a)(1) to increase from $100 to $110 the civil money penalty assessment for an employer's willful failure to post the required notice, consistent with the requirements of the Debt Collection Improvement Act of 1996 amendment of the Federal Civil Penalties Inflation Adjustment Act of 1990. For purposes of clarity, the Department proposed to separate out into paragraph (a)(2) the requirement in the current rule that a covered employer post the general notice even if no employees are eligible for FMLA leave. Proposed § 825.300(a)(3) required covered employers with eligible employees to distribute the general notice 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. Proposed § 825.300(a)(4) permitted employers to meet their obligation to both post and distribute the general

notice by duplicating the text of the prototype notice contained in Appendix C. The proposal required that, when the employer employs a significant portion of employees who are not literate in English, the employer provide the poster and general notice to employees in a language in which they are literate, and it also retained language in the current rule requiring notice to sensory-impaired individuals as required under applicable federal and state law. Additionally, the Department proposed revisions to its prototype general notice to provide employees more useful information on their FMLA rights and responsibilities.

The final rule adopts § 825.300(a) with the following modifications. Language similar to current § 825.301(a)(1) has been added to § 825.300(a)(3) of the final rule to clarify that if employers have employee handbooks or other written materials concerning benefits and leave, such written materials must include the general notice information. Where such materials do not exist, the final rule requires an employer to provide the general notice to new employees upon being hired, rather than requiring that it be distributed to all employees annually. Additionally, the final rule in § 825.300(a)(4) clarifies that employers may meet the general notice requirements by either duplicating the prototype general notice in Appendix C or by using another format so long as the information provided, at a minimum, includes all of the information contained in the prototype general notice.

Several commenters were concerned that electronic posting of the general notice as permitted in proposed § 825.300(a)(1) would be insufficient to alert individuals to their rights and responsibilities under the law. The National Partnership for Women & Families commented that, while electronic posting could be beneficial to some employees and applicants who might work at locations other than the employer's worksite or who might be applying for a position online, it ''should be required as an addition, rather than a substitution, to employers actually posting the FMLA poster.'' *See also* American Association of University Women; AFL–CIO; Communications Workers of America. Other commenters, however, specifically approved of the Department's proposal to allow electronic posting of the general notice. Verizon commented that ''[p]ermitting electronic forms of communication recognizes the reality of the times, encourages efficiency and provides employees with access to information at the time of their choice.'' *See also* AT&T; Willcox and Savage; National School Boards Association; College and University Professional Association for Human Resources; National Association of Manufacturers.

Some employers also questioned whether the statute allowed the Department to require a notice to applicants for employment in proposed § 825.300(a)(1). Spencer Fane Britt & Browne stated ''we find no basis in the Act for requiring that employers make applicants aware of the FMLA and the rights they may have a year down the road'' if the applicant is hired and remains employed. *See also* Society for Human Resource Management; National Coalition to Protect Family Leave; Willcox and Savage. Other employers felt electronic notification of applicants would be confusing and burdensome and suggested the Department eliminate or scale back the requirement. The Northern California Human Resources Association specifically questioned the definition of ''applicant'' and noted that ''the number of unqualified applicants for an open position is significantly high.'' The commenter asked when the ''disclosure'' should occur and also questioned ''what FMLA regulations would need to be provided?'' *See also* Judi Moran; Hewitt Associates; Southern Company.

The final rule adopts § 825.300(a)(1) as proposed, including the provision that the posting requirement may be satisfied through an electronic posting of the general notice as long as it otherwise meets the requirements of this section. The Department believes that electronic posting of the notice can facilitate increased employee awareness while limiting cost burdens on employers. For the posting requirement to be met, however, all employees and applicants for employment must have access to the information. Thus, for example, if an employer has some employees who do not have employer-provided computer access or who are not otherwise able to access the information electronically, the employer must post on its premises where it can be readily seen a paper copy of the information contained in the general notice, such as a copy of the prototype general notice in Appendix C. Additionally, electronic posting does not excuse the employer from the statutory requirement to post in a location viewable by applicants for employment. 29 U.S.C. 2619(a). Therefore, if the employer posts such information on an intranet that is not accessible to applicants, additional posting would be necessary in a conspicuous place where notices for applicants for employment are customarily posted.

Numerous commenters responded to the proposed annual notification requirement in § 825.300(a)(3). Employee groups suggested that all employers, including those who have handbooks, should be required to distribute the general notice annually to all employees. *See* National Partnership for Women & Families; American Association of University Women; A Better Balance: The Work and Family Legal Center. Several employers opposed the annual notification requirement, arguing that it goes beyond the statutory requirement to post a general notice. *See* City of Colorado Springs (CO); City of Independence (MO); Catholic Charities, Diocese of Metuchen; Fisher & Phillips; National Coalition to Protect Family Leave; National Franchise Association. Spencer Fane Britt & Browne stated:

> We are not even convinced that any required distribution of the General Notice should be required if it is posted in conspicuous places for employees to read. The Act's only notice requirement is a poster. The DOL drafted the poster as required notice to employees of his/her FMLA rights and obligations. In the *Ragsdale* decision, even the Supreme Court questioned, although did not rule on, whether the DOL's other notice requirements for employers went beyond the Act.

The Association of Corporate Counsel's Employment and Labor Law Committee commented that because employers must post the policy in a conspicuous place, ''it seems unnecessary to require an annual distribution of the policy, especially given the administrative costs this will impose on the employer.'' The American Health Care Association also objected to the annual notice requirement, stating that employers that do not have handbooks typically will be smaller employers with limited budgets and no human resources department. Fisher & Phillips commented that only an employee with a current need for leave will read the available information and thus the annual distribution requirement ''simply creates an additional administrative burden that will not improve the quality of employee's knowledge of their rights.'' The Metropolitan Transportation Authority (NY) suggested that ''it should be sufficient for the employer to distribute such notices [once upon hiring the employee] and to post the notice in conspicuous locations throughout the workplace.'' Vercruysse Murray & Calzone objected to the handbook or annual notice requirement beyond the posting requirement, calling it a ''level of overkill [that] is virtually

unprecedented and can result in significant expense to employers who must reprint handbooks or handbook inserts or distribute hard copies of the notice to large numbers of employees in workplaces where not all employees are connected electronically.'' Some employers specifically addressed electronic distribution of the annual general notice to all employees under proposed § 825.300(a)(3). AT&T commented that ''expansion of the posting requirements to include annual [notification] would be workable if done electronically.'' The Southern Company requested that this section be clarified to provide that the annual notice requirement can be satisfied by including the notice in an employee handbook that is maintained electronically as long as all employees have access to the electronic handbook, stating that this would be a cost-effective solution that still meets the Department's goals. Harrill & Sutter, on the other hand, objected to any distribution that was limited to an electronic posting, stating that employees forget about such postings.

In light of the numerous comments regarding the administrative burden and expense of the proposed annual distribution requirement, particularly for employers with large numbers of employees who do not have access to a company-provided computer, the final rule modifies this provision. The final rule requires employers that do not have employee handbooks or other written materials concerning benefits and leave that are distributed to all employees to provide the general notice to each employee when the employee is hired. Under the current rule, employers that do not have a handbook or similar written material are only required to advise employees of their FMLA rights and responsibilities after they request FMLA leave. The additional notice provided in the final rule, given to employees when they are hired, will alert employees to their FMLA rights and responsibilities before they are 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. Thus, the new general notice requirement will provide important information to employees at a time when they are not in a crisis situation and when it is likely that they are receiving other important information that they will retain for future reference regarding their new employment. A covered employer with no eligible employees would not be required to distribute the general notice, although the employer would have to comply with this requirement even if it only has one eligible employee. The Department adopts the provision permitting distribution of the handbook or general notice to new employees through electronic means for the same reasons that it adopts the proposal to permit electronic posting of the general notice discussed above. With regard to the use of an electronic employee handbook, the Department believes that having the FMLA notice incorporated into an employee handbook that is maintained electronically can satisfy this general notice requirement, so long as all of the requirements of this section are met, *i.e.*, that the information is accessible to all employees of the employer, that it is made available to employees not literate in English (if required), and that the information provided includes, at a minimum, all of the information contained in the prototype general notice.

A few commenters addressed the provision in proposed § 825.300(a)(4) permitting employers to meet the general notice requirements by duplicating the text of the prototype general notice contained in Appendix C. Vercruysse Murray & Calzone commented that ''some employers will simply use the FMLA notice/poster as their FMLA policy and do away with more specific policies that are currently in place'' leaving out important information, such as the employer's 12-month leave period, because it is not contained in the notice/poster. TOC Management Services also objected to the use of the prototype notice in employee handbooks, stating that ''handbook policies are more informative than a generic general notice'' and that to require employers to use the general notice in their handbook will inevitably lead to confusion. The final rule in § 825.300(a)(4) clarifies that employers may use a copy of the prototype general notice in Appendix C or may use employer-drafted FMLA policy information (including information specific to the employer's policies) for inclusion in an employee handbook or for distribution to new employees, so long as it contains, at a minimum, all of the information included in the prototype general notice and is consistent with that notice.

A few commenters noted that the Department's proposed general notice did not include information advising employees of the type of information the employee will need to provide to the employer when requesting leave to meet the employee notice standards in §§ 825.302 and 825.303. One commenter, Robert Schwartz, who objected to the employee notice obligations, also objected that the draft general notice ''simply warns employees that they must furnish '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'' without alerting employees to additional information they will need to provide. *See also* Society for Human Resource Management; National Coalition to Protect Family Leave. In the final rule, the Department has updated the prototype general notice to indicate more clearly the type of information an employee may need to provide to his or her employer for the notice to be ''sufficient.'' *See* §§ 825.302 and 825.303.

Several commenters sought clarification of the requirement in proposed § 825.300(a)(4) that employers with a ''significant portion'' of employees not literate in English provide the poster and general notice in a language in which they are literate. Jackson Lewis questioned whether the ''employment of more than a few non-English literate employees'' would trigger the obligation or if ''a workforce of 25% non-English literate employees'' would trigger it. Catholic Charities, Diocese of Metuchen commented ''[t]he regulation should define what constitutes a significant portion. * * * [and] provide clarification of the measures, if any, that employers are required to take so as to ensure that workers are informed of the contents of the poster and general notice when only a small number of employe[es] are not literate in English.'' The Equal Employment Advisory Council recommended the Department clarify that the ''alternative notice is required only where the workforce in a particular location is literate in a language other than English'' to more readily accommodate those employers with multiple locations. Finally, the Communications Workers of America stated that ''the agency should more closely monitor all of the FMLA notices that employers are providing to employees, including ensuring that this information is provided in many languages other than English in appropriate work locations.'' The final rule in § 825.300(a)(4) adopts the proposal on this topic without change. Nonetheless, the Department notes that employers with multiple locations may post notices in different languages at different locations, if the posted notices are provided in languages in which the employees are literate at each location. Additionally, the final rule applies the same ''significant portion of workers not

literate in English'' standard for translation of the notification of eligibility and rights and responsibilities in § 825.300(b)(2) and (c)(1).

Finally, two commenters addressed the proposed increase (from $100 to $110) in the Civil Money Penalty (CMP) required under § 825.300(a)(1). One commenter, Tracy Hutchinson, suggested that penalties for employers who ''ignore the law'' should be much harsher including jail time. The Coalition of Labor Union Women commented that the proposed increase was ''inadequate to discourage employers from ignoring their clear statutory obligation to provide sufficient FMLA notice to their workers.''

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 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 Department proposed to increase the CMP to $110 to meet requirements of the Debt Collection Improvement Act of 1996, which amended the Federal Civil Penalties Inflation Adjustment Act of 1990 to require that federal agencies 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 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. Therefore, although the amount of inflation since June of 1993 has exceeded 10 percent, the Department's proposal to amend § 825.300(a) to provide for assessment of a penalty of $110 for willful violations of the posting requirement is limited by these statutory constraints and is adopted as proposed.

Eligibility Notice

The Department proposed to consolidate the existing eligibility notice requirements in current §§ 825.110 and 825.301 into one section in § 825.300(b) and to strengthen and clarify them. Consistent with the requirement in current § 825.110(d), proposed § 825.300(b)(1) required an employer to advise an employee of his or her eligibility status when the employee requests leave under the FMLA. The Department proposed in § 825.300(b)(1) to extend the time frame for an employer to respond to an employee's request for FMLA leave from two business days to five business days of the employee's request for leave or of the employer acquiring knowledge that the leave may be for a FMLA-qualifying reason. The Department sought comment on whether this increased time frame would both impart sufficient information to employees in a timely manner and be workable for employers. Proposed § 825.300(b)(2) specified what information an employer must convey to an employee as to eligibility status, including whether the employee still has FMLA leave available in the current 12-month FMLA leave period. It also required, if the employee was determined not to be eligible or to have no FMLA leave available, that the employer state the reasons why the employee was not eligible. If the employee was determined to be eligible, proposed § 825.300(b)(3) required the employer to provide the employee with specific notice of his or her rights and obligations under the law and the consequences of failing to meet those obligations, consistent with current § 825.301(b)(1). The Department proposed to add language at § 825.300(b)(3)(iii) requiring that, when an employer notifies an eligible employee of the right to substitute employer-provided paid leave and the conditions related to any such substitution, the employer also must inform the employee that he or 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). Proposed § 825.300(b)(3)(v) provided that employers should include a list 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 when the employee returns to work. Proposed § 825.300(b)(4) retained the language from current § 825.301(b)(2) which provides that the eligibility notice may, but is not required to, include other information, such as whether the employer will require periodic reports of the employee's status and intent to return to work. Proposed § 825.300(b)(5) provided that the eligibility notice should be accompanied by any required medical certification forms. Consistent with current § 825.301(c), proposed § 825.300(b)(6) required that the eligibility notice to be provided no less often than the first time in each six-month period that the employee gives notice of the need for leave (if the employee takes leave in that six-month period) and, if leave has already begun, that the notice be mailed to the employee's address of record. It also required that the notice be given within a reasonable time after notice of the need for leave is given by the employee, and should be within five business days if feasible. Proposed § 825.300(b)(7) provided that if the information changed with respect to a subsequent period of FMLA leave during the six-month period, the employer should, within five business days, provide notice to the employee of any information that has changed from a previous eligibility notice. Consistent with the current § 825.301(c)(2), proposed § 825.300(b)(8) provided that if an employer requires a medical certification or fitness-for-duty certification, written notice of the requirement must be given for each 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 § 825.300(b)(9) retained the requirement from current § 825.300(d) that employers are expected to responsively answer employees' questions about their rights and responsibilities under the FMLA. Finally, proposed § 825.300(b)(10) referenced an optional prototype eligibility notice, included as Appendix D, which reflected the changes in the proposed regulation and the Department's attempt to simplify the form for easier use and adaptability.

The final rule adopts proposed § 825.300(b) with several modifications. Final § 825.300(b)(1) reinserts the qualifying phrase ''absent extenuating circumstances'' that appears in current § 825.110(d) and clarifies the frequency that the eligibility notice must be provided, codifying in the regulations Wage and Hour Opinion Letter FMLA–112 (Sept. 11, 2000). Final § 825.300(b)(2) requires that, if an employee is not eligible for FMLA leave, the employer's notice to the employee need only state at least one reason why the employee is not eligible. A new § 825.300(b)(3) has been added to the final rule clarifying when subsequent eligibility notice must be provided in the same leave year. Proposed § 825.300(b)(3) has been redesignated as final § 825.300(c) setting forth the employer's obligation to provide notice of the employee's rights and responsibilities. The final rule clarifies that this Rights and Responsibilities notice must be provided at the same time the eligibility notice is provided. The final rule deletes the requirement in proposed § 825.300(b)(3)(v) that the employer provide a list of the essential job functions with the eligibility notice. The final rule requires that this list of

essential job functions be provided with the designation notice if the employer will require that the fitness-for-duty certification address the employee's ability to perform the essential functions of the position. The final rule renumbers proposed § 825.300(b)(4) and (b)(5) as final § 825.300(c)(2) and (c)(3). The final rule deletes proposed § 825.300(b)(6) and (b)(8). Proposed § 825.300(b)(7) is renumbered as final § 825.300(c)(4) and modified to require the employer to notify the employee of any change in the information contained in the notice of rights and responsibilities within five business days of the first notice of the need for leave following any such change.

Many commenters addressed the requirement in proposed § 825.300(b)(1) 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. Many employers and employer representatives supported increasing the time to provide the eligibility notice from two to five business days. Infinisource, Inc. and Cummins Inc. noted that the increased time frame will allow employers to gather the information necessary to determine eligibility and respond to a leave request. *See also* Hinshaw & Culbertson; U.S. Small Business Administration's Office of Advocacy; Community Health and Counseling Services. Hewitt Associates commented that the increased time was ''a significant improvement'' as ''[e]mployers have consistently been challenged by completing the eligibility * * * notice within two days given the confirmations to be made and calculations to be performed.'' Hewitt Associates also noted, however, that the increased time frame was a ''trade-off'' as the proposed regulations ''would require employers to provide even more information than they do currently.'' Southwest Airlines commented that the new time frame was ''a welcome addition, particularly in light of the additional extensive information to be included'' and also noted it was ''particularly appropriate when considering * * * employers with multiple work locations.'' Other commenters felt the increased time was still insufficient. Verycruysse Murray & Calzone commented that, ''the relaxation of the response period from two business days to five days will not be sufficient for many employers to ensure that all of the information to be gathered and communicated is correct and accurately reflected on the form.'' Willcox and Savage stated the process of verifying the employee's eligibility and availability of leave ''can be extremely time-consuming, especially if intermittent leave has been used'' and suggested providing a ten-day time frame. New York City (NY) Law Department stated that five business days may not be adequate for employees who use unscheduled intermittent leave and suggested that it should be sufficient for an employer to provide such employees eligibility notification once upon completion of a medical certification rather than each time the employee uses intermittent leave.

On the other hand, some commenters objected that five days was too long for the employee to have to wait for a determination of eligibility. The Legal Aid Society, Employment Law Center asked, ''What is an employee expected to do while waiting for her employer to determine her eligibility? Take the time off work and risk being terminated * * * ?'' *See also* Tracy Hutchinson. Another commenter, Frank Sample, pointed out that ''[a]n employee denied information for a week may make improper decisions regarding their care and treatment which is wholly unfair to an ill employee or their family.'' Other commenters stated that the two-day time frame was reasonable and the increase to five days unnecessary. *See,* Linda Gore; Cindy Whitmore; Richard Mielke. The National Partnership for Women & Families also opposed the increased time frame, objecting that ''throughout the NPRM, there are proposed changes that shorten employees' time frames for meeting requirements for FMLA leave while employers would be given more time to respond to requests for FMLA leave.'' *See also* AFL–CIO.

The final rule in § 825.300(b)(1) adopts the Department's proposal to increase the time frame for providing the eligibility notice from two to five business days and also reinstates the ''absent extenuating circumstances'' language from current § 825.110(d). The numerous comments that the two-day turnaround time is, in practice, very difficult to meet illustrate the necessity of this change. The Department also believes that extending this time frame to five business days affords the employer with the opportunity to calculate more accurately whether the employee is, in fact, eligible without compromising the employee's FMLA rights.

Addressing proposed § 825.300(b)(1) more generally, the Metropolitan Transportation Authority (NY) commented that the ''trigger [for determining eligibility] also needs to be revisited'' and indicated that it was unreasonable to require a large employer to ''discern from thousands of sick leave requests the ones that may indicate a pattern of leave usage that may be consistent'' with the FMLA. The Department acknowledges that the timing and frequency of the eligibility notice was unclear in the NPRM and could be read to require the employer to provide the notice every time an employee gave notice of an absence that might be FMLA-protected. Proposed § 825.300 contained elements drawn from current §§ 825.110(d), 825.208 and 825.301, each of which had different timing requirements for the provision of information related to eligibility, designation, and notice of rights and responsibilities, respectively. While the consolidation of the employer notice requirements into a single section in the proposal made it easier for employers to identify and comply with their notice obligations, the proposal did not resolve the differing timing requirements for the various notices employers must provide. For example, proposed § 825.300(b)(1) was based on current § 825.110(d) and required the eligibility notice to be provided within five business days of the employer learning that an employee's absence might be FMLA-protected. In contrast, § 825.300(b)(6) was based on current § 825.301(b) and required the eligibility notice to be provided no less often than every six months (assuming the employee used FMLA leave during the six-month period).

In order to clarify the employer's notice obligations, the final rule re-establishes the distinction in current §§ 825.110(d) and 825.301(b) between notice of the employee's eligibility (*i.e.*, whether the employee meets the requirements of § 825.110(a)) and notice of the employee's rights and responsibilities, and separates the latter into final § 825.300(c). As discussed below, the final rule also clarifies the timing of these two notices and moves the obligation to notify the employee whether he or she has FMLA leave available to the designation notice because the employer is already required to make that determination at the designation stage. The Department believes that these revisions will clarify the rule and result in information being provided to employees in the most logical and timely fashion without resulting in redundant notices or undue burden on employers.

Final § 825.300(b)(1) clarifies the eligibility determination process and codifies in the regulations Wage and Hour Opinion Letter FMLA–112 (Sept. 11, 2000). The eligibility notice

addresses only whether the employee meets the statutory eligibility criteria as discussed in § 825.110(a): Employment by the employer for 12 months; 1,250 hours of service in the 12-month period immediately preceding the request for leave; and employment at a worksite where 50 or more employees are employed within 75 miles. The determination of employee eligibility to take FMLA leave is addressed separately from the determination of whether the employee has FMLA leave to take (or has exhausted all available FMLA leave entitlement) and whether the reason for which the employee needs leave is covered under the FMLA. As clarified in Wage and Hour Opinion Letter FMLA–112, once an employee has been determined to be eligible to take FMLA leave for a particular FMLA-qualifying serious health condition, the employee remains eligible to take FMLA leave for that serious health condition for the remainder of the leave year (although the employee may exhaust his or her FMLA leave entitlement). Wage and Hour Opinion Letter FMLA–112 (stating that ''an employee's eligibility, once satisfied, for intermittent FMLA leave for a particular condition would last through the entire current 12-month period as designated by the employer for FMLA leave purposes''). The final rule applies this same standard to leave taken for a qualifying exigency and for military caregiver leave. If an employee needs leave for a different FMLA-qualifying reason during the same leave year, the employee's eligibility to take FMLA leave (*i.e.*, whether the employee has worked 1,250 hours of service in the immediately preceding 12 months and whether 50 or more employees are employed at the worksite) is determined separately as to leave for that reason. Accordingly, final § 825.300(b)(1) clarifies that the eligibility notice must be provided ''at the commencement of the first instance of leave in the 12-month FMLA leave year for each FMLA-qualifying reason'' and that eligibility to take FMLA leave ''as to that reason for leave does not change during the leave year.'' If an employee needs FMLA leave due to a different FMLA-qualifying reason in the same leave year and is determined not to be eligible as to that second qualifying reason, § 825.300(b)(3) of the final rule requires the employer to notify the employee of the change in eligibility status within five business days, absent extenuating circumstances, of the employee's request for leave due to the second reason. The final rule sets out in similar fashion the frequency with which eligibility must be determined for leave to care for a covered servicemember with a serious injury or illness.

To further clarify the eligibility determination procedure under the final rule, the employer's obligation to notify the employee of the specific expectations and obligations related to the employee's FMLA leave is moved from proposed § 825.300(b)(3) to final § 825.300(c) titled ''Rights and responsibilities notice.'' The Department notes that this is not a new notice obligation; the same obligation exists under current § 825.301(b) and was included in proposed § 825.300(b)(3). Moving this requirement into a separate paragraph more closely resembles the structure of the current regulations, which address the employer's obligation to notify the employee of his or her eligibility and the obligation to notify the employee of the expectations and obligations associated with the leave in different sections of the rule. Lastly, the final rule also modifies some of the data elements in both the eligibility and rights and responsibilities notices; those changes are discussed below in connection with the comments regarding the corresponding provisions in the NPRM.

Several commenters addressed proposed § 825.300(b)(2) that required employers to provide employees with specific information regarding eligibility and whether the employee still has any FMLA leave available in the current 12-month FMLA leave period. Willcox and Savage objected that the proposed accounting and reporting requirements are unwarranted and burdensome, especially absent ''any assurance that the employee will take the contemplated leave,'' and that the employer may not have recorded the hours uniformly or consistently with ''specific twelve-month periods.'' Other commenters objected to the content of the eligibility notice. AT&T commented that the eligibility notice ''invites employees to request information about eligibility and entitlement without imminent need for leave'' and expressed concern that employees will inundate their managers with such requests. Spencer Fane Britt & Browne commented that it would be burdensome (both in the amount of time needed for the calculations and in the potential for error) for the employer and questioned the usefulness of explaining exactly why the employee is not eligible if an ineligible employee does not have FMLA rights. *See also* Vercruysse Murray & Calzone.

The final rule in § 825.300(b)(2) adopts the proposal with modifications. The Department notes that the requirement to inform employees if they are eligible to take FMLA leave is not a new one, and the obligation has always been triggered by the employee providing notice of the need for leave that may be covered under the FMLA. *See* current §§ 825.110(d), 825.302, 825.303. Proposed § 825.300(b)(2), which is retained in the final rule, added a new requirement that when an employer determines that an employee is not, in fact, eligible to take FMLA leave, the employer must so inform the employee and indicate the reasons the employee is not eligible. The final rule modifies this obligation, however, by limiting the notification that an employee is ineligible to any one of the potential reasons why an employee fails to meet the eligibility requirements. Thus, for example, if an employee has worked for the employer for fewer than 12 months, the employer would be able to so indicate to the employee and would not, then, still be required to calculate (and notify the employee of the results of those calculations) whether the employee had worked 1,250 hours in the 12 months prior to the requested leave. The final rule also removes from the eligibility notice the requirement that the employer notify the employee whether the employee still has FMLA leave available. The determination of whether the employee has FMLA leave available or has exhausted the FMLA leave entitlement is part of the designation of FMLA leave process under both current § 825.208 and proposed § 825.300(c). Accordingly, the final rule moves the requirement to inform the employee of whether he or she has FMLA leave available to new § 825.300(d), which addresses the designation notice.

Rights and Responsibilities Notice

As discussed above, the final rule moved proposed § 825.300(b)(3) to final § 825.300(c), separating the notice of rights and responsibilities from the notice of eligibility. To simplify the timing of the notice of rights and responsibilities and to avoid unnecessary administrative burden on employers, § 825.300(c)(1) of the final rule requires employers to provide this notice to employees at the same time they provide the eligibility notice. Additionally, if the information in the notice of rights and responsibilities changes, § 825.300(c)(4) also requires the employer to notify the employee of any changes within five business days of the first notice of the need for FMLA leave subsequent to any change. This timing requirement will ensure that employees receive timely notice of the expectations and obligations associated with their FMLA leave each leave year

and also receive prompt notice of any change in those rights or responsibilities when leave is needed during the leave year. The final rule also makes several changes in the information included in the notice of rights and responsibilities, which are addressed below.

Several commenters addressed proposed § 825.300(b)(3), which is moved to paragraph (c) of this section in the final rule, specifying the information that must be included in the eligibility notice. The final rule modifies proposed § 825.300(b)(3)(i), which is moved to final § 825.300(c)(1)(i), to require employers to notify employees of the method used for establishing the 12-month period for FMLA entitlement, or, in the case of military caregiver leave, the start date of the ''single 12-month period.'' The Department believes that this change will provide employees with information that is crucial to their understanding of their FMLA leave rights. The final rule redesignates proposed § 825.300(b)(3)(ii) and (iii) as § 825.300(c)(1)(ii) and (iii), but otherwise makes no changes in these paragraphs (other than incorporating references to the military family leave provisions where applicable). In commenting on proposed § 825.300(b)(3)(iii), Vercruysse Murray & Calzone objected to the level of detail required regarding the conditions applicable to any paid leave that is substituted for FMLA leave, because this information is typically contained in employee handbooks or paid leave plans. The Department redesignates proposed § 825.300(b)(3)(iii) as § 825.300(c)(1)(iii) and adopts it as proposed, requiring that employers include in the eligibility notice an explanation of conditions applicable to the use of paid leave that runs concurrently with unpaid FMLA. The Department notes that this requirement is in current § 825.301(b)(1)(iii). The NPRM only proposed to expand this section to require that employers also notify employees of their continuing entitlement to take unpaid FMLA leave if they do not comply with employer-required conditions for use of paid leave. To clarify, however, the Department notes that an employer may meet the requirements of providing information about the conditions related to the substitution of paid leave by reference to existing, employee-accessible copies of such policies. *See* Appendix D.

A number of commenters addressed the requirement in proposed § 825.300(b)(3)(v) that an employer provide a list of the essential functions of the employee's position with the eligibility notice if the employer will require a fitness-for-duty certification that addresses those functions. Domtar Paper Company supported the proposed change, stating that while it will require additional administrative burden for employers, it ''is a valid requirement if the employer wants the option to be able to determine fitness for duty at some point in the future.'' *See also* National Business Group on Health; Community Health and Counseling Services. Other commenters opposed this proposal, arguing that it would be administratively burdensome to provide a list of the employee's essential job functions at the eligibility notice stage. Hewitt Associates commented that ''many [employers] struggle with maintaining usable job descriptions.'' Vercruysse Murray & Calzone commented that five days would not be sufficient for large employers to find the applicable job description, verify its accuracy, and revise it as necessary to reflect the actual essential functions of the employee's position, or in other cases, to create new job descriptions. ORC Worldwide commented that the proposal would be burdensome because ''large employers would feel compelled to require Fitness-for-Duty certifications in all instances to preserve their rights. Allowing employers additional time to properly evaluate the employee's condition and determine whether there are any job-related concerns will also minimize the burden on employees, who would otherwise not be required to submit medical documentation for brief absences.'' The Equal Employment Advisory Council commented the proposal would be burdensome ''by requiring employers to assess and list the essential functions of the job that are unique to each employee requesting leave when it may not ever be necessary to do so'' and specifically recommended that ''the employer be permitted to state in the Eligibility Notice merely that a fitness-for-duty certification *may* be required.'' (Emphasis in original.) The HR Policy Association also questioned the utility of providing a list of essential functions of the employee's job with the eligibility notice, noting that ''at the Eligibility Notice stage, an employer has not yet received the medical certification form from the employee's health care provider, which details the employee's medical condition and allows an employer to determine whether a Fitness-for-Duty certification is even permissible under the law.'' (*See also* discussion of § 825.310, which discusses additional comments on this subject.)

After careful consideration of these comments, the Department has modified the timing requirement for providing the list of essential functions of the employee's position if the employer will require that the fitness-for-duty certification address the employee's ability to perform those functions. For the reasons discussed in § 825.310, employers will not be required to provide the list of essential functions with the eligibility notice. Instead, as noted in the designation notice discussion below, if the employer will require that the fitness-for-duty certification specifically address the employee's ability to perform the essential functions of the employee's job, the employer must provide the employee with a list of the essential functions no later than with the designation notice required by final § 825.300(d), and the employer must also indicate in the designation notice that the fitness-for-duty certification must address the employee's ability to perform those essential functions. As a consequence of these modifications, the final rule deletes proposed § 825.300(b)(3)(v) and renumbers the remaining paragraphs in § 825.300(c)(1) accordingly.

The Department did not receive significant comments on proposed § 825.300(b)(4). The final rule redesignates paragraph (b)(4) as (c)(2) and changes the reference from ''eligibility notice'' to ''notice of rights and responsibilities,'' but otherwise makes no change.

A few comments addressed proposed § 825.300(b)(5), which states that the eligibility notice should be accompanied by any required medical certification form. Verizon requested clarification of the requirement that any required medical certification form accompany the eligibility notice:

> In Verizon, over 6,000 eligibility notices are sent out each week. Approximately 2,800 medical certification forms are received each week for processing. The paper that is wasted with respect to those that do not submit a certification form is, at Verizon alone, over half a million sheets of paper per year * * *. While it is the employer's obligation to make required certification forms available in a manner that is reasonable (i.e., included with eligibility letter, electronically, or upon request), we are sure that the Department will clarify that it is not requiring that employers engage in the wasteful extravagance of mailing literally tons of paper for no purpose.

See also National Restaurant Association. The Department did not intend that proposed § 825.300(b)(5) be read to require the employer to provide the employee with the medical certification form in instances when one would not be submitted and has altered the wording of this provision in final

§ 825.300(c)(3) to indicate that the medical certification may be included with the notice of rights and responsibilities. The Department notes that both the employer and employee have an interest in the prompt determination of whether leave is covered by the FMLA and the early provision of any required medical certification form facilitates this determination; employers are not, however, required to provide the certification form with the notice of rights and responsibilities.

Although proposed § 825.300(b)(6) sets forth a timing requirement that was inconsistent with the timing requirement contained in proposed § 825.300(b)(1), the Department did not receive any significant comment regarding this provision. As explained above, § 825.300(b) of the final rule clarifies the timing of the eligibility notice and final § 825.300(c) clarifies the timing of the notice of rights and responsibilities. The requirement to provide both of these notices is timed to the employee's need for this information, which, in many cases, is much less frequent than either with each FMLA-protected absence or every six months. Accordingly, the final rule deletes proposed § 825.300(b)(6).

The Department did not receive significant comments on proposed paragraphs (b)(7), (b)(8), (b)(9), or (b)(10) of this section. The final rule redesignates paragraph (b)(7) as (c)(4) and clarifies that notice of any changes in the rights and responsibilities notice must be provided within five business days of the first notice of an employee's need for leave subsequent to any change. The final rule deletes proposed paragraph (b)(8), which addressed notification of the requirement for medical certification or fitness-for-duty certification, because final paragraph (c)(1)(ii) addresses information regarding the requirement for medical certification, and the requirement for information regarding fitness-for-duty certification is addressed in the designation notice in final § 825.300(d). Proposed paragraph (b)(9) is redesignated as final paragraph (c)(5) and adopted without change. Finally, proposed paragraph (b)(10) has been adopted as final paragraph (c)(6), and the prototype notice is redesignated as the ''Notice of Eligibility and Rights and Responsibilities.'' Final § 825.300(c)(6) has also been modified to permit electronic distribution of the notice of rights and responsibilities, so long as the employer can demonstrate that the employee (who may already be on leave and who may not have access to employer-provided computers) has access to the information electronically.

Designation Notice

Under the current and proposed regulations, the employer must notify the employee when leave is designated as FMLA leave. Proposed § 825.300(c) outlined the requirements of the designation notice an employer must provide to an employee. (Additional requirements concerning employer designation of FMLA leave are found at proposed and final § 825.301.) The Department's proposal sought to clarify and strengthen the existing designation notice requirements contained in current § 825.208(b) in a number of ways.

Proposed § 825.300(c)(1) required that, once the employer has enough information to determine whether the leave qualifies as FMLA leave, the employer must notify the employee within five business days of making the determination whether the leave has or has not been designated as FMLA leave. This was an increase from the two-day time frame in current § 825.208(b)(1). Proposed § 825.300(c)(1) also required the employer to inform the employee of the number of hours, days or weeks that would be designated as FMLA leave. To the extent it is not possible to provide such information (such as in the case of unforeseeable intermittent leave), the Department proposed that the employer be required to provide such information to the employee every 30 days if the employee took leave during the 30-day period. In addition, proposed § 825.300(c)(1) provided that if the employer requires that paid leave be substituted for unpaid leave, or that paid leave taken under an existing leave plan be counted as FMLA leave, the employer must inform the employee of this designation at the time the leave is designated as FMLA leave. Proposed § 825.300(c)(2) required the designation notice to be in writing, but indicated that it may be in any form, including a notation on the employee's pay stub, and that if the leave is not designated as FMLA leave, the notice to the employee may be in the form of a simple written statement. Proposed § 825.300(c)(3) permitted an employer to provide an employee with both the eligibility and designation notice at the same time in cases where the employer had adequate information to designate leave as FMLA leave when an employee requested the leave. Proposed § 825.300(c)(4) referred to a new optional prototype designation notice in Appendix E that an employer could use to satisfy its obligation to notify an employee that leave taken for a qualifying reason is or is not designated as FMLA leave.

The final rule redesignates proposed paragraph (c) as final paragraph (d) of this section and makes several changes to clarify the timing and content of the designation notice, as well as the shift of notice of the requirement for a fitness-for-duty certification from the eligibility notice in the NPRM to the designation notice in the final rule. The final rule moves the statement of the employer's obligation to provide the designation notice from proposed § 825.301(a) to final § 825.300(d)(1) so that the structure of the designation notice in paragraph (d) of this section more closely parallels the structure of the eligibility notice in paragraph (b) of this section and the rights and responsibilities notice in paragraph (c) of this section. The final rule in paragraph (d)(1) also includes reference to the military family leave provisions. The Department moved proposed § 825.300(c)(3) to § 825.300(d)(2) in the final rule, and made minor wording changes. Final § 825.300(d)(3) requires employers to notify employees of the requirement to provide a fitness-for-duty certification no later than the designation notice. Proposed paragraphs (c)(2) and (c)(4) of this section have been combined and redesignated as final § 825.300(d)(4). A new paragraph (d)(5) has been added to this section of the final rule requiring the employer to notify the employee if the information provided in the designation notice changes (*e.g.*, if the employee exhausts the FMLA leave entitlement). Lastly, the final rule distinguishes between designation of leave for a specific qualifying reason as FMLA-covered and notification of the particular hours of leave that have been counted against the FMLA entitlement, a distinction that is implicit in current § 825.208 and in proposed § 825.300(c), and moves the obligation to notify the employee of the amount of leave counted as FMLA to final § 825.300(d)(6).

The Department received many comments on designation. Several commenters supported the proposal at § 825.300(c)(1) to increase the time frame for providing the designation notice from two to five business days. *See* Retail Industry Leaders Association. Cummins Inc. commented that the increased time frame ''coupled with the strengthened medical certification process, will provide the necessary time for employers to appropriately respond to an FMLA leave request.'' The Illinois Credit Union League supported the extended time frame but requested additional time ''if the individual with FMLA responsibilities is out of the

office on vacation, for example.'' Verizon acknowledged that five days is ''certainly reasonable'' but objected that the time frame was ''inflexible'' because it did not provide for ''exceptional or unusual circumstances.'' Some employers, on the other hand, objected that the five business days proposed was still inadequate. Southwest Airlines noted that the requirement was ''particularly unreasonable for employers * * * with multiple worksites and/or local, decentralized recordkeeping.'' *See also* Metropolitan Transportation Authority (NY); Regence. Spencer Fane Britt & Browne stated, ''[a]lthough we believe the five-day rule is an improvement over the existing two-day rule and certainly more realistic, we question whether such a rule is even necessary in light of the *Ragsdale* decision'' and interpreted the proposed rule to allow notification outside the five-day rule ''if the employee suffers no harm.'' Others viewed the increase less favorably. *See* Cindy Whitmore. The National Partnership for Women & Families commented that the change ''provides another example of the pattern in the NPRM of employees requesting leave having less time to meet new requirements and time frames and employers having more time to respond to requests.'' The Communications Workers of America also opposed ''giving employers additional time to process FMLA paperwork without giving employees an equal extension of time to provide responsive documentation requests'' and further expressed a concern that the failure to timely designate leave may result in related absences also being denied, ultimately leading employees ''to abandon their FMLA rights.''

A significant number of comments from employers, employer representatives, and employer associations objected to proposed § 825.300(c)(1)'s requirement that, in situations involving unscheduled intermittent leave, employers provide employees notice every 30 days of the amount of leave that has been designated as FMLA-qualifying if the employee took leave during the 30-day period. Community Health and Counseling Services called the notification requirement ''an administrative nightmare—especially with the time records always in arrears upwards of two weeks.'' The New York City (NY) Law Department commented that this proposal placed ''an undue burden on employers who may have many employees frequently using intermittent leave.'' This commenter and the Chamber suggested that employers be required to provide employees with such information upon request, but not more often than every 30 days. The Catholic Charities, Diocese of Metuchen recommended the designation notice ''only be provided to the employee more frequently than every six months if the employee's leave will not be considered FMLA leave.'' The Unified Government of Wyandotte County/Kansas City (KS) agreed, stating its concern about the increased workload that will be caused by the reporting of leave used to employees taking leave each month. Willcox and Savage commented that the proposal was unnecessary since many employees using unscheduled intermittent leave do not begin to exhaust their twelve-week entitlement. *See also* Ohio Department of Administrative Services; Columbus (OH) City Attorney's Office; Illinois Credit Union League; and Vercruysse Murray & Calzone. The AFL–CIO, however, supported the requirement and stated the information required to be provided in a 30-day notice ''will also facilitate leave-related decisions by employees who take unforeseen, intermittent leave.'' Community Legal Services, Inc./AIDS Law Project of Pennsylvania also supported the Department's proposal but urged the Department ''to go further and require that employers inform employees who are on leave when they are within a week of exhausting their FMLA leave.''

The Department considers communication between the employer and the employee to be critical to the smooth administration of the FMLA and has significantly modified the process for designating FMLA leave to ensure that employees receive timely notification both that leave for a particular condition will be FMLA-protected and the number of hours that will be counted against their FMLA leave entitlement in a manner that is not unduly burdensome for employers. The Department is cognizant of the various factors that employers must consider before determining whether an employee's leave should be designated as FMLA leave and the administrative burden imposed by having to make this determination in a short time frame. Accordingly, final § 825.300(d)(1) modifies the timing of the designation notice, requiring the employer to notify the employee whether a leave of absence will be designated as FMLA leave within five business days absent extenuating circumstances of when the employer has sufficient information to determine whether the leave is being taken for a FMLA-qualifying reason. Final § 825.300(d)(1) further clarifies that only one designation notice is required for each FMLA-qualifying reason per leave year, regardless of whether the leave is taken as a continuous block of leave or on an intermittent or reduced leave schedule basis. In order to clarify the distinction between designating leave taken for a qualifying reason as FMLA-protected and notifying the employee of the number of hours counted against the FMLA leave entitlement, the final rule moves the latter requirement to a new paragraph (d)(6) of this section; this requirement applies also to the military family leave provisions. This distinction is implicit in both current § 825.208 and proposed §§ 825.300(c) and 825.301(a). Under § 825.300(d)(6) of the final rule, if the amount of leave needed is known at the time of the employer's designation of the leave as FMLA leave, the employer must notify the employee of the amount of leave that will be counted against the employee's FMLA leave entitlement in the designation notice. The Department finds persuasive the comments that the automatic 30-day tracking, recording, and reporting to intermittent FMLA leave-takers of the amount of leave counted as FMLA required by proposed § 825.300(c)(1) would be unduly burdensome. Accordingly, in situations in which the amount of leave to be taken is not known at the designation stage (*e.g.*, when unforeseeable intermittent leave will be needed), the final rule modifies the employer's obligation, requiring employers to inform the employee of the number of hours counted against the FMLA leave entitlement only upon employee request, and no more often than every 30 days if FMLA leave was taken during that period. In order to lessen the burden of this notification, and consistent with current § 825.208(b)(2), the final rule also permits the employer to notify the employee of the hours counted against the FMLA leave entitlement orally and follow up with written notification on a pay stub at the next payday (unless the next payday is in less than one week, in which case the notice must be no later than the subsequent payday). By clarifying that this requirement can be met with simple notation of FMLA leave on a pay stub, the Department believes that employers will be able to provide the necessary information to employees in a timely fashion with minimal additional burden. To further encourage employers to provide notice to the employee at the earliest possible stage, the Department has also moved proposed § 825.300(c)(3) to final

§ 825.300(d)(2), to emphasize that the employer is expressly permitted to provide the designation and eligibility notices simultaneously upon an employee's request for FMLA leave, if the employer has sufficient information to do so at that time.

The Department has included a new § 825.300(d)(3), consistent with the changes in the final rule in § 825.300(c) and the discussion above, to require that the employer provide written notice of any requirement for a fitness-for-duty certification, including indicating whether the fitness-for-duty certification must address the employee's ability to perform the essential functions of the employee's position and, if so, to provide a list of the essential functions of the employee's position, with the designation notice. If the employee handbook or other written documents clearly provide that a fitness-for-duty certificate will be required, written notice is not required, but oral notice must be provided.

The final rule combines proposed § 825.300(c)(2) and (c)(4), both of which addressed the form of the designation notice, and redesignates them as § 825.300(d)(4). Because pay stub designation is more appropriate for notifying employees of the amount of leave counted against the FMLA leave entitlement, reference to designation by pay stub notation has been deleted from this paragraph of the final rule and moved to final § 825.300(d)(6). As noted above, final § 825.300(d)(6) reinstates oral notification of the amount of leave counted as FMLA leave with written follow-up notification; such designation is permitted under current § 825.208(b)(2), but had been removed from proposed § 825.300(c). The prototype designation notice referenced in final § 825.300(d)(4) has been modified consistent with the final rule.

Finally, the final rule adds a new § 825.300(d)(5) that requires employers to notify employees if the information in the designation notice changes. For example, if an employee exhausts his or her FMLA leave entitlement and the leave will no longer be designated as FMLA leave, the employer must provide the employee with written notice of this change consistent with this section.

Consequences of Failing To Provide Notice

The Department proposed a new paragraph at § 825.300(d) to address concerns arising out of the U.S. Supreme Court's decision in *Ragsdale* v. *Wolverine World Wide, Inc.*, 535 U.S. 81 (2002). This paragraph provided a remedy provision that is dependent on an employee having suffered individualized harm as a result of any violation of the general, eligibility, or designation notice requirements. The Department's proposal clarified that failure to comply with the notice requirements set forth in this section could constitute interference with, restraint of, or denial of the use of FMLA leave. The proposal further provided that, if the employee is able to demonstrate harm as a result of the employer's failure to provide a required notice, the employer could 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. *See also* § 825.301(e).

Few commenters addressed this provision and most agreed with the proposed changes. The National Partnership for Women & Families, for example, agreed that proposed § 825.300(d) is necessary given the *Ragsdale* decision, and suggested the final rule make clear that ''one of the equitable remedies an employee may obtain is additional leave.'' As in any action arising under the FMLA, any remedy is specific to the facts of the individual's circumstance, and a court may order any appropriate relief. Therefore, no change to the proposal is necessary, and the final rule adopts proposed paragraph (d) as final paragraph (e) without modification. *See also* the preamble discussion of § 825.301 for additional discussion of the designation and remedy provisions.

Section 825.301 (Employer Designation of FMLA Leave)

The Department proposed to delete current § 825.301, which addressed employer notices to employees, because its requirements were incorporated into proposed § 825.300 as discussed above. Provisions in current § 825.208 addressing designation of FMLA leave, to the extent not incorporated into proposed § 825.300(c), were moved to proposed § 825.301.

Proposed § 825.301(a) stated an employer's obligations regarding timely designation of leave as FMLA-qualifying and reiterated the requirement to notify the employee of the designation within five business days as proposed in § 825.300. This section required that the employer's designation decision be based only on information received from the employee or the employee's representative and also provided that, if the employer does not have sufficient information about the employee's reason for leave, the employer should inquire further of the employee or of the employee's spokesperson. The section further provided that, in the case of intermittent leave or leave on a reduced schedule, only one such notice is required unless the circumstances regarding leave have changed. Proposed § 825.301(b) outlined employee responsibilities, with cross-references to proposed §§ 825.302 and 825.303, which addressed what constitutes sufficient information an employee must communicate to an employer when needing FMLA leave. Among other things, proposed § 825.301(b) required that an employee (or his or her spokesperson) provide sufficient information to allow the employer to determine that the leave qualifies under the FMLA, but the employee need not expressly assert rights under the Act or even mention the FMLA. Proposed § 825.301(b) also explained that the consequences for an employee's failure to satisfy these responsibilities could include delay or denial of FMLA leave. Proposed § 825.301(b), as a matter of clarification, deleted the word ''unpaid'' found in current § 825.208(a)(2), as these employee responsibilities apply whether the leave is paid or unpaid. Proposed § 825.301(c) provided that if there is a dispute between an employee and employer about whether leave qualifies as FMLA leave, it should be resolved through discussion and the dispute resolution documented. Proposed § 825.301(d) permitted retroactive designation under certain circumstances. Additionally, the Department proposed in § 825.301(d) that in all cases where leave is FMLA-qualifying, an employer and an employee can mutually agree that the leave be retroactively designated as FMLA leave. Proposed § 825.301(e) clarified that, if an employer failed to timely designate leave 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. Proposed § 825.301(e) provided that failure to timely designate may constitute an interference with, restraint of, or denial of, the exercise of an employee's FMLA rights. This section clarified that, if the employee is able to establish prejudice as a result of the employer's failure to designate leave properly, an employer could 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. The Department provided examples 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. Lastly, the Department's proposal eliminated the ''provisional designation'' concept that appears in current § 825.208(e)(2).

Southwest Airlines noted that the provision in proposed § 825.301(a) allowing only one designation notice in the case of intermittent or reduced schedule leave, unless the circumstances of the leave have changed, coupled with the new requirement to provide designation notice as often as every 30 days created ''confusion as to whether an employer is obligated to provide the designation notice every 30 days, or only once.'' The Department agrees that the proposal did not clearly distinguish between the employer's obligation to designate a leave of absence as FMLA-qualifying, which generally applies only once per leave year for each FMLA-qualifying reason, and the employer's obligation to notify the employee of how much leave is to be counted against the employee's FMLA leave entitlement, which must be determined for each absence. As discussed above, the final rule clarified these two obligations in final § 825.300(d)(1) and (d)(6). As part of this clarification, both the general statement of the employer's obligation to designate leave as FMLA-protected and the statement regarding the need to designate intermittent and reduced schedule leave only once were moved from proposed § 825.301(a) to final § 825.300(d)(1), with modifications.

The Department did not receive significant comments regarding proposed § 825.301(b) and (c). Therefore, the final rule adopts these provisions as proposed with minor editorial changes, including the deletion of some references to ''paid leave'' that were unnecessary.

Several commenters agreed that proposed § 825.301(d) and (e) accurately reflected the Supreme Court's decision in *Ragsdale* v. *Wolverine World Wide, Inc.*, 535 U.S. 81 (2002). *See* Equal Employment Advisory Council; the Association of Corporate Counsel's Employment and Labor Law Committee; TOC Management Services; the Chamber; Community Health and Counseling Services; National Association of Wholesaler-Distribution. The American Foundry Society concurred but requested clarification regarding at ''what point an employer's obligations are triggered to make follow-up inquiries.'' The AFL–CIO agreed specifically with the proposed revisions to § 825.301(e) concerning remedies. Hewitt Associates commented that ''employers will find [the example provided in that section] highly instructive'' and suggested adding other examples. The National Retail Federation however, objected that the ''equitable relief language for harm caused by interference with FMLA rights is problematic'' and ''too vague about how the loss of FMLA rights directly results in monetary harm.'' The Illinois Credit Union League commented that the remedy provision (specifically citing to the provision as it appears at proposed § 825.300(d)) was ''particularly troubling'' and objected that ''interference with a 'right' suggests something more than failure to provide notice.'' The National Association of Convenience Stores stated the *Ragsdale* decision rendered the designation requirements of no effect and recommended that any designation requirement be eliminated from the regulations.

The Department does not believe that the *Ragsdale* decision limited the Department's ability to require employer notices beyond a posted general notice. The *Ragsdale* decision invalidated the categorical penalty imposed by § 825.700(a) of the current regulations. The Court stated ''in so holding we do not decide whether the notice and designation requirements are themselves valid or whether other means of enforcing them might be consistent with the statute.'' 535 U.S. at 96. In fact, the Court also stated, ''[t]o be sure, 12 more weeks might be an appropriate make-whole remedy for an employee who would not have taken any leave at all if the [designation] notice had been given,'' lending further support to the validity of the regulatory notice requirements. *Id.* at 93. Therefore, the final rule adopts proposed § 825.301(d) and (e) without modification. The Department notes that retroactive designation consistent with this provision must be accompanied by appropriate notice to the employee as required under § 825.300 and can only be undertaken where it does not cause harm or injury to the individual or where the employee and employer mutually agree to the retroactive designation.

Finally, several commenters addressed the elimination of the ''provisional designation'' concept. The Metropolitan Transportation Authority (NY) supported the elimination, noting that it was a confusing concept for both employers and employees. The National Partnership for Women & Families on the other hand, stated that the Department ''does not explain how this change could affect workers and whether the lack of a provisional designation accompanied by DOL's proposal to grant employers more time to respond to employee's requests for FMLA leave will make employees less likely to take FMLA leave as they will not know quickly whether the leave will be covered.'' The American Association of University Women stated that the elimination of the ''provisional'' designation status was ''particularly troubling'' in light of the increased time frame afforded employers and questioned whether workers might ''be less likely to take leave because it will take that much longer to know whether they are covered, and the leave is not provisionally designated in the meantime.'' The AFL–CIO commented that the ''[p]reliminary designation of FMLA leave gives employees the comfort of knowing that their requests for leave will be approved provided they give their employer requisite information 'which confirms the leave is for an FMLA reason.' ''

The final rule eliminates the ''provisional designation'' concept as proposed. The process for ''provisional designation'' of leave may have caused confusion over whether leave is protected prior to the actual designation, especially in cases where the leave does not eventually qualify for the Act's protections. The Department continues to believe that the deletion of a ''provisional'' designation concept will result in less confusion for employees. If employees take leave that ultimately is determined not to be FMLA-qualifying, it is not protected. A preliminary FMLA designation may have given false comfort to leave takers that their leave would be protected when, in fact, it was not. However, whether the leave is provisionally designated as FMLA leave or not, the leave is only protected by the statute if it is determined to be FMLA-qualifying, such as by timely completion of the medical certification process. Therefore, the proposed rule deleting this provision is adopted.

Section 825.302 (Employee Notice Requirements for Foreseeable FMLA Leave)

Section 825.302 addresses an employee's obligation to provide notice of the need for foreseeable FMLA leave. Proposed § 825.302(a) retained 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 proposed section further added the requirement that when an employee gives less than 30

days advance notice, the employee must respond to a request from the employer to explain why it was not practicable to give 30 days notice. Proposed § 825.302(b) deleted the second sentence of current § 825.302(b), which defined ''as soon as practicable'' as ''ordinarily * * * within one or two business days of when the need for leave becomes known to the employee.'' The NPRM further provided examples of when notice of the need for leave that is foreseeable less than 30 days in advance could practicably be provided. Proposed § 825.302(c) retained the standard from the current regulation 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. The NPRM clarified, however, the information the employee must provide in order to provide sufficient notice to the employer of the need for FMLA leave and added that the employee has an obligation to respond to an employer's questions designed to determine whether leave is FMLA-qualifying. The Department sought comment as to whether a different notice standard requiring that employees expressly assert their FMLA rights should apply in situations in which an employee had previously provided sufficient notice of a serious health condition necessitating leave and was subsequently providing notice of dates of leave due to that same condition. Proposed § 825.302(d) retained the current requirement that an employee comply with the employer's usual notice and procedural requirements for calling in absences and requesting leave, but deleted current language stating that an employer cannot delay or deny FMLA leave if an employee fails to follow such procedures. The proposal qualified the employee's obligation to comply with the employer's customary notice and procedural requirements by noting that the obligation applied ''absent unusual circumstances'' and provided examples of what might constitute unusual circumstances. No changes were proposed to §§ 825.302(e) and 825.302(f). Proposed § 825.302(g) retained language stating that employers may waive employees' FMLA notice requirements but deleted language stating that employers could not enforce FMLA notice requirements if those requirements were stricter than the terms of a collective bargaining agreement, state law or employer leave policy.

Section 825.302(a) of the final rule retains the requirement that employees respond to requests from employers to explain why it was not possible to give 30 days notice of their need for FMLA leave. It also makes clear that the 30-day notice requirement applies to FMLA leave taken for an expected birth, placement for adoption or foster care, planned medical treatment for a serious health condition of the employee or of a family member, or the planned medical treatment for a serious injury or illness of a covered servicemember. For FMLA leave taken for a qualifying exigency, notice must be provided as is practicable. The final rule also retains in § 825.302(b) the statutory standard that notice of the need for leave that is foreseeable less than 30 days in advance must be provided ''as soon as practicable'' and provides guidance as to what notice the Department expects will be practicable in such circumstances. Section 825.302(c) of the final rule continues to provide guidance as to what information an employee may need to provide to constitute sufficient notice, but clarifies that the types of information listed are merely examples and may not be required in all situations. The general notice poster has been revised to include this information as well. The final rule also maintains the employee's obligation to respond to employer inquiries designed to determine if leave is FMLA-qualifying. It adds a requirement that, for FMLA leave taken because of a qualifying exigency, the employee shall provide sufficient information that indicates that a family member is on active duty or call to active duty status, that the requested leave is for one of the reasons listed in § 825.126(a), and the anticipated duration of the absence. Additionally, the final rule requires employees seeking leave for a previously certified FMLA condition, covered servicemember's serious injury or illness, or qualifying exigency to inform the employer that the leave is for a condition, covered servicemember's serious injury or illness, or qualifying exigency that was previously certified or for which the employee has previously taken FMLA leave. The final rule maintains the standard in proposed § 825.302(d) that ''absent unusual circumstances'' employees may be required to comply with employer policies for requesting leave so long as those policies do not require notice to be provided sooner than is practicable. The final rule makes a minor change to § 825.302(e) to clarify that the reference to the scheduling of intermittent leave is merely an example and that the employee's obligation to make reasonable efforts to schedule planned medical treatment so as not to unduly disrupt the employer's operations applies to all FMLA leave whether it is taken as a continuous block of leave or as intermittent or reduced schedule leave. The final rule modified proposed § 825.302(f) to include appropriate references to the military family leave provisions, including the requirement that, for intermittent or reduced schedule leave taken to care for a covered servicemember with a serious injury or illness, the employee shall attempt to schedule such leave to not unduly disrupt the employer's operations. The final rule makes no changes to proposed § 825.302(f) and (g).

Several commenters representing employees took issue with the requirement in the proposed rule that employees who fail to provide 30 days notice of the need for foreseeable leave must explain the reasons for their failure to do so upon request from their employer for such information. *See, e.g.*, National Treasury Employees Union; National Partnership for Women & Families; Legal Aid Society-Employment Law Center; Community Legal Services, Inc./AIDS Law Project of Pennsylvania; American Postal Workers Union. These commenters viewed the requirement as unnecessary and potentially invasive of employee privacy. The AFL–CIO asserted that the requirement ''unduly intrudes upon employee privacy'' and argued that ''[t]here is no reason to give employers unfettered discretion to demand that employees explain why they did not give 30 days notice of leave, particularly where the explanation may require the disclosure of sensitive medical or other personal information.''

The few employer representatives that specifically addressed this notice requirement argued that it would facilitate employers' ability to plan for employee absences. Jackson Lewis noted, ''[w]hen the need for leave is foreseeable (as is often the case when an employee seeks leave for childbirth, surgery and recovery), employees should provide advance notification to their employer so that the employer has the time necessary to redistribute work to other employees.'' *See also* National Roofing Contractors Association; Equal Employment Advisory Council. The Equal Employment Advisory Council requested that the regulation go further and require that employees provide documentation to support their inability to provide additional notice.

The Department believes that an employee's obligation to explain the reason he or she was unable to provide 30 days advance notice of the need for

foreseeable leave is implicit in the current regulation, which allows for the provision of less than 30 days notice only in those circumstances in which 30 days notice was not practicable. *See* § 825.302(a); *see also* 29 U.S.C. 2612(e)(1) and (2) (employee shall provide 30 days notice of the need for foreseeable leave due to applicable FMLA-qualifying reasons, unless circumstances require that the leave begin in less than 30 days, in which case the employee shall provide such notice as is practicable). Because employees already may be required to provide such an explanation, the Department does not view the explicit acknowledgement of this obligation in proposed § 825.302(a) as imposing any additional burden on employees. Additionally, the Department believes that early notice of the need for FMLA-protected leave is essential to the smooth functioning of FMLA leave in the workplace and that making clear that employees may be required to explain why they provided less than 30 days notice of the need for foreseeable leave emphasizes the importance of the notice requirement under the FMLA. Accordingly, the final regulation retains the requirement from the proposal that in applicable situations employees must provide an explanation upon request from their employer of the reason why they were unable to provide 30 days notice of the need for foreseeable FMLA leave.

The NPRM raised a number of issues regarding the notice requirements for the military family leave provisions. While the NDAA applies the existing FMLA notice requirements to military caregiver leave, it establishes a different notice requirement for qualifying exigency leave. Under the NDAA, in such circumstances where leave taken for a qualifying exigency is foreseeable, eligible employees must provide notice to the employer that is ''reasonable and practicable.'' 29 U.S.C. 2612(e)(3). The Department stated an initial view that proposed §§ 825.302 and 825.303 should be extended to military caregiver leave. An employee using military caregiver leave would then be generally 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. The Department asked whether military caregiver leave should be incorporated into this and all of the appropriate provisions in proposed §§ 825.302 and 825.303. In addition, the Department stated its initial view that §§ 825.302 and 825.303 should also be applied to qualifying exigency leave. The Department asked, if §§ 825.302 and 825.303 were not applied to qualifying exigency leave, what other notice requirements should be used.

The Department received many comments on employee notice requirements and the military family leave provisions. The Delphi Corporation offered that the ''new provisions should, to the greatest possible extent, track the current regulatory scheme. Any regulations concerning the administration of these leaves—including notice provisions and certification requirements—should track the non-military FMLA requirements. This will help minimize disruption and confusion caused by the new provisions.'' The Manufacturers Alliance/MAPI stated that ''[j]ust as the proposed FMLA regulations require the employee to give the employer notice of the need for foreseeable and unforeseeable leave, the same notice requirements should extend to leave taken to care for a covered service member and to leave taken for a qualifying exigency.'' Others addressed their comments specifically to notice for qualifying exigency leave. The National Coalition to Protect Family Leave expressed concern that the NDAA only requires notice for qualifying exigency leave ''if the need for leave is foreseeable. The language almost implies that no notice at all is required if exigency leave is unforeseeable. We believe the Department should apply the same principles of foreseeability as described in the proposed regulations * * * in sections 825.302 and 825.303.'' This commenter also stated that employees should ''notify their employers as soon as reasonable and practical when the employee learns that the servicemember has been called to active duty * * *. However, such notice of a call to active duty * * * should not be considered notice of a need for [qualifying exigency] leave. The employee should still be required to provide notice when the actual need for leave becomes known.'' *Id.* The Independent Bakers Association suggested that ''[m]eetings and appointments should be scheduled in advance. Notice to employers should be provided as soon as the employee is aware of the need to take off.'' The National Association of Manufacturers commented:

> The statute requires that when the need for leave because of a family member's active duty is ''foreseeable,'' the employee should provide notice ''as is reasonable and practicable.'' The statute is silent with regard to notice when the need for leave is not foreseeable. The [National Association of Manufacturers] recognizes that even in the instance of when the need is foreseeable, there may be very limited notice; but the [National Association of Manufacturers] believes that the Department should clarify that an employee should provide notice as soon as practicable in either circumstance.
>
> Allowing no notice would present production issues and foreclose planning to accommodate the absence. This becomes more evident since the leave is based on exigent circumstances. In such circumstances, we believe the Department should require the employee to provide the employer with notice when the employee learns of the need for leave. The [National Association of Manufacturers] proposes that the Department consider incorporating the Department of Defense regulations interpreting the notice provisions under the Uniformed Services Employment and Reemployment Rights Act (''USERRA'') for these regulations. There, DoD recommends that a servicemember provide 30 days notice of the upcoming absence when feasible. In addition, notice can be provided for the employee by others, such as an appropriate military officer. Another approach could be to conform all notice requirements under FMLA with those in USERRA, which would lead to a similar result. Either alternative would be a meaningful improvement.

In the final rule, the same requirements for providing notice for foreseeable leave that apply to existing FMLA leave are extended to military caregiver leave. Because Congress specifically amended the FMLA to include military caregiver leave under the existing statutory provisions regarding notice for foreseeable leave, it makes sense for the Department to do the same for the regulatory notice provisions for foreseeable leave. The statutory amendments regarding qualifying exigency leave created a free-standing notice provision for such leave that requires employees to provide such notice as is ''reasonable and practicable.'' The Department agrees with those commenters who argued that ''reasonable and practicable'' should be interpreted the same as ''practicable'' and that the same standard of ''practicable'' should thus apply to leave for any FMLA-qualifying reason. Accordingly, in all cases of foreseeable leave due to a qualifying exigency, an employee is required to provide notice ''as soon as practicable'' and § 825.302 has been modified to apply to such leave. Thus, § 825.302(a) in the final rule is changed to incorporate references to military caregiver leave and also makes clear that the 30-day advanced notice requirement for foreseeable leave does not apply to qualifying exigency leave. Employees are not obligated to provide notice to an employer when they first become aware of a covered family member's active duty or call to

active duty status. The Department believes this is an unnecessary requirement because many employees with a covered military member may never need to use qualifying exigency leave. Notice for qualifying exigency leave should be provided when the employee first seeks to take leave for a qualifying exigency.

When the need for FMLA leave is foreseeable less than 30 days in advance, an employee must ''provide such notice as is practicable.'' 29 U.S.C. 2612(e)(1), (2)(B). Proposed § 825.302(b) deleted language from current § 825.302(b) defining ''as soon as practicable'' as ''ordinarily * * * mean[ing] at least verbal notification to the employer within one or two business days of when the need for leave becomes known to the employee.'' As discussed in the preamble to the proposed rule, the ''one or two business days'' timeframe was intended as an illustrative outer limit, but had come to be read 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. 73 FR 7907 (Feb. 11, 2008). *See* Wage and Hour Opinion Letter FMLA–101 (Jan. 15, 1999).

Several employee representatives specifically opposed the deletion of the ''one or two business days'' language in proposed § 825.302(b). *See, e.g.*, National Partnership for Women & Families; Community Legal Services, Inc./AIDS Law Project of Pennsylvania; PathWaysPA; Human Rights Campaign. The National Partnership for Women & Families noted that the Department was proposing to shorten the amount of time that employees had to provide notice of the need for FMLA leave at the same time that it was proposing to give employers more time to respond to the employee's notice. Many commenters viewed the proposed requirement that employees provide notice of the need for leave that is foreseeable less than 30 days in advance either on the same day or the next business day to be unduly restrictive and to impose an unnecessary hurdle to employees seeking to utilize FMLA leave. *See, e.g.*, Community Legal Services, Inc./AIDS Law Project of Pennsylvania; Human Rights Campaign; Denise Evans; PathWaysPA; Maine Department of Labor. The United Food and Commercial Workers International Union argued that the current regulation does not permit employees to wait two days if it is practicable for them to provide notice sooner and that therefore no regulatory change is needed as to the timing of notice for FMLA leave foreseeable less than 30 days in advance.

Employee representatives also took issue with the statement in the preamble that:

> Absent emergency situations, where an employee becomes aware of the 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).

73 FR 7908 (Feb. 11, 2008). The Legal Aid Society—Employment Law Center questioned whether under the proposed regulation an employee diagnosed with early stage breast cancer would be required to tell her employer about her diagnosis before telling her family. Similarly, the National Partnership for Women & Families noted that under the proposed rule an employee learning that the date for her cesarean section has been moved up may be required to inform her employer before her family. *See also* American Postal Workers Union (''The examples provided by the proposed regulation in § 825.302(b) make no allowance for employees who, although they may be aware of a medical appointment, are not aware of the FMLA or of its employee notice requirements.'').

Conversely, employer representatives overwhelmingly supported the deletion of the ''two-day rule.'' *See, e.g.*, Equal Employment Advisory Council; the Chamber; National Newspaper Association; National Small Business Association. Commenters including the Equal Employment Advisory Council and the Chamber argued that prompt notice of an employee's need for FMLA leave is essential to the employer's ability to manage the workplace. *See also* HR Policy Association; AT&T. The Chamber stated that the lack of advance notice of absences was one of the biggest problems employers faced under the current regulations. They argued that deleting the ''two-day rule'' would reduce what they perceived to be the abuse of FMLA leave. AT&T noted that advance notice of absences is essential to its ability to comply with federal- and state-mandated service levels in some call centers.

HR Policy Association and the National Association of Manufacturers agreed with the statement in the preamble that the Department expected that it would be practicable for employees to provide notice the same day or the next business day. The National Coalition to Protect Family Leave and the National Restaurant Association however, argued that employees should be required to comply with the timing requirements of employers' normal policies for reporting absences.

The Department notes that prompt notice of an employee's need for FMLA leave not only allows an employer to manage its staffing needs but also facilitates the prompt determination of FMLA coverage. When an employee's need for FMLA leave is foreseeable, it is in the employee's interest that the determination of whether the leave is FMLA-protected be made prior to the commencement of the leave. Prompt notice of the need for leave to the employer allows the employer to determine whether or not certification will be required. Wherever possible, it is preferable that the employer receive all information necessary to determine whether the leave will be designated as FMLA-protected prior to the date of the leave.

The Department wishes to stress that both current and proposed § 825.302(b) defined ''as soon as practicable'' as ''as soon as both possible and practical, taking into account all the facts and circumstances of the individual case.'' The deletion of the ''two-day rule'' does not change the fact that whether notice is given as soon as practicable will be determined based upon the particular facts and circumstances of the employee's situation. For example, if an employee receives a call during the workday from her health care provider telling her that she had been diagnosed with breast cancer and will have a need for FMLA leave, the employee would not be expected to inform her employer of the need for leave the same day. Given the facts and circumstances related to the gravity of the condition and when the employee became aware of the diagnosis, it would not be practicable for the employee to provide notice to her employer of her impending need for leave to treat her cancer prior to having the opportunity to discuss the diagnosis with her family. In contrast, if an employee receives a call during the workday from her health care provider telling her that an appointment previously scheduled for Friday is being moved to Thursday, the employee would be expected to inform her employer of the change in her need for leave the same day. The examples provided in the proposed rule have been replaced with the statement that:

> Where an employee becomes aware of a need for FMLA leave less than 30 days in advance, it should be practicable for the employee to provide notice of the need for leave either the same day or the next business day. In all cases, however, the

determination of when an employee could practicably provide notice must take into account the individual facts and circumstances.

Thus, the employee's obligation is always to provide notice as soon as practicable. In the normal course, the Department expects that employees will be able to provide notice of the need for leave that is foreseeable less than 30 days in advance either the same day or the next business day. In cases involving unusual facts and circumstances, such as the diagnosis of a serious disease, additional time may be necessary before the employee can practicably provide notice to the employer of the need for leave.

Proposed § 825.302(c) retained the standard from current § 825.302(c) that an employee need not expressly assert his or her rights under the FMLA or even mention the FMLA, but instead must provide sufficient information to make his or her employer aware that FMLA rights may be at issue. To clarify the employee's notice obligation, proposed § 825.302(c) added language clarifying what information the employee must provide to make the employer aware of the employee's need for FMLA-protected leave.

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.

73 FR 7981 (Feb. 11, 2008). The proposed rule also added language explaining an employee is obligated to respond to an employer's questions designed to determine whether or not the absence is FMLA-qualifying, and that failure to respond to reasonable inquiries may result in the denial of FMLA protection if the employer is unable to determine whether the leave is FMLA-qualifying. Additionally, the preamble to the proposed rule sought comments ''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.'' *Id.* at 7908.

Employee representatives including the AFL–CIO and the National Employment Lawyers Association expressed concern that the proposed language was unduly proscriptive and would be difficult for employees to comply with. The National Partnership for Women & Families and the Sargent Shriver National Center on Poverty Law pointed out that not all of the listed elements would be applicable in some situations covered by the FMLA. Some commenters viewed the increased specificity in the proposed regulation as serving no purpose other than providing employers with another opportunity to deny FMLA protection to qualifying leave. *See* United Food and Commercial Workers International Union; Communications Workers of America. Community Legal Services, Inc./AIDS Law Project of Pennsylvania analyzed the proposal as follows: ''The true effect of this change would simply be to give the employers additional grounds for denying FMLA leave, by claiming that leave requests which lacked one or more of the new requirements did not put them on notice of a possible FMLA-eligible leave request, and that therefore they did not need to inquire further.'' The National Partnership for Women & Families and the AFL–CIO expressed a concern that employees would lose FMLA protection because they would be unaware of the specific types of information required and noted that the proposed rule did not establish any mechanism for informing employees of the additional information they would be required to provide. *See also* Sargent Shriver National Center on Poverty Law; Community Legal Services, Inc./AIDS Law Project of Pennsylvania. A labor union attorney, Robert M. Schwartz, noted that the new notice requirements were not included in the proposed general notice and poster.

Employer commenters indicated that requiring employees to provide additional information regarding their need for leave would facilitate the process of identifying, and protecting, FMLA leave. *See* the Chamber; Catholic Charities, Diocese of Metuchen. The Equal Employment Advisory Council stated that ''[i]nformation such as the inability to perform work, the anticipated duration of the absence, and the need to see a health care provider is critical to trigger for the employer the possibility that the employee may be requesting FMLA-qualifying leave.'' Jackson Lewis, however, commented that the additional information required under the proposed rule may still not be sufficient to put employers on notice that an employee's leave should be FMLA-protected. Several employer representatives also requested that the Department go further and require employees to expressly assert their FMLA rights in all instances. *See, e.g.*, National Restaurant Association; National Coalition to Protect Family Leave; National Newspaper Association; Spencer Fane Britt & Browne; Society for Human Resource Management; National Association of Convenience Stores; American Foundry Society. Jackson Lewis suggested that employees be required ''to specifically request FMLA leave for all absences less than one week/five business days in duration.'' The Equal Employment Advisory Council expressed its support for requiring employees to respond to employer requests for follow-up information regarding their need for leave, noting that ''the employee's cooperation is necessary to substantiate a request for legally protected leave.''

Most employee commenters who addressed the Department's inquiry regarding requiring employees to expressly assert their FMLA rights when they were requesting leave based on a condition for which they had previously provided sufficient notice, opposed the idea. *See, e.g.*, National Partnership for Women & Families; United Food and Commercial Workers International Union; Community Legal Services, Inc./AIDS Law Project of Pennsylvania. Community Legal Services, Inc./AIDS Law Project of Pennsylvania argued that ''[e]mployees who have already established a right to FMLA leave should not be vulnerable to losing their jobs simply because they neglect to use the magic words in giving notice to an employer that was already aware of why they have been out on leave.'' The Communications Workers of America, however, asserted that the use of a separate notice standard in such instances would be beneficial.

Many employer representatives, including a number of employers with large workforces such as the U.S. Postal Service and AT&T supported requiring employees to specifically reference the FMLA when requesting leave due to a previously-certified FMLA-protected condition. See *also* Southern Company; New York City (NY) Law Department; Vercruysse Murray & Calzone; National Association of Manufacturers; Society for Human Resource Management; Spencer Fane Britt & Browne; National School Boards Association. The U.S. Postal Service noted that requiring employees to specifically reference a previously-certified FMLA condition would be particularly helpful in situations in which employees have multiple FMLA conditions and

employers need to identify the condition for which the leave is being taken. The Equal Employment Advisory Council and Jackson Lewis, however, opposed having a separate notice standard in these circumstances because they perceived it as a lessening of the employee's notice obligation. Manufacturers Alliance/MAPI suggested that the uncertainty surrounding employee notice of the need for FMLA leave could be resolved if the Department created a form which employees could be required to use to request FMLA leave.

Finally, several commenters including the National Partnership for Women & Families and the National Employment Lawyers Association expressed concern that proposed § 825.302(c) fundamentally altered the employer's obligation to inquire if additional information was necessary to determine whether an employee's need for leave is FMLA-protected. *See also* Sargent Shriver National Center on Poverty Law; Community Legal Services, Inc./AIDS Law Project of Pennsylvania. The AFL–CIO asserted that the proposed rule affirmatively ''shifts the burden to employees to provide information that is currently the employer's obligation to obtain if the initial notice is insufficient.''

By setting forth the types of information that an employee may have to provide in order to put an employer on notice of the employee's need for FMLA-protected leave, the Department did not intend to establish a list of information that must be provided in all cases. Instead, the Department intended to provide additional guidance to employees so that they would know what information to provide to their employers. The Department agrees with those commenters who noted that the nature of the information necessary to put the employer on notice of the need for FMLA leave will vary depending on the circumstances. For example, an employee who informs her supervisor that she is pregnant and needs to attend a doctor's appointment related to her pregnancy has provided sufficient notice of her need for FMLA-protected leave. Likewise, where an employee is seriously injured at work and the employer sends the employee to the hospital by ambulance, the employer has sufficient information to be on notice that the employee's leave may be FMLA-protected. Accordingly, the final rule has been changed to read: ''Depending on the situation, such information may include 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; that the employee is pregnant or has been hospitalized overnight; the anticipated duration of the absence, if known; and whether the employee or the employee's family member is under the continuing care of a health care provider.'' The Department wishes to emphasize that the employer's obligation to inquire if it needs additional information to determine whether the leave is FMLA-qualifying remains the same as it is under the current regulations. No change in this obligation was proposed in the NPRM and none is intended in the final rule.

Section 825.302(c) of the final rule has been changed to include a different notice standard when the employee requests leave for a previously-certified FMLA-qualifying reason. The Department believes that in such situations, because employees are already aware that leave for such reason is FMLA-protected, it is not overly burdensome to require them to specifically reference either the particular reason or their need for FMLA leave. Where an employee has previously taken FMLA leave for more than one qualifying reason, the employer may need to inquire further to determine for which reason the leave is being taken and employees will be required to respond to such inquiries. The Department believes that this requirement will facilitate employers' ability to appropriately designate and protect FMLA leave. Because incidents of unforeseeable leave are often related to previously-certified FMLA-qualifying reasons, a similar notice standard has also been included in § 825.303 of the final rule.

Finally, § 825.302(c) in the final rule has been modified to incorporate appropriate references to military caregiver leave and provides that for qualifying exigency leave the employee must provide notice with sufficient information that indicates that a family member is on active duty or call to active duty status, that the requested leave is for one of the reasons listed in § 825.126(a), and the anticipated duration of the absence. It also states that an employer may request certification in the case of both military caregiver leave and qualifying exigency leave.

Section 825.302(d) of the proposed rule retained the requirement that an employee comply with the employer's usual notice and procedural requirements for calling in absences and requesting leave, but deleted language stating that the employer could not delay or deny FMLA leave if the employee failed to follow such procedures. The proposed rule qualified the employee's obligation to comply with the employer's usual reporting requirements, however, by noting that it applies ''absent unusual circumstances'' and providing examples of what might constitute such circumstances. The proposed rule also clarified that where the employer's usual reporting procedure allowed less time for reporting absences than § 825.302(a), the employer could not enforce its policy as to timing.

Employee representatives strongly opposed allowing employers to delay or deny FMLA protection because of an employee's failure to comply with the employer's usual requirements for requesting leave. *See, e.g.*, AFL–CIO; Community Legal Services, Inc./AIDS Law Project of Pennsylvania; American Postal Workers Union; National Partnership for Women & Families; Coalition of Labor Union Women. The AFL–CIO noted that the ''unusual circumstances'' exception would not provide employees with sufficient protection to prevent them from being denied FMLA leave due to the rigid application of employer policies. The American Postal Workers Union and the American Association of University Women argued that employers should not be able to enforce their usual policies unless they could show that they were harmed by the employee's failure to comply with the policy.

Employer commenters, however, argued that employees should be required to follow the same procedures for requesting leave regardless of whether their need for leave was covered by the FMLA. *See, e.g.*, National Coalition to Protect Family Leave; Equal Employment Advisory Council; TOC Management Services; Retail Industry Leaders Association; Society for Human Resource Management; Association of Corporate Counsel's Employment and Labor Law Committee. The Chamber argued that allowing employers to apply their normal procedures for requesting leave to FMLA leave requests would help reduce confusion and duplicative policies. The Equal Employment Advisory Council and the Association of Corporate Counsel's Employment and Labor Law Committee specifically supported the deletion of language from the current regulation stating that employers could not delay or deny FMLA protection where an employee fails to provide timely FMLA notice. The Equal Employment Advisory Council and others commented in favor of the clarification in the preamble to the proposed rule that where FMLA-

protected leave is delayed or denied because the employee failed to provide timely notice, and the employee is absent during the period in which he or she is not entitled to FMLA protection, the employer may treat the absence in the same manner it would treat any other unexcused absence. *See also* U.S. Postal Service; Retail Industry Leaders Association.

The Department recognizes that call-in procedures are routinely enforced in the workplace and are critical to an employer's ability to ensure appropriate staffing levels. Such procedures frequently specify both when and to whom an employee is required to report an absence. The Department believes that employers should be able to enforce non-discriminatory call-in procedures, except where an employer's call-in procedures are more stringent than the timing for FMLA notice as set forth in § 825.302(a). In that situation, the employer may not enforce the more stringent timing requirement of its internal policy. Additionally, where unusual circumstances prevent an employee seeking FMLA-protected leave from complying with the procedures, the employee will be entitled to FMLA-protected leave so long as the employee complies with the policy as soon as he or she can practicably do so. Unusual circumstances would include where the employer's procedure requires employees to report absences to a specific individual, and that individual was absent on a particular day, or the individual's voice mail box was full. Because the example of an employee unable to report an absence due to his or her medical condition is more appropriately viewed as unforeseeable leave, the example has been replaced with an employee unable to comply with the employer's requirement for the reasons discussed above. In such an instance, the employee would satisfy his or her FMLA notice obligation by providing notice in accordance with the employer's policy as soon as the employee can practicably do so.

Although the proposed rule made no changes in § 825.302(e), one change has been made in the final rule. The phrase ''for example'' has been added to the third sentence to emphasize that the reference to the use of intermittent leave for planned medical treatment is only one example of when an employee is obligated to make a reasonable effort to schedule leave so as not to disrupt unduly the employer's operations. The employee's obligation applies to all foreseeable FMLA leave for planned medical treatment, whether that leave is taken in a single continuous block of leave or intermittently. 29 U.S.C. 2612(e)(2)(A).

No changes were proposed to § 825.302(f). The final rule modifies paragraph (f) to incorporate references to the military family leave provisions. The rule makes clear that the requirement that an employee and employer attempt to work out a schedule without unduly disrupting the employer's operations applies only to military caregiver leave. It does not apply to qualifying exigency leave.

Proposed § 825.302(g) retained only the first sentence of current § 825.302(g) stating that employers may waive employees' FMLA notice requirements. The proposal deleted the remainder of current § 825.302(g), which addressed whether employers could require compliance with FMLA notice requirements where the provisions of a collective bargaining agreement, state law, or applicable leave plan allow for less advance notice to the employer. This proposal did not draw a significant number of comments.

Three unions, however, objected to the deletion of the language referencing less restrictive procedures in collective bargaining agreements. *See* National Association of Letter Carriers; National Treasury Employees Union; AFL–CIO. While the AFL–CIO agreed that the vacation leave example in current § 825.302(g) was confusing and should be deleted, it argued that it was important to retain the second and fourth sentences of the current regulation to provide guidance on less strict notice provisions in collective bargaining agreements. The National Treasury Employees Union argued that the deletion was inconsistent with 29 U.S.C. 2652, which states that nothing in FMLA ''shall be construed to diminish the obligation of an employer to comply with any collective bargaining agreement or any employment benefit program or plan that provides greater family or medical leave rights to employees than the rights established under this Act.'' *See also* National Partnership for Women & Families. Finally, the National Partnership for Women & Families objected to the deletion generally, not just as it applied to collective bargaining agreements. Only two employer representatives directly addressed proposed § 825.302(g) and both supported the proposed changes. *See* Equal Employment Advisory Council; TOC Management Services. The Equal Employment Advisory Council argued that current § 825.302(g) was confusing and inconsistent with the employer's right to notice under the FMLA.

The final rule makes no substantive changes to proposed § 825.302(g). The FMLA does not relieve employers of their obligation to comply with state and local laws, collective bargaining agreements, or employment benefit programs that provide ''greater family or medical leave rights.'' 29 U.S.C. 2651(b), 2652(a). These statutory obligations are not diminished by the revisions made to § 825.302(g). The Department does not believe that these obligations should be addressed in § 825.302(g) as they are fully discussed in §§ 825.700 and 825.701 of both the current and final rules. A cross-reference has been added in § 825.302(g) of the final rule, however, to § 825.304, which also addresses waiver of an employee's notice obligations.

Section 825.303 (Employee Notice Requirements for Unforeseeable FMLA Leave)

Section 825.303 addresses an employee's obligation to provide notice when the need for FMLA leave is unforeseeable. Proposed § 825.303(a) retained the current standard that employees must provide notice of their need for unforeseeable leave ''as soon as practicable under the facts and circumstances of the particular case.'' The proposed rule replaced language stating that, except in extraordinary circumstances, employees would be expected to give notice ''within no more than one or two working days of learning of the need for leave,'' with the requirement that employees provide notice ''promptly'' and provided examples of appropriate notice. Proposed § 825.303(b) retained the current 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 unforeseeable FMLA leave. The proposal added the same clarifying language used in proposed § 825.302(c) explaining the information the employee must provide in order to provide sufficient notice to the employer of the need for FMLA leave and added that the employee has an obligation to respond to an employer's questions designed to determine whether leave is FMLA-qualifying. The proposal also added a specific statement that calling in ''sick,'' without providing additional information, will not be sufficient notice under the Act. The preamble to the proposed rule also sought comment on whether employees needing unforeseen leave for a previously-certified FMLA condition (*e.g.*, a flare-up of a chronic condition) should be required to expressly assert their FMLA rights. Finally, proposed

§ 825.302(c) added the requirement that, except when extraordinary circumstances exist, employees must comply with employers' usual and customary notice and procedural requirements for requesting leave and provided examples.

Section 825.303(a) of the final rule retains the standard from the current regulation that employees must provide notice of the need for unforeseeable FMLA leave ''as soon as practicable.'' The final rule replaces the statement that employees will be expected to give notice to their employer ''promptly'' with the statement that it generally should be practicable for the employee to provide notice of leave that is unforeseeable within the time prescribed by the employer's usual and customary notice requirements applicable to such leave. Section 825.303(b) of the final rule continues to provide guidance as to what information an employee may need to provide to constitute sufficient notice, but clarifies that the types of information listed are merely examples and may not be required in all situations. It adds a requirement that, for FMLA leave taken because of a qualifying exigency, the employee shall provide sufficient information that indicates that a family member is on active duty or call to active duty status, that the requested leave is for one of the reasons listed in § 825.126(a), and the anticipated duration of the absence. Additionally, the final rule requires employees seeking leave for a previously certified FMLA condition, covered servicemember's serious injury or illness, or qualifying exigency to inform the employer that the leave is for a condition, covered servicemember's serious injury or illness, or qualifying exigency that was previously certified or for which the employee has previously taken FMLA leave. The final rule also retains the statement that calling in ''sick'' is not sufficient notice of the need for FMLA leave and the requirement that employees respond to employer questions designed to determine if leave is FMLA-qualifying. The final rule in § 825.303(c) provides that, absent unusual circumstances, employees must comply with employers' usual notice and procedural requirements for requesting leave. This section makes clear that in the case of an emergency requiring leave because of an employee's own serious health condition, because of a qualifying exigency, or to care for a family member with a serious health condition or a covered servicemember with a serious injury or illness, written advance notice pursuant to an employer's internal rules and procedures may not be required. This section also makes clear that FMLA-protected leave may be delayed or denied when an employee does not comply with the employer's usual notice and procedural requirements and no unusual circumstances justify the failure to comply.

Employee representatives objected to the proposed regulation's shortening of the time for employees to provide notice of the need for unforeseeable leave. *See, e.g.*, National Partnership for Women & Families; United Food and Commercial Workers International Union; Community Legal Services, Inc./AIDS Law Project of Pennsylvania; National Employment Lawyers Association; Human Rights Campaign. The AFL–CIO and the United Food and Commercial Workers International Union took issue with the statement in the preamble to proposed § 825.303(a) that ''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.'' 73 FR 7910 (Feb. 11, 2008). The United Food and Commercial Workers International Union objected to the examples provided in the proposed rule of an employee caring for a child with asthma and providing notice of the unforeseen need for leave ''promptly,'' arguing that the example ''fails to consider the timing of the child's asthma in relationship to the start of the employee's shift, whether following the attack the employee believes further treatment may be advisable, or whether, at the time of the asthma attack, the employee had to interrupt other responsibilities which have to be completed such as getting other children to school.'' The United Food and Commercial Workers International Union also noted that the term ''promptly'' was undefined and argued that it could be read to conflict with the statutory standard that notice must be provided ''as soon as practicable.'' The National Partnership for Women & Families questioned how the proposed regulation would work, noting that ''[i]t is unclear how employers will ascertain whether the employee could have called in earlier or not and who will determine if 'extraordinary circumstances' actually existed.'' *See also* PathWaysPA; Sargent Shriver National Center on Poverty Law.

Employer representatives overwhelmingly supported replacing the ''one or two working days'' standard with the requirement that employees provide notice of the unforeseen need for FMLA leave ''promptly.'' *See, e.g.*, Equal Employment Advisory Council; National Newspaper Association; Jackson Lewis. Several commenters emphasized that timely notice of absences is even more critical to an employer's operations when the need for leave is unforeseen. *See* Equal Employment Advisory Council; American Health Care Association; National Association of Manufacturers; AT&T; National Small Business Association. The Equal Employment Advisory Council and other commenters supported the statement in the preamble to the proposed rule that, absent extraordinary circumstances, employees would be expected to notify their employers of the need for unforeseen FMLA leave prior to the start of their shifts. *See also* American Health Care Association. Several law firms suggested that the final rule would be improved if this language from the preamble were incorporated into the regulatory text. *See* Spencer Fane Britt & Browne; Willcox & Savage; Vercruysse Murray & Calzone; *see also* TOC Management Services. The National Coalition to Protect Family Leave and others, however, objected to setting the standard at prior to the start of the shift and instead suggested that employer call-in policies should determine the timing of notice for unforeseen leave. *See* Spencer Fane Britt & Browne; Society for Human Resource Management; National Restaurant Association; National Newspaper Association. Spencer Fane Britt & Browne, for example, commented:

> Under the Proposed Rule, an employee can literally call in absent one minute before the start of the shift with impunity. In some industries, however, employers require as much as two hours advance notice because of scheduling issues and the need to find a replacement. It is literally impossible to have a replacement on site when an employee merely calls in right before the start of his/her shift. This is a particular problem in time-sensitive, critical services, and interdependent jobs (*e.g.*, health care, transportation, utilities, assembly line, work group operations, law enforcement and fire protection, *etc.*).

The Department has concluded that the statement in the proposed regulatory text that ''[w]here the need for leave is unforeseeable, it is expected that an employee will give notice to the employer promptly'' does not provide useful guidance for applying the ''as soon as practicable'' standard. As noted in the discussion of § 825.303(c) below, ''as soon as practicable'' is the governing standard. The Department believes that the employer's usual and customary notice requirements for taking such leave are a useful guide for providing notice of the need for unforeseeable

FMLA leave because the Department anticipates that providing notice ''as soon as practicable'' will generally be consistent with an employer's reasonable notice requirements for taking such leave. Accordingly, § 825.303(a) of the final rule replaces the statement that employees will be expected to give notice to their employers ''promptly'' with the statement that it generally should be practicable for the employee to provide notice of leave that is unforeseeable within the time prescribed by the employer's usual and customary notice requirements applicable to such leave, with a cross-reference to § 825.303(c). Where unusual circumstances prevent the employee from complying with the employer's normal reporting policy, the employee will satisfy the FMLA notice obligation if he or she provides notice to the employer ''as soon as practicable'' under the circumstances. The final rule retains the examples from proposed § 825.303(a) because the Department believes that they provide useful guidance on how the ''as soon as practicable'' standard should be applied.

Employee representatives commenting on proposed § 825.303(b) objected, as they did in responding to proposed § 825.302(c), that the listing in the regulation of the information necessary to notify an employer of the need for unforeseeable FMLA leave was overly prescriptive and presented an unnecessary hurdle for employees seeking to use FMLA leave. *See, e.g.*, National Partnership for Women & Families; AFL–CIO; United Food and Commercial Workers International Union; Communications Workers of America. The United Food and Commercial Workers International Union argued that under the proposed rule employees would be required to provide information which they may well not know at the time they initially provide notice of the need for unforeseeable leave. Other commenters expressed concern that employees would not be aware of their increased notice obligation and would therefore lose FMLA protection because they did not include all of the necessary information in providing notice of the need for leave. *See* National Partnership for Women & Families; National Employment Lawyers Association; Sargent Shriver National Center on Poverty Law. The National Partnership for Women & Families argued that the problems that employers allegedly face with unforeseen intermittent leave could be addressed without altering the employee's notice obligation:

> To the extent that employers feel that employees are abusing unforeseeable leave, especially intermittent unforeseeable leave, employers should address those problems as an issue of management of their employees. There is no need to change the regulations for a federal statute for the entire country especially without sufficient evidence that such change is necessary.

The National Employment Lawyers Association questioned whether the proposed regulation inappropriately shifted the burden from the employer to inquire if additional information was needed to determine if leave was FMLA-qualifying to the employee to provide all necessary information in the initial notice. *See also* National Partnership for Women & Families; United Food and Commercial Workers International Union; Community Legal Services, Inc./AIDS Law Project of Pennsylvania; Sargent Shriver National Center on Poverty Law.

Employer representatives also reiterated their comments on proposed § 825.302(c) when commenting on § 825.303(b), arguing that requiring employees to provide the enumerated information would facilitate the identification and protection of FMLA-qualifying leave. *See* the Chamber; Association of Corporate Counsel's Employment and Labor Law Committee. The National Coalition to Protect Family Leave and Society for Human Resource Management suggested that if employees were required to provide the information listed in proposed § 825.303(b), it would be equally appropriate and more effective to require them to specifically assert their FMLA rights when requesting unforeseen leave. *See also* National Newspaper Association; National Restaurant Association; Spencer Fane Britt & Browne. TOC Management Services and other commenters specifically supported the inclusion in the proposed regulation of the statement that simply calling in ''sick'' was insufficient to put an employer on notice of the need for unforeseen FMLA leave. *See also* American Health Care Association; Association of Corporate Counsel's Employment and Labor Law Committee; the Chamber. The Association of Corporate Counsel's Employment and Labor Law Committee and the National Newspaper Association specifically supported the requirement that employees respond to follow-up inquiries from employers to determine whether leave is FMLA-qualifying. One law firm, Vercruysse Murray & Calzone, commented that language in the proposed preamble stating that employees would be expected to provide additional information to their employers if a condition that initially did not appear to be a serious health condition developed into one should be included in the text of the final regulation.

Employers and their representatives generally supported requiring employees to expressly assert their FMLA rights when taking leave for a previously certified FMLA-qualifying reason, with several commenters noting that the need for such a requirement was even more imperative when the need for leave was unforeseen. *See, e.g.*, American Health Care Association; Association of Corporate Counsel's Employment and Labor Law Committee; Southern Company. In particular, the U.S. Postal Service highlighted the problems faced by employers when employees with multiple FMLA-certified conditions notify their employers of an unscheduled absence. Vercruysse Murray & Calzone asserted that employees with approved FMLA certifications for chronic conditions frequently do not specify the reason for their absence, and argued that since such employees have ''already been approved for FMLA leave and have been notified of their rights and responsibilities under the FMLA, they should be required to specify, when reporting an absence, that the absence relates to their previously approved FMLA leave.'' Employee representatives generally opposed requiring employees to specifically assert their FMLA rights when requesting unforeseen leave due to a serious health condition for which they have previously been certified. *See* National Partnership for Women & Families; Community Legal Services, Inc./AIDS Law Project of Pennsylvania; United Food and Commercial Workers International Union. The Communications Workers of America, however, supported the application of the different notice standard in these circumstances, but expressed concern as to how employees would learn of such a new requirement.

As discussed above in § 825.302(c), the Department did not intend in proposed § 825.303(b) to establish a list of information that must be provided in all cases. Accordingly, for the reasons discussed above in the preamble to § 825.302(c), the final rule has been changed to read: ''Depending on the situation, such information may include that a condition renders the employee unable to perform the functions of the job; that the employee is pregnant or has been hospitalized overnight; whether the employee or the employee's family member is under the continuing care of a health care provider; if the leave is due to a qualifying exigency, that a

covered military member is on active duty or call to active duty status, that the requested leave is for one of the reasons listed in § 826.126(a), and the anticipated duration of the absence; or if the leave is for a family member that the condition renders the family member unable to perform daily activities or that the family member is a covered servicemember with a serious injury or illness; the anticipated duration of the absence, if known.'' The Department also wishes to emphasize that the employer's obligation to inquire if additional information is needed to determine whether the leave is FMLA-qualifying remains the same as it is under the current regulations. No change in this obligation was proposed in the NPRM and none is intended in the final rule. Final § 825.303(b) retains the obligation that employees respond to employer inquiries designed to determine whether leave is FMLA-qualifying. In addition, references to both military caregiver leave and qualifying exigency leave are added to § 825.303(b). This paragraph is altered to provide that for qualifying exigency leave, the employee must provide notice with sufficient information that indicates that a family member is on active duty or call to active duty status, that the requested leave is for one of the reasons listed in § 825.126(a), and the anticipated duration of the absence. Section 825.303(b) has also been changed to include a different notice standard when the employee requests unforeseen leave due to a previously certified FMLA-qualifying reason. As explained in connection with the revisions to final § 825.302(c), the Department believes that in such circumstances, because employees are already aware that leave for the reason is FMLA-protected, it is not overly burdensome to require them to specifically reference their FMLA-qualifying reason or their need for FMLA leave. When an employee has more than one previously certified FMLA-qualifying reason, the employer may need to inquire further to determine for which FMLA-qualifying reason the leave is being taken, and employees will be required to respond to such inquires. The Department believes this requirement will facilitate an employer's ability to appropriately designate and protect FMLA leave.

Employee representatives objected to the requirement in proposed § 825.303(c) that employees comply with the employer's usual and customary notice and procedural requirements for requesting leave, except when extraordinary circumstances exist. *See* National Partnership for Women & Families; United Food and Commercial Workers International Union; Community Legal Services, Inc./AIDS Law Project of Pennsylvania. Community Legal Services, Inc./AIDS Law Project of Pennsylvania emphasized that in low-wage settings employees may not be familiar with their employers' procedures for requesting leave. Employer representatives, however, argued that employees should follow the same procedures for absence reporting regardless of whether the leave was for a FMLA condition. *See, e.g.*, National Coalition to Protect Family Leave; Retail Industry Leaders Association; National Restaurant Association; Ohio Department of Administrative Services; College and University Professional Association for Human Resources. Jackson Lewis objected to allowing an exception from the requirement for extraordinary circumstances.

As discussed above in connection with the revisions to § 825.302(d), the Department recognizes that call-in procedures are a routine part of many workplaces and are critical to an employer's ability to manage its work force. Adherence to such policies is even more critical when the need for leave is unforeseen. Accordingly, the final rule in § 825.303(c) provides that, absent unusual circumstances, employees must comply with their employer's usual and customary notice and procedural requirements for requesting leave. The Department modified the standard from ''extraordinary circumstances'' in the proposal to ''unusual circumstances'' in the final rule to make the standard consistent with that used in § 825.302(d). In the final rule, the Department deleted the sentence that FMLA leave may not be delayed or denied where the employer's policy requires notice to be given sooner than set forth in § 825.303(a) and the employee provides timely notice as required in that section. Because final § 825.303(a) makes the employer's usual and customary notice requirements the benchmark for providing timely notice for unforeseeable leave in most cases, this sentence no longer makes sense. Nonetheless, it is important to note that ''as soon as practicable'' is the governing standard; the Department anticipates that an employer's reasonable notice requirements for taking unforeseeable leave will be consistent with this standard in most circumstances. The final rule in § 825.303(d) includes the provision that FMLA-protected leave may be delayed or denied when an employee does not comply with the employer's usual notice and procedural requirements and no unusual circumstances justify the failure to comply. The Department included this provision to make it consistent with § 825.302(d).

Section 825.304 (Employee Failure To Provide Notice)

Proposed § 825.304 clarified what an employer may do if an employee fails to provide the required notice for FMLA leave. Specifically, the proposed section separated into different paragraphs the rules applicable to leave foreseeable at least 30 days in advance, leave foreseeable less than 30 days in advance, and unforeseeable leave. The proposed section provided examples of what it means to delay FMLA leave in cases of both foreseeable and unforeseeable leave. The proposed rule retained language from current § 825.304(c) stating that FMLA leave cannot be delayed due to lack of required employee notice if the employer has not complied with its notice requirements, as set forth in proposed § 825.300. The final rule reorganizes § 825.304 by moving paragraph (e) to paragraph (a) (and vice versa) as set forth in the proposed rule and by deleting the reference to annual distribution of employee notices to conform to changes made in final § 825.300.

The Department received few comments specifically addressing proposed § 825.304. The Equal Employment Advisory Council, Jackson Lewis, and the Pennsylvania Governor's Office of Administration noted that the clarification of employers' rights when employees fail to meet their FMLA notice obligations provided needed guidance to employers. The United Food and Commercial Workers International Union, however, strongly opposed permitting employers to discipline employees or delay the start of FMLA leave when employees needing unforeseeable leave fail to comply with employer call-in procedures.

The Department believes that proposed § 825.304 provides helpful guidance clarifying the consequences of an employee's failure to provide timely notice of the need for FMLA leave. While current § 825.304 addresses the delay of FMLA protection where an employee fails to provide 30 days notice of the need for FMLA leave, the regulation does not explain the consequences for failure to provide timely notice when the need for leave was either foreseeable less than 30 days

in advance or unforeseeable. Moreover, the current regulation does not explain the effect of delaying FMLA protection if the employee was absent during the period in which the protection was appropriately delayed. The Department believes that § 825.304 as proposed more clearly explains the consequences of an employee's failure to provide timely FMLA notice. Accordingly, except for the organizational changes in re-ordering paragraphs (a) and (e) noted above, the final rule adopts proposed § 825.304 without change.

Section 825.305 (Certification, General Rule)

The FMLA permits employers to require employees to provide a certification from their health care provider (or their family member's health care provider, as appropriate) to support the need for leave due to a serious health condition. 29 U.S.C. 2613. Section 825.305 of the regulations sets forth the general rules governing employer requests for medical certification to substantiate an employee's need for FMLA leave due to a serious health condition. The new military family leave provisions also permit employers to require employees to provide a certification in the case of leave taken for a qualifying exigency or to care for a covered servicemember with a serious injury or illness. Accordingly, § 825.305 in the final rule has been retitled and edited to apply generally to all types of certification. In most cases, for example, references to ''medical certification'' have been changed to simply ''certification.''

In the NPRM, no changes were proposed to current § 825.305(a), which states the general rule that employers may require certification from a health care provider where the employee's need for leave is due to a serious health condition of the employee or a covered family member. Current § 825.305(b) sets forth the timing requirement for providing the certification. Proposed § 825.305(b) increased the time frame in which an employer should request medical certification from two to five business days after notice of the need for FMLA leave and applied the general 15-day time period for providing a requested certification to all cases, including where the employee provides notice of the need for leave 30 days in advance. The Department also requested comment as to whether it should add a requirement under this section that employers must notify employees when a requested certification is not received within the 15-day time frame. Proposed § 825.305(c) added definitions of incomplete and insufficient certifications and set forth a procedure for curing an incomplete or insufficient certification that requires an employer to notify the employee in writing as to what additional information is necessary for the medical certification and provide seven calendar days to provide the additional information. Proposed § 825.305(d) clarified that if an employee fails to submit a complete and sufficient certification, despite the opportunity to cure the deficiency as set forth in § 825.305(c), the employer may deny the taking of FMLA leave. This proposed section also clarified that, when certification is required by the employer, it is the employee's obligation to either provide a complete and sufficient certification or provide any necessary authorization for the health care provider to release a complete and sufficient certification directly to the employer; this obligation applies regardless of whether the certification requested is an initial certification, a recertification, a second or third opinion, or a fitness for duty certification. Current § 825.305(e) states that if a less stringent medical certification standard applies under the employer's sick leave plan, only that lesser standard may be required when the employee substitutes any form of paid leave for FMLA leave. The proposed rule deleted this provision because it conflicted with the employer's right under 29 U.S.C. 2613 to require as a prerequisite to FMLA leave for a serious health condition that the employee provide a medical certification to substantiate the serious health condition. The proposed rule added a new § 825.305(e) allowing for annual medical certifications in those cases in which a serious health condition extends beyond a single leave year; this addition codified the Department's interpretation of the certification requirement in Wage and Hour Opinion Letter FMLA–2005–2–A (Sept. 14, 2005). The final rule adopts § 825.305 as proposed with one clarification to § 825.305(e) and with appropriate edits to reflect the military family leave provisions.

Proposed § 825.305(b) increased the time frame during which an employer should request medical certification from two to five business days after receiving notice of the employee's need for FMLA leave. The Department did not receive substantial comment on this proposal. For the most part, those commenters that addressed this proposal specifically supported the increase in the time frame to allow employers to process the employee's initial request for FMLA leave and determine if medical certification will be required. *See, e.g.*, the Chamber; TOC Management Services; National Retail Federation; College and University Professional Association for Human Resources. The National Small Business Association noted that the increased time frame would be particularly helpful for small businesses, which must divert resources from other functions to administer FMLA requests.

Current § 825.305(b) states that where the need for leave is foreseeable and notice is provided 30 days in advance, the employee must provide any requested medical certification prior to the commencement of the leave; in all other cases, the employee must provide medical certification within 15 days after the leave is requested ''unless it is not practicable under the particular circumstances to do so despite the employee's diligent, good faith efforts.'' Proposed § 825.305(b) applied the 15-day time frame, subject to the employee's diligent, good faith efforts, to all cases of FMLA leave in order to make it consistent with the timing requirements set forth in § 825.311 of the regulations. The Department did not receive extensive comments regarding this proposed change. The Chamber and the Association of Corporate Counsel's Employment and Labor Law Committee supported the application of the 15-day time frame to all requests for certification because it establishes a clear deadline that would facilitate FMLA administration. The AFL–CIO, however, objected to the proposed change arguing that the shorter time frame would burden employees.

Both proposed § 825.305(b) and (c) provide employees additional time in which to either initially submit the medical certification or cure a deficiency in the certification if the employee is unable to comply with the initial time frame ''despite the employee's diligent, good faith efforts.'' Several commenters requested that the Department provide additional guidance on what constitutes ''diligent, good faith efforts'' sufficient to justify allowing the employee additional time to provide or cure a medical certification. *See, e.g.*, Hewitt Associates; UMC of Southern Nevada; Dalton Corp. The AFL–CIO suggested that ''an employee who has requested a medical certification and has followed up at least once with his or her healthcare provider'' should be considered to have met the ''diligent, good-faith efforts'' standard justifying additional time within which to submit the certification. The Society for Human Resource Management and the National Coalition to Protect Family Leave suggested that where employees are

unable to submit a certification within 15 days despite diligent, good faith efforts, final § 825.305(b) should provide a single seven day extension to submit the certification so that the process would be clear and would mirror the cure process in proposed § 825.305(c).

The preamble discussion of proposed § 825.305(b) also sought comment on whether employers should be required to notify employees if a requested certification was not submitted within the 15-day time frame and allow the employee another seven days to provide the certification. Several employee representatives, including the National Partnership for Women & Families and the AFL–CIO supported requiring employers to provide notice to employees when a certification was not received within the initial time frame and provide additional time for the employee to submit the certification. *See also* National Treasury Employees Union; PathWaysPA. The National Treasury Employees Union noted that employees frequently request that their health care providers submit the certification directly to their employer and assume that the health care provider has done so. The AFL–CIO agreed that employers should be required to notify employees when a certification is not received, but suggested that the additional grace period for submitting the certification should be 15 days instead of seven. Catholic Charities, Diocese of Metuchen also supported allowing employees additional time to submit a certification. Employer representatives, however, almost uniformly opposed requiring employers to provide such notification because of the administrative burden doing so would impose. *See, e.g.*, Burr and Forman; Equal Employment Advisory Council; AT&T; National Association of Manufacturers; Willcox & Savage; Manufacturers Alliance/MAPI; Southwest Airlines; Berens & Tate; National School Boards Association. The Southern Company argued that such a requirement would inappropriately shift the employee's statutory responsibility to provide a medical certification to the employer and would, in effect, convert the intended 15-day period for providing certification into a 22-day period in all cases. Jackson Lewis and the Ohio Department of Administrative Services objected that requiring employers to inform employees that a certification has not been received would be overly paternalistic.

The final rule adopts proposed § 825.305(b) without change. First, as to this section's time frames for employers, the Department believes that the increase in the general time frame for the employer to request the employee to furnish a certification from a health care provider from two to five business days is reasonable and consistent with other similar changes. *See* final §§ 825.300(b) and (c); 825.301(a). Second, as to this section's time frames governing employees' follow-up with employers, the Department believes that applying the 15-day time period as the outer limit of the time period by which the employee must respond to all requests for certification will facilitate the prompt determination of whether leave qualifies for FMLA protection. By requiring employees seeking leave that is foreseeable 30 days in advance to provide any requested certification within the time frame requested by the employer—which must allow at least 15 calendar days after the certification is requested by the employer—employers should have sufficient time to review the certification, request additional information or clarification in accordance with § 825.305(c) if necessary, and determine whether the leave is FMLA-protected prior to employees commencing their leave. In all cases, employees who are unable to meet the 15-day time frame despite their diligent, good faith efforts must be allowed additional time to supply the certification. In all cases, it is imperative that employees communicate to their employers the efforts they are making to secure the completed medical certification. In assessing whether employees have made diligent, good faith efforts to submit a timely certification, employers should consider all the circumstances, including the employee's efforts to schedule appointments and follow-up with the health care provider's office, or other appropriate offices in the case of qualifying exigency leave or military caregiver leave, to ensure that the certification is completed; employers should be mindful that employees must rely on the cooperation of their health care providers and other third parties in submitting the certification and that employees should not be penalized for delays over which they have no control. The Department has decided not to require employers to provide notice to employees when a certification is not received because of the administrative burden this would impose. The Department is aware that many employers, in an effort to ensure that employees are aware of their FMLA rights, routinely send FMLA notifications and requests for certification for a wide range of absences, even when employees have not indicated that the absences are FMLA-qualifying. In such cases, there may be many reasons why an employee does not return the certification and requiring the employer to track every employee's time from the certification request and follow-up when a certification is not returned would create a significant burden on the employer and would be of questionable value to employees whose need for leave may be completely unrelated to the FMLA. Employees who request that their health care providers submit the certification directly to their employer can check with their employer to ensure that the certification has been received and follow-up with their health care provider if it has not. Such employee follow-up would be evidence of the employee's diligent, good faith efforts to provide timely certification. The Department deleted the phrase ''from a health care provider'' from the first sentence in the final rule. As noted above, this provision applies to all certifications for FMLA leave, including certification for qualifying exigency leave, which does not depend on a health care provider completing the certification.

Proposed § 825.305(c) defined the process by which an employee could cure an incomplete or insufficient certification, requiring employers to state in writing what additional information was necessary and establishing a seven-day period for the employee to provide the additional information. The Department proposed to define the cure procedure to address employee concerns that some employers made repeated requests for additional information without specifying why the certification was deficient, and employer concerns that without a defined process, it was unclear how many opportunities an employee must be given to cure a deficient certification. Overall, the Department received very positive feedback regarding the cure procedure in proposed § 825.305(c).

Several unions and other employee representatives supported the process in proposed § 825.305(c) for curing an incomplete or insufficient certification. *See, e.g.*, National Partnership for Women & Families; American Civil Liberties Union; AFL–CIO; Association of Professional Flight Attendants; National Postal Mail Handlers Union. The AFL–CIO commented that requiring employers to state in writing what additional information was required when they determine that a certification is incomplete or insufficient was justified based on employee complaints of employers making repeated requests for additional information. The

Association of Professional Flight Attendants, however, asserted that the proposal could be improved by requiring that employers ''provide sufficient detail for the health care provider to cure the deficiency.'' *See also* National Postal Mail Handlers Union. The National Association of Letter Carriers argued that limiting the cure period to seven days set an artificial deadline that would increase the likelihood that FMLA protection would be denied; the American Postal Workers Union suggested that an additional 15 days would be appropriate.

Employer representatives were also supportive of the proposed cure procedure. *See, e.g.*, the Chamber; Society for Human Resource Management; Equal Employment Advisory Council; TOC Management Services; National Coalition to Protect Family Leave; College and University Professional Association for Human Resources; Domtar Paper Company; American Foundry Society. The National Association of Manufacturers found the cure process to be ''appropriate;'' the National Newspaper Association described it as ''both explicit and fair;'' Spencer Fane Britt & Browne noted the process was ''workable and fair;'' and Hewitt Associates asserted that the proposed regulation ''provid[ed] a needed structure to the employer's obligation for incomplete or insufficient forms.'' Some commenters, however, opposed the additional seven-day period to cure a deficient certification, arguing that the 15-day period for submitting a complete and sufficient certification should not be extended. *See, e.g.*, Independent Bakers Association; Burr and Forman; Vercruysse Murray & Calzone. Jackson Lewis argued that the seven-day period to cure the certification should not be subject to extension even when the employee is unable to meet the deadline despite diligent, good faith efforts. The Metropolitan Transportation Authority (NY) opposed the cure procedure, noting that the requirement that employers inform employees in writing of the reasons the certification is deficient imposes an additional administrative burden on employers. *See also* Independent Bakers Association. AT&T and the U.S. Postal Service, however, supported requiring employers to inform employees of the additional information necessary for the medical certification, noting that they have already been providing this information to their employees in writing and do not find it unduly burdensome. The U.S. Postal Service noted the benefit of this procedure, stating that ''keeping lines of communication open between the employee and FMLA coordinator is crucial to help employees navigate their way through sometimes complex regulatory requirements during times of individual and family crisis.'' The Food Marketing Institute argued that employers should be required to inform employees of technical deficiencies in a certification but, where the employer finds the certification to be vague, should not be required to provide specific instructions as to how the deficiency could be corrected.

Several commenters also found the definitions of incomplete and insufficient certifications in proposed § 825.305(c) to be useful additions to the regulations. *See, e.g.*, National Coalition to Protect Family Leave; Society for Human Resource Management; Equal Employment Advisory Council; American Foundry Society; Spencer Fane Britt & Browne; Retail Industry Leaders Association; Dalton Corp.; Scott D. Macdonald Esq. The Chamber stated that the clarification of these standards would ''immediately and drastically improve FMLA communications.'' The AFL–CIO disagreed, however, stating it was ''greatly troubled'' by the definition of an ''insufficient certification'' as one containing ''vague, ambiguous or nonresponsive'' information. The AFL–CIO noted that in some cases, particularly those involving chronic conditions, medical providers may not be able to provide the level of certainty that employers desire in providing the frequency and duration of anticipated absences due to the condition. *See also* National Partnership for Women & Families (''DOL must make clear that a medical certificate may not be considered insufficient simply because the health care provider cannot supply a definite date by which the serious health condition will end or cannot predict when intermittent leave may be necessary.''). The National Postal Mail Handlers Union and the Association of Professional Flight Attendants requested that the Department state that a range of occurrences or a duration of ''indefinite,'' ''unknown,'' or ''lifetime'' should not be considered vague, ambiguous or non-responsive.

The final rule adopts § 825.305(c) as proposed without any substantive changes. The Department believes that the procedure for curing a deficient certification set forth in this section will go a long way toward lessening the friction between employers and employees during the certification process by increasing communication and providing a clear and manageable process for resolving questions regarding certifications. The Department believes the seven-calendar-day time frame to cure a deficient certification is appropriate because the employee need only follow-up with the health care provider's office, or other appropriate office in the case of leave for a qualifying exigency or military caregiver leave to ensure that the complete certification is sent. In the case of a serious health condition, an employee should not need to schedule any additional medical treatment during this period. The Department also believes that it is appropriate that this time frame be extended when employees are unable to meet it despite diligent, good faith efforts. As discussed above regarding § 825.305(b), while employees have an obligation to provide a complete and sufficient certification in a timely manner, employers must be cognizant of the fact that employees must rely on health care providers and other third parties to complete the certification and in some circumstances employees will not be able to comply with the time frame specified in this section despite their best efforts to do so. The Department has also retained the proposed definitions of incomplete and insufficient certifications because it believes that they provide useful guidance for employers in assessing whether a certification is sufficient to support a request for FMLA leave. While a medical certification should include the clearest information that is practicable for the health care provider to provide regarding the employee's need for leave, the Department is aware that precise responses are not always possible, particularly regarding the frequency and duration of incapacity due to chronic conditions. The Department does expect, however, that over time health care providers should be able to provide more detailed responses to these questions based on their knowledge of the employee's (or family member's) condition. For example, while an initial certification for a newly diagnosed chronic serious health condition may provide a relatively large range of expected incapacity, subsequent certifications in new leave years should be able to provide more specific information regarding the anticipated frequency and duration of incapacity based on the employee's actual experience during the intervening period.

Proposed § 825.305(d) explained the consequences of an employee's failure to provide a complete and sufficient certification. Employers welcomed the clarification that employees bear the

burden of ensuring that a complete and sufficient FMLA certification is submitted to the employer upon request in order to substantiate their right to FMLA-protected leave. *See, e.g.*, U.S. Postal Service; Association of Corporate Counsel's Employment and Labor Law Committee; the Chamber.

Finally, the proposed regulation deleted current § 825.305(e), which addresses the employee's certification obligation when the employer's sick leave plan requires less stringent medical certification than the FMLA and the employee substituted paid leave. Proposed § 825.305(e) replaced this requirement with a new provision allowing employers to require a new certification on an annual basis for conditions lasting beyond a single leave year. This addition codified the Department's interpretation of the certification requirement set forth in Wage and Hour Opinion Letter FMLA2005–2–A (Sept. 14, 2005).

The AFL–CIO and the National Association of Letter Carriers opposed the deletion of current § 825.305(e), which states that if the employer's sick leave plan has less stringent certification requirements, an employer can only require that lesser certification when an employee substitutes paid leave for FMLA leave. The National Association of Letter Carriers argued that the deletion would needlessly create a double standard in workplaces, with the documentation required for paid leave varying depending on whether the leave was FMLA-protected. TOC Management Services, however, argued that the deletion of current § 825.305(e) resolved confusion as to whether employers could require FMLA medical certification in all cases. *See also* Association of Corporate Counsel's Employment and Labor Law Committee; Equal Employment Advisory Council.

The AFL–CIO, American Postal Workers Union, and the National Postal Mail Handlers Union also opposed the provision in proposed § 825.305(e) allowing for a new medical certification each year for conditions lasting longer than a single leave year, arguing that there was no statutory basis for this new requirement. These commenters argued that annual medical certifications imposed an unnecessary and meaningless burden on employees with stable, long-term chronic health conditions. Employer commenters, however, argued that allowing employers to require annual medical certification would provide employers with a much needed tool for managing intermittent FMLA leave. *See, e.g.*, the Chamber; U.S. Postal Service; American Foundry Society; National Association of Manufacturers; Retail Industry Leaders Association; National Small Business Association; Hewitt Associates; WorldatWork. TOC Management Services requested that the Department clarify that annual certifications would be considered ''new'' certifications, on which employers would be entitled to request second opinions, as opposed to ''recertifications,'' on which the regulations do not permit second opinions. *See also* Equal Employment Advisory Council (''In particular, because the statute does not allow for second or third opinions on recertification, the recognition that a new leave year should trigger an employer's right to require a new certification is important.''). The National Retail Federation asked that the Department allow employers to request a new certification every six months.

The Department believes that current § 825.305(e) created needless confusion and conflicted with the statutory right of employers to require certification of a serious health condition from a health care provider to substantiate the employee's right to FMLA-protected leave. *See* 29 U.S.C. 2613. Additionally, for the reasons explained in Wage and Hour Opinion Letter FMLA2005–2–A (Sept. 14, 2005), the Department believes that allowing employers to require annual medical certifications of conditions lasting longer than a single leave year is an appropriate interpretation of the employer's statutory right to certification and provides a useful tool for administering the FMLA in the workplace. The Department does not believe that the requirement will be burdensome, particularly in light of the requirement that employees with chronic serious health conditions receive treatment by a health care provider at least twice per year. *See* § 825.115(c)(1). Finally, as the Department stated in the 2005 opinion letter, such new annual medical certifications are subject to clarification, including second and third opinions, as provided in § 825.307. Accordingly, the final rule adopts § 825.305(e) as proposed with the additional clarification that the clarification and authentication provisions of § 825.307 apply to new annual certifications.

Section 825.306 (Content of Medical Certification for Leave Taken Because of an Employee's Own Serious Health Condition or the Serious Health Condition of a Family Member)

Current § 825.306 addresses how much information an employer can obtain in the medical certification to substantiate the existence of a serious health condition (of the employee or a family member) and the employee's need for leave due to the condition. This section also explains that the Department provides an optional form (Form WH–380) for use in the medical certification process; other forms may be used, but they may only seek information related to the condition for which leave is sought, and no additional information beyond that contained in the WH–380 may be required. As discussed in the preamble to the proposed rule, the Department has received significant feedback from stakeholders, including health care providers, that the current WH–380 is confusing and could be improved. In addition to proposing a revised WH–380, the Department sought comment as to whether multiple forms would be clearer. The preamble to proposed § 825.306 also contained an extensive discussion of the interaction between the FMLA certification process and the Department of Health and Human Services' Health Insurance Portability and Accountability Act (HIPAA) Privacy Rule, which governs the privacy of individually identifiable health information created or held by HIPAA-covered entities. Proposed § 825.306(a) contained the information necessary for a complete certification set forth in current § 825.306(b) with a number of changes, including the addition of the health care provider's specialization; guidance as to what may constitute appropriate medical facts, including that a health care provider may provide a diagnosis; and whether intermittent or reduced schedule leave is medically necessary. Proposed § 825.306(b) retained language from current § 825.306(a) and (b) regarding the Department's optional Form WH–380. The proposed rule deleted current § 825.306(c), which contains language similar to current § 825.305(e) regarding lesser certification requirements in employer sick leave plans. Proposed § 825.306(c) incorporated language from current § 825.307(a)(1) explaining the interaction between workers' compensation and the FMLA with regard to the clarification of medical information. The proposed section also clarified 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 right to unpaid FMLA leave. The proposed rule contained a new § 825.306(d), which clarified that where a serious health condition may also be a disability, employers are not prevented from following the procedures under the Americans with Disabilities Act (ADA) for requesting medical information. The proposed rule also contained a new § 825.306(e), which codified in the regulations the Department's long-standing position that employers may not require employees to sign a release of their medical information as a condition of taking FMLA leave. The final rule adopts § 825.306 as proposed with mostly minor changes, which are discussed below. The title of § 825.306 is modified in the final rule to clarify that this section does not apply to the military family leave provisions. Additionally, the Department has revised the current optional certification form WH–380 into two separate optional forms, one for the employee's own serious health condition and one for the serious health condition of a covered family member.

The Department received few comments on the inclusion in proposed § 825.306(a)(1) of the health care provider's specialization in the information that may be required on a certification. *See, e.g.*, Equal Employment Advisory Council (''Particularly considering the broad definition of 'healthcare provider,' the scope of the provider's expertise is important information that the employer needs to determine whether the certification is sufficient.''); Spencer Fane Britt & Browne (specialization is irrelevant unless employers are allowed to require that the certification be provided by an appropriate specialist); National Partnership for Women & Families (''the identification of the specialty could lead to the employer gaining information regarding the medical condition of the employee that is unnecessary to the determination of whether the employee qualifies for FMLA leave''). The Department notes it has always included the ''Type of Practice'' as part of the medical certification form. The Department believes that the health care provider's medical specialty/type of practice is useful and appropriate to the medical certification form and has retained this requirement in the final rule.

Many comments were received on proposed § 825.306(a)(3), which stated that the statement of appropriate medical facts ''may include information on symptoms, diagnosis, hospitalization, doctors visits, whether medication has been prescribed, any referrals for evaluation or treatment (physical therapy, for example), or any other regimen of continuing treatment.'' 73 FR 7983 (Feb. 11, 2008). Employees and their representatives objected to the proposal because they felt that a diagnosis should not be provided. *See, e.g.*, Family Caregiver Alliance; National Treasury Employees Union; National Partnership for Women & Families; American Postal Workers Union; National Association of Letter Carriers; Texas Classroom Teachers Association; Darcy Bowles; Craig Stiver; Jon Arnold. The AFL–CIO expressed concern that specifying medical facts, including diagnosis, ''may'' be provided on the certification would result in employers rejecting as insufficient certifications that do not contain this information. Employer representatives, on the other hand, considered the proposal to provide useful clarification for the health care provider. *See, e.g.*, Manufacturers Alliance/MAPI; Equal Employment Advisory Council; American Foundry Society; Dalton Corp. A number of employer representatives requested that the list of appropriate medical facts be made mandatory so that employers could require a diagnosis to support a request for FMLA leave. *See, e.g.*, the Chamber; Society for Human Resource Management; National Association of Manufacturers; National Association of Wholesaler-Distributors; National Business Group on Health; National Coalition to Protect Family Leave; Food Marketing Institute. The Department notes that the determination of what medical facts are appropriate for inclusion on the certification form will vary depending on the nature of the serious health condition at issue, and is appropriately left to the health care provider. Accordingly, the Department declines to set forth a mandatory list of medical facts that must be included in the FMLA certification. Similarly, the Department continues to believe that it would not be appropriate to require a diagnosis as part of a complete and sufficient FMLA certification. Whether a diagnosis is included in the certification form is left to the discretion of the health care provider and an employer may not reject a complete and sufficient certification because it lacks a diagnosis.

Several employer representatives praised the inclusion in proposed § 825.306(a)(6), (7), and (8) of the statutory requirement that there must be a medical necessity for leave taken on an intermittent or reduced leave schedule basis due to a serious health condition. *See, e.g.*, Equal Employment Advisory Council; International Public Management Association for Human Resources; City of Medford (OR); American Foundry Society; Dalton Corp. The National Association of Letter Carriers, however, objected to the inclusion of this language arguing that it ''would impose unnecessary requirements on employees and their health providers to disclose confidential medical information.'' Because leave may only be taken intermittently or on a reduced leave schedule due to the employee's or a family member's serious health condition when medically necessary, the final rule retains the requirement that a certification supporting the need for such leave must include information sufficient to establish the medical necessity for intermittent or reduced schedule leave. *See* 29 U.S.C. 2612(b)(1).

The Equal Employment Advisory Council and the Chamber specifically supported the proposed clarification in § 825.306(c) that where an employee's serious health condition is covered by workers' compensation and the workers' compensation procedures permit the employer to request additional information beyond that included in a FMLA certification, the employer may follow the workers' compensation procedure. Both of these commenters also agreed with the proposal in this section to allow employers to request additional information in accordance with a paid disability leave policy or disability plan that requires greater information to qualify for payment or benefits. The AFL–CIO, however, opposed this proposal and argued that it was inconsistent with the Department's proposal to delete current § 825.305(e), which prevented employers from requiring FMLA certification where the employers' sick leave plan had less stringent certification requirements and paid leave was substituted for unpaid FMLA leave. *See also* American Postal Workers Union. The Department disagrees with the AFL–CIO comment. The proposed clarifications in current § 825.306(c) and the deletion of current § 825.305(e) are wholly consistent with each other. Taken together, these changes reflect both an employer's statutory right to require a minimally sufficient certification to substantiate the employee's right to FMLA-protected leave in all cases, and an employer's right to additional information when another benefit plan or program requires greater information in order to qualify the employee for payment or benefits beyond those provided by the FMLA.

The Equal Employment Advisory Council, the Chamber, and TOC Management Services supported the Department's clarification in § 825.306(d) that employers may follow the procedures for requesting medical information under the ADA where the employee's serious health condition may also be a disability within the meaning of that Act. The Equal Employment Opportunity Commission, which enforces Title I of the ADA, was also supportive of this clarification, noting in its comments that it often receives ''questions from employers who are worried that they will violate the FMLA if they follow the ADA's procedures for requesting medical information in these circumstances.'' The Texas Classroom Teachers Association, however, suggested that the regulation be modified so that an employer could only follow ADA procedures where an employee requests an accommodation ''not otherwise provided by the FMLA.'' Hewitt Associates asked for clarification as to whether additional medical information received pursuant to § 825.306(c) and (d) may be used to determine employees' eligibility for FMLA leave. *See also* Metropolitan Transportation Authority (NY). The final rule revises § 825.306(c) and (d) to further clarify that additional information received pursuant to workers' compensation, paid leave, or ADA procedures may be considered in determining an employee's entitlement to FMLA-protected leave.

Lastly, employee representatives supported the clarification in § 825.306(e) that while employees may choose to comply with an authorization, release, or waiver allowing the employer to communicate directly with the employee's health care provider, they may not be required to provide such an authorization, release, or waiver permitting their employer to contact their health care provider directly as part of the FMLA certification process. *See, e.g.*, National Partnership for Women & Families; AFL–CIO; American Association of University Women; National Postal Mail Handlers Union; Coalition of Labor Union Women. *See also* Equal Employment Advisory Council. The Metropolitan Transportation Authority (NY), however, argued that employees should be required to execute a release of their medical information as part of the FMLA certification process. The Equal Employment Advisory Council and the Association of Corporate Counsel's Employment and Labor Law Committee supported the statement in this section that employees are responsible for providing complete and sufficient certification and that their failure to do so may result in the denial of FMLA leave. The Department continues to believe that employees should not be required to execute any type of release or authorization permitting their employers to receive medical information directly from their health care providers as part of the FMLA certification process. Of course, an employee remains free to choose to comply with the certification requirement in this manner by executing an authorization providing for the release of information required for a complete and sufficient certification. Accordingly, the final rule adopts § 825.306(e) as proposed, with only minor editorial changes. As stated in the regulation, however, in all cases where certification is requested, it is the employee's obligation to provide a complete and sufficient certification and the failure to do so may result in the denial of FMLA leave.

The Department received generally favorable comments regarding the proposed revision to the WH–380 optional medical certification form. *See* Equal Employment Advisory Council; Domtar Paper Company; Spencer Fane Britt & Browne; National Treasury Employees Union. *But see* Vercruysse Murray & Calzone; Illinois Credit Union League. Most commenters who addressed the issue supported the creation of multiple certification forms, most often suggesting separate forms for leave due to the serious health condition of the employee and the employee's family member. *See, e.g.*, Equal Employment Advisory Council; Hewitt Associates; American Health Care Association; National Partnership for Women & Families; Communications Workers of America; Southern Company. *See also* Spencer Fane Britt & Browne (suggesting separate forms for block and intermittent or reduced schedule leave); American Health Care Association/National Center for Assisted Living (suggesting a separate certification form for chronic serious health conditions). A few commenters, however, opposed the creation of multiple forms. *See* Jackson Lewis; National Treasury Employees Union; Scott D. Macdonald Esq.; Pennsylvania Governor's Office of Administration (noting that the Commonwealth of Pennsylvania switched from using two forms to using a single form because employees frequently filled out the wrong form). The Communications Workers of America, the Coalition of Labor Union Women, and the Academic Pediatric Association *et al.*, encouraged the Department to make use of the WH–380 mandatory. Based on the comments received, the Department has decided to include two optional certification forms in the final rule, one form to be used when the need for leave is due to the employee's own serious health condition and a second form to be used when the need for leave is to care for a family member with a serious health condition. Section 825.306(b) of the final rule has been modified accordingly to reflect that there are two optional certification forms. The Department also altered several of the questions from the single optional certification form proposed in the NPRM to better explain the information needed to support a request for each type of leave. The Department believes that using separate forms will make the forms shorter, clearer, and easier for health care providers to complete. The Department further believes that the purpose behind the two forms is sufficiently clear that it will not cause confusion. Because many serious health conditions require a combination of both a continuous block of leave and intermittent leave, the Department is not promulgating separate certification forms for block and intermittent leave. The Department also declines to mandate the use of either of the optional Department of Labor certification forms; where certification is requested, the employee's obligation is to provide a complete and sufficient certification, regardless of the form used.

Several commenters offered specific comments on the proposed revision to the Department's optional medical certification form. A number of commenters praised the Department's deletion of checkboxes on the current form for health care providers to indicate the type of serious health condition at issue. *See, e.g.*, Society for Human Resource Management; National Coalition to Protect Family Leave; American Foundry Society; College and University Professional Association for Human Resources; National Business Group on Health; Bridgestone Firestone North American Tire. These commenters noted that whether the medical facts satisfy one of the definitions of a serious health condition under the regulations is a legal determination, not a medical one; they also reported significant confusion resulting from health care providers checking a type of serious health condition that was inconsistent with the medical information contained in the rest of the form. *See* Society for Human Resource Management; National

Coalition to Protect Family Leave; College and University Professional Association for Human Resources; *see also* Equal Employment Advisory Council. Other commenters, however, objected that the proposed changes would impermissibly result in employers making medical judgments that should be made by health care providers. *See* National Partnership for Women & Families; Association of Professional Flight Attendants; Mary Lundquist. The National Partnership for Women & Families objected to the removal from the proposed form of the definitions of serious health condition, asserting that ''employees will be unable to determine themselves if they qualify for FMLA leave and will be unable to challenge the employer's determination that they do not qualify without legal or medical assistance.'' Because the Department has added a definition of serious health condition to the notice of Employee Rights under FMLA that must be posted, and provided to all employees at hiring, the Department disagrees with the National Partnership's assertion that removing this same information from the certification form will impact an employee's ability to determine for themselves if they qualify for FMLA leave. Moreover, the Department believes that requiring a health care provider to determine which definition of serious health condition is applicable has caused considerable confusion, with employers frequently receiving certifications with multiple and contradictory boxes checked, or with medical facts contained in the certification that are inconsistent with the serious health condition that has been checked. Accordingly, the optional certification forms contained in the final rule do not include boxes to indicate which definition of serious health condition is applicable. As the Department stated in the NPRM, the health care provider should determine the appropriate relevant medical facts to include on the certification and the employer should determine whether the certification is complete and sufficient to meet the regulatory definition of serious health condition. 73 FR 7915 (Feb. 11, 2008).

The Illinois Credit Union League and Cummins Inc. objected to being required to include on the certification form a statement of the essential functions of the position, arguing that it was unduly burdensome to require employers to set forth the essential functions of the employee's position or to provide a job description. The Equal Employment Advisory Council, however, supported the requirement that the health care provider provide information sufficient to establish the employee is unable to perform one or more of the essential functions of the employee's job, noting that the inability to perform the essential functions of the job due to a serious health condition is a ''threshold requirement'' that is ''the foundation for this type of FMLA leave.'' *See also* Association of Corporate Counsel's Employment and Labor Law Committee. The Illinois Credit Union League requested that the references to employees' job duties or functions in questions 6 and 7 be standardized to refer to ''essential functions.'' *See also* Scott R. Macdonald Esq.

In response to the concern of some commenters, the final rule makes clear in § 825.123(b) that an employer may, but is not required to, provide a list of essential functions when it requires a medical certification. The Department believes it is in the best interests of both employers and employees when such information is provided by the employer at the time it requests medical certification, so that the health care provider may assess the employee's ability to perform his or her job based on the most complete description of the employee's duties. The Department recognizes, however, that the FMLA imposes no legal obligation on employers to create or maintain written job descriptions or a list of essential functions for each position. Accordingly, the final form WH–380E has been revised to make clear that, in those cases in which the employer chooses not to include information on the certification form identifying the employee's essential functions, the health care provider may assess the employee's ability to perform his or her job based on the employee's own description of his or her job functions. For this same reason, and because the determination of whether a particular job duty is an ''essential function'' as that term is used for purposes of the FMLA is a legal, not a medical, conclusion, the final form WH–380E also retains the references to an employee's ''functions'' in questions 6 and 7.

The Department notes that an employer may use the procedures set forth in § 825.307 to clarify a certification that does not clearly specify that an employee is unable to perform one or more essential functions of the position. For example, if a certification specifies only that an employee is unable to lift heavy items, an employer may clarify with the health care provider whether the employee can perform the essential function of his or her job of lifting 20 pounds. In order to minimize the need for such clarifications, the Department strongly encourages employers to provide a list of essential functions when it requests medical certification.

Several commenters objected to the wording of question 3, which asks the health care provider to describe the relevant medical facts, arguing that as worded in the proposed form health care providers would not be aware that the medical facts listed, including diagnosis, were not mandatory. *See, e.g.*, National Partnership for Women & Families; Communications Workers of America; Coalition of Labor Union Women; Texas Classroom Teachers Association; Academic Pediatric Association, et al. Other commenters requested, as they had in response to proposed § 825.306(a), that the provision of a diagnosis and the other listed medical facts be made mandatory on the medical certification form. *See, e.g.*, Society for Human Resource Management; National Coalition to Protect Family Leave; American Foundry Society; Independent Bakers Association; National Newspaper Association; Illinois Credit Union League. The National Business Group on Health and Hewitt Associates suggested that including the list of conditions set forth in current § 825.114(c), which are ordinarily not serious health conditions, would provide useful guidance to health care practitioners in completing the medical certification form. As discussed above regarding proposed § 825.306(a)(3), the determination of what medical facts are appropriate for inclusion on the certification form is within the discretion of the health care provider and will vary depending on the nature of the condition for which leave is sought. The Department has revised the certification form to clearly indicate that the medical facts listed are merely examples and are not required in all cases. The Department does not believe that it is necessary to include the list of conditions set forth in final § 825.113(d) (current § 825.114(c)) on the certification forms; the health care provider will determine the medical facts relating to the employee's or family member's health condition, and where those medical facts meet one of the definitions of serious health condition the employee's need for leave will be FMLA-protected regardless of whether the condition is one of those listed.

Vercruysse Murray & Calzone objected to the statement in the form's instructions to the employee that failure to provide the requested information ''may result in a denial'' of FMLA leave,

arguing that failure to provide such information will always result in such a denial and the instructions should so indicate. *See also* Hewitt Associates. The Department believes that this instruction is correct. Employers are not required to request medical certification and in appropriate circumstances may protect leave under the FMLA despite the employee's failure to return the certification form.

Several commenters also objected to the instructions to the health care provider in section III of the proposed form, arguing that instead of indicating that the terms ''lifetime,'' ''unknown,'' or ''indeterminate'' ''may not be sufficient to determine FMLA coverage,'' the instructions should state clearly that such terms are not sufficient to support a request for FMLA-protected leave. *See, e.g.*, Society for Human Resource Management; National Coalition to Protect Family Leave; American Foundry Society; Hewitt Associates; National Newspaper Association; Spencer Fane Britt & Browne. *But see* National Partnership for Women & Families (''We are concerned that this instruction, coupled with the proposed direct contact between the employer and employee's health care provider could lead to employer representatives demanding that health care providers give more definite answers when they cannot.''); Communications Workers of America. The Academic Pediatric Association et al. argued that ''lifetime,'' ''unknown,'' and ''indeterminate'' may be medically appropriate answers for some conditions and that the ''lack of medical certainty should not supply a de facto reason for denying FMLA leave.'' The Department believes that the instructions are correct as proposed. While terms such as ''lifetime,'' ''unknown,'' or ''indeterminate'' will not be sufficient where more specific estimates are possible, there will be situations in which such terms are an appropriate response reflecting the health care provider's best medical judgment and will therefore be sufficient.

Finally, several commenters addressed the Department's discussion of the Health Insurance Portability and Accountability Act (HIPAA) and the HIPAA Privacy Rule. The National Coalition to Protect Family Leave and the Equal Employment Advisory Council agreed with the Department's observation that the HIPAA Privacy Rule sets the standard for the protection of employee medical information. *See also* U.S. Postal Service; American Health Care Association; Society for Human Resource Management; Retail Industry Leaders Association. Infinisource, Inc., concurred, stating that ''DOL correctly recognized with the advent of HIPAA since the FMLA regulations were last finalized, a framework already exists for ensuring privacy.'' Commenters representing employees, however, objected that the HIPAA Privacy Rule does not provide sufficient protection for employee medical privacy. *See, e.g.*, AFL–CIO; National Treasury Employees Union; National Association of Letter Carriers; National Postal Mail Handlers Union. As the Department explained in the NPRM, the HIPAA Privacy Rule governs disclosures of medical information to employers or their representatives by employees' health care providers that are HIPAA-covered entities and sets a far higher standard for protection of employee medical information than the current FMLA regulations. The impact of HIPAA is discussed further in § 825.307 as it relates to the process of clarification and authentication of medical certifications.

Section 825.307 (Authentication and Clarification of Medical Certification for Leave Taken Because of an Employee's Own Serious Health Condition or the Serious Health Condition of a Family Member)

Current § 825.307 addresses the employer's ability to clarify or authenticate a complete and sufficient FMLA certification. Current § 825.307(a) permits an employer, with the employee's permission, to have its own health care provider contact the employee's health care provider in order to clarify or authenticate a FMLA certification. Proposed § 825.307(a) defined ''authentication'' and ''clarification,'' clarifying that ''authentication'' involves providing the health care provider with a copy of the certification and requesting verification that the information on the form was completed and/or authorized by the provider; no additional medical information may be requested and the employee's permission is not required. In contrast, ''clarification'' involves contacting the employee's health care provider in order to understand the handwriting on the medical certification or to understand the meaning of a response; no additional information beyond that included in the certification form may be requested and any contact with the employee's health care provider must comply with the requirements of the HIPAA Privacy Rule. The NPRM removed the requirement that the employer utilize a health care provider to make the contact with the employee's health care provider, and the requirement that the employee consent to the contact. Proposed § 825.307(a) required that prior to any contact with the employee's health care provider for purposes of clarification or authentication of the FMLA certification, the employee must first be given an opportunity to cure any deficiencies in the certification pursuant to the procedures set forth in § 825.305(c). The proposed rule also made clear that the employee is not obligated to permit his or her health care provider to communicate with the employer, but that if such contact is not permitted and the employee does not otherwise clarify the certification, the employer may deny the taking of FMLA leave. Proposed § 825.307(b) consolidated language from current § 825.307(a)(2) and (b) setting forth the requirements for an employer to obtain a second opinion, and added language requiring the employee or the employee's family member to authorize his or her health care provider to release relevant medical information pertaining to the serious health condition at issue if such information is requested by the second opinion health care provider. Proposed § 825.307(c) added the same requirement to provide relevant medical information if requested by the third opinion health care provider. Proposed § 825.307(d) increased the number of days the employer has to provide an employee with a requested copy of a second or third opinion from two to five business days. The NPRM proposed no changes to current § 825.307(e) and (f), involving travel expenses for second and third opinions and certifications by foreign health care providers, respectively. The Department did note in the preamble, however, that it was aware of significant concerns regarding foreign medical certifications and asked for comment as to what changes would allow for better authentication of such certifications.

The final rule makes three changes to proposed § 825.307. First, in response to many comments from employee groups and individual employees expressing concern for employee medical privacy, § 825.307(a) of the final rule modifies the process by which an employer may contact an employee's health care provider to clarify who may contact the employee's health care provider and to ensure that the employee's direct supervisor is not the point of contact. The final rule also revises the reference to the HIPAA Privacy Rule in this section to make clear that its requirements must be satisfied whenever individually-identifiable health information of an employee is

shared with an employer by a HIPAA-covered health care provider. Second, § 825.307(f) has been modified to require employees to provide, upon request by the employer, a translation of FMLA certifications that are completed by foreign medical providers in languages other than English. In addition, the title of § 825.307 is modified in the final rule to clarify that this section does not apply to the military family leave provisions.

The Department's proposal to allow direct contact (*i.e.*, without the use of a health care provider) between employers and employees' health care providers resulted in a significant number of comments to the NPRM. Employees and their representatives expressed both generalized concerns arising from the removal of the requirement of employee consent, and specific concerns regarding the possibility of direct supervisors being made aware of sensitive medical information. Employers and their representatives expressed overwhelming support for the proposal, arguing that it would streamline the certification process and decrease administrative costs.

While most of the comments focused on the clarification process, several commenters representing employers specifically supported the Department's proposal regarding authentication of FMLA certifications. These commenters noted that the current regulation's requirement of employee consent for authentication of a FMLA certification is problematic because the purpose of authenticating a certification is to ensure that fraud has not been committed. Consent is unlikely in such situations and defeats the purpose. *See, e.g.*, AT&T; International Public Management Association for Human Resources; HR Policy Association; National Small Business Association; National Association of Manufacturers; the Chamber; Equal Employment Advisory Council. The National Association of Letter Carriers, however, argued that if such direct contact between the employer and the employee's health care provider is necessary to ensure the authenticity of a certification, the employer should be required to make such contact only in writing in order to ensure that additional medical information is not disclosed. The American Civil Liberties Union specifically objected to removing the requirement of employee consent in order for an employer to authenticate a FMLA certification. *See also* National Treasury Employees Union; AFL–CIO. The Department declines to require that the authentication process be limited to a written process. The Department has modified the final rule to make clear that, to the extent that authentication requires a HIPAA-covered health care provider to share individually-identifiable health information with an employer, the HIPAA Privacy Rule will require a valid HIPAA authorization.

Regarding the clarification process, the Department received a significant number of comments, many coming from individual employees, opposing the Department's proposal to allow employers to contact an employee's health care provider for purposes of clarifying a certification without the employee's permission and without using a health care provider to make the contact. *See, e.g.*, Richard Baerlocher; Theodore Rabinowitz; Kenneth Kelble; Robin Arnold; Donna Long; Bob Gunter; Sarah Blackman; Susan Fuchs. Many commenters representing employees were particularly concerned that the proposed rule would allow an employee's direct supervisor to contact the employee's health care provider. *See, e.g.*, National Postal Mail Handler's Union; Legal Aid Society—Employment Law Center; National Association of Letter Carriers. The Service Employees International Union argued that the prospect of a direct supervisor contacting a health care provider ''would deter valid requests for leave from employees who resent this invasion of their own and their family member's privacy.'' *See also* National Employment Lawyers Association; Women Employed. The National Partnership for Women & Families noted that under the proposed regulation there was nothing to prevent an employer from utilizing the employee's supervisor, or even a coworker, to clarify a FMLA certification. *See also* Women Employed; Family Caregiver Alliance; American Association of University Women.

Commenters also objected to allowing individuals without medical training to contact an employee's health care provider. *See, e.g.*, National Postal Mail Handlers Union; Association of Professional Flight Attendants; Women Employed; National Association of Letter Carriers; PathWaysPA. The AFL–CIO argued that the employee protections afforded by requiring provider-to-provider contact far outweigh any expense or delay incurred as a result of such requirement. The Communications Workers of America argued that allowing employer representatives who lack medical training to contact employee health care providers would significantly increase the burden on the healthcare system.

Several commenters representing employees expressed concern that once employers were allowed to make contact with an employee's health care provider without having to use the employer's own health care provider, there would be no way to ensure that employers limited themselves to requesting clarification of the certification and did not request additional medical information. *See, e.g.*, National Association of Letter Carriers; Family Caregiver Alliance; American Civil Liberties Union; American Association of University Women. The National Postal Mail Handlers Union argued that the appropriate mechanism for an employer to gather additional information regarding an employee's medical condition is the second opinion process, not direct contact with the employee's health care provider. *See also* Service Employees International Union; Communications Workers of America.

Finally, commenters representing employees also argued that the requirement in current § 825.307(a) that the employee consent to any contact with his or her health care provider provides greater protection for employee medical privacy than does requiring employers to comply with the HIPAA Privacy Rule. The AFL–CIO, for example, argued that the HIPAA Privacy Rule's protections are insufficient because they do not provide a remedy against employers for the unauthorized disclosure of protected health information. *See also* Air Line Pilots Association. The National Treasury Employees Union and the National Association of Letter Carriers both argued that the current FMLA regulations provide greater protection for employee medical information than does HIPAA. The National Postal Mail Handlers Union argued that if the Department included proposed § 825.307(a) in the final rule despite employee objections, it should make clear that a HIPAA-compliant authorization for employer contact could be narrowly limited to cover only the information included in the FMLA certification form. *See also* Association of Professional Flight Attendants.

Commenters representing employers overwhelmingly supported the proposed changes to the clarification process. *See, e.g.*, Infinisource, Inc.; AT&T; Society for Human Resource Management; Association of Corporate Counsel's Employment and Labor Law Committee; National Coalition to Protect Family Leave; National Association of Manufacturers. The Chamber described the proposal to permit contact between the employer without the use of a health

care provider representing the employer and the employee's health care provider as ''among the most impactful changes proposed'' in the NPRM and assured that ''employers are mindful of the sensitive nature of the information involved and consider this additional privilege extremely limited * * * [they] do not view this as permission to go on a 'fishing expedition' and delve further into an employee's private affairs than necessary to evaluate the request for leave.'' The Equal Employment Advisory Council asserted that allowing human resources professionals to contact the employee's health care provider would allow the necessary information to be obtained more efficiently because the individual making the contact would be familiar with both the FMLA's requirements and the employee's job functions. The National Newspapers Association noted that allowing direct employer contact with the employee's health care provider was a ''significant improvement'' for small businesses that do not have health care providers on staff. *See also* National Federation of Independent Business. The Society for Human Resource Management and the National Coalition to Protect Family Leave urged the Department to clarify in the final rule that employees may choose to authorize their employers to contact their health care providers at the outset of the clarification process, and are not required to first seek to cure the certification themselves pursuant to § 825.305(c). Finally, numerous employers and employer representatives commented that the HIPAA Privacy Rule has supplanted the consent requirement of the current regulation and sets the appropriate standard for guaranteeing employee medical privacy. *See, e.g.*, National Coalition to Protect Family Leave; Equal Employment Advisory Council; American Health Care Association; Society for Human Resource Management; Retail Industry Leaders Association. For example, the U.S. Postal Service stated that ''HIPAA restrictions will continue to protect unwarranted disclosures but at the same time, employers will be able to process FMLA requests more expeditiously when allowed direct access to a provider.''

The Department understands the concerns expressed by employees and their representatives that the proposed regulation did not prohibit an employee's direct supervisor from contacting the employee's health care provider. The Department agrees that employers should not be able to use the employee's direct supervisor to contact an employee's health care provider. Accordingly, § 825.307(a) of the final rule specifies that the employer representative contacting the employee's health care provider must be either a health care practitioner, a human resources professional, a leave administrator, or a management official, but in no case may the employer representative be the employee's direct supervisor. The Department recognizes that many employers utilize third party providers to manage all or part of their leave administration; such third party providers may be used for the purposes of authenticating or clarifying FMLA certifications. The Department declines, however, to restrict employers to utilizing only health care providers for purposes of authenticating or clarifying an employee's FMLA certification. As is the case under the existing process set forth in current § 825.307(a), the final rule restricts the employer to contacting the health care provider for the purpose of understanding the handwriting on the medical certification or the meaning of a response. In light of the fact that an employer may make similar, or even more detailed, inquiries without utilizing a health care provider when determining an employee's eligibility for other related benefits, the Department does not believe that employers should be so constrained under the FMLA. For example, the Department notes that employers are not constrained by any such restriction under the Americans with Disabilities Act, as amended, and, in fact, commonly utilize human resources professionals or other management officials to communicate with employees' health care providers when appropriate under that Act. The Department encourages employers to continue to utilize health care practitioners when contacting an employee's health care provider to clarify FMLA certifications wherever possible, but § 825.307(a) of the final rule permits employers to use other appropriate representatives in order to streamline the authentication and clarification process, speed the determination of whether an employee's leave is FMLA-protected and reduce the associated administrative costs.

The final rule also maintains the requirement from the proposal that communication between employers and employees' HIPAA-covered health care providers for purposes of clarification of FMLA certifications comply with the requirements of the HIPAA Privacy Rule and clarifies that the requirements of the HIPAA Privacy Rule must be satisfied whenever individually-identifiable health information of an employee is shared with an employer by a HIPAA-covered health care provider. As the Department noted in the NPRM, the HIPAA Privacy Rule provides far more protection for employee medical information than current § 825.307(a). For example, although the current regulation requires an employee's permission for an employer to contact the employee's HIPAA-covered health care provider, it does not dictate the form such permission may take. Under the current regulation, employees could verbally consent to such contact. In contrast, in order for a health care provider that is a HIPAA-covered entity to share employee health information with an employer, the authorization must be valid under the HIPAA Privacy Rule, which requires that the authorization must be a written document containing the name of the health care provider, a description of the information to be disclosed, the name or specific identification of the person to whom the disclosure may be made, a description of the purpose of the requested disclosure, an expiration date or event for the authorization, and a signature of the individual making the authorization. 45 CFR 164.508(c)(1). In addition, three required statements regarding the revocation of the authorization, the conditioning of treatment or payment, and the potential for redisclosure must also be included as provided at 45 CFR 164.508(c)(2). Finally, the HIPAA Privacy Rule at 45 CFR 164.508(b)(3), prohibits a HIPAA authorization from being combined with certain other documents.

Hence, the HIPAA authorization supplants and serves the same purpose as the ''with the employee's permission'' standard under the current FMLA rule. In such cases employees will be made aware that their employers may need to contact the employees' HIPAA-covered health care provider because the employee will have to complete a HIPAA authorization form with his or her health care provider, at which point in time employees can choose to allow the authorization or not. If the employee chooses not to authorize such contact under the HIPAA Privacy Rule, he or she has the same responsibilities as under the current FMLA rule to provide a complete and sufficient medical certification form. Finally, the Department notes that because employers are not covered entities under HIPAA, the HIPAA Privacy Rule does not provide a remedy to employees for employers' dissemination of confidential medical information. However, § 825.500(g) of

both the current and final rules requires employers to maintain medical certifications created for purposes of the FMLA as confidential medical records in separate files from the usual personnel files.

Finally, the Department agrees that employees may choose to forego the opportunity to utilize the cure procedure in § 825.305(c) if they wish their employer to proceed immediately with curing any deficiencies in the certification through direct contact with their health care provider. The Department does not believe that any change is necessary in the proposed regulatory language in this regard, however, as the regulation requires only that the employee be given the opportunity to cure any deficiencies in this manner; it does not require that the employee avail himself or herself of that opportunity. The Department also does not believe that any change is necessary to clarify the scope of information involved in the clarification process. The final rule maintains the standard set forth in current § 825.307(a) limiting the scope of clarification to the information set forth in the certification. The Department's addition of a definition of the term ''clarification'' is not intended to broaden the type or amount of information an employer may obtain as part of the existing clarification process.

The Department received comments from several employers and their representatives regarding the proposal in § 825.307(b) and (c) to require employees or their family members to authorize their health care providers to release all relevant medical information pertaining to the serious health condition at issue if requested by the provider of the second or third opinion in order to render a sufficient and complete medical opinion. These commenters universally agreed that this proposal would enhance the second and third opinion process. *See, e.g.*, the Chamber; Society for Human Resource Management; Equal Employment Advisory Council; American Foundry Society; Domtar Paper Company; National Business Group on Health; National Association of Manufacturers; AT&T. The U.S. Postal Service argued that both the employer and the employee will benefit from this proposal because the second or third opinion provider will be better able to assess the employee's medical condition and may also be able to rely on prior test results in some cases, thus sparing employees unnecessary additional medical testing. *See also* National Coalition to Protect Family Leave. The Department believes that it is appropriate to require employees or their family members to make such authorizations in this context because the information will be conveyed directly to the second or third opinion health care provider, as opposed to being provided to the employer as is the case with clarification. While the Department received very few comments on the proposal in § 825.307(d) to increase from two to five business days unless extenuating circumstances prevent such action the amount of time employers have to provide a copy of a second or third opinion to an employee who requests one, TOC Management Services and Infinisource, Inc. specifically supported this proposal. *But see* Richard Baerlocher (urging the Department to retain the current two-day time frame). The final rule adopts § 825.307(b), (c), and (d) as proposed without any changes.

Finally, the Department received comments from several employer representatives regarding FMLA certifications filled out by foreign medical care providers. The Equal Employment Advisory Council and others suggested that employees should be expected to provide an English translation of a medical certification provided in another language. *See also* National School Boards Association; Vercruysse Murray & Calzone. The National Coalition to Protect Family Leave, the Society for Human Resource Management, and the American Foundry Society argued that employers should be automatically entitled to get a second opinion on any certification provided by a foreign health care provider. Spencer Fane Britt & Browne argued an employee should be required to have his or her own health care provider in the United States authenticate and verify any FMLA certification completed by a foreign health care provider.

The final rule modifies § 825.307(f) to require that employees provide a written translation of any certification by a foreign health or provider that is completed in a language other than English. The Department believes that in most situations either the employee or the employee's family member will be able to provide the written translation and such a translation will satisfy the rule. Therefore, the Department does not anticipate that this requirement will impose a significant burden on employees. The provision of an English translation of the certification will facilitate the employer's ability to determine whether or not the leave is FMLA protected, and whether additional clarification or authentication is required. The Department recognizes that providing for translation of certifications by foreign health care providers does not fully address all of the concerns employers have regarding such certifications. The Department believes, however, that this approach, while limited, recognizes the legitimate need of employees to take FMLA leave to care for family members in foreign countries and the need of employers to be able to verify that such leave is being appropriately used.

Section 825.308 (Recertifications for Leave Taken Because of an Employee's Own Serious Health Condition or the Serious Health Condition of a Family Member)

Current § 825.308 of the regulations addresses the employer's ability to seek recertification of an employee's medical condition. Section 825.308(a) of the current regulations sets forth the rule for recertification for pregnancy, chronic, or permanent/long-term conditions and generally permits recertification no more often than every 30 days in connection with an absence. Current § 825.308(b) states that where a certification specifies a minimum duration of incapacity of more than 30 days, or specifies a minimum period of intermittent or reduced schedule leave, recertification generally may not be required until the specified minimum duration has passed. Section 825.308(c) of the current regulations provides that in all situations not covered by § 825.308(a) and (b), employers may generally request recertification every 30 days. Current § 825.308(d) requires employees to provide recertification within at least 15 calendar days of the employer's request, unless it is not practicable to do so despite the employee's diligent, good faith efforts. Current § 825.308(e) provides that recertification is at the employee's expense and that no second or third opinions may be required on recertification. In the NPRM, the Department proposed to reorganize § 825.308 for purposes of clarity. Proposed § 825.308(a), titled ''30-day rule,'' permitted recertification every 30 days in connection with an absence. Proposed § 825.308(b), titled ''More than 30 days,'' stated the rule from current § 825.308(b) that where the certification indicates a minimum period of incapacity in excess of 30 days, recertification generally may not be required until the minimum duration has passed and added an example to clarify the application of this rule. The proposal also permitted an employer to request recertification every six months in connection with an absence in all

cases. Proposed § 825.308(c), titled ''Less than 30 days,'' explained under what circumstances an employer could require recertification more frequently than every 30 days and provided examples of circumstances that might justify requesting more frequent recertification. Proposed § 825.308(d) was unchanged from the current regulations other than the addition of the title ''Timing.'' The proposal contained a new § 825.308(e), titled ''Content,'' which clarified that an employer may request the same information on recertification as required for the initial certification as set forth in § 825.306, and the employee has the same obligation to cooperate in providing recertification as he or she does in providing the initial certification. Proposed § 825.308(e) also clarified that employers may provide the employee's health care provider with a record of the employee's absence pattern and ask whether the leave pattern is consistent with the employee's serious health condition. Current § 825.308(e) was redesignated as proposed § 825.308(f) without any changes. The Department requested comment, however, regarding its decision to retain the current regulation's prohibition against second and third opinions on recertification. The final rule adopts § 825.308 as proposed, with minor clarifications in § 825.308(b) as discussed below. The title is also modified in the final rule to clarify that this section does not apply to the military family leave provisions.

The NPRM proposed to resolve uncertainty under current § 825.308 as to how often employers could seek recertification of chronic conditions where the certification indicates that the duration of the condition is ''lifetime.'' Under the current regulation, it is unclear whether such certifications would be subject to recertification every 30 days under § 825.308(a) because the conditions are chronic, or whether they would never be subject to recertification under § 825.308(b)(2) because the certification indicated a need for intermittent leave for the employee's lifetime. The NPRM clarified that conditions that will last an extended period of time, including conditions for which the duration is indicated as ''lifetime,'' ''indefinite,'' or ''unknown,'' would fall under proposed § 825.308(b). Under that section, employers would not be able to seek recertification until the minimum duration specified in the certification had passed, but would always be entitled to seek recertification every six months in connection with an absence. In other words, if the certification specified a duration of greater than six months, the employer would still be able to seek recertification at six-month intervals. (Where the requirements of proposed § 825.308(c) were met, recertification would also be permitted pursuant to that section.) The proposal represented a change in the Department's position, which had previously been that certifications indicating an ''indefinite'' or ''unknown'' duration were subject to recertification every 30 days. *See* Wage and Hour Opinion Letter FMLA2004–2–A (May 25, 2004). The Department received significant comments from both employers and employees regarding this proposal. By and large, the comments confirmed the confusion that exists in this area. Despite the Department's explanation in the NPRM that permitting six-month recertification of long-term or permanent health conditions would result in fewer recertifications for many employees with chronic serious health conditions than currently permitted, most employees and their representatives interpreted the proposal as an increase in their recertification burden. Employers and their representatives were divided as to whether the Department's proposal represented an increase or a diminution in their recertification right.

Most employees and their representatives opposed the proposal in § 825.308(b) to permit recertification every six months for long-term or permanent conditions, viewing it as unnecessary in the absence of some change in the condition and as imposing an increased burden on employees. *See, e.g.*, National Postal Mail Handlers Union; National Federation of Federal Employees; Academic Pediatric Association *et al.*; Association of Professional Flight Attendants; Diane North; Mary Freeman; Gregory Sheffield, Jr. The Communications Workers of America suggested that employees with chronic serious health conditions should not be required to recertify more than once per year. *See also* National Partnership for Women & Families. The American Postal Workers Union suggested that recertification of chronic conditions should only be permitted where circumstances change or new information justifies the request. The Academic Pediatric Association *et al.* argued that requiring recertification of chronic or lifelong conditions ''does not serve any useful purpose.'' The AFL–CIO, however, supported the proposed change as it applies to conditions of indefinite, unknown, or lifetime duration, but opposed six-month recertification for conditions with a defined duration in excess of six months (*e.g.*, for a condition that will last nine months). In support of six-month recertification for chronic serious health conditions, the AFL–CIO argued that ''[r]ecertifications on a 30-day basis for long-term conditions are not only burdensome to employees and their health care providers, but are highly unlikely to elicit useful information for making leave decisions under the FMLA.''

Many commenters representing employees also noted that recertification imposes a financial burden on employees because health care providers charge for the additional medical examination and/or paperwork associated with recertification. *See, e.g.*, Communications Workers of America; Sargent Shriver National Center on Poverty Law; Association of Professional Flight Attendants; National Partnership for Women & Families; National Postal Mail Handlers Union. The National Partnership for Women & Families requested that, if the Department finalized § 825.308 as proposed, it make clear that the two visits required under the proposed definition of a chronic serious health condition in § 825.115(c)(1) could be satisfied by the six-month visits for recertification.

Employers and their representatives were split as to whether the six-month recertification rule was an improvement on the current recertification provision. Several large employers and employer associations supported permitting recertification on a six-month basis for long-term or permanent conditions. *See, e.g.*, AT&T; the Chamber; Equal Employment Advisory Council; National Association of Manufacturers; HR Policy Association; WorldatWork; Manufacturers Alliance; TOC Management Services. The U.S. Postal Service stated that the six-month recertification proposal for conditions of unknown or permanent duration ''eliminates the ambiguity that had been a hallmark of the recertification provisions and is sorely needed.'' The National Business Group on Health asserted that the Department's proposal ''will help to alleviate situations where, under current rules, doctors can provide multi-year medical certifications for serious health conditions that may no longer be present after some months or longer.'' The Chamber argued that ''requiring more frequent certifications will not present any additional hardship to employees, as employees with chronic conditions are likely to be visiting their health care providers at lease twice a year already.''

Other commenters, however, argued that 30-day recertification for chronic serious health conditions would be more appropriate. *See, e.g.*, Metropolitan Transportation Authority (NY); International Public Management Association for Human Resources; Ohio Department of Administrative Services; City of Medford (OR); National Association of Wholesaler-Distributors; American Foundry Society. The Society for Human Resource Management objected that the proposal would require employers to permit potential misuse of leave to continue for months before being able to obtain a recertification. Jackson Lewis suggested that recertification every 60 days would be more appropriate. The Association of Corporate Counsel's Employment and Labor Law Committee suggested that recertification be should be permitted every three months. *See also* National School Boards Association. The law firm of Willcox & Savage argued that ''[s]ix-month recertifications would be entirely inadequate to ensure that intermittent leave is used for qualified reasons and to limit misuse of intermittent leave.''

The law firms of Spencer Fane Britt & Browne and Vercruysse Murray & Calzone expressed confusion as to the interaction of the ''[m]ore than 30 days'' rule and the ''30-day rule.'' Both of these commenters asked whether the 30-day recertification rule would apply to long-term conditions requiring short periods of intermittent leave. They questioned what serious health conditions would be covered by § 825.308(a) if these long-term or permanent conditions were instead covered under § 825.308(b). These commenters attributed their confusion to the use of the phrase ''minimum period of incapacity'' in proposed § 825.308(b), and questioned whether the Department meant the duration of ''incapacity'' or the duration of the ''condition.'' *See also* Equal Employment Advisory Council.

The Department views the conflicting comments it received regarding proposed § 825.308(b) as indication of the need to further clarify the recertification regulation. The Department agrees that, as proposed in the NPRM, it was unclear whether § 825.308(b) applied to permanent or long-term conditions requiring short periods of intermittent leave (*i.e.*, chronic conditions). Accordingly, final § 825.308(b) is modified to clarify that the rule applies to conditions where the minimum duration of the condition, as opposed to the duration of the period of incapacity, exceeds 30 days. This is a clarification, not a change in the Department's enforcement position. Current § 825.308(b) has two subsections, the first of which addresses certifications specifying a minimum period of incapacity in excess of 30 days, and the second of which addresses certifications specifying a minimum period during which intermittent or reduced schedule leave will be needed; in both situations an employer may not request recertification until the minimum period specified has passed. Accordingly, the Department has always interpreted the current regulation as applying to those situations in which the certification states that an employee will need leave due to a serious health condition for a specified period in excess of 30 days, regardless of whether that leave is taken as a single continuous block or on an intermittent basis. The final rule also provides an example of how the six-month recertification provision would apply. Not all situations will fit within final § 825.308(b), and, as the final rule makes clear, employers are entitled to recertification on a 30-day basis, unless the requirements of paragraphs (b) or (c) are met. In all cases, where the criteria of § 825.308(c) are met, employers may seek recertification in less than 30 days.

The Department declines in the final rule to permit recertification of long-term or permanent conditions more frequently than every six months unless the conditions set forth in § 825.308(c) are met. As explained in the NPRM, the Department is concerned about the burden frequent recertifications place on employees suffering from permanent or long-term serious health conditions. The Department believes that permitting recertification on a six-month basis represents the appropriate balance between the employer's right to receive updated medical information to support the need for FMLA leave, and the employee's right to take such leave. As noted in the NPRM, the six-month period for recertification generally coincides with the requirement of periodic visits of twice per year for treatment in the definition of a chronic serious health condition in § 825.115(c)(1). To the extent that an employee visits his or her health care provider for treatment in connection with obtaining a recertification, that visit could count towards satisfying the periodic treatment criteria for a chronic serious health condition if it occurs every six months.

The Department also received several comments from employer representatives supporting the Department's proposal in § 825.308(e) to expressly permit employers to provide an employee's health care provider with information regarding the employee's absences due to the serious health condition, with many commenters indicating that this change would significantly improve their ability to administer FMLA leave. *See, e.g.*, HR Policy Association; Pennsylvania Governor's Office of Administration; Southwest Airlines; American Foundry Society; Equal Employment Advisory Council. The AFL–CIO, however, argued that proposed § 825.308(e) was an unnecessary addition to the regulations as the Department had already taken this position in Wage and Hour Opinion Letter FMLA2004–2–A (May 25, 2004). The Department believes it is appropriate to include this language in the regulatory text and therefore the final rule adopts § 825.308(e) as proposed.

Finally, the National Association of Manufacturers and the National Association of Wholesaler-Distributors, as well as many other commenters, objected to the Department's continued prohibition in proposed § 825.308(f) on second and third opinions on recertification. *See also* Vercruysse Murray & Calzone; TOC Management Services; Jackson Lewis; Metropolitan Transportation Authority (NY); Independent Bakers Association; Pennsylvania Governor's Office of Administration; International Public Management Association for Human Resources; City of Medford (OR); American Foundry Society. The National Association to Protect Family Leave and the Society for Human Resource Management argued that the statute does not prohibit second and third opinions on recertification and that permitting them would reduce the number of second and third opinions on initial certifications, which would benefit both employers and employees. The Southern Company argued that the Department's proposal to permit employers to require new certifications of ongoing conditions on an annual basis, which would be subject to second and third opinions, was not sufficient to allow employers to effectively manage employee leave and that employers should therefore be permitted to seek second and third opinions on recertifications as well. *See also* Berens & Tate; National Coalition to Protect Family Leave. Spencer Fane Britt & Browne argued that employers should be entitled to get a second opinion whenever they are permitted to seek recertification in less than 30 days under § 825.308(c), and in other situations every three months.

The Department declines in the final rule to permit second or third opinions on recertification. As discussed above,

§ 825.305(e) of the final rule will permit employers to require a new certification on an annual basis for conditions lasting longer than a single leave year, and such new certifications will be subject to second and third opinions. The Department believes that allowing employers the option of a second and third opinion once per leave year is sufficient and that permitting second and third opinions on recertifications would impose an additional burden on employees that would be disproportionate to any benefit to employers.

Section 825.309 (Certification for Leave Taken Because of a Qualifying Exigency)

Under the military family leave provisions of the NDAA, 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.'' 29 U.S.C. 2613(f). Because the NDAA gives the Secretary of Labor the authority to prescribe a new certification requirement for FMLA leave taken because of a qualifying exigency, the Department's NPRM included a discussion of a number of issues related to the Department's implementation of a certification requirement for qualifying exigency leave. The Department specifically sought comment on the type of information that should be provided in a certification related to qualifying exigency leave in order for it to be considered complete and sufficient. The Department expressed an initial view that, in addition to providing confirmation of the covered military member's active duty or call to active duty status, an employee could be asked to provide certification that an absence is due to a qualifying exigency. The Department sought comment on whether an employee should provide certification of the qualifying exigency by statement or affidavit or by another means. The Department also sought comment on whether the certification requirements should vary depending on the nature of the qualifying exigency for which leave is being taken.

In addition, the Department asked for comments regarding who should bear the cost, if any, of obtaining certifications related to leave taken because of a qualifying exigency and what timing requirements should be applied to such certifications. The Department also asked whether an employer should be permitted to clarify, authenticate, or validate an active duty or call to active duty certification or a certification that a particular event is a qualifying exigency, and what limitations, if any, should be imposed on an employer's ability to seek such clarification, authentication, or validation. Lastly, the Department sought comment on whether a recertification process should be established for certifications related to leave taken because of a qualifying exigency and, if so, how that process should compare to the recertification process used for existing FMLA leave entitlements.

While the Department has attempted to mirror the existing FMLA certification process wherever possible for qualifying exigency leave, the unique nature of this leave necessitates that an employee provide different information in order to confirm the need for leave. In the final rule, the certification requirements for leave taken because of a qualifying exigency are set forth in § 825.309. Section 825.309(a) of the final rule establishes that an employer may require that the employee provide a copy of the covered military member's active duty orders or other documentation issued by the military which indicates that the covered military member is on active duty (or has been notified of an impending call or order to active duty) in support of a contingency operation, and the dates of the covered military member's active duty service. Section 825.309(b) establishes that each time leave is first taken for one of the qualifying exigencies specified in § 825.126, an employer may require an employee to provide a certification that sets forth certain information. Section 825.309(c) of the final rule describes the optional form (Form WH–384) developed by the Department for employees' use in obtaining certification that meets the FMLA's certification requirements. The form is optional for employers and reflects the certification requirements established in § 825.309(b) so that it is easier for an employee to furnish appropriate information to support his or her request for leave because of a qualifying exigency. Form WH–384, or another form containing the same basic information, may be used by the employer; however, no information may be required beyond that specified in this section. Section 825.309(d) of the final rule establishes the verification process for certifications.

The Department received many comments that agreed that it is appropriate to require a copy of the covered military member's active duty orders or some other form of documentation issued by the military which indicates that the covered military member is on active duty (or has been notified of an impending call or order to active duty) in support of a contingency operation for certification purposes. *See* National Partnership for Women & Families, in joint comments with the National Military Family Association; U.S. Postal Service; National Coalition to Protect Family Leave; Society for Human Resource Management; Equal Employment Advisory Council; Hewitt Associates; AT&T; South Carolina, Office of Human Resources; Pennsylvania Governor's Office of Administration. Hewitt Associates also suggested that ''[i]f military orders are not readily available, employers should permit employees to provide secondary documentation confirming that the family member is on active military duty.'' TOC Management Services went further to suggest that the Department ''develop a 'qualifying exigency certification,' to be completed by the military servicemember's commanding officer (or other authorized military personnel).'' Senator Dodd and Representative Woolsey *et al.* suggested that certification should ''consist of activation orders or letters from a commanding officer.''

The Department agrees with the majority of commenters that a complete and sufficient certification for purposes of qualifying exigency leave should include a copy of the covered military member's active duty orders. The orders will confirm that the covered military member is on active duty (or has been notified of an impending call to active duty) in support of a contingency operation. The Department also believes that it is appropriate to allow an employee to provide other documentation issued by the military in order to establish that the covered military member is on active duty or has been notified of an impending call or order to active duty for purposes of qualifying exigency leave. Accordingly, § 825.309(a) provides that an employer may request, as part of a complete and sufficient certification to support a request for qualifying exigency leave, a copy of the covered military member's active duty orders or other documentation issued by the military which indicates that the covered military member is on active duty or call to active duty status in support of a contingency operation, and the dates of the covered military member's active duty service. In addition, to alleviate as much of the burden as possible on employees using this new leave entitlement, this provision provides that this information need only be provided to the employer the first time an employee requests leave because of a

qualifying exigency arising out of a particular active duty or call to active duty of a covered military member. While additional information is required to provide certification for subsequent requests for exigency leave, an employee is only required to give a copy of the active duty orders to the employer once. A copy of new active duty orders or other documentation issued by the military only needs to be provided to the employer if the need for leave because of a qualifying exigency arises out of a different active duty or call to active duty order of the same or a different covered military member.

A number of commenters addressed whether an employer should be able to request documentation beyond the covered military member's active duty orders, and provided suggestions on the types information an employee could be required to provide. Senator Dodd and Representative Woolsey *et al.* commented that ''a simple personal statement * * * stating the reason for the leave and that the leave arises from the deployment or return of the servicemember'' is sufficient. The National Partnership for Women & Families, in joint comments with the National Military Family Association, suggested that notes from the service provider or the military association should be sufficient, such as a note from a counselor when the leave is needed to attend counseling. The National Coalition to Protect Family Leave recommended that an employee provide written documentation unless there are extraordinary or extenuating circumstances, or documentation does not exist, and that such documentation be from an independent source if available; a statement or affidavit should be sufficient only if there is no other alternative method of certification available. The Equal Employment Advisory Council requested that an employee provide proof of the need for leave and sign an affidavit declaring the reason for taking leave. The Chamber stated that an employee ''should provide the employer with detailed information about the reasons for leave.'' TOC Management Services suggested that an employee be required to submit a statement or affidavit. Hewitt Associates noted that:

> The list of qualifying exigencies may be too broad and indefinite to create a form that speaks to the leave reasons themselves. In addition, in many cases, there may not be a clear third party like a physician, teacher, or department able to certify the leave. Employers that are concerned with abuse could rely upon company rules prohibiting dishonesty, misrepresentation, and/or the falsification of company documents and a reminder of such rules and policies could be included on the form itself.

In the final rule, the Department seeks to provide an appropriate balance between providing employers with a reasonable amount of information to demonstrate the validity of the qualifying exigency and ensuring that employees are not overburdened with unnecessary steps that do not enhance the utility of the certification. For example, the Department does not believe that it is necessary for an employee to sign an affidavit to provide a meaningful certification. Such a requirement would place a burden on employees that would potentially delay or frustrate their ability to utilize qualifying exigency leave. Most employers have policies in place that prohibit employees from providing false information and enforcing such policies would have substantially the same effect as an affidavit in deterring abuse. Section 825.309(b)(1)–(5) of the final rule allows an employer to require an employee to provide a reasonable amount of information for certification. Where applicable, this information should be readily available to the employee and should not impose a significant obstacle.

Section 825.309(b)(1) requires the employee to provide a signed statement or description of the facts regarding each qualifying exigency for which FMLA leave is requested and stipulates that such facts must be sufficient to support the need for leave. Where an employee needs intermittent leave for a particular qualifying exigency, only one certification is required for that qualifying exigency. For example, there are many types of qualifying exigencies within the category of childcare and school activities. Thus, an employee would need to provide one certification for enrolling a child in school, and a separate certification for arranging for alternative childcare; the employee, however, would only need one certification for a series of related parent-teacher conferences. The final rule also provides a number of examples of written documents that could support a request of leave, such as a copy of a meeting announcement for informational briefings sponsored by the military, a document confirming an appointment with a counselor or school official, or a copy of a bill of services for the handling of legal or financial affairs. These examples illustrate that, whenever possible, the employee's statement should include demonstrable information that relates to the type of leave being taken.

Section 825.309(b)(2) of the final rule requires the inclusion of the approximate date on which the qualifying exigency commenced or will commence. Section 825.309(b)(3) stipulates that if an employee requests leave because of a qualifying exigency for a single, continuous period of time, the employee should provide the beginning and end dates for such absence. If an employee requests leave because of a qualifying exigency on an intermittent or reduced schedule basis, § 825.309(b)(4) of the final rule requires an estimate of the frequency and duration of the qualifying exigency. These sections will not always apply to every kind of qualifying exigency. When applicable, however, all three of these provisions will assist employers by providing them with sufficient information to adequately prepare for the employee's absence in connection with qualifying exigency leave.

Finally, in § 825.309(b)(5) of the final rule, the Department allows the employer to require the inclusion of appropriate contact information when an exigency involves meeting with a third party. In addition to the name, title, organization, address, telephone number, fax number, and e-mail address for the individual or entity with which the employee is meeting, the contact information can also include a brief description of the purpose of the meeting. Although the Department recognizes that not every qualifying exigency involves a third party, for those exigencies where a third party is involved such detailed information should provide meaningful assurance and validation for employers.

The Department also received a few comments regarding the creation of a certification form to be used by employees and employers. Infinisource, Inc. and the Equal Employment Advisory Council suggested that the Department provide a sample qualifying exigency certification form.

The final rule provides an optional form (Form WH–384) that is described in § 825.309(c) and included in Appendix G to the regulations. The form reflects the certification requirements so as to permit an employee to furnish appropriate information to support his or her request for leave because of a qualifying exigency. This optional Form WH–384, or another form containing the same basic information, may be used by the employer. The final rule makes clear, however, that no information may be required beyond that specified in § 825.309 and in all instances the information on the form must relate only to the qualifying exigency for which the current need for leave exists.

The Department believes Form WH–384 will benefit both employees and employers by providing all the certification requirements in a clear, easy to follow format.

The Department also received many comments on the issues of authentication and recertification. Many commenters requested that employers be permitted to clarify or authenticate military active duty orders and the event necessitating qualifying exigency leave. *See* AT&T; Pennsylvania Governor's Office of Administration; Catholic Charities, Diocese of Metuchen; National Association of Manufacturers; Association of Corporate Counsel's Employment and Labor Law Committee. The Association of Corporate Counsel's Employment and Labor Law Committee suggested that employers be permitted to contact third parties involved in the need for leave, such as calling ''a childcare provider to confirm that they were consulted to provide care as a result of a servicemember's call to duty.'' Senator Dodd and Representative Woolsey *et al.* and the National Partnership for Women & Families, in joint comments with the National Military Family Association, argued that there should be no need to clarify or authenticate military active duty orders. The National Partnership for Women & Families, in joint comments with the National Military Family Association, acknowledged, however, that ''[e]mployers should be able to authenticate the certifications for the actual leave—for example by calling the school and checking that the parent was scheduled for a conference at that time.'' Senator Dodd and Representative Woolsey *et al.* similarly suggested that an ''employer could request additional information if it suspects that the employee is misusing the leave entitlement.'' On the subject of recertification, AT&T and Catholic Charities requested that recertifications be allowed. Catholic Charities asserted that ''the employer should have the right to request a recertification every 30 days regardless of the duration of time that the certification states the employee is to be out.'' AT&T asserted that recertifications should be permitted at least once every six months for intermittent qualifying exigency leave.

The Department agrees that employers should have the opportunity to verify certain information in the certification in a limited way that respects the privacy of the employee. Section 825.309(d) of the final rule describes the verification process. If an employee submits a complete and sufficient certification to support his or her request for leave because of a qualifying exigency, the employer may not request additional information from the employee. However, if the qualifying exigency involves meeting with a third party, the employer may contact the individual or entity with whom the employee is meeting for purposes of verifying a meeting or appointment schedule and the nature of the meeting between the employee and the specified individual entity. For example, an employer could call a school to confirm that a meeting took place between the employee and the teacher of a child of a covered military member. The section provides that no additional information may be requested by the employer and the employee's permission is not required in order to verify meetings or appointments with third parties.

In addition, the final rule allows an employer to contact an appropriate unit of the Department of Defense to request verification that a covered military member has been called to active duty status (or notified of an impending call to active duty status) in support of a contingency operation. Again, no additional information may be requested by the employer and the employee's permission is not required. This verification process will protect employees from unnecessary intrusion while still providing a useful tool for employers to verify the certification information given to them.

With regard to recertification, however, the Department agrees with the comments that suggested that recertification is unnecessary; the final rule does not provide for recertification. An employee is already required to provide certification to the employer in connection with leave taken for a qualifying exigency. *See* discussion regarding § 825.309(b)(1), *supra.* A recertification would most likely result in the employee providing the employer with a copy of the same active duty orders already provided to the employer. Section 825.309(a), however, does state that a copy of new active duty orders or other documentation issued by the military shall be provided to the employer if the need for leave because of a qualifying exigency arises out of a different active duty or call to active duty order of the same or a different covered military member.

Section 825.310 (Certification for Leave Taken To Care for a Covered Servicemember (Military Caregiver Leave))

The military family leave provisions of the NDAA amended the FMLA's certification requirements to permit an employer to request that leave taken to care for a covered servicemember be supported by a medical certification. 29 U.S.C. 2613(a). The FMLA's existing 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 the NDAA did 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. In light of this, the Department sought comment in the NPRM on the appropriate requirements and content of a certification for leave to care for a covered servicemember. The Department also sought comment on whether a certification from the DOD or VA 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 on active duty in the Armed Forces.

Section 825.310 of the final rule provides that when leave is taken to care for a covered servicemember with a serious injury or illness, an employer *may* require an employee to support his or her request for leave with a sufficient certification. Section 825.310(a) of the final rule permits an employer to require that certain necessary information to support the request for leave be supported by a certification from one of the following authorized health care providers: (1) A DOD health care provider; (2) a VA health care provider; (3) a DOD TRICARE network authorized private health care provider; or (4) a DOD non-network TRICARE authorized private health care provider. Section 825.310(b)–(c) of the final rule sets forth the information an employer may request from an employee (or the authorized health care provider) in order to support the employee's request for leave. As indicated in § 825.310(d) of the final rule, the Department has developed a new optional form, Form WH–385, which may be used to obtain appropriate information to support an employee's request for leave to care for a covered servicemember with a serious injury or illness. An employer may use this optional form, or another form containing the same basic information; however, as is the case for any required certification for leave taken to care for a family member with a serious health condition, no information may be required beyond that specified in § 825.310 of the final rule. In all instances, the information on any required certification must relate only to

the serious injury or illness for which the current need for leave exists.

Additionally, § 825.310(e) of the final rule provides that an employer requiring an employee to submit a certification for leave to care for a covered servicemember must accept as sufficient certification ''invitational travel orders'' (''ITOs'') or ''invitational travel authorizations'' (''ITAs'') issued by the DOD for a family member to join an injured or ill servicemember at his or her bedside. If an employee will need leave to care for a covered servicemember beyond the expiration date specified in an ITO or an ITA, the final rule provides that an employer may request further certification from the employee. Lastly, § 825.310(f) of the final rule provides that 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.

The majority of comments received from both employees and employers regarding certification requirements for military caregiver leave requested that the Department create a separate certification process for such leave, rather than incorporate such requests into the certification process used for other FMLA qualifying reasons. For example, the National Partnership for Women & Families, in joint comments with the National Military Family Association, wrote that because the ''triggering events'' for an employee to use leave for an injured servicemember are significantly different from those for leave taken for other FMLA-qualifying reasons, ''the medical certification requirements for leave to care for an injured servicemember should match those in the statute, rather than being grafted onto requirements in the existing FMLA.'' The National School Boards Association also commented that a certification for covered servicemember leave should focus on each aspect of the definition of ''serious injury or illness'' and ''should not focus on 'serious health condition' because this term does not trigger the right to take military family leave.'' Finally, comments submitted by Senator Dodd and Representative Woolsey *et al.* suggested that any required certification should provide employers who request certification with ''essential information.''

The Department agrees with those comments that suggested that the certification requirements for taking leave to care for a covered servicemember must necessarily be different than those for taking leave to care for a family member with a serious health condition since the ''triggers'' for taking each type of leave are different. The NDAA's definitions of ''serious injury or illness'' and ''covered servicemember'' contain specific components that are unique to military servicemembers that would not adequately be addressed if the certification requirements for a serious health condition were adopted for purposes of military caregiver leave. Moreover, adopting the existing FMLA certification requirements for purposes of military caregiver leave would permit an employer, in some instances, to obtain medical and other information that is not relevant to support a request to take FMLA leave to care for a covered servicemember.

Accordingly, the final rule creates a new regulatory section, § 825.310, which sets forth separate certification requirements for military caregiver leave. This section, as suggested by the majority of commenters, provides that an employer may seek a certification which provides information specific to the NDAA requirements for taking leave to care for a covered servicemember, including: (1) Whether the servicemember has incurred a serious injury or illness; (2) whether the injury or illness may render the servicemember medically unfit to perform the duties of the member's office, grade, rank, or rating; (3) whether the injury or illness was incurred by the member in line of duty on active duty; and (4) whether the servicemember is undergoing medical treatment, recuperation, or therapy, is otherwise on outpatient status, or is otherwise on the temporary disability retired list. The Department notes that the optional certification form (WH–385) for covered servicemember leave includes two additional categories of internal DOD casualty assistance designations used by DOD health care providers ((VSI) Very Seriously Ill/Injured and (SI) Seriously Ill/Injured) that also meet the standard of a serious injury or illness.

At the same time, the Department also agrees with those commenters who recommended that a certification for military caregiver leave should contain certain information about the need for leave that is also required of individuals requesting FMLA leave to care for a family member with a serious health condition. *See e.g.*, Jackson Lewis; Association of Corporate Counsel's Employment and Labor Law Committee; and AT&T. This information includes (1) the probable duration of the injury or illness; (2) frequency and duration of leave required; (3) if leave is requested on an intermittent or reduced schedule basis, an estimate of the frequency and duration of such leave; and (4) the family relationship of the eligible employee to the covered servicemember. The Department believes it is reasonable to require all individuals requesting leave to care for a family member to provide this information, regardless of whether the family member has a serious health condition or is a covered servicemember with a serious injury or illness. Accordingly, § 825.310(a)–(c) of the final rule permit an employer to require such information. As is the case with the certification process for leave taken to care for a family member with a serious health condition, no information may be required beyond that specified in § 825.310 of the final rule.

Most of the commenters also agreed with the Department's initial view in the NPRM that the DOD and the VA are in the best position to determine what constitutes a ''serious injury or illness.'' Additionally, the majority of commenters also supported employees providing certification from the DOD (or relevant military branch) or VA to support a request for leave to care for a covered servicemember. Domtar Paper Company wrote that, ''the DOL should adopt DOD certification for FMLA purposes. We agree that military branches, as well as the Department of Veterans' Affairs do a good job in making these determinations.'' The Illinois Credit Union League believed a certification from ''either Department'' should be ''sufficient.'' As to ''serious injury or illness,'' Hewitt Associates supported providing DOD or VA with ''deference in this analysis.''

Based upon extensive discussions with the DOD, as well as with the VA, the Department believes that the DOD should not be the only entity able to certify that an eligible employee is needed to care for a covered servicemember with a serious injury or illness. At the present time, servicemembers with serious injuries or illnesses intended to be covered by the NDAA amendments do not receive care solely from DOD health care providers. Rather, such covered servicemembers also may receive care from either VA health care providers or DOD TRICARE military health system authorized private health care providers. Indeed, it is the Department's understanding that members of the National Guard and Reserves, especially in more rural areas, will be more likely to receive care from DOD TRICARE authorized private health care providers than from DOD or even VA health care providers.[6]

[6] Based upon discussions with the DOD, it is the Department's understanding that some covered

Additionally, servicemembers on the temporary disability retired list may be receiving care from these private health care providers. Accordingly, § 825.310(a) of the final rule provides that any of the following health care providers may complete an employer-required certification to support a request for military caregiver leave: (1) A DOD health care provider; (2) a VA health care provider; (3) a DOD TRICARE network authorized private health care provider; or (4) a DOD non-network TRICARE authorized private health care provider.

If a VA or a DOD TRICARE authorized health care provider is unable to make any of the military-related determinations (*i.e.*, whether the serious injury or illness may render the covered servicemember medically unfit to perform the duties of the member's office, grade, rank, or rating and/or whether the serious injury or illness was incurred in line of duty on active duty) as part of the certification process, § 825.310(a) of the final rule provides that such health care providers may complete the certification form by relying on a determination from an authorized DOD representative (such as a recovery care coordinator). The Department believes this solution sufficiently protects an employer's right to obtain a sufficient certification while not unduly burdening an employee seeking to take leave by unnecessarily restricting the health care providers who may complete such a certification. Based on consultation with the DOD, it is the Department's understanding that every covered servicemember will have a DOD representative who can serve as a point of contact for health care providers who need information relating to the military-related determinations requested in the FMLA certification form. For example, the most seriously injured or ill covered servicemembers (*i.e.*, those servicemembers receiving injuries that the DOD terms catastrophic or severe) will have either a ''Federal Recovery Coordinator'' or ''Recovery Care Coordinator'' assigned to assist the covered servicemember and his or her family.

Although the military caregiver leave provisions of the NDAA permit an eligible employee who is the next of kin of a covered servicemember to take leave to care for a covered servicemember, the NDAA's certification requirements appear to permit an employer to obtain a certification issued by the health care provider of the employee's next of kin, rather than the covered servicemember. *See* 29 U.S.C. 2613(a). In the NPRM, the Department stated that it 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, and not the health care provider of the next of kin. The comments addressing this issue agreed with the Department 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 U.S. Postal Service wrote: ''A provider's medical certification of a health condition can only pertain to his/her patient, which in this case is the covered servicemember. No other interpretation makes sense. A physician simply cannot provide any medical documentation for a 'next of kin' when that person receives no treatment, therapy, etc. Notably, the overall FMLA scheme is one that requires certification of a patient's condition from the treating provider. There is no logical basis for construing the servicemember certification requirements any differently.'' Additionally, the National School Boards Association wrote that ''[t]he results of the statute as written are odd and would only serve to inconvenience everyone in the process particularly the servicemember whose medical certification would have to come from a doctor [with] whom the service member has no relationship.''

After reviewing all of the comments, the Department agrees with those comments that stated that an employer should only be able to obtain a certification from the health care provider of the covered servicemember for whom the eligible employee is caring. To permit an employer to obtain a medical certification issued by the health care provider of the ''next of kin,'' rather than the servicemember is illogical, and does not serve the interests of either employees or employers. Accordingly, the final rule provides that any certification supporting a request for FMLA leave by a covered servicemember's next of kin should be issued by the health care provider of the covered servicemember—not the health care provider of the next of kin.

Additionally, § 825.310(e) of the final rule provides that an employer must accept the submission of ''invitational travel orders'' (''ITOs'') or ''invitational travel authorizations'' (''ITAs'') issued for medical purposes, in lieu of the DOL optional certification form or an employer's own form, as sufficient certification of a request for military caregiver leave during the time period specified in the ITOs or ITAs. Based on consultation with the DOD, it is the belief of the Department that the issuance of such orders or authorizations, by themselves, qualifies a servicemember as a ''covered servicemember'' for purposes of the military caregiver leave provisions of the FMLA. The issuance of an ITO or ITA for medical purposes permits the family member of the injured or ill servicemember to travel immediately to the servicemember's bedside, at DOD's expense. These ITOs or ITAs for medical purposes are not issued by the DOD as a matter of course, but rather only when the servicemember is, at minimum, seriously injured or ill. It is the Department's understanding that, in such cases, the ITO or ITA is issued to a servicemember's family upon the direction of a DOD health care provider and will state on its face that the travel order or authorization is for ''medical purposes.''

The Department believes that permitting ITOs or ITAs to serve as sufficient certification is appropriate in light of the fact that the DOD has determined that the injury or illness incurred by the servicemember is serious enough to warrant the immediate presence of a family member at the servicemember's bedside. Moreover, in many circumstances where ITOs or ITAs are issued, it may be extremely difficult for an employee to provide an otherwise timely certification that complies with the requirements of § 825.310 to an employer. The Department also believes this approach appropriately accommodates an employer's right to obtain a sufficient certification from an employee in order to designate such leave as FMLA qualified.

Given the seriousness of the injuries or illness incurred by a servicemember whose family member receives an ITO or ITA, and the immediate need for the family member at the servicemember's bedside, it is the Department's intention to remove as many certification hurdles for the employee as possible for the duration of the order or authorization. Accordingly, the final rule further provides that during the period of time specified in the ITO or ITA, an eligible employee may take leave to care for the covered servicemember in a continuous block of time or on an intermittent basis.

servicemembers in more remote areas of the United States may not have a local health care provider who is in the DOD TRICARE network. In these situations, TRICARE authorizes non-network health care providers to administer care to these servicemembers. These ''non-network'' health care providers are specifically included in the regulations as one of the categories of health care providers authorized to complete certifications for leave to care for a covered servicemember.

An eligible employee who provides an ITO or ITA to support his or her request for leave may not be required to provide any additional or separate certification that leave taken on an intermittent basis during the period of time specified in the ITO or ITA is medically necessary. The final rule also provides that an employer must not refuse to accept an ITO or ITA because the order or authorization is not signed by a health care provider. As long as the ITO or ITA is issued by the DOD, an employer must accept it. While an ITO or ITA is only issued to family members upon the direction of a DOD health care provider, the actual order or authorization may or may not be signed by a health care provider.

If an employee will need leave to care for a covered servicemember beyond the expiration date specified in an ITO or ITA, the final rule permits an employer to require that the employee have one of the authorized health care providers listed under § 825.310(a) complete the DOL optional certification form (WH–385) or an employer's own form, as requisite certification for the remainder of the employee's necessary leave period. The Department is permitting this additional certification, if an employer so chooses, in order to allow an employer to obtain information about the employee's continued need for leave once the ITO or ITA expires, including specific information regarding the servicemember's injury or illness and its expected duration. The Department believes this approach is reasonable since the ITO or ITA will not provide the employer with such information initially. Furthermore, the Department believes that once an ITO or ITA expires, the employee will be in a better position to have an authorized health care provider furnish a complete certification as to the servicemember's medical condition and the employee's continuing need for leave.

The final rule also permits an eligible employee who is a spouse, parent, son, daughter or next of kin of a covered servicemember to submit an ITO or ITA issued to another family member as sufficient certification for the duration of time specified in the ITO or ITA, even if the employee seeking leave is not the named recipient on the ITO or ITA. Thus, for example, a covered servicemember's son may submit an ITO issued to the servicemember's spouse to support the son's request for FMLA leave to care for the servicemember during the time period specified by the ITO. An employer must accept such an ITO or ITA from the employee as sufficient certification, in lieu of the Department's optional certification form (WH–385) or an employer's own certification form, for the duration of time specified in the order or authorization.

The DOD does not issue an ITO or ITA to every family member of an injured or ill servicemember who might be eligible to take FMLA leave to care for the covered servicemember. It is the Department's understanding that if the DOD issues an ITO or ITA at all, they do so for between one and three family members of the servicemember. However, in some situations, the servicemember may have additional family members who are eligible to take FMLA leave to care for the servicemember, even if the DOD has not authorized an ITO for that person. For example, an ITO or ITA can be issued to the spouse of a servicemember without also being issued to a servicemember's parents, children, or siblings. The Department believes that all family members of a covered servicemember who are eligible to take FMLA leave to care for the covered servicemember should be able to rely on the DOD's issuance of an ITO or ITA as sufficient certification to support a request for FMLA leave during the effective period of the ITO or ITA. Like a named recipient in an ITO or ITA, an employee using another family member's orders or authorizations may take the leave in a continuous block or on an intermittent basis for the duration of time specified in the ITO or ITA without providing an additional or separate certification that such leave is medically necessary. However, an employer may require an employee to provide confirmation of covered family relationship to the seriously injured or ill servicemember pursuant to § 825.122(j) of the FMLA in support of the employee's use of an ITO or ITA.

In addition to requesting comment on the appropriate certification process for military caregiver leave, the Department also sought comment on whether the clarification, authentication, second and third opinion, and recertification provisions applicable to FMLA leave taken to care for a family member with a serious health condition should be applied to certifications supporting FMLA leave taken to care for a covered servicemember. Sections 825.310(d) and (e)(2) of the final rule provide that an employer may seek to authenticate and clarify a certification provided in support of a request for leave to care for a covered servicemember, including ITOs or ITAs. The final rule does not permit an employer to seek second and/or third opinions of an employee's need to care for a covered servicemember in any case. Because leave to care for a covered servicemember is a one-time entitlement that must be used within a ''single 12-month period,'' the final rule also does not provide a recertification process for leave to care for a covered servicemember. The final rule does permit an employer to require an employee to provide confirmation of covered family relationship to the covered servicemember pursuant to § 825.122(j).

Comments addressing whether the FMLA clarification, authentication, second and third opinion, and recertification processes used for other types of FMLA leave should apply to military caregiver leave were mixed. The U.S. Postal Service wrote that ''[c]onsistent with the other provisions of the FMLA, the employer should have the ability to seek clarification, authentication, recertification, and second/third opinions, if necessary.'' Infinisource, Inc. commented that there are ''clear advantages'' for adopting the same certification scheme for military caregiver leave that exists for leave for a serious health condition, and that ''[t]his would include first and subsequent certifications, second opinions and third opinions. It would be easiest for employers and employees alike to know that there is one set of rules for all types of FMLA leave.''

However, other commenters believed that a certification for military caregiver leave should not require the same follow-up mechanisms as permitted under the FMLA for a serious health condition. AT&T wrote that if leave to care for a covered servicemember is limited to a single 12-month period, there should be ''no need for a general recertification (*i.e.*, once every 6 months) after initial certification has been secured.'' The National Partnership for Women & Families, in joint comments with the National Military Family Association, argued that the authentication and clarification processes applicable to other types of FMLA leave should not apply to leave taken to care for a covered servicemember because requiring ''frequent certification'' will be difficult for the family members of servicemembers and will discourage them from taking leave, particularly given the likelihood that the employee will be away from home because the servicemember is in a ''highly specialized'' hospital unit. These commenters also argued that recertification is not necessary because the NDAA limits the leave taking to one 12-month period.

The Department agrees with those commenters that argued that similar procedures should be used for all types

of FMLA leave whenever feasible in order to minimize the number of different procedures that have to be followed by both employees requesting leave and employers administering leave programs. Accordingly, the final rule permits employers to authenticate and clarify medical certifications submitted to support a request for leave to care for a covered servicemember using the procedures applicable to FMLA leave taken to care for a family member with a serious health condition. However, the Department also agrees with those comments that suggested that it would not be appropriate to apply the recertification and second and third opinion processes used for other types of FMLA leave to military caregiver leave. Because an employee's use of military caregiver leave is limited to a ''single 12-month period'' from the date such leave is first taken, the Department has concluded that recertification and second and third opinions are not warranted for purposes of military caregiver leave. In addition, because the statutory standard for determining whether a family member has a serious injury or illness is dependent on several determinations which can only be made by the military, including whether the injury may render the servicemember unfit to perform his or her duties and whether the injury was incurred in the line of duty on active duty, the Department believes it would be inappropriate to permit second and third opinions regarding these determinations.

The Department also specifically sought comment in the NPRM on whether there should be different timing requirements for the provision of any required certification for military caregiver leave. The final rule applies the same timing requirements to all requests for FMLA leave. Thus, under § 825.305(b) of the final rule, an employee seeking to take military caregiver leave 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.

A number of commenters expressed concerns regarding timely receipt of certifications from the DOD. The Unum Group stated that a certification from the DOD should be sufficient to establish whether a serious injury or illness exists, but that employers should also be able to use a certification from a health care provider as well ''because of potential time concerns with receiving the certification from the Department of Defense.'' The Manufacturers Alliance/MAPI expressed concern with the timeliness in which the DOD and VA can provide certifications, stating that ''numerous media reports about some returning injured servicemembers who have faced obstacles and delays in receiving treatment through these Departments—often as a result of missing or inaccurate paperwork—at least call into question whether these Departments have the full capability to supply certifications with sufficient medical information in a timely fashion. Neither employers nor employees would be well served if they must wait months to obtain these certifications.'' The National Partnership for Women & Families, in joint comments with the National Military Family Association, commented that ''given the well documented delays and uneven outcomes of employees going through the military disability system, we are concerned that any certification requirement created by the DOD or VA will be overly burdensome and may lead to unequal results.'' Therefore, these commenters recommended that the Department develop a ''simple form, similar to the medical forms used in the rest of the FMLA, which will allow private health care providers, DOD, or the VA to make this a simple and expedited process.'' They also suggested that the Department should consult with the DOD and VA to determine which office within these organizations would be responsible for issuing certifications and set a ''maximum amount of time'' by which the offices should respond to such a request—''for example, a maximum of 15 days.'' In contrast, a number of employers and employer groups, including the Equal Employment Advisory Council, ORC Worldwide, and AT&T, recommended that the timing requirements set out in the Department's NPRM for the certification of a serious health condition should be applied to the certification for military caregiver leave.

The Department agrees with the comments submitted by Senator Dodd and Representative Woolsey *et al.* that delays in the provision of service at the DOD and VA could ''undermine the intent of the law'' in providing family assistance to those who need it most. The Department is fully cognizant of the special circumstances surrounding this type of leave and the fact that an employee may have very little notice before he or she is needed to care for a seriously injured or ill servicemember. As noted by the National Partnership for Women & Families, in joint comments with the National Military Family Association, employees may need to travel in order to be with an injured servicemember and may not be near a specific DOD or VA office where paperwork can be completed. In addition, the Department fully recognizes and acknowledges the concerns expressed by commenters regarding the timely receipt of certifications from the DOD. It is for these reasons that the Department is requiring employers to accept ITOs and ITAs as sufficient certification for those employees who must travel immediately to the bedside of their seriously injured or ill servicemember.

Furthermore, these timing concerns guided the Department in working with the DOD to create the Department's optional certification form (WH–385). Consistent with the recommendation received from the National Partnership for Women & Families, in joint comments with the National Military Family Association, the Department created a ''simple form, similar to the medical forms used in the rest of the FMLA'' which will allow the DOD, VA, and DOD TRICARE private health care providers to make this a ''simple and expedited process.'' The Department also believes that the inclusion of TRICARE private health care providers as one of the categories of health care providers authorized to complete a certification will give greater flexibility to employees seeking to certify that they are needed to care for a covered servicemember with a serious injury or illness. Additionally, the Department believes the inclusion of these private health care providers will allay the concerns of commenters that there might be significant delays in the receipt of certifications if only the DOD and/or VA could complete the necessary certification.

The Department has taken significant steps to simplify the certification process for military caregiver leave, such as creating, with the assistance of the DOD, a simplified Department optional certification form, by requiring an employer to accept ITOs or ITAs as sufficient certification, and by authorizing TRICARE private health care providers to issue certifications. Given these provisions, the Department does not believe that different timing requirements should be created for the receipt of certifications for military caregiver leave. Thus, the final rule provides that an employee seeking FMLA leave to care for a covered servicemember must comply with the timing requirements for certifications set forth in § 825.305(b). Under this

section, an employee seeking FMLA leave to care for a covered servicemember 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.

Section 825.311 (Intent To Return to Work)

The Department did not propose any changes in § 825.309 in the NPRM and received no significant comments on this section. In the final rule, § 825.309 is renumbered as § 825.311 to account for the new military family leave sections (§§ 825.309 and 825.310) and is otherwise adopted as proposed.

Section 825.312 (Fitness-for-Duty Certification)

Section 825.312 addresses the fitness-for-duty certification that an employee may be required to submit upon return to work from FMLA leave. This section was numbered § 825.310 in the NPRM but is renumbered as § 825.312 in the final rule to account for the new military family leave sections (§§ 825.309 and 825.310). The Department proposed 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 in order for that person to provide the information directly to the employer in the fitness-for-duty certification process as they do in the initial certification process. The Department did not propose any changes to current paragraph (b). The Department proposed to change current paragraph (c) in two respects. First, the Department proposed to change the requirement in current paragraph (c) that the fitness-for-duty certification need only be a ''simple statement.'' The Department proposed to allow an employer to require that the fitness-for-duty certification address the employee's ability to perform the essential functions of the employee's job as long as the employer provides the employee with a list of those essential job functions at the same time that the employer provides the eligibility notice required by proposed § 825.300(b). Second, the Department proposed to allow an employer to contact the employee's health care provider directly, consistent with the procedure in proposed § 825.307(a), for purposes of authenticating or clarifying the fitness-for-duty certification. The Department did not propose any changes to current paragraph (d). The Department proposed to modify current paragraph (e) to require that the employer advise the employee in the eligibility notice required by proposed § 825.300(b) if the employer will require a fitness-for-duty certification to return to work. The Department proposed to add language to current paragraph (f) to make clear that the employee is not entitled to the reinstatement protections of the Act if he or she does not provide the required fitness-for-duty certification or request additional FMLA leave. The Department proposed to change current paragraph (g) to allow an employer to require a fitness-for-duty certification up to once every 30 days if an employee has used intermittent or reduced schedule leave during the 30-day period and 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. Finally, the Department proposed deleting current paragraph (h) as redundant with § 825.213 regarding 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.

The final rule adopts the proposed change to paragraph (a). The Department has moved the statements in current paragraph (b) that discusses the applicability of provisions in state or local law or collective bargaining agreements that govern an employee's return to work to a new paragraph (g) in the final rule. The Department has also moved the discussion of the ADA in current paragraph (b) to a new and separate paragraph (h) in the final rule. Due to the reorganization of this section in the final rule, proposed paragraph (c) is paragraph (b) in the final rule. In paragraph (b) in the final rule, the Department adopts the proposed change but modifies the language to make clear that an employer may require that a fitness-for-duty certification specifically address the employee's ability to perform the essential functions of the employee's job. To do so, the final rules explain that the employer must provide the employee with a list of the essential job functions no later than with the designation notice required by § 825.300(d), rather than with the eligibility notice as proposed, and the employer must indicate in the designation notice that the certification must address the employee's ability to perform those essential functions. In addition, the Department has moved the statement in current paragraph (e) that no second or third opinions on a fitness-for-duty certification may be required to paragraph (b) in the final rule. Current paragraph (d) is paragraph (c) in the final rule. Current paragraph (e) is paragraph (d) in the final rule. The Department has modified the notice requirement in paragraph (d) in the final rule to provide that, if the employer will require a fitness-for-duty certification, the employer must advise the employee of this requirement in the designation notice and indicate therein whether that certification must address the employee's ability to perform the essential functions of the employee's job. Current paragraph (f) is paragraph (e) in the final rule. The Department adopts the proposed change to current paragraph (f) without modifications. Current paragraph (g) is paragraph (f) in the final rule. The Department adopts the proposal in this paragraph regarding uniformly-applied policies permitting fitness-for-duty certifications for intermittent and reduced schedule leave users when reasonable safety concerns are present and adds a definition of ''reasonable safety concerns.'' ''Reasonable safety concerns'' means a reasonable belief of a significant risk of harm to the individual employee or others. In determining whether reasonable safety concerns exist, an employer should consider the nature and severity of the potential harm and the likelihood that potential harm will occur. In addition, the Department has added a notice requirement to this paragraph requiring the employer, if it chooses to require a fitness-for-duty certification as allowed by this paragraph, to inform the employee at the same time it issues the designation notice that for each subsequent instance of intermittent or reduced schedule leave, the employee will be required to submit a fitness-for-duty certification unless one has already been submitted within the past 30 days. Alternatively, the employer can set a different interval for requiring a fitness-for-duty certification as long as it does not exceed more than once every 30 days and the employer advises the employee of the requirement in advance of the employee taking intermittent or reduced schedule leave. The Department deletes current paragraph (h) in the final rule.

The Department received few substantive comments on its proposal 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 enable that person to provide the

information directly to the employer in the fitness-for-duty certification process as they do in the initial certification process. The Equal Employment Advisory Council supported the proposal, noting the importance of the fitness-for-duty certification to an employee's exercise of the right to reinstatement. The Department adopts the proposed clarification to paragraph (a) without modification.

The Department did not propose any changes to current paragraph (b), which addresses the applicability of provisions in state or local law or collective bargaining agreements that govern an employee's return to work, and the ADA in the fitness-for-duty context. However, to make clear that the statements in this paragraph apply to all of the provisions in § 825.312, the Department has moved the statements in current paragraph (b) to the end of the section in the final rule. Thus, the statement that provisions in state or local law or the terms of a collective bargaining agreement that govern an employee's return to work shall be applied is in paragraph (g) in the final rule. Additionally, for reasons discussed below, the Department has moved the discussion of the ADA contained in current paragraph (b) to a new paragraph (h) in the final rule in order to highlight the relationship between the FMLA's fitness-for-duty certification and the ADA. The Department does not intend for either of these changes to be substantive.

In response the proposal in paragraph (c) to allow employers to require that fitness-for-duty certifications contain more than a ''simple statement'' of the employee's ability to return to work, many employers and employer organizations welcomed the ability to obtain a certification that addresses the employee's ability to perform the essential functions of the job. *See* National Association of Manufacturers; National Business Group on Health; ORC Worldwide; National Restaurant Association; AT&T; International Public Management Association for Human Resources/International Municipal Lawyers Association. Domtar Paper Company recognized that providing a list of essential job functions may be burdensome to employers, but asserted that it was worth the effort if the employer wants a more useful fitness-for-duty certification.

In contrast, employee organizations and unions opposed this proposed change, because they believed it would be duplicative, onerous, and costly for employees. *See* United Food and Commercial Workers International Union; Coalition of Labor Union Women; National Partnership for Women & Families; Tracy Hutchinson. The Coalition of Labor Union Women commented that the additional information that an employee is required to provide will likely increase the cost to employees because it might necessitate an additional medical evaluation. Commenters including Richard Baerlocher and the United Food and Commercial Workers International Union asserted that a more detailed certification could delay an employee's return to work, which could require the employee to take more FMLA leave than needed or face discipline if the employee has no leave remaining. These commenters argued that this will discourage employees from taking FMLA leave. The United Food and Commercial Workers International Union also questioned the necessity of a detailed fitness-for-duty certification when the initial medical certification for FMLA leave requires the employee's health care provider to assess the employee's condition in relationship to the employee's essential job functions. This commenter argued that because the health care provider has already considered the essential functions of the employee's position in completing the initial certification, by certifying that the employee is fit to return to duty, the health care provider necessarily certifies that the employee's serious health condition no longer prevents the employee from being able to perform the essential functions of his or her job.

The Department notes that the current regulation already allows an employer to delay an employee's return to work until the employee provides a fitness-for-duty certification, assuming the employer has appropriately notified the employee of the requirement. The only difference under the proposed regulation is that the employer may, if it so chooses, require that the fitness-for-duty certification address the employee's ability to perform the essential functions of the job. Because the employee will know in advance (as discussed below) that a fitness-for-duty certification is required, and that it must address the employee's ability to perform the essential functions of the employee's job, and will have the list of essential job functions to present to his or her health care provider, the additional requirement that the fitness-for-duty certification address the employee's ability to perform the essential functions of the job should not impose any additional delay in the employee's return to work. Additionally, requiring the health care provider to address the employee's essential job functions when determining whether the employee is fit to return to duty will produce a more meaningful fitness-for-duty certification. The fact that the employee's health care provider certified, in the medical certification submitted in support of the request for leave, that the employee was unable to perform the essential functions of the employee's position does not mean that the health care provider will specifically consider these functions again when the employee seeks to return to work unless specifically called upon to do so.

The AFL–CIO commented that the Department's proposal to allow employers to require a fitness-for-duty certification that addresses an employee's ability to perform the essential functions of the position for all employees goes beyond what it asserted was a more limited request by employer groups to allow more detailed certifications for employees in safety-sensitive jobs. The Department notes that the FMLA does not obligate employers to restore any employee to the same or equivalent position if the employee is unable to resume work. Resuming work requires that the employee be able to perform the essential functions of the job. Accordingly, an employer is entitled in all cases in which it is authorized to obtain a fitness-for-duty certification to require that the certification address the employee's ability to perform the essential functions of the position. An employer's rights and obligations on this issue are not limited to employees working in safety-sensitive jobs.

Several employers and employer organizations, while supportive of the proposal, viewed the timing requirements under the proposal as problematic. *See* Equal Employment Advisory Council; ORC Worldwide; HR Policy Association; Manufacturers Alliance. Their comments on this subject addressed proposed paragraph (e)'s requirement that the employer inform the employee in the eligibility notice if the employer will require a fitness-for-duty certification to return to work and proposed paragraph (c)'s requirement that the employer provide the list of essential job functions with the eligibility notice. Specifically, they argued that this timing requirement is premature (for reasons discussed in detail in conjunction with the discussion of paragraph (e) below). These commenters stated that requiring employers to provide a list of essential job functions with the eligibility notice will be burdensome and costly to employers because in order to preserve the option of requiring a fitness-for-duty certification, they will be forced to

prepare lists of essential job functions in all instances; whereas if they could determine later whether a fitness-for-duty certification will be required and whether the fitness-for-duty certification needs to address the employee's ability to perform the essential job functions, they may decide not to require a fitness-for-duty certification at all or not to require a certification that addresses an employee's essential job functions in certain cases. These commenters recommended that employers be permitted to provide the list of essential job functions at a later time. The Equal Employment Advisory Council suggested that the fitness-for-duty certification notice requirement should come, at the earliest, at the designation notice stage. ORC Worldwide suggested there be no time limit on when an employer must advise an employee of the fitness-for-duty certification requirement because this will change on a case-by-case basis. According to the Manufacturers Alliance and the HR Policy Association, a later notice requirement would not be burdensome to employees because employees could simply fax or email the fitness-for-duty certification and list of essential job functions to their health care providers upon receiving notice that the fitness-for-duty certification is needed. The National Association of Manufacturers and AT&T suggested altering the timing to allow an employer to provide the list of essential job functions directly to the health care provider when seeking authentication or clarification of the fitness-for-duty certification.

As an initial matter, the Department notes that it has not prepared or issued a fitness-for-duty certification form. It appears that several commenters erroneously assumed that the Department had proposed a separate fitness-for-duty certification form for an employee's health care provider to complete. There is no fitness-for-duty certification form, nor is there any specific format such a certification must follow as long as it contains the required information. The Department also notes that this section permits an employer to require that the fitness-for-duty certification address the employee's ability to perform the essential functions of his or her position. However, the employer can chose to accept a simple statement fitness-for-duty certification (or not require a fitness-for-duty certification at all). The Department has modified the language in the final rule in paragraph (b) to make this distinction clear. Specifically, if the employer chooses to require a certification that addresses the employee's ability to perform the essential functions of the employee's job, the employer must so indicate in the designation notice (in addition to providing a list of the essential functions of the employee's job).

In response to the comments about the timing requirements in the proposal, the Department has changed the timing requirement in what was proposed paragraph (e) and is now paragraph (d) in the final rule (discussed in detail below) to coincide with the designation notice instead of the eligibility notice. For consistency, the Department has also changed paragraph (b) in the final rule to require the employer to provide the list of essential functions no later than with the designation notice. Therefore, final paragraph (b) states that if the employer will require that the fitness-for-duty certification address the employee's ability to perform the essential job functions, the employer must provide the employee with the list of the essential job functions no later than with the designation notice required by § 825.300(d).

The AFL–CIO and the law firm Sherman & Howard each addressed the preparation of the list of essential job functions. The AFL–CIO commented that the proposal would appear to give employers the ability to determine the essential job functions regardless of whether a written job description already exists. The AFL–CIO believes that employers that do not already have written job descriptions should not be able to create a list of essential functions for the purpose of determining if an employee is fit to return to duty because employers will use this as an opportunity to create arbitrary lists to penalize employees for taking FMLA leave. In contrast, the law firm Sherman & Howard requested that employers be able to provide the list of essential job functions regardless of whether those functions are listed in a formal job description. While employers must set forth the essential functions of an employee's position if they wish to require a fitness for duty certification that specifically addresses those functions, there is no requirement that an employer have pre-existing written job descriptions. There is no legal requirement under the FMLA that employers have written or formal job descriptions for all positions. It would be unreasonably burdensome to impose such a requirement. The Department notes, however, that an employer may rely on its determination of the essential functions of a position in denying an employee's return to work only to the extent that the essential functions it has listed are in fact essential functions of the position.

In conjunction with these proposed changes, the Department requested input concerning 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. Several employers and employer organizations requested that the Department establish a second and third opinion process for fitness-for-duty certifications. *See* Equal Employment Advisory Council; TOC Management Services; National School Boards Association. The Independence (MO) Human Resources Department and Catholic Charities noted that this is particularly important in safety-sensitive positions. The Society for Human Resource Management and the National Coalition to Protect Family Leave argued that prohibiting an employer from seeking second and third opinions presents safety concerns and conflicts with the fitness-for-duty assessment permitted under the ADA. The Southern Company expressed concern that an employee may pressure his or her health care provider to certify that the employee is able to return to work before he or she is truly ready. This commenter suggested that permitting a second and third opinion would address this problem. The Association of American Railroads requested that employers be allowed to apply the same fitness-for-duty certification standards to employees returning from FMLA leave as employers apply to employees returning from other forms of leave. The law firm Vercruysse Murray & Calzone suggested that employers be allowed to delay an employee's return to work pending a second and third opinion. The Equal Employment Advisory Council noted that the current regulation allows employers to require an employee to submit to a medical examination after returning from leave so long as the examination is consistent with ADA standards. It requested that the final regulation explicitly permit such a post return-to-work examination, in addition to second and third opinions on a fitness-for-duty certification. Others, including the law firm Spencer Fane Britt & Browne and Central Carolina Society for Human Resource Management suggested as an alternative to second and third opinions in the fitness-for-duty context that employers be allowed to require a full medical examination by the employer's health care provider before allowing an employee to return to work. These

commenters maintained that employers should use such examinations only on a uniformly applied basis that does not distinguish between FMLA leave and non-FMLA leave. On a similar note, the U.S. Department of Transportation, Federal Railroad Administration requested that employers be able to use their own health care providers to evaluate an employee's fitness to return to duty.

The Equal Employment Opportunity Commission commented that, contrary to some of the other commenters' assertions, prohibiting second and third opinions on fitness-for-duty certifications does not conflict with the ADA. The ADA does not expressly regulate second and third opinions. The Equal Employment Opportunity Commission stated that the current regulation already addresses the Commission's highest priority by making clear in current paragraph (b) (paragraph (h) in the final rule) that a fitness-for-duty examination must be job-related and consistent with business necessity.

The National Federation of Federal Employees and the AFL–CIO were opposed to including a second and third opinion process in the fitness-for-duty certification procedure. Both commenters maintained that the statute does not permit second and third opinions for fitness-for-duty certifications. On a related note, the Association of Professional Flight Attendants suggested that if an employer questions an employee's general ability to perform the essential functions of the job, the employer may choose to send the employee to a doctor for a general fitness-for-duty examination at the employer's expense and on-the-clock for the employee.

The Department declines to establish a second and third opinion process for a fitness-for-duty certification. A second and third opinion process would impose a significant burden on employees because it would delay an employee's return to work from FMLA leave. The statute permits an employee to return to work based on a uniformly-applied policy permitting a fitness-for-duty certification from the employee's health care provider, 29 U.S.C. 2614(a)(4). A fitness-for-duty certification need only address the condition for which FMLA leave was taken and the employee's ability to perform the essential functions of the job. The employee's health care provider determines whether a separate examination is required in order to determine the employee's fitness to return to duty under the FMLA. The statute does not require that an employee returning from FMLA leave submit to a medical examination by an employer's health care provider. An employer may not require that an employee submit to a medical exam by the employer's health care provider as a condition of returning to work. A medical examination at the employer's expense by an employer's health care provider may be required only after the employee has returned from FMLA leave and must be job-related and consistent with business necessity as required by the ADA. Thus, if an employer is concerned about the health care provider's fitness-for-duty certification, the employer may, consistent with the ADA, require a medical exam at the employer's expense after the employee has returned to work from FMLA leave as stated in paragraph (h) in the final rule. The employer cannot, however, delay the employee's return to work while arranging for and having the employee undergo a medical examination. The Department has moved the statement that no second or third opinions on a fitness-for-duty certification may be required from current paragraph (e) to paragraph (b) in the final rule because this follows logically the discussion regarding the content of the certification and the employer's ability to authenticate or clarify the fitness-for-duty certification.

The second change the Department included in proposed paragraph (c) was to allow an employer to contact the employee's health care provider directly, consistent with the procedure in proposed § 825.307(a), for purposes of authenticating or clarifying the fitness-for-duty certification. In conjunction with this change, the Department deleted the statement that no additional information may be acquired because 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; any additional information, however, must be limited to the condition for which the leave was taken and the employee's ability to perform the essential functions of the position.

The Service Employee International Union, the American Association of University Women, and the National Employment Lawyers Association opposed the Department's proposal to allow direct contact between the employer and the employee's health care provider consistent with the procedure proposed in § 825.307(a). The National Employment Lawyers Association expressed concern that this will have a chilling effect on whether employees will feel secure in taking FMLA leave for their own serious health condition. This issue of employer contact with the employee's health care provider is discussed extensively in regard to § 825.307. For the same reasons outlined there, the Department retains the provision allowing for an employer to contact directly the employee's health care provider to clarify or authenticate a fitness-for-duty certification. As discussed above in § 825.307, the Department has modified § 825.307(a) to specify the manner in which the employer may contact the employee's health care provider. Because paragraph (b) explicitly references § 825.307(a), the procedures set forth in § 825.307(a) apply in the fitness-for-duty certification context.

As noted above, several commenters objected to proposed paragraph (e)'s requirement that the employer advise the employee in the eligibility notice if a fitness-for-duty certification will be required. *See, e.g.*, Equal Employment Advisory Council; ORC Worldwide; HR Policy Association; Manufacturers Alliance. They argued that this timing requirement is premature. The Equal Employment Advisory Council stated that this is inconsistent with the Department's proposed simplification of the notice process and will result in an undue administrative burden on both employers and employees because some employers do not require medical documentation until an employee misses a threshold number of workdays. According to this commenter, requiring notice at the eligibility notice stage will instead force employers to require a fitness-for-duty certification in all instances in which the FMLA permits them to do so and will force some employees to obtain fitness-for-duty certifications that would otherwise not have been required. The HR Policy Association expressed these same concerns and asserted that this timing requirement could create a greater burden on employers and employees rather than a lesser burden. The Equal Employment Advisory Council suggested that the fitness-for-duty certification notice requirement should come, at the earliest, at the designation notice stage. ORC Worldwide and the HR Policy Association suggested there be no time limit on when an employer must advise an employee of the fitness-for-duty certification requirement because this will change on a case-by-case basis.

In response to the comments about the timing requirements, the Department has modified these requirements. As outlined in the comments, an employer may not know

at the eligibility notice stage if it will need a fitness-for-duty certification. It may depend on the nature of the employee's health condition and the duration of the leave. Requiring that an employer state that it will require a fitness-for-duty certification in order to preserve its right to request one later could have the effect of forcing an employer to require such certifications in all instances, even when it would not do so otherwise. However, in order to reduce the burden on the employee, if the employer is going to require a fitness-for-duty certification prior to returning the employee to work, the employer must provide notice of this requirement no later than in the designation notice and indicate in the designation notice whether certification must address the employee's ability to perform the essential functions of the employee's job. Further, if the employer will require a fitness-for-duty certification that addresses the employee's ability to perform the essential job functions, the employer must provide the employee with the list of essential functions as required by final paragraph (b) no later than with the designation notice.

The Department did not receive any significant comments specifically addressed to the change in proposed paragraph (f) to add language to current paragraph (f) to make clear that the employee is not entitled to the reinstatement protections of the Act if he or she does not provide the required fitness-for-duty certification or request additional FMLA leave. The Department adopts the proposal without modification. Due to the reorganization of this section, current paragraph (f) is paragraph (e) in the final rule.

Proposed paragraph (g) allowed employers to require a uniformly-applied policy permitting a fitness-for-duty certification for employees returning from intermittent or reduced schedule leave if reasonable safety concerns existed, but limited the frequency of such certifications to once in a 30-day period in which intermittent or reduced schedule leave was taken. Numerous employee unions and organizations opposed proposed paragraph (g), focusing most of their criticism on the increased costs that requiring fitness-for-duty certifications for employees returning from intermittent or reduced schedule leave would impose on employees. *See, e.g.*, National Federation of Federal Employees; Coalition of Labor Union Women; National Employment Lawyers Association; AFL–CIO; National Partnership for Women & Families; A Better Balance: The Work and Family Legal Center. These commenters said that requiring an employee in a safety-sensitive position to obtain a fitness-for-duty certification every 30 days when the employee has taken intermittent leave during the 30-day period will increase the costs to the employee of taking FMLA leave, which may cause employees to forego taking FMLA leave. Robert Schwartz noted that an employee who is absent one day a month because of a back condition could be required to submit twelve certifications a year. Robert Jusino commented that this is especially costly for employees who do not have health insurance or have a high deductible. He and the American College of Occupational and Environmental Medicine each suggested that the Department require the employer to pay for the fitness-for-duty certification if the employer is going to require it when an employee takes intermittent or reduced schedule leave. Similarly, in response to the Department's request for suggestions on how to minimize the cost to employees, A Better Balance: The Work and Family Legal Center urged the Department to require employers to share a portion of the cost of the required medical visits by providing paid sick leave to cover the appointments, and in the case of employers who do not provide health insurance, requiring the employer to pay the cost of the medical visit necessary to obtain the fitness-for-duty certification. The AFL–CIO argued that permitting fitness-for-duty certifications for intermittent FMLA absences under any circumstances is particularly unworkable and costly to employees with chronic conditions such as migraines or asthma because the duration of the leave is uncertain and the employee may not be able to schedule an appointment with his or her health care provider or request that the provider prepare the certification until the employee knows that the condition has subsided. The AFL–CIO argued that in these cases, because the certification is a condition of restoring the employee to work, the employee will be forced to take more leave than actually needed while obtaining the certification.

Employee commenters also questioned the value of the fitness-for-duty certification in the intermittent and reduce schedule leave context even when the employer has safety concerns. The AFL–CIO maintained that this requirement is unnecessary in situations where the employee's health condition has not changed. It argued that there is no purpose in requiring repeat certifications other than imposing a burden on employees to discourage them from taking such leave. The National Employment Lawyers Association urged the Department to allow an employer to require a fitness-for-duty certification for intermittent leave users only if there is an observed material change in the employee's condition.

Lastly, several employee commenters pointed out that the term ''reasonable safety concerns'' is ambiguous and urged the Department to define the term. *See, e.g.*, National Employment Lawyers Association; AFL–CIO; National Partnership for Women & Families; National Employment Lawyers Association. The National Partnership for Women & Families questioned whether the safety concerns must be related to safety issues of the job or safety issues posed by the serious health condition or both, and how this term interacts with the ADA's direct threat standard. Kindra Obermeier expressed concern that employers will require a fitness-for-duty certification for intermittent or reduced schedule leave as a blanket policy, not limited to the existence of reasonable safety concerns.

Employers and employer organizations generally supported allowing fitness-for-duty certifications for intermittent or reduced schedule leave where reasonable safety concerns exist, but some felt that the proposal did not go far enough. Several of these commenters supported the proposal, stating that allowing employers to require a fitness-for-duty certification once in a 30-day period when leave is taken during that period adequately addressed their safety concerns and struck the appropriate balance. *See, e.g.*, U.S. Postal Service; Association of American Railroads; National Association of Manufacturers; the Chamber; Spencer Fane Britt & Browne; Southwest Airlines; Navy Federal Credit Union; Southern Company; AT&T. The Southern Company recognized that this will impose some burden on employees, but believed that the safety considerations outweigh that burden. The U.S. Postal Service stated that the ADA's direct threat standard (29 CFR 1630.2(r)) is itself sufficient to restrain employers from requesting certifications on an unwarranted and repetitive basis, and recommended that the Department specifically apply the ADA standard.

Numerous employers and employer organizations, however, stated that the proposal did not go far enough because allowing a fitness-for-duty certification only once in a 30-day period when the employee takes more than one instance of leave during that period does not

adequately address employers' safety concerns. They urged the Department to allow employers to require a fitness-for-duty certification after each instance of intermittent or reduced schedule leave. *See, e.g.*, Society for Human Resource Management; National Coalition to Protect Family Leave; Food Marketing Institute; Colorado Department of Personnel & Administration; Schreiber Foods; South Carolina Office of Human Resources; Jackson Lewis; New York City (NY) Law Department; City of Medford (OR); City of American Canyon (CA); Dalton Corp.; International Public Management Association for Human Resources/International Municipal Lawyers Association. WorldatWork suggested that this would be particularly appropriate where employee abuse is suspected. The law firm Willcox & Savage and the National School Board Association believed that the fitness-for-duty certification for employees returning from intermittent leave should not be limited to situations where safety concerns exist. They argued that all employees should be able to perform the essential functions of the position, and requiring a certification regardless of whether there are safety concerns would be a means of controlling abuse of intermittent leave.

The National School Boards Association and the law firm Spencer Fane Britt & Browne also requested that the Department define ''reasonable safety concerns.'' The National School Boards Association suggested that the Department make clear that the safety concerns must arise due to a particular health condition in relation to an employee's position. As an example, this commenter suggested that a teacher who suffers from seizures could not be required to provide a fitness-for-duty certification, but a bus driver could. The law firm Spencer Fane Britt & Browne suggested that the term include, at a minimum, the possibility of risk of harm or injury to the employee or others, whether the employee works around or with dangerous/hazardous equipment or products, whether there are OSHA considerations, and whether there are Department of Transportation driver medical qualification considerations.

The Department agrees with the commenters that the term ''reasonable safety concerns'' needs further clarification. Therefore, the Department has revised the regulation to include a definition of this term. ''Reasonable safety concerns'' means a reasonable belief of significant risk of harm to the individual employee or others. In determining whether reasonable safety concerns exist, an employer should consider the nature and severity of the potential harm and the likelihood that potential harm will occur. The Department intends for this to be a high standard. The determination that there are reasonable safety concerns must rely on objective factual evidence, not subjective perceptions. In other words, the employer must have a reasonable belief, based on the objective information available, that there is a significant risk of harm. Both the employee's condition for which FMLA leave was taken and the employee's essential job functions are relevant to determine if there are reasonable safety concerns. For example, a delivery person whose essential job functions require him or her to lift articles over a certain weight and who suffers from a back condition that limits his or her ability to lift items above that weight may present reasonable safety concerns upon return from intermittent or reduced schedule FMLA leave due to the employee's back condition. An air traffic controller who takes intermittent leave to treat high blood pressure may present reasonable safety concerns upon return from intermittent or reduced schedule FMLA leave due to the employee's high blood pressure. A roofer who experiences panic attacks may present reasonable safety concerns upon return from intermittent or reduced schedule FMLA leave due to the employee's panic attacks. In contrast, an office worker who has periodic seizures would likely not present reasonable safety concerns. Similarly, a cashier who suffers from migraines would likely not present reasonable safety concerns upon return from intermittent or reduced schedule FMLA leave due to the employee's migraines.

The Department recognizes that this new regulation may impose additional costs on some employees. However, because the Department has defined the term ''reasonable safety concerns'' to create a high standard, and employers may only request a fitness-for-duty certification pursuant to a uniformly-applied practice or policy, the Department estimates that a relatively small group of employees will fall into this category. For these employees, the significant safety concerns that their conditions present in the context of their essential job functions outweigh the burden imposed.

The Department wishes to emphasize that, even where employers have a uniformly-applied policy of requesting fitness-for-duty certifications, employees who take intermittent or reduced schedule leave may only be required to provide such certifications where reasonable safety concerns are present, and employers cannot under this regulation require such certifications in all intermittent or reduced schedule leave situations. Furthermore, the requirement may not be used to penalize employees who take intermittent or reduced schedule leave. An employer may impose this requirement only if there are reasonable safety concerns present, as discussed above. The Department's objective in allowing an employer to require a fitness-for-duty certification for intermittent or reduced schedule leave is to ensure the safety of all employees in the workplace and the public when there are legitimate reasonable safety concerns.

The Department declines to adopt the suggestion that a fitness-for-duty certification for intermittent or reduced schedule leave be allowed only when there is a material change in the employee's condition. This would not adequately address employers' legitimate safety concerns. Likewise, the fact that an employee's condition has not changed does not eliminate the reasonable safety concerns that may be present depending on the particular condition for which leave was taken and the employee's essential job functions.

The Department also declines to adopt the request to allow a fitness-for-duty certification after each instance of intermittent or reduced schedule leave. This would impose an unreasonable burden on employees. If an employer is concerned that an employee's intermittent or reduced schedule leave that occurs more often than once in a 30-day period presents safety concerns, the employer may require the employee, once returned to work from FMLA leave, to submit to a medical exam as long as the exam is job-related and consistent with business necessity as required by the ADA (see discussion above). Alternatively, if there are changed circumstances in the employee's medical condition, § 825.308(c) permits an employer to require recertification.

As provided in paragraph (d) of this section, if the employer will require a fitness-for-duty certification, it must notify the employee in the designation notice of this requirement. However, the Department recognizes that this is logistically difficult when the intermittent or reduced schedule leave is unforeseen and the employer may provide the designation notice after the employee is ready to return to work. In order to provide sufficient advance notice to the employee of the fitness-for-duty certification requirement in connection with intermittent leave, the Department has adopted a modified

notice requirement for a fitness-for-duty certification in such circumstances. When an employee uses intermittent or reduced schedule leave for a condition that presents reasonable safety concerns, if the employer chooses to require a fitness-for-duty certification, the employer shall inform the employee at the time it issues the designation notice that for each subsequent instance of intermittent or reduced schedule leave, the employee will be required to submit a fitness-for-duty certification unless one has already been submitted within the past 30 days. Alternatively, an employer can set a different interval of time for a fitness-for-duty certification requirement as long as it does not exceed once every 30 days and as long as the employer advises the employee of the requirement in advance of the employee taking the intermittent or reduced schedule leave. The Department recognizes that the first time an employee uses intermittent or reduced schedule leave and reasonable safety concerns exist, it may be difficult to inform the employee of the fitness-for-duty certification requirement in a timely manner. In such instances, however, the employer may, consistent with the ADA, require a medical exam after the employee has returned to work from FMLA leave.

The Department did not receive any comments on its proposal to delete current paragraph (h) as redundant with § 825.213. Therefore, the Department has deleted current paragraph (h) in the final rule. As stated above, the Department has moved the statement regarding the applicability of the provisions in state or local law or the terms of collective bargaining agreements that govern an employee's return to work in current paragraph (b) to a new paragraph (h) in the final rule in order to make clear that this applies to all of the provisions in this section.

As stated above, the Department has also moved the discussion of the ADA in current paragraph (b) to a new paragraph (h) in the final rule. The Department has modified the discussion of the ADA in paragraph (h) to make clear that medical examinations after the employee has returned to work from FMLA leave must be job related and consistent with business necessity. The Department has also included the statement in § 825.306(d) that ''[i]f an employee's serious health condition may also be a disability within the meaning of the ADA, the FMLA does not prevent the employer from following the procedure for requesting medical information under the ADA'' in paragraph (h). Based on the comments, it appears that both employers and employees are confused regarding the interaction between the ADA and the FMLA in relation to fitness-for-duty certifications. By moving the discussion to a separate paragraph and including the statement in § 825.306(d) regarding the ADA, the Department intends to make clear that, once an employee returns to work and is no longer on FMLA leave, an employer may require a medical exam under the guidelines and restrictions imposed by the ADA. At that point, the FMLA's fitness-for-duty regulation no longer applies.

Section 825.313 (Failure To Provide Certification)

Current § 825.311 provides that 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. Current § 825.311(a) addresses the failure to provide timely certification of the foreseeable need for FMLA leave, and § 825.311(b) addresses the failure to provide timely certification when the need for FMLA leave is not foreseeable. Current § 825.311(c) addresses an employee's failure to provide timely certification of the employee's fitness to return to work pursuant to § 825.310 (§ 825.312 in the final rule). In the NPRM, the Department proposed to explain more clearly the implications of an employee's failure to provide medical certification in a timely manner. To that end, the Department proposed to amend the wording in current § 825.311(a) and (b) permitting an employer to ''delay'' FMLA leave to instead clarify that an employer may ''deny'' FMLA leave until the required certification as provided. As explained in the NPRM, the proposed change in language was intended to ensure that both employees and employers understood the potential impact of a failure to provide medical certification in a timely manner, but was not a substantive change from the current regulation. The Department also proposed a new § 825.311(c) that addressed the consequences of failing to provide timely recertification. Current § 825.311(c) was redesignated as § 825.311(d) in the proposed rule, without a substantive change. The final rule adopts § 825.311 as proposed, but the section is renumbered as § 825.313 to account for the new military family leave sections (§§ 825.309 and 825.310). Section 825.313(c) also clarifies that recertification does not apply to leave taken for a qualifying exigency or to care for a covered servicemember.

The Department received very few comments regarding proposed § 825.311 (§ 825.313 in the final rule). The Equal Employment Advisory Council supported the Department's clarification regarding the consequences of an employee's failure to provide medical certification but asked the Department to state even more explicitly in the final rule that any absences an employee may have during the period in which the employer may deny FMLA protection due to the failure to provide timely certification may be treated as unexcused, even if certification is later provided that covers the period of time in which the protection was denied. The law firm of Vercruysse Murray & Calzone expressed concern that this section could be read as prohibiting employers from disciplining or terminating employees for absences that occur during the period in which employers are permitted to deny FMLA protection due to the employee's failure to provide timely certification. TOC Management Services argued that employees should not be given 15 days of protection, as indicated in the example in § 825.311(a), when they fail to provide timely medical certification. The National Retail Federation requested clarification as to whether FMLA leave can be denied from the date the employer requests the certification or from the date that the employee fails to timely provide the certification. The Pennsylvania Governor's Office of Administration asked for clarification of the employer's ability to retroactively designate leave as FMLA-protected when an employee provides late certification.

The Department believes that § 825.311 as proposed (§ 825.313 in the final rule) is clear as to the consequences of an employee's failure to provide timely certification or recertification. Any absences that occur during the period in which an employer has the right to deny FMLA protection due to the failure to provide timely certification may be treated under the employer's normal attendance policies. The Department disagrees that, where employees fail to provide timely certification, employers should be able to deny FMLA protection for the entire period from the request for certification until such time as the certification is provided. Employees must be provided at least 15 calendar days to provide the requested certification, and are entitled to additional time when they are unable to meet that deadline despite their diligent, good-faith efforts. The Department expects that in all cases employees will communicate to their employers the efforts they are making to secure the completed medical certifications. *See* §§ 825.305(b) and

825.308(d). Accordingly, an employee's certification (or recertification) is not untimely until that period has passed, as the regulation indicates. Finally, the Department notes that § 825.313 permits employers to deny FMLA protection when an employee fails to provide a timely certification or recertification, but it does not require employers to do so. Employers always have the option of accepting an untimely certification and not denying FMLA protection to any absences that occurred during the period in which the certification was delayed.

Sections 825.400–825.600

The Department noted in the NPRM that conforming changes would need to be made to §§ 825.400–825.600, which include Subpart D—Enforcement Mechanisms, Subpart E—Recordkeeping Requirements, and Subpart F—Special Rules Applicable to Employees of Schools, in order to incorporate the new military family leave entitlements. The Department proposed no other substantive changes to these sections, although it did propose new titles and very minor editorial changes, such as adding a reference to the Department's Web site 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 D—Enforcement Mechanisms (Sections 825.400–825.404)

There were very few comments on §§ 825.400–825.404 of the proposal. The final rule adopts proposed §§ 825.400–825.404 without change, except as explained below with respect to the incorporation of appropriate references to the military family leave entitlements.

The military family leave amendments to the FMLA provide for the recovery of damages equal to, in a case involving the need for 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, any actual monetary losses sustained by the employee up to a sum equal to a total of 26 weeks of wages (rather than the usual 12 weeks). 29 U.S.C. 2617. In order to implement this provision, the preamble to the NPRM stated the Department's belief that a conforming revision would be required to § 825.400(c), which, as proposed, provided that an employee is entitled to wages, employment benefits, or other compensation lost or denied to the employee by reason of the violation or, where no such tangible loss has occurred, any actual monetary losses sustained as a direct result of an employer's violation of one or more of the provisions of FMLA up to an amount equal to a total of 12 weeks of wages. *See* 73 FR at 7932. Accordingly, the final rule amends § 825.400(c) to provide that, in a case involving the military caregiver leave, an employee is entitled to actual monetary losses sustained up to sum equal to a total of 26 weeks of wages for the employee. The final rule makes no other changes to proposed §§ 825.400–825.404.

Section 825.500 (Recordkeeping Requirements)

The only change proposed in § 825.500 was to paragraph (c)(4) to include a reference to the eligibility notice requirement in proposed § 825.300(b) and to delete the reference to the general notice form. The final rule adopts these proposed changes, incorporates a reference to the notice requirements for military family leave, and further clarifies that employers should retain all written notices given to employees as required under the FMLA and these regulations.

Comments on the FMLA recordkeeping provisions centered on proposed § 825.500(g), which, like the current regulations, requires that certain records created for purposes of FMLA be maintained as confidential medical records. The American Postal Workers Union, for example, recommended that FMLA medical certifications be accessible only to trained professionals employed by or representing the employer. Many employees raised concerns about supervisors disclosing information about an employee's serious health condition. Catholic Charities, Diocese of Metuchen urged that the Department clarify whether this section of the recordkeeping provisions applies to fitness-for-duty documents.

The Department believes this section of the proposed rule, which closely tracks the current regulation, adequately addresses the issues raised by these comments. The proposed regulation provided that records and documents relating to medical certifications, recertifications, or medical histories of employees or employees' family members, created for purposes of FMLA, are to be maintained as confidential medical records in separate files/records from the usual personnel files, and that if the ADA is also applicable, such records are to 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) are to be provided relevant information upon request. Because a fitness-for-duty certification is a type of medical certification, the Department does not believe that a separate reference to fitness-for-duty certifications is required in this section. As is the case under the current regulations, fitness-for-duty certifications are to be maintained as confidential medical records pursuant to § 825.500(g).

The Department did make two minor changes in § 825.500(c)(4) of the final rule, which requires an employer to maintain copies of notices provided to an employee pursuant to the FMLA. The proposed recordkeeping requirement did not specifically mention the designation notice (Form WH–382). In response to a comment from the Metro Regional Transit Authority in Akron, Ohio, the final rule clarifies in § 825.500(c)(4) that employers must maintain copies of all written notices given to employees as required under the FMLA and these regulations, and not just eligibility notices. Finally, in § 825.500(g), a reference to ''medical certifications'' is changed to ''certifications'' to incorporate certifications related to the military family leave provisions.

Subpart F—Special Rules Applicable to Employees of Schools (Sections 825.600–825.604)

There were very few comments on §§ 825.600–825.604 of the proposal. The National School Boards Association commented that the possible regulatory changes the Department discussed in the preamble regarding the application of the military family leave amendments to eligible instructional employees of local educational agencies appeared consistent with the new legislation. The American Federation of Teachers commented on the need for the availability of FMLA leave for its 1.4 million members and stated that ''without the ability to use FMLA leave, many AFT members would have risked losing their jobs and/or essential health insurance in order to provide necessary care for themselves or for a family member. Increased restrictions on using such leave could therefore have a

devastating impact upon workers.'' Other than changes to titles and very minor editorial changes, the proposed text for §§ 825.600—825.604 was the same as the current regulations. The preamble to the proposed rule, however, stated that three related regulatory changes would be required to incorporate the new military family leave provisions into these sections of the FMLA regulations. 73 FR at 7932–33.[7]

First, the military family leave amendments provide that an employer covered by 29 U.S.C. 2618 can require-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-that 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 stated in the preamble to the proposed rule that a minor technical revision would be required to current and proposed § 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 with a serious health condition 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. The final rule incorporates this change.

Second, the military family leave amendments 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 stated in the preamble to the proposed rule that it believed the text of § 825.602(a)(2) and (a)(3) would need to be changed in order to apply the limitations on leave near the end of an academic term to military family leave. 73 FR at 7933. Specifically, current and proposed § 825.602(a)(2) provide that if 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. Current and proposed § 825.602(a)(3) provide that an employer may require an instructional employee to continue taking leave until the end of the term if the employee begins leave that 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.

Because the military family leave amendments extend the limitations in § 825.602(a)(2) and (a)(3) only to leave taken to care for a covered servicemember, and not leave taken because of a qualifying exigency, the Department stated in the NPRM that these two FMLA regulatory sections would need to be changed in order to specifically reference the types of leave that are subject to the limitations, namely: (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. 73 FR at 7933. The final rule incorporates these changes and a minor grammatical change to § 825.602(a)(3). No other changes have been made to proposed §§ 825.600–825.604.

Subpart G—Effect of Other Laws, Employer Practices, and Collective Bargaining Agreements on Employee Rights Under FMLA (Sections 825.700–825.702)

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. The NPRM proposed to delete the last sentence of § 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, in order to conform to the U.S. Supreme Court's decision in *Ragsdale* which invalidated this provision. The Department proposed 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 proposed 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.

There were only a few comments on these changes. The Association of Corporate Counsel's Employment and Labor Law Committee and the Equal Employment Advisory Council commented that they supported the changes in § 825.700(a) to align the regulations with the *Ragsdale* decision. The final rule adopts § 825.700 as proposed and makes no further changes.

Section 825.701 (Interaction With State laws)

Section 401(b) of the FMLA, 29 U.S.C. 2651(b), provides that ''Nothing in this Act or any amendment made by this Act shall be construed to supersede any provision of any State or local law that provides greater family or medical leave rights than the rights established under this Act or any amendment made by this Act.'' When § 825.701 of the current rule was proposed for public comment, a number of employer groups argued that this part of the statute should be interpreted to apply only in the case of more generous State or local law *substantive* provisions, such as eligibility and coverage requirements, amount of leave, benefits and employment protections, and substitution requirements, and not to *procedural* provisions such as notification of leave and certification requirements. These commenters argued at that time that any State or local law's (or implementing regulation's) procedural provision that is inconsistent with the FMLA should be preempted because of the administrative difficulty in trying to determine if a particular State or local law's procedural provision is more or less generous to the employee than the FMLA procedural provisions. *See* the discussion on this topic in the preamble to the current rule at 60 FR at 2230–32 (Jan. 6, 1995).

Because the wording of the statute provides that the FMLA does not

[7] The military family leave provisions of the NDAA that 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 agencies are codified in subsections (c)(1), (d)(2), and (d)(3) of 29 U.S.C. 2618.

supersede ''any provision'' of any State or local law that provides greater family or medical leave ''rights'' than those provided under the FMLA, the Department stated in the preamble to the current rule that it was not possible to apply section 401(b) of the statute only to substantive provisions that provide more generous family or medical leave benefits and not to procedural provisions that may extend greater rights:

> There is no basis under this [statutory] language or the legislative history to distinguish between procedural provisions that extend greater rights to employees and substantive provisions that provide more generous family or medical leave benefits to employees * * *. Given the literal language of FMLA, DOL has no authority to preempt State laws to the extent they provide more generous leave rights to employees. The results about which the majority of the comments complained occur by operation of law (FMLA and State family and medical leave laws), and cannot be mitigated by regulation.

Id.

Although no changes to § 825.701 were proposed in the NPRM, the Department received a few comments regarding this section. TOC Management Services raised a question regarding § 825.701(a)(4). Specifically, TOC Management Services commented,

> Nothing in the [FMLA] statute limits the employer's ability to request the second opinion if state law limits the ability. State leave laws regulate their specific leave provisions, not the FMLA. Clearly an employer would not have the ability to ask for the second opinion if the employee's leave only qualified under state law and such second opinions were prohibited by that state. But when an employee is taking FMLA leave (even if it runs concurrently with state leave), 29 U.S.C. 2601–2654 sets the parameters of that leave. The DOL cannot enact regulations that contradict the statute; 29 U.S.C. 2623(c)(1) provides employers with the right to obtain second opinions and the DOL cannot deprive employers of that statutory right.

The Legal Aid Society-Employment Law Center also commented that ''many large corporations that operate throughout the Unites States utterly fail to comply with California's more restrictive privacy laws in California * * * [and that] DOL must take action to ensure that large companies, which operate throughout the United States, comply with California's more protective privacy and medical confidentiality laws.''

The Department disagrees with the comment from TOC Management Services that nothing in the FMLA limits the employer's ability to request a second opinion in the case of FMLA leave contrary to State law, ''even if it runs concurrently with state leave.'' It is correct that State and local family and medical leave laws do not supersede or preempt the FMLA. As explained above, however, section 401(b) of the FMLA, 29 U.S.C. 2651(b), provides that the FMLA does not supersede or preempt provisions of State or local laws (whether substantive or procedural) that afford employees with greater rights than the FMLA. Thus, an employer must comply with all the provisions of the FMLA and any parallel State or local law that applies to a given leave request.

Conversely, the Department disagrees with the Legal Aid Society-Employment Law Center's comment that the Department should take action to ensure that companies comply with State privacy and confidentiality laws. The Department's Wage and Hour Division administers and enforces the FMLA and has no authority to administer or enforce any State laws.

Based on its consideration of these two comments, however, the Department has decided that the examples in § 825.701(a)(3) and (a)(4) are not helpful because they can be read incorrectly to suggest that the Department is assuming the responsibility for the administration or enforcement of provisions of State or local laws that afford employees with greater rights than the FMLA. As indicated above, the Department's Wage and Hour Division administers and enforces the FMLA and has no authority to administer or enforce State or local family and medical leave laws. Employers who contact local Wage and Hour offices with questions about State laws are referred to the appropriate State government agency.

Thus, in order to avoid any misimpression that the Wage and Hour Division enforces State or local family and medical leave laws, the examples in the current § 825.701(a)(3) and (a)(4) have been removed from the text of the final rule. This change has no policy or legal effect whatsoever on the continued application of the principle embodied in section 401(b) of the FMLA, 29 U.S.C. 2651(b), that the FMLA does not supersede or preempt any provision of a State or local law that affords an employee with greater rights than the FMLA. This change in the final rule is intended only to clarify that the Department administers and enforces the FMLA; State and local government agencies administer and enforce the laws for which they are responsible; and employers must comply with all applicable laws. Where a State or local law applies concurrently with the FMLA, there is unfortunately no way for employers to avoid the administrative burden that each leave request is to be considered first under one law (including its benefit and procedural provisions) and then the other(s). No other changes to the proposed text for § 825.701 have been made.

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. The Department proposed to add a new paragraph (g) in this section to discuss the interaction between the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA) and the FMLA and incorporate the information in a 2002 guidance memorandum on this matter. Existing paragraph (g) of this section was proposed to be redesignated as paragraph (h). The only other change in the proposal was to conform the cross-reference in § 825.702(d)(2) to the proper paragraph in proposed § 825.207. These changes are included in the final rule.

The Chamber stated that it supports the clarification in proposed new § 825.702(g), ''which codifies guidance issued by the Department in July 2002, especially in light of the reentry into the workforce of thousands of service members in the coming years.'' The Equal Employment Advisory Council, however, commented that the ''Department's proposal to confer eligibility on military service members pursuant to the Uniformed Services Employment and Reemployment Rights Act (USERRA) * * * exceeds the Department's authority,'' and that the proposed new § 825.702(g), and a related new paragraph in § 825.110(c)(2) (in the section entitled ''Eligible employee'') should be deleted.

The Department does not agree with this latter comment. The NPRM included this new § 825.702(g) simply to incorporate the substance of a July 22, 2002 guidance memorandum, available at *http://www.dol.gov/vets/media/fmlarights.pdf*, stating the Department's opinion on the application of uniformed servicemembers' rights under USERRA to family and medical leave. Under USERRA, servicemembers who are reemployed are entitled to the rights and benefits that they would have attained if they had remained continuously employed. The rights and benefits protected by USERRA include those provided by employers and those required by another statute, such as the right to leave under the FMLA. Accordingly, under USERRA, a

returning servicemember would be entitled to FMLA leave if the hours that he or she would have worked for the civilian employer during the period of military service would have met the FMLA eligibility threshold. This is not an expansion of FMLA rights through regulation; this is a requirement of USERRA.

Section 825.702(b)–(e) of the current and proposed rule discuss the interaction between the FMLA and the ADA, as amended. As indicated in the preamble to the proposed rule, the Department received a number of comments in response to the RFI that discussed the relationship between the FMLA and the ADA, particularly regarding job modification, light duty, and reassignment. *See* 73 FR at 7923 (Feb. 11, 2008). Many of those comments were discussed in Chapter VII of the Department's 2007 Report on the RFI comments. *See* 72 FR at 35599 (June 28, 2007). The preamble to the proposed rule stated that the Department could do nothing to alter the fact that the two statutes serve distinctly different purposes, provide different rights, and have different eligibility criteria. *See* 73 FR at 7924. Although the Department did not propose any regulatory changes, it did provide a lengthy discussion in the preamble to the proposed rule regarding the interaction between the FMLA and the ADA to aid both employees and employers.

In response to the NPRM, comments from employer groups continued to express frustration over the difficulty of reconciling the two statutes. The National Federation of Independent Business commented that ''employers must navigate the complexities of both laws in order to determine whether an employee should be granted medical leave in a given situation * * *. [A]n employee's condition must be looked at from both perspectives to determine whether the FMLA, ADA, or both apply * * *. [For example,] an impaired employee entitled to ADA protections is not limited to the 12 weeks leave permitted under the FMLA [and this can] lead to situations where employers simply play it safe by extending FMLA leave beyond 12 weeks without question because of concerns that an employee would file an ADA discrimination lawsuit.'' The NPRM also prompted a significant number of comments on the Department's preamble discussion of the interaction between the FMLA and the ADA.

The Department recognizes the difficulty employers face in addressing both ADA and FMLA compliance issues that can arise on a particular leave request and the frustration that this administrative burden causes. The Department continues to believe that the administrative burden of complying with the FMLA and the ADA cannot be reduced through revisions to the regulatory requirements under the FMLA. 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). Thus, where both laws may apply, the applicability of each statute needs to be evaluated independently. For these reasons, the final rule does not make any changes to this regulatory section in response to these comments. The words ''as amended'' have been added to the reference to the ADA in § 825.702(a), and to the definition of the ADA in § 825.800, to reflect the passage of the Americans with Disabilities Amendments Act of 2008, which makes several changes to the definition of the term ''disability'' under the ADA. The Department notes that the EEOC will be revising its ADA regulations to comply with these amendments, which become effective on January 1, 2009.

Subpart H—Definitions

Section 825.800 (Definitions)

The current § 825.800 contains the definitions of significant terms used in the regulations. Changes to definitions that would be affected by the Department's proposed rule were included in the NPRM. Specifically, changes and clarifications were proposed to the definitions of the terms ''continuing treatment,'' ''eligible employee,'' ''employee,'' ''health care provider,'' ''serious health condition,'' ''parent,'' and ''son or daughter.''

The Department received two comments on the content of the definitions. WorldAtWork commented that the definition of ''son or daughter'' should be expanded to children over age 18 who do not have a mental or physical disability if they meet other conditions. Because ''son or daughter'' is defined by the statute itself, the Department is not adopting this comment. *See* 29 U.S.C. 2611(12). The American Academy of Physician Assistants stated its support for the Department's inclusion of physician assistants in the definition of ''health care provider.''

One commenter, Illinois Credit Union League expressed concern that the cross-references made the definitions difficult to read; another commenter, Catholic Charities, Diocese of Metuchen suggested that the definitions should be placed at the beginning of the rule. The Department agrees that it is preferable to avoid cross-references to other sections in the definitions. This is not always possible, however, without including very lengthy text in a definition that is identical to text in another section. Also, no other commenters suggested moving the definitions section to the front of the regulation, and its current position in § 825.800 is a familiar location to many people. Consequently, these two comments were not adopted in the final rule.

The final rule adopts § 825.800 as proposed except where changes were needed to conform the definitions to changes in other sections of the final rule. Specifically, the final rule includes additional changes to the definitions for ''continuing treatment'' and ''serious health condition.''

In the NPRM, the Department also stated that it was considering the addition of certain new terms related to the military family leave entitlements to the definitions found in § 825.800. Specifically, the Department stated that it would add the terms ''active duty,'' ''contingency operation,'' ''covered servicemember,'' ''outpatient status,'' ''next of kin,'' and ''serious injury or illness.'' These terms are discussed in depth in the sections of the preamble related to qualifying exigency leave (§ 825.126) and military caregiver leave (§ 825.127).

In the final rule, § 825.800 contains new definitions for the terms ''active duty or call to active duty status,'' ''contingency operation,'' ''covered military member,'' and ''son or daughter on active duty or call to active duty status'' in relation to qualifying exigency leave. It also contains new definitions for the terms ''covered servicemember,'' ''parent of a covered servicemember,'' ''outpatient status,'' ''next of kin of a covered servicemember,'' ''serious injury or illness,'' and ''son or daughter of a covered servicemember'' in relation to military caregiver leave. The definitions for these terms in § 825.800 reflect the definitions for these terms found in §§ 825.126, 825.127, 825.309, and 825.310.

Paperwork Reduction Act

The Office of Management and Budget (OMB) has assigned control number 1215–0181 to the FMLA information collections. In accordance with the

Paperwork Reduction Act of 1995 (PRA), the February 11, 2008, NPRM solicited comments on the FMLA information collections as they were proposed to be changed. 44 U.S.C. 3506(c)(2). The Department also submitted a contemporaneous request for OMB review of the proposed revisions to the FMLA information collections, in accordance with 44 U.S.C. 3507(d). On March 11, 2008, the OMB issued a notice that continued the previous approval of the FMLA information collections under the existing terms of clearance. The OMB asked the Department to resubmit the information collection request upon promulgation of a final rule and after considering public comments on the FMLA NPRM. While the Department received comments regarding substantive aspects of the FMLA information collections, no comments directly addressed the methodology for estimating the public burdens under the PRA. In order to facilitate a full understanding of all the issues involved and avoid duplication within this preamble, the public comments addressing FMLA information collections imposed by this final rule are discussed in the applicable portions of this preamble. The following table shows where the various information collections appear in the final rule.

Information collection name	Regulatory citation(s) within 29 CFR 825
Employee's Notice of Need for FMLA Leave.	§§ .100(d), .301(b), .302, .303.
Notice to Employee of FMLA Eligibility.	§ .300(b).
Notice to Employee of FMLA Rights and Responsibilities.	§ .300(c).
Notice to Employee of FMLA Designation.	§§ .127(c)(4), .300(d), .301(a), .312.
Medical Certification/ Recertification (Self and Family).	§§ .100(d), .305–.308.
Fitness-For-Duty Medical Certification.	§§ .100(d), .212(a)(3), .216(b), .312.
Notice to Employee of Incomplete or Insufficient Medical Certification.	§ .305(c).
Notice to Employee of Change of 12-Month Period for Determining Entitlement.	§ .200(d)(1), (e).
Employee's Periodic Status Report.	§ .311.
Documenting Family Relationships.	§§ .122(j), .310(d), (e)(3).
"Key Employee" Notification.	§§ .219, .300(c)(1)(v).
Notice to Employee of Pending Cancellation of Health Benefits.	§ .212(a)(1).
Documenting Call to Military Active Duty.	§ .309(a).
Certification of Qualifying Exigency.	§§ .309(b)–(c).
Servicemember's Designation of Next of Kin.	§§ .122(d), .127(b)(3).
Certification for Serious Injury or Illness of Covered Servicemember.	§§ .307(a), .310.
General Recordkeeping.	§ .500.

Interested parties may obtain prototype FMLA notices via the Wage and Hour Division's Forms Web site at *http://www.dol.gov/esa/whd/forms/index.htm*, contacting the Wage and Hour Division at 1–866–4US–WAGE (1–866–487–9243), or visiting a Wage and Hour Division District Office. A list of District Office addresses is available on the Internet at *http://www.dol.gov/esa/whd/america2.htm*. Prototype FMLA forms are also available through the forms.gov Web site. Specifically, the Wage and Hour Division offers the following prototype notices: Certification of Serious Health Condition—Employee's Own Condition (Form WH–380–E), Certification of Serious Health Condition—Employee's Family Member's Condition (Form WH–380–F), Notice of FMLA Eligibility and Rights and Responsibilities (Form WH–381), Notice to Employee of FMLA Designation (Form WH–382), Certification of Qualifying Exigency (Form WH–384), Certification for Serious Injury or Illness of Covered Servicemember (Form WH–385).

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number. The Department has resubmitted the revised FMLA information collections to the OMB for approval, and the Department intends to publish a notice announcing the OMB's decision regarding this information collection request. A copy of the information collection request can be obtained at *http://www.RegInfo.gov* or by contacting the Wage and Hour Division as shown in the **FOR FURTHER INFORMATION CONTACT** section of this preamble. The existing FMLA information collection authorization will remain in effect until the OMB finally approves the new information collection request or this final rule takes effect on January 16, 2009, whichever date is later.

VI. Executive Order 12866 and the Small Business Regulatory Enforcement Fairness Act

This rule has been drafted and reviewed in accordance with Executive Order 12866, section 1(b), Principles of Regulation. The Department has determined that this rule is an "economically significant" regulatory action under section 3(f)(1) of Executive Order 12866. Based on the analysis presented below, the Department has determined that the final rule will have an annual effect on the economy of $100 million or more. For similar reasons, the Department has concluded that this rule is a major rule under the Small Business Regulatory Enforcement Fairness Act of 1996 (5 U.S.C. 801 *et seq.*). Therefore, the Department has prepared a Regulatory Impact Analysis ("RIA") in connection with this rule as required under Section 6(a)(3) of the Order and the Office of Management and Budget has reviewed the rule. The RIA is presented in its entirety below.

Regulatory Impact Analysis

Chapter 1: Executive Summary

The final rule will revise the FMLA regulations published in 1995 and implement the new changes required by the National Defense Authorization Act for FY 2008 ("NDAA"), Public Law 110–181. The Department determined that changes to the 1995 regulations were necessary because a decision by the U.S. Supreme Court and a number of decisions by other federal courts invalidated aspects of the regulations, the Department's experience administering the law, and public comments that it has received. The NDAA expanded the FMLA to allow eligible employees of covered employers to take FMLA-qualifying leave "[b]ecause of any qualifying exigency (as the Secretary [of Labor] 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." The NDAA also provides that "an eligible employee who is the spouse, son, daughter, parent, or next of kin of a covered servicemember shall be entitled to a total of 26 workweeks of leave during a 12-month period to care for the servicemember." (Pub. L. 110–181, Section 585(a)).

Based upon an analysis presented in more detail in the Preliminary Regulatory Impact Analysis (PRIA),

which was in turn based on an analysis by CONSAD Research and the 2000 Westat Report the Department estimates that 285,237 firms are covered by Title I of the FMLA.[8] These firms operate 1.1 million establishments and employ 95.8 million workers. In 2005, 77.1 million workers or 80.5 percent of the workers employed at the covered establishments met the FMLA eligibility requirements (*i.e.*, have been employed by their employer for 12 months and have worked for their employer at least 1,250 hours during the previous 12 months). Based upon CONSAD's projection of 2000 FMLA leave usage rates to 2007, the Department estimates that 7.0 million workers took an estimated 10.5 million FMLA leaves. In addition, the Department estimates that 139,000 workers will take FMLA leave under the military leave provisions of the NDAA.

The Department estimates that the revisions will result in total first year net costs of $327.7 million and annual reoccurring costs of $244.4 million for both workers and employers. Based upon a five year pay-off period and a real interest rate of 3.0 percent (OMB Circular A–4),[9] total annualized costs for the revisions for both workers and employers is $262.6 million. Based upon a five year pay-off period and a real interest rate of 7.0 percent, total annualized costs for the revisions for both workers and employers is $264.7 million. For employers, the largest cost is the $257.3 million in recurring costs related to the new military leave provisions (§§ 825.126 and .127). For workers, the largest cost is the $19.8 million in recurring costs associated with the additional fitness-for-duty certifications that may be required if a worker has used intermittent leave and a reasonable safety concern exists (§ 825.312(f)).

The annualized costs for employers based upon a 7.0 percent discount rate is $230.6 million, or about $2.41 for each of the 95.8 million workers employed at establishments covered by Title I of the FMLA; and about $2.99 for each of the 77.1 million workers eligible to take FMLA leave; and about $32.48 for each of the 7.1 million workers who will take FMLA leave.[10] The $230.6 million in costs also represents less than 0.006 percent of the estimated $3.7 trillion in payroll costs for the establishments covered by Title I of the FMLA (CONSAD). Therefore, the Department has determined that the costs of the final rule do not represent a significant economic impact for most establishments covered by Title I of the FMLA.

The annualized costs for workers is $34.1 million, or about $0.36 for each of the 95.8 million workers employed at establishments covered by Title I of the FMLA; and about $0.44 for each of the 77.1 million workers eligible to take FMLA leave; and about $4.80 for each of the 7.1 million workers who will take FMLA leave. Therefore, the Department has determined that the costs of the final rule do not represent a significant economic impact for most workers who take leave under Title I of the FMLA.

The Department anticipates that substantial but unquantifiable benefits will accrue from the proposed revisions to the FMLA regulations. First, associated with the addition of the provisions for military leave, the families of servicemembers will no longer have to worry about losing their jobs or health insurance due to absences to care for a covered seriously injured or ill servicemember or due to a qualifying exigency resulting from active duty or call to active duty in support of a contingency operation. Second, the clarifications to the regulations and the revisions to improve the communications between employers and employees should reduce the uncertainty and the worries about FMLA leave. Third, the revisions should reduce the costs of unforeseeable intermittent FMLA leave in high-impact, time-sensitive operations. And, finally, the proposed changes related to fitness-for-duty certifications should reduce some presenteeism.

Chapter 2: Industry Profile

The industry profile presents the Department's best estimates of the number of establishments covered by the FMLA and the number of workers employed at those establishments. 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 Regulatory 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. The NDAA amendments did not affect these eligibility requirements and, therefore, have no impact on either the number of covered establishments or eligible employees.

The industry profile estimates presented in the PRIA were developed by CONSAD Research. Just as the Department did for the Request for Information (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.'' 73 FR at 7941.

In the PRIA, the Department used the estimated number of FMLA covered workers that was developed by CONSAD using the data sources listed above. *Id.* at 7942. The Department estimated the number of workers eligible to take FMLA leave by applying estimates from the 2000 Westat Report to the Department's 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[11] by the number of workers covered by the FMLA in each industry. *Id.* at 7943.

In the PRIA, the Department estimated the number of workers who took FMLA leave in 2005 by multiplying the number of covered and eligible workers times the percentage of covered and eligible workers who took FMLA leave, after adjusting the percentage in the 2000 Westat Report to account for the increase in FMLA usage

[8] The CONSAD analysis is available at: *www.regulations.gov*, ESA–2008–0001–0002; and the 2000 Westat Report is available at *www.regulations.gov*, ESA–2006–0022–0006.

[9] Available on the Internet at: *http://www.whitehouse.gov/omb/circulars/a004/a-4.html.*

[10] As noted above, 7.0 million workers take FMLA leave, and the Department estimates that 139,000 additional workers will take FMLA leave under the military leave provisions of the NDAA, for a total of 7.1 million.

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

over time. *Id.* at 7943. The number of workers who took intermittent FMLA leave in 2005 was estimated using Westat's estimate that 23.9 percent of workers who take FMLA leave take some of the leave intermittently. *Id.* at 7943–44.

Since the FMLA leave provisions for military families were enacted after the 2000 Westat Report was completed, the Department estimated the number of FMLA covered and eligible workers who would take qualifying exigency leave or caregiver leave in the PRIA using a model developed by CONSAD with data from the Defense Manpower Data Center, the Current Population Survey and the Decennial Census of Population. First, CONSAD developed a model to estimate the number of parents, spouses, and adult sons and daughters of servicemembers; it then calculated the employment rates for parents and spouses who might need to take military family leave, using the employment rates for age ranges expected to be associated with the age range of the military servicemembers. *Id.* at 7954–55.

For qualifying exigency leave, the Department developed estimates in the PRIA of the number of servicemembers deployed or activated for contingency operations based upon Department of Defense data and then used the CONSAD model to develop estimates of the potential number of family members who may be eligible for qualifying exigency leave under the FMLA. ''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. 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.'' *Id.* at 7956.

For caregiver leave, the Department developed estimates in the PRIA of the number of seriously injured servicemembers based upon Department of Defense data and then utilized the CONSAD model to develop estimates of the potential number of caregivers who may be eligible for FMLA leave. ''[T]he Department estimates that there are 1,500 to 14,000 seriously injured servicemembers whose potential caregivers may be eligible for FMLA leave * * * Based on the assumption that the age distribution of seriously wounded servicemembers is the same as the age distribution of all military servicemembers * * *, 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.'' *Id.* at 7955.

The Department received no substantive comments on its PRIA estimates of the number of establishments covered by the FMLA, the number of workers employed at those establishments, and FMLA leave usage. The Department believes the lack of substantive comments is due to the fact that the Department used a methodology in the PRIA that was similar to the methodology used in the Request for Information (RFI), and that the methodology and estimates presented in the PRIA were based upon a careful review of the comments the Department received in response to the RFI and the refinements that were made to the methodology at that stage of the rulemaking. For example, in response to comments on the RFI that FMLA leave usage has probably increased since Westat conducted its surveys in the 1999–2000 time period (*see* 72 FR 35622–23), the Department adjusted the FMLA usage rates developed by Westat (*see* 73 FR 7943). The Department also supplemented the data in the 2000 Westat Report that was used in the PRIA with data that was submitted in response to the RFI.

Comments received by the Department on its PRIA estimates focused on the age of the data the Department used to develop its estimates and the need for the Department to conduct a new data collection before proceeding with this rulemaking. For example, the United States Congress, Joint Economic Committee (''JEC'') stated ''[r]ather than commission a survey * * * the Department develops their main source of data on FMLA coverage, eligibility, and usage by extrapolating forward the trends from previously commissioned surveys * * * The Department also relies on non-representative, industry sponsored data * * *.'' Similarly, the Institute for Women's Policy Research stated ''[t]he proposed regulations rely on data from non-representative and possibly biased samples; from a survey conducted in 2000 that did not directly address some of the key issues for which changes are proposed; from generalizations about individual employers' reports of their experiences that cannot be compared with the entire universe of employers; and from judgments about how use of the FMLA may have changed since the 2000 survey was conducted.'' The National Partnership for Women & Families stated that ''[s]ince 2000, DOL has not conducted any rigorous surveys or analysis of how the FMLA is working * * * If DOL is going to change regulations that DOL's own survey data show have been working well for over a decade, DOL should have empirical evidence to support those changes.'' *See also* AFL–CIO, American Association of University Women, Communications Workers of America, Disability Policy Collaboration.

This issue was initially raised in response to the RFI and the Department addressed it in the Report on the RFI prior to publishing the NPRM and PRIA. Although the Department recognizes that the RFI is not the same as conducting a nationally representative FMLA survey, the Department ''believes that 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 that supplements and updates our knowledge of the impacts of FMLA leave. In fact, several organizations conducted national surveys in response to the RFI.'' 72 FR at 35621.

The Department continues to believe the RFI was a satisfactory alternative to conducting another national survey. As noted in the report, the RFI yielded a wealth of data, some of which would have been difficult to obtain in a survey. Further, the necessity to combine multiple data sources from multiple years is a common concern in regulatory analysis and is not a unique issue for the FMLA rulemaking.

Rulemakings can frequently take years to complete. Even if a data collection is conducted before the rulemaking begins, it is not unusual for the data to be years old by the time the rulemaking is completed. Requiring the data to be ''up to date'' would leave very short time frames for rulemakings to be completed and would allow parties to hinder the proceedings simply by delaying them until the data are older than some arbitrary age limitation. Further, requiring all data be obtained from government surveys would be prohibitively costly and would result in rulemakings taking even longer than they currently do. For example, under this scenario, if some aspect of a rulemaking (*e.g.*, an alternative that arose during the public comment

period) were not covered by existing survey data, then an agency would be required to go out and conduct a new survey, and designing and conducting a new survey could take a number of years during which time some of the other data may become dated.

Finally, requiring an agency to only use recent government surveys would have a chilling effect on the ability of agencies to use data obtained through public comments in response to RFIs and NPRMs. In fact, the Department was able to collect a considerable amount of data in response to the RFI and NPRM. ''Some of the data submitted [in response to the RFI] were national surveys (*e.g.*, AARP, International Foundation of Employee Benefit Plans, Society for Human Resource Management, National Association of Manufacturers, U.S. Chamber of Commerce, WorldatWork, and the College and University Professional Association for Human Resources). Others submitted surveys or collections of reports from their clients, customers, or members (*e.g.*, Willcox & Savage, Kalamazoo Human Resources Management Association, Manufacturers Alliance, Air Conference, Association of American Rail Roads, Retail Industry Leaders Association, National Federation of Independent Business, HR Policy Association, International Public Management Association for Human Resources, and American Bakers Association). Numerous other comments provided data from individual companies (*e.g.*, United Parcel Service, U.S. Postal Service, Honda, Southwest Airlines, YellowBook, Madison Gas and Electric Company, Edison Electric, Verizon, Delphi, MGM Mirage, Union Pacific, and Palmetto Health) or government and quasi-government agencies (*e.g.*, New York City, Dallas Area Rapid Transit, Fairfax County, VA, the Port Authority of Allegheny County, PA, and the City of Portland, OR). Other comments provided references to previously published studies (*e.g.*, Darby Associates, the Center for WorkLife Law, Women Employment Rights, and the Family Care Alliance). Many comments were also received from labor organizations and family advocates (*e.g.*, AFL–CIO, Communications Workers of America, National Partnership for Women and Families, Families USA, 9to5, National Association of Working Women). Finally, the Department received many comments from workers who took FMLA leave.'' 72 FR at 35620.

Moreover, additional data was submitted in response to the NPRM, including new membership surveys (*e.g.*, WorldatWork, College and University Professional Association for Human Resources (''CUPA–HR''), Hinshaw & Culbertson, and Working America), corporate data (*e.g.*, Unum Group), and data on the costs being incurred by individual workers (*e.g.*, Jay Zeunen Sr.).

Given the FMLA surveys previously conducted by the Department, the availability of data from other government surveys and the wealth of data submitted by the public in response to the RFI and NPRM, the Department concludes that it has sufficient data to meet its responsibilities in this rulemaking. This position was supported by the National Coalition to Protect Family Leave which stated ''[t]here is in the record a substantial amount of data, analysis and conjecture on which to base a description of various attributes of benefits and costs arising from over a decade of experience under the FMLA.'' 72 FR at 35621.

Therefore, for its coverage estimates, the Department will continue to use the estimates developed by CONSAD and presented in Table 4 of the NPRM (73 FR 7943) and reproduced in Table 1 below. In 2005, there were 285,237 private sector firms and government entities covered by Title 1 of the FMLA. These covered entities operated 1.1 million establishments and employed 95.8 million workers. In 2005, an estimated 77.1 million workers, or 80.5 percent of the workers employed at the covered establishments, met the FMLA eligibility requirements (*i.e.*, have been employed by their employer for 12 months and have worked for their employer at least 1,250 hours during the previous 12 months). Table 5 of the NPRM (73 FR 7944) presented the estimated distribution of these workers by industry.

TABLE 1—ESTIMATED NUMBER OF FMLA COVERED FIRMS, ESTABLISHMENTS AND EMPLOYMENT, 2005

Thousands of FMLA Covered Entities	285.2
Thousands of FMLA Covered Establishments	1,134.6
Thousands of Workers Employed at FMLA Covered Establishments	95,793.5

Source: U.S. Department of Labor, ESA, 2008.

For its estimates of FMLA leave usage under the 1995 regulations, the Department will continue to use the estimates developed by CONSAD and presented in Table 5 of the NPRM. (73 FR 7944). In 2005, approximately 7.0 million workers (*i.e.*, 7.3 percent of workers employed at establishments covered by Title I of the FMLA) took FMLA leave and 1.7 million workers (23.9 percent of all workers who took FMLA leave) took intermittent FMLA leave.

Comments from the JEC criticized the Department's use of the 23.9 percent estimate from the 2000 Westat employee survey arguing that this was only one of many estimates in the 2000 Westat Report. ''The Department estimated the number of workers who took intermittent leave in 2005 * * * [based upon] Westat's estimate that 23.9 percent of workers who take FMLA take some leave intermittently. However, the data that are available from the survey seem to suggest a wide range of possible leave-takers who might use leave intermittently.'' The Department examined the entire 2000 Westat employer and employee questionnaires prior to publishing estimates in the RFI and the NPRM, and determined that question 5B of the 2000 Westat employee survey provides the best basis for estimating intermittent leave use. Based upon the JEC comment and one from Albelda, Boushey and Lovell (cited in the Report on the RFI, 72 FR 35626, Footnote 32), the Department has carefully re-examined the survey instrument and stands by its earlier determination.

Although intermittent leave is brought up in other questions, it is important to examine the ''skip patterns'' in the questionnaire when determining the appropriate question and data to use. Question 5B was asked of all leave takers, which is why it was used by the Department as the basis for its estimate. Question 8 of the Westat employee survey, an alternative suggested by some commenters, was only asked of leave takers who indicated that they took multiple leaves during the 18 month survey period. (*See* the last programming note on page D–10 of the 2000 Westat Report). Since Question 8 was not asked of all leave takers, and since there was some concern about the meaning of ''leave'' in the 2000 Westat employee survey (*see* 73 FR at 7944), the Department does not believe that Question 8 is appropriate to use as the basis for its estimate.

Similarly, some commenters suggested that Question 17A of the Westat employee survey should be used. However, as was noted by the JEC, Question 17A was only asked of ''employees who took a leave that the establishment classified as FMLA leave.'' The Department does not believe that Question 17A is appropriate to use as the basis for its estimate because the 2000 Westat survey data suggests that

many employees are unaware that their employers have designated their leave as FMLA leave. (*See* the discussion of § 825.300(c) in this preamble and the discussions regarding estimating the number of workers who took FMLA leave in 71 FR at 69511 (Dec. 1, 2006) and 72 FR at 35623–24 (June 28, 2007).) Therefore, the Department concludes that Question 5B of the Westat employee survey provides the best basis for estimating the number of workers who took intermittent FMLA leave. Moreover, as was discussed in the Report on the RFI, the 23.9 percent estimate based on Question 5B is consistent with data submitted by the public on the use of intermittent FMLA leave. *See id.* at 35625.

The Department based its estimates of the leave that will be taken under the military leave provisions of the NDAA on the analysis presented in Appendix A of the PRIA (73 FR at 7954). However, after reviewing that preliminary analysis the Department has made some revisions.

In the NPRM, based upon the President's Commission on Care for America's Returning Wounded Warriors and other sources, the Department estimated that each year approximately 1,500 servicemembers would incur a serious injury or illness in training and contingency operations. Using the age distribution of the military and the likely family structure based on that age distribution, the Department estimated that these 1,500 serious injuries would result in approximately 1,900 caregivers taking FMLA leave. In the NPRM, the Department also provided an alternative estimate based upon estimates from the Department of Defense (''DOD'') Disability System. DOD separates or retires for disability reasons (with benefits) about 14,000 servicemembers annually. Based upon this estimate of serious illnesses and injuries (*e.g.*, illnesses and injuries serious enough to cause servicemembers to separate from the military), the Department estimated there would be about 17,700 potential caregivers for servicemembers who are separated through the DOD Disability System every year.

The statute defines the term ''serious injury or illness'' for members of the Armed Forces, including members of the National Guard or Reserves, as ''an injury or illness incurred by the member in the 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.'' As discussed in the preamble above, the final rule provides that a request to take military caregiver leave may be supported by a certification that is completed by any one of the following health care providers: (1) A DOD health care provider; (2) a VA health care provider; (3) a DOD TRICARE network authorized private health care provider; or (4) a DOD non-network TRICARE authorized private health care provider. Depending upon how the four different types of DOD or VA authorized health care providers interpret the statutory definition of serious injury or illness, the estimates in the NRPM may be too low. For example, in 2001, there were 1.9 million reported injuries in the military of which 32,000 resulted in lost duty time.[12] If lost duty time injuries were classified as serious, then about 40,500 workers would be eligible for caregiver leave.

Although not all lost duty time injuries are likely to be certified for caregiver leave, the Department believes that the estimate based on disability retirement alone is probably too low. Therefore, the Department's best estimate is that about 29,100 workers will take military caregiver leave each year.[13]

In the NRPM, the Department preliminarily estimated there were 339,000 servicemembers currently deployed or activated in support of contingency operations and that this would result in 330,000 family members taking FMLA leave for a qualifying exigency. (73 FR at 7957). However, these estimates included all servicemembers on active duty in contingency operations. As discussed in the preamble, under the statute only family members of the servicemembers in the Reserves and National Guard would qualify for the exigency leave. Of the 339,000 servicemembers deployed on or activated for contingency operations in October 2007, one-third or 113,000 were Reserve and National Guard personnel. This would result in about 110,000 family members being eligible to take qualifying exigency leave each year.[14]

Although the Department has no experience with the patterns of leave use under the NDAA amendments, it assumes, as it did for the 1995 FMLA final rule, that most workers taking FLMA leave for qualifying exigencies or to provide care to a seriously injured or ill servicemember will not use their entire 12-week or 26-week allotment. In addition, given the nature of the leave that would be taken under the military leave provisions of the NDAA, the Department assumes that all workers taking this type of leave will take some leave intermittently. Table 2 presents the Department's best estimates for FMLA usage.

TABLE 2—ESTIMATED USE OF FMLA LEAVE *

Millions of Workers Taking FMLA Leave	7.100
Millions of Workers Taking FMLA Leave Under the 1995 Regulations	7.000
Millions of Workers Taking FMLA Leave to Care for Seriously Ill or Injured Servicemembers	0.029
Millions of Workers Taking FMLA Leave for Qualifying Exigencies	0.110
Millions of Workers Taking Intermittent FMLA Leave	1.800
Millions of Workers Taking Intermittent FMLA Leave under the 1995 regulations	1.700
Millions of Workers Taking Intermittent FMLA Leave to Care for Seriously Ill or Injured Servicemembers	0.029
Millions of Workers Taking Intermittent FMLA Leave for Qualifying Exigencies	0.110

* Based upon the 2005 estimates in Table 1.
Source: U.S. Department of Labor, ESA, 2008.

Chapter 3: Estimated Costs of the Final Revisions

This chapter presents a provision-by-provision analysis of the changes in costs that would be incurred by employers and workers covered by Title I of the FMLA. The estimates presented in the PRIA were developed using three approaches.

First, the PRIA assessed the impacts that are generally applicable to most employers and their employees. ''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 * * * Although the vast majority of FMLA leave-takers will see no difference, the Department estimates that employees will incur * * *

[12] DOD Military Injury Metrics Working Group White Paper, November 2002, pg. G1, Available at: *http://www.ergoworkinggroup.org/ewgweb/SubPages/ProgramTools/Metrics/MilitaryInjuryMetricsWhitepaperNov02rev.pdf.*

[13] This estimate is the average of 17,700 and 40,500.

[14] The reason there are fewer family members eligible to take qualifying exigency leave than there are Reserve and Guard personnel is because not every member of the Reserve and Guard will have a covered and eligible family member.

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.'' 73 FR at 7952.

Second, the PRIA qualitatively discussed the impacts on employers and employees with highly time-sensitive operations. The Department noted that ''[i]n 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. 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.'' *Id.* at 7954.

Third, the Department estimated the magnitude of the potential costs associated with the NDAA military family leave provisions by comparing the additional number of workers who might take FMLA leave under the new requirements with those currently taking FMLA leave. *Id.* at 7957.

The Department received no substantive comments on the methodology that it used to estimate the costs in the PRIA. Although there were some comments about the lack of draft provisions for the NDAA amendments and the potential burden that such provisions could impose, most of the comments that the Department received on its methodology focused upon the underlying data. ''Since 2000, DOL has not conducted any rigorous surveys or analysis of how the FMLA is working.'' (National Partnership for Women & Families). ''I am confused about why some businesses are lobbying for these changes, when they cannot demonstrate that the provisions have affected their business operations.'' (Andrea Barreiro). ''The lack of adequate data may have led the Department to underestimate the costs of the Proposed Rules for employees.'' (JEC). ''There is no data about what conditions the individuals have or in what industries they are employed. Lacking this data, DOL cannot know if its proposed changes will remedy the claimed problems.'' (Disability Policy Collaboration).

Some criticized the Department's reliance on the 2000 Westat Report. For example, the Institute of Women's Policy Research stated ''[t]he most recent data available on FMLA coverage, eligibility, and use are from a survey commissioned by the DOL and conducted by Westat in 2000. Even when the survey results were published in 2001, these data were unable to illuminate many aspects of FMLA use, because of difficulty distinguishing between FMLA-qualifying leaves and other leaves for similar circumstances that did not meet the criteria for FMLA leave, and lack of emphasis on some topics that are now a bigger concern. These data may not reflect the current average or range of experiences with the FMLA of either workers or employers.'' The Equal Employment Advisory Council also noted that ''[w]hile the 2000 Westat Report * * * suggests little, if any, burden associated with administering FMLA leave, we believe the Report does not accurately reflect the level of difficultly employers have experienced in attempting to comply with current FMLA regulations.''

Others criticized the Department for using data supplied by the public. ''The Department also relies on non-representative, industry-sponsored survey data for developing its recommendations.'' (JEC). ''It is unlikely that information collected in this manner gives an accurate picture of workers' or employers' experiences with the FMLA. DOL assumptions * * * [draw on] non-representative survey of self-interested respondents * * * Survey methodologists recognize that individuals invited to participate in non-random-sampled surveys are more likely to respond if they have strong feelings about the issues on the survey instrument.'' (The Institute of Women's Policy Research)

The Department recognizes that the 2000 Westat Report has certain limitations that affect the accuracy of the Department's estimates. In fact, the Department raised many of these limitations in the RFI (*see* 71 FR at 69510–13) and was even criticized by some commenters for raising these limitations (*see* 72 FR at 35621). As the Department has previously noted, one purpose of the RFI ''was to supplement existing data and information on the wide variety of economic impacts that the FMLA is likely to have on both workers and employers, including productivity and profitability.'' *Id.* at 35628.

In fact, the RFI provided the Department a vast quantity of data to supplement the data in the 2000 Westat Report. The Department did not indiscriminately utilize these data. Rather, whenever possible, the Department prudently tried to validate estimates (including those based on the 2000 Westat Report) by corroborating them from multiple sources. Some of this validation was presented in the Report on the RFI (*see*, for example, the discussions at 71 FR at 35623–26) and some in the PRIA (*see*, for example, the discussions at 73 FR at 7942–43, 7946, and 7949–50). Moreover, based upon its assessments, which were founded on professional judgment and the comments received in response to the RFI, the Department made appropriate adjustments to the raw survey data. (*See*, for example, the discussions at 73 FR 7943, 7948 and 7952.)

The Department notes that it has been a long-standing established procedure in regulatory assessment to combine data from multiple sources and multiple years in order to address the limitations of any one data source. In fact, this very procedure was used to develop the estimates for the 1995 FMLA regulations. ''The Department's analysis was principally based on a previous analysis of the cost impact of prior versions of FMLA legislation pending before the U.S. Congress which were conducted by the U.S. General Accounting Office (GAO). The latest GAO report on FMLA legislation, updated to reflect the 1993 enactment * * * [was] based on a survey of selected firms in the Detroit, Michigan and Charleston, South Carolina areas.'' (60 FR at 2236 (Jan. 6, 1995)). An examination of the 1993 GAO report referenced by the Department (GAO/HRD–93–14R) indicates that the 1993 GAO estimates were in fact based upon a 1987 GAO report (GAO/HRD–88–34).

> To calculate an estimate for the cost to employers of providing unpaid leave to eligible workers that reflect 1992 employment and cost information we made three adjustments to our previous cost estimates. First, we updated employers' health insurance costs. Second, we increased the number of likely beneficiaries to reflect employment growth. Third, we adjusted the duration of leave an employee would take to reflect provisions of * * * the Family and Medical Leave Act of 1993. (GAO/HRD–93–14R at 3)

According to the 1987 GAO report ''[t]o develop our cost estimates, we obtained data from numerous sources.'' Two of the sources cited in the report were the 1985 National Health Interview Survey, which was used to estimate ''the number likely to take leave under the sick child and temporary medical leave provisions'' and the 1982 National Long-Term Care Survey, which was used to estimate ''the number likely to

take leave under the ill parent provision * * *'' (GAO/HRD–88–34 at 2). Since none of the underlying data in the 1985 and 1982 surveys was updated by either GAO or the Department, by the time the Department published its 1995 FMLA regulations the underlying data were a decade or more old.

The Department also notes that statistical agencies also use data from multiple sources to adjust their survey data. For example, the Bureau of Labor Statistics (''BLS'') estimates the monthly unemployment rate based upon the Current Population Survey (''CPS'') of approximately 60,000 households (*http://www.bls.gov/cps/cps_htgm.htm*). According to the CPS Technical Documentation, the Census Bureau adjusts the CPS population controls (weights) every year based on administrative data, such as birth and death statistics, along with the Census Bureau's estimates of net international migration (reflecting both legal and illegal immigration). (*http://www.bls.gov/cps/documentation.htm#pop*)

The Department, therefore, concludes that the general approach presented in the NPRM to estimate the impacts of the proposed changes to the FMLA regulations by combining data from multiple sources and multiple years is reasonable. It is consistent with the approach commonly used by regulatory agencies. In fact, it is very similar to the approach previously used by the GAO and the Department to estimate the impacts of the 1995 FMLA regulations (*e.g.*, basing the rates on data from multiple sources and updating the estimates to reflect population and employment changes). The Department's approach (although less sophisticated) is also similar in many respects to that used by statistical agencies. In the example cited above, the sample frames used by the BLS to estimate the unemployment rate at times may be as much as a decade old. Therefore, the Bureau uses data from other sources (*e.g.*, birth and death statistics and Census Bureau's estimates of net international migration) to adjust the sample frame, even though it recognizes that the adjustments are imperfect and will require the Bureau to periodically revise its estimates.

Thus, Department continued to use this approach for estimating the impacts of the regulatory changes in the final rule. The provision-by-provision analysis of the final rule (including and the new provisions implementing the NDAA amendments) is presented below. As was the case in the PRIA, the provision-by-provision analysis is followed by a discussion of the qualitative impact on time-sensitive operations.[15]

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. For the PRIA, the Department estimated: ''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.'' 73 FR at 7945. Although the Department did not receive any comments on this estimate, because of the provisions associated with the NDAA, for the final rule the Department estimates that it will take eight hours instead of six hours.

Given that the average hourly wage and benefits rate of a Human Resource compensation and benefits specialist is $36.51,[16] the average one-time cost per covered firm is $292.08 (8 hours × $36.51). Multiplying this average cost per firm by the estimated 285,237 entities[17] that have FMLA covered establishments results in an estimated one-time cost of about $83.3 million for employers to review the changes and revise their policies and procedures.

Although the Department did not receive any comments on this estimate, because of the new provisions associated with the NDAA, for the final rule the Department is estimating that it will take eight rather than six hours to review the revised FMLA provisions, adjust existing company policies accordingly, and disseminate information to managers and staff. This change results in first year costs of $80 million for the final rule.

The FMLA and Its Purpose (§§ 825.100 and .101)

In the final rule, the Department added references to the NDAA military family leave to §§ 825.100 and .101. The impact of these changes is to expand the list of criteria under which an eligible employee can qualify for FMLA-protected leave. The cost associated with this update is included in the cost of reviewing and implementing the final rule.

Clarifying the Treatment of Professional Employer Organizations (§ 825.106)

The Department is clarifying how the joint employment rules apply to a Professional Employer Organization (''PEO''). 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. However, where a PEO has the right to exercise control over the activities of the client's employees, or has the right to hire, fire or supervise them, or benefits from the work that the employees perform, they are more likely to be considered a joint employer. Essentially, in order to determine whether a PEO is a joint employer all of the facts and circumstances must be evaluated to assess the economic realities of the situation.

In the PRIA, the Department stated ''[a]lthough 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. *Id.* Although the Department received several comments on § 825.106, none of them provided data or addressed the Department's estimated impact. Therefore, the Department concludes that very few workers or employers will be impacted by this clarification.

Clarifying the Definition of ''Public Agency'' (§ 825.108)

Although the Department proposed no changes to this section, in the final rule the definition of ''public agency'' was revised to conform to that used in the FLSA. 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. The Department proposed 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. As discussed in the preamble above, the final rule modifies the proposal by extending the permissible gap to seven years. In the PRIA, the Department determined that very few workers will be impacted by this clarification because ''[i]n order to be impacted

[15] However, the latter discussion was moved to another chapter.

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

[17] This estimate includes private sector entities, state and local government entities, and quasi-governmental employers. See Table 4 of the PRIA. *Id.* at 7943.

* * * 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 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 seven 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.'' *Id.*, Footnote 33. Even fewer workers are likely to be impacted by the final rule, which extends the period to seven years.

Although the Department received several comments on this change, as noted in the preamble discussion above, none of the comments provided estimates of the number of employers or workers who would be impacted by the change, nor did they dispute the Department's assessment. Therefore, the Department concludes that very few workers or employers will be impacted by this change.

The final rule also adopts the two exceptions to the cap set forth in § 825.110(b)(2) for breaks in service resulting from an employee's fulfillment of National Guard or Reserve military service obligations and breaks where a written agreement exists concerning the employer's intention to rehire the employee after the break in service. The final rule also adopts the provision in § 825.110(b)(4) stating that an employer may consider prior employment falling outside the cap, provided that it does so uniformly with respect to all employees with similar breaks.

The Department also proposed and has adopted in the final rule § 825.110(d), which clarifies that an employee may attain FMLA eligibility while out on a continuous block of leave when the employee satisfies the requirement for 12 months of employment. The Department believes that this change will have a minimal burden on employers because it would only apply to employers who voluntarily allow employees to go out on leave before the employee has satisfied the 12-month requirement.

Finally, the Department deleted the ''deeming'' provisions in current § 825.110(c) and (d). This change should have no impact on employers or employees because the Department believes that it cannot enforce the deeming provisions of the current rule in light of the Supreme Court's 2002 *Ragsdale* decision.

Determining 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. The Department proposed and is adopting a modification to § 825.111(a)(3) that when an employee is jointly employed by two or more employees, the employer'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.

In the PRIA, the Department stated that it anticipates 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.'' *Id.* at 7946.

The Department did not receive comments disputing this assessment although Burr & Forman was concerned about the potential impact of this revision on small businesses using leased employees. The firm stated that this revision ''would result in not only administrative burdens, but also will result in additional costs in orienting and training temporary employees rotating into slots vacated by those on leave.'' After carefully considering this comment, the Department disagrees because the change impacts the eligibility of the jointly employed worker, and regardless of the eligibility of the worker, the jointly employed worker must still be counted as an employee by both the primary and the secondary employers. That is, the small business would have to count the leased employees towards the 50 or more employee threshold for FMLA coverage whether or not those employees have their home office or the actual physical place where they work as their official worksite. Therefore, the Department concludes that this change will have little *net* impact on workers or employers.

Qualifying Reasons for Leave, General Rule (§ 825.112)

The Department proposed no substantive changes to § 825.112 but did propose moving several paragraphs of the current rule to other sections to improve the organization of the regulations. This reorganization has been adopted in the final rule and will improve understanding of the rules but will not substantively impact workers or employers.

Serious Health Condition (§ 825.113) and Inpatient Care (§ 825.114)

The Department proposed and has adopted changes to § 825.113 to incorporate the definitions of ''incapacity'' and ''treatment'' from current § 825.114 and to move the definition of ''parent, spouse, son or daughter'' to § 825.122. In addition, § 825.113 of the final rule adopts, with limited change, language from § 825.114 that illustrates the types of treatments and conditions not ordinarily expected to be covered by the definition of serious health condition. The reorganization and clarification will improve understanding of the rules but will unlikely have an identifiable impact on either employers or workers.

Clarifying the Definition of ''Continuing Treatment'' (§ 825.115)

Proposed § 825.115 defined ''continuing treatment'' for purposes of establishing a serious health condition. Two changes were proposed from current regulations and they were adopted in the final rule.

First, current § 825.114(a)(2)(i)(A) establishes that an employee can meet the definition of serious health condition if, in connection with a period of incapacity of more than three consecutive calendar days, the employee or family member is treated two or more times by a health care provider. However, the current ''two visit'' requirement for serious health conditions is open-ended. In § 825.115(a)(1), the Department proposed and has adopted a clarification specifying that the two visits to a health care provider must take place within 30 days unless extenuating circumstances exist to meet the definition. The final rule also clarifies that the period of incapacity must be

more than three consecutive ''full'' calendar days; that the 30-day period begins with the first day of incapacity; and that the first visit to the health care provider must occur within 7 days of the first day of incapacity.

Second, the current definition of a chronic serious health condition in § 825.114(a)(2)(iii) is similarly open-ended because the regulations do not define the term ''periodic visit.'' In § 825.115(c)(1), as discussed in the preamble above, the Department proposed and has adopted a clarification defining the term ''periodic treatment'' as visiting a health care provider at least twice a year for the same condition.

In the PRIA, the Department stated that the proposed clarifications were ''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)–(v), the Department is proposing to update only two. Those workers who meet the other tests will not be affected * * *. 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. 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 'at least twice a year' will reduce uncertainty in the workplace and decrease the burden for some workers.'' 73 FR at 7946.

In response to the NPRM the Department received many comments from individual employees and employee representatives that the Department's assessment was incorrect and that these changes would increase the burden on workers taking FMLA leave. For example, in response to the Department's proposal to clarify in § 825.115(a) that the two visits to a health care provider must take place within a 30-calendar-day period unless extenuating circumstances exist, the Communications Workers of America (''CWA'') stated ''this arbitrary change [requiring treatment by a health care provider twice within a 30-day period] will impose an unwarranted burden on employees and their health care providers * * *.'' The National Postal Mail Handlers Union stated that ''[t]o require the employee to visit the doctor a second time within 30 days imposes an undue cost and inconvenience on the employee, and a burden on the already overburdened health care system. The employee is likely to have a co-pay for this additional (and medically unnecessary) visit and the employee's insurance may even refuse to cover such a medically unnecessary appointment, potentially imposing great cost on the employee.''

In response to the Department's proposal to clarify in § 825.115(c) that the term ''periodic visit'' for chronic conditions means visiting a health care provider at least twice a year for the same condition, many members of the American Postal Workers Union (''APWU'') stated ''[t]he new regulations would pose an unreasonable burden on employees who suffer from long-term or chronic conditions, requiring them to make unnecessary visits to their doctor, and forcing them to pay for the extra visits.'' The JEC stated ''an employee with an incurable disease, such as diabetes, may not actually need to go to the doctor that often. This rule may in fact lead to the need *for more intermittent leave* for those employees so that they can go to the doctor * * *.''

After carefully reviewing all of the comments related to the clarification that the two visits to a health care provider must take place within a 30-day period unless extenuating circumstances exist, and re-examining its assessment in the PRIA, the Department stands by its earlier determination that this clarification is unlikely to have any identifiable impact on FMLA leave-takers. As noted in the PRIA, serious health conditions usually require two visits to a health care provider within 30 days. In fact, the final rule's requirement of two visits to a health care provider is encompassed by the current standard. Therefore, workers will not have any additional costs under this ''test'' than they did before. The only difference is the costs for the two visits will be borne within 30 days instead of over some indefinite period. Further, the final rule also includes the ''extenuating circumstances'' exception to the 30-day standard in § 825.115(a)(1), so it is unlikely that any 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.

After carefully reviewing all of the comments related to the clarification that the term ''periodic visit'' means visiting a health care provider at least twice per year for the same condition, the Department stands by its determination in the PRIA that this clarification is unlikely to have any identifiable impact on FMLA leave-takers. As noted in the PRIA, workers with chronic serious health conditions that are currently covered by the FMLA typically visit their health care providers twice a year. In fact, the current standard of ''periodic'' visits for chronic conditions is implicitly the same as the final rule's requirement of two visits per year. As noted in the preamble, the Department does not agree with comments from employee groups that because many chronic conditions are stable and require limited treatment, the twice per year standard is burdensome since that view effectively ignores the requirement for ''periodic'' visits in the current regulations. As with the requirement of two treatment visits within 30 days, the determination of whether two treatment visits per year are necessary is a medical determination to be made by the health care provider. The clarification more effectively identifies the types of chronic conditions Congress intended to cover under the FMLA, without including some conditions that the Department believes are not currently covered. The Department also notes that ''two visits to a health care provider'' every year is not the sole criterion in the regulations for determining a covered chronic serious health condition. Therefore, workers with currently covered chronic conditions are unlikely to incur any additional costs under this ''test'' than they did before. 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 visits at least twice a year may reduce uncertainty in the workplace and may decrease the burden for some workers.

Leave for Treatment of Substance Abuse (§ 825.119)

The Department proposed and has adopted in the final rule consolidating in a single location the provisions in current §§ 825.112(g) and 825.114(d). This reorganization will have no impact on either employers or workers.

Leave for Pregnancy or Birth (§ 825.120)

The Department proposed and has adopted in the final rule consolidating the existing regulations pertaining to pregnancy and birth in a single location. In the final rule the Department also clarifies that a husband is entitled to FMLA-protected leave if he is needed to care for his wife who is incapacitated due to her pregnancy (*e.g.*, if the pregnant wife is unable to transport herself to a doctor's appointment). As with all care for covered family members under the FMLA such care may include providing psychological comfort and reassurance. The Department also clarified that FMLA leave to care for a pregnant woman is available to the spouse and not, for example, to a boyfriend or fiancé who is the father of the unborn child. The reorganization and clarification will have no impact on either employers or workers.

Leave for Adoption or Foster Care (§ 825.121)

The Department proposed and has adopted the consolidation of the existing regulations pertaining to the rights and obligations with regard to adoption and foster care. The reorganization will have no impact on either employers or workers.

Clarifying the Definitions of Spouse, Parent, Son and Daughter (§ 825.122)

The proposal relocated these definitions from existing § 825.113 and made some minor editorial changes. In addition, § 825.122(f) of the proposal added language that the employer could require the employee to provide documentation to confirm a family relationship such as a sworn, notarized statement or a submitted and signed tax return. In the final rule the Department adopted the edits but did not adopt the proposed language in paragraph (f) regarding the additional documentation necessary to confirm the family relationship, and retained the current regulation instead. The Department also further reorganized this section by inserting clarifying definitions related to military caregiver leave and moving the language about documentation confirming a family relationship to new § 825.122(j). In addition, in the final rule the Department clarified (as did the proposal) that an adult child must be incapable of self-care because of a disability at the time FMLA leave is to commence. The reorganization, edits and clarifications will have no impact on either employers or workers.

Unable To Perform the Functions of the Position (§ 825.123)

The Department proposed no substantive changes to this section but proposed to clarify in paragraph (b) that a sufficient medical certification must specify what functions the employee is unable to perform. The final rule adopts the proposal with one minor change. In order to make the terminology consistent with 29 U.S.C. 2613(b)(3) and (4)(B), paragraph (b) of the final rule uses the term ''essential functions.'' The edits and clarifications will have no impact on either employers or workers.

Needed To Care for a Family Member or Covered Servicemember (§ 825.124)

The proposal relocated the regulations that define the phrase ''needed to care for'' a family member from § 825.116. In addition, the Department clarified that the employee need not be the only individual, or even the only family member, available to provide care to the family member with a serious health condition. The reorganization and clarification will have no impact on either employers or workers.

Definition of Health Care Provider (§ 825.125)

The Department proposed and has adopted a change to the definition of health care provider by clarifying the status of a physician assistant (''PA''). Corresponding changes were also made to § 825.115 (Continuing treatment) and § 825.800 (Definitions). The reorganization and clarifications will have no impact on either employers or workers. As was noted previously in the preamble, most PAs are already included in the definition of health care provider because the vast majority of group health plans accept them when substantiating a claim for benefits.

Leave Because of a Qualifying Exigency (§ 825.126) and Leave To Care for a Covered Servicemember With a Serious Injury or Illness (§ 825.127)

Section 825.126 (addressing what is referred to as ''qualifying exigency leave'' in this document) implements the provision of the NDAA that eligible employees may take up to 12 weeks of FMLA leave for any qualifying exigency arising out of the fact that the spouse, son, daughter or parent of the employee is on active duty or has been notified of an impending call to active duty status in support of a contingency operation. As discussed in the preamble, for the purposes of § 825.126 servicemembers include members of the National Guard, the Reserves, and certain retired members of the Regular Armed Forces and retired Reserve who are the spouse, son, daughter or parent of the eligible employee. Section 825.126 also includes a list of qualifying exigencies.

Section 825.127 (addressing what is referred to as ''military caregiver leave'' in this document) implements the provision of the NDAA that provides that eligible employees may take up to 26 weeks of FMLA leave during a single 12-month period to care for a ''covered servicemember'' with a serious injury or illness incurred by the servicemember in the line of duty on active duty that may render the servicemember medically unfit to perform the duties of his or her office, grade, rank or rating. For the purposes of this section, a ''covered servicemember'' must be a member of the Armed Forces, including a member of the National Guard or Reserves, who has a serious injury or illness for which he or she is (1) undergoing medical treatment, recuperation or therapy; or (2) otherwise in ''outpatient status;'' or (3) otherwise on the temporary disability retired list (''TRDL''). Former members of the Armed Forces, former members of the National Guard and Reserves, and members on the permanent disability retired list (''PDRL'') are not ''covered servicemembers.'' In order to care for a covered servicemember, an employee must be the spouse, son, daughter, parent or next of kin of a covered servicemember.

As discussed in the PRIA (*id.* at 7954), the Department identified the potential number of covered and eligible workers who may be impacted by the military family leave provisions but did not develop specific cost estimates for these provisions. Rather, based upon the potential increase in the number of FMLA-eligible workers who would take FMLA leave due to the military family leave provisions and the assumption that the costs of military family leave are similar to the costs of current FMLA leaves, the Department estimated that the cost of the FMLA could potentially increase by as much as 5 percent,[18] *Id.*

[18] As was discussed in the PRIA, the Department believed that a 5 percent cost increase may be an over-estimate because (1) the NDAA did not change the scope of covered employers or eligible workers under the FMLA and 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, and (2) 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,

at 7957. Although the Department received many comments on the NDAA provisions, they primarily indicated support for the new entitlements and provided recommendations on how they should be implemented. None of the comments addressed the estimation of potential impacts.

Because §§ 825.126 and 825.127 are new provisions, the Department has no history on which to base its estimates. For example, there are no existing surveys (either conducted by the public or the federal government) that can be used as a basis to estimate the leave patterns of workers taking either qualifying exigency leave under § 825.126 or military caregiver leave under § 825.127. Therefore, the Department is using a different approach to estimate the impacts of §§ 825.126 and 825.127 than it used to estimate the impacts of the other provisions.

First, based upon its analysis of the provisions, the Department developed typical profiles of the leave patterns of workers that it estimates would take qualifying exigency leave under § 825.126 and military caregiver leave under § 825.127. The Department believes that a typical employee who will take qualifying exigency leave under § 825.126 will have the following leave pattern:

- Upon notification of the deployment of the servicemember, the eligible employee will take a block of one week of unforeseeable FMLA leave to address qualifying exigencies (*e.g.*, under § 825.126(a)(1)(i)).
- During the deployment of the servicemember, the eligible employee will take ten days of unforeseeable FMLA leave to address qualifying exigencies under § 825.126(a).
- During the deployment of the servicemember, the eligible employee will take a block of one week of foreseeable FMLA leave to join the servicemember while the servicemember is on ''Rest and Recuperation'' (§ 825.126(a)(6)).
- Post deployment of the servicemember, the eligible employee will take a block of one week of foreseeable FMLA leave to address qualifying exigencies (§ 825.126(a)(7)).

The Department believes that a typical employee who will take military caregiver leave under § 825.127 will have the following leave pattern:

- Upon receiving notification of the serious injury or illness of the covered servicemember the eligible employee will take a block of four weeks of unforeseeable FMLA leave to care for the covered servicemember.
- The eligible employee will subsequently take a second block of two weeks of unforeseeable FMLA leave to care for the covered servicemember after the covered servicemember is transferred to a rehabilitation facility.
- During the single 12-month period, the eligible employee will take two one-week blocks of unforeseeable FMLA leave to care for the covered servicemember, under the assumption that the covered servicemember may experience an unanticipated complication.
- During the single 12-month period, the eligible employee will schedule and take 40 individual days of foreseeable FMLA leave to care for the covered servicemember.

Next, the Department assessed the costs associated with each type of leave. As noted in the NPRM, the Department recognized that the NDAA ''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.'' *Id.* at 7957. The Department determined that the marginal costs related to workers taking both kinds of military family leave under §§ 825.126 and 825.127 result from the cost of providing health insurance during the period the worker is on leave and the efficiency costs associated with unexpected absences. The Department believes these two categories of costs are reasonable proxies for the opportunity cost of the NDAA provisions, since health insurance coverage represents the marginal compensation an employer is still required to cover under the FMLA when a worker is absent, and unexpected absences have long been identified in this rulemaking and other FMLA leave studies as a potential source of burden above and beyond the cost of a replacement worker. Since FMLA leave is unpaid, as was done in the promulgation of the 1995 FMLA regulation, the Department is not assessing the costs associated with the replacement workers as a cost of this rulemaking.

The Department based the costs of providing health insurance on data from the BLS, Employer Costs for Employee Compensation survey. According to the June 2008 report (USDL: 08–1271), employers spend an average of $2.25 per hour on health insurance (*see* Table 1, pg. 5). Based upon the assumption that typical employees work 8-hour days and 40-hour workweeks, typical employees will cost their employer approximately $450 for the estimated 200 hours (*i.e.*, 25 days × 8 hours per day) of FMLA leave that they will take for qualifying exigency leave under § 825.126 and $1,440 for the estimated 640 hours (*i.e.*, 80 days × 8 hours per day) of FMLA leave that they will take for military caregiver leave under § 825.127.

The Department based the costs of unforeseeable FMLA leave on data from the *Unscheduled Absence Survey* by CCH [19] and a 2008 Employee Absenteeism survey conducted by WorldatWork.[20] According to the CCH 2005 survey, the average per-employee cost of unscheduled absenteeism is $660. Since this estimate was per employee, the Department converted it to a per day estimate. According to the 2008 WorldatWork Employee Absenteeism survey, employees averaged 5.3 days of unplanned absences per year. Applying this rate to the $660 cost per employee results in an estimated cost of $125 per day for unplanned absences. Based upon comments made regarding the need for employee notification, the Department assumes that this cost only applies to the first day of the blocks of unforeseeable FMLA leave because employers will have had time to schedule coverage on the subsequent days. Therefore, the Department estimates that the one block and 10 individual days of unforeseeable FMLA leave taken by a typical employee for qualifying exigency leave under § 825.126 will cost employers $1,375 and the four blocks of unforeseeable FMLA leave taken by a typical employee for military caregiver leave under § 825.127 will cost employers $500.

Thus the Department estimates a typical employee utilizing FMLA leave under the provisions of the NDAA will cost his or her employer approximately $1,825 for qualifying exigency leave under § 825.126 and $1,940 for military caregiver leave under § 825.127. Based on an estimated 110,000 eligible employees taking qualifying exigency leave under § 825.126, the Department estimates that § 825.126 will result in added costs to employers of $200.8 million. Based on an estimated 29,100 eligible employees taking military caregiver leave under § 825.127, the Department estimates that § 825.127 will result in added costs to employers of $56.5 million.

similarly, not all employees eligible to take FMLA leave will do so under the new military family leave provisions. *Id.* at 7957.

[19] Available at: *http://www.cch.com/Press/news/2005/200510121h.asp.*

[20] Available at: *http://www.worldatwork.org/waw/adimComment?id=28206.*

The Department also estimated other costs associated with the military leave provisions, such as those related to the employer notification provisions in § 825.300. Those costs are presented in the appropriate sections below.

The Department did not assess any additional costs for foreseeable FMLA leave taken under §§ 825.126 and 825.127. The Department believes that employers covered by the FMLA will have the systems in place to handle these foreseeable FMLA leaves after the occurrence of the initial unforeseeable FMLA leaves were taken. Moreover, after the employee has supplied the initial information for the employer to determine that the initial unforeseeable leave qualifies as FMLA leave, the certification requirements for the subsequent leave taken under §§ 825.126 and 825.127 are less burdensome. Finally, the marginal administrative costs for the foreseeable FMLA leaves taken under §§ 825.126 and 825.127 are negligible (*e.g.*, once the eligible employee has taken the initial unforeseen leave under either §§ 825.126 or 825.127, the employer is on notice that additional leaves will follow, so that the costs to employers of administering subsequent scheduled leaves taken under either §§ 825.126 or 825.127 will be nominal).

Amount of Leave (§ 825.200)

Section 825.200 explains the basic leave entitlement. The Department proposed and has adopted a clarification regarding how holidays are counted when they fall in a week that an employee needs less than a full week of FMLA leave. Specifically, in these situations, it has been the Department's enforcement position not to count the holidays against the employee's 12-week entitlement. The Department has not made any changes in the treatment of holidays which fall within a full week of FMLA leave. The Department also added additional explanation to the rolling leave year calculation. These clarifications will have no impact on either employers or workers.

Leave To Care for a Parent (§ 825.201)

The Department proposed and has adopted some changes to make the regulations more clear and accessible. The requirements regarding leave for the birth, adoption or foster care of a child have been relocated to § 825.120 and § 825.121. Therefore, § 825.201 now only covers leave to care for a parent, which was previously in § 825.202. The reorganization and edits will have no impact on either employers or workers.

Intermittent Leave or Reduced Schedule Leave (§ 825.202)

The Department proposed and has adopted some changes to make the regulations more clear and accessible. The Department made three edits in final rule. First, the parenthetical phrase ''(as distinguished from voluntary treatments and procedures)'' was deleted because it was an unnecessary and confusing reference to provisions in the 1993 interim rule that were dropped when the 1995 regulations were promulgated. Next, a clear definition of ''medical necessity'' for intermittent leave was included by combining existing language from current § 825.117 and illustrations from current § 825.203(c). Finally, as explained in the preamble, the Department agreed with commenters to delete the word ''related'' from the phrase ''treatment of related serious health condition'' as an unnecessary term and potentially problematic. Overall, the aforementioned changes to this section were well received by commenters to the NPRM. The reorganization and edits will have no impact on either employers or workers.

Scheduling of Intermittent or Reduced Schedule Leave (§ 825.203)

The Department proposed and has adopted some changes to make the regulations more clear and accessible. In addition, the Department proposed and has adopted an editorial change to clarify that employees who take intermittent FMLA leave have a statutory obligation to make a ''reasonable effort'' to schedule such leave so as not to disrupt unduly the employer's operations. The reorganization and clarification that more closely follows the statutory language will have no impact on either employers or workers.

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

The Department proposed and has adopted some non-substantive editorial changes to this section such as adding new subheadings. In addition, the NPRM solicited comments on whether to alter the rules to expand employers' ability to transfer workers who take intermittent FMLA leave to alternative positions. As discussed in the preamble above, the Department found no statutory basis to permit transfers to an alternative position for those taking unscheduled or unforeseeable intermittent leave and declined to make this change in the final rule. The non-substantive edits will have no impact on either employers or workers.

Increments of FMLA Leave for Intermittent or Reduced Schedule Leave (§ 825.205)

The Department proposed and has adopted some changes to make the regulations more clear and accessible such as relocating some of the language currently in § 825.203 and adding subtitles. The reorganization and clarification will have no impact on either employers or workers.

In addition, the NPRM requested comments on whether the minimum increment of leave should be raised for all workers or in situations where a physical impossibility prevents an employee from commencing work part-way through a shift. As discussed in the preamble above, the Department retained the current requirement that employers use the shortest period of time their leave system uses to account for other types of leave as long as it does not exceed one hour. In doing so, the Department also recognized that employers may account ''for absences or use of leave in varying increments at different times of the day or shift.'' This clarification coupled with the one hour increment discussed above allows employers to assess FMLA-leave time in increments of an hour to tardy employees, so long as the employees do not work during the time charged as leave. However, the Department went on to adopt changes related to situations where it is not possible for an employee to commence work part-way through a shift.

The language in the final rule makes it clear that the Department intends the exception to be applied narrowly to situations where an employee is physically unable to access the worksite after the start of the shift such as where a flight attendant or a railroad conductor is scheduled to work aboard an airplane or train, or a laboratory employee is unable to enter or leave a sealed ''clean room'' during a certain period of time.

According to the Bureau of Labor Statistics, Occupational Employment Survey, approximately 3.75 million employees work on flight crews, train crews, ship crews, and as truck, bus, and subway drivers. The Department also estimates another 150,000 employees work in clean rooms for a total of 3.9 million workers.[21] It is likely

[21] According to a 1999 report in the San Francisco Chronicle, roughly 74,000 people across the country work in clean rooms building semiconductors. The report is available at: *http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/1999/04/19/BU86426.DTL&type=printable.* The Department has doubled this

that about 80.5 percent of these workers are covered and eligible to take FMLA leave; that about 9.1 percent of those workers will take FMLA leave; and that about 23.9 percent of those workers will take intermittent FMLA leave, or about 68,000 workers. Further, since the Department intends the physical impossibility exception to be applied narrowly, this is likely to be an overestimate of the number of workers who actually will be impacted by the change because it likely includes a number of workers who will not fit into the exception examples provided in the preamble above.

Using Data from the BLS' Occupation Employment Statistics survey, the Department estimates that the median hourly wage for flight crews, train crews, ship crews, drivers, and clean room workers to be about $17.66 per hour.

Assuming that the regulatory change will result in an average of eight hours of additional unpaid leave for each of the estimated 68,000 workers who take intermittent leave in situations where it is not possible for them to commence work part-way through a shift, then at most $9.6 million per year (*e.g.*, 68,000 workers per year × 8 hours per worker × $17.66 per hour) would be transferred from these employees to their employers in the form of unpaid FMLA leave or using accrued paid leave.[22] Again, since the Department intends the physical impossibility exception to be applied narrowly, this is likely to be an overestimate of the cost of this provision.

Finally, in response to comments, the Department is making two revisions to the calculation of leave to address issues that arise when an employee's schedule varies. First, the Department clarified that workweeks and fractions thereof may be converted to hours for tracking purposes. Second, the Department changed the rule for calculating an average workweek when the employee has no normal schedule to a 12-month rather than a 12-week average to account for seasonal variation. As discussed in the preamble above, the Department believes that it has addressed the commenters' concerns by changing the calculation of leave so that overtime is factored into the leave entitlement, either because the regular schedule is over 40 hours or because the employee is on a variable schedule and the hours are averaged over a 12-month period. The Department concludes that the changes to the calculation of leave will have no impact on either employers or workers.

Substitution of Paid Leave (§ 825.207)

The Department proposed and has adopted several changes to § 825.207 allowing employers to apply their normal paid leave policies to the substitution of all types of paid leave for unpaid leave. In addition, the Department proposed and has adopted changes that permit employers and employees to voluntarily agree to supplement workers' compensation benefits with accrued paid leave; allow the substitution of compensatory time accrued by public agency employees; and deleted current § 825.207(h), which states that where paid leave is substituted for unpaid FMLA leave and employer's procedural requirements for taking paid leave are less stringent than the requirements of the FMLA, employees cannot be required to comply with the higher FMLA standards. Finally, the Department made a few editorial changes such as deleting the term ''running concurrently.''

Several commenters criticized the Department's assessment in the PRIA that the proposed changes to this section would have little impact. *Id.* at 7947. The JEC stated ''[t]he Department does not provide evidence that employees can easily access paid leave or vacation time, or whether they can easily use paid time off for FMLA. While some FMLA leaves can be planned or requested far in advance, many cannot.'' The Institute for Women's Policy Research stated ''DOL does not report having surveyed employers about the conditions they may impose on taking paid leave, such as whether the leave must be requested some number of days or weeks in advance, whether a minimum amount of paid leave must be taken at once, or whether the leave must be coordinated with co-workers' leave.'' The National Partnership for Women & Families stated ''if an employer does not allow vacation leave during certain times of the year, requires five days notice for vacation time, or requires that vacation time be taken in four hour blocks, an employee will have to abide by these rules when taking leave concurrently with FMLA leave in order to be paid while on FMLA leave * * * Many employees cut their leaves short because they cannot afford to go too long without a paycheck. DOL's proposed new rule may increase the number of employees that will have to face the agonizing choice between a paycheck and their health or the health of a loved one.'' The Coalition of Labor Union Women (''CLUW'') noted that ''information from members indicates that the vast majority of unpaid leaves are unscheduled, caused by unforeseen medical problems. CLUW is concerned that this regulatory change will make it more difficult for an employee to qualify for much-needed leave without income loss.'' The AFL–CIO stated that ''[m]any collective bargaining agreements require employees to bid on vacation time on an annual basis, and the Department's reinterpretation would foreclose the use of paid vacation leave in these workplaces.'' The Institute for Women's Policy Research also stated that ''[i]t seems entirely reasonable to expect that some share of FMLA leave-takers will not be able to meet their employer's general paid leave requirements and thus will not be paid during their FMLA leave. This will place a new financial burden on workers.''

The Department notes that it presented evidence based on data in the 2000 Westat Report that suggests many employees can easily access paid leave or vacation time. *Id.* at 7947. 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 a large majority of workers will have no problem complying with their employers' leave policies. Moreover, the Department concurs with the Institute for Women's Policy Research that it is entirely reasonable to expect that some FMLA leave-takers will not be able to meet their employers' general paid leave requirements and thus will not be paid during their FMLA leave. In fact, the Department presented data in the PRIA from the 2000 Westat Report that suggests 14 percent of workers reported that it was difficult to get time off and that a similarly small percentage of the workers who received paid vacation or personal leave during their FMLA leave may have some difficulty satisfying their employers' paid leave policies.

The Department notes that the analysis presented in the PRIA was *not*

estimate to account for clean rooms in other industries and employment growth since 1999.

[22] Based on the comments, the Department has determined that under the current regulations some employers end up having to pay two workers for the same shift when one worker shows up late for work because they take intermittent FMLA leave (*i.e.*, the worker called in to take the shift of the employee on FMLA leave, and the employee returning from FMLA leave). For example, the Airline Industrial Relations Conference (comment for the RFI), noted that 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.'' Under the final rule, the employee could remain on unpaid FMLA leave. Since under the final rule the employer would no longer have to pay two employees for the same shift, the value of the unpaid leave of the employee on FMLA leave is effectively a transfer to the employer.

based upon the assertion that very few workers would lose the ability to use paid vacation and personal leave when they take FMLA leave under the revised provisions. Rather, based upon data from the 2000 Westat Report, the Department determined that 63.8 percent of workers do *not* run either paid vacation or personal leave concurrently with their FMLA leave. Moreover, of those workers who do use the types of paid leave covered by the update in the final rule, many are likely to have *no* problem complying with their employers' paid leave policies. 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.

In addition, a number of commenters pointed out that allowing employees to have paid vacation leave run concurrently with their unpaid FMLA leave without having to meet their employer's normal paid vacation leave-taking rules, places employees using FMLA leave in a more favorable position regarding the use of employer provided paid leave than their coworkers taking vacation or personal leave for non-FMLA reasons.

However, the Department recognizes that the inability to take paid vacation leave concurrently with FMLA leave may have an impact on some workers. Those workers who are covered by a collective bargaining agreement (''CBA'') that requires them to bid on their vacations may not be able to substitute paid vacation leave for unpaid FMLA leave under the final rule unless their CBAs are changed. In addition, it is likely that some workers who take FMLA leave that is unscheduled and unforeseen will not be able to comply with their employers' procedures (particularly those related to advanced notice) for taking vacation or personal leave.

For the purposes of this RIA, however, the revisions have no impact on the workers' ability to take unpaid protected FMLA leave or the workers' ability to use accrued paid leave under their employers' procedures. 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, and for the workers who may 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. Thus any impacts resulting from the final rule will be in the nature of a lost opportunity to have paid leave run concurrently with FMLA leave rather than actual income losses. How the lost opportunities affect individual workers will depend on the amount of deferred paid leave and the workers' financial status. Ultimately, the FMLA is an unpaid leave statute that does *not* convey the right to the paid leave that workers may have accrued but are not yet fully vested in. *See* Wage and Hour Opinion Letter FMLA–75 (November 14, 1995). Nor does the Department believe that Congress intended to put FMLA leave-takers in a more favorable position regarding the use of employer provided paid leave than their coworkers taking vacation or personal leave for non-FMLA reasons. Therefore, the Department believes it has appropriately determined for the purposes of the RIA that the updated text in the final rule will have only minor unquantifiable impacts on workers.

Employee Payment of Group Health Benefit Premiums (§ 825.210)

The Department proposed and adopted some editorial changes (*e.g.*, deleting the word unpaid) and some technical corrections (*e.g.*, related to the cross-references) to § 825.210. These editorial changes and technical corrections will have no impact on employers or workers.

Employee Failure To Make Health Premium Payments (§ 825.212)

The Department proposed and adopted a revision to § 825.212(c), which clarifies 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, the employer still has a duty to reinstate the employee's health insurance when the employee returns to work, and the employer may be liable for harm suffered by the employee as a result of a failure to do so. Since this revision was a clarification of and not a change to the Department's enforcement position, it will have no impact on employers or workers.

Employer Recovery of Benefit Costs (§ 825.213)

The Department proposed and adopted a revision to § 825.213 to move language from current § 825.310(h) in order to combine it with other issues involving repayment of health premiums. This relocation of the language will have no impact on employers or workers.

Employee Right to Reinstatement (§ 825.214)

The Department proposed and adopted organizational changes and minor edits to § 825.214 by moving language from current § 825.214(b) to § 825.216(c). This relocation of the language and minor edits will have no impact on employers or workers.

Equivalent Position (§ 825.215)

The Department proposed and adopted minor organizational changes to § 825.215 such as adding subtitle headings and making some editorial changes. The only substantive change proposed and adopted was modifying perfect attendance awards in § 825.215(c)(2) to allow employers to disqualify employees from bonuses or other payments based on achievement of a specified job-related performance goal where the employee has not met the goal due to FMLA leave *so long as this is done in a nondiscriminatory manner*. In the final rule the Department replaced the proposed phrase ''unless otherwise paid to employees on equivalent non-FMLA leave status'' with ''unless otherwise paid to employees on an equivalent leave status for a reason that does not qualify as FMLA leave.'' The final rule also changed § 825.215(c)(1) to include the same limitation on the employer's ability to deny pay increases.

As was noted in the PRIA, ''[p]erfect 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. In such situations, both employers and employees gain from the bonus. Employers reduce their costs. Employees increase their income * * * 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.'' *Id.* at 7947 (footnote omitted).

Several employee organizations and unions opposed the change asserting that it would provide a disincentive to take FMLA leave (*e.g.*, Working America/Working America Education Fund, Center for WorkLife Law, and National Partnership for Women & Families). However, as was noted in the NRPM, employers believe ''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.'' *Id.* at 7898.

The Department concludes that making the change is more favorable to workers than the current trend of companies eliminating all perfect attendance awards. The revisions were drafted to reduce the disincentive for employers to provide such awards by treating workers who take FMLA leave in a similar manner to employees ''on equivalent leave status for a reason that does not qualify as FMLA leave.'' Although the Department expects that some reduction in unnecessary absenteeism will reduce overall employer costs, data limitations inhibit the Department from quantifying the impact of this revision.

Similarly, the nondiscriminatory treatment of FMLA leave for pay increases based upon seniority, length of service or performance in revised § 825.215(c)(1) should eliminate the disincentive for employers to provide these pay increases on these bases.

Limitations on an Employee's Right to Reinstatement (§ 825.216)

The Department proposed and adopted organizational changes and minor edits to § 825.216 such as moving language from current § 825.214(b) and § 825.312, as well as reordering and combining paragraphs to § 825.216(c). This relocation of the language and minor edits will have no impact on employers or workers.

Explanation of Key Employees and Their Rights (§ 825.217 through 825.219)

The Department proposed and has adopted minor changes to update the reference to ''salary basis.'' The updated reference will have no impact on employers or workers.

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

The Department proposed and has adopted new language in § 825.220 setting forth the remedies for interfering with an employee's FMLA rights, such as referencing retaliation. The Department also proposed and has adopted a change to § 825.220(c) to clarify that the prohibition against interference includes a prohibition against retaliation as well as a prohibition against discrimination. These clarifications will have no impact on employers or workers.

The Department also proposed and has adopted modified language in § 825.220(d) to clarify that the prohibition against employees waiving their rights applies only to prospective FMLA rights and does not apply to settling past FMLA claims. The Department concurs with the comments of the College and University Professional Association for Human Resources that the primary impact of ''this clarification * * * will help promote voluntary resolution of claims and reduce unnecessary litigation.'' Although it should be easier for employers and workers to settle FMLA claims, data limitations prevent the Department from quantifying the benefits of this clarification.

Finally, the Department proposed and adopted clarifying modifications to § 825.220(d) so that light duty does not count against the employee's 12 week FMLA leave entitlement.

Since the Department received no comments on its analysis presented in the NPRM, it retains that analysis for the final rule. ''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.'' *Id.* at 7947.

Changes to the Employer Notification Requirements (§ 825.300)

The Department proposed a reorganization of the notice requirements so that all of the employer notice requirements were consolidated in § 825.300 under the major topics of ''general,'' ''eligibility,'' and ''designation'' notices, and ''consequences of failing to provide notice.'' The final rule adopts the consolidated format, but makes additional changes to further clarify employer obligations to provide notice to employees. In addition, the final rule creates a new section, titled ''*Rights and responsibilities notice*'' and relocates provisions from proposed § 825.300(b)(3) to that section. Each of the major topics is discussed below.

General Notice (§ 825.300(a))

Current § 825.300 addresses the statutory posting requirement applicable to employers (29 U.S.C. 2619(a)). The Department proposed and retained the current requirement that covered employers must post the general notice even if no employees are eligible for FMLA leave (see current § 825.300(a) and final § 825.300(a)(2)). The Department also proposed and has adopted changes to allow electronic posting and to increase the civil money penalties for willful violations of the posting requirement. The Department believes that electronic posting of the notice can facilitate increased employee awareness while limiting cost burdens on employers. Although electronic posting should result in some cost savings for employers, the Department has not quantified this impact because it will depend on many site-specific factors such as the accessibility of the notice to both employees and applicants. Increasing the civil money penalties from $100 to $110 was statutorily required by the Federal Civil Penalties Inflation Adjustment Act of 1990 as amended by the Debt Collection and Improvement Act of 1996 and will partially address the erosion of the penalties due to inflation over time.

Current § 825.300(c) requires that if the employer's workforce is comprised of a significant portion of workers who are not literate in English then the employer must post the notice in a language in which the employees are literate. The Department proposed retaining this requirement that appears in the final rule in § 825.300(a)(4). The final rule explicitly informs employers that prototypes are available from the Wage and Hour Division office nearest the employer or may be downloaded from the agency's Internet Web site. Thus, because no changes have been made to the requirement there are no impacts on workers or employers; to the extent employers avail themselves of Wage and Hour Division prototypes, however, their costs should be reduced.

Under current § 825.301(a)(1), the general notice must contain the same information that is required to be posted in current § 825.300(a), and a prototype notice is available in current Appendix C.

In the NPRM, proposed § 825.300(a)(3) required 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 format, regardless of whether an employee requests leave. Based upon the comments received (see preamble discussion), the Department modified this provision in the final rule so that employers are required to provide the general notice either by including it in an employee handbook or other written guidance to employees concerning employee benefits or leave rights, if such written materials exist, or by distributing a copy to each *new employee upon hire*. The Department has retained the proposal in the final rule that the general notice may be distributed by electronic means, and has also updated Appendix C.

In the proposal, the Department estimated the costs that would be incurred by employers who do not have handbooks. *Id.* at 7948. Many employers commented about the burden that the proposed requirement would impose.

For the final rule, the Department has determined that because *current* § 825.301(a)(2) and (c) require employers to provide the general notice to employees no less often than the first time in each six-month period that an employee gives notice of the need for leave, and the *final* § 825.301(a) only requires the general notice to be posted and included in employee handbooks or other written guidance, or in the alternative, distributed to each new employee upon hiring, the burden and cost to employers of this subsection of the general notice requirements will be reduced.

In the proposal, the Department estimated the costs that would be incurred by employers who do not have handbooks. *Id.* at 7948. Many employers commented about the *burden* that the new requirement would impose. For example, Spencer Fane Britt & Browne asserted ''[t]here is also no other federal employment law that requires such onerous notice requirements * * *.'' (*See also* the preamble discussion of § 825.300(a)(3)). However, since none of the comments specifically addressed the Department's approach, the Department will use the same approach in the final rule to estimate the increased costs for covered employers without handbooks with an adjustment so that costs are only associated with new employees:

> CONSAD estimated the number of additional notices that may be required for this provision, based upon data from the 2000 Westat Report * * * employers currently send out about 1 million general notices to employees requesting leave * * * Under the new provision * * * 6.8 million additional general notices [will be] sent out each year * * * 2.2 million * * * will be emailed, 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 * * * the estimated cost to prepare the 29,000 email notices is about $1.1 million * * * and the estimated cost for 57,000 firms to hand deliver notices is about $3.4 million * * * The estimated cost * * * to prepare and deliver the notice through regular mail is about $0.6 million * * * Adding all of these costs together yields a total estimated annual additional cost of about $5.1 million for the general notice proposal. *Id.* at 7948.

After receiving these general notices when they are hired, 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. Based upon data from Westat, in the PRIA the Department estimates that the number of FMLA leave-takers will increase by about 37,000 employees because of the proposed general notice provision resulting in annual estimated administrative costs of approximately $1.7 million. *Id.*

The Department used data from the Job Openings and Labor Turnover Survey (''JOLTS'') to adjust the PRIA estimates for providing the general notice to new employees rather than all employees on an annual basis. According to the 2008 annual release, hires in 2007 were equivalent to 42 percent of employment. (USDL 08–0332 at 5.)[23] Applying this 42 percent to the costs for all workers results in an estimated $2.1 million for the general notice (*i.e.*, 42% of $5.1 million) and $0.7 million for increased leave use (*i.e.*, 42% of $1.7 million).

Eligibility Notice (§ 825.300(b))

The Department proposed and adopted changes to consolidate and strengthen the existing eligibility notices in § 825.300(b). Consistent with current § 825.110, the employer continues to be responsible for communicating eligibility status.

The Department proposed and adopted an extension to the time frame for the employer to respond to an employee's request for leave in § 825.300(b)(1) from 2 days to 5 days. In the final rule, the Department reinserted the phrase ''absent extenuating circumstances'' that appears in current § 825.110(d).

In the NPRM, the Department stated ''[p]roviding more time will reduce mistakes and provide greater certainty in the workplace, and this typically benefits both workers and employers.'' *Id.* at 7949. Based on the comments supporting the extension (see, for example, Infinisource, Hinshaw & Culbertson, U.S. Small Business Administration's Office of Advocacy, Community Health and Counseling Services, Hewitt Associates, and Southwest Airlines), the Department concludes that its initial assessment was correct, despite the fact that many comments argued for shorter or longer periods (see the preamble discussion of § 825.300(b)).

In the PRIA, the Department combined the savings resulting in the longer time given employers to provide both the eligibility and designation notices in a single calculation. For the final rule, the Department has determined that two calculations are necessary because the number of eligibility notices will be greater than the number of designation notices.

As noted in the PRIA, CONSAD, 2.1 at 20, estimated that the 95.8 million workers employed in establishments covered by the FMLA made 12.7 million leave requests in 2005. *See id.* The Department estimates that the changes related to increasing the time permitted to provide the eligibility notices will save employers an average of five minutes per notice of a ''compensation and benefits specialist'' time in processing each request. At a cost of $36.51 per hour, saving 0.08 hours on each of the estimated 12.7 million leaves requested results in a savings of about $37.1 million.

Proposed § 825.300(b)(2) required employers to notify employees both of their eligibility status and the availability of FMLA entitlement. The Department notes that the requirement to inform employees if they are eligible to take FMLA leave is not a new one, and the obligation has always been triggered by the employee providing notice of the need for leave that may be covered under the FMLA. *See* current §§ 825.110(d), 825.302, 825.303. The new requirement in proposed § 825.300(b)(2), which is retained in the final rule, is that when an employer determines that an employee is not, in fact, eligible to take FMLA leave, the employer must inform the employee and indicate why the employee is not eligible. If the employee is not eligible for FMLA leave, the proposal would have required employers to list the reasons why the employee is not eligible

[23] Available at: *http://www.bls.gov/news.release/archives/jolts_03122008.htm.*

or that the employee has no FMLA leave available ''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.'' *Id.* at 7978. However, the Department's assessment in the PRIA was ''that there will be very little additional burden, since the employer is already required to calculate such information in order to determine eligibility.'' *Id.* at 7949.

The Department received a number of comments on this proposed revision. For example, National Association of Manufacturers (''NAM'') stated that ''[p]roposed § 825.300(b)(2) may present a significant administrative burden on employers because it invites employees to request information about eligibility and entitlement without imminent need for leave. Currently, employers need only calculate eligibility and verify remaining leave if an employee has expressed a need for foreseeable leave, or at the time that the need for leave arises. NAM members are concerned that employers will be obligated to respond to requests for verification of eligibility and entitlement in addition to all of the requests they already receive from employees with an actual need for leave. The proposed regulation should require that employers need only provide information about FMLA eligibility and entitlement in concert with an imminent need for leave.'' Hewitt Associates stated ''employers must send a separate notice that informs employees that they are ineligible * * * [This] will mean a large increase in notifications produced as the current regulations have not required employers to communicate FMLA data to ineligible employees.'' And, according to Society for Human Resource Management ''[t]he practical import of this requirement is that any time an employee requests leave that involves any type of medical issue, the employer would be required to send out paperwork indicating that the employee is not eligible or entitled to leave.''

In response to these and other comments (see the preamble discussion of § 825.300(b)(2)), the Department changed the proposed requirements. The provision in the final rule permits the employer to limit the notification that the employee is ineligible to any one of the potential reasons why an employee fails to meet the eligibility requirements. In addition, in recognition of the potential inaccuracies in the employer's estimates the Department modified this provision to indicate that the information is a ''good faith estimate.'' The Department disagrees with the Society for Human Resource Management's assertion, however, that the revised provisions will increase employers' burden because they will be obligated to respond to employee requests for verification of eligibility. Current § 825.301(d), which has been relocated to § 825.300(b)(5), specifies that ''[e]mployers are also expected to responsively answer questions from employees concerning their rights and responsibilities under the FMLA.'' So there is no new obligation being created except for providing the notice in writing to workers who are ineligible to take FMLA leave.

As noted in the PRIA, CONSAD estimated that 12.7 million of the 95.8 million workers employed in establishments covered by the FMLA requested FMLA leave in 2005, and that these requests resulted in 7.0 million workers taking FMLA leave. *Id.* at 7949. This strongly suggests that 5.7 million workers were denied FMLA leave either because the worker was found to be ineligible, or because the condition did not rise to the level of a serious health condition. In the PRIA, all of the denials were implicitly assumed to be eligible workers being denied due to the condition so all of the costs were attributed to changes in the designation notice. This is clearly not the case. For the final rule, the Department is attributing one-half of the denials to the workers being found ineligible, and one-half of the workers who were denied FMLA leave on the basis that the workers' or the family members' condition did not rise to the level of a serious health condition.

The Department assumes that the 2.85 million workers (*i.e.*, 5.7 million divided by 2) who were denied FMLA leave on the basis of eligibility will on average receive 1.5 denial notices per year.[24] The Department estimates that creating and distributing 4.3 million eligibility notices (*i.e.*, 2.85 million times 1.5) to workers found to be ineligible will cost employers on average about 10 minutes of a ''compensation and benefits specialist'' time for each notice. This estimate does *not* include the time for the calculations, since the calculations are required by both the current and revised provisions to determine eligibility. At a cost of $36.51 per hour for each of the estimated 4.3 million requests from workers found to be ineligible to take FMLA leave will result in additional costs of about $26.2 million (*i.e.*, 4.3 million times $36.51/6).

The remainder of § 825.300(b) is based upon current § 825.301(a) with some minor conforming edits such as changing the two day period to five days as was done in § 825.300(b)(1) (see preamble discussion). In addition, in response to comments that providing a list of essential job functions with the eligibility notice would create an administrative burden for employers, the final rule was restructured so that employers are required to provide employees with the list of essential job functions no later than the designation notice, if the employer requires a fitness-for-duty certification to return to work. These changes from the current rule will have no impact on employers or workers.

Finally, the Department estimates that the additional eligibility notices for the 139,000 workers taking military leave under §§ 825.126 and .127 will each take about 10 minutes of a Human Resource Compensation and Benefits Specialist's time to prepare. At an average hourly wage and benefits rate of $36.51, this will result in additional costs of $0.8 million (*i.e.*, 139,000 × $36.51/6).

Rights and Responsibilities Notice (§ 825.300(c))

The final rule moved proposed § 825.300(b)(3) to final § 825.300(c), separating the notice of rights and responsibilities from the notice of eligibility. To simplify the timing of the notice of rights and responsibilities and to avoid unnecessary administrative burden on employers, § 825.300(c)(1) of the final rule requires employers to provide this notice to employees at the same time that they provide the eligibility notice. Additionally, if the information in the notice of rights and responsibilities changes, § 825.300(c)(4) also requires the employer to notify the employee of any changes within five business days of the first notice of the need for FMLA leave subsequent to any change. This timing requirement will ensure that employees receive timely notice of the expectations and obligations associated with their FMLA leave each leave year and also receive prompt notice of any change in those rights or responsibilities during the leave year. In addition, the final rule makes some clarifying changes to the

[24] This accounts for some workers being denied multiple times due to different reasons. For example, a worker who is initially denied because they have worked less than 12 months for the employer may be subsequently denied on the basis that they did not work 1,250 hours in the previous 12 months.

language of proposed § 825.300(b)(3). Also, in response to comments that providing a list of essential job functions with the eligibility notice would create an administrative burden for employers (*see*, for example, Hewitt Associates, Vercruysse Murray & Calzone, ORC Worldwide, AT&T, and NAM), the final rule was restructured so that employers are required to notify employees no later than the designation notice that a fitness-for-duty certification is required and to provide the list of essential job functions at that time, if the employer wants the worker's ability to perform these functions addressed in the fitness-for-duty certification. Finally, the prototype notice is referenced in § 825.300(c)(6). Since the requirements of this section are in current § 5.301(b)(1), these changes will have no impact on employers or their employees.

However, the additional workers taking FMLA leave under the military leave provisions in §§ 825.126 and 825.127 will result in additional rights and responsibilities notices. The Department estimates that each rights and responsibilities notice will take about 20 minutes of a Human Resource Compensation and Benefits Specialist's time to prepare. At an average hourly wage and benefits rate of $36.51, preparing 139,000 rights and responsibilities notices will result in additional costs of $1.7 million (*i.e.*, 139,000 × $36.51/3).

Designation Notice (§ 825.300(d))

Under current and proposed regulations, employers must notify the employee in writing when the leave is designated as FMLA leave. Section 825.300(d) outlines the requirements of the designation notice an employer must provide to an employee. Additional requirements are located in § 825.301. The revisions were designed to strengthen and clarify the existing requirements currently located in § 825.208(b). In the final rule, the Department is requiring employers to provide the list of essential job functions to employees (in those cases in which this is to be addressed in the fitness-for-duty certification as discussed above) no later than with the designation notice for those workers who are required to provide a fitness-for-duty certification in order to return to work. The cost of providing the list of essential job functions for employers is estimated below in the section of the RIA that discusses § 825.310. Because of this change, several of the provisions have been renumbered.

The proposed § 825.300(c)(1) required 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. In the final rule, the Department adopts this change but reinserts the phrase ''absent extenuating circumstances'' that appears in current § 825.208(b)(1) and makes some minor editorial edits. Several comments stated that increasing the time to provide the designation notice would reduce the burden on employers. *See, e.g.*, Retail Industry Leaders Association, Illinois Credit Union League, Verizon, and Cummins.

Since the Department did not receive any comments on its methodology for estimating the costs of the designation notice in the PRIA, the Department is using a similar approach here. CONSAD estimated that the 95.8 million workers employed in establishments covered by the FMLA made 12.7 million leave requests in 2005. The Department estimated above, that 1.1 million leave requests were denied on the basis that the workers were ineligible. The remaining 11.6 million leave requests require designation notices. As in the PRIA, the Department estimates that the changes related to increasing the time permitted to provide the eligibility notices will save employers an average of 5 minutes per notice of a ''compensation and benefits specialist'' time in processing each request. At a cost of $36.51 per hour, saving 0.08 hours on each of the estimated 11.6 million determination notices results in a savings of about $33.9 million for employers.

Proposed § 825.300(c)(2) requires the employer to notify the employee if the leave is not designated as FMLA leave and the reason the leave was not designated. This change has also been adopted in § 825.300(d)(1) with minor editorial changes. Since the Department did not receive any substantive comments on the estimates presented in the PRIA, a similar approach to estimate the costs is used for the final rule. As noted above, based on the CONSAD analysis, the Department estimated that 5.7 million covered employees who request FMLA leave each year are denied that leave. The Department assumes that one-half of these workers are denied FMLA leave on the basis that the worker was ineligible for FMLA leave, and one-half are due to the condition not qualifying as a serious health condition. To account for multiple denials based upon different conditions, the Department assumes that these workers would average 1.5 denials per 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 providing the 2.85 million workers (*i.e.*, 5.7 million/2) with the explanation why their requests for FMLA has been denied will result in a cost to employers of about $52.0 million (*i.e.*, 2.85 million times $36.51/2).

Proposed § 825.300(c)(3) permits employers to provide both the eligibility notice and the designation notice at the same time. This change has been adopted as § 825.300(d)(2) with minor editorial changes. The Department assumes that employers will have sufficient information to provide both the eligibility and designation notices for about 25 percent of the approved FMLA leaves (*e.g.*, the employer will probably issue both notices at the same time for many unforeseeable health conditions that result in an overnight hospital stay). The Department estimates that the changes related to providing both notices at the same time will save employers an average of 10 minutes per notice of a Human Resource Compensation and Benefits Specialist's time in processing each leave. At a cost of $36.51 per hour, saving 0.17 hours on 25 percent of 10.5 million leaves results in a savings of about $16.3 million for employers.

The new provisions related to fitness-for-duty certifications are located in § 825.300(d)(3). As discussed above, this change was made in response to comments that the proposed requirement to include this information with the eligibility notice would have unduly burdened employers. Since the final requirement is based upon current § 825.301(b)(1)(v) it will have no impact on employers or workers.

Proposed § 825.300(c)(4) referenced a new prototype designation notice. The form is referenced in § 825.300(d)(4) in the final rule. Although the inclusion of a prototype designation notice should make compliance easier for employers, the Department has not assessed the savings.

Proposed § 825.300(c)(1) expressly required that the employer inform the employee of the number of hours, days or weeks that would be designated as FMLA leave. The Department has adopted this with the change discussed below as § 825.300(d)(6) in the final rule. Since the Department did not receive any substantive comments on the methodology used in the PRIA (*id.* at 7949) to estimate the burden of providing the estimated amount of designated FMLA leave to workers, the same approach was used for the final rule. The Department assumes it would take an additional 10 minutes of Human

Resource Compensation and Benefits Specialist's time to process each designation because of the new requirement to provide the amount of time that will be designated as FMLA leave to workers. Based upon 10.5 million leaves, this will result in about $65.9 million in additional costs.

To the extent that future leave would be needed but the exact amount of leave was unknown, proposed § 825.300(c)(1) also required that the employer inform the employee every 30 days that leave was designated as FMLA leave and advise the employee of the amount so designated. In the PRIA, the Department estimated that providing designation notices every 30 days to workers with chronic conditions would cost employers approximately $121.9 million per year. *Id.* The Department received many comments about the burden this provision would impose on employers. For example, the Chamber of Commerce of the United States of America (the ''Chamber''), stated ''[s]uch a requirement will require employers to constantly monitor and communicate with numerous, if not hundreds, of employees who take intermittent FMLA leave. This requirement is therefore unduly burdensome.'' *See also*, Community Health and Counseling Services, New York City Law Department, NY, Unified Government of Wyandotte County/ Kansas City (KS), and Vercruysse Murray and Calzone. In response to these comments, § 825.300(d)(6) of the final rule requires that 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 the amount of leave counted against the employee's FMLA leave entitlement must be provided upon the request by the employee, and then only every 30 days and only if the employee has taken FMLA leave. Since the new language in the final rule is simply a clarification of existing § 825.301(d), this change will have no impact on employers or workers.

However, the additional workers taking FMLA leave under the military leave provisions in §§ 825.126 and 825.127 will result in additional designation notices. The Department estimates that each rights and responsibilities will take about 20 minutes of a Human Resource Compensation and Benefits Specialist's time to prepare. At an average hourly wage and benefits rate of $36.51, preparing 139,000 designation notices will result in additional costs of $1.7 million (*i.e.*, 139,000 × $36.51/3).

Consequences of Failing To Provide Notice (§ 825.300(e))

The Department proposed in § 825.300(d) and has adopted as § 825.300(e) a remedy provision tailored to individualized harm for any violation of the general, eligibility, or designation notice requirements. This provision arises out of the U.S. Supreme Court's *Ragsdale* decision which invalidated the remedy provision in current § 825.301(f). As in any action arising under the FMLA, any remedy is specific to the facts of the individual's circumstances, and a court may order appropriate relief. For the purposes of this RIA the Department assumes full compliance with the final rule and, therefore, has not estimated any cost associated with this provision.

Employer Designation of FMLA Leave (§ 825.301)

The Department proposed and has adopted the relocation of the requirements of current § 825.301 into § 825.300 (see the discussion above) and the requirements in current § 825.208 addressing the designation of FMLA leave, in order to consolidate all the designation requirements in one place. In addition, as is discussed in the preamble, the Department proposed and adopted several changes necessitated by the U.S. Supreme Court's *Ragsdale* decision. For example, the Department has changed the remedy provisions because the current remedy provisions have not been enforceable since *Ragsdale*. In addition, the Department made some editorial changes and clarifications such as removing the references to ''unpaid leave'' and ''paid'' leave because the provisions apply to all FMLA leave. Finally, the Department proposed and adopted the elimination of the ''provisional designation'' concept in current § 825.208(e)(2) because it could cause confusion over whether leave is protected prior to the actual designation, especially in cases where the leave does not eventually qualify for the Act's protections.

Although many comments supported the Department's proposal to delete the provisional designation, some employee representatives commented that workers benefit from the designation because it allows employers to make a quick determination. The National Partnership for Women & Families noted that ''DOL does not explain how this change could affect workers and whether the lack of a provisional designation accompanied by DOL's proposal to grant employers more time to respond to employee's requests for FMLA leave will make employees less likely to take FMLA leave as they will not know quickly whether the leave will be covered.'' *See also*, Communications Workers of America, American Association of University Women, and AFL–CIO. As noted in the preamble, the Department believes provisional designation gives the workers a false sense of comfort that their leave is job protected under the FMLA. If an employee takes leave under a provisional designation and the leave is subsequently determined not to qualify as FMLA leave then the leave will not be protected regardless of the provisional designation. The Department believes that it is better *not* to provide workers with a provisional designation so that they can make alternative arrangements if possible to avoid taking unprotected leave or take leave with the full knowledge that it may be unprotected.

The Department, therefore, concludes that none of these changes should have an impact on employers and their employees.

Employees Notifying Their Employers of the Need for Leave (§§ 825.302, .303 and .304)

Sections 825.302, 825.303 and 825.304 of the current regulations require an employee to notify his or her employer of the need for leave and to generally schedule leave for planned medical treatments in a way that the absences do not unduly disrupt the employer's business operations. The Department proposed and adopted several revisions to these requirements intended to reduce the impact of leave taking and uncertainty in the workplace without negatively impacting leave-needers.

Sections 825.302, 825.303 and 825.304 of the final rule require an employee who seeks leave due to a condition for which the employer has previously provided FMLA-protected leave to inform the employer that the leave is for a condition that was previously certified or for which the employee has previously taken FMLA leave. This change should reduce the burden on employers with no impact on employees. However, data is not available for the Department to estimate the savings that will result from this change.

The final rule also requires the employee to provide notice as soon as practicable and comply with the employer's usual procedures for calling in and requesting leave, except where unusual circumstances exist. If the employee fails to comply with these requirements, the employer may delay FMLA coverage for the leave. As the Department stated in the PRIA the

''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.'' *Id.* at 7950.

As noted in both the RFI Report (72 FR at 35631) and the PRIA (73 FR at 7950), ''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.''

In response to the NPRM, CUPA–HR stated that ''call-in procedures can be 'critical to an employer's ability to ensure appropriate staffing levels.' This issue is of major concern for CUPA–HR members, with close to 65 percent of those participating in a recent survey reporting problems with notice for leave and unscheduled absences.'' The Society for Human Resource Management (''SHRM'') stated that ''[w]hen unforeseen leave is used, in many cases co-workers bear the burden of such call-ins, because employers do not have enough time to adequately staff for the employee absences and still run their operations if the co-worker is allowed to depart from work. In other cases, the co-worker must bear the burden of performing their own job and that of the employee on FMLA leave because of the lack of notice provided.''

In the PRIA the Department estimated that the ''net impact of all of the revisions discussed in §§ 825.302, 825.303 and 825.304 would be a net savings of about $121.8 million.'' 73 FR at 7951. The Department's estimated savings were based upon its estimate of the potential number of leaves impacted by the revisions. According to a 2007 survey conducted by the Society for Human Resource Management (the SHRM survey),[25] ''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. 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. 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).'' *Id.* at 7950.

The JEC criticized the Department's estimate of the no or short notice leaves stating ''[t]he Department relies on an estimate for the prevalence of lack of notice that seems unreasonably high * * * the SHRM data are not based on a nationally representative sample, but rather on a survey of self-selected SHRM human resource practitioners. Further, the description of SHRM's analysis does not make clear how or if SHRM dealt with 'notice' when the employee fell sick at work or needed to leave work to care for a sick family member. The Department's statement that the SHRM's finding is consistent with that of the Employment Policy Foundation (EPF) does not bolster the claim. The EPF is an industry-sponsored non-profit that has now gone out of business; their reports are currently not available to the public and their analysis should not be relied on as the basis for policymaking because it may be biased and is now unverifiable. It is unclear whether the SHRM survey is referring to all FMLA leaves or only intermittent leave and the final number seems much higher than expected. The term ''episodic conditions'' implies that the survey only applies to a subset of leaves * * * If 46 percent of all leaves provide no advance notice, this implies that two-thirds of all non-new child leaves do not provide notice, since the Westat Report finds that a quarter of leaves are for pregnancy or care for a new child and are therefore foreseeable in most cases. This high share of employees providing no notice seems highly suspect * * *.''

First, the Department notes that although the JEC asserts that the SHRM ''estimate for the prevalence of lack of notice * * * seems unreasonably high'', the JEC provides no data to support its assertion. If the JEC is basing its assertion on data, these data were not given to the Department in any of the comments to the RFI or the NRPM. Nor did the Department find such data in any of the comments or literature reviewed by CONSAD or DOL staff. Therefore, the Department concludes that the JEC assertion was not based upon any data; in contrast, the Department's PRIA estimate was based on available data.

Next, the JEC asserts that the Department should not use the SHRM survey because it is unrepresentative and SHRM's findings cannot be confirmed by the EPF report because the EPF report is unavailable to the public.[26] Although SHRM conducted a membership survey, the survey respondents represented a broad range of firms based upon industry, staff size, unionization, and region (SHRM Survey). The Department would normally be concerned about the over representation of medium and large firms, which comprised approximately 75 percent of the respondents that reported size; however, this is not a significant issue in this analysis because the FMLA specifically excludes small businesses with fewer than 50 employees from the scope of coverage.

Moreover, as discussed previously, the Department attempted to validate estimates including those from the Westat surveys by comparing them to estimates from alternative sources. The Department agrees with the JEC that this validation is particularly important when using data from membership surveys. Although this validation was not always possible despite the Department's efforts to collect data in the RFI, in this instance the SHRM estimate was collaborated by estimates from the EPF. In spite of some limitations in both the SHRM and EPF surveys, the fact that their estimates are very close to each other provides confidence in the use of these estimates. The JEC's assertion that the Department cannot use the EPF survey to validate the SHRM survey because the EPF report is unavailable to the public is incorrect. The Department placed the EPF report in the publicly available RFI docket[27] as it did many other materials (*e.g.*, the Westat report[28]) that were referenced in the RFI. These materials are still available on the regulations.gov Web site.

The JEC makes a valid point that the application of SHRM's 46 percent rate to all leaves may have overstated the impacts of the revisions because the 46 percent rate applied to ''episodic conditions'' implying that it only applies to a subset of leaves. So the

[25] FMLA and Its Impact on Organizations: A Survey Report by the Society for Human Resource Management, July 2007, available at: *www.shrm.org/hrresources/surveys_published/FMLA%20And%20Its%20Impact%20On%20Organizations%20Survey%20Report.pdf.*

[26] A similar criticism of the SHRM survey was made by the Institute for Women's Policy Research.

[27] Available at: *www.regulations.gov/fdmspublic/ContentViewer?objectId=09000064801e8894&disposition=attachment&contentType=pdf.*

[28] Available at: *www.regulations.gov/fdmspublic/ContentViewer?objectId=09000064801ec387&disposition=attachment&contentType=pdf.*

Department has reassessed the findings of the SHRM survey and presents a summary of the review below.

SHRM found that 8 percent of workers at covered establishments took FMLA leave in the past year (SHRM survey), which is comparable to CONSAD's estimate of 7.3 percent based upon adjusted Westat survey data (73 FR at 7943). As previously discussed in the PRIA, the issue with both the SHRM and Westat surveys is that employees may take leave that involves more than one event or episode. ''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).'' *Id.* at 7944.

When reviewing the findings in the SHRM survey for the PRIA, the Department felt that it was not appropriate to remove leave taken for family reasons, even though SHRM reported (at 17) that employees can and do provide significant notice for the actual birth or adoption. Similarly, the Department did not feel that it was appropriate to remove leave taken for catastrophic events even though the SHRM survey breaks these out in Figure 7 (at 17). For example, while SHRM states ''[f]or catastrophic event[s], it should come as no surprise when an employee provides notice on the same day of leave due to its unforeseeable nature (50%),'' the Department felt that the employee may have subsequent episodes of treatment, rehabilitation, and flare-ups. Therefore, in the PRIA the Department applied the rate for episodic conditions to all leaves.

However, based upon its reconsideration of the SHRM survey, the Department has reanalyzed the data towards the goal of applying the rate for episodic conditions to only a subset of leaves that may be a better estimate of those leaves that are truly episodic. According to Table 10 of the SHRM survey, leaves for family-related reasons [29] account for 38 percent of leaves and leaves for medical reasons [30] account for 59 percent of leaves. Together these two reasons account for nearly 100 percent or all reasons for leave given rounding errors. Since Table 10 also states that leaves for episodic conditions [31] account for 32 percent of leaves, the leave for episodic conditions must overlap the leave for family-related and medical reasons.

Moreover, the estimated number of episodic leaves based on the 2000 Westat Report can be calculated by subtracting the Department's estimate of 7.0 million workers who had at least one FMLA leave episode in 2005 from its estimate of 10.5 million FMLA leaves taken in 2005.[32] If the resulting 3.5 million episodic (or multiple event) FMLA leaves is divided by the 10.5 million estimated total FMLA leaves, then episodic conditions accounted for 33 percent of leaves in the 2000 Westat employee survey, a figure almost identical to the SHRM estimate. Therefore, the Department now believes that it is appropriate to only apply SHRM's notification rate for episodic conditions to one-third of FMLA leaves. Thus, the Department estimates that no notice is currently being provided prior to the start of the workday for 1.6 million leaves (*i.e.*, 46 percent of the estimated 3.5 million leaves for episodic conditions).[33]

The Department believes that this estimate probably understates the actual amount of leave taken for episodic conditions because, as previously stated, the 10.5 million estimated number of leaves may be understated because of issues with the term ''leave.'' However, this is somewhat, although not completely, compensated by the fact that some leaves for episodic conditions will not be affected by the revisions to §§ 825.302, 825.303 and 825.304.[34] As was noted by the JEC, there has been no attempt to estimate the number of employees who either fell sick at work or needed to leave work to care for a sick family member. As is the case for catastrophic events, the changes to §§ 825.302, 825.303 and 825.304 will not increase the amount of notice that the employees can provide for these unforeseeable leaves, so these leaves should not be included in the basis for the savings resulting from the changes.

Since there were no comments on the remainder of the Department's analysis of the revisions to §§ 825.302, 825.303 and 825.304, the Department simply divided the PRIA estimate of $121.8 million by three to arrive at an estimated net savings of about $40.6 million.

Medical Certifications (§§ 825.305, 825.306 and 825.307)

Sections 25.305, 825.306 and 825.307 specify the requirements for medical certifications. Each section is discussed below, followed by the Department's estimate of the impact of the combined updates to the medical certification provisions.

General Rule for Medical Certifications (§ 825.305)

Section 825.305 sets forth the general rules governing employer requests for medical certification to substantiate an employee's need for FMLA leave due to a serious health condition. The Department proposed and adopted a change to § 825.305(b) to increase the usual time frame during which an employer should request medical certification from two business days to five business days after the employee provides notice of the need for FMLA leave. This change is consistent with the modifications made to § 825.300. The Department also proposed and adopted a change to § 825.305(b), in order to make it consistent with the timing requirements of § 825.311, by requiring the employee to 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),

[29] Family-related reasons include maternity, birth or adoption of a child or newly placed foster child. (SHRM Survey)

[30] Medical reasons include an employee's serious health condition or care for a child, spouse or parent who has a serious health condition. (SHRM Survey)

[31] Episodic condition includes ongoing injuries, ongoing illnesses and/or non-life-threatening conditions. (SHRM Survey)

[32] Note these estimates do not include the estimated 200,000 employees who will take an estimated 300,000 leaves under the military leave provisions of the NDAA because when estimating the costs of §§ 825.126 and .127 the Department did not include costs that would be saved by the revisions to §§ 825.302, .303 and .304.

[33] The Department notes that SHRM's 46% estimate is not only consistent with the EPF estimates as was noted previously, but is also consistent with the WorldatWork estimate that 51% of intermittent leaves are unscheduled and that notice for 56% of intermittent leaves occurs either on the day of the absence (43%) or the day following the absence (10%).

[34] According to WorldatWork, notice of 7% of intermittent leaves occurs during the work shift. However, WorldatWork also estimated that notice for 56% of intermittent leaves occurs either on the day of the absence or the day following the absence. So if the notices given during the work shift are removed, then according to WorldatWork, notice for 49% of intermittent leaves was either provided on the day of the absence but prior to the shift or the day after the shift. (1528.1, attachment at 7) This estimate is slightly higher than the 46% SHRM estimate of the no or short notice leaves used by the Department.

unless it is not practicable under the particular circumstances to do so despite the employee's diligent, good faith efforts.

The Department proposed and adopted additions to § 825.305(c) to clarify the meaning of incomplete and insufficient certifications and set forth a procedure for curing incomplete or insufficient certifications. As a result, the final rule requires the employer to notify the employee in writing of what information is necessary for completing the medical certification and to provide the employee at least seven calendar days to furnish the additional information.

The Department proposed and adopted changes to § 825.305(d) to clarify that if an employee fails to submit a complete and sufficient certification despite the opportunity afforded by the provisions of § 825.305(c), the employer may deny the taking of FMLA leave. In addition, the Department proposed and adopted a clarification that when the employer requires a certification, the employee's obligation to provide either a complete and sufficient certification or provide any necessary authorization for the healthcare provider to release a complete and sufficient certification directly to the employer applies to initial certifications, recertifications, second and third opinions and fitness-for-duty certifications.

Finally, the Department proposed and adopted the deletion of § 825.305(e), which specified that if the employee's sick leave plan had less stringent requirements than the FMLA, only the less stringent requirements may be required when the employee substitutes any form of paid leave for FMLA leave. The Department proposed and adopted updates to § 825.305(e), consistent with Opinion Letter FMLA2005–2–A, clarifying that an employer can require annual medical certifications in those cases where a serious health condition extends beyond a single leave year.

Both §§ 825.305(b) and 825.305(c) provide employees with additional time or a more specific time period to either initially submit the medical certification or to cure a deficiency. Section 825.305(b) increases the time an employer can request medical certification from the employee from two business days to five business days after receiving the employee notice of the need for leave. Providing more time will reduce mistakes and provide greater certainty in the workplace, and this typically benefits both workers and employers. The clarification in § 825.305(c) of the meaning of incomplete and insufficient certifications should also provide greater certainty in the workplace, benefiting both workers and employers. Finally, the change in § 825.305(c), requiring 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) will also provide greater certainty in the workplace and benefit both workers and employers.

As discussed in the preamble, several commenters believe these updates will ''immediately and drastically improve FMLA communications'' (the Chamber); reduce the number of times ''the employees are forced to go back to their health care providers repeatedly in a vain attempt to guess what the * * * [employer] would like'' (National Postal Mail Handlers Union); and ''alleviate delay and uncertainty in the FMLA approval process as well as unnecessary administrative burdens associated with repeated follow-up communications related to the certification process * * * both employers and employees will understand what their obligations are in the certification process'' (Society for Human Resource Management).

Content of the Medical Certifications (§ 825.306)

Section 825.306 addresses how much information an employer can obtain in the medical certification to substantiate the existence of a serious health condition. It also references optional form WH–380 for use in the certification process and specifies that while other forms may be used, no additional information beyond that contained in WH–380 may be required.

The Department proposed and adopted several revisions to the medical certification form in § 825.306 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 also proposed and adopted with modifications several revisions to optional form WH–380. The Department proposed and adopted the deletion of § 825.306(c), which contained language similar to that deleted from § 825.305(e). The Department proposed and adopted the incorporation of language from current § 825.307(a)(1), explaining the interaction between workers' compensation and the FMLA with regard to the clarification of medical information in § 825.306(c). Finally, the Department proposed and adopted additions to this provision clarifying that if an employee is required to submit additional information to receive payments under a paid leave or benefit plan, the employer may require that the employee provide the 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 paid leave and does not affect the employee's right to unpaid FMLA leave. The Department also added new § 825.306(d) clarifying that where a serious health condition is a disability under the ADA, employers are not prevented from following the procedures under the ADA for requesting medical information, and new § 825.306(e) codifying the Department's long-standing position that employers may not require employees to sign a release of their medical information as a condition of taking FMLA leave, but that employees must submit a complete and sufficient certification upon request.

Similar to the changes made to § 825.305, the clarifications in § 825.306 should provide greater certainty in the workplace, benefiting both workers and employers. As the CUPA–HR noted in its comments, ''[i]n the past, there has been unnecessary confusion over certifications, with close to 70 percent of CUPA–HR members responding to a survey reporting that they received vague information in certifications and close to half reporting challenges in authenticating or verifying information * * *.''

Authentication and Clarification of the Medical Certification (§ 825.307)

Current § 825.307 addresses the employer's ability to clarify or authenticate an FMLA certification. Section 825.307(a) permits an employer, with the employee's permission, to have its own health care provider contact the employee's health care provider in order to clarify or authenticate an FMLA certification. The Department proposed and adopted a change to § 825.307(a) that allows employers to contact the employee's health care provider directly. In response to privacy concerns expressed by employees and their representatives, the Department added a requirement to the final rule that specifies the employer's representative contacting the employee's health care provider must be a human resource professional, a leave administrator, or a management official, but in no case may it be the employee's direct supervisor.

As discussed in the preamble, two types of contact between the employer and the employee's health care provider are permitted. An employer may contact the employee's health care provider for the purposes of clarification and authentication of the medical certification. In both cases, however, the employer may request no additional information beyond that included in the certification form and any sharing of individually identifiable health information by a HIPAA-covered health care provider must be in compliance with the HIPAA Privacy Rule at 45 CFR Parts 160 and 164. The revision also specifies that the employee is not required to permit his or her health care provider to communicate with the employer, but that if such contact is *not* permitted and the employee does not otherwise clarify an unclear certification, the employer may deny the designation of FMLA leave. The revision also specifies that prior to making any contact with the health care provider, the employer must first provide the employee an opportunity to cure any deficiencies in the certification pursuant to the procedures set forth in § 825.305(c).

In § 825.307(b), the Department also proposed and adopted the consolidation of current § 825.307(a)(2) and (b) setting forth the requirements for an employer to obtain a second opinion and added language requiring the employee or the employee's family to authorize his or her health care provider to release any medical information pertaining to the serious health condition at issue if such information is requested by the second opinion health care provider. The Department also proposed and adopted a similar requirement for the third opinion in § 825.307(c).

The new provision in § 825.307(d) 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.

No changes were made to § 825.307(e) and (f) involving travel expenses for second and third opinions. In response to comments regarding medical certifications from foreign health care providers, the final rule modifies § 825.307(f) to require that employees provide a written translation of any certification by a foreign health care provider that is completed in a language other than English. The Department believes that in most situations either the employee or a member of the employee's family will be able to provide the translation, so this change should have a minimal impact on workers.

The changes to § 825.307 should expedite the certification process, thereby reducing the uncertainty to both employers and their employees. Similar to the changes made to §§ 825.305 and .306, providing greater certainty in the workplace should benefit both workers and employers. SHRM stated that the current regulatory requirement ''creates unnecessary delay and expense for employers'' and that ''the proposed changes should help ensure that the certification process is more efficient and less burdensome.'' The Chamber stated the changes ''will streamline the medical certification'' and ''are among the most impactful changes proposed by the Department.'' The National Coalition to Protect Family Leave noted that smaller employers will no longer ''have to incur the unnecessary expense of finding a health care provider to make contact with the employee's provider and educate them on what information the employer needs to be clarified.'' The National Newspaper Association applauded the Department on its proposed revisions to streamline the medical certification process stating that the ''bright-line rule helps to eliminate confusion and frustration for both the employee and employer'' and that ''permitting the employer to authenticate the certificate directly with the health care provider is a significant improvement in the FMLA regulations for small businesses.''

Estimated Impacts of the Revisions to the Medical Certification Requirements

In the PRIA, the Department estimated the savings that would result from the changes to medical certification requirements in §§ 825.305, 825.306 and 825.307 based upon the estimated number of leaves that involve serious health conditions and thus may require medical certifications. ''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), and 92 percent of covered establishments required medical documentation for covered leave due to a serious health condition. [footnote omitted] 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. [footnote omitted] At a cost $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.'' *Id.* at 7951.

Since the Department received no substantive comments on this estimate, it is retaining it in this analysis.

Recertifications (§ 825.308)

Current § 825.308 addresses the employer's ability to seek recertification of the employee's medical condition. The changes to this section are intended to address the uncertainty regarding how often an employer can seek recertification.

Section 825.308(a) of the current regulations sets forth the rule for recertification for pregnancy, chronic or permanent/long-term conditions and generally permits recertifications no more often than every 30 days in connection with an absence. The Department proposed and has adopted in the final rule a clarification to § 825.308(a) entitled the ''30 day rule'' that sets forth a general rule permitting recertification every 30 days in connection with an absence.

Section 825.308(b)(1) of the current regulations states that where a certification specifies a minimum duration of incapacity of more than 30 days, generally employers may not request recertifications until the specified minimum duration has passed. Section 825.308(b)(2) of the current regulations states that for FMLA leave taken intermittently or on a reduced leave schedule basis, generally employers may not request recertification in less than the minimum period specified on the certification as necessary for such leave.

As discussed in the preamble, the Department proposed to resolve the uncertainty under current § 825.308 as to how often employers could seek recertification of chronic conditions where the certification indicates that the duration of the condition is ''lifetime.'' Under the current regulation, it is unclear whether such certification would be subject to recertification every 30 days under § 825.308(a) because the conditions are chronic, or whether they would never be subject to recertification under § 825.308(b)(2) because the certification indicated the need for intermittent leave for the employee's lifetime. As noted in the NPRM, the Department proposed in § 825.308(b) to permit employers, in all cases, to request recertifications in connection with absences every *six months* if the certification indicated the ongoing need for intermittent leave. The proposal represented a change in the Department's position, which had

previously been that certifications indicating an ''indefinite'' or ''unknown'' duration were subject to recertification every *30 days. See* Wage and Hour Opinion Letter FMLA2004–2–A (May 25, 2004), where implicit in the four scenarios that are the subject of the opinion letter is the assumption that each scenario would involve some intermittent or reduced schedule leave. In the PRIA, the Department assumed that ''this clarification will not impact either employers or employees.'' *Id.* 7951.

Further, as noted in the preamble above, the current 825.308(b) has two subsections, the first of which addresses certifications specifying a minimum period of incapacity in excess of 30 days, and the second of which addresses certifications specifying a minimum period during which intermittent or reduced schedule leave will be needed; in both situations an employer may not request recertification until the minimum period has passed. The Department has interpreted current § 825.308(b) as applying to those situations in which the certification states that an employee will need leave due to a serious health condition for a specified period in excess of 30 days, regardless of whether that leave is taken as a single continuous block of leave or on an intermittent or reduced schedule basis.

In the final rule, § 825.308(b) has also been modified to clarify that the rule applies to conditions where the minimum duration of *the condition*, as opposed to the minimum duration of *the incapacity*, exceeds 30 days. This is a clarification, not a change in the Department's enforcement position. The final rule also provides an example of how the six-month recertification provision would apply.

Section 825.308(c) of the current regulations provides that in all situations not covered by § 825.308(a) and (b), employers may generally request recertifications at any reasonable interval, including less than every 30 days, but only if certain circumstances exist as described in current § 825.308(c)(1), (2), and (3). The Department proposed and adopted entitling § 825.308(c) ''Less than 30 days'' which explains, similar to current § 825.308(c)(1), (2), and (3), under what circumstances the employers could request recertifications more frequently than every 30 days. Examples were also added to this provision.

Section 825.308(d) of the current regulations requires employees to provide recertifications within 15 calendar days of the employer's request, unless it is not practicable to do so despite the employee's diligent, good faith efforts. The only change made to § 825.308(d) was entitling it ''Timing.''

Section 825.308(e) of the current regulations provides that recertification is at the employee's expense and that no second opinion may be required for recertification. Current § 825.308(e) was redesignated as § 825.308(f) with no other change.

The Department proposed and adopted the addition of new recertification requirements in § 825.308(e), entitled ''Content,'' which clarifies that an employer may request the same information on recertification as required for the initial certification in § 825.306, and that the employee has the same obligation to cooperate in providing the recertification as in providing the initial certification. In addition, the Department proposed and adopted a clarification that employers may provide the employee's health care provider with a record of the employee's absence pattern and ask whether the leave is consistent with the employee's serious health condition.

The Department received significant comments from both employers and employees regarding this proposal that confirmed the confusion that exists in this area. Some employers and their representatives interpreted proposed § 825.308(b) as diminishing their recertification rights, while others interpreted it as increasing their rights. Most employees and their representatives interpreted proposed § 825.308(b) as increasing their recertification burden. However, the AFL–CIO supported the proposed change, arguing that recertifications on a 30-day basis for long-term conditions are burdensome on employees.

The Institute for Women's Policy Research provided an alternative estimate of the potential increased burden on workers. ''According to the Federal Register document, there are 2 million FMLA leave-takers with a chronic health condition. Analysis of the 2006 National Health Interview Survey shows that 10.9 percent of workers with one of five major chronic health diseases (diabetes, chronic obstructive pulmonary disease, asthma, congestive heart disease, and hypertension) have not seen a physician in the last year, and another 14.2 percent have visited a physician only once in the past year (Institute for Women's Policy Research analysis). If workers with other chronic health diseases have similar health-care utilization rates, requiring these leave-takers to have at least two doctor visits per year will result in an additional 720,000 doctor visits annually. At an average cost of $71.72 and assuming each visit takes two hours of workers' time (including travel and waiting), valued at $17.57 per hour (the wage used by the DOL in its impact estimates), and that that time is unpaid, this requirement will cost nearly $77 million per year in medical expenses and lost wages.''

The Department disagrees with this estimate for two reasons. First, as explained in the preamble, and noted above, the proposed and final § 825.308(b) represents a change in the Department's position from permitting a recertification every 30 days for chronic or permanent/long-term conditions regardless of whether the leave is taken as a single continuous block of leave or on an intermittent or reduced schedule basis to permitting a recertification every six months where the certification provides no time-frame, or indicates a minimum duration of ''lifetime,'' or ''indefinitely.'' Arguably, this will reduce the burden on workers.

Second, a chronic serious health condition within the meaning of § 825.114(a)(2)(iii) of the current FMLA regulations requires periodic treatment by a health care provider. General statistics involving all workers with chronic conditions are inappropriate. The fact that over 10 percent of the workers in the study analyzed by the Institute for Women's Policy Research reported not seeing a physician in the past year indicates that either their conditions did not meet the requirements of current § 825.114(a)(2)(iii)(A), and thus are not chronic serious health conditions qualifying for FMLA leave, or they were answering the question specifically concerning physicians as opposed to all qualifying health care providers for FMLA purposes such as physician assistants. Moreover, the analysis submitted by the Institute for Women's Policy Research does not include the savings that would result from the change under the proposed and final rule that recertifications for chronic serious health conditions cannot be required more frequently than once every six months, which is less frequently than some employers currently require.

In reexamining this proposed and final provision, and carefully considering all of the comments, the Department concludes that this provision will not increase the burden on either employers or employees, and arguably may reduce the costs associated with recertifications. However, data limitations prevent the Department from making a specific estimate.

The proposed and adopted change to § 825.308(e) will 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 cannot estimate what impact this proposal would have on the alleged misuse of FMLA leave. *See id.* at 7951.

Certification for Leave Taken Because of a Qualifying Exigency (§ 825.309)

Under the military family leave provisions of the NDAA, 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.'' While the Department has attempted to mirror the existing FMLA certification process wherever possible for qualifying exigency leave, the unique nature of this leave necessitates that an employee provide different information in order to confirm the need for leave. In the final rule, the certification requirements for leave taken because of a qualifying exigency are set forth in § 825.309.

Section 825.309(a) of the final rule establishes that an employer may require an employee to provide a copy of the covered military member's active duty orders or other documentation issued by the military which indicates that the covered military member is on active duty (or has been notified of an impending call or order to active duty) in support of a contingency operation, and the dates of the covered military member's active duty service. § 825.309(b) establishes that each time leave is first taken for one of the qualifying exigencies specified in § 825.118, an employer may require an employee to provide a certification that sets forth certain information. Section 825.309(c) of the final rule describes the optional form developed by the Department for employees' use in obtaining certification that meets the FMLA's certification requirements. Section 825.309(d) of the final rule establishes the verification process for certifications.

The Department estimates that requesting, reviewing and verifying the certifications for the estimated 110,000 workers taking exigency leave under § 825.126 will take an average of about 20 minutes of a Human Resource Compensation and Benefits Specialist's time. At an average hourly wage and benefits rate of $36.51, this will result in additional costs of $1.3 million (*i.e.*, 110,000 × $36.51/3).

Certification for Leave Taken To Care for a Covered Servicemember (§ 825.310)

The military family leave provisions of the NDAA amended the FMLA's certification requirements to permit an employer to request that leave taken to care for a covered servicemember be supported by a medical certification. The FMLA's existing 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.

Section 825.310 of the final rule provides that when leave is taken to care for a covered servicemember with a serious injury or illness, an employer may require an employee to support his or her request for leave with a sufficient certification. Section 825.310(a) permits an employer to require that certain necessary information support the request for leave. Section 825.310(b) of the final rule sets forth the information an employer may request from an employee in order to support his or her request for leave. Section 825.310(c) of the final rule describes the optional form developed by the Department for employees' use in obtaining certification that meets the FMLA's certification requirements. Section 825.310(d) describes alternatives to the optional form that employers must accept from employees obtaining certifications.

The Department estimates that requesting, reviewing and verifying the certifications for the estimated 29,100 workers taking caregiver leave under § 825.127 will take an average of about 30 minutes of a Human Resource Compensation and Benefits Specialist's time. At an average hourly wage and benefits rate of $36.51, this will result in additional costs of $0.5 million (*i.e.*, 29,100 × $36.51/3).

Intent To Return To Work (§ 825.311)

The Department did not propose any changes in § 825.309 in the NPRM and received no significant comments on this section. In the final rule, § 825.309 is renumbered as § 825.311 to account for the new military family leave sections (§§ 825.309 and 825.310) and is otherwise adopted as proposed. This change will not result in any costs to employers or workers.

Employer Refusal To Reinstate an Employee (formerly § 825.312)

Current § 825.312 addresses the conditions under which an employer can refuse to reinstate an employee after FMLA leave. Current § 825.312(a)–(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, the Department proposed and adopted their deletion and the renumbering of current paragraphs (g) and (h) as § 825.216(d) and (e). As no substantive changes have been made, and none of the comments disputed the Department's assessment, the Department concludes that these changes will impose no additional costs on workers or employers.

Certifications for Fitness-For-Duty (§ 825.312)

Current § 825.310, which was renumbered in the final rule as § 825.312, addresses the fitness-for-duty certification that an employee may be required to submit upon return to work from FMLA leave.

The Department proposed in § 825.310(a) and adopted in § 825.312(a) the addition of a sentence clarifying that employees have the same obligation to provide complete certification or provide sufficient authorization to the health care provider in order for that person to provide the information directly to the employer in the fitness-for-duty certification process as they do in the initial certification process.

The final rule, deleted the current § 825.310(b) and moved the discussion of the applicability of state or local law, or collective bargaining agreements that govern an employee's return to work, to a new § 825.312(g). The Department also moved the discussion of the ADA to a new § 825.312(h) in the final rule.

Current § 825.310(c) states that the fitness-for-duty certification may be a simple statement. The Department proposed two changes. First, the employer would be permitted to require that the fitness-for-duty certification address the employee's ability to perform the essential functions of the employee's job as long as the employer provides the employee with a list of those essential job functions at the same time that the employer provides the eligibility notice required by proposed § 825.300(b). Second, the employer would be permitted to contact the employee's health care provider directly, consistent with the procedure in proposed § 825.307(a), for purposes of authenticating or clarifying the fitness-for-duty certification. These changes were generally adopted in the final rule but the subsection has been renumbered as § 825.312(b). However,

in the final rule, the Department also modified the language to specify that, if the employer requires that the fitness-for-duty certification address the employee's ability to perform the essential functions of the employee's job, then the employer must provide the employee with a list of those essential job functions no later than the *designation notice* required by § 825.300(c) and specify in the designation notice that the fitness-for-duty certification must address the employee's ability to perform those essential functions.

The Department did not propose or make any changes to current § 825.310(d). This paragraph has been renumbered as 825.312(c) in the final rule.

Current § 825.310(e) requires employers to advise the employee if the employer will require fitness-for-duty certification to return to work. If the employer has a handbook explaining employment policies and benefits, the handbook should explain the employer's general policy regarding any requirement for fitness-for-duty certification to return to work. Specific notice shall also be given to any employee from whom fitness-for-duty certification will be required either at the time the notice of the need for leave is given or immediately after leave commences and the employer is advised of the medical circumstances requiring the leave, unless the employee's condition changes from one that did not previously require certification pursuant to the employer's practice or policy. No second or third fitness-for-duty certification may be required. Current § 825.310(e) also does not allow second or third fitness-for-duty certifications.

The Department's proposed § 825.310(e) required employers to advise their employees in the eligibility notice required by § 825.300(b) if the employer will require a fitness-for-duty certification to return to work, and retained the prohibition on second or third fitness-for-duty certifications.

In the final rule, proposed § 825.310(e) has been renumbered as § 825.312(d), and it has been modified to state that if the employer requires a fitness-for-duty certification, the employer must advise the employee of this requirement in the designation notice and indicate therein whether that certification must address the employee's ability to perform the essential functions of the employee's job. The final rule also retains the prohibition on second or third fitness-for-duty certifications, but has moved the statement to paragraph (b) in the final rule.

The Department proposed changes to language in § 825.310(f) to clarify that the employee is not entitled to the reinstatement protections of the Act if he or she does not provide the required fitness-for-duty certification or request additional FMLA leave. These changes have been adopted in renumbered 825.312(e) of the final rule.

The Department proposed a change to § 825.310(g) permitting an employer to require a fitness-for-duty certification up to once every 30 days if an employee has used intermittent or reduced schedule leave during the 30-day period and 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. This change has been adopted and renumbered as § 825.312(f) in the final rule.

Finally, the Department proposed and adopted the deletion of current § 825.310(h) as redundant with § 825.213 regarding 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.

In the PRIA, the Department stated that ''[t]hese proposed changes have several important impacts. First, they would better protect the safety and health of workers taking leave, and their coworkers. Second, [proposed] § 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.'' *Id.* at 7952.

As noted in the preamble, many employees and employee representatives opposed the proposed change permitting employers to require a fitness-for-duty certification to address an employee's ability to perform essential job functions because they believe it would be duplicative, onerous, and costly for workers. Some commenters argued that the proposal would discourage workers from taking FMLA leave. One commenter argued that because the health care provider has already considered the essential functions of the employee's position in completing the initial certification, by certifying that the employee is fit to return to duty, the health care provider necessarily certifies that the employee's serious health condition no longer prevents the employee from being able to perform the essential functions of his or her job.

In the PRIA, the Department determined that proposed § 825.310(c) allows for a fitness-for-duty certification similar to that of the initial medical certification of the FMLA leave and, therefore, did not estimate any additional costs for workers. *Id.* at 7952. However, the Department estimated that the additional information needed for a fitness-for-duty certification will result in an estimated $4.7 million in additional costs to health care providers to review the employee's essential job functions and provide the additional information. The Department believes that although these costs would most likely be passed on to workers, the workers' health insurance would likely pay for much of these added costs. *Id.* at 7952.

After reviewing the comments, Department has determined that under the final rule workers will visit their health care providers the same number of times as they do under the current regulations for the following reasons. The *current* regulation already allows an employer to delay an employee's return to work until the employee provides a fitness-for-duty certification as long as the employer has appropriately notified the employee of the requirement. The fact that health care providers have already considered the job functions of the employee's position in completing the initial medical certification under current § 825.306(b)(4)(ii) does not preclude employers from requiring workers to visit a health care provider to obtain a fitness-for-duty certification under current § 825.310(c), even if the fitness-for-duty certification need only be a simple statement of an employee's ability to return to work (as long as employers have complied with all of the requirements in current § 825.310). Therefore, the Department has determined that § 825.312(b) will impose no additional costs on workers aside from those identified below.

The Department estimates that the additional information needed for a fitness-for-duty certification will result in an estimated $4.7 million in additional costs to health care providers to review the employee's essential job functions and provide the additional information. The Department believes that although these costs would likely be passed on to employees, workers' health insurance may pay for some of these added costs.

Proposed § 825.310(g) (§ 825.312(f) in the final rule) permits an employer to require an employee to furnish a fitness-for-duty certification every 30 days if an employee has used intermittent leave during that period and reasonable safety concerns exist. Based on the costs of additional fitness-for-duty certifications that would be required under this provision, the PRIA estimated about

$6.6 million per year in additional costs to workers. *Id.* at 7952.

Several employees and employee groups commented on the costs this change would impose on workers. For example, the Coalition of Labor Union Women stated that ''employees will be burdened with the financial costs of these added examinations which will increase the risk that they will forego FMLA leave or be denied it unfairly.'' The National Employment Lawyers Association, Massachusetts Chapter stated ''it could be unduly burdensome for employees who are using intermittent leave because of a chronic condition to have to get recertified every 30 days. In some instances, such a person may not even need FMLA leave more than once in a 30-day period. To require the employee to get re-certified that often could require him or her to be recertified every time he or she takes FMLA leave * * *.'' The AFL-CIO stated that the ''requirement is unworkable because employees generally take intermittent leave in periods that last for no more than a few days (and may even last for less than a full day). It is highly unlikely that an employee will be able to obtain a fitness-for-duty certification from the health care provider without giving more advance notice * * * failure to obtain a certification as soon as the employee is able to return to work will only prolong the employee's unpaid absence.''

Based upon these comments and those of individual workers, particularly members of the APWU, the Department has revised its methodology to include an estimate for lost income or paid leave resulting from the potential delay in workers' return to duty while they obtain the required fitness-for-duty certifications.

As was the case in the PRIA, since a fitness-for-duty certification can only be required when a reasonable safety concerns exists, the Department anticipates that this revision is likely to impact very few workers. For the final rule, the Department developed this estimate based upon an approach used in the PRIA. *Id.* at 7952. According to the 2000 Westat Report, 52.4 percent of workers take leave for their own serious health condition. *Id.* Therefore, about 3.7 million (*i.e.*, 52.4% of 7 million) take FMLA leave for their own serious health condition. The 2000 Westat Report also found that 23.9 percent of workers took it intermittently,[35] suggesting that about 880,000 workers (*i.e.*, 23.9% of 3.7 million) take intermittent FMLA leave for their own serious health conditions.

In the PRIA, the Department assumed that five percent of these leave-takers, or 44,000 workers, will be required to have a fitness-for-duty certification where reasonable safety concerns exist. Although the Department received many comments on how burdensome the proposed revision would be on workers and the impact that it might have, none of the comments provided any data or evidence to suggest that the Department's five percent assumption was incorrect. As discussed in the preamble, the Department intends for the term ''reasonable safety concerns'' to be a high standard. The determination that there are reasonable safety concerns must rely on objective factual evidence, not subjective perceptions. Although this new regulation may impose additional costs on some employees, the Department continues to believe that at most five percent of these leave-takers, or 44,000 workers, will be required to provide fitness-for-duty certifications under § 825.312(f) (*i.e.*, 5.0% of 880,000).

As in the PRIA (*see id.*), the Department assumes that on average these workers will be required to provide three fitness-for-duty certifications for the intermittent leave they take at an average of $50 cost per certification. Thus the 132,000 additional certifications (*i.e.*, 3 certifications per worker × 44,000 workers) will cost workers about $6.6 million per year.

In addition, since these workers may not be allowed to return to work until they obtain a fitness-for-duty certification, these workers may remain on paid or unpaid leave. As noted by the AFL–CIO, for workers with chronic conditions taking intermittent FMLA leave, the inability to obtain a certification as soon as the employee is able to return to work will prolong the employee's paid or unpaid absence. However, some of these workers will be able to obtain the fitness-for-duty certifications without any loss of income because they will be able to obtain the required certification before they are ready to return to work.[36] Therefore, the Department assumes that each of the three fitness-for-duty certifications will on average result in the loss of one-half of an 8-hour work day. Based upon a fully loaded average hourly rate for production and nonsupervisory workers on private nonfarm payrolls of $24.60 (*id.* at 7950), the Department estimates that the ''cost'' for workers of the paid or unpaid leave associated with each certification will be on average about $100. Therefore, the ''cost'' of the unpaid or paid leave will be about $13.2 million per year (*i.e.*, $100 per certification times 132,000 certifications).

Although the Department recognizes that this provision will impose a direct cost on workers who do not have health insurance or have a high deductible, the Department expects a large portion of this cost is likely to be paid by the employee's health insurance, some of which is financed by employers. As noted in the PRIA, 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. *Id.* at 7952–53.

Thus the Department estimates that the revision to § 825.312(f) will result in annual costs of about $19.8 million to workers (*i.e.*, $6.6 million for additional visits to the health care providers plus $13.2 million in lost income or paid leave).

The Department used the same approach as in the PRIA to estimate the impact of these additional certifications on employers. *Id.* Based upon the assessment 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, the 132,000 fitness-for-duty certifications will result in about $2.4 million in additional costs for employers.

Although the net impact of the revisions to § 825.312 will be a cost of about $2.4 million for employers and $19.8 million for employees (§ 825.312(f)), the changes in § 825.312 will increase workplace safety by making sure that workers are healthy enough to return to work and do not pose a health or safety risk to themselves or others. Although many employers and employer organizations recognize that this provision will impose some additional cost on the workplace, they generally believe that the safety considerations outweigh the cost. However, data limitations inhibit the Department from quantifying the health and safety benefits of this provision for workers and employers.

[35] The 2000 Westat Report, Table 2.3, p. 2–5; and those that answered yes to Question A5B of Westat's employee questionnaire.

[36] For example, some workers will be able to visit their health care provider during the period that they are on FMLA leave solely to obtain the required fitness-for-duty certification.

Failure To Provide Medical Certification (§ 825.313)

Current § 825.311, renumbered as § 825.313 in the final rule, provides that 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. The Department proposed and adopted a clarification that would permit employers to ''deny'' FMLA leave until the medical certification is provided and added § 825.311(c) (renumbered § 825.313(c) in the final rule) which addressed the consequences to employees for failing to provide timely recertification. As discussed in the NPRM (*id.* at 7922) and in this preamble, these are not substantive changes to the current rule, but clarifications intended to ensure that both employees and employers understand the potential impact of a failure to provide certification in a timely manner. Although the Department received several comments on this clarification, as noted in the preamble discussion above, none of the comments disputed the Department's assessment. Therefore, the Department concludes that very few, if any, workers or employers will be impacted by this clarification.

Enforcement Mechanisms (§§ 825.400–825.404)

Only minor editorial changes were proposed to the enforcement mechanisms in §§ 825.400–825.404. The final rule adopts these changes. In addition, the final rule makes a conforming revision to § 825.400(c) to add that employees taking FMLA leave for the new military family leave entitlements under §§ 825.126 and 825.127 are entitled to actual monetary losses sustained as a direct result of an employer's violation of one or more of the provisions of the FMLA. The Department concludes that these changes will have no quantifiable impacts.

Recordkeeping (§ 825.500)

Current § 825.500 deals with the recordkeeping requirements. In addition to minor editorial changes, the Department proposed and adopted a revision to § 825.500(c)(4) to include the eligibility notice in § 825.300(b). The final rule also clarifies that employers must maintain copies of all written notices given to employees. These changes should have very little impact on either workers or employers.

Special Rules Applicable to Employees of Schools (§§ 825.600–825.604)

Only changes to the titles and other minor editorial changes were proposed to the special rules for schools in §§ 825.600–825.604. The final rule adopts these changes, which should have very little impact on either workers or employers.

In addition, the final rule makes conforming revisions to §§ 825.601 and 825.602 so that the special rules are applicable when an eligible instructional employee takes leave to care for a covered servicemember under § 825.127, as is specified by the statute. Since the eligible instructional employees have been taking FMLA leave under the special rules for more than a decade, these changes should have very little impact on either workers or employers.

Effect of Other Laws, Employer Practices, and Collective Bargaining Agreements on Employee Rights Under FMLA (§§ 825.700 Through 825.702)

The Department proposed and adopted several revisions to § 825.700 because they either dealt with the initial applicability of the standard or because they were invalidated by *Ragsdale*. Since these provisions have no effect, their deletion will have no economic impact on either workers or employers.

In the final rule, the Department also deleted two examples in § 825.701(a) regarding the interaction of the FMLA and state law because the examples may be incorrectly read to suggest that the Department is assuming responsibility for the administration or enforcement of state or local laws. Since the Department only administers and enforces the FMLA and not state or local laws, this deletion will have no impact on either workers or employers, except to avoid potential misunderstandings regarding the Department's enforcement role under the FMLA.

The Department proposed and adopted the addition of a new paragraph to § 825.702 (the interaction with federal and state anti-discrimination laws) to clarify the interaction between the FMLA and USERRA. Since this addition is not an expansion of FMLA rights through regulation but merely an instruction of how USERRA affects the rights of uniformed servicemembers to FMLA leave, it will have little impact on either workers or employers, except to avoid potential misunderstandings.

Similarly, the Department proposed and has adopted with modifications clarifications to the interaction between the FMLA and the ADA. This also is not an expansion of FMLA rights through regulation but merely interpretive guidance that will have little impact on either workers or employers, except to avoid potential misunderstandings.

Definitions (§ 825.800)

The Department proposed and adopted changes and clarifications to several terms in § 825.800 including ''continuing treatment,'' ''eligible employee,'' ''employee,'' ''health care provider,'' ''serious health condition,'' ''parent'' and ''son or daughter.'' In addition, due to the implementation of the NDAA provisions for military leave, the final rule makes other changes in the proposed definitions of the terms ''continuing treatment'' and ''serious health condition'' and adds new definitions for the terms ''active duty or call to active duty status,'' ''contingency operation,'' ''covered military member,'' ''covered servicemembers,'' ''parent of a covered servicemember,'' ''outpatient status,'' ''son or daughter on active duty or call to active duty,'' ''serious injury or illness'' in the case of a member of the Armed Forces, ''son or daughter of a covered servicemember'' and ''next of kin of a covered servicemember.'' The change or addition of these definitions will have little impact on either workers or employers, except to avoid potential misunderstandings.

Summary of Impacts

The Department estimates that the revisions will result in a total first year net costs of $327.7 million and annual reoccurring costs of $244.4 million for both workers and employers. Based upon a five year pay-off period and a real interest rate of 3.0 percent (OMB Circular A–4),[37] total annualized costs for the revisions for both workers and employers is $262.6 million. Based upon a five year pay-off period and a real interest rate of 7.0 percent, total annualized costs for the revisions for both workers and employers is $264.7 million. For employers, the largest cost is the $257.3 million in recurring costs related to the new military leave provisions (§§ 825.126 and 825.127). For workers, the largest cost is the $19.8 million in recurring costs associated with the additional fitness-for-duty certifications that may be required if a worker has used intermittent leave and a reasonable safety concern exists (§ 825.312(f)).

Table 3 presents a summary of the impacts discussed above.

[37] Available on the Internet at: *http://www.whitehouse.gov/omb/circulars/a004/a-4.html.*

TABLE 3—SUMMARY OF THE IMPACTS OF THE REVISIONS TO THE FMLA REGULATIONS

Provision	Cost to employers ($millions)	Cost to employees ($millions)
First Year Costs	$83.3	$0.0
§ 825.126	200.8	0.0
§ 825.127	56.5	0.0
§ 825.205	−9.6	9.6
§ 825.300(a)	2.8	0.0
§ 825.300(b)	−10.1	0.0
§ 825.300(c)	1.7	0.0
§ 825.300(d)	69.4	0.0
§§ 825.302–.304	−40.6	0.0
§§ 825.305–.307	−64.8	0.0
§ 825.309	1.3	0.0
§ 825.310	0.5	0.0
§ 825. 312(b)	0.0	4.7
§ 825.312(f)	2.4	19.8
Total First Year Costs	293.6	34.1
Total Reoccurring Costs	210.3	34.1

Source: U.S. Department of Labor.

Chapter 4: Feasibility of the Revised Regulation

This chapter discusses the feasibility of paying for the estimated $264.7 million in total annualized costs associated with the revisions based upon a 7.0 percent discount rate.

The annualized costs for employers is $230.6 million, or about $2.41 for each of the 95.8 million workers employed at establishments covered by Title I of the FMLA; and about $2.99 for each of the 77.1 million workers eligible to take FMLA leave; and about $32.48 for each of the 7.1 million workers who will take FMLA leave.[38] The $230.6 million in costs also represents less than 0.006 percent of the estimated $3.7 trillion in payroll costs for the establishments covered by Title I of the FMLA (CONSAD). Therefore, the Department has determined that the costs of the final rule do not represent a significant economic impact for most establishments covered by Title I of the FMLA.

While it is certainly possible that some establishments may have several employees who take military leave under new §§ 825.126 and 825.127, the associated $1,825 cost for each employee taking exigency leave under § 825.126 and $1,940 for each employee taking military caregiver leave under § 825.127 should not have a significant impact on otherwise financially healthy establishments. Based upon a fully loaded average hourly rate for production and nonsupervisory workers on private nonfarm payrolls of $24.60 (73 FR at 7950), and the assumption of an average 2,000 hour working year (*i.e.*, 8 hours per day × 5 days per week × 50 weeks per year), $1,940 would represent an increase of about 4 percent in the average annual cost of $49,500 for such employees.

The annualized costs for workers is $34.1 million, or about $0.36 for each of the 95.8 million workers employed at establishments covered by Title I of the FMLA; and about $0.44 for each of the 77.1 million workers eligible to take FMLA leave; and about $4.80 for each of the 7.1 million workers who will take FMLA leave. Therefore, the Department has determined that the costs of the final rule do not represent a significant economic impact of for most workers who take leave under Title I of the FMLA.

However, it is possible that some of the 44,000 workers who will need additional fitness-for-duty certifications under § 825.312(f) will incur significant impacts. Although the estimated $150 in lost wages plus health care provider office visits charges represents about 0.04 percent of the average annual $35,000 earnings of such employees, these employees may be required to obtain several fitness-for-duty certifications. At the extreme, if some employees without health insurance were required to obtain a fitness-for-duty certification each month, $1,800 (*i.e.*, $150 × 12) would represent over 5 percent of the average annual $35,000 earnings of such employees. In this example, these workers could be motivated to work with their employers to transfer to alternative positions that did not involve ''reasonable safety concerns.''

However, the Department expects a large portion of this cost is likely to be paid by the employee's health insurance, some of which is financed by employers. As noted in the PRIA, 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. *Id.* at 7952–53.

Chapter 5: Benefits Not Quantified

The Department anticipates that substantial but unquantifiable benefits will accrue from the proposed revisions to the FMLA regulations. First, associated with the addition of the provisions for military leave, the families of servicemembers will no longer have to worry about losing their jobs or health insurance due to absences to care for a covered seriously injured or ill servicemember or due to a qualifying exigency resulting from active duty or call to active duty in support of a contingency operation. Second, the clarifications to the regulations and the revisions to improve the communications between employers and employees should reduce the uncertainty and the worries about FMLA leave. Third, the revisions should reduce the costs of unforeseeable intermittent FMLA leave in high-impact, time-sensitive operations. And, finally, the revisions related to fitness-

[38] As noted above, 7.0 million workers took FMLA leaves, and the Department estimates that 139,000 additional workers will take FMLA leave under the military leave provisions of the NDAA, for a total of 7.1 million.

for-duty certifications should reduce presenteeism. Each of these benefits is discussed qualitatively below.

The Benefits of Military Leave

According to the comments submitted by several members of Congress ''[t]hese new provisions, which constitute the first expansion of the FMLA since its enactment 15 years ago, are designed to make it easier for workers with family in military service to balance their work and family lives during these particularly demanding times without the fear of losing their jobs * * *'' The inclusion of military leave provisions in the FMLA was overwhelmingly supported by employers and employees, as well as both their representatives.

• National Partnership for Women & Families/National Military Family Association stated ''[w]e strongly support the expansion of the FMLA and the use of FMLA leave by military families, and we believe that the leave provided by the expansion of the FMLA will be of great assistance to military families * * * we urge the Department to create regulations that are fair to employees and recognize and honor the sacrifice made by military servicemembers and their families * * * The expansion of FMLA leave for military families enjoys bipartisan support, and the regulations for this leave should not be controversial.''

• The National Postal Mail Handlers Union ''urges the Department to act promptly in issuing regulations to implement the newly enacted provisions allowing employees that have family members serving our nation to take time off in order to handle issues arising out of their family members' military service.''

• The National Military Family Association ''strongly urges the DOL to issue the regulations for the military expansions of the FMLA * * * We have heard from military families frustrated that they could not access leave—military families need access to the FMLA leave now.''

• The Southern Company Entities ''strongly support the legislative intent and effort of expanding the FMLA to cover certain events and aspects of military service of employees and their family members. We understand and agree with the need for employees to be absent from work in certain situations related to military service or in situations where they are needed to assist family members recovering from injuries sustained in their military service.''

• The National Business Group on Health stated ''[e]mployers recognize the importance of added flexibility and the need to support military families.''

• ''The NAM and our member companies are very supportive of the many men and women who serve in the Armed Forces, including the Reserves and the National Guard. Similarly, we understand the need for employees whose family members have been called to active duty to take time off from work in order to handle critical and pressing matters resulting from the servicemember's absence. We also understand employees' needs to care for a loved one injured during their service in the military. The NAM hopes that any new military FMLA regulations will recognize the current supportive environment in the workplace related to military service * * *''

• Waushara County (WI) stated ''[w]e have many guard (spouse) employees that are being called to active duty and the impact may be extensive. Specifics on how and when this leave is applicable will help to alleviate problems in the administration of the Act.''

• Many of the write-in campaigns for the NPRM voiced support for military leave. For example, many SHRM members stated ''I support the legislative intent of expanding the FMLA to cover these qualifying events'' and numerous individual workers stated ''I do support the provisions dealing with 'light duty' and military family leave * * *.''

These provisions should not only make it easier for workers with family in military service to balance their work and family lives without fear of losing their jobs but the knowledge that their family members have such leave available should also mitigate some of the burdens felt by servicemembers faced with serious illness or injury or deployment in support of contingency operations.

The Benefits From the Clarifications to the Regulations and the Revisions To Improve Communications

Many of the revisions were designed to clarify the requirements that the FMLA imposes on both employees and employers, and to improve the communication between the parties. As was noted in the Report on the RFI (72 FR at 35556–60 (June 28, 2007)), the knowledge that employees can take FMLA leave without fear of losing their jobs or health insurance has been critical in getting them through difficult times. ''[I]t is easy to lose perspective about the overall value of the workplace protections provided by the Act. That value is best shown in the comments submitted by individual employees and, in some instances their employers or representatives.'' *Id.*

Employees will benefit from better communications resulting from the changes because it allows them to better understand their rights and responsibilities under the FMLA.

• ''As a cancer survivor myself, I cannot imagine how much more difficult those days of treatments and frequent doctor appointments would've been without FMLA.'' *Id.*

• ''I was out of work for a short period of time due to a serious medical condition that was treatable. FMLA gives the employee the ability to tend to these concerns with their full attention, to recuperate without sacrificing their career [or] their livelihood.'' *Id.*

• ''FMLA saved my job and I also believe saved my life, and to this day gives me a sense of security against any discipline or termination based on my legitimate medical needs.'' *Id.*

• ''Knowing that I was protected meant I didn't have to choose between my Father's health and my job.'' *Id.*

• ''A Cingular employee with a good work record has Lupus which causes periodic flare-ups that prevent her from working and require weekly therapy and regular doctor visits. FMLA has allowed her to remain stress-free * * * because she does not need to worry about losing her job.'' *Id.*

• ''[A]n employee said she was '[s]o thankful when my employer informed me of this law because it gave my mom peace of mind knowing that I would be available for her when she needed me.' '' *Id.*

• ''I was secure in the knowledge that I could come right back to my job, and I developed a keen sense of loyalty to my employer which has more than once prevented me from looking for work elsewhere.'' (72 FR 35559).

''The Department received many comments [to the RFI] emphasizing the positive impact the FMLA has on employee morale and how it increases worker retention and lowers turnover costs. By reducing employee turnover, some commenters argued that the FMLA reduces employer costs.'' *Id.* at 35629.

Employers will also benefit from better communications resulting from the changes to §§ 825.302—825.304 because they will allow employers to staff their operations more efficiently and thereby reduce costs.

• Southwest Airways noted in comments to the RFI that the Department's current ''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.'' *Id.* at 35576.

• NAM stated ''[a]s currently interpreted by DOL, the FMLA has become the single largest source of uncontrolled absences and, thus, the single largest source of all the costs those absences create: Missed deadlines, late shipments, lost business, temporary help, and over-worked staff.'' *Id.*

• The Chamber stated in its comments to the NPRM that the ''[l]ack of advance notice for unscheduled absences is one of the biggest disruptions employers point to as an unintended consequence of the current regulations.''

• The University of Minnesota noted ''[d]ealing with such situations is extremely difficult. Supervisors do not know if the employee will come in to work on any given day. They do not know if the employee will work an entire shift. Employees will simply notify their supervisors, in many cases after the fact, that they have experienced symptoms and cannot come in to work, or must leave work early. A comment by a supervisor regarding a performance issue may result in the employee excusing himself/herself for the rest of the day. Without proper notice, a supervisor cannot make plans for a replacement * * * Nonetheless, the current statutory and regulatory provisions provide employers with few options.'' 72 FR at 35579.

• SHRM also noted in their comments to the NPRM that the need for standard call-in procedures because without them ''employers do not have enough time to adequately staff for the employee absences and still run their operations if the co-worker is allowed to depart from work. In other cases, the co-worker must bear the burden of performing their own job and that of the employee on FMLA leave because of the lack of notice provided.''

The Benefits in the High-Impact, Time-Sensitive Operations

As the Department noted in the PRIA, the lack of employee notice is especially difficult for employers with 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 * * * 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 * * *.

* * * 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 * * * 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.'' 73 FR at 7953–54.

The Benefits of Reduced Presenteeism

Revisions to the fitness-for-duty requirements should help employers address the growing problem of presenteeism. According to a survey conducted by Harris Interactive for CCH ''[t]he problem of presenteeism—when employees come to work even though they are ill and pose problems of contagion and lower productivity—is an emerging area of concern for organizations. Nearly half (48 percent) of employers surveyed reported that presenteeism is a problem in their organizations, up over 20 percent from the 39 percent who saw it as a problem last year * * * While the direct hit to the bottom line isn't immediately evident with presenteeism, the hidden, indirect costs are very high * * * When someone doesn't feel well, they are simply not as productive, nor is the quality of their work as high * * * Then, there is the added problem of spreading illnesses to other employees who in turn either call in sick, or come in sick * * *.''[39]

Presenteeism was discussed in the Report on the RFI. ''According to the Center for Worklife Law, 'The cost of lost productivity due to presenteeism is significantly greater than the cost of lost productivity due to absenteeism. The total annual cost of lost productivity is $250 billion. Presenteeism accounts for $180 billion or 72% of that total * * * Although many commenters [to the RFI] cited the overall costs of presenteeism and asserted that FMLA has some positive impact on limiting those costs, no one attempted to quantify the marginal effect or economic impact that enactment of the FMLA had on the issue. However, the lack of a quantitative estimate does not mean that the FMLA does not have an impact on presenteeism.'' 72 FR at 35628–29.

Regulatory Flexibility Act

The Regulatory Flexibility Act requires that agencies prepare a regulatory flexibility analyses for final 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 (including workers who are jointly employed). 29 U.S.C. 2611(4). In addition, the FMLA excludes employees from eligibility for FMLA leave if the total number of employees, including those jointly 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 examined the impact of the final rule on all firms covered under the FMLA, including those with 50 to 500 employees, and estimated the net impact of the changes would increase the overall costs for all firms, both large and small because of the new military leave provisions of the NDAA. Most small businesses (establishments), 89.4 percent, are excluded from FMLA coverage by statute.[40] An estimated 6.3

[39] *http://www.cch.com/Press/news/2005/200510121h.asp.*

[40] However, if an employer has 15 workers and jointly employs another 40 workers with a

Continued

percent of establishments employing less than 50 employees are covered by the Act because the entities employ at least 50 employees within 75 miles of the worksite. 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 a small percentage—10.6%) of small employers.[41]

The annualized costs for employers are $230.6 million based upon a 7.0 percent discount rate, which comes to about $210 for each of the estimated 1.1 million establishments and about $32.48 for each of the 7.1 million workers who will take FMLA leave. Clearly, costs of this magnitude do not represent a significant impact for most of the establishments, even the smaller businesses, covered by Title I of the FMLA.

The major cost increases for all businesses, including the smaller businesses result from the new military leave provisions in §§ 825.126 and 825.127. It is certainly possible that some small businesses in specific locations may have several employees who take military leave and the additional costs ($1,825 for each employee taking qualifying exigency leave and $1,940 for each employee taking military caregiver leave) associated with those leaves are not trivial. Based upon a fully loaded average hourly rate for production and nonsupervisory workers on private nonfarm payrolls of $24.60 (*id.* at 7950), and the assumption of an average 2,000 hour working year (*i.e.*, 8 hours per day × 5 days per week × 50 weeks per year), $1,940 would only represent an increase of about 4 percent in the average annual cost of $49,500 for such employees.

However, many of the provisions in the final rule will decrease the costs for all businesses, including smaller businesses. Some of these changes are discussed below.

• Increments of Leave for Intermittent or Reduced Schedule Leave (§ 825.205)—The final rule includes an exception that permits employers to designate the entire shift as FMLA leave and count it against the employee's FMLA leave entitlement in situations where it is not possible for an employee using intermittent leave or working a reduced leave schedule to commence work midway through a shift. Since smaller employers are less likely to have an alternative position for workers who miss their normal shift than larger employers, this change is likely to benefit smaller employers more.

• Employer Notice Requirements (§ 825.300)—The final rule increases the amount of time employers have to notify the employee of eligibility of FMLA leave and the designation of FMLA leave. Smaller employers, who typically do not have dedicated HR staff, should benefit most from this additional time.

• Authentication and Clarification of the Medical Certification (§ 825.307)—The final rule permits employers to contact the employee's health care provider directly, rather than through a third-party health care provider that represents the employer. Smaller employers, who typically do not either contract with third-party health care providers or have health care providers on staff, should benefit most from this change.

The Chief Counsel for Advocacy of the Small Business Administration (SBA) submitted comments in response to the NPRM that recommended: (1) That DOL finalize additional reforms to minimize the costs of the rulemaking on small entities; (2) narrow the definition of serious health condition in proposed § 825.114; (3) increase the minimum increment of intermittent leave in proposed § 825.203 to half a day or four hours; (4) clarify the employee notice requirements in proposed § 825.302; (5) provide further guidance on medical certifications in proposed §§ 825.305–.308; and (6) complete a Section 610 Periodic Review of the FMLA regulations. As discussed in the preamble, after carefully considering the comments the Department has modified a number of proposed sections in the final rule that reduces the cost of the final rule on all businesses, including small businesses, and clarifies the employer and employee notice requirements. The Department has also provided additional guidance on the medical certification provisions in the final rule. However, for the reasons discussed in the preamble the Department has not narrowed the definition of serious health condition, nor increased the minimum increment of intermittent leave as recommended by SBA. In response to the SBA's Section 610 review recommendation, the Department notes that during this rulemaking it did consider whether the FMLA rule should be continued without change, or should be amended or rescinded, consistent with the stated objectives of the statute, to minimize any significant economic impact of the rules upon a substantial number of small entities. Specifically, the Department considered the following factors during this rulemaking: (1) The continued need for the rule; (2) the nature of complaints or comments received concerning the rule from the public; (3) the complexity of the rule; (4) the extent to which the rule overlaps, duplicates, or conflicts with other Federal rules, and, to the extent feasible, with State and local government rules; and (5) the length of time since the rule was published in 1995, and the degree to which technology, economic conditions, and case law has changed. However, because the new military leave provisions could impose a cost on some small entities, the Department is committed to conducting a complete Section 610 review of the FMLA at the appropriate time.

Consequently, the Department has certified to the Chief Counsel for Advocacy of the Small Business Administration that this final rule will not have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, and therefore, a regulatory flexibility analysis is not required for this rule.

Executive Order 13132 (Federalism)

This rule does not have federalism implications as outlined in Executive Order 13132 regarding federalism. The 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 rule was reviewed under the terms of Executive Order 13175 and determined not to have ''tribal implications.'' The 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 was prepared.

Effects on Families

The final rule was assessed as required by section 654 of the Treasury and General Government Appropriations Act, 1999, and the Department has determined that it will not adversely affect the well-being of a significant number of families. As discussed in the preamble, the Department expects a large portion of the cost of the final rule to be paid by the employee's health insurance, some

temporary employment agency, then the employer would be covered by the FMLA.

[41] The Department of Labor based these estimates on the Westat 2000 establishment survey data.

of which is financed by employers. As previously noted, 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. *Id.* at 7952–53.

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 rule is not subject to Executive Order 13045 because, although the 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 does not concern environmental health or safety risks that may disproportionately affect children.

Environmental Impact Assessment

The Department reviewed this rule 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, and found that the rule will not have a significant impact on the quality of the human environment. Thus, no environmental assessment or environmental impact statement was prepared.

Executive Order 13211, Energy Supply

This 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 rule 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 rule was drafted and reviewed in accordance with Executive Order 12988 and will not unduly burden the federal court system. The 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 4th day of November 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, Title 29, Chapter V of the Code of Federal Regulations is amended revising Part 825 to read 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, next of kin of a covered servicemember, adoption, foster care, son or daughter on active duty or call to active duty status, son or daughter of a covered servicemember, and parent of a covered servicemember.
825.123 Unable to perform the functions of the position.
825.124 Needed to care for a family member or covered servicemember.
825.125 Definition of health care provider.
825.126 Leave because of a qualifying exigency.
825.127 Leave to care for a covered servicemember with a serious injury or illness.

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.
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825.209 Maintenance of employee benefits.
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825.212 Employee failure to pay health plan premium payments.
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825.214 Employee right to reinstatement.
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825.217 Key employee, general rule.
825.218 Substantial and grievous economic injury.
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825.220 Protection for employees who request leave or otherwise assert FMLA rights.

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825.301 Designation of FMLA leave.
825.302 Employee notice requirements for foreseeable FMLA leave.
825.303 Employee notice requirements for unforeseeable FMLA leave.
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825.305 Certification, general rule.
825.306 Content of medical certification for leave taken because of an employee's own serious health condition or the serious health condition of a family member.
825.307 Authentication and clarification of medical certification for leave taken because of an employee's own serious health condition or the serious health condition of a family member; second and third opinions.
825.308 Recertifications for leave taken because of an employee's own serious health condition or the serious health condition of a family member.
825.309 Certification for leave taken because of a qualifying exigency.
825.310 Certification for leave taken to care for a covered servicemember (military caregiver leave).
825.311 Intent to return to work.

825.312 Fitness-for-duty certification.
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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.
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Subpart E—Record-Keeping Requirements

825.500 Record-keeping 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 (Forms WH–380E & WH–380F)

Appendix C to Part 825—Notice to Employees Of Rights Under FMLA (WH Publication 1420)

Appendix D to Part 825—Notice of Eligibility and Rights & Responsibilities (Form WH–381)

Appendix E to Part 825—Designation Notice to Employee of FMLA Leave (Form WH–382)

Appendix F to Part 825—[Reserved]

Appendix G to Part 825—Certification of Qualifying Exigency for Military Family Leave (Form WH–384)

Appendix H to Part 825—Certification for Serious Injury or Illness of Covered Servicemember for Military Family Leave (Form WH–385)

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, as amended, (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 (*see* § 825.200(b)) 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, because the employee's own serious health condition makes the employee unable to perform the functions of his or her job, or because of any qualifying exigency arising out of the fact that the employee's spouse, son, daughter, or parent is a covered military member on active duty (or has been notified of an impending call or order to active duty) in support of a contingency operation. In addition, ''eligible'' employees of a covered employer may take job-protected, unpaid leave, or substitute appropriate paid leave if the employee has earned or accrued it, for up to a total of 26 workweeks in a ''single 12-month period'' to care for a covered servicemember with a serious injury or illness (*see* § 825.127(c)). In certain cases, FMLA 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, the serious injury or illness of a covered servicemember, 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 generally has a right to advance notice from the employee. In addition, the employer may require an employee to submit certification to substantiate that the leave is due to the serious health condition of the employee or the employee's covered family member, due to the serious injury or illness of a covered servicemember, or because of a qualifying exigency. 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* §§ 825.312 and 825.313). 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, for the care of a child, spouse, or parent who has a serious health condition, for the care of a covered servicemember with a serious injury or illness, or because of a qualifying exigency arising out of the fact that the employee's spouse, son, daughter, or parent is on active duty or call to active duty status in support of a contingency operation. 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 Fourteenth Amendment in minimizing the potential for employment discrimination on the basis of sex, while promoting equal employment opportunity for men and women.

(b) The 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), 29 U.S.C. 203(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, 2008, subsequently dropped below 50

employees before the end of 2008 and continued to employ fewer than 50 employees in all workweeks throughout calendar year 2009, the employer would continue to be covered throughout calendar year 2009 because it met the coverage criteria for 20 workweeks of the preceding (*i.e.*, 2008) 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 placement agency supplies employees to a second employer.

(2) A type of company that is often called a ''Professional Employer Organization'' (PEO) contracts with client employers to perform administrative functions such as payroll, benefits, regulatory paperwork, and updating employment policies. The determination of whether a PEO is a joint employer also turns on the economic realities of the situation and must be based upon all the facts and circumstances. A PEO does not enter into a joint employment relationship with the employees of its client companies when it merely performs 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 client's employees, or benefits from the work that the employees perform, such rights may lead to a determination that the PEO would be a joint employer with the client employer, depending upon all the facts and circumstances.

(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 placement agencies, for example, the placement agency most commonly would be the primary employer. Where a PEO is a joint employer, the client employer 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 temporary placement 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. In those cases in which a PEO is determined to be a joint employer of a client employer's employees, the client employer would only be required to count employees of the PEO (or employees of other clients of the PEO) if the client employer jointly employed those employees.

(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 placement 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 jointly employed 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 work force;

(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. Whether two agencies of the same State or local government constitute the same public agency can only be determined on a case-by-case basis. One factor that would support a conclusion that two agencies are separate is whether they are treated separately for statistical purposes in the Census of Governments issued by the Bureau of the Census, U.S. Department of Commerce.

(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, or online at *http://www.census.gov/govs/www/index.html*. 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 this part 825 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 this part 825 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 this part 825.

(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 seven 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 seven 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), 38 U.S.C. 4301, *et seq.*; 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 seven 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) Pursuant to USERRA, 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 or 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 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);

(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);

(5) Because of any qualifying exigency arising out of the fact that the employee's spouse, son, daughter, or parent is a covered military member on active duty (or has been notified of an impending call or order to active duty) in support of a contingency operation (*see* §§ 825.122 and 825.126); and

(6) To care for a covered servicemember with a serious injury or illness if the employee is the spouse, son, daughter, parent, or next of kin of the servicemember (*see* §§ 825.122 and 825.127).

(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 therefore, 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 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, full 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 30 days of the first day of incapacity, 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.

(3) The requirement in paragraphs (a)(1) and (2) of this section for treatment by a health care provider means an in-person visit to a health care provider. The first (or only) in-person treatment visit must take place within seven days of the first day of incapacity.

(4) Whether additional treatment visits or a regimen of continuing treatment is necessary within the 30-day period shall be determined by the health care provider.

(5) The term ''extenuating circumstances'' in paragraph (a)(1) of this section means circumstances beyond the employee's control that

prevent the follow-up visit from occurring as planned by the health care provider. Whether a given set of circumstances are extenuating depends on the facts. For example, extenuating circumstances exist if a health care provider determines that a second in-person visit is needed within the 30-day period, but the health care provider does not have any available appointments during that time period.

(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, full calendar days in the absence of medical intervention or treatment, such as cancer (chemotherapy, radiation, *etc.*), severe arthritis (physical therapy), or 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, full 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 FMLA leave for a birth expires at the end of the 12-month period beginning on the date of the birth. If state law allows, or the employer permits, bonding leave to be taken beyond this period, such leave will not qualify as FMLA leave. *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 husband is entitled to FMLA leave if needed to care for his pregnant spouse who is incapacitated or if needed to care for her during her 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 825.122(c) are met. Thus, a husband and wife may each take 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 through 825.205 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. If state law allows, or the employer permits, leave for adoption or foster care to be taken beyond this period, such leave will not qualify as FMLA leave. *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 825.122(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, next of kin of a covered servicemember, adoption, foster care, son or daughter on active duty or call to active duty status, son or daughter of a covered servicemember, and parent of a covered servicemember.

(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.* For purposes of FMLA leave taken for birth or adoption, or to care for a family member with a serious health condition, 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) *Next of kin of a covered servicemember.* ''Next of kin of a covered servicemember'' means the nearest blood relative other than the covered servicemember's spouse, parent, son, or daughter, in the following order of priority: Blood relatives who have been granted legal custody of the covered servicemember by court decree or statutory provisions, brothers and sisters, grandparents, aunts and uncles, and first cousins, unless the covered servicemember has specifically designated in writing another blood relative as his or her nearest blood relative for purposes of military caregiver leave under the FMLA. When no such designation is made, and there are multiple family members with the same level of relationship to the covered servicemember, all such family members shall be considered the covered servicemember's next of kin and may take FMLA leave to provide care to the covered servicemember, either consecutively or simultaneously. When such designation has been made, the designated individual shall be deemed to be the covered servicemember's only next of kin. *See* § 825.127(b)(3).

(e) *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.

(f) *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.

(g) *Son or daughter on active duty or call to active duty status.* ''Son or daughter on active duty or call to active duty status'' means the employee's biological, adopted, or foster child, stepchild, legal ward, or a child for whom the employee stood in loco parentis, who is on active duty or call to active duty status, and who is of any age. *See* § 825.126(b)(1).

(h) *Son or daughter of a covered servicemember.* ''Son or daughter of a covered servicemember'' means the servicemember's biological, adopted, or foster child, stepchild, legal ward, or a child for whom the servicemember stood in loco parentis, and who is of any age. *See* § 825.127(b)(1).

(i) *Parent of a covered servicemember.* ''Parent of a covered servicemember'' means a covered servicemember's biological, adoptive, step or foster father or mother, or any other individual who stood in loco parentis to the covered servicemember. This term does not include parents ''in law.'' *See* § 825.127(b)(2).

(j) *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 simple statement from the employee, or a child's birth certificate, a court document, *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), as amended, 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. A sufficient medical certification must specify what functions of the employee's position the employee is unable to perform so that the employer can then determine whether the employee is unable to perform one or more essential functions of the employee's position. 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. *See* § 825.306.

§ 825.124 Needed to care for a family member or covered servicemember.

(a) The medical certification provision that an employee is ''needed to care for'' a family member or covered servicemember 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. 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 substitute for others who normally care for the family member or covered servicemember, 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 family member or covered servicemember.

(c) An employee's intermittent leave or a reduced leave schedule necessary to care for a family member or covered servicemember includes not only a situation where the condition of the family member or covered servicemember 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.

§ 825.126 Leave because of a qualifying exigency.

(a) Eligible employees may take FMLA leave while the employee's spouse, son, daughter, or parent (the ''covered military member'') is on active duty or call to active duty status as defined in § 825.126(b)(2) for one or more of the following qualifying exigencies:

(1) *Short-notice deployment.*

(i) To address any issue that arises from the fact that a covered military member is notified of an impending call or order to active duty in support of a contingency operation seven or less calendar days prior to the date of deployment;

(ii) Leave taken for this purpose can be used for a period of seven calendar days beginning on the date a covered military member is notified of an impending call or order to active duty in support of a contingency operation;

(2) *Military events and related activities.*

(i) To attend any official ceremony, program, or event sponsored by the military that is related to the active duty or call to active duty status of a covered military member; and

(ii) To attend family support or assistance programs and informational briefings sponsored or promoted by the military, military service organizations, or the American Red Cross that are related to the active duty or call to active duty status of a covered military member;

(3) *Childcare and school activities.*

(i) To arrange for alternative childcare when the active duty or call to active duty status of a covered military member necessitates a change in the existing childcare arrangement for a biological, adopted, or foster child, a stepchild, or a legal ward of a covered military member, or a child for whom a covered military member stands 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;

(ii) To provide childcare on an urgent, immediate need basis (but not on a routine, regular, or everyday basis) when the need to provide such care arises from the active duty or call to active duty status of a covered military member for a biological, adopted, or foster child, a stepchild, or a legal ward of a covered military member, or a child for whom a covered military member stands 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;

(iii) To enroll in or transfer to a new school or day care facility a biological, adopted, or foster child, a stepchild, or a legal ward of the covered military member, or a child for whom the covered military member stands 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, when enrollment or transfer is necessitated by the active duty or call to active duty status of a covered military member; and

(iv) To attend meetings with staff at a school or a daycare facility, such as meetings with school officials regarding disciplinary measures, parent-teacher conferences, or meetings with school counselors, for a biological, adopted, or foster child, a stepchild, or a legal ward of the covered military member, or a child for whom the covered military member stands 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, when such meetings are necessary due to circumstances arising from the active duty or call to active duty status of a covered military member;

(4) *Financial and legal arrangements.*

(i) To make or update financial or legal arrangements to address the covered military member's absence while on active duty or call to active duty status, such as preparing and executing financial and healthcare powers of attorney, transferring bank account signature authority, enrolling in the Defense Enrollment Eligibility Reporting System (DEERS), obtaining military identification cards, or preparing or updating a will or living trust; and

(ii) To act as the covered military member's representative before a federal, state, or local agency for purposes of obtaining, arranging, or appealing military service benefits while the covered military member is on active duty or call to active duty status, and for a period of 90 days following the termination of the covered military member's active duty status;

(5) *Counseling.* To attend counseling provided by someone other than a health care provider for oneself, for the covered military member, or for the biological, adopted, or foster child, a stepchild, or a legal ward of the covered military member, or a child for whom the covered military member stands 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, provided that the need for counseling arises from the active duty or call to active duty status of a covered military member;

(6) *Rest and recuperation.*

(i) To spend time with a covered military member who is on short-term, temporary, rest and recuperation leave during the period of deployment;

(ii) Eligible employees may take up to five days of leave for each instance of rest and recuperation;

(7) *Post-deployment activities.*

(i) To attend arrival ceremonies, reintegration briefings and events, and any other official ceremony or program sponsored by the military for a period of 90 days following the termination of the covered military member's active duty status; and

(ii) To address issues that arise from the death of a covered military member while on active duty status, such as meeting and recovering the body of the covered military member and making funeral arrangements;

(8) *Additional activities.* To address other events which arise out of the covered military member's active duty or call to active duty status provided that the employer and employee agree that such leave shall qualify as an exigency, and agree to both the timing and duration of such leave.

(b) A ''covered military member'' means the employee's spouse, son, daughter, or parent on active duty or call to active duty status.

(1) A ''son or daughter on active duty or call to active duty status'' means the employee's biological, adopted, or foster child, stepchild, legal ward, or a child for whom the employee stood in loco parentis, who is on active duty or call to active duty status, and who is of any age.

(2) ''Active duty or call to active duty status'' means duty under a call or order to active duty (or notification of an impending call or order to active duty) in support of a contingency operation pursuant to: Section 688 of Title 10 of the United States Code, which authorizes ordering to active duty retired members of the Regular Armed Forces and members of the retired Reserve who retired after completing at least 20 years of active service; Section 12301(a) of Title 10 of the United States Code, which authorizes ordering all reserve component members to active duty in the case of war or national emergency; Section 12302 of Title 10 of the United States Code, which authorizes ordering any unit or unassigned member of the Ready Reserve to active duty; Section 12304 of Title 10 of the United States Code, which authorizes ordering any unit or unassigned member of the Selected Reserve and certain members of the Individual Ready Reserve to active duty; Section 12305 of Title 10 of the United States Code, which authorizes the suspension of promotion, retirement or separation rules for certain Reserve components; Section 12406 of Title 10 of the United States Code, which authorizes calling the National Guard into federal service in certain circumstances; chapter 15 of Title 10 of the United States Code, which authorizes calling the National Guard and state military into federal service in the case of insurrections and national emergencies; or any other provision of law during a war or during a national emergency declared by the President or Congress so long as it is in support of a contingency operation.

(i) Employees are eligible to take FMLA leave because of a qualifying exigency when the covered military member is on active duty or call to active duty status in support of a contingency operation pursuant to one of the provisions of law identified in paragraph (b)(2) of this section as either a member of the reserve components (Army National Guard of the United States, Army Reserve, Navy Reserve, Marine Corps Reserve, Air National Guard of the United States, Air Force Reserve and Coast Guard Reserve), or a retired member of the Regular Armed Forces or Reserve. An employee whose family member is on active duty or call to active duty status in support of a contingency operation as a member of the Regular Armed Forces is not eligible to take leave because of a qualifying exigency.

(ii) A call to active duty for purposes of leave taken because of a qualifying exigency refers to a Federal call to active duty. State calls to active duty are not covered unless under order of the President of the United States pursuant to one of the provisions of law identified in paragraph (b)(2) of this section in support of a contingency operation.

(3) The active duty orders of a covered military member will generally specify if the servicemember is serving in support of a contingency operation by citation to the relevant section of Title 10 of the United States Code and/or by reference to the specific name of the contingency operation. A military operation qualifies as a contingency operation if it:

(i) is designated by the Secretary of Defense as an operation in which members of the armed forces are or may become involved in military actions, operations, or hostilities against an enemy of the United States or against an opposing military force; or

(ii) results in the call or order to, or retention on, active duty of members of the uniformed services under section 688, 12301(a), 12302, 12304, 12305, or 12406 of Title 10 of the United States Code, chapter 15 of Title 10 of the United States Code, or any other provision of law during a war or during a national emergency declared by the President or Congress. 10 U.S.C. 101(a)(13).

§ 825.127 Leave to care for a covered servicemember with a serious injury or illness.

(a) Eligible employees are entitled to FMLA leave to care for a current member of the Armed Forces, including a member of the National Guard or Reserves, or a member of the Armed Forces, the National Guard or Reserves who is on the temporary disability retired list, who has a serious injury or illness incurred in the line of duty on active duty for which he or she is

undergoing medical treatment, recuperation, or therapy; or otherwise in outpatient status; or otherwise on the temporary disability retired list. Eligible employees may not take leave under this provision to care for former members of the Armed Forces, former members of the National Guard and Reserves, and members on the permanent disability retired list.

(1) A ''serious injury or illness'' means an injury or illness incurred by a covered servicemember in the line of duty on active duty that may render the servicemember medically unfit to perform the duties of his or her office, grade, rank or rating.

(2) ''Outpatient status,'' with respect to a covered servicemember, means the status of a member of the Armed Forces assigned to either a military medical treatment facility as an outpatient; or a unit established for the purpose of providing command and control of members of the Armed Forces receiving medical care as outpatients.

(b) In order to care for a covered servicemember, an eligible employee must be the spouse, son, daughter, or parent, or next of kin of a covered servicemember.

(1) A ''son or daughter of a covered servicemember'' means the covered servicemember's biological, adopted, or foster child, stepchild, legal ward, or a child for whom the covered servicemember stood in loco parentis, and who is of any age.

(2) A ''parent of a covered servicemember'' means a covered servicemember's biological, adoptive, step or foster father or mother, or any other individual who stood in loco parentis to the covered servicemember. This term does not include parents ''in law.''

(3) The ''next of kin of a covered servicemember'' is the nearest blood relative, other than the covered servicemember's spouse, parent, son, or daughter, in the following order of priority: blood relatives who have been granted legal custody of the servicemember by court decree or statutory provisions, brothers and sisters, grandparents, aunts and uncles, and first cousins, unless the covered servicemember has specifically designated in writing another blood relative as his or her nearest blood relative for purposes of military caregiver leave under the FMLA. When no such designation is made, and there are multiple family members with the same level of relationship to the covered servicemember, all such family members shall be considered the covered servicemember's next of kin and may take FMLA leave to provide care to the covered servicemember, either consecutively or simultaneously. When such designation has been made, the designated individual shall be deemed to be the covered servicemember's only next of kin. For example, if a covered servicemember has three siblings and has not designated a blood relative to provide care, all three siblings would be considered the covered servicemember's next of kin. Alternatively, where a covered servicemember has a sibling(s) and designates a cousin as his or her next of kin for FMLA purposes, then only the designated cousin is eligible as the covered servicemember's next of kin. An employer is permitted to require an employee to provide confirmation of covered family relationship to the covered servicemember pursuant to § 825.122(j).

(c) An eligible employee is entitled to 26 workweeks of leave to care for a covered servicemember with a serious injury or illness during a ''single 12-month period.''

(1) The ''single 12-month period'' described in paragraph (c) of this section begins on the first day the eligible employee takes FMLA leave to care for a covered servicemember and ends 12 months after that date, regardless of the method used by the employer to determine the employee's 12 workweeks of leave entitlement for other FMLA-qualifying reasons. If an eligible employee does not take all of his or her 26 workweeks of leave entitlement to care for a covered servicemember during this ''single 12-month period,'' the remaining part of his or her 26 workweeks of leave entitlement to care for the covered servicemember is forfeited.

(2) The leave entitlement described in paragraph (c) of this section is to be applied on a per-covered-servicemember, per-injury basis such that an eligible employee may be entitled to take more than one period of 26 workweeks of leave if the leave is to care for different covered servicemembers or to care for the same servicemember with a subsequent serious injury or illness, except that no more than 26 workweeks of leave may be taken within any ''single 12-month period.'' An eligible employee may take more than one period of 26 workweeks of leave to care for a covered servicemember with more than one serious injury or illness only when the serious injury or illness is a subsequent serious injury or illness. When an eligible employee takes leave to care for more than one covered servicemember or for a subsequent serious injury or illness of the same covered servicemember, and the ''single 12-month periods'' corresponding to the different military caregiver leave entitlements overlap, the employee is limited to taking no more than 26 workweeks of leave in each ''single 12-month period.''

(3) An eligible employee is entitled to a combined total of 26 workweeks of leave for any FMLA-qualifying reason during the ''single 12-month period'' described in paragraph (c) of this section, provided that the employee is entitled to no more than 12 weeks of leave for one or more of the following: because of the birth of a son or daughter of the employee and in order to care for such son or daughter; because of the placement of a son or daughter with the employee for adoption or foster care; in order to care for the spouse, son, daughter, or parent with a serious health condition; because of the employee's own serious health condition; or because of a qualifying exigency. Thus, for example, an eligible employee may, during the ''single 12-month period,'' take 16 weeks of FMLA leave to care for a covered servicemember and 10 weeks of FMLA leave to care for a newborn child. However, the employee may not take more than 12 weeks of FMLA leave to care for the newborn child during the ''single 12-month period,'' even if the employee takes fewer than 14 weeks of FMLA leave to care for a covered servicemember.

(4) In all circumstances, including for leave taken to care for a covered servicemember, the employer is responsible for designating leave, paid or unpaid, as FMLA-qualifying, and for giving notice of the designation to the employee as provided in § 825.300. In the case of leave that qualifies as both leave to care for a covered servicemember and leave to care for a family member with a serious health condition during the ''single 12-month period'' described in paragraph (c) of this section, the employer must designate such leave as leave to care for a covered servicemember in the first instance. Leave that qualifies as both leave to care for a covered servicemember and leave taken to care for a family member with a serious health condition during the ''single 12-month period'' described in paragraph (c) of this section must not be designated and counted as both leave to care for a covered servicemember and leave to care for a family member with a serious health condition. As is the case with leave taken for other qualifying reasons, employers may retroactively designate leave as leave to care for a covered servicemember pursuant to § 825.301(d).

(d) 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 26 workweeks of leave during the ''single 12-month period'' described in paragraph (c) of this section 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, to care for the employee's parent with a serious health condition, or to care for a covered servicemember with a serious injury or illness. 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 26 workweeks of FMLA leave.

Subpart B—Employee Leave Entitlements Under the Family and Medical Leave Act

§ 825.200 Amount of leave.

(a) Except in the case of leave to care for a covered servicemember with a serious injury or illness, 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;

(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; and,

(5) Because of any qualifying exigency arising out of the fact that the employee's spouse, son, daughter, or parent is a covered military member on active duty (or has been notified of an impending call or order to active duty) in support of a contingency operation.

(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 described in paragraph (a) of this section 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 under paragraph (a) begins; or,

(4) A ''rolling'' 12-month period measured backward from the date an employee uses any FMLA leave as described in paragraph (a).

(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, 2008, four weeks beginning June 1, 2008, and four weeks beginning December 1, 2008, the employee would not be entitled to any additional leave until February 1, 2009. However, beginning on February 1, 2009, the employee would again be eligible to take FMLA leave, recouping the right to take the leave in the same manner and amounts in which it was used in the previous year. Thus, the employee would recoup (and be entitled to use) one additional day of FMLA leave each day for four weeks, commencing February 1, 2009. The employee would also begin to recoup additional days beginning on June 1, 2009, and additional days beginning on December 1, 2009. Accordingly, employers using the rolling 12-month period may need to calculate whether the employee is entitled to take FMLA leave each time that leave is requested, and employees taking FMLA leave on such a basis may fall in and out of FMLA protection based on their FMLA usage in the prior 12 months. For example, in the example above, if the employee needs six weeks of leave for a serious health condition commencing February 1, 2009, only the first four weeks of the leave would be FMLA-protected.

(d)(1) Employers will be allowed to choose any one of the alternatives in paragraph (b) of this section for the leave entitlements described in paragraph (a) 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 the leave entitlements described in paragraph (a) 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 for the leave entitlements described in paragraph (a), 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) An eligible employee's FMLA leave entitlement is limited to a total of 26 workweeks of leave during a ''single 12-month period'' to care for a covered servicemember with a serious injury or illness. An employer shall determine the ''single 12-month period'' in which the 26-weeks-of-leave-entitlement

described in this paragraph occurs using the 12-month period measured forward from the date an employee's first FMLA leave to care for the covered servicemember begins. *See* § 825.127(d)(1).

(g) During the ''single 12-month period'' described in paragraph (f), an eligible employee's FMLA leave entitlement is limited to a combined total of 26 workweeks of FMLA leave for any qualifying reason. *See* § 825.127(d)(2).

(h) 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. *See also* § 825.127(d).

§ 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 taken because of one's own serious health condition, to care for a parent, son, or daughter with a serious health condition, or to care for a covered servicemember with a serious injury or illness, there must be a medical need for leave 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 and in the certification of a serious injury or illness, if required by the employer, addresses the medical necessity of intermittent leave or leave on a reduced leave schedule. *See* §§ 825.306, 825.310. Leave may be taken intermittently or on a reduced leave schedule when medically necessary for planned and/or unanticipated medical treatment of a serious health condition or of a covered servicemember's serious injury or illness, or for recovery from treatment or recovery from a serious health condition or a covered servicemember's serious injury or illness. It may also be taken to provide care or psychological comfort to a covered family member with a serious health condition or a covered servicemember with a serious injury or illness.

(1) Intermittent leave may be taken for a serious health condition of a parent, son, or daughter, for the employee's own serious health condition, or a serious injury or illness of a covered servicemember 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 or a serious injury or illness of a covered servicemember, even if he or she does not receive treatment by a health care provider. *See* §§ 825.113 and 825.127.

(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).

(d) *Qualifying exigency*. Leave due to a qualifying exigency may be taken on an intermittent or reduced leave schedule basis.

§ 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 covered family member or the employee or the serious injury or illness of a covered servicemember. *See* § 825.202. Eligible employees may also take FMLA leave on an intermittent or reduced schedule basis when necessary because of a qualifying exigency. 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 treatment 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, a family member, or a covered servicemember, including during a period of recovery from one's own serious health condition, a serious health condition of a spouse, parent, son, or daughter, or a serious injury or illness of a covered servicemember, 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 or 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 FMLA leave for intermittent or reduced schedule leave.

(a) *Minimum increment.* (1) When an employee takes FMLA leave on an intermittent or reduced leave schedule basis, the employer must account for the leave using an increment no greater than the shortest period of time that the employer uses to account for use of other forms of leave provided that it is not greater than one hour and provided further that an employee's FMLA leave entitlement may not be reduced by more than the amount of leave actually taken. If an employer accounts for use of leave in varying increments at different times of the day or shift, the employer may not account for FMLA leave in a larger increment than the shortest period used to account for other leave during the period in which the FMLA leave is taken. If an employer accounts for other forms of leave use in increments greater than one hour, the employer must account for FMLA leave use in increments no greater than one hour. An employer may account for FMLA leave in shorter increments than used for other forms of leave. For example, an employer that accounts for other forms of leave in one hour increments may account for FMLA leave in a shorter increment when the employee arrives at work several minutes late, and the employer wants the employee to begin work immediately. Such accounting for FMLA leave will not alter the increment considered to be the shortest period used to account for other forms of leave or the use of FMLA leave in other circumstances.

(2) Where it is physically impossible for an employee using intermittent leave or working a reduced leave schedule to commence or end work mid-way through a shift, such as where a flight attendant or a railroad conductor is scheduled to work aboard an airplane or train, or a laboratory employee is unable to enter or leave a sealed ''clean room'' during a certain period of time, the entire period that the employee is forced to be absent is designated as FMLA leave and counts against the employee's FMLA entitlement.

(b) *Calculation of leave.* (1) When an employee takes leave on an intermittent or reduced leave schedule, only the amount of leave actually taken may be counted toward the employee's leave entitlement. The actual workweek is the basis of leave entitlement. Therefore, if an employee who would otherwise work 40 hours a week takes off 8 hours, the employee would use ⅕ of a week of FMLA leave. Similarly, if a full-time employee who would otherwise work 8-hour days works 4-hour days under a reduced leave schedule, the employee would use ½ week of FMLA leave. Where an employee works a part-time schedule or variable hours, the amount of FMLA leave that an employee uses is determined on a pro rata or proportional basis. For example, if an employee who would otherwise work 30 hours per week, but works only 20 hours a week under a reduced leave schedule, the employee's ten hours of leave would constitute one-third (⅓) of a week of FMLA leave for each week the employee works the reduced leave schedule. An employer may convert these fractions to their hourly equivalent so long as the conversion equitably reflects the

employee's total normally scheduled hours. *See also*, §§ 825.601 and 825.602, special rules for schools.

(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 to such an extent that an employer is unable to determine with any certainty how many hours the employee would otherwise have worked (but for the taking of FMLA leave), a weekly average of the hours scheduled over the 12 months prior to the beginning of the leave period (including any hours for which the employee took leave of any type) would be used for calculating the employee's leave entitlement.

(c) *Overtime*. If an employee would normally be required to work overtime, but is unable to do so because of a FMLA-qualifying reason that limits the employee's ability to work overtime, the hours which the employee would have been required to work may be counted against the employee's FMLA entitlement. In such a case, the employee is using intermittent or reduced schedule leave. For example, if an employee would normally be required to work for 48 hours in a particular week, but due to a serious health condition the employee is unable to work more than 40 hours that week, the employee would utilize eight hours of FMLA-protected leave out of the 48-hour workweek ($8/48 = 1/6$ workweek). Voluntary overtime hours that an employee does not work due to a serious health condition may not be counted against the employee's FMLA leave entitlement.

§ 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 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 serious injury or illness; or for leave which is more generous than provided by FMLA. 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 accrued 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 substitute accrued paid leave is determined by the terms and conditions of the employer's normal leave policy. 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 of the paid leave policy only in connection with the receipt of such payment. *See* § 825.300(c). 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 take unpaid FMLA leave. Employers may not discriminate against employees on FMLA leave in the administration of their paid leave policies.

(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 employee's FMLA leave entitlement. For example, paid sick leave used for a medical condition which is not a serious health condition or serious injury or illness does not count against the employee's FMLA leave entitlement.

(d) Leave taken pursuant to a disability leave plan would be considered FMLA leave for a serious health condition and counted in the leave entitlement permitted under FMLA if it meets the criteria set forth above in §§ 825.112–825.115. In such cases, the employer may designate the leave as FMLA leave and count the leave against the employee's FMLA leave entitlement. Because leave pursuant to a disability benefit plan is not unpaid, the provision for substitution of the employee's accrued paid leave is inapplicable, and neither the employee nor the employer may require the substitution of paid leave. However, employers and employees may agree, where state law permits, to have paid leave supplement the disability plan 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 § 825.300(d), the leave counts against the employee's FMLA leave entitlement. Because the workers' compensation absence is not unpaid, the provision for substitution of the employee's accrued paid leave is not applicable, and neither the employee nor the employer may require the substitution of paid leave. However, employers and employees may agree, where state law permits, to have paid leave supplement workers' compensation benefits, such as in the case where workers' compensation only provides replacement income for two-thirds of an employee's salary. 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 employee's FMLA leave 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. This section of the FLSA limits the number 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 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 the 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), 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(c).

(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 either a serious health condition of the employee or the employee's family member, or a serious injury or illness of a covered servicemember, 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 either a serious health condition of the employee or employee's family member, or a serious injury or illness of a covered servicemember, 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 or the covered servicemember's serious injury or illness. 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 forms developed for these purposes (*see* §§ 825.306(b), 825.310(c)–(d) and Appendices B and H 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 must be granted in accordance with the employer's policy or practice with respect to other employees on an equivalent leave status for a reason that does not qualify as 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 leave status for a reason that does not qualify as FMLA leave. For example, if an employee who used paid vacation leave for a non-FMLA purpose would receive the payment, then the employee who used paid 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) *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 § 825.312.

(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. The employer's obligations may, however, be governed by the Americans with Disabilities Act (ADA), as amended. *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 the settlement or release of FMLA claims by employees based on past employer conduct without the approval of the Department of Labor or a court. Nor does it 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)). An employee's acceptance of such ''light duty'' assignment does not constitute a waiver of the employee's prospective rights, including the right to be restored to the same position the employee held at the time the employee's FMLA leave commenced or to an equivalent position. The employee's right to restoration, however, ceases at the end of the applicable 12-month FMLA leave year.

(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 section. 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 including the notice in employee handbooks or other written guidance to employees concerning employee benefits or leave rights, if such written materials exist, or by distributing a copy of the general notice to each new employee upon hiring. In either case, distribution may be accomplished electronically.

(4) To meet the requirements of paragraph (a)(3) of this section, employers may duplicate the text of the notice contained in Appendix C of this part or may use another format so long as the information provided includes, at a minimum, all of the information contained in that notice. Where an employer's workforce is comprised of a significant portion of workers who are not literate in English, the employer shall provide the general notice in a language in which the employees are literate. Prototypes are available 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 reason, the employer must notify the employee of the employee's eligibility to take FMLA leave within five business days, absent extenuating circumstances. *See* § 825.110 for definition of an eligible employee. Employee eligibility is determined (and notice must be provided) at the commencement of the first instance of leave for each FMLA-qualifying reason in the applicable 12-month period (*see* §§ 825.127(c) and 825.200(b)). All FMLA absences for the same qualifying reason are considered a single leave and employee eligibility as to that reason for leave does not change during the applicable 12-month period.

(2) The eligibility notice must state whether the employee is eligible for FMLA leave as defined in § 825.110(a). If the employee is not eligible for FMLA leave, the notice must state at least one reason why the employee is not eligible, including as applicable the number of months the employee has been employed by the employer, the number of hours of service worked for the employer 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. Notification of eligibility may be oral or in writing; employers may use Appendix D of this part 825 to provide such notification to employees. The employer is obligated to translate this notice in any situation in which it is obligated to do so in § 825.300(a)(4).

(3) If, at the time an employee provides notice of a subsequent need for FMLA leave during the applicable 12-month period due to a different FMLA-qualifying reason, and the employee's eligibility status has not changed, no additional eligibility notice is required. If, however, the employee's eligibility status has changed (*e.g.*, if the employee has worked less than 1,250 hours of service for the employer in the 12 months preceding the commencement of leave for the subsequent qualifying reason or the size of the workforce at the worksite has dropped below 50 employees), the employer must notify the employee of the change in eligibility status within five business days, absent extenuating circumstances.

(c) *Rights and responsibilities notice.* (1) Employers shall provide written notice detailing the specific expectations and obligations of the employee and explaining any consequences of a failure to meet these obligations. The employer is obligated to translate this notice in any situation in which it is obligated to do so in § 825.300(a)(4). This notice shall be provided to the employee each time the eligibility notice is provided pursuant to paragraph (b) of this section. If leave has already begun, the notice should be mailed to the employee's address of record. 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) and the applicable 12-month period for FMLA entitlement (*see* §§ 825.127(c), 825.200(b), (f), and (g));

(ii) Any requirements for the employee to furnish certification of a serious health condition, serious injury or illness, or qualifying exigency arising out of active duty or call to active duty status, and the consequences of failing to do so (*see* §§ 825.305, 825.309, 825.310, 825.313);

(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 meet the conditions for paid leave (*see* § 825.207);

(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) 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);

(vi) 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

(vii) 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).

(2) The notice of rights and responsibilities 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.

(3) The notice of rights and responsibilities may be accompanied by any required certification form.

(4) If the specific information provided by the notice of rights and responsibilities changes, the employer shall, within five business days of receipt of the employee's first notice of need for leave subsequent to any change, provide written notice referencing the prior notice and setting forth any of the information in the notice of rights and responsibilities that 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.

(5) Employers are also expected to responsively answer questions from employees concerning their rights and responsibilities under the FMLA.

(6) A prototype notice of rights and responsibilities 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 *www.wagehour.dol.gov*. Employers may adapt the prototype notice as appropriate to meet these notice requirements. The notice of rights and responsibilities may be distributed electronically so long as it otherwise meets the requirements of this section.

(d) *Designation notice*. (1) The employer is responsible in all circumstances for designating leave as FMLA-qualifying, and for giving notice of the designation to the employee as provided in this section. When the employer has enough information to determine whether the leave is being taken for a FMLA-qualifying reason (*e.g.*, after receiving a certification), the employer must notify the employee whether the leave will be designated and will be counted as FMLA leave within five business days absent extenuating circumstances. Only one notice of designation is required for each FMLA-qualifying reason per applicable 12-month period, regardless of whether the leave taken due to the qualifying reason will be a continuous block of leave or intermittent or reduced schedule leave. If the employer determines that the leave will not be designated as FMLA-qualifying (*e.g.*, if the leave is not for a reason covered by FMLA or the FMLA leave entitlement has been exhausted), the employer must notify the employee of that determination. If the employer requires paid leave to be substituted for unpaid FMLA leave, or that paid leave taken under an existing leave plan be counted as FMLA leave, the employer must inform the employee of this designation at the time of designating the FMLA leave.

(2) If the employer has sufficient information to designate the leave as FMLA leave immediately after receiving notice of the employee's need for leave, the employer may provide the employee with the designation notice at that time.

(3) If the employer will require the employee to present a fitness-for-duty certification to be restored to employment, the employer must provide notice of such requirement with the designation notice. If the employer will require that the fitness-for-duty certification address the employee's ability to perform the essential functions of the employee's position, the employer must so indicate in the designation notice, and must include a list of the essential functions of the employee's position. *See* § 825.312. If the employer handbook or other written documents (if any) describing the employer's leave policies clearly provide that a fitness-for-duty certification will be required in specific circumstances (*e.g.*, by stating that fitness-for-duty certification will be required in all cases of back injuries for employees in a certain occupation), the employer is not required to provide written notice of the requirement with the designation notice, but must provide oral notice no later than with the designation notice.

(4) The designation notice must be in writing. 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 *http://www.wagehour.dol.gov*. 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.

(5) If the information provided by the employer to the employee in the designation notice changes (*e.g.*, the employee exhausts the FMLA leave entitlement), the employer shall provide, within five business days of receipt of the employee's first notice of need for leave subsequent to any change, written notice of the change.

(6) The employer must notify the employee of the amount of leave counted against the employee's FMLA leave entitlement. If the amount of leave needed is known at the time the employer designates the leave as FMLA-qualifying, the employer must notify the employee of the number of hours, days, or weeks that will be counted against the employee's FMLA leave entitlement in the designation notice. 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 the employer must provide notice of the amount of leave counted against the employee's FMLA leave entitlement upon the request by the employee, but no more often than once in a 30-day period and only if leave was taken in that period. The notice of the amount of leave counted against the employee's FMLA entitlement may be oral or in writing. If such notice is oral, it shall be confirmed in writing, no later than the following payday (unless the payday is less than one week after the oral notice, in which case the notice must be no later than the subsequent payday). Such written notice may be in any form, including a notation on the employee's pay stub.

(e) *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 Designation of FMLA leave.

(a) *Employer responsibilities*. The employer's decision to designate leave as FMLA-qualifying 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 leave is potentially FMLA-qualifying. Once the employer has acquired knowledge that the leave is being taken for a FMLA-qualifying reason, the employer must notify the employee as provided in § 825.300(d).

(b) *Employee responsibilities*. 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 whether 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 leave, especially when the need for the leave was unexpected or unforeseen, an employee will provide sufficient information for the employer to designate the leave as FMLA leave. An employee using accrued paid leave may in some cases not spontaneously explain the reasons or their plans for using their accrued leave. However, if an employee requesting to use paid leave for a FMLA-qualifying reason does not explain the reason for the leave and the employer denies the employee's request, the employee will need to provide sufficient information to establish a FMLA-qualifying reason for the needed leave so that the employer is aware that the leave may not be denied and may designate that the paid leave be appropriately counted against (substituted for) the employee's FMLA leave entitlement. Similarly, an employee using accrued paid vacation leave who seeks an extension of unpaid leave for a FMLA-qualifying reason 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 reason against the employee's FMLA leave entitlement.

(c) *Disputes*. If there is a dispute between an employer and an employee as to whether 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 him or her 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 his or her 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, planned medical treatment for a serious health condition of the employee or of a family member, or the planned medical treatment for a serious injury or illness of a 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, 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. For foreseeable leave due to a qualifying exigency notice must be provided as soon as practicable, regardless of how far in advance such leave is foreseeable. Whether FMLA 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 is required to provide at least 30 days notice of foreseeable leave and does not do so, 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. When an employee becomes aware of a need for FMLA leave less than 30 days in advance, it should be practicable for the employee to provide notice of the need for leave either the same day or the next business day. In all cases, however, the determination of when an employee could practicably provide notice must take into account the individual facts and circumstances.

(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. Depending on the situation, such information may include that a condition renders the employee unable to perform the functions of the job; that the employee is pregnant or has been

hospitalized overnight; whether the employee or the employee's family member is under the continuing care of a health care provider; if the leave is due to a qualifying exigency, that a covered military member is on active duty or call to active duty status, and that the requested leave is for one of the reasons listed in § 825.126(a); if the leave is for a family member, that the condition renders the family member unable to perform daily activities, or that the family member is a covered servicemember with a serious injury or illness; and the anticipated duration of the absence, if known. When an employee seeks leave for the first time for a FMLA-qualifying reason, the employee need not expressly assert rights under the FMLA or even mention the FMLA. When an employee seeks leave due to a FMLA-qualifying reason, for which the employer has previously provided FMLA-protected leave, the employee must specifically reference the qualifying reason for leave or the need for FMLA leave. In all cases, 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 employer may also request certification to support the need for leave for a qualifying exigency or for military caregiver leave (*see* §§ 825.309, 825.310). When an employee has been previously certified for leave due to more than one FMLA-qualifying reason, the employer may need to inquire further to determine for which qualifying reason the leave is needed. 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 comply with the employer's policy that requests for leave should be made by contacting a specific number because on the day the employee needs to provide notice of his or her need for FMLA leave there is no one to answer the call-in number and the voice mail box is full. 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. For example, 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) Intermittent leave or leave on a reduced leave schedule must be medically necessary due to a serious health condition or a serious injury or illness. 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 for such leave that 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. *See* § 825.304.

§ 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. It generally should be practicable for the employee to provide notice of leave that is unforeseeable within the time prescribed by the employer's usual and customary notice requirements applicable to such leave. *See* § 825.303(c). 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 a 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. Depending on the situation, such information may include that a condition renders the employee unable to perform the functions of the job; that the employee is pregnant or has been hospitalized overnight; whether the employee or the employee's family member is under the continuing care of a health care provider; if the leave is due to a qualifying exigency, that a covered military member is on active duty or call to active duty status, that the requested leave is for one of the reasons listed in § 825.126(a), and the anticipated duration of the absence; or if the leave is for a family member that the condition renders the family member unable to perform daily activities or that the family member is a covered servicemember with a serious injury or illness; and the anticipated duration of the absence, if known. When an employee seeks leave for the first time for a FMLA-qualifying reason, the employee need not expressly assert rights under the FMLA or even mention the FMLA. When an employee seeks leave due to a qualifying reason, for which the employer has previously

provided the employee FMLA-protected leave, the employee must specifically reference either the qualifying reason for leave or the need for FMLA leave. 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, absent unusual circumstances. 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. Similarly, in the case of an emergency requiring leave because of a FMLA-qualifying reason, written advance notice pursuant to an employer's internal rules and procedures may not be required when FMLA leave is involved. If 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.

§ 825.304 Employee failure to provide notice.

(a) *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 employee distribution, as required by § 825.300.

(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 very soon after the need arises consistent with the employer's policy, 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) *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, absent unusual circumstances, 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).

§ 825.305 Certification, general rule.

(a) *General*. An employer may require that an employee's leave to care for the employee's covered family member with a serious health condition, 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 family member. An employer may also require that an employee's leave because of a qualifying exigency or to care for a covered servicemember with a serious injury or illness be supported by a certification, as described in §§ 825.309 and 825.310, respectively. An employer must give notice of a requirement for certification each time a certification is required; such notice must be written notice whenever required by § 825.300(c). An employer's oral request to an employee to furnish any subsequent certification is sufficient.

(b) *Timing*. In most cases, the employer should request that an employee furnish certification 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 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 or the employer provides more than 15 calendar days to return the requested certification.

(c) *Complete and sufficient certification*. The employee must provide a complete and sufficient certification to the employer if required by the employer in accordance with §§ 825.306, 825.309, and 825.310. 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 § 825.313. 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 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 § 825.313. 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 825.312.

(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 covered family member, 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. Such new medical certifications are subject to the provisions for authentication and clarification set forth in § 825.307, including second and third opinions.

§ 825.306 Content of medical certification for leave taken because of an employee's own serious health condition or the serious health condition of a family member.

(a) *Required information.* When leave is taken because of an employee's own serious health condition, or the serious health condition of a family member, 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/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 essential 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 covered family member with a serious health condition, 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's or a covered family member's serious health condition, 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 serious 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 covered family member with a serious health condition, 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 two optional forms (Form WH–380E and Form WH–380F, as revised) for use in obtaining medical certification, including second and third opinions, from health care providers that meets FMLA's certification requirements. (*See* Appendix B to this Part 825.) Optional form WH–380E is for use when the employee's need for leave is due to the employee's own serious health condition. Optional form WH–380F is for use when the employee needs leave to care for a family member with a serious health condition. These optional forms reflect certification requirements so as to permit the health care provider to furnish appropriate medical information. Form WH–380E and WH–380F, 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 and information received under those provisions may be considered in determining the employee's entitlement to FMLA-protected leave. 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. Any information received pursuant to such policy or plan may be considered in determining the employee's entitlement to FMLA-protected leave. If the employee fails to provide the information required for receipt of such

payments or benefits, such failure will not affect the employee's entitlement to take unpaid FMLA leave. *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), as amended, the FMLA does not prevent the employer from following the procedures for requesting medical information under the ADA. Any information received pursuant to these procedures may be considered in determining the employee's entitlement to FMLA-protected leave.

(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 health care provider of the employee or his or her covered family member, 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 for leave taken because of an employee's own serious health condition or the serious health condition of a family member; second and third opinions.

(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 health care provider. However, the employer may contact the 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). To make such contact, the employer must use a health care provider, a human resources professional, a leave administrator, or a management official. Under no circumstances, however, may the employee's direct supervisor contact the employee's health care provider. 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. ''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. The requirements of the Health Insurance Portability and Accountability Act (''HIPAA'') Privacy Rule (*see* 45 CFR parts 160 and 164), which governs the privacy of individually-identifiable health information created or held by HIPAA-covered entities, must be satisfied when individually-identifiable health information of an employee is shared with an employer by a HIPAA-covered health care provider. If an employee chooses not to provide the employer with authorization allowing the employer to clarify the certification with the 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 and to clarify the certification if necessary.

(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 in which 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. Where a certification by a foreign health care provider is in a language other than English, the employee must provide the employer with a written translation of the certification upon request.

§ 825.308 Recertifications for leave taken because of an employee's own serious health condition or the serious health condition of a family member.

(a) *30-day rule.* An employer may request recertification no more often than every 30 days and only in connection with an absence by the employee, unless paragraphs (b) or (c) of this section apply.

(b) *More than 30 days.* If the medical certification indicates that the minimum duration of the condition is more than 30 days, an employer must wait until that minimum duration expires before requesting a recertification, unless paragraph (c) of this section 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 of a medical condition every six months in connection with an absence by the employee. Accordingly, even if the medical certification indicates that the employee will need intermittent or reduced schedule leave for a period in excess of six months (*e.g.*, for a lifetime condition), the employer would be permitted to request recertification every six months in connection with an absence.

(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 or 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 or 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 timeframe 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 for leave taken because of a serious health condition, 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 Certification for leave taken because of a qualifying exigency.

(a) *Active Duty Orders.* The first time an employee requests leave because of a qualifying exigency arising out of the active duty or call to active duty status of a covered military member (as defined in § 825.126(b)(2)), an employer may require the employee to provide a copy of the covered military member's active duty orders or other documentation issued by the military which indicates that the covered military member is on active duty or call to active duty status in support of a contingency operation, and the dates of the covered military member's active duty service. This information need only be provided to the employer once. A copy of new active duty orders or other documentation issued by the military shall be provided to the employer if the need for leave because of a qualifying exigency arises out of a different active duty or call to active duty status of the same or a different covered military member;

(b) *Required information.* An employer may require that leave for any qualifying exigency specified in § 825.126 be supported by a certification from the employee that sets forth the following information:

(1) A statement or description, signed by the employee, of appropriate facts regarding the qualifying exigency for which FMLA leave is requested. The facts must be sufficient to support the need for leave. Such facts should include information on the type of qualifying exigency for which leave is requested and any available written documentation which supports the request for leave; such documentation, for example, may include a copy of a meeting announcement for informational briefings sponsored by the military, a document confirming an appointment with a counselor or school official, or a copy of a bill for services for the handling of legal or financial affairs;

(2) The approximate date on which the qualifying exigency commenced or will commence;

(3) If an employee requests leave because of a qualifying exigency for a single, continuous period of time, the beginning and end dates for such absence;

(4) If an employee requests leave because of a qualifying exigency on an intermittent or reduced schedule basis, an estimate of the frequency and duration of the qualifying exigency; and

(5) If the qualifying exigency involves meeting with a third party, appropriate contact information for the individual or entity with whom the employee is meeting (such as the name, title, organization, address, telephone number, fax number, and e-mail address) and a brief description of the purpose of the meeting.

(c) DOL has developed an optional form (Form WH–384) for employees' use in obtaining a certification that meets

FMLA's certification requirements. (*See* Appendix G to this Part 825.) This optional form reflects certification requirements so as to permit the employee to furnish appropriate information to support his or her request for leave because of a qualifying exigency. Form WH–384, or another form containing the same basic information, may be used by the employer; however, no information may be required beyond that specified in this section.

(d) *Verification.* If an employee submits a complete and sufficient certification to support his or her request for leave because of a qualifying exigency, the employer may not request additional information from the employee. However, if the qualifying exigency involves meeting with a third party, the employer may contact the individual or entity with whom the employee is meeting for purposes of verifying a meeting or appointment schedule and the nature of the meeting between the employee and the specified individual or entity. The employee's permission is not required in order to verify meetings or appointments with third parties, but no additional information may be requested by the employer. An employer also may contact an appropriate unit of the Department of Defense to request verification that a covered military member is on active duty or call to active duty status; no additional information may be requested and the employee's permission is not required.

§ 825.310 Certification for leave taken to care for a covered servicemember (military caregiver leave).

(a) *Required information from health care provider.* When leave is taken to care for a covered servicemember with a serious injury or illness, an employer may require an employee to obtain a certification completed by an authorized health care provider of the covered servicemember. For purposes of leave taken to care for a covered servicemember, any one of the following health care providers may complete such a certification:

(1) A United States Department of Defense (''DOD'') health care provider;

(2) A United States Department of Veterans Affairs (''VA'') health care provider;

(3) A DOD TRICARE network authorized private health care provider; or

(4) A DOD non-network TRICARE authorized private health care provider.

(b) If the authorized health care provider is unable to make certain military-related determinations outlined below, the authorized health care provider may rely on determinations from an authorized DOD representative (such as a DOD recovery care coordinator). An employer may request that the health care provider provide the following information:

(1) The name, address, and appropriate contact information (telephone number, fax number, and/or email address) of the health care provider, the type of medical practice, the medical specialty, and whether the health care provider is one of the following:

(i) A DOD health care provider;

(ii) A VA health care provider;

(iii) A DOD TRICARE network authorized private health care provider; or

(iv) A DOD non-network TRICARE authorized private health care provider.

(2) Whether the covered servicemember's injury or illness was incurred in the line of duty on active duty;

(3) The approximate date on which the serious injury or illness commenced, and its probable duration;

(4) A statement or description of appropriate medical facts regarding the covered servicemember's health condition for which FMLA leave is requested. The medical facts must be sufficient to support the need for leave. Such medical facts must include information on whether the injury or illness may render the covered servicemember medically unfit to perform the duties of the servicemember's office, grade, rank, or rating and whether the member is receiving medical treatment, recuperation, or therapy;

(5) Information sufficient to establish that the covered servicemember is in need of care, as described in § 825.124, and whether the covered servicemember will need care for a single continuous period of time, including any time for treatment and recovery, and an estimate as to the beginning and ending dates for this period of time;

(6) If an employee requests leave on an intermittent or reduced schedule basis for planned medical treatment appointments for the covered servicemember, whether there is a medical necessity for the covered servicemember to have such periodic care and an estimate of the treatment schedule of such appointments;

(7) If an employee requests leave on an intermittent or reduced schedule basis to care for a covered servicemember other than for planned medical treatment (*e.g.*, episodic flare-ups of a medical condition), whether there is a medical necessity for the covered servicemember to have such periodic care, which can include assisting in the covered servicemember's recovery, and an estimate of the frequency and duration of the periodic care.

(c) *Required information from employee and/or covered servicemember.* In addition to the information that may be requested under § 825.310(b), an employer may also request that such certification set forth the following information provided by an employee and/or covered servicemember:

(1) The name and address of the employer of the employee requesting leave to care for a covered servicemember, the name of the employee requesting such leave, and the name of the covered servicemember for whom the employee is requesting leave to care;

(2) The relationship of the employee to the covered servicemember for whom the employee is requesting leave to care;

(3) Whether the covered servicemember is a current member of the Armed Forces, the National Guard or Reserves, and the covered servicemember's military branch, rank, and current unit assignment;

(4) Whether the covered servicemember is assigned to a military medical facility as an outpatient or to a unit established for the purpose of providing command and control of members of the Armed Forces receiving medical care as outpatients (such as a medical hold or warrior transition unit), and the name of the medical treatment facility or unit;

(5) Whether the covered servicemember is on the temporary disability retired list;

(6) A description of the care to be provided to the covered servicemember and an estimate of the leave needed to provide the care.

(d) DOL has developed an optional form (WH–385) for employees' use in obtaining certification that meets FMLA's certification requirements. (*See* Appendix H to this Part 825.) This optional form reflects certification requirements so as to permit the employee to furnish appropriate information to support his or her request for leave to care for a covered servicemember with a serious injury or illness. WH–385, or another form containing the same basic information, may be used by the employer; however, no information may be required beyond that specified in this section. In all instances the information on the certification must relate only to the serious injury or illness for which the current need for leave exists. An

employer may seek authentication and/or clarification of the certification under § 825.307. However, second and third opinions under § 825.307 are not permitted for leave to care for a covered servicemember. Additionally, recertifications under § 825.308 are not permitted for leave to care for a covered servicemember. An employer may require an employee to provide confirmation of covered family relationship to the seriously injured or ill servicemember pursuant to § 825.122(j) of the FMLA.

(e) An employer requiring an employee to submit a certification for leave to care for a covered servicemember must accept as sufficient certification, in lieu of the Department's optional certification form (WH–385) or an employer's own certification form, ''invitational travel orders'' (''ITOs'') or ''invitational travel authorizations'' (''ITAs'') issued to any family member to join an injured or ill servicemember at his or her bedside. An ITO or ITA is sufficient certification for the duration of time specified in the ITO or ITA. During that time period, an eligible employee may take leave to care for the covered servicemember in a continuous block of time or on an intermittent basis. An eligible employee who provides an ITO or ITA to support his or her request for leave may not be required to provide any additional or separate certification that leave taken on an intermittent basis during the period of time specified in the ITO or ITA is medically necessary. An ITO or ITA is sufficient certification for an employee entitled to take FMLA leave to care for a covered servicemember regardless of whether the employee is named in the order or authorization.

(1) If an employee will need leave to care for a covered servicemember beyond the expiration date specified in an ITO or ITA, an employer may request that the employee have one of the authorized health care providers listed under § 825.310(a) complete the DOL optional certification form (WH–385) or an employer's own form, as requisite certification for the remainder of the employee's necessary leave period.

(2) An employer may seek authentication and clarification of the ITO or ITA under § 825.307. An employer may not utilize the second or third opinion process outlined in § 825.307 or the recertification process under § 825.308 during the period of time in which leave is supported by an ITO or ITA.

(3) An employer may require an employee to provide confirmation of covered family relationship to the seriously injured or ill servicemember pursuant to § 825.122(j) when an employee supports his or her request for FMLA leave with a copy of an ITO or ITA.

(f) 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).

§ 825.311 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.

§ 825.312 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) An employer may seek a 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. Additionally, an employer may require that the certification specifically address the employee's ability to perform the essential functions of the employee's job. In order to require such a certification, an employer must provide an employee with a list of the essential functions of the employee's job no later than with the designation notice required by § 825.300(d), and must indicate in the designation notice that the certification must address the employee's ability to perform those essential functions. If the employer satisfies these requirements, 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. No second or third opinions on a fitness-for-duty certification may be required.

(c) 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.

(d) The designation notice required in § 825.300(d) shall advise the employee if the employer will require a fitness-for-duty certification to return to work and whether that fitness-for-duty certification must address the employee's ability to perform the essential functions of the employee's job.

(e) 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 (d) 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* § 825.313(d).

(f) An employer is not entitled to a certification of fitness to return to duty for each absence taken on an intermittent or reduced leave schedule. 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. If an employer chooses to require a fitness-for-duty certification under such circumstances, the employer shall inform the employee at the same time it issues the designation notice that for each subsequent instance of intermittent or reduced schedule leave, the employee will be required to submit a fitness-for-duty certification unless one has already been submitted within the past 30 days. Alternatively, an employer can set a different interval for requiring a fitness-for-duty certification as long as it does not exceed once every 30 days and as long as the employer advises the employee of the requirement in advance of the employee taking the intermittent or reduced schedule 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. Reasonable safety concerns means a reasonable belief of significant risk of harm to the individual employee or others. In determining whether reasonable safety concerns exist, an employer should consider the nature and severity of the potential harm and the likelihood that potential harm will occur.

(g) 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.

(h) Requirements under the Americans with Disabilities Act (ADA), as amended, apply. After an employee returns from FMLA leave, the ADA requires any medical examination at an employer's expense by the employer's health care provider be job-related and consistent with business necessity. 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 or her job or to his/her impairment. If an employee's serious health condition may also be a disability within the meaning of the ADA, the FMLA does not prevent the employer from following the procedures for requesting medical information under the ADA.

§ 825.313 Failure to provide 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 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. Recertification does not apply to leave taken for a qualifying exigency or to care for a covered servicemember.

(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* § 825.312(a)) if the employer has provided the required notice (*see* § 825.300(e)); the employer may delay restoration until the certification is provided. 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 26 weeks of wages for the employee in a case involving leave to care for a covered servicemember or 12 weeks of wages for the employee in a case involving leave for any other FMLA qualifying reason. 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 Web site.

(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 FMLA exists or the Department 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 written notices given to employees as required under FMLA and these regulations (*see* § 825.300(b) through (c)). 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 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 the ADA, as amended, 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 with a serious health condition, to care for a covered servicemember, 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 during the five-week period before the end of

a term because of the birth of a son or daughter; the placement of a son or daughter for adoption or foster care; to care for a spouse, son, daughter, or parent with a serious health condition; or to care for a covered servicemember. 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 during the three-week period before the end of a term because of the birth of a son or daughter; the placement of a son or daughter for adoption or foster care; to care for a spouse, son, daughter, or parent with a serious health condition; or to care for a covered servicemember. The employer may require the employee to continue taking leave until the end of the term if the leave will last more than five working days.

(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 needing leave due to his or her own serious health condition 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) 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 his or her full FMLA leave entitlement, 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.''

(4) 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 [as amended] 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 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 due to their own serious health condition, 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 (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., as amended*).

Active duty or call to active duty status means duty under a call or order to active duty (or notification of an impending call or order to active duty) in support of a contingency operation pursuant to Section 688 of Title 10 of the United States Code, which authorizes ordering to active duty retired members of the Regular Armed Forces and members of the retired Reserve who retired after completing at least 20 years of active service; Section 12301(a) of Title 10 of the United States Code, which authorizes ordering all reserve component members to active duty in the case of war or national emergency; Section 12302 of Title 10 of the United States Code, which authorizes ordering any unit or unassigned member of the Ready Reserve to active duty; Section 12304 of Title 10 of the United States Code, which authorizes ordering any unit or unassigned member of the Selected Reserve and certain members of the Individual Ready Reserve to active duty; Section 12305 of Title 10 of the United States Code, which authorizes the suspension of promotion, retirement or separation rules for certain Reserve components; Section 12406 of Title 10 of the United States Code, which authorizes calling the National Guard into federal service in certain circumstances; chapter 15 of Title 10 of the United States Code, which authorizes calling the National Guard and state military into federal service in the case of insurrections and national emergencies; or any other provision of law during a war or during a national emergency declared by the President or Congress so long as it is in support of a contingency operation. *See also* § 825.126(b)(2).

ADA means the Americans With Disabilities Act (42 U.S.C. 12101 *et seq.*, as amended).

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).

Contingency operation means a military operation that:

(1) Is designated by the Secretary of Defense as an operation in which members of the armed forces are or may become involved in military actions, operations, or hostilities against an enemy of the United States or against an opposing military force; or

(2) Results in the call or order to, or retention on, active duty of members of the uniformed services under section 688, 12301(a), 12302, 12304, 12305, or 12406 of Title 10 of the United States Code, chapter 15 of Title 10 of the United States Code, or any other provision of law during a war or during a national emergency declared by the President or Congress. *See also* § 825.126(b)(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, full 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 30 days of the first day of incapacity, 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.

(iii) The requirement in paragraphs (1)(i) and (ii) of this definition for treatment by a health care provider means an in-person visit to a health care provider. The first in-person treatment visit must take place within seven days of the first day of incapacity.

(iv) Whether additional treatment visits or a regimen of continuing

treatment is necessary within the 30-day period shall be determined by the health care provider.

(v) The term ''extenuating circumstances'' in paragraph (1)(i) of this definition means circumstances beyond the employee's control that prevent the follow-up visit from occurring as planned by the health care provider. Whether a given set of circumstances are extenuating depends on the facts. *See also* § 825.115(a)(5).

(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 full 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 full 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.

Covered military member means the employee's spouse, son, daughter, or parent on active duty or call to active duty status. *See also* § 825.126(b).

Covered servicemember means a current member of the Armed Forces, including a member of the 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 incurred in the line of duty on active duty. *See also* § 825.127(a).

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 seven 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, *except that*:

(i) 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);

(ii) 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; 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.

Next of kin of a covered servicemember means the nearest blood relative other than the covered servicemember's spouse, parent, son, or daughter, in the following order of priority: Blood relatives who have been granted legal custody of the covered servicemember by court decree or statutory provisions, brothers and sisters, grandparents, aunts and uncles, and first cousins, unless the covered servicemember has specifically designated in writing another blood

relative as his or her nearest blood relative for purposes of military caregiver leave under the FMLA. When no such designation is made, and there are multiple family members with the same level of relationship to the covered servicemember, all such family members shall be considered the covered servicemember's next of kin and may take FMLA leave to provide care to the covered servicemember, either consecutively or simultaneously. When such designation has been made, the designated individual shall be deemed to be the covered servicemember's only next of kin. *See also* § 825.127(b)(3).

Outpatient status means, with respect to a covered servicemember, the status of a member of the Armed Forces assigned to either a military medical treatment facility as an outpatient; or a unit established for the purpose of providing command and control of members of the Armed Forces receiving medical care as outpatients. *See also* § 825.127(a)(2).

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.''

Parent of a covered servicemember means a covered servicemember's biological, adoptive, step or foster father or mother, or any other individual who stood in loco parentis to the covered servicemember. This term does not include parents ''in law.'' *See also* § 825.127(b)(2).

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, issued by the Equal Employment Opportunity Commission under the Americans with Disabilities Act (ADA), 42 U.S.C. 12101 *et seq.*, as amended, 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 or allergies may be serious health conditions, but only if all the conditions of § 825.113 are met.

Serious injury or illness means an injury or illness incurred by a covered servicemember in the line of duty on active duty that may render the servicemember medically unfit to perform the duties of the member's office, grade, rank, or rating. *See also* § 825.127(a)(1).

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.

Son or daughter of a covered servicemember means a covered servicemember's biological, adopted, or foster child, stepchild, legal ward, or a child for whom the covered servicemember stood in loco parentis, and who is of any age. *See also* § 825.127(b)(1).

Son or daughter on active duty or call to active duty status means the employee's biological, adopted, or foster child, stepchild, legal ward, or a child for whom the employee stood in loco parentis, who is on active duty or call to active duty status, and who is of any age. *See also* § 825.126(b)(1).

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.

BILLING CODE 4510–27–P

Appendix A to Part 825—Index [Reserved]

Appendix B to Part 825—Certification of Health Care Provider (Forms WH–380E & WH–380F)

Appendix B

Certification of Health Care Provider for Employee's Serious Health Condition (Family and Medical Leave Act)

U.S. Department of Labor
Employment Standards Administration
Wage and Hour Division

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 protections because of a need for leave due to a serious health condition to submit a medical certification issued by the employee's health care provider. Please complete Section I before giving this form to your employee. Your response is voluntary. 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. §§ 825.306-825.308. Employers must generally maintain records and documents relating to medical certifications, recertifications, or medical histories of employees 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.

Employer name and contact: _____

Employee's job title: _____ Regular work schedule: _____

Employee's essential job functions: _____

_____

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. If requested by your employer, your response is required to obtain or retain the benefit of FMLA protections. 29 U.S.C. §§ 2613, 2614(c)(3). Failure to provide a complete and sufficient medical certification may result in a denial of your FMLA request. 20 C.F.R. § 825.313. Your employer must give you at least 15 calendar days to return this form. 29 C.F.R. § 825.305(b).

Your name: _____
First Middle Last

SECTION III: For Completion by the HEALTH CARE PROVIDER

INSTRUCTIONS to the HEALTH CARE PROVIDER: Your patient 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. Please be sure to sign the form on the last page.

Provider's name and business address: _____

Type of practice / Medical specialty: _____

Telephone: (_____) _____ Fax:(_____) _____

CONTINUED ON NEXT PAGE

PART A: MEDICAL FACTS

1. Approximate date condition commenced: _____

   Probable duration of condition: _____

   Mark below as applicable:
   Was the patient admitted for an overnight stay in a hospital, hospice, or residential medical care facility?
   ___No ___Yes. If so, dates of admission:

   _____

   Date(s) you treated the patient for condition:

   _____

   Will the patient need to have treatment visits at least twice per year due to the condition? ___No ___ Yes.

   Was medication, other than over-the-counter medication, prescribed? ___No ___Yes.

   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. If so, expected delivery date: _____

3. Use the information provided by the employer in Section I to answer this question. If the employer fails to provide a list of the employee's essential functions or a job description, answer these questions based upon the employee's own description of his/her job functions.

   Is the employee unable to perform any of his/her job functions due to the condition: ____ No ____ Yes.

   If so, identify the job functions the employee is unable to perform:

   _____

4. Describe other relevant medical facts, if any, related to the condition for which the employee seeks leave (such medical facts may include symptoms, diagnosis, or any regimen of continuing treatment such as the use of specialized equipment):

   _____

   _____

   _____

   _____

   _____

   _____

   _____

CONTINUED ON NEXT PAGE

PART B: AMOUNT OF LEAVE NEEDED

5. Will the employee be incapacitated for a single continuous period of time due to his/her medical condition, including any time for treatment and recovery? ___No ___Yes.

   If so, estimate the beginning and ending dates for the period of incapacity: _____.

6. Will the employee need to attend follow-up treatment appointments or work part-time or on a reduced schedule because of the employee's medical condition? ___No ___Yes.

   If so, are the treatments or the reduced number of hours of work medically necessary? ___No ___Yes.

   Estimate treatment schedule, if any, including the dates of any scheduled appointments and the time required for each appointment, including any recovery period:

   _____

   Estimate the part-time or reduced work schedule the employee needs, if any:

   _____ hour(s) per day; _____ days per week from _____ through _____

7. Will the condition cause episodic flare-ups periodically preventing the employee from performing his/her job functions? ____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 (e.g., 1 episode every 3 months lasting 1-2 days):

   Frequency: _____ times per _____ week(s) _____ month(s)

   Duration: _____ hours or ___ day(s) per episode

ADDITIONAL INFORMATION: IDENTIFY QUESTION NUMBER WITH YOUR ADDITIONAL ANSWER.

_____

_____

_____

_____

_____

_____

CONTINUED ON NEXT PAGE

Signature of Health Care Provider **Date**

PAPERWORK REDUCTION ACT NOTICE AND PUBLIC BURDEN STATEMENT

If submitted, it is mandatory for employers to retain a copy of this disclosure in their records for three years. 29 U.S.C. § 2616; 29 C.F.R. § 825.500. 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 Ave., NW, Washington, DC 20210. **DO NOT SEND COMPLETED FORM TO THE DEPARTMENT OF LABOR; RETURN TO THE PATIENT.**

Appendix B

Certification of Health Care Provider for Family Member's Serious Health Condition (Family and Medical Leave Act)

U.S. Department of Labor
Employment Standards Administration
Wage and Hour Division

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 protections because of a need for leave to care for a covered family member with a serious health condition to submit a medical certification issued by the health care provider of the covered family member. Please complete Section I before giving this form to your employee. Your response is voluntary. 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. §§ 825.306-825.308. Employers must generally maintain records and documents relating to medical certifications, recertifications, or medical histories of 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.

Employer name and contact: _____

_____

SECTION II: For Completion by the EMPLOYEE

INSTRUCTIONS to the EMPLOYEE: Please complete Section II before giving this form to your family member or his/her 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 to care for a covered family member with a serious health condition. If requested by your employer, your response is required to obtain or retain the benefit of FMLA protections. 29 U.S.C. §§ 2613, 2614(c)(3). Failure to provide a complete and sufficient medical certification may result in a denial of your FMLA request. 29 C.F.R. § 825.313. Your employer must give you at least 15 calendar days to return this form to your employer. 29 C.F.R. § 825.305.

Your name: _____
First Middle Last

Name of family member for whom you will provide care: _____
First Middle Last

Relationship of family member to you: _____

If family member is your son or daughter, date of birth: _____

Describe care you will provide to your family member and estimate leave needed to provide care:

_____

_____

_____

_____ _____
Employee Signature Date

CONTINUED ON NEXT PAGE

SECTION III: For Completion by the HEALTH CARE PROVIDER

INSTRUCTIONS to the HEALTH CARE PROVIDER: The employee listed above has requested leave under the FMLA to care for your patient. Answer, fully and completely, all applicable parts below. 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 patient needs leave. Page 3 provides space for additional information, should you need it. Please be sure to sign the form on the last page.

Provider's name and business address:_____

Type of practice / Medical specialty: _____

Telephone: (_____)_____ Fax:(_____)_____

PART A: MEDICAL FACTS

1. Approximate date condition commenced: _____

   Probable duration of condition: _____

   Was the patient admitted for an overnight stay in a hospital, hospice, or residential medical care facility?
   ___No ___Yes. If so, dates of admission: _____

   Date(s) you treated the patient for condition: _____

   Was medication, other than over-the-counter medication, prescribed? ___No ___Yes.

   Will the patient need to have treatment visits at least twice per year due to the condition? ___No ____ Yes

   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. If so, expected delivery date: _____

3. Describe other relevant medical facts, if any, related to the condition for which the patient needs care (such medical facts may include symptoms, diagnosis, or any regimen of continuing treatment such as the use of specialized equipment):

_____

_____

_____

_____

CONTINUED ON NEXT PAGE

PART B: AMOUNT OF CARE NEEDED: When answering these questions, keep in mind that your patient's need for care by the employee seeking leave may include assistance with basic medical, hygienic, nutritional, safety or transportation needs, or the provision of physical or psychological care:

4. Will the patient be incapacitated for a single continuous period of time, including any time for treatment and recovery? ___No ___Yes.

   Estimate the beginning and ending dates for the period of incapacity: _____

   During this time, will the patient need care? __ No __ Yes.

   Explain the care needed by the patient and why such care is medically necessary: _____

   _____

   _____

   _____

   _____

   _____

5. Will the patient require follow-up treatments, including any time for recovery? ___No ___Yes.

   Estimate treatment schedule, if any, including the dates of any scheduled appointments and the time required for each appointment, including any recovery period:

   _____

   Explain the care needed by the patient, and why such care is medically necessary: _____

   _____

6. Will the patient require care on an intermittent or reduced schedule basis, including any time for recovery? __ No __ Yes.

   Estimate the hours the patient needs care on an intermittent basis, if any:

   _____ hour(s) per day; _____ days per week from _____ through _____

   Explain the care needed by the patient, and why such care is medically necessary: _____

   _____

   _____

   _____

   _____

CONTINUED ON NEXT PAGE

7. Will the condition cause episodic flare-ups periodically preventing the patient from participating in normal daily activities? ____No ____Yes.

   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 (e.g., 1 episode every 3 months lasting 1-2 days):

   Frequency: _____ times per _____ week(s) _____ month(s)

   Duration: _____ hours or ___ day(s) per episode

   Does the patient need care during these flare-ups? ____ No ____ Yes.

   Explain the care needed by the patient, and why such care is medically necessary: _____

   _____

   _____

   _____

   _____

ADDITIONAL INFORMATION: IDENTIFY QUESTION NUMBER WITH YOUR ADDITIONAL ANSWER.

_____

_____

_____

_____

_____

_____

_____ _____

Signature of Health Care Provider **Date**

PUBLIC BURDEN STATEMENT

If submitted, it is mandatory for employers to retain a copy of this disclosure in their records for three years. 29 U.S.C. § 2616; 29 C.F.R. § 825.500. 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 Ave., NW, Washington, DC 20210.

DO NOT SEND COMPLETED FORM TO THE DEPARTMENT OF LABOR; RETURN TO THE PATIENT.

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Appendix C to Part 825–Notice to Employees Of Rights Under FMLA (WH Publication 1420)

EMPLOYEE RIGHTS AND RESPONSIBILITIES
UNDER THE FAMILY AND MEDICAL LEAVE ACT

Basic Leave Entitlement
FMLA requires covered employers to provide up to 12 weeks of unpaid, job-protected leave to eligible employees for the following reasons:

- For incapacity due to pregnancy, prenatal medical care 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.

Military Family Leave Entitlements
Eligible employees with a spouse, son, daughter, or parent on active duty or call to active duty status in the National Guard or Reserves in support of a contingency operation may use their 12-week leave entitlement to address certain qualifying exigencies. Qualifying exigencies may include attending certain military events, arranging for alternative childcare, addressing certain financial and legal arrangements, attending certain counseling sessions, and attending post-deployment reintegration briefings.

FMLA also includes a special leave entitlement that permits eligible employees to take up to 26 weeks of leave to care for a covered servicemember during a single 12-month period. A covered servicemember is a current member of the Armed Forces, including a member of the National Guard or Reserves, who has a serious injury or illness incurred in the line of duty on active duty that may render the servicemember medically unfit to perform his or her duties for which the servicemember is undergoing medical treatment, recuperation, or therapy; or is in outpatient status; or is on the temporary disability retired list.

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.

Definition of Serious Health Condition
A serious health condition is an illness, injury, impairment, or physical or mental condition that involves either an overnight stay in a medical care facility, or continuing treatment by a health care provider for a condition that 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 calendar days combined with at least two visits to a health care provider or one visit and a regimen of continuing treatment, or incapacity due to pregnancy, or incapacity due to a chronic condition. Other conditions may meet the definition of continuing treatment.

Use of Leave
An employee does not need to use this 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 due to qualifying exigencies may also be taken on an intermittent basis.

Substitution of Paid Leave for Unpaid Leave
Employees may choose or employers may require use of accrued paid leave while taking FMLA leave. In order to use paid leave for FMLA leave, employees must comply with the employer's normal paid leave policies.

Employee Responsibilities
Employees must provide 30 days 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 normal call-in procedures.

Employees must provide sufficient information for the employer to determine if the leave may qualify for FMLA protection and the anticipated timing and duration of the leave. Sufficient information may include that the employee is unable to perform job functions, the family member is unable to perform daily activities, the need for hospitalization or continuing treatment by a health care provider, or circumstances supporting the need for military family leave. Employees also must inform the employer if the requested leave is for a reason for which FMLA leave was previously taken or certified. Employees also may be required to provide a certification and periodic recertification supporting the need for leave.

Employer Responsibilities
Covered employers 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 a reason for the ineligibility.

Covered employers must inform employees if leave will be designated as FMLA-protected and the amount of leave counted against the employee's leave entitlement. 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.

For additional information:
1-866-4US-WAGE (1-866-487-9243) TTY: 1-877-889-5627
WWW.WAGEHOUR.DOL.GOV

U.S. Wage and Hour Division

U.S. Department of Labor | Employment Standards Administration | Wage and Hour Division

WHD Publication 1420 (Rev. XX-XXX)

Appendix D to Part 825—Notice of Eligibility and Rights & Responsibilities (Form WH-381)

Appendix D

Notice of Eligibility and Rights & Responsibilities (Family and Medical Leave Act)

U.S. Department of Labor
Employment Standards Administration
Wage and Hour Division

OMB Control Number: 1215-0181
Expires: XX/XX/XXX

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 employees with the 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. Part B provides employees with information regarding their rights and responsibilities for taking FMLA leave, as required by 29 C.F.R. § 825.300(b), (c).

[Part A – NOTICE OF ELIGIBILITY]

TO: _____
Employee

FROM: _____
Employer Representative

DATE: _____

On _____, you informed us that you needed leave beginning on _____ for:

_____ The birth of a child, or placement of a child with you for adoption or foster care;

_____ Your own serious health condition;

_____ Because you are needed to care for your ____ spouse; _____child; _____ parent due to his/her serious health condition.

_____ Because of a qualifying exigency arising out of the fact that your ____ spouse; _____son or daughter; _____ parent is on active duty or call to active duty status in support of a contingency operation as a member of the National Guard or Reserves.

_____ Because you are the ____ spouse; _____son or daughter; _____ parent; _____ next of kin of a covered servicemember with a serious injury or illness.

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 (only one reason need be checked, although you may not be eligible for other reasons):

- _____ You have not met the FMLA's 12-month length of service requirement. As of the first date of requested leave, you will have worked approximately ___ months towards this requirement.
- _____ You have not met the FMLA's 1,250-hours-worked requirement.
- _____ You do not work and/or report to a site with 50 or more employees within 75-miles.

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 applicable 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 _____.** (If a certification is requested, employers must allow at least 15 calendar days from receipt of this notice; additional time may be required in some circumstances.) If sufficient information is not provided in a timely manner, your leave may be denied.

____ Sufficient certification to support your request for FMLA leave. A certification form that sets forth the information necessary to support your request ____**is**/____ **is not** enclosed.

____ Sufficient documentation to establish the required relationship between you and your family member.

____ 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 FMLA leave entitlement.

____ Due to your status within the company, you are considered a "key employee" as defined in 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 calculated as:

  _____ the calendar year (January – December).

  _____ a fixed leave year based on _____.

  _____ the 12-month period measured forward from the date of your first FMLA leave usage.

  _____ a "rolling" 12-month period measured backward from the date of any FMLA leave usage.

- You have a right under the FMLA for up to 26 weeks of unpaid leave in a single 12-month period to care for a covered servicemember with a serious injury or illness. This single 12-month period commenced on _____.
- 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 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; 2) the continuation, recurrence, or onset of a covered servicemember's serious injury or illness which would entitle you to FMLA leave; or 3) 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. Applicable conditions related to the substitution of paid leave are referenced or set forth below. If you do not meet the requirements for taking paid leave, you remain entitled to take unpaid FMLA leave.

  ____For a copy of conditions applicable to sick/vacation/other leave usage please refer to _____ available at: _____.

  ____Applicable conditions for use of paid 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 FMLA leave entitlement. If you have any questions, please do not hesitate to contact:

_____at _____.

PAPERWORK REDUCTION ACT NOTICE AND PUBLIC BURDEN STATEMENT

It is mandatory for employers to provide employees with notice of their eligibility for FMLA protection and their rights and responsibilities. 29 U.S.C. § 2617; 29 C.F.R. § 825.300(b), (c). It is mandatory for employers to retain a copy of this disclosure in their records for three years. 29 U.S.C. § 2616; 29 C.F.R. § 825.500. 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 Ave., NW, Washington, DC 20210. **DO NOT SEND THE COMPLETED FORM TO THE WAGE AND HOUR DIVISION.**

Appendix E to Part 825—Designation Notice to Employee of FMLA Leave (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
Expires: XX/XX/XXX

Leave covered under the Family and Medical Leave Act (FMLA) must be designated as FMLA-protected and the employer must inform the employee of the amount of leave that will be counted against the employee's FMLA leave entitlement. In order to determine whether leave is covered under the FMLA, the employer may request that the leave be supported by a certification. If the certification 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), 825.301, and 825.305(c).

To: _____

Date: _____

We have reviewed your request for leave under the FMLA and any supporting documentation that you have provided. We received your most recent information on _____ and decided:

_____ **Your FMLA leave request is approved. All leave taken for this reason will be designated as FMLA leave.**

The FMLA requires that you notify us as soon as practicable if dates of scheduled leave change or are extended, or were initially unknown. Based on the information you have provided to date, we are providing the following information about the amount of time that will be counted against your leave entitlement:

_____ Provided there is no deviation from your anticipated leave schedule, the following number of hours, days, or weeks will be counted against your leave entitlement: _____

_____ Because the leave you will need will be unscheduled, it is not possible to provide the hours, days, or weeks that will be counted against your FMLA entitlement at this time. You have the right to request this information once in a 30-day period (if leave was taken in the 30-day period).

Please be advised (check if applicable):

_____ You have requested to use paid leave during your FMLA leave. Any paid leave taken for this reason will count against your FMLA leave entitlement.

_____ We are requiring you to substitute or use paid leave during your FMLA leave.

_____ 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.

_____ **Additional information is needed to determine if your FMLA leave request can be approved:**

_____ The certification you have provided is not complete and sufficient to determine whether the FMLA applies to your leave request. You must provide the following information no later than _____, unless it is not
(Provide at least seven calendar days)
practicable under the particular circumstances despite your diligent good faith efforts, or your leave may be denied.

_____
(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.

_____ Your FMLA Leave request is Not Approved.
_____ The FMLA does not apply to your leave request.
_____ You have exhausted your FMLA leave entitlement in the applicable 12-month period.

PAPERWORK REDUCTION ACT NOTICE AND PUBLIC BURDEN STATEMENT

It is mandatory for employers to inform employees in writing whether leave requested under the FMLA has been determined to be covered under the FMLA. 29 U.S.C. § 2617; 29 C.F.R. §§ 825.300(d), (e). It is mandatory for employers to retain a copy of this disclosure in their records for three years. 29 U.S.C. § 2616; 29 C.F.R. § 825.500. 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 – 30 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 Ave., NW, Washington, DC 20210. **DO NOT SEND THE COMPLETED FORM TO THE WAGE AND HOUR DIVISION.**

Appendix F to Part 825—[Reserved]

Appendix G to Part 825—Certification of Qualifying Exigency for Military Family Leave (Form WH-384)

Appendix G

Certification of Qualifying Exigency For Military Family Leave (Family and Medical Leave Act)

U.S. Department of Labor
Employment Standards Administration
Wage and Hour Division

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 qualifying exigency to submit a certification. Please complete Section I before giving this form to your employee. Your response is voluntary, and 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. § 825.309.

Employer name: _____

Contact Information: _____

SECTION II: For Completion by the EMPLOYEE

INSTRUCTIONS to the EMPLOYEE: Please complete Section II fully and completely. The FMLA permits an employer to require that you submit a timely, complete, and sufficient certification to support a request for FMLA leave due to a qualifying exigency. Several questions in this section seek a response as to the frequency or duration of the qualifying exigency. Be as specific as you can; terms such as "unknown," or "indeterminate" may not be sufficient to determine FMLA coverage. Your response is required to obtain a benefit. 29 C.F.R. § 825.310. 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

Name of covered military member on active duty or call to active duty status in support of a contingency operation:

_____
First Middle Last

Relationship of covered military member to you: _____

Period of covered military member's active duty: _____

A complete and sufficient certification to support a request for FMLA leave due to a qualifying exigency includes written documentation confirming a covered military member's active duty or call to active duty status in support of a contingency operation. Please check one of the following:

___ A copy of the covered military member's active duty orders is attached.
___ Other documentation from the military certifying that the covered military member is on active duty (or has been notified of an impending call to active duty) in support of a contingency operation is attached.
___ I have previously provided my employer with sufficient written documentation confirming the covered military member's active duty or call to active duty status in support of a contingency operation.

CONTINUED ON NEXT PAGE

PART A: QUALIFYING REASON FOR LEAVE

1. Describe the reason you are requesting FMLA leave due to a qualifying exigency (including the specific reason you are requesting leave):

_____

_____

_____

_____

_____

_____

2. A complete and sufficient certification to support a request for FMLA leave due to a qualifying exigency includes any available written documentation which supports the need for leave; such documentation may include a copy of a meeting announcement for informational briefings sponsored by the military, a document confirming an appointment with a counselor or school official, or a copy of a bill for services for the handling of legal or financial affairs. Available written documentation supporting this request for leave is attached. __ Yes __ No __ None Available

PART B: AMOUNT OF LEAVE NEEDED

1. Approximate date exigency commenced: _____

   Probable duration of exigency: _____

2. Will you need to be absent from work for a single continuous period of time due to the qualifying exigency? ___No ___Yes.

   If so, estimate the beginning and ending dates for the period of absence:

   _____.

3. Will you need to be absent from work periodically to address this qualifying exigency? ___No ___Yes.

   Estimate schedule of leave, including the dates of any scheduled meetings or appointments:_____

   _____

   _____

   _____

   Estimate the frequency and duration of each appointment, meeting, or leave event, including any travel time (i.e., 1 deployment-related meeting every month lasting 4 hours):

   Frequency: _____ times per _____ week(s) _____ month(s)

   Duration: _____ hours ___ day(s) per event.

CONTINUED ON NEXT PAGE

PART C:

If leave is requested to meet with a third party (such as to arrange for childcare, to attend counseling, to attend meetings with school or childcare providers, to make financial or legal arrangements, to act as the covered military member's representative before a federal, state, or local agency for purposes of obtaining, arranging or appealing military service benefits, or to attend any event sponsored by the military or military service organizations), a complete and sufficient certification includes the name, address, and appropriate contact information of the individual or entity with whom you are meeting (i.e., either the telephone or fax number or email address of the individual or entity). This information may be used by your employer to verify that the information contained on this form is accurate.

Name of Individual: _____ Title: _____

Organization: _____

Address: _____

Telephone: (_____) _____ Fax: (_____) _____

Email: _____

Describe nature of meeting: _____

_____

_____

_____

_____

_____

_____

_____

_____

PART D:

I certify that the information I provided above is true and correct.

_____ _____

Signature of Employee Date

PAPERWORK REDUCTION ACT NOTICE AND PUBLIC BURDEN STATEMENT

If submitted, it is mandatory for employers to retain a copy of this disclosure in their records for three years. 29 U.S.C. § 2616; 29 C.F.R. § 825.500. 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 EMPLOYER.**

Appendix H to Part 825—Certification for Serious Injury or Illness of Covered Servicemember for Military Family Leave (Form WH-385)

Appendix H

Certification for Serious Injury or Illness of Covered Servicemember - - for Military Family Leave (Family and Medical Leave Act)

U.S. Department of Labor
Employment Standards Administration
Wage and Hour Division

OMB Control Number: 1215-0181
Expires: XX/XX/XXX

Notice to 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 injury or illness of a covered servicemember to submit a certification providing sufficient facts to support the request for leave. Your response is voluntary. 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. § 825.310. 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.

SECTION I: For Completion by the EMPLOYEE and/or the COVERED SERVICEMEMBER for whom the Employee Is Requesting Leave **INSTRUCTIONS to the EMPLOYEE or COVERED SERVICEMEMBER:** Please complete Section I before having Section II completed. The FMLA permits an employer to require that an employee submit a timely, complete, and sufficient certification to support a request for FMLA leave due to a serious injury or illness of a covered servicemember. If requested by the employer, your response is required to obtain or retain the benefit of FMLA-protected leave. 29 U.S.C. §§ 2613, 2614(c)(3). Failure to do so may result in a denial of an employee's FMLA request. 29 C.F.R. § 825.310(f). The employer must give an employee at least 15 calendar days to return this form to the employer.

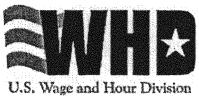
SECTION II: For Completion by a UNITED STATES DEPARTMENT OF DEFENSE ("DOD") HEALTH CARE PROVIDER or a HEALTH CARE PROVIDER who is either: (1) a United States Department of Veterans Affairs ("VA") health care provider; (2) a DOD TRICARE network authorized private health care provider; or (3) a DOD non-network TRICARE authorized private health care provider **INSTRUCTIONS to the HEALTH CARE PROVIDER:** The employee listed on Page 2 has requested leave under the FMLA to care for a family member who is a member of the Regular Armed Forces, the National Guard, or the 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. For purposes of FMLA leave, a serious injury or illness is one that was incurred in the line of duty on active duty that may render the servicemember medically unfit to perform the duties of his or her office, grade, rank, or rating.

A complete and sufficient certification to support a request for FMLA leave due to a covered servicemember's serious injury or illness includes written documentation confirming that the covered servicemember's injury or illness was incurred in the line of duty on active duty and that the covered servicemember is undergoing treatment for such injury or illness by a health care provider listed above. 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.

CONTINUED ON NEXT PAGE

Certification for Serious Injury or Illness of Covered Servicemember - - for Military Family Leave (Family and Medical Leave Act)

U.S. Department of Labor
Employment Standards Administration
Wage and Hour Division



SECTION I: For Completion by the EMPLOYEE and/or the COVERED SERVICEMEMBER for whom the Employee Is Requesting Leave: (This section must be completed first before any of the below sections can be completed by a health care provider.)

Part A: EMPLOYEE INFORMATION

Name and Address of Employer (this is the employer of the employee requesting leave to care for covered servicemember):

_____

Name of Employee Requesting Leave to Care for Covered Servicemember:

_____
First Middle Last

Name of Covered Servicemember (for whom employee is requesting leave to care):

_____
First Middle Last

Relationship of Employee to Covered Servicemember Requesting Leave to Care:
☐ Spouse ☐ Parent ☐ Son ☐ Daughter ☐ Next of Kin

Part B: COVERED SERVICEMEMBER INFORMATION

(1) Is the Covered Servicemember a Current Member of the Regular Armed Forces, the National Guard or Reserves? ___Yes ____No

If yes, please provide the covered servicemember's military branch, rank and unit currently assigned to:

_____

Is the covered servicemember assigned to a military medical treatment facility as an outpatient or to a unit established for the purpose of providing command and control of members of the Armed Forces receiving medical care as outpatients (such as a medical hold or warrior transition unit)? ___Yes ___No If yes, please provide the name of the medical treatment facility or unit:

_____

(2) Is the Covered Servicemember on the Temporary Disability Retired List (TDRL)? ____Yes ____No

Part C: CARE TO BE PROVIDED TO THE COVERED SERVICEMEMBER

Describe the Care to Be Provided to the Covered Servicemember and an Estimate of the Leave Needed to Provide the Care:

_____

CONTINUED ON NEXT PAGE

SECTION II: For Completion by a United States Department of Defense ("DOD") Health Care Provider or a Health Care Provider who is either: (1) a United States Department of Veterans Affairs ("VA") health care provider; (2) a DOD TRICARE network authorized private health care provider; or (3) a DOD non-network TRICARE authorized private health care provider. If you are unable to make certain of the military-related determinations contained below in Part B, you are permitted to rely upon determinations from an authorized DOD representative (such as a DOD recovery care coordinator). (Please ensure that Section I above has been completed before completing this section.) Please be sure to sign the form on the last page.

Part A: HEALTH CARE PROVIDER INFORMATION

Health Care Provider's Name and Business Address:

_____

Type of Practice/Medical Specialty: _____

Please state whether you are either: (1) a DOD health care provider; (2) a VA health care provider; (3) a DOD TRICARE network authorized private health care provider; or (4) a DOD non-network TRICARE authorized private health care provider: _____

Telephone: ( ) _____ Fax: ( ) _____ Email: _____

PART B: MEDICAL STATUS

(1) Covered Servicemember's medical condition is classified as (Check One of the Appropriate Boxes):

☐ **(VSI) Very Seriously Ill/Injured** – Illness/Injury is of such a severity that life is imminently endangered. Family members are requested at bedside immediately. (Please note this is an internal DOD casualty assistance designation used by DOD healthcare providers.)

☐ **(SI) Seriously Ill/Injured** – Illness/injury is of such severity that there is cause for immediate concern, but there is no imminent danger to life. Family members are requested at bedside. (Please note this is an internal DOD casualty assistance designation used by DOD healthcare providers.)

☐ **OTHER Ill/Injured** – a serious injury or illness that may render the servicemember medically unfit to perform the duties of the member's office, grade, rank, or rating.

☐ **NONE OF THE ABOVE** (Note to Employee: If this box is checked, you may still be eligible to take leave to care for a covered family member with a "serious health condition" under § 825.113 of the FMLA. If such leave is requested, you may be required to complete DOL FORM WH-380 or an employer-provided form seeking the same information.)

(2) Was the condition for which the Covered Service member is being treated incurred in line of duty on active duty in the armed forces? ____ Yes ____ No

(3) Approximate date condition commenced: _____

(4) Probable duration of condition and/or need for care: _____

(5) Is the covered servicemember undergoing medical treatment, recuperation, or therapy? ____Yes ___No. If yes, please describe medical treatment, recuperation or therapy:

CONTINUED ON NEXT PAGE

PART C: COVERED SERVICEMEMBER'S NEED FOR CARE BY FAMILY MEMBER

(1) Will the covered servicemember need care for a single continuous period of time, including any time for treatment and recovery? ___ Yes ___ No
If yes, estimate the beginning and ending dates for this period of time: _____

(2) Will the covered servicemember require periodic follow-up treatment appointments?
___ Yes ___ No If yes, estimate the treatment schedule: _____

(3) Is there a medical necessity for the covered servicemember to have periodic care for these follow-up treatment appointments? ____Yes _____No

(4) Is there a medical necessity for the covered servicemember to have periodic care for other than scheduled follow-up treatment appointments (e.g., episodic flare-ups of medical condition)? ____Yes ____No If yes, please estimate the frequency and duration of the periodic care:

_____

_____

Signature of Health Care Provider: _____ **Date:** _____

PAPERWORK REDUCTION ACT NOTICE AND PUBLIC BURDEN STATEMENT

If submitted, it is mandatory for employers to 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. 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.**

[FR Doc. E8–26577 Filed 11–14–08; 8:45 am]
BILLING CODE 4510–27–C