

# Rules and Regulations

Federal Register

Vol. 76, No. 190

Friday, September 30, 2011

This section of the FEDERAL REGISTER contains regulatory documents having general applicability and legal effect, most of which are keyed to and codified in the Code of Federal Regulations, which is published under 50 titles pursuant to 44 U.S.C. 1510.

The Code of Federal Regulations is sold by the Superintendent of Documents. Prices of new books are listed in the first FEDERAL REGISTER issue of each week.

## OFFICE OF PERSONNEL MANAGEMENT

### 5 CFR Part 630

RIN 3206-AM11

#### Absence and Leave; Qualifying Exigency Leave

**AGENCY:** U.S. Office of Personnel Management.

**ACTION:** Final rule.

**SUMMARY:** The U.S. Office of Personnel Management is issuing final regulations to amend the Family and Medical Leave Act (FMLA) regulations to provide eligible Federal employees up to 12 administrative workweeks of unpaid leave under the FMLA for qualifying exigency purposes. Qualifying exigencies arise when the spouse, son, daughter, or parent of an employee is on covered active duty in the Armed Forces, or has been notified of an impending call or order to covered active duty status. These regulations will help employees manage family affairs when their family members are on covered active duty.

**DATES:** This rule is effective October 31, 2011.

**FOR FURTHER INFORMATION CONTACT:** Doris Rippey by telephone at (202) 606-2858; by fax at (202) 606-0824; or by e-mail at [pay-leave-policy@opm.gov](mailto:pay-leave-policy@opm.gov).

**SUPPLEMENTARY INFORMATION:** The U.S. Office of Personnel Management (OPM) is issuing final regulations to implement section 565(b)(1) of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2010 (Pub. L. 111-84, October 28, 2009). Section 565(b)(1) amended 5 U.S.C. 6382(a)(1) by inserting a new subparagraph (E) that adds qualifying exigencies to the circumstances or events that entitle Federal employees to up to 12 administrative workweeks of unpaid leave under the Family and Medical Leave Act (FMLA) during any

12-month period. The regulations amend OPM's current regulations at 5 CFR part 630, subpart L, to cover qualifying exigencies that arise when the spouse, son, daughter, or parent of an employee is on covered active duty in the Armed Forces or has been notified of an impending call or order to covered active duty. As required by 5 U.S.C. 6387, the final regulations are, to the extent appropriate, consistent with the regulations prescribed by the Secretary of Labor to carry out the family medical leave entitlement for employers covered under title I of the FMLA, which primarily applies to employers in the private sector, but also includes some Federal entities, such as the U.S. Postal Service. Similar to the Department of Labor (DOL) regulations, OPM provides for eight categories of qualifying exigencies in its regulations: short-notice deployments, military events and related activities, childcare and school activities, financial and legal arrangements, counseling, rest and recuperation, post-deployment activities, and additional activities not encompassed in the other categories when the agency and employee agree they qualify as exigencies and agree to the timing and duration of the leave.

OPM published proposed regulations on the qualifying exigency leave entitlement for Federal employees for public comment on November 19, 2010, at 75 FR 70845 (<http://www.gpo.gov/fdsys/pkg/FR-2010-11-19/pdf/2010-29275.pdf>). We received comments from three Federal labor organizations and two agencies that are addressed below.

#### Counseling

One agency asked for clarification of the proposed regulations at § 630.1204(a)(5), which provide that employees may take qualifying exigency leave to attend counseling provided by someone other than a healthcare provider for the employee him or herself, for the covered military member, or for a child, provided that the need for counseling arises from the covered active duty or call to covered active duty status of a covered military member. The agency recommended including examples of other types of counseling that might be provided by someone other than a healthcare provider.

OPM expects that most counseling will be provided by a healthcare

provider and fall under the existing FMLA provisions, but recognizes that there may be circumstances where counseling that is non-medical in nature will be provided by someone other than a healthcare provider. 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. We believe that providing these examples in this supplementary information portion of the regulations is sufficient and do not believe it is necessary to add these examples to the regulatory text.

#### Certification

One labor organization said it supported the regulations, but recommended that OPM clarify certain provisions pertaining to the certification requirements under the regulations. The union referred to proposed § 630.1209(b) published November 19, 2010, at 75 FR 70850.

The commenter stated that § 630.1209 requires a substantial amount of information to certify exigencies, some of which involve sensitive and privileged subjects such as legal services, counseling, child care, and education. For example, the labor organization stated that the regulations "would require a Federal employee who needs time off to attend a parent-teacher conference to submit a signed statement of the need for the exigency leave, along with a signed document from the school confirming the meeting, in addition the name of the parties met with, their titles, their organizations, addresses, phone numbers, fax numbers and e-mail addresses." The commenter noted obstacles to obtaining this information, such as a school prohibition on documenting these conferences, schools not having appropriate letterhead, or school staff not having time to fill out the certification. The commenter also expressed concern regarding an employee's ability to gather and, where necessary, pay for the documentation needed to comply with certification requirements when the employee is otherwise burdened as a result of the deployment or death of a family member. The union said employees in these circumstances might not have time to pursue documentation for the number of exigencies for which they are now solely responsible.

To address these concerns, the commenter recommended that OPM permit employees to provide a statement of facts regarding the qualifying exigency along with either the supporting documentation described under § 630.1209(b)(1) or the third party contact information described under § 630.1209(b)(5), but not require both. The labor organization feels this will give Federal employees some flexibility in dealing with sensitive issues or uncooperative service providers.

OPM modeled its regulations on qualifying exigency leave to be consistent, to the extent appropriate, with DOL's regulations. Section 630.1209 of OPM's regulations corresponds to 29 CFR 825.309 of DOL's regulations. DOL addressed this issue in its final regulations. (See discussion at 73 FR 68023–68025.) DOL strove to achieve 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. They also stated that for certification purposes, “[w]here applicable, this information should be readily available to the employee and should not impose a significant obstacle.” (73 FR 68024.)

We believe that the certification requirements for qualifying exigency leave under the regulations do not overly burden employees. Section 630.1209(b)(1) states only that the certification statement include “any available written documentation” that supports the leave request, and provides such examples as a meeting announcement, an appointment confirmation, or a copy of a bill for legal or financial services. The regulations do not require the employee to obtain a letter or signature from a school, sponsoring organization, or other party, or provide any documentation that would be prepared at a cost to the employee. The employee's statement of facts regarding the qualifying exigency should include, whenever possible, only documentation that is already on hand or is easily obtainable.

Under section 630.1209(b)(5), agencies may require employees to provide contact information for individuals or entities with whom the employee is meeting so that agencies may verify, as necessary, the information described under section 630.1209(c). We believe it is important that agencies have discretion to require that employees provide this contact information even when the statement of facts is complete, sufficient, and fully

documented. Agencies must have the option to verify the information described in paragraphs (c)(1) and (2) in order to prevent abuse of the qualifying exigency leave entitlement. However, in most cases, we do not anticipate that agencies will contact third parties to verify the information under paragraph (c) if the employee provides sufficient documentation of the qualifying exigency with his or her statement of facts. We also note that the contact information listed in parentheses in paragraph (b)(5) is illustrative; employees need provide only the information appropriate for the contact (*e.g.*, in many cases, address and fax number may not be necessary). Therefore, OPM has not adopted this recommendation and has made no changes to the regulations in this section.

Another labor organization expressed concerns about the potential privacy implications of the certification requirement, citing as an example a meeting with a bankruptcy counselor. As noted previously, employers must be provided a reasonable amount of information to demonstrate the validity of the qualifying exigency; however, that information may be described in general terms on the certification.

#### Verification

In regard to the verification provisions in § 630.1209(c), the same labor organization recommended that agencies not be permitted to request that third parties describe the nature of employee visits. The labor organization also recommended that the verification be conducted and kept confidential by agency human resources staff, not by the direct supervisor of the employee. Another labor organization commented on the verification provisions, recommending that OPM address management access to an employee's medical records in regard to the Privacy Act. This labor organization also said that agencies should inform an employee before a verification contact so that the employee can alert the third party as to the importance of the contact to the employee's qualifying exigency leave entitlement.

Based on the comments received by the labor organizations, it is apparent that the verification provisions in § 630.1209(c) of the proposed regulations did not clearly describe the information an agency may verify. Specifically, where the proposed regulations state that an agency may verify the nature of a meeting, the intent was not to permit an agency to ask for detailed information about an employee's medical circumstances or

other personal matters, but to permit the agency to verify the information the employee already provided in his or her statement under § 630.1209(b)(1) regarding the nature of the qualifying exigency. As an example of a verification contact (paraphrased from DOL's discussion in its November 17, 2008, regulations), an agency might call a school to confirm that a meeting took place between the employee and the teacher of a child of a covered military member. Therefore, we have clarified in § 630.1209(c) of the final regulations that agencies may verify only the information provided by the employee in his or her statement and may not request additional information.

In light of this clarification, we believe the recommendation from the labor organizations that the verification be conducted and kept confidential by agency human resources staff and not by the direct supervisor of the employee should no longer be an issue. The employee's direct supervisor must be able to manage the workload for his or her workgroup, which includes the approval of leave requests. The verification of information regarding the employee's qualifying exigency leave entitlement is therefore pertinent to decisions the supervisor must make in scheduling work and approving leave requests. Therefore, we believe it is appropriate for the employee's direct supervisor to conduct the verification of the information in the employee's request or at least be fully apprised of the results of the verification.

Regarding the comment on addressing management access to an employee's medical records under the Privacy Act, the qualifying exigency leave regulations do not require any collection of medical records. (We note, however, that access to medical records is subject to the provisions of 5 CFR part 293. See 5 CFR 630.1208(k) of these final regulations.) Regarding the comment stating that agencies should inform an employee before making a verification contact, we believe that the requirement for an employee to provide third party contact information is sufficient notice to the employee that the agency may contact the third party.

One agency expressed concern with the verification provisions in § 630.1209(c) of the proposed regulations which provide that an agency may contact an appropriate unit of the Department of Defense to request verification that a covered military member is on covered active duty or a call to covered active duty status. The agency suggested that before the regulations are implemented, it would be helpful for OPM and DOD to agree

on a procedure for agencies to obtain this information and share these procedures. The agency further stated that its experience has been that DOD will not provide information on an employee's military service without written consent from the employee, and under the regulations, the covered military member is likely not an employee of the agency.

When the Department of Labor was developing the military portions of its FMLA regulations (i.e., the qualifying exigency and leave to care for a covered servicemember entitlements) it consulted with the Department of Defense (DOD), the Department of Veterans Affairs (VA), and a number of military service organizations to provide regulations that would both meet the intent of Congress and not place an undue burden on employees seeking to use these entitlements. OPM therefore believes that the verification process outlined in 5 CFR 630.1209(c)(1), which is the same procedure as in the DOL FMLA regulations, should function appropriately. We understand that the covered military member may have to provide written consent for release of this information, but that may also be the case when an employee seeks FMLA leave to care for a family member who has a serious health condition. We also believe that in most circumstances, an agency will find the covered servicemember's active duty orders sufficient proof that a covered military member is on covered active duty or call to covered active duty status and will not feel a need to verify the certification. However, if an agency has any doubt about the active duty orders, we believe the verification process will provide a useful tool for agencies to use to verify the certification information given to them.

### Application

One labor organization asked if any distinctions exist between District of Columbia (DC) employees and other employees under OPM's qualifying exigency leave regulations. There are no distinctions made between Federal employees working in DC compared to those who work outside of the District. OPM's qualifying exigency FMLA regulations apply to any employees covered under title II of the FMLA (5 U.S.C. 6381). Employees who work for the District of Columbia government are not covered by title II of FMLA.

### Certification Form

For employees covered by DOL's FMLA regulations, DOL has developed an optional form (Form WH-384) for employees' use in obtaining a

certification that meets the qualifying exigency certification requirements. (See <http://www.dol.gov/whd/forms/WH-384.pdf>) On March 5, 2010, OPM issued CPM 2010-06 to Heads of Executive Departments and Agencies regarding "Recent Changes to the Family and Medical Leave Act" to reflect the changes made by the FY 2010 NDAA. As part of this memorandum, we provided Federal agencies the option to choose to use this form as a guide in administering FMLA leave for qualifying exigencies for their employees. 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. At that time, we stated that employing agencies could use Form WH-384 or another document containing the same basic information for qualifying exigency purposes. In our proposed regulations, we requested comments on whether OPM should develop a certification form similar to DOL's WH-384 for use by Federal employees covered by title II of the FMLA.

We received one comment outside of the public comment period in support of developing an OPM form. The commenting agency felt that an OPM form would provide more specific information to Federal employees, including applicable regulatory citations. Currently the WH-384 references the DOL citations for title I employees, who are primarily employed in the private sector.

We have considered developing a separate form for Federal agencies to use with specific citations to OPM's FMLA regulations. The DOL form is optional and 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. Currently, we state that employing agencies could use Form WH-384 or another document containing the same basic information for qualifying exigency purposes. Absent any comments or concerns raised by agencies, we have concluded that there is little to be gained by creating another optional form that would mostly duplicate the DOL form.

As mentioned in our previous guidance, it should be noted that Form WH-384 contains citations to DOL's regulations, which are not the applicable authority for Federal employees governed by OPM's FMLA authorities. It should also be noted that since WH-384 was issued, the NDAA for FY 2010 added a definition of "covered active duty" at 5 U.S.C.

6381(7) to mean duty of a member of a regular component of the Armed Forces during deployment to a foreign country, and duty of a member of a reserve component of the Armed Forces to a foreign country under a call or order to active duty under a provision of law referred to in 10 U.S.C. 101(a)(13)(B). Currently the WH-384 requests documentation to confirm that a covered servicemember's active duty (or call to active duty) is in support of a contingency operation. Federal agencies should continue to use the WH-384 as a tool; however, agencies do not need to document that the covered service member's active duty is in support of a contingency operation, but instead may request information to ensure that the active duty is to a foreign country.

### Executive Order 13563 and Executive Order 12866

The Office of Management and Budget has reviewed this rule in accordance with E.O. 13563 and E.O. 12866.

### Regulatory Flexibility Act

I certify that these regulations will not have a significant economic impact on a substantial number of small entities because they will apply only to Federal agencies and employees.

### List of Subjects in 5 CFR Part 630

Government employees.

U.S. Office of Personnel Management.

**John Berry,**  
*Director.*

Accordingly, OPM is amending 5 CFR part 630 as follows:

### PART 630—ABSENCE AND LEAVE

■ 1. The authority citation for part 630 continues to read as follows:

**Authority:** 5 U.S.C. 6311; § 630.205 also issued under Pub. L. 108-411, 118 Stat. 2312; § 630.301 also issued under Pub. L. 103-356, 108 Stat. 3410 and Pub. L. 108-411, 118 Stat. 2312; § 630.303 also issued under 5 U.S.C. 6133(a); §§ 630.306 and 630.308 also issued under 5 U.S.C. 6304(d)(3), Pub. L. 102-484, 106 Stat. 2722, and Pub. L. 103-337, 108 Stat. 2663; subpart D also issued under Pub. L. 103-329, 108 Stat. 2423; § 630.501 and subpart F also issued under E.O. 11228, 30 FR 7739, 3 CFR, 1974 Comp., p. 163; subpart G also issued under 5 U.S.C. 6305; subpart H also issued under 5 U.S.C. 6326; subpart I also issued under 5 U.S.C. 6332, Pub. L. 100-566, 102 Stat. 2834, and Pub. L. 103-103, 107 Stat. 1022; subpart J also issued under 5 U.S.C. 6362, Pub. L. 100-566, and Pub. L. 103-103; subpart K also issued under Pub. L. 105-18, 111 Stat. 158; subpart L also issued under 5 U.S.C. 6387 and Pub. L. 103-3, 107 Stat. 23; and subpart M also issued under 5 U.S.C. 6391 and Pub. L. 102-25, 105 Stat. 92.

■ 2. In § 630.1202, add the definitions of “Covered active duty or call to covered active duty status,” “Covered military member,” and “Son or daughter on covered active duty or call to covered active duty status” alphabetically to read as follows:

§ 630.1202 Definitions.

\* \* \* \* \*

Covered active duty or call to covered active duty status means—

(1) In the case of a member of a regular component of the Armed Forces, duty during the deployment of the member with the Armed Forces to a foreign country under a call or order to active duty (or notification of an impending call or order to active duty); and

(2) In the case of a member of a reserve component of the Armed Forces, duty during the deployment of the member with the Armed Forces to a foreign country 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 any of the following sections of title 10, United States Code, or any other provision of law during a war or during a national emergency declared by the President or Congress:

(i) Section 688, which authorizes ordering to active duty retired members of the Regular Armed Forces and members of the Retired Reserve retired after 20 years for length of service, and members of the Fleet Reserve or Fleet Marine Corps Reserve;

(ii) Section 12301(a), which authorizes ordering all reserve component members to active duty in the case of war or national emergency declared by Congress, or when otherwise authorized by law;

(iii) Section 12302, which authorizes ordering any unit or unassigned member of the Ready Reserve to active duty in time of national emergency declared by the President after January 1, 1953, or when otherwise authorized by law;

(iv) Section 12304, which authorizes ordering any unit or unassigned member of the Selected Reserve and certain members of the Individual Ready Reserve to active duty;

(v) Section 12305, which authorizes the suspension of promotion, retirement, or separation rules for certain Reserve components;

(vi) Section 12406, which authorizes calling the National Guard into Federal service in certain circumstances; or

(vii) Chapter 15, which authorizes calling the National Guard and State militia into Federal service in the case of insurrections and national emergencies.

Covered military member means the employee’s spouse, son, daughter, or parent on covered active duty or call to covered active duty status.

\* \* \* \* \*

Son or daughter on covered active duty or call to covered active duty status means the employee’s biological, adopted, or foster child, stepchild, legal ward, or a child for whom the employee stands in loco parentis, who is on covered active duty or call to covered active duty status, and who is of any age.

\* \* \* \* \*

■ 3. In § 630.1203, add a new paragraph (a)(5), revise the first sentence of paragraph (b), and revise the last sentence of paragraph (h) to read as follows:

§ 630.1203 Leave entitlement.

(a) \* \* \*

(5) Any qualifying exigency arising out of the fact that the employee’s spouse, son, daughter, or parent is a covered military member on covered active duty (or has been notified of an impending call or order to covered active duty) in the Armed Forces.

(b) An employee must invoke his or her entitlement to family and medical leave under paragraph (a) of this section, subject to the notification and medical certification requirements in §§ 630.1207 and 630.1208. \* \* \*

\* \* \* \* \*

(h) \* \* \* An employee’s notice of his or her intent to take leave under § 630.1207 may suffice as the employee’s confirmation.

■ 4. Redesignate §§ 630.1204 through 630.1211 as §§ 630.1205 through 630.1212, respectively, and add a new § 630.1204 to read as follows:

§ 630.1204 Qualifying exigency leave.

(a) An employee may take FMLA leave while the employee’s spouse, son, daughter, or parent (the “covered military member”) is on covered active duty or call to covered active duty status for one or more of the following qualifying exigencies:

(1) Short-notice deployment. To address any issue that arises from the fact that a covered military member is notified of an impending call or order to covered active duty 7 or fewer calendar days prior to the date of deployment. Leave taken for this purpose can be used for a period of up to 7 calendar days beginning on the date a covered military member is notified of an impending call or order to covered active duty.

(2) Military events and related activities. (i) To attend any official ceremony, program, or event sponsored

by the military that is related to the covered active duty or call to covered 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 covered active duty or call to covered active duty status of a covered military member.

(3) Childcare and school activities.

(i) To arrange for alternative childcare when the covered active duty or call to covered active duty status of a covered military member necessitates a change in the existing childcare arrangement for a child;

(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 covered active duty or call to covered active duty status of a covered military member for a child;

(iii) To enroll in or transfer to a new school or day care facility a child, when enrollment or transfer is necessitated by the covered active duty or call to covered 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 child when such meetings are necessary due to circumstances arising from the covered active duty or call to covered active duty status of a covered military member.

(v) For purposes of paragraphs (a)(3)(i) through (a)(3)(iv) of this section, “child” means 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 the FMLA leave is to commence.

(4) Financial and legal arrangements.

(i) To make or update financial or legal arrangements to address the covered military member’s absence while on covered active duty or call to covered active duty status, such as preparing and executing financial and health care 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 covered active duty or call to covered active duty status, and for a period of 90 days following the termination of the covered military member's covered 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 a child as defined in paragraph (a)(3)(v) of this section, provided that the need for counseling arises from the covered active duty or call to covered active duty status of a covered military member.

(6) *Rest and recuperation*. 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 5 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 covered active duty status; and

(ii) To address issues that arise from the death of a covered military member while on covered 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 that arise out of the covered military member's covered active duty or call to covered active duty status, provided that the agency and employee agree that such leave qualifies as an exigency, and that they agree to both the timing and duration of such leave.

(b) An employee is eligible to take FMLA leave because of a qualifying exigency when the covered military member is on covered active duty or call to covered active duty status as a member of a regular component of the Armed Forces, or when the covered military member is on covered active duty or call to covered active duty status in support of a contingency operation pursuant to one of the provisions of law identified in the definition of *covered active duty or call to covered active duty status* 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.

(c) For those called to covered active duty status in support of a contingency operation—

(1) 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) of this section in support of a contingency operation.

(2) For such members, the active duty orders of a covered military member will generally specify whether the servicemember is serving in support of a contingency operation by citation to the relevant section of title 10 of the United States Code or by reference to the specific name of the contingency operation, or both. 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, or 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 10 U.S.C. 101(a)(13).)

■ 5. In redesignated § 630.1205, revise paragraph (b) and the last sentence of paragraph (c) to read as follows:

**§ 630.1205 Intermittent leave or reduced leave schedule.**

\* \* \* \* \*

(b) Leave under § 630.1203(a)(3) or (4) may be taken intermittently or on a reduced leave schedule when medically necessary, subject to §§ 630.1207 and 630.1208 (b)(6). Leave under § 630.1203(a)(5) may be taken on an intermittent or reduced leave schedule basis, subject to §§ 630.1207 and 630.1209.

(c) \* \* \* Upon returning from leave, the employee is entitled to be returned to his or her permanent position or an equivalent position, as provided in § 630.1210(a) of this part.

\* \* \* \* \*

■ 6. In redesignated § 630.1207, redesignate paragraphs (c) through (f) as (d) through (g), respectively, and add a new paragraph (c) to read as follows:

**§ 630.1207 Notice of leave.**

\* \* \* \* \*

(c) If the need for leave taken under § 630.1203(a)(5) is foreseeable, the employee must provide notice as soon as practicable, regardless of how far in advance the leave is being requested.

\* \* \* \* \*

■ 7. In redesignated § 630.1208, revise paragraph (k) to read as follows:

**§ 630.1208 Medical certification.**

\* \* \* \* \*

(k) To ensure the security and confidentiality of any written medical certification under § 630.1208 or 630.1210(h) of this part, the medical certification is subject to the provisions for safeguarding information about individuals under subpart A of part 293 of this chapter.

■ 8. Further redesignate §§ 630.1209 through 630.1212 as §§ 630.1210 through 630.1213, respectively, and add new § 630.1209 to read as follows:

**§ 630.1209 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 covered active duty or call to covered active duty status of a covered military member, an agency may require the employee to provide a copy of the covered military member's active duty orders or other documentation issued by the military that indicates the covered military member is on covered active duty or call to covered active duty status, and the dates of the covered military member's active duty service. This information need only be provided to the agency once. A copy of new active duty orders or other documentation issued by the military must be provided to the agency if the need for leave because of a qualifying exigency arises out of a different covered active duty or call to covered active duty status of the same or a different covered military member.

(b) *Required information*. An agency may require that leave for any qualifying exigency specified in § 630.1204 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 include the type of qualifying exigency for which leave is requested and any available written documentation that supports the request for 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 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 leave 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) *Verification.* If an employee submits a complete and sufficient certification to support his or her request for leave because of a qualifying exigency, the agency may not request additional information from the employee. However, the agency may verify the information described in paragraphs (c)(1) and (c)(2) of this section and does not need the employee's permission to do so.

(1) If the qualifying exigency involves meeting with a third party, the agency may contact the individual or entity with whom the employee is meeting for purposes of verifying a meeting or appointment schedule and verifying the information provided in the employee's statement under paragraph (b)(1) of this section regarding the meeting between the employee and the specified individual or entity. No additional information may be requested by the agency.

(2) An agency may contact an appropriate unit of the Department of Defense to request verification that a covered military member is on covered active duty or call to covered active duty status. No additional information may be requested by the agency.

■ 9. In § 630.1210 as redesignated, revise the last three sentences in paragraph (h) and all of paragraph (l) to read as follows:

**§ 630.1210 Protection of employment and benefits.**

\* \* \* \* \*

(h) \* \* \* The same conditions for verifying the adequacy of a medical certification in § 630.1208(c) apply to the medical certification to return to work. No second or third opinion on the medical certification to return to work may be required. An agency may not require a medical certification to return to work during the period the employee takes leave intermittently or under a reduced leave schedule under § 630.1205.

\* \* \* \* \*

(l) An employee who does not comply with the notification requirements in § 630.1207 and does not provide medical certification signed by the health care provider that includes all of the information required in § 630.1208(b) is not entitled to family and medical leave.

■ 10. In redesignated § 630.1213, revise paragraph (b)(3) to read as follows:

**§ 630.1213 Records and reports.**

\* \* \* \* \*

(b) \* \* \*

(3) The number of hours of leave taken under § 630.1203(a), including any paid leave substituted for leave without pay under § 630.1206(b); and

\* \* \* \* \*

[FR Doc. 2011-25310 Filed 9-29-11; 8:45 am]

**BILLING CODE 6325-39-P**

**MERIT SYSTEMS PROTECTION BOARD**

**5 CFR Part 1201**

**Practices and Procedures**

**AGENCY:** Merit Systems Protection Board.

**ACTION:** Final rule.

**SUMMARY:** The Merit Systems Protection Board (MSPB or the Board) is amending its rules of practice and procedure to clarify procedures regarding the issuance and citation of nonprecedential Orders.

**DATES:** This Final Rule is effective October 1, 2011.

**FOR FURTHER INFORMATION CONTACT:** William D. Spencer, Clerk of the Board, Merit Systems Protection Board, 1615 M Street, NW., Washington DC 20419; (202) 653-7200, fax: (202) 653-7130, or e-mail: [mspb@mspb.gov](mailto:mspb@mspb.gov).

**SUPPLEMENTARY INFORMATION:** On October 5, 2010, the MSPB published an interim rule amending 5 CFR 1201.117. (75 FR 61321) The interim rule amended 5 CFR 1201.117(c) to make clear that the Board may, in its discretion, include discussion of issues

raised in an appeal in a nonprecedential Order and amended 5 CFR 1201.117(b) to make clear that the Board may issue a final decision and, when appropriate, order a date for compliance with that decision.

The Board received comments concerning this interim rule from two individuals. The first commenter expressed unease with 5 CFR 1201.117(a)(5) and feared that this provision could be used to "scuttle" cases and asked that this provision be amended to state clearly that it would not be used to the detriment of employees and applicants for Federal positions. The interim rule did not amend 5 CFR 1201.117(a)(5). The Board has considered this comment and declines to amend this section.

A second commenter offered several observations. First, this commenter noted that there was no need for a separate class of nonprecedential Orders because the Board has in the past used footnotes to provide additional information in cases summarily denying petitions for review. The Board has considered this comment, but has determined that the goal of giving parties greater insight into the Board's reasoning in a particular case, without requiring the Board to issue a precedential decision, is best served by the issuance of nonprecedential Orders. This commenter also expressed the concern that if the Board's purpose was to avoid publication of nonprecedential Orders on the Board's Web site or by other reporting services, this goal would likely be thwarted by commercial reporting services with the result that two classifications of Board decisions would be published and ultimately cited by parties. The Board's goal was not to avoid publication of nonprecedential Orders. The Board will post nonprecedential Orders on its Web site. In addition, this final rule contains specific guidelines for the citation of nonprecedential Orders. Finally, this commenter opined that issuance and publication of nonprecedential Orders would complicate legal research, lead to confusion, and not serve the goal of open government. As noted above, the Board has included specific guidelines for the citation of nonprecedential Orders. Further, the Board is convinced that the issuance and publication of nonprecedential Orders will serve the goal of openness in the Board's decision-making by giving parties greater insight into the Board's reasoning.

The amendments in this final rule affect only 5 CFR 1201.117(c) and include updated procedures for the issuance of Opinions and Orders and