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29 CFR Part 825

The Family and Medical Leave Act; Final Rule

**DEPARTMENT OF LABOR****Wage and Hour Division****29 CFR Part 825**

RIN 1215-AB76, RIN 1235-AA03

**The Family and Medical Leave Act****AGENCY:** Wage and Hour Division, Department of Labor.**ACTION:** Final rule.

**SUMMARY:** This Final Rule amends certain regulations of the Family and Medical Leave Act of 1993 (the FMLA or the Act) to implement amendments to the military leave provisions of the Act made by the National Defense Authorization Act for Fiscal Year 2010, which extends the availability of FMLA leave to family members of members of the Regular Armed Forces for qualifying exigencies arising out of the servicemember's deployment; defines those deployments covered under these provisions; extends FMLA military caregiver leave for family members of current servicemembers to include an injury or illness that existed prior to service and was aggravated in the line of duty on active duty; and extends FMLA military caregiver leave to family members of certain veterans with serious injuries or illnesses. This Final Rule also amends the regulations to implement the Airline Flight Crew Technical Corrections Act, which establishes eligibility requirements specifically for airline flight crewmembers and flight attendants for FMLA leave and authorizes the Department to issue regulations regarding the calculation of leave for such employees as well as special recordkeeping requirements for their employers. In addition, the Final Rule includes clarifying changes concerning the calculation of intermittent or reduced schedule FMLA leave; reorganization of certain sections to enhance clarity; the removal of the forms from the regulations; and technical corrections to the current regulations.

**DATES:** This Final Rule is effective March 8, 2013.**FOR FURTHER INFORMATION CONTACT:**

Mary Ziegler, Director of the Division of Regulation, Legislation, and Interpretation, Wage and Hour Division, U.S. Department of Labor, Room S-3502, 200 Constitution Avenue NW., Washington, DC 20210; telephone: (202) 693-0406 (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 (this is not a toll-free number). 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/whd/america2.htm>.

**SUPPLEMENTARY INFORMATION:****I. Executive Summary***Purpose of the Regulatory Action*

This Final Rule amends certain regulations of the FMLA to implement amendments to the military leave provisions of the Act made by the National Defense Authorization Act for Fiscal Year 2010 (FY 2010 NDAA), to implement amendments to the hours of service requirements made by the Airline Flight Crew Technical Corrections Act (AFCTCA) and add new leave calculation regulations for flight crew employees, and to clarify existing regulatory provisions related to intermittent leave and make other clarifying changes.

On November 17, 2008, the Department issued a Final Rule (2008 Final Rule) implementing amendments to the FMLA made by the National Defense Authorization Act for Fiscal Year 2008 (FY 2008 NDAA). 73 FR 67934. The FY 2008 NDAA created two new categories of leave: qualifying exigency leave and military caregiver leave. Under the FY 2008 NDAA's qualifying exigency leave provision, eligible family members of members of the National Guard and Reserves are entitled to take FMLA leave for qualifying exigencies, as defined by the Secretary of Labor, arising out of the military member's deployment in support of a contingency operation. In the 2008 Final Rule, the Secretary defined qualifying exigency using eight categories: *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* to which both the employer and employee agree. Under the FY 2008 NDAA's military caregiver leave provision, eligible family members of current servicemembers are entitled to take up to 26 workweeks of military caregiver

leave in a single 12-month period to care for a current servicemember who incurred a serious injury or illness in the line of duty on active duty that renders the servicemember unable to perform the duties of his or her office, grade, rank, or rating. The Secretary implemented the FY 2008 amendments in the 2008 Final Rule.

The FY 2010 NDAA further amends the FMLA by expanding the qualifying exigency leave provision to include leave for eligible family members of members of the Regular Armed Forces and by adding a foreign deployment requirement for both members of the Regular Armed Forces and the National Guard and Reserves. The FY 2010 NDAA amendments also expands military caregiver leave to cover injuries or illnesses that existed prior to the servicemember's active duty and were aggravated in the line of duty on active duty in the Armed Forces. 29 U.S.C. 2611(18)(A). It further expands the military caregiver leave provision to provide leave to eligible family members of certain veterans with a serious injury or illness who are receiving medical treatment, recuperation, or therapy, if the veteran was a member of the Armed Forces at any time during the period of five years preceding the date of the medical treatment, recuperation, or therapy. 29 U.S.C. 2611(15)(B). The amendments define a serious injury or illness for a veteran as a "qualifying (as defined by the Secretary of Labor) injury or illness that was incurred by the member in line of duty on active duty in the Armed Forces (or existed before the beginning of the member's active duty and was aggravated by service in line of duty on active duty in the Armed Forces) and that manifested before or after the member becomes a veteran." 29 U.S.C. 2611(18)(B).

The AFCTCA establishes special hours of service eligibility requirements for airline flight crewmembers and flight attendants (collectively referred to as airline flight crew employees) for FMLA leave. The amendments provide that an airline flight crew employee meets the hours of service requirement if during the previous 12-month period, he or she (1) has worked or been paid for not less than 60 percent of the applicable total monthly guarantee (or the equivalent) and (2) has worked or been paid for not less than 504 hours, not including personal commute time or time spent on vacation, medical, or sick leave. Congress authorized the Department to issue regulations providing a method of calculating leave for airline flight crew employees as well as regulations regarding employers' maintenance of

certain information specific to airline flight crew employees.

Finally, in this rulemaking, the Department also took the opportunity to make organizational improvements and clarifying edits to enhance the regulated community's understanding of the regulations.

#### *Summary of the Major Provisions of the Final Rule*

To implement the amendments made to the FMLA by the FY 2010 NDAA, this Final Rule revises the FMLA regulations to reflect the expansion of qualifying exigency leave to include eligible employees with family members serving in the Regular Armed Forces and the addition of the foreign deployment requirement. It also increases the length of time an eligible family member may take for the qualifying exigency leave reason of Rest and Recuperation from five days to up to a maximum of 15 days and creates a new qualifying exigency leave category for *parental care*.

In military caregiver leave, the Final Rule expands the definition of *serious injury or illness* to include pre-existing injuries or illnesses of current service members that were aggravated in the line of duty, and expands military caregiver leave to care for covered veterans. It defines a *covered veteran* as an individual who is undergoing medical treatment, recuperation, or therapy for a serious injury or illness and who was discharged or released under conditions other than dishonorable at any time during the five-year period prior to the first date the eligible employee takes FMLA leave to care for the covered veteran. The Final Rule interprets the five-year period of eligibility for a covered veteran to exclude the period between the enactment of the FY 2010 NDAA on October 28, 2009, and the effective date of this Final Rule to protect the military caregiver leave entitlement of family members of veterans whose five-year period has either expired or has been diminished during that time. The Final Rule defines a *serious injury or illness of a covered veteran* as: (i) A continuation of a serious injury or illness that was incurred or aggravated when the covered veteran was a member of the Armed Forces and rendered the servicemember unable to perform the duties of the servicemember's office, grade, rank, or rating; (ii) a physical or mental condition for which the covered veteran has received a U.S. Department of Veterans Affairs Service Related Disability Rating (VASRD) of 50 percent or higher, and such VASRD rating is based, in whole or in part, on the condition precipitating the need for

military caregiver leave; (iii) a physical or mental condition that substantially impairs the covered veteran's ability to secure or follow a substantially gainful occupation by reason of a disability or disabilities related to military service, or would do so absent treatment; or (iv) an injury, including a psychological injury, on the basis of which the covered veteran has been enrolled in the Department of Veterans Affairs Program of Comprehensive Assistance for Family Caregivers.

In addition to revising the regulations to reflect the statutory amendments, the Final Rule also increases the length of time an eligible family member may take for the qualifying exigency leave reason of *Rest and Recuperation* from five days to up to a maximum of 15 days to match the military member's Rest and Recuperation leave orders, and creates a new qualifying exigency leave category for *parental care*. The Final Rule also expands the list of authorized health care providers from whom an employee may obtain a certification of the servicemember's serious injury or illness to include authorized health care providers as defined by the regulations in § 825.125. The Final Rule permits an employer to request a second and third opinion for medical certifications obtained from a health care provider who is not affiliated with the Department of Defense (DOD), the Department of Veterans Affairs (VA), or the TRICARE network.

This Final Rule also implements the amendments made to the FMLA by the AFCTCA. The Final Rule relocates the special rules applicable only to airline flight crew employees and their employers to revised Subpart H—Special Rules Applicable to Airline Flight Crew Employees to provide clarity to employees and employers and to emphasize the distinction between the eligibility requirements and calculation of FMLA leave for airline flight crew employees and all other employees. Additionally, the Final Rule adopts a uniform entitlement for airline flight crew employees of 72 days of leave for one or more of the FMLA-qualifying reasons set forth in §§ 825.112(a)(1)–(5) and 156 days of military caregiver leave under § 825.112(a)(6). The Final Rule further provides that employers must account for an airline flight crew employee's FMLA leave usage utilizing an increment no greater than one day. As revised, Subpart H also includes special recordkeeping requirements applicable to the employers of airline flight crew employees.

The Final Rule also revises various regulatory sections the Department

revisited in the course of implementing the statutory amendments described previously. For instance, the Department moves the definitions section from current § 825.800 to currently reserved § 825.102. These revisions also include clarifications to the rules for calculation of intermittent or reduced schedule FMLA leave, including clarifying regulatory language regarding increments of leave and providing additional explanation of the physical impossibility rule. The Department also made modifications to ensure consistency with other statutes, such as amending references to the Uniformed Services Employment and Reemployment Rights Act (USERRA) to more closely mirror the USERRA regulations, and setting forth an employer's obligation to comply with the confidentiality requirements of the Genetic Information Nondiscrimination Act of 2008 (GINA).

Finally, the Final Rule updates the FMLA optional use forms (WH–380, WH–381, WH–382, WH–384, and WH–385) to reflect the statutory changes, creates a new optional use form for the certification of a serious injury or illness for a veteran (WH–385–V), and removes the forms from the regulations.

This Final Rule revises only some provisions of the existing regulations and creates certain new provisions, but the Department is republishing the entirety of the FMLA regulations (Part 825). The Department is republishing the unchanged provisions along with the revised provisions as a convenience to readers and to ensure readers are provided the context for the changes made in the Final Rule.

#### *Costs and Benefits*

The Department estimates that 381,000 covered firms and government agencies owning 1.2 million establishments and employing 91.1 million workers will potentially be affected by the Final Rule changes. These employers have an annual payroll of \$5.0 trillion, estimated annual revenues of \$23.7 trillion, and estimated net income of \$1.03 trillion. See Table 3 in the Summary of Impacts.

Under the AFCTCA, the Department estimates that nearly 6,000 flight attendants, pilots, co-pilots, and flight engineers will take new FMLA leaves. The Department estimates that each individual will take 1.5 leaves, for a total of 8,930 leaves. Under the FY 2010 NDAA amendments, the Department estimates that approximately 30,900 eligible employees will take 926,000 days (7.4 million hours) of FMLA leave annually to address qualifying exigencies; and, that nearly 7,000

eligible employees will take 385,000 days (3.1 million hours) of FMLA leave annually to act as a caregiver for a veteran who is undergoing treatment for a serious illness or injury. See Table ES-1.

TABLE ES-1—SUMMARY OF LEAVES TAKEN AS A RESULT OF THE RULE

Leave taker	Covered service-members and veterans	Number eligible for leave	Number who will take FMLA leave	Number of leaves (1,000)	Days of leave (1,000)	Hours of leave (mil.)
Flight Crew [a]		90,560	5,950	8.9	8.9	
Pilots		41,470	2,070	3.1	3.1	
Flight Attendants		49,090	3,880	5.8	5.8	
NDAAs 2010 [b]	218,130	219,908	37,896	758	1,311	10.5
Qualifying Exigency	197,000	193,000	30,900	401	926	7.4
Military Caregiver	21,130	26,908	6,966	357	385	3.1

[a] Number eligible for leave represents only those flight crew employees not currently covered by an FMLA-type provision under a CBA; thus, the number of leaves equals new leaves as a result of this rule. The Department did not estimate the number of hours of leave for flight crew employees because the rule establishes a bank of days of leave, to be used in full day increments.

[b] Number of days and hours of leave estimated based on leave profiles, see discussion for more detail.

The Department projects that the annualized cost of the rule will average somewhat less than \$43 million per year over 10 years. The rule is expected to cost \$53.9 million in the first year, and \$41.3 million per year in subsequent years. The amendment to extend FMLA provisions to flight crew employees

accounts for 0.7 percent of first year costs and 0.9 percent in subsequent years, while military exigency and caregiver leave account for 75.9 percent of first year costs and 99.1 percent of costs in subsequent years. Regulatory familiarization costs account for 23.4 percent of first year costs. The costs

related to the provision of health benefits account for the largest share of costs, about 44.0 percent of costs in the first year of the rule, and 57.5 percent of costs each in each of the following years. See Table ES-2.

TABLE ES-2—SUMMARY OF IMPACT OF CHANGES TO FMLA [A]

Component	Year 1 (\$ mil)	Year 2 (\$ mil)	Annualized (\$ mil) [b]	
			Real discount rate 3%	Real discount rate 7%
Total	\$53.9	\$41.3	\$42.8	\$43.0
<i>Cost of Each Amendment:</i>				
Any FMLA regulatory revision	12.6	0.0	1.4	1.7
Flight Crew Technical Amendment	0.4	0.4	0.4	0.4
NDAAs 2010	41.0	41.0	41.0	41.0
<i>NDAAs Subtotal: Qualifying Exigency</i>	25.8	25.8	25.8	25.8
<i>NDAAs Subtotal: Military Caregiver</i>	15.1	15.1	15.1	15.1
<i>Cost of Each Requirement:</i>				
Regulatory Familiarization	12.6	0.0	1.4	1.7
Employer Notices	17.1	17.1	17.1	17.1
Certifications	0.4	0.4	0.4	0.4
Health Benefits	23.8	23.8	23.8	23.8

[a] Columns may not sum due to rounding.  
 [b] Costs are annualized over 10 years.

The Department anticipates significant benefits resulting from the Final Rule. For example, providing job-protected leave for caregivers of covered veterans under the military caregiver provision is expected to increase family involvement in the veteran’s recovery, improve self-reliance and access to resources for caregivers, and reduce negative outcomes for covered veterans and their families. Also, the extension of FMLA leave entitlement to flight crew employees will allow them to enjoy all the benefits of FMLA coverage, and may also reduce employer costs due to presenteeism (the loss of productivity due to employees working while injured or ill) and a resulting increase in overall productivity, workplace safety and

employee wellness. The Department is not able to quantify these benefits at this time due to lack of suitable data.

**II. Background**

This regulatory action first appeared on the Department’s Fall 2009 Regulatory Agenda where the Department stated its intent to review the impact of the 2008 Final Rule on the regulated community. 77 FR 67934. Subsequently, the FMLA was amended by the National Defense Authorization Act for Fiscal Year 2010 (FY 2010 NDAAs), Public Law 111-84, and the Airline Flight Crew Technical Corrections Act (AFCTCA), Public Law 111-119. This rulemaking, therefore, makes regulatory changes to implement

these statutory amendments. It also makes various clarifying revisions to existing regulations. The Department continues to review the impact of regulatory revisions made in the FMLA 2008 Final Rule.

*A. What the FMLA provides*

The FMLA was enacted on February 5, 1993, and became effective for most covered employers on August 5, 1993. As originally enacted, the 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 incapacitated due to the employee's own serious health condition.

The FMLA was amended in January 2008 with the enactment of the FY 2008 NDAA. Public Law 110–181. Section 585(a) of FY 2008 NDAA expanded the FMLA to allow eligible employees of covered employers to take FMLA leave because of any qualifying exigency (as determined by the Secretary of Labor) when that employee's spouse, son, daughter, or parent is a member of the National Guard or Reserves who is on, or has been notified of an impending call or order to, active duty in the Armed Forces in support of a contingency operation (referred to as qualifying exigency leave). Additionally, the FY 2008 NDAA amendments provided up to 26 workweeks of leave in a single 12-month period for an eligible employee 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 covered servicemember (referred to as military caregiver leave). These two leave entitlements are collectively referred to as military family leave.

The FMLA was again amended in 2009 with the enactment of the FY 2010 NDAA on October 28, 2009, and the AFCTCA on December 21, 2009. Section 565(a) of the FY 2010 NDAA amended the military family leave provisions of the FMLA by extending qualifying exigency leave to eligible family members of members of the Regular Armed Forces, and military caregiver leave to include care provided to certain veterans. The AFCTCA amended the FMLA to provide special hours of service eligibility requirements for airline flight crew employees. Each of these amendments is discussed in detail in the section-by-section analysis that follows.

FMLA leave may be taken in a block, or under certain circumstances, intermittently or on a reduced leave schedule. In addition to providing job-protected family and medical leave, employers must also maintain any pre-existing group health plan coverage for an employee on FMLA-protected leave under the same conditions that would apply if the employee had not taken leave. 29 U.S.C. 2614. Once the leave period is concluded, the employer is required to restore the employee to the same or an equivalent position with equivalent employment benefits, pay,

and other terms and conditions of employment. *Id.* If an employee believes that his or her FMLA rights have been violated, the employee may file a complaint with the Department or file a private lawsuit in Federal or state court. If the employer has violated the 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. 29 U.S.C. 2617.

Title I of the FMLA is administered by the Department and applies to private sector employers with 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 and certain employees covered by other Federal leave systems. Title III established a temporary Commission on Leave to conduct a study and report on existing and proposed policies on leave and the costs, benefits, and impact on productivity of such policies. Title IV contains provisions governing the effect of the FMLA on more generous leave policies, other laws, and existing employment benefits. Finally, Title V originally extended the leave provisions to certain employees of the U.S. Senate and House of Representatives; however, such coverage was repealed and replaced by the Congressional Accountability Act of 1995. 2 U.S.C. 1301.

#### *B. Who the Law Covers*

The FMLA generally covers employers with 50 or more employees. To be eligible to take FMLA leave, an employee must meet specified criteria, including employment with a covered employer for at least 12 months, performance of a specified number of hours of service in the 12 months prior to the start of leave, and work at a location where there are at least 50 employees within 75 miles.

#### *C. Regulatory History*

The FMLA required the Department to issue initial regulations to implement Title I and Title IV of the FMLA within 120 days of the law's enactment (by June 5, 1993) with an effective date of August 5, 1993. The Department published a Notice of Proposed Rulemaking (NPRM) in the **Federal Register** on March 10, 1993. 58 FR 13394. The Department received

comments from a wide variety of stakeholders, and after considering these comments the Department issued an Interim Final Rule on June 4, 1993, effective August 5, 1993. 58 FR 31794.

After publication, the Department invited further public comment on the interim regulations. 58 FR 45433. During this comment period, the Department received a significant number of substantive and editorial comments on the interim regulations from a wide variety of stakeholders. Based on this second round of public comments, the Department published final regulations to implement the FMLA on January 6, 1995. 60 FR 2180. The regulations were amended February 3, 1995 (60 FR 6658) and 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** requesting public comment on its experiences with and observations of the Department's administration of the FMLA and the effectiveness of the regulations. 71 FR 69504. Comments were received from workers, family members, employers, academics, and other interested parties, ranging from personal accounts, surveys, and legal reviews to academic studies and recommendations for regulatory and statutory changes to the FMLA. The Department published its Report on the comments in the **Federal Register** on June 28, 2007. 72 FR 35550.

The Department published an NPRM in the **Federal Register** on February 11, 2008 proposing changes to the FMLA's regulations based on the Department's experience administering the law, two Department of Labor studies and reports on the FMLA issued in 1996 and 2001, several U.S. Supreme Court and lower court rulings on the FMLA, and a review of the comments received in response to the RFI. 73 FR 7876. Comments were also sought on the FY 2008 NDAA military family leave statutory provisions. In response to the NPRM, the Department received thousands of comments from a wide variety of stakeholders. The Department issued a Final Rule on November 17, 2008, which became effective on January 16, 2009. 73 FR 67934.

The Department commenced the current rulemaking by publishing an NPRM in the **Federal Register** on February 15, 2012 (77 FR 8960), inviting public comment for 60 days. On April 16, 2012, in response to requests to extend the comment period, the Department published a notice extending the original 60-day comment

period by 14 days. 77 FR 22519. The comment period closed on April 30, 2012; approximately 870 comments were received and are available for review at the Federal eRulemaking Portal, [www.regulations.gov](http://www.regulations.gov), Docket ID WHD-2012-0001. Comments were received from worker advocacy organizations, military members, employers, employer associations, human resource specialists, labor organizations, and private individuals. Approximately 90 percent of the comments received were identical or nearly identical form letters sent in response to a comment campaign by members of the Society for Human Resource Management (SHRM). The Department received one comment “late”—after the close of the comment period—from SHRM. Although SHRM accessed the Federal eRulemaking Portal prior to the midnight deadline, it was unable to submit its comment in a timely manner due to technical difficulties. Since technical difficulties prevented SHRM from complying with the deadline, the Department accepted SHRM’s comment in this rulemaking. Several of the comments received addressed issues that are beyond the scope or authority of the proposed regulations including expanding the coverage or benefits of the Act. However, many of the comments centered on either the military amendments or the AFCTCA amendments, with several offering comments on both amendments. Comments on specific provisions are discussed in detail in the Summary of Comments below.

#### *D. Updates to the Military Family Leave Provisions*

Section 565(a) of the FY 2010 NDAA, enacted on October 28, 2009, amends the military family leave provisions of the FMLA. Public Law 111-84. The FY 2010 NDAA expands the availability of qualifying exigency leave and military caregiver leave. Qualifying exigency leave, which was made available to family members of the National Guard and Reserve components under the FY 2008 NDAA, is expanded to include family members of members of the Regular Armed Forces. The entitlement to qualifying exigency leave is expanded by substituting the term covered active duty for active duty and defining covered active duty for a member of the Regular Armed Forces as “duty during the deployment of the member with the Armed Forces to a foreign country”, and for a member of the Reserve components of the Armed Forces as “duty during the deployment of the member with the Armed Forces to a foreign country

under a call or order to active duty under a provision of law referred to in section 101(a)(13)(B) of title 10, United States Code.” 29 U.S.C. 2611(14).<sup>1</sup> Prior to the FY 2010 NDAA amendments, there was no requirement that members of the National Guard and Reserves be deployed to a foreign country.

The FY 2010 NDAA amendments expand the definition of a serious injury or illness for military caregiver leave for current members of the Armed Forces to include an injury or illness that existed prior to service and was aggravated in the line of duty on active duty and that renders the member medically unfit. 29 U.S.C. 2611(18)(A). These amendments also expand the military caregiver leave provisions of the FMLA to allow family members to take military caregiver leave to care for certain veterans. The definition of a covered servicemember, which is the term the Act uses to indicate the group of military members for whom military caregiver leave may be taken, is broadened to include a veteran with a serious injury or illness who is receiving medical treatment, recuperation, or therapy, if the veteran was a member of the Armed Forces at any time during the period of five years preceding the date of the medical treatment, recuperation, or therapy. 29 U.S.C. 2611(15)(B). The amendments define a serious injury or illness for a veteran as a “qualifying (as defined by the Secretary of Labor) injury or illness that was incurred by the member in line of duty on active duty in the Armed Forces (or existed before the beginning of the member’s active duty and was aggravated by service in line of duty on active duty in the Armed Forces) and that manifested itself before or after the member became a veteran.” 29 U.S.C. 2611(18)(B).

As was the case with the FY 2008 NDAA, the FY 2010 NDAA is silent as to the effective date of the FMLA amendments. In the NPRM, the Department stated its position that the qualifying exigency provision of the FY 2010 NDAA was effective upon the law’s enactment on October 28, 2009. 77 FR 8962. However, because the FY 2010 NDAA requires the Secretary to define a serious injury or illness of a veteran, the Department concluded that the military caregiver leave provision for family members of certain veterans

would not be effective until the Department defined this term. 77 FR 8962. The Department stated that employers were not required to provide employees with leave to care for a covered veteran until the Department defined the term. *Id.* The Department noted, however, that employers were not prohibited from providing employees with leave to care for a veteran if employers chose to do so before the Department defined this term through regulation, but such leave, assuming it did not otherwise qualify as FMLA leave to care for a family member with a serious health condition, would not be FMLA-protected and would not count against employees’ FMLA entitlement. *Id.*

Although the Department did not request comments on its interpretation of the effective date of the FY 2010 NDAA amendments, a few commenters addressed the effective date of the military caregiver leave provision providing care to certain veterans. SHRM and Senators Harkin and Murray concurred with the Department’s position that military caregiver leave is not available to veterans’ families until the Department defines serious injury or illness of a veteran through regulation. The Legal Aid Society—Employment Law Center (Legal Aid) asserted that the Department’s positions on the effective date of the military caregiver leave provision in the FY 2008 NDAA and the FY 2010 NDAA were inconsistent. It urged the Department to treat the provision providing military caregiver leave to care for veterans as effective on the signing date of the FY 2010 NDAA in light of the critical needs of veterans. It also urged the Department to state that if an employer permitted an employee to take leave to care for a veteran before the Department defined this term through regulation, such leave is protected under the FMLA. The National Employment Lawyers Association (NELA) commented that, from the date the law was enacted in 2009 until the adoption of final regulations, employers could have permitted employees to take leave to care for a veteran pursuant to 29 U.S.C. 2652(a), which authorizes employers to voluntarily provide leave rights broader than those provided for under the FMLA, and asserted that such leave would be FMLA protected. At the same time, however, NELA supported the Department’s position that any such leave taken before final regulations are adopted should not count against an employee’s FMLA entitlement, and recommended that the regulations expressly incorporate this requirement.

<sup>1</sup> As with the FY 2008 NDAA, the FY 2010 NDAA references 10 U.S.C. 101(a)(13)(B), which covers call ups of the National Guard and Reserves and certain retired members of the Regular Armed Forces and Reserves in support of contingency operations. 73 FR 67954-55. For simplicity, the terms “National Guard and Reserve” and “Reserve components” are used interchangeably throughout this document and refer to these categories of military members.

The Department disagrees with Legal Aid's suggestion that the Department is being inconsistent in its position on the effective date of the 2008 and 2010 amendments. In both the 2008 Final Rule and this rulemaking, the Department determined that where the statute requires the Secretary to define a term, that portion of the statute is not effective until the Department defines the term through regulation; where the statute does not require the Secretary to define any terms, that portion of the statute is effective upon the statute's enactment. In the FY 2008 NDAA, Congress directed the Secretary to define the term qualifying exigency, and, therefore, the Department concluded that qualifying exigency leave was not effective until the Department defined this term in the 2008 Final Rule. 73 FR 7925. In the FY 2010 NDAA, Congress directed the Secretary to define what qualifies as a serious injury or illness of a veteran, and, therefore, the Department has taken the position that employers are not required to provide military caregiver leave to care for a veteran until the Department defines a serious injury or illness of a veteran through regulation. Similarly, in the FY 2008 NDAA, Congress did not require the Secretary to define any terms related to military caregiver leave, and therefore the Department took the position that the military caregiver leave provision was effective upon enactment. 73 FR 7925. In the FY 2010 NDAA, Congress did not require the Secretary to define any terms related to the expansion of qualifying exigency leave, and therefore Department has taken the position that the qualifying exigency leave provision was effective upon enactment. As to the comments regarding the treatment of leave to care for a veteran that is voluntarily provided by an employer before the effective date of this Final Rule, the Department disagrees with the commenters' assertions that such leave is FMLA-protected. Because this provision of the FY 2010 NDAA is not effective until the Department defines a qualifying serious injury or illness of a veteran through regulation, there is no basis to treat such leave, if voluntarily provided by an employer, as FMLA-protected. There is likewise no basis to interpret 29 U.S.C. 2652(a) as requiring that leave to care for a veteran voluntarily provided by an employer prior to the effective date of this Final Rule be treated as protected FMLA leave. Section 2652(a) states that the FMLA does not diminish an employer's obligations to comply with the terms of any employment benefit program or

plan providing greater rights than the FMLA that the employer has agreed to provide through a collective bargaining agreement or otherwise voluntarily agreed to provide. This section does not say that any benefit provided under such program or plan that exceeds the rights provided under the FMLA is protected under the FMLA. Nor does it say that the FMLA provides a mechanism for enforcement of such benefits. Thus, the Department's position in this Final Rule is the same as set out in the NPRM: the qualifying exigency leave provision of the FY 2010 NDAA was effective on October 28, 2009; the military caregiver leave provision to care for a covered veteran will be effective on the effective date of this Final Rule; and any leave to care for a veteran voluntarily provided by an employer before the effective date of this Final Rule that does not otherwise qualify as FMLA leave to care for a family member with a serious health condition is not FMLA-protected and does not count against employees' FMLA entitlement.

#### *E. Amendments to Eligibility Criteria for Airline Flight Crewmembers and Flight Attendants*

On December 21, 2009, the AFCTCA was enacted, establishing a special hours of service eligibility requirement for airline flight crew employees. The AFCTCA provides that an airline flight crew employee will meet the hours of service eligibility requirement if he or she has worked or been paid for not less than 60 percent of the applicable total monthly guarantee (or its equivalent) and has worked or been paid for not less than 504 hours (not including personal commute time or time spent on vacation, medical, or sick leave) during the previous 12 months. Airline flight crew employees continue to be subject to the FMLA's other eligibility requirements. The AFCTCA also authorized the Department to issue regulations regarding the calculation of FMLA leave for airline flight crew employees as well as special recordkeeping requirements for the employers of such employees.

The AFCTCA is silent as to its effective date. The Department concluded in the NPRM that the amendment became effective on the date of enactment, December 21, 2009, because the AFCTCA is explicit about how to calculate the hours of service requirement for airline flight crew employees. 77 FR 8962. Although the AFCTCA authorizes the Department to promulgate regulations regarding how to calculate the FMLA leave entitlement for airline flight crew employees, and

special recordkeeping requirements, these authorizations are permissive and do not require the Department to engage in rulemaking. The Department did not request comments concerning the effective date of the AFCTCA and no comments were received on the issue. The Department's position in this Final Rule is the same as set out in the NPRM.

### **III. Summary of Comments**

The Department received approximately 870 comments on the NRPM; of those, almost 90 percent were identical or nearly identical form letters from SHRM members which addressed concerns about the Department's proposed elimination of the employer's ability to utilize different increments of FMLA leave at different times of the day or shift and the Department's consideration of whether the physical impossibility provision should be removed from the regulations. The Department also received comments that were general statements, and comments addressing issues that are beyond the scope authority of the proposed regulations. The remaining comments reflect a wide variety of views primarily concerning proposals to implement the FY 2010 NDAA or the AFCTCA. Many include substantive analyses of the proposed revisions. Some commenters addressed both amendments and some addressed other proposed changes as well. The Department 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. A number of other minor editorial changes have been made for consistency in the regulatory text.

### **IV. Section-by-Section Analysis of Proposed Changes to the FMLA Regulations**

The following is a section-by-section analysis of the final revisions to the FMLA regulations. As explained, this Final Rule revises only certain provisions of the existing regulations and creates certain new provisions, which are discussed below. The Department is republishing, however, the entirety of the FMLA regulations, including the unchanged regulatory provisions not discussed here.

The primary sections of the regulations with revisions to implement the FY 2010 NDAA amendments are: § 825.126 (Leave because of a qualifying

exigency); § 825.127 (Leave to care for a covered servicemember with a serious injury or illness); § 825.309 (Certification for leave taken because of a qualifying exigency); and § 825.310 (Certification for leave taken to care for a covered servicemember (military caregiver leave)). Less substantive changes are made to § 825.122 (Definitions of covered servicemember, spouse, parent, son or daughter, next of kin of a covered servicemember, adoption, foster care, son or daughter on covered active duty or call to covered active duty status, son or daughter of a covered servicemember, and parent of a covered servicemember) and § 825.102 (Definitions) to reflect new definitions related to military family leave (moved from § 825.800 in the current regulations).

The sections of the regulations with final revisions to implement the AFCTCA are located in revised Subpart H newly titled, Special Rules Applicable to Airline Flight Crew Employees. This reorganization is intended to enhance clarity and utility of the regulations, and to prevent confusion about the applicability of the special rules for airline flight crew employees to any other types of employees. Subpart H includes the following sections: § 825.800 (Special rules for airline flight crew employees, general), § 825.801 (Special rules for airline flight crew employees, hours of service requirement); § 825.802 (Special rules for airline flight crew employees, calculation of leave); and § 825.803 (Special rules for airline flight crew employees, recordkeeping requirements). Additional changes to implement the AFCTCA are made in § 825.102 (Definitions).

In addition to changes to incorporate the statutory amendments, the Department also made changes to clarify existing regulatory text and for consistency with other statutes and regulations. Specifically, the Department moved the definitions section of the regulations from § 825.800 to § 825.102, which is reserved in the current regulations, and made certain substantive revisions to the definitions as discussed later in this preamble. Other modified sections include § 825.110 (Eligible employee), § 825.205 (Increment of FMLA leave for intermittent and reduced schedule leave), § 825.500 (Recordkeeping requirements), and § 825.702 (Interaction with Federal and State anti-discrimination laws).

The Department also removes the following optional-use forms and notices from the regulations' Appendices: Forms WH-380-E

(Certification of Health Care Provider—Employee), WH-380-F (Certification of Health Care Provider—Family Member), WH-384 (Certification of Qualifying Exigency for Military Family Leave), and WH-385 (Certification for Serious Injury or Illness of Covered Servicemember for Military Family Leave) related to certification; and Forms WH-381 (Notice of Eligibility and Rights & Responsibilities), WH-382 (Designation Notice to Employee of FMLA Leave), and Notice to Employees of Rights under FMLA (WH Publication 1420) related to notification. The Department noted in the NPRM that the forms would continue to be available to the public on the WHD Web site, and that the forms are separately subject to the requirements of the Paperwork Reduction Act of 1995 (PRA), which provides an opportunity for the public to comment on the forms and their information collection requirements every three years. The Department also advised that future substantive changes to the forms would continue to require separate and additional rulemaking. 77 FR 8963.

The Department received several comments on this proposal. Aon Hewitt and a self-described labor-employment attorney both supported the Department's proposal to remove the forms from the regulations. Legal Aid, the National Coalition to Protect Family Leave (Coalition), and SHRM opposed the proposal. Legal Aid stated that removing the forms from the regulations would eliminate an important source of information for employers and employees. This commenter also stated that many people lack access to the Internet, and even for those who do have access, navigating the Internet and being certain that the most recent form is being accessed is difficult. The Coalition expressed concern that the PRA procedures would not produce the same amount of public participation and awareness of future proposed changes to the forms. This commenter further asserted that even the slightest changes to the forms can result in a significant economic impact on an employer as systems must be updated to accommodate the changes. The commenter also stated that the forms are a critical part of the FMLA approval process, and even the smallest proposed changes should receive careful consideration. SHRM commented that the notice and comment process has contributed to the improvement of these forms over time and that it would be a mistake to remove the forms from this regulatory process. It also commented that removal of the forms from the

rulemaking process would be contrary to the Administration's commitment to transparency and open government, notwithstanding the Department's assertion that the PRA review process would facilitate these goals.

The Department has carefully considered the concerns raised by the commenters, and has decided to implement the provision as proposed. The Department understands that, for many employers and employees, compliance with the FMLA begins with notification and certification of the employee's need for leave. The Department recognizes that its optional-use FMLA forms, as well as employer forms requiring the same information, play a key role in employers' compliance with the FMLA and employees' ability to take FMLA-protected leave when needed. Therefore, the Department believes it would be helpful to discuss the authority for these information collections, briefly describe the PRA process, and explain how the removal of the forms from the regulations will and will not impact the regulated community.

The Department's authority for the collection of information and the required disclosure of information under the FMLA stems from the statute and/or the implementing regulations. The authority for an employer requiring medical certification in support of an employee's request for FMLA leave due to a serious health condition and for the content of the certification are found in 29 U.S.C. 2613(a), 2614(c)(3) and 29 CFR 825.100(d), 825.305–308, 825.312. These provisions are the basis for Forms WH-380-E and WH-380-F. The authority for requiring certification in support of an employee's need for leave due to a qualifying exigency arising from the deployment of the employee's family member and the content of the information included in Form WH-384 are found in 29 U.S.C. 2613(f) and § 825.309. The authority for requiring certification of a covered servicemember's serious injury or illness and the content of Form WH-385 and new Form WH-385-V are found in 29 U.S.C. 2613(a) and § 825.310. The regulations, § 825.300(b)–(c), set forth the authority and information requirements for Form WH-381, Notice to Employee of FMLA Eligibility and Rights and Responsibility. The authority for and content of Form WH-382, Notice to Employees of FMLA Leave Designation is found in §§ 825.300(c)–.301(a). In order to make any changes to the information included in these forms, the Department must engage in



rulemaking because the content of the forms is determined by the regulations.

Under the PRA process, the WHD publishes a notice in the **Federal Register** notifying the public that the agency is seeking an extension of approval from the Office of Management and Budget (OMB) for the subject information collection, and that the Department is accepting comments for 60-days on the extension of OMB approval of the information collection. In this notice, WHD describes the information collection, the estimated time needed to complete the information collection, the cost of complying with the information collection, and describes the changes, if any, to the information collection from the previous clearance. Often they are programmatic to the information collection requirements or format changes to the instruments. In such cases the Agency merely updates number of responses or respondents, or updating the cost of responding to account for items such as wage increases as reported by the Department's Bureau of Labor Statistics or increases in postage rates. The **Federal Register** notice provides the public an opportunity to comment on those estimates and make recommendations on how the agency might improve the information collection in a way that would not necessarily require rulemaking. After the 60 day comment period, the Department publishes a notice informing the public of its intention to submit the information collection to the OMB for an extension of approval. This notice informs the public that they have 30 days to submit comments to OMB on the extension of approval, a brief description of the information collection, the estimated time needed to complete the information collection, the cost of complying with the information collections, and describes the changes, if any, to the information collection from the previous clearance. The Department also provides OMB with a summary of any comments received in response to the first notice and of the agency's response to those comments. The public may seek additional information about the forms from the WHD Web site at any time. Information about specific information collections is also available at [www.reginfo.gov](http://www.reginfo.gov).

Removal of the forms from the regulations will allow the Department to make non-regulatory changes to the forms in a more effective manner while still offering the public an opportunity to comment on the proposed changes. For example, the Department regularly receives completed medical certification

forms (Forms WH-380-E and WH-380-F) from health care providers even though respondents are instructed not to send the form to the Department of Labor. This results in the employee's FMLA leave being delayed because the employer has not received the medical certification supporting the employee's need for leave. Through the PRA notice and review process, the Department could modify the instructions for health care providers in Section III of the form to include an instruction not to send the forms to the Department. This type of change would not require a regulatory change but would enhance the usability of the form and employers' compliance efforts.

As discussed, even with removal of the forms from the regulations, the information collection requirements underlying the FMLA forms continue to be subject to both the rulemaking process and the PRA process. The FMLA regulations determine what substantive information is collected on the forms and the PRA process requires that any Federal government information collection be approved by OMB and re-authorized every three years. Removing the forms from the regulations gives the Department the ability to maintain one version of the FMLA forms, thereby lessening the confusion among employees and employers currently resulting from the existence of multiple versions of the forms. The forms will continue to be available on the WHD Web site, and for those individuals who lack Internet access, forms may be obtained from their local WHD district office and, in some cases, from their employer. Removal of the forms from the regulations does not alter the Department's belief that the forms facilitate employer and employee compliance with their respective obligations under the FMLA. Employers are permitted to use forms other than those issued by the Department so long as they do not require information beyond that specified in the regulations. See 29 CFR 825.306, 825.309, 825.310. However, if an employee provides sufficient certification regardless of format, no additional information may be requested.

In response to SHRM's comment regarding transparency and open government and the Coalition's concern that the Department does not publicize the PRA process in the same manner that it publicizes proposed changes to the regulations, the Department believes that the PRA process is open, transparent, and well-publicized; however the Department will take into consideration additional steps to alert

the regulated community that the FMLA forms are undergoing the PRA process. Additionally, as stated previously, any changes to the information collection requirements underlying the forms would still require full notice and comment through the rulemaking process. Changes to the forms would still require full notice and comment under the PRA process.

In the Final Rule, as proposed, the Department makes various minor changes or corrections to the forms and regulations. Specifically, the Department makes small modifications to the FMLA forms, and creates a new form for certification of a serious injury or illness of a covered veteran, to reflect the FY 2010 NDAA amendments and the AFCTCA, which are discussed in the section-by-section analysis. In addition, minor edits to more accurately reflect the new military family leave and airline flight crew employee eligibility provisions or to delete references to Appendices for prototype forms or notices are made at: §§ 825.100, 825.101, 825.107, 825.112, 825.200, 825.213, 825.300, 825.302, 825.303, and 825.306. Cross-references to the special rules applicable only to airline flight crew employees and their employers in revised Subpart H are included in §§ 825.102, 825.110, 825.120, 825.121, 825.200, 825.205, 825.300, and 825.702. Cross-references to the definitions section, which the Department moves, as proposed, to § 825.102, are updated throughout the regulations. The Department also corrects inadvertent drafting errors that were made in the 2008 Final Rule, including correcting the cross-references in § 825.200(f) and (g) and inserting the word "spouse" in the first lines of § 825.202(b) and (b)(1). Furthermore, the Department includes the word "the" in the statutory phrase "in line of duty" where used in the regulations and updates the URL for the WHD Web site in §§ 825.300, 825.306, and 825.309 to link viewers directly to the WHD site. These minor editorial changes are not addressed in the section-by-section analysis.

#### *A. Revisions To Implement the FY 2010 NDAA Amendments*

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

The Department proposed to add a definition of covered servicemember as

a new paragraph (a) in this section and to modify the definition in the current regulations to reflect the addition of covered veterans as covered servicemembers under the FY 2010 NDAA, and to redesignate the paragraphs that follow. The Department also proposed to change the term active duty to covered active duty in each place it appears in both the title of this section and in current paragraph (g), and to update the reference in this paragraph to proposed § 825.126(a)(5).

The Department received several comments on the proposed definition of *covered servicemember*, all of which are discussed below in conjunction with § 825.127(b)(2). For the reasons stated in the discussion of § 825.127(b)(2), the Final Rule modifies the definition of *covered servicemember* in § 825.122 in the same manner that it modifies § 825.127(b)(2), and makes additional minor word changes to mirror the language used in § 825.127(b)(2).

No comments were received on the other proposed changes to this section. The Final Rule adopts these proposals without modification, and updates cross-references throughout the regulations to the definitions in this section that have been redesignated.

## 2. Section 825.126 Leave Because of a Qualifying Exigency

Section § 825.126 sets forth the regulation allowing an eligible employee whose spouse, parent, son, or daughter is on active duty or has been notified of an impending call or order to active duty to take FMLA leave for a qualifying exigency arising out of that active duty or call to active duty. The FY 2008 NDAA defined active duty as a call or order to active duty under a provision of law referred to in 10 U.S.C. 101(a)(13)(B). Public Law 110–181; § 585(a). The provisions referred to in 10 U.S.C. 101(a)(13)(B) are limited to duty by members of the Reserve components, the National Guard, and certain retired members of the Regular Armed Forces and retired Reserve. The FY 2008 NDAA thus limited the availability of qualifying exigency leave to family members of members of the National Guard and Reserve components. 73 FR 67954–55.

The FY 2010 NDAA further amended the FMLA to permit an eligible employee to take FMLA leave for any qualifying exigency arising out of the fact that the employee's spouse, son, daughter, or parent is on covered active duty, or has been notified of an impending call or order to covered active duty in the Armed Forces. Public Law 111–84, § 565(a)(1); see 29 U.S.C. 2611(14)(A), 2612(a)(1)(E). The FY 2010

NDAA defined covered active duty to include duty by members of the Regular Armed Forces during deployment to a foreign country, and duty by members of the Reserve components during deployment to a foreign country under a call or order to active duty under a provision of law referred to in section 101(a)(13)(B) of title 10, United States Code. 29 U.S.C. 2611(14). Thus, the FY 2010 NDAA expanded the availability of qualifying exigency leave to include family members of the Regular Armed Forces during a foreign deployment, and added a foreign deployment requirement to the type of call or order to active duty required for the Reserve components of the Armed Forces.

The Department proposed to reverse the order in which the two parts of this section appear, so that proposed paragraph (a) addressed an employee's entitlement to qualifying exigency leave and proposed paragraph (b) identified the specific circumstances under which qualifying exigency leave may be taken. The Department also proposed to substitute covered active duty for active duty in paragraph (a) (as well as throughout the regulations wherever the term appeared) to incorporate the FY 2010 NDAA statutory language. Additionally, because the term covered military member was associated with the restrictive nature of qualifying exigency leave under the FY 2008 NDAA, *i.e.*, the limitation of such leave to family members of Reserve component members only, the Department proposed to delete references to a covered military member and instead use the term member or military member to refer to all military members on covered active duty as defined by the statute.

In accordance with the FY 2010 NDAA, the Department proposed to delete the statement in current § 825.126(b)(i) that family members of members of the Regular Armed Forces are not entitled to qualifying exigency leave. The Department proposed in paragraph (a) to state that an eligible employee may take FMLA leave for a qualifying exigency while the employee's spouse, son, daughter, or parent is on covered active duty or call to covered active duty status. The Department proposed in § 825.126(a)(1) to define *covered active duty or call to covered active duty status* for a member of the Regular Armed Forces as “duty under a call or order to active duty (or notification of an impending call or order to covered active duty) during the deployment of the member with the Armed Forces to a foreign country,” and to state that the active duty orders will generally specify if the member's

deployment is to a foreign country. The Department proposed in § 825.126(a)(2) to define *covered active duty or call to covered active duty status* for a member of the Reserve components as “duty under a call or order to active duty (or notification of an impending call or order to active duty) during the deployment of the member with the Armed Forces to a foreign country under a Federal call or order to active duty in support of a contingency operation” pursuant to the provisions of law referred to in 10 U.S.C.

101(a)(13)(B). The Department also proposed to use the word Federal in proposed § 825.126(a)(2) in describing the covered calls or orders to active duty in order to make clear that only Federal calls to duty will meet the definition of covered active duty. The Department proposed to move to § 825.126(a)(2)(i) the list of the specific Reserve components in current § 825.126(b)(2)(i). The Department proposed to move to § 825.126(a)(2)(ii) the statement in current § 825.126(b)(3) that the active duty orders of a member of the Reserve components will generally specify if the covered active duty military member is serving in support of a contingency operation by citing the relevant section of Title 10 of the United States Code and/or by reference to the specific name of the contingency operation, and to state also in § 825.126(a)(2)(ii) that the active duty orders will generally specify that the deployment is to a foreign country. The Department proposed in § 825.126(a)(3) to define *deployment* of the member with the Armed Forces to a foreign country as deployment to areas outside of the United States, the District of Columbia, or any Territory or possession of the United States, including deployment in international waters. As discussed in the NPRM, this definition was consistent with the Department's understanding of the term deployment based on consultations with the DOD. 77 FR 8965. The Department also sought comment on the types of duty assignments for members of the Navy and Coast Guard that would satisfy the definition of *deployment*. The Department proposed to move to § 825.126(a)(4) the provision specifying that covered deployments are limited to Federal calls to active duty, which is in current § 825.126(b)(2)(ii). Finally, the Department proposed to move the definition of *son or daughter on active duty or call to active duty status* to § 825.126(a)(5) from current § 825.126(b)(1).

No comments were received on the proposed changes regarding the

reorganization of the section, or the changes in proposed paragraph (a) regarding the use of the term covered active duty rather than active duty or the use of the term military member or member rather than covered military member. Therefore, the Final Rule adopts these changes as proposed.

Several commenters suggested additional language changes for paragraph (a) of this section. Two commenters, the National Partnership for Women and Families (Partnership) and the North Carolina Justice Center, suggested that the term qualifying exigency may be confusing to military families and that the Department should provide a general explanation of what is meant by this term. NELA commented that the definition of covered active duty or call to covered active duty status is confusing because it seems to indicate that an impending call or order to active duty must occur during deployment to a foreign country. NELA suggested that the Department remove the phrase call or order to active duty from proposed § 825.126(a)(1) defining the term for members of the Regular Armed Forces, noting that 29 U.S.C. 2611(14)(A) does not use the phrase. NELA further suggested that the Department include a definition of the Armed Forces in this subparagraph rather than using the term Regular Armed Forces. NELA also commented that the use of the term contingency operation in the proposed regulation at § 825.126(a)(2), discussing covered active duty, is confusing and unnecessary in light of the fact that Congress deleted this term in the FY 2010 NDAA. This commenter suggested that, because each of the listed military duties in 10 U.S.C. 101(a)(13) is a type of contingency operation, there is no reason to include the phrase in the final regulations. In contrast, SHRM commented that the inclusion of the language that the call or order to active duty must be in support of a contingency operation will help clarify this entitlement. The Coalition commented that the inclusion of the word Federal in § 825.126(a)(2) adds clarity and the reference to Title 10 of the United States Code in subparagraph (2) is appropriate, but that this subparagraph should provide explicit definitions or descriptions of the different types of active duty under the various statutes listed in Title 10 because most employers are not familiar with these statutory references.

The Partnership and the North Carolina Justice Center supported the Department's proposed definition of deployment to a foreign country in proposed § 825.126(a)(3) to include international waters as consistent with

congressional intent. The Military Officers Association of America also supported the inclusion of international waters in this definition, but suggested that the Department "encourage expansion of the law" to include family members of servicemembers assigned overseas to remote areas and to servicemembers of all the uniformed services, including the National Oceanic and Atmospheric Administration (NOAA) and the U.S. Public Health Service Commissioned Corps.

The Department has carefully considered all of the comments regarding the proposed changes to § 825.126 and has adopted paragraph (a) as proposed with a slight modification. The Department removes from the proposed definition of *covered active duty or call to covered active duty status* in the Final Rule the phrase "under a call or order to active duty (or notification of an impending call or order to active duty)" and inserts into the regulatory text preceding the definition the phrase "(or has been notified of an impending call or order to covered active duty)". The revised text is not intended to change the meaning of § 825.126(a), under which an eligible employee may take qualifying exigency leave if that employee's spouse, son, daughter, or parent is on covered active duty or call to covered active duty status or has been notified of an impending call or order to covered active duty, but instead to provide clarity and more closely track the statutory language of the FY 2010 NDAA. With regard to commenters' request that the Department provide a definition for the term qualifying exigency, the Department notes that the 2008 Final Rule defined qualifying exigency by providing clearly defined reasons for which an eligible employee can take leave because of a qualifying exigency. 73 FR 67957. Thus, the proposed rule provided, just as the 2008 Final Rule did, eight distinct categories that the Department has determined to be qualifying exigencies that entitle eligible family members to FMLA leave. The Department does not believe that any additional explanation of the term qualifying exigency is necessary. In response to the comment concerning whether the phrase covered active duty or call to covered active duty limits qualifying exigency leave to the period during the military member's deployment, the Department notes that eligible employees who are family members of military members of the Armed Forces are entitled to qualifying exigency leave after notification of an impending deployment, during the

deployment, and post-deployment. As explained in the NPRM, the Department does not believe that the FY 2010 NDAA altered the applicability of qualifying exigency leave to the limited category of post-deployment activities, the need for which immediately and foreseeably arise from the military member's covered active duty. In response to the request to define Armed Forces, the Department believes that the public has a common understanding of the Armed Forces, and that further definition is not necessary.

In response to the comments regarding the continued use of the term contingency operation in the definition of covered active duty for military members of the Reserve components, the Department declines to modify the language in § 825.126(a)(2) as suggested in light of the complexity of the different designations for types of duties and deployments within the military. The Department maintains its view, as explained in the NPRM, that because Congress retained the reference to 29 U.S.C. 101(a)(13)(B) in the FY 2010 NDAA, and 29 U.S.C. 101(a)(13)(B) defines contingency operations, this reference continues to require that members of the Reserve components be called to duty in support of a contingency operation in order for their family members to be entitled to qualifying exigency leave. 77 FR 8965. In response to the request to provide descriptions of the different types of active duty under the statutes listed in Title 10, the Department notes that proposed § 825.126(a)(2) provided, just as current § 825.126(b)(2) does, brief descriptions of the types of active duty to which each of the referenced statutes refers in addition to citing the statutes referenced in 10 U.S.C. 101(a)(13)(B). The Department believes that these descriptions are sufficient for employers and employees to ascertain the types of deployments for which members of the National Guard and Reserve components may be deployed which would entitle an eligible family member to take qualifying exigency leave.

In response to the Military Officers Association of America's comment suggesting expansion of the law to servicemembers assigned overseas, the Department notes that military members of the Regular Armed Forces who are assigned overseas to remote areas may be considered on covered active duty if they are called or ordered to active duty under a deployment and the remote area to which they are deployed is an area outside of the United States, the District of Columbia, or any Territory or possession of the United States, including international waters. The

same is true of military members of the National Guard and Reserve components as long as their foreign deployment is in support of a contingency operation referenced in § 825.126(a)(2). As to the inclusion of servicemembers of all the uniformed services referenced by the Military Officers Association of America, the Department notes that the definition of covered active duty in the FY 2010 NDAA specifically refers to the Armed Forces for members of both the Regular Armed Forces and the National Guard and Reserve components. See 29 U.S.C. 2611 (14). “[A]rmed [F]orces” is defined in 10 U.S.C. 101(a)(4) as the “Army, Navy, Air Force, Marine Corps, and Coast Guard.” While the NOAA Commissioned Corps and the U.S. Public Health Service Commissioned Corps are, part of the uniformed services as defined in 10 U.S.C. 101(a)(5), they are explicitly not part of the Armed Forces as defined in 10 U.S.C. 101(a)(4) and the Department lacks the authority to expand coverage for qualifying exigency leave as requested. Therefore, the Department adopts paragraph (a) as proposed in the Final Rule without modification.

Current § 825.126(a) sets forth the list of reasons for which an eligible employee may take qualifying exigency leave. The current qualifying exigency leave categories are: (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*. The Department proposed to move this list to § 825.126(b) without changing the subparagraph numbers that correspond to categories of qualifying exigencies.

Proposed § 825.126(b)(1) tracked current § 825.126(a)(1), which sets forth the requirements for *short-notice deployment* qualifying exigency leave. In addition to redesignating this subparagraph from (a)(1) to (b)(1), the proposal inserted the term “covered active duty” and deleted the reference to contingency operations from this section. However, the Department requested comment on whether the current seven-calendar-day period for *short-notice deployment* qualifying exigency leave remained appropriate. The Department received a few comments on this issue. The Coalition commented that, based on feedback from its members, the current seven-day period remains appropriate, and, along with SHRM, urged the Department not to make any changes to this section. World at Work conducted a survey (to which it received 94 responses) on

issues raised in the NPRM, and found that the majority of requests for *short-notice deployment* qualifying exigency leave have not been for amounts of time beyond the current allotment. In contrast, the National Association of Letter Carriers (the Letter Carriers) suggested the period be expanded to 15 days, stating its members have found that seven days is often inadequate for dealing with all of the arrangements and adjustments that family members must make when faced with short-notice deployment. Twiga, an organization that advocates for workplace flexibility, also suggested an expansion to 15 days, asserting that some military members face difficulties in securing alternative childcare arrangements within a seven-day period.

The Department acknowledges the concern that seven days may be inadequate to address all issues arising from the short-notice deployment of a military member. After this seven-day-period, however, the employee remains entitled to qualifying exigency leave for any of the other enumerated exigencies set forth in this section. For example, an eligible employee would be able to take leave pursuant to § 825.126(b)(3) to address childcare arrangement issues arising from the military member’s deployment subsequent to the seven-day short-notice period. Likewise, the employee is entitled, pursuant to current § 825.126(a)(8), to job-protected leave to address events arising out of the military member’s deployment that are not included in the list of qualifying exigencies 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. Accordingly, the Final Rule adopts the redesignation of § 825.126(a)(1) to § 825.126(b)(1) as proposed and retains the seven-day period for *short-notice deployment* qualifying exigency leave.

Proposed § 825.126(b)(3), *childcare and school activities*, tracked current § 825.126(a)(3), which allows eligible employees to take qualifying exigency leave to arrange childcare or attend certain school activities for a military member’s son or daughter. In addition to redesignating this paragraph from (a)(3) to (b)(3), the Department proposed to delete repetitive text throughout this paragraph identifying the relationship between the child and the military member. Proposed § 825.126(b)(3) stated that, for purposes of the childcare and school activities leave listed in § 825.126(b)(3)(i) through (iv), the child must be “the military member’s biological, adopted, or foster child, stepchild, legal ward, or child for whom

the military member stands in loco parentis, who is either under 18 years of age or 18 years of age or older and incapable of self-care because of a mental or physical disability at the time that FMLA leave is to commence”, and also added language to clarify that, as with all instances of qualifying exigency leave, the military member must be the spouse, son, daughter, or parent of the employee requesting leave. As stated in the NPRM, the Department believes this clarifying language is necessary because of this section’s unique relationship requirements. 77 FR 8966. While the military member must be the spouse, parent, or son or daughter of the eligible employee, the child for whom childcare leave is sought need not be a child of the employee requesting leave.

Several commenters addressed the clarifying language in proposed § 825.126(b)(3) with respect to *childcare and school activities* qualifying exigency leave. Legal Aid commended the Department for including such language. In contrast, an individual commenter did not support granting leave to military members’ families to take leave for school activities when non-military working parents do not receive this benefit. Several commenters, including the Family Equality Council, North Carolina Justice Center, the Partnership, and Twiga, urged the Department to explicitly note that all FMLA regulations are interpreted to include the children of persons standing in loco parentis to those children. Twiga recommended the Department strike the requirement that the military member must be the spouse, son, daughter, or parent of the employee taking qualifying exigency leave and instead simply require that the employee be the parent of, or stand in loco parentis to, the military member’s child for this category of qualifying exigency leave. The Partnership, Twiga, and the Family Equality Council noted that the Wage and Hour Administrator’s Interpretation No. 2010–3, issued on June 22, 2010, stated that in loco parentis under the FMLA includes all persons with day-to-day responsibility to care for or financially support a child. For these reasons, Twiga suggested that the definition of who may take qualifying exigency leave should be flexible enough to account for relationships beyond the nuclear family.

A number of commenters, including Senators Harkin and Murray, and the Partnership, suggested adding a new qualifying exigency leave category to address issues regarding educational and related services for a child with a disability under the Individuals with

Disabilities Education Act (IDEA) or section 504 of the Rehabilitation Act of 1973, including attending meetings about eligibility, placement, and services, or to develop, update, or revise the child's Individual Education Plan under the IDEA. The North Carolina Justice Center also suggested the Department indicate that other childcare needs, such as the need to arrange for summer care and to attend medical appointments for children, would be included.

In response to the comments regarding in loco parentis, the Department reiterates its interpretation in Administrator's Interpretation No. 2010-3 that either day-to-day care or financial support may establish an in loco parentis relationship under the FMLA where the adult intends to assume the responsibilities of a parent with regard to a child. However, the statutory provisions of the FMLA with respect to qualifying exigency leave are very specific that the military member on covered active duty or call to covered active duty status must be the spouse, parent, or son or daughter of the eligible employee in order for the FMLA protections to apply. 29 U.S.C. 2612(a)(1)(E). Therefore, the fact that an employee may stand in loco parentis to a child of a military member is not sufficient to satisfy the statutorily-required relationship with the military member for qualifying exigency leave. The statute requires that the employee, whether or not he or she stands in loco parentis to the military member's child, have the requisite relationship with the military member. For example, the mother of a military member may be entitled to childcare and school activities qualifying exigency leave for the military member's child, but the military member's mother-in-law would not be regardless of her relationship to the military member's child. The Department notes, however, that any eligible employee who stands in loco parentis to the child of a military member (or any other child) is entitled to take FMLA leave if the child needs care due to a serious health condition. In light of the confusion indicated in the comments regarding the relationship requirements for qualifying exigency leave for childcare and school activities, the Department believes that the proposed clarification is beneficial.

In response to comments seeking the addition of a specific qualifying exigency category for educational and related services for disabled children, the Department notes that § 825.126(b)(3) allows qualifying exigency leave for a broad array of childcare and school activities, which

could include leave to enroll a child in summer day camp or similar kind of summer day care at the end of the school year if the need to do so arises out of the military member's covered active duty or call to covered active duty. 73 FR 67959. Likewise, § 825.126(b)(3)(iv) provides for qualifying exigency leave to attend meetings with staff at a school or daycare facility, such as meetings with school counselors, parent-teacher conferences, or meetings with school officials regarding disciplinary matters, when such meetings are necessary due to circumstances arising from the covered active duty or call to covered active duty of a military member. The Department believes the current regulation is sufficient to include attending meetings about eligibility, placement, and services, or to develop, update or revise a child's Individual Education Plan when those meetings are necessary due to the covered active duty or call to covered active duty of a military member. The Department does not intend for this leave to be used to meet with staff at a school or daycare facility for routine academic concerns, nor to be used for routine educational and related services for a child with a disability under the Individuals with Disabilities Education Act that are unrelated to the military member's deployment. Therefore, no additional clarification or additional categories of childcare and school activities are added to the Final Rule. The Final Rule adopts the re-designation of § 825.126(a)(3) to § 825.126(b)(3) and the other proposed changes in § 825.126(b)(3) without modification.

Proposed § 825.126(b)(6), *Rest and Recuperation*, followed current § 825.126(a)(6), which allows an eligible employee to take up to five days of leave to spend time with a military member on Rest and Recuperation leave during a period of deployment. In addition to re-designating this paragraph from (a)(6) to (b)(6) and capitalizing Rest and Recuperation to correspond directly to the DOD's Rest and Recuperation leave programs, the Department also proposed to expand the maximum duration of *Rest and Recuperation* qualifying exigency leave from five days to the duration of the military member's Rest and Recuperation leave, up to a maximum of 15 days. As stated in the NPRM, the DOD has advised the Department that the actual number of days of Rest and Recuperation leave provided by the military varies, with some military members receiving as many as 15 days, depending upon the length of their deployment. 77 FR 8966.

The Department proposed to allow the amount of leave an employee may take for *Rest and Recuperation* qualifying exigency leave to equal that provided to the military member, up to a maximum of 15 days. The Department sought comment on the expansion of *Rest and Recuperation* qualifying exigency leave, and whether the proposed 15-day period would be sufficient in all instances.

Several commenters, including World at Work, North Carolina Justice Center, the Partnership, and the Military Officers Association of America, supported the Department's proposal to expand *Rest and Recuperation* leave up to a maximum of 15 days. The Military Officers Association of America and the Partnership stated that it is appropriate to grant employees time with their military family members when the military member is home for a limited time from a foreign deployment, as allowing for such leave positively impacts family members at home and improves the morale of those serving abroad. SHRM supported the expansion, but suggested that the leave be limited only to the actual Rest and Recuperation time at home or some other destination where the military member will take the Rest and Recuperation leave. The Coalition agreed that an extension is appropriate, but commented that 15 days is excessive and suggested a 10-day period instead. The Coalition commented that as written, the proposal would allow an employee to take 15 days off of work, potentially equating to three full five-day workweeks of leave, while the military's leave programs allow up to 15 calendar days of leave, which is meant to allow the military member two weeks at home. The Letter Carriers commented that because the need for recuperation can vary tremendously depending on the nature of the deployment, the leave granted for this exigency should be equal to the amount of leave the military has determined to be necessary and has granted for the military member, up to a maximum of at least 30 days.

As stated in the NPRM, the Department believes it is appropriate to make the availability of this type of qualifying exigency leave consistent with the leave actually provided by the military to the member on covered active duty. 77 FR 8966. Therefore, the Department has decided to implement the regulation as proposed in the Final Rule, providing for up to a maximum of 15 days for *Rest and Recuperation* qualifying exigency leave, but has modified the language for clarity. The Department has modified the language to delete the reference to eligible

employees because the paragraph (b) makes it clear that all of the subparagraphs under (b), including this one, apply only to eligible employees. Further, in response to the comments, the Department has modified the language to state that leave taken for this purpose can be used for a period of 15 calendar days beginning on the date the military member commences each instance of Rest and Recuperation leave. This language is consistent with the Department's position for *short-notice deployment* leave found in § 825.126(b)(1). The Department reiterates that, as noted in the NPRM, this allows an employee to take *Rest and Recuperation* qualifying exigency leave for the same amount of time as is provided to the military member for the member's Rest and Recuperation leave, up to a maximum of 15 days. 77 FR 8966. The Department further clarifies that the employee may choose to take the leave in a continuous block of time or intermittently over the duration of the military member's Rest and Recuperation leave, up to 15 calendar days. Thus, the employee's leave does not need to be taken as a single block of time. However, it must be taken during the period of time indicated on the Rest and Recuperation orders.

Proposed § 825.126(b)(7), *Post-deployment activities* tracked current § 825.126(a)(7). In addition to the redesignation of paragraph from (a)(7) to (b)(7), the Department proposed to add attending funeral services to redesignated paragraph (b)(7)(ii), which permits an employee to take qualifying exigency leave to address issues that arise from the death of a military member while on covered active duty status, as an additional example of the activities that are covered by such leave. Legal Aid supported this addition. SHRM endorsed the Department's clarification, stating that according to SHRM survey data, over 90 percent of all employers currently provide some form of paid bereavement leave, and the availability of qualifying exigency leave for this purpose ensures coverage for those who take such leave. Accordingly, the Department implements the redesignation and § 825.126(b)(7)(ii) as proposed.

The Department did not propose any new qualifying exigencies for which FMLA leave may be taken, but invited comment on whether additional qualifying exigencies should be added in light of the extension of this leave entitlement to family members of members of the Regular Armed Forces. The Department received one comment in response. The Letter Carriers suggested adding an eldercare provision

as an additional qualifying exigency, stating that several of its members have indicated that providing and making arrangements for eldercare is as pressing a need for them as childcare is when they face military deployment.

The Department agrees that the need to provide care to a military member's parent is analogous to the need to provide care for a military member's child and that such a need may arise when a military member is called to covered active duty. Consistent with the purpose and intent of the qualifying exigency leave provision in the FMLA, the Department modifies the Final Rule to create a new provision for parental care qualifying exigency leave. An eligible employee may take qualifying exigency leave to care for the parent of a military member, or someone who stood in loco parentis to the military member, when the parent is incapable of self-care and the need for leave arises out of the military member's covered active duty or call to covered active duty status. In the 2008 Final Rule establishing qualifying exigency leave for *childcare and school activities*, the Department stated that certain childcare and school activities require attention because the military member is on active duty or has been called to active duty status and that qualifying exigency leave would be appropriate in such situations, but that routine events that occur regularly for all children would not warrant qualifying exigency leave. 73 FR 67959. This same standard applies to qualifying exigency leave to care for a military member's parent when the parent is incapable of self-care. Therefore, the parental care qualifying exigency provision in the Final Rule tracks the childcare provision in setting out the types of situations when qualifying exigency leave is available. Thus, parental care qualifying exigency leave may be used for: (i) Arranging for alternative care for a parent of the military member when the parent is incapable of self-care and the covered active duty or call to covered active duty status of the military member necessitates a change in the existing care arrangements; (ii) providing care for a parent of the military member on an urgent, immediate need basis (but not on a routine, regular, or everyday basis) when the parent is incapable of self-care and the need to provide such care arises from the covered active duty or call to covered active duty status of the military member; (iii) admitting or transferring a parent of the military member to a care facility when the admittance or transfer is necessitated by

the covered active duty or call to covered active duty status of the military member; and (iv) attending meetings with staff at a care facility for the parent of the military member, such as meeting with hospice or social service providers, when such meetings are necessitated by the covered active duty or call to covered active duty status of the military member (but not for routine or regular meetings). For purposes of parental care qualifying exigency leave, incapable of self-care means that the parent requires active assistance or supervision to provide daily self-care in three or more of the "activities of daily living" or "instrumental activities of daily living." Activities of daily living include, but are not limited to, adaptive activities such as caring appropriately for one's grooming and hygiene, bathing, dressing, and eating. Instrumental activities of daily living include, but are not limited to, cooking, cleaning, shopping, taking public transportation, paying bills, maintaining a residence, using telephones and directories, using a post office, etc. This definition of incapable of self-care is adopted from § 825.122(d)(1), where it is used as part of the determination of whether a child 18 years of age or older is a son or daughter under the FMLA. Thus, for example, if a military member's parent is incapable of self-care and the parent was cared for by the military member, an eligible employee may take parental care qualifying exigency leave to arrange for the alternative care of the military member's parent, such as hiring a home health care aide, or to provide, on an urgent, immediate need basis, care that a home health care aide would normally provide. In either event, however, the employee may not take parental care qualifying exigency leave to provide such care to the parent on a regular or routine basis, even if the military member previously provided such regular or routine care. The Department reiterates that as with all instances of qualifying exigency leave, the military member must be the spouse, parent, son, or daughter of the employee requesting qualifying exigency parental care leave. In the case of parental care leave, the parent in need of care must be the military member's parent or a person who stood in loco parentis to the military member when the member was less than 18 years old. Accordingly, the Department creates a new provision for *parental care* leave at § 825.126(b)(8), and redesignates *additional activities* from current § 825.126(a)(8) to § 825.126(b)(9).

3. Section 825.127 Leave To Care for a Covered Servicemember With a Serious Injury or Illness (Military Caregiver Leave)

Section 825.127 sets forth the regulation allowing an eligible employee who is a covered servicemember's spouse, son, daughter, parent, or next of kin to take up to 26 workweeks of leave during a single 12-month period to care for a servicemember with a serious injury or illness (military caregiver leave). Section 825.127 implemented Section 585(a) of the FY 2008 NDAA, which entitled an eligible employee who is a spouse, parent, son, daughter, or next of kin of a current servicemember with a serious injury or illness, to take FMLA leave to provide care to that covered servicemember. Section 565(a) of the FY 2010 NDAA further expands military caregiver leave to eligible employees caring for certain veterans with a qualifying (as defined by the Secretary of Labor) injury or illness incurred in line of duty on active duty or that existed before the member's active duty and was aggravated in the line of duty on active duty. 29 U.S.C. 2611(15)(B). Section 565(a) also amends the FMLA by revising the definition of a serious injury or illness for current servicemembers of the Armed Forces to include conditions that existed before the current servicemember's active duty and were aggravated by service in the line of duty on active duty. 29 U.S.C. 2611(18)(A).

The Department proposed to reorganize § 825.127 to incorporate the substantive changes to the military caregiver leave provisions pursuant to the FY 2010 NDAA amendments. The Department proposed to add the term military caregiver leave to the title of this section for clarity. The Department also proposed to move current § 825.127(b), which defines the family members qualified to take caregiver leave, to proposed § 825.127(d), current § 825.127(c), which explains the single 12-month period, to proposed § 825.127(e), and current § 825.127(d), which addresses circumstances when a husband and wife who are both eligible for FMLA leave work for the same employer, to proposed § 825.127(f), as well as to update the internal cross-references in the provision accordingly. The Department did not receive any comments on the proposal to redesignate these three paragraphs or to modify the title of this section. The Department adopts these proposed changes in the Final Rule.

Consistent with the FY 2008 NDAA, under current § 825.127(a), an eligible

employee may take FMLA leave to care for a current member of the Armed Forces, including National Guard and Reserves members, with a serious injury or illness incurred in the line of duty on active duty for which the servicemember is undergoing medical treatment, recuperation, or therapy, is otherwise in outpatient status, or is otherwise on the temporary disability retired list. This paragraph specifically excludes former members of the Regular Armed Forces, former members of the National Guard and Reserves, and members on the permanent disability list from the current definition of a covered servicemember. In accordance with the FY 2010 NDAA, the Department proposed to remove the statement that military caregiver leave does not apply to former members of the military from proposed paragraph (a), and to move the definitions in current paragraph (a)(1) to proposed paragraph (c) and current paragraph (a)(2) into proposed paragraph (b). The Department proposed in paragraph (a) to state simply that eligible employees are entitled to take FMLA leave to care for a covered servicemember with a serious injury or illness. The Department did not receive any comments on proposed paragraph (a), and therefore, adopts this paragraph without modification in the Final Rule.

The Department proposed in § 825.127(b) to define a covered servicemember for current members of the Armed Forces and for covered veterans. Proposed § 825.127(b)(1) defined *covered servicemember* for current members of the Armed Forces, including members of the Reserve components. The proposed definition mirrored the statutory definition. 29 U.S.C. 2611(15)(A). The proposed definition also incorporated the definition of outpatient status from current § 825.127(a)(2), which applies only to current servicemembers. No comments were received on this proposal. It is adopted without modification in the Final Rule.

Proposed § 825.127(b)(2) defined *covered servicemember* for veterans as a covered veteran who is undergoing medical treatment, recuperation, or therapy for a serious injury or illness. It further defined a *covered veteran* as an individual who was discharged or released under conditions other than dishonorable at any time during the five-year period prior to the first date the eligible employee takes FMLA leave to care for the covered veteran. See 29 U.S.C. 2611(15)(B) (defining a covered servicemember as a veteran "who is undergoing medical treatment, recuperation, or therapy for a serious

injury or illness" and who was a member of the Armed Forces "at any time during the period of 5 years preceding the date of which the veteran undergoes that medical treatment, recuperation, or therapy"); 29 U.S.C. 2611(19) (defining veteran as the term is defined in 38 U.S.C. 101). As discussed in the NPRM, the Department noted that Congress extended FMLA leave to care for a particular subset of veterans. 77 FR 8967. The Department noted that this interpretation may exclude veterans of previous conflicts such as Gulf War veterans, as well as certain veterans of the War in Afghanistan and Operation Iraqi Freedom. *Id.* The proposal also indicated that an eligible employee must commence leave to care for a covered veteran within five years of the veteran's active duty service, but noted the single 12-month period described in proposed paragraph (e)(1) may extend beyond the five-year period. As explained in the NPRM, the Department proposed to measure the five-year period from the date the employee first takes leave to care for the veteran, and to permit an employee to continue leave begun within the five-year period until the end of the applicable single 12-month period. *Id.* Thus, if the leave commences within the five-year period, the employee may continue leave for the applicable single 12-month period even if it extends beyond the five-year period.

The Department received several comments on this definition. SHRM commented that the definition failed to include the requirement that the veteran was a member of the Armed Forces (including a member of the National Guard or Reserves) that is part of the statutory definition at 29 U.S.C. 2611(15)(B). The Department had not included this phrase in the proposed definition because the Department's understanding was that all veterans were, by definition, members of the Armed Forces, and therefore the Department believed that the inclusion of such language was unnecessary. While this is still the Department's understanding, in the interest of clarity, the Department modifies § 825.127(b)(2), as well as the corresponding definitions in §§ 825.102 and 825.122, in the Final Rule to incorporate this statutory language.

The majority of the comments on this section were directed at the Department's interpretation of the five-year period. The Partnership and Twiga supported the Department's interpretation that an employee who begins taking military caregiver leave during the five-year period will be permitted to continue taking such leave after the five-year period has expired.



Similarly, the North Carolina Justice Center approved of the interpretation of the five-year period for veterans. Both the Partnership and the North Carolina Justice Center noted, however, that some veterans who would have been covered veterans under this interpretation of the five-year period when the FY 2010 NDAA was enacted on October 28, 2009 will have been discharged for more than five years when these regulations become effective and, therefore, will no longer be covered veterans for whom an employee may take military caregiver leave. They urged the Department to provide for a special exception for the calculation of the five-year period for such veterans who have qualifying injuries or illnesses so that their family members will be able to take caregiver leave to care for them. The Consortium for Citizens with Disabilities (CCD) recognized that the five-year time period is statutorily determined, but asked that the Department adopt as broad a definition as possible. Senators Harkin and Murray suggested that the time period between the date the law was enacted (October 28, 2009) and the effective date of these regulations should not count in the five-year window. They provided an example of a scenario in which a servicemember became a veteran on July 1, 2010 and the Department's final regulations become effective on July 1, 2012—they asserted that this servicemember's family should be eligible to take military caregiver leave until June 30, 2017 rather than until June 30, 2015.

While the Department has taken and continues to take the position that the military caregiver leave provision to care for veterans is not effective until the effective date of this Final Rule, the Department acknowledges that the time in which family members of veterans can take military caregiver leave to care for veterans who were discharged or released between October 28, 2009 and the effective date of this Final Rule has been diminished. The comments highlighted that there are veterans whose five-year period will have expired between October 28, 2009 and the effective date of this Final Rule but who will still have serious injuries or illnesses and will still need caregiving from family members when this Final Rule becomes effective. The comments likewise highlighted that there are servicemembers who will have become veterans between October 28, 2009 and the effective date of this Final Rule and who will have a shortened period remaining in their five-year window during which they may receive needed

caregiving from family members for a serious injury or illness when this Final Rule becomes effective. Similarly, there may be servicemembers who became or will become veterans between October 28, 2009 and the effective date of this Final Rule and who will manifest a serious injury or illness that was incurred or aggravated in the line of duty and will need caregiving from family members for longer than the shortened period remaining in their five-year window when this Final Rule becomes effective. Therefore, after further consideration, the Department believes that it would not be consistent with congressional intent to deprive the family members of such veterans the complete amount of time that the family members would have had to take military caregiver leave to care for those servicemembers who became veterans between October 28, 2009 (the date the FY 2010 NDAA was enacted) and the effective date of this Final Rule. Therefore, the Department has modified § 825.127(b)(2) in the Final Rule to provide for a special method of calculating the five-year period for this subset of veterans: for an individual who was a member of the Armed Forces (including a member of the National Guard or Reserves) and who was discharged or released under conditions other than dishonorable prior to the effective date of this Final Rule, the period between October 28, 2009 and the effective date of this Final Rule shall not count towards the determination of the five-year period for covered veteran status. This will protect the military caregiver leave entitlement for the family members of veterans whose five-year period either expired or was diminished between October 28, 2009 and the effective date of this Final Rule. Thus, for a veteran whose five-year period expired between October 28, 2009 and the effective date of this Final Rule, the five-year period will be extended by the amount of time that the veteran would have had if the provision had been effective on October 28, 2009. For example, if, on October 28, 2009, a veteran had one year remaining before the expiration of the five-year period (*i.e.*, the veteran was honorably discharged from the military on October 28, 2005), the veteran's family member would have one year from the effective date of this Final Rule during which he or she could, if all other conditions were met, commence taking military caregiver leave. Similarly, as suggested by Senators Harkin and Murray, for a servicemember who became a veteran between October 28, 2009 and the effective date of this Final Rule, the five-

year period will be extended by the amount of time between the veteran's date of discharge and the effective date of this Final Rule. For example, if a servicemember became a veteran two years before the date this Final Rule becomes effective, the two years that elapsed between that date of discharge and the effective date of this Final Rule would be excluded from the calculation of the period in which the veteran's family members could begin taking FMLA military caregiver leave. In such a situation, two years would be added to the amount of time that the veteran has remaining in his or her five-year window as of the date that this Final Rule becomes effective. In all instances of military caregiver leave, regardless of how the five-year period is calculated, the veteran must have a qualifying serious injury or illness on the date the family member seeks to take military caregiver leave. In addition, this special provision for the subset of veterans described above does not change the character of any leave to care for a veteran that was voluntarily provided by an employer before the effective date of this Final Rule and that was not otherwise qualified as FMLA-protected leave. As discussed earlier in this preamble, if such leave was provided before the effective date of this Final Rule, the leave is not FMLA-protected leave and does not count against an employee's FMLA entitlement.

The Department proposed in § 825.127(c) to define a serious injury or illness for both current members of the Armed Forces and covered veterans. Proposed § 825.127(c)(1) incorporated the definition of a *serious injury or illness for a current servicemember* from current § 825.127(a)(1), and expanded the definition pursuant to the FY 2010 NDAA amendments to include an illness or injury that existed prior to the member's active duty and was aggravated by service in the line of duty on active duty.

As the Department explained in the NPRM, for both current members of the Armed Forces and covered veterans, a serious injury or illness that existed before the beginning of the servicemember's active duty and was aggravated by service in the line of duty on active duty includes both conditions that were noted at the time of entrance into active service and conditions that the military was unaware of at the time of entrance into active service but that are later determined to have existed at that time. 77 FR 8967. A preexisting injury or illness would generally be considered to have been aggravated by service in the line of duty on active duty where there is an increase in the



severity of such injury or illness during service, unless there is a specific finding that the increase in severity is due to the natural progression of the injury or illness. As stated in the NPRM, it was the Department's understanding that individuals will not be accepted for military service in the Regular or Reserve components unless they are: (1) Free of contagious diseases that probably will endanger the health of other personnel; (2) free of medical conditions or physical defects that may require excessive time lost from duty for necessary treatment or hospitalization, or probably will result in separation for medical unfitness; (3) medically capable of satisfactorily completing required training; (4) medically adaptable to the military environment without the necessity of geographical area limitations; and (5) medically capable of performing duties without aggravation of existing physical defects or medical conditions. 77 FR 8967. In light of these standards, the Department sought comments, particularly from military members and their families, concerning types of injuries or illnesses that may exist prior to service and be aggravated in the line of duty on active duty to such an extent as to render the servicemember unable to perform the duties of the member's office, grade, rank, or rating. The Department did not receive any comments in response.

The Department received two comments that addressed proposed § 825.127(c)(1) more generally. Senators Harkin and Murray and the CCD suggested that the Department consider participation in or meeting the eligibility requirements of the Department of Defense Special Compensation for Assistance with Activities of Daily Living (SCAADL) caregiver program as a method to establish the current servicemember's serious injury or illness. The SCAADL program was authorized by the FY 2010 NDAA and implemented by the Department of Defense in August 2011. See Public Law 111-84 and Department of Defense Instruction 1341.12. The SCAADL program provides compensation to an eligible member of the active or Reserve components of the military who has a permanent catastrophic injury or illness that was incurred or aggravated in the line of duty. The compensation is intended to offset the economic burden borne by the servicemember's primary caregiver in providing such caregiving. The criteria for participation in the SCAADL program includes, in relevant part, certification by a licensed DOD or VA physician that the servicemember has a

permanent catastrophic injury or illness and is in need of assistance from another person to perform the personal functions required in everyday living and that, in the absence of the provision of such assistance, the servicemember would require hospitalization, nursing home care, or other residential institutional care. 37 U.S.C. 439. The Department notes that the definition of *serious injury or illness for a current servicemember* in § 825.127(c)(1) reflects the statutory definition of the term. While the Department does not believe that it would be appropriate to add participation in the SCAADL program as a second definition for serious injury or illness of a current servicemember, it does believe that a current servicemember enrolled in the program may meet the requirement of suffering a serious injury or illness that renders the servicemember unable to perform the duties of his or her office, grade, rank, or rating. As discussed in more detail in the discussion of § 825.310 below, private health care providers may consider documentation produced by the DOD, such as DD Form 2948, in assessing whether the current servicemember has a serious injury or illness that may render him or her medically unfit to perform the duties of his or her office, grade, rank, or rating.

The FY 2010 NDAA requires the Department to define a qualifying serious injury or illness for a veteran. Proposed § 825.127(c)(2) defined serious injury or illness for a covered veteran as an injury or illness that was incurred in the line of duty on active duty or existed before the beginning of active duty and was aggravated by service in the line of duty on active duty and manifested before or after the member became a veteran and satisfied one of three alternate definitions set out in paragraphs (c)(2)(i), (c)(2)(ii), and (c)(2)(iii). With these three proposed definitions, the Department intended for there to be parity between the definition of a serious injury or illness of a covered veteran and the statutory definition of a serious injury or illness of a current servicemember. Because a veteran no longer has a military office, grade, rank, or rating and may participate in the civilian workforce, the standard for a serious injury or illness for current members of the Armed Forces cannot be directly applied to veterans. The three alternative definitions set out in the proposal at (c)(2)(i), (ii), and (iii) were intended to achieve this parity. As discussed later, the Department also requested comment on adding enrollment in the Department of Veterans Affairs (VA) Program of

Comprehensive Assistance for Family Caregivers as a possible fourth definition for establishing a qualifying serious injury or illness of a covered veteran, and sought comment from veterans and caregivers on whether inclusion of this program would be helpful. 77 FR 8969.

Proposed § 825.127(c)(2)(i) defined a *serious injury or illness of a covered veteran* as a serious injury or illness of a current servicemember, as defined in proposed § 825.127(c)(1), that continues after the servicemember becomes a veteran. Thus, if a veteran suffered a serious injury or illness when he or she was a current member of the Armed Forces and that same injury or illness continues after the member leaves the Armed Forces and becomes a veteran, the injury or illness will continue to qualify as a serious injury or illness warranting military caregiver leave. As stated in the NPRM, the Department believes that allowing qualifying family members to take leave to care for covered veterans who continue to suffer from these serious injuries or illnesses is consistent with congressional intent, as evidenced by the extension of military caregiver leave provisions for veterans for a defined five-year period. 77 FR 8967. Senators Harkin and Murray submitted the only comment on this definition, and stated that the definition is clear and understandable. The Final Rule incorporates this definition as proposed.

Proposed § 825.127(c)(2)(ii) defined a *serious injury or illness for a covered veteran* as a physical or mental condition for which the covered veteran has received a VA Service Related Disability Rating (VASRD) of 50 percent or greater, and the VASRD rating is based, in whole or part, on the condition for which the caregiver leave is needed. As discussed in the NPRM, the Department considered proposing a VASRD rating of 60 percent, which is equal to the level at which the veteran is considered "totally disabled", meaning that the veteran is unable to secure or follow a substantially gainful occupation by reason of a service-connected disability under the VA regulations. 77 FR 8968; see 38 CFR 4.16. The Department was concerned, however, that veterans may suffer from injuries and illnesses that do not result in a total disability under the VASRD rating system, but which should qualify as a serious injury or illness for military caregiver leave. The Department also considered proposing a VASRD rating at a level less than 50 percent, but determined that a lower threshold might capture injuries and illnesses that Congress did not intend to qualify as

serious injuries or illnesses for which employees would be entitled to 26 workweeks of FMLA leave. In addition, the Department believed that a single threshold of an overall VASRD rating of 50 percent (based on a single or multiple disabilities) was more appropriate to establish a serious injury or illness for a covered veteran than the two-tiered test used under VASRD determining total disability based on multiple conditions. The Department sought comments on all aspects of this proposed definition.

Several comments were received with respect to the second proposed definition of a qualifying serious injury or illness for a veteran set out in § 825.127(c)(2)(ii). Senators Harkin and Murray stated that the proposed 50 percent VASRD rating threshold is sufficient so long as there are other avenues for the veteran to qualify as having a serious injury or illness. The Partnership expressed concern that the 50 percent VASRD rating may not capture certain serious injuries and illnesses. The Partnership pointed to traumatic brain injuries and post traumatic stress disorder and suggested that these conditions may not be captured by the 50 percent threshold. An individual commenter expressed a similar concern regarding post traumatic stress disorder. The CCD noted that while a 50 percent VASRD rating is likely to capture the most significantly disabled veterans, a number of arguably serious conditions may not be rated at a level of 50 percent or greater, and cited a number of conditions that it asserted should be covered but that might not be rated at a level of 50 percent or greater. Legal Aid commented that the Department's decision to pick a certain VASRD rating rather than allowing for the more fact-specific inquiry allowed for under the definition of serious health condition seemed unnecessarily rigid.

The Department has considered the comments, and continues to believe that a VASRD rating of 50 percent or greater is most reflective of congressional intent and is the rating at which injuries or illnesses are on par with a serious injury or illness of a current servicemember. In proposing a threshold of 50 percent, the Department was attempting to ensure that disabilities or conditions that may render the veteran substantially unable to work were captured, so as to achieve parity with the definition of serious injury or illness for a current servicemember. At the same time, the Department was attempting to ensure that the threshold was great enough to preclude injuries or illnesses that Congress did not intend to include in

the definition of a serious injury or illness. The Department's review indicates that a VASRD disability rating of 50 percent or greater encompasses disabilities or conditions such as amputations, severe burns, post traumatic stress disorder, and severe traumatic brain injuries. While these and other injuries and illnesses may not result in a total disability under the VASRD rating system, the Department believes that such conditions should qualify as a serious injury or illness for military caregiver leave. Similarly, as noted in the NPRM, the Department believes that a VASRD rating below 50 percent would fail to reach the level of severity intended by Congress. 77 FR 8968. The commenters who addressed this proposed definition did not suggest an alternative VASRD rating that would better capture conditions that should be considered a serious injury or illness. Therefore, in order to achieve parity with the standard of a serious injury or illness for a current member of the Armed Forces, the Department concludes that a VASRD rating of 50 percent or greater is appropriate and most closely approximates a condition that substantially impairs a veteran's ability to work.

The Department is cognizant of the commenters' concern that many veterans who will have a need for care arising out of an injury or illness related to military service may not have received a VASRD rating. The Department reiterates its intent that the VASRD rating be only one alternative for establishing a qualifying serious injury or illness of a covered veteran. In instances where the servicemember has not yet received a VASRD rating, family members will still be able to take leave if the veteran's condition is such that it constitutes a serious illness or injury in accordance with any one of the other definitions set forth in § 825.127(c)(2). Therefore, the Department adopts proposed § 825.127(c)(2)(ii) without modification in the Final Rule.

The Department proposed a third definition of *serious injury or illness for a covered veteran* in § 827.127(c)(2)(iii) as a physical or mental condition that substantially impairs the veteran's ability to secure or follow a substantially gainful occupation by reason of a service-connected disability or would do so absent treatment. 77 FR 8968. This definition was intended to cover injuries and illnesses that are similar in severity to the injuries and illnesses qualifying under the proposed definitions in (c)(2)(i) and (ii), but for which the veteran did not obtain certification as a serious injury or illness when he or she was a current member

of the military or had not received a VASRD rating. In addition, the Department intended by this definition to cover veterans who may need a family member to provide care for injuries or illnesses that, *absent treatment*, would substantially impair the veteran's ability to secure or follow a substantially gainful occupation. 77 FR 8968. The Department explained that it expected that, when making determinations of a serious injury or illness under this proposed definition, health care providers would do so in the same way they make similar determinations for Social Security Disability and Workers' Compensation claims. *Id.* at 8969.

The Department sought comment specifically on whether this proposed definition would be effective at capturing the serious injuries or illnesses that covered veterans suffer for which caregiving is needed by qualifying family members and which would not be covered under the first two proposed definitions in paragraphs (c)(2)(i) and (c)(2)(ii). The Department also sought comment on the ability of health care providers to certify a serious injury or illness for a covered veteran and the ability of employers to administer leave associated with a serious injury or illness for a covered veteran under this proposed definition. Finally, the Department sought comment on the types of injuries and illnesses that typically manifest after the servicemember becomes a veteran, whether a family member is needed to care for the veteran for such injuries or illnesses, and, if so, whether the proposed definition would cover such situations.

The Department received numerous comments on this proposed third definition. The CCD generally supported this proposal (with specific exceptions discussed below) given the length of time it may take to receive a VASRD rating. Several commenters addressed the part of the definition that requires the injury or illness to substantially impair the veteran's ability to work or would do so absent treatment. SHRM asked that the Department provide further guidance on the terms in the definition. Legal Aid, Senators Harkin and Murray, and the Partnership similarly expressed concern that this definition contained undefined terms, which could cause confusion among military families or medical professionals unfamiliar with this language. Twiga and an individual commenter expressed support for the Department's recognition that a veteran may be able to work while also needing assistance performing other daily

activities. However, Aon Hewitt inquired why a family member would still need FMLA leave if the veteran is able to work. This commenter believed that this provision would lead to increased abuse of FMLA leave. Senators Harkin and Murray expressed concern that the focus on a veteran's ability to work might provide a disincentive for the veteran to pursue employment. The Senators further asserted, along with the Partnership, that making a family member's ability to take military caregiver leave dependant on the veteran's inability to work imposes a more stringent standard for leave to care for veterans with a serious injury or illness than for non-veterans with a serious health condition. These commenters recommended that the Department permit military caregiver leave for family members of covered veterans who have a serious health condition that was caused or aggravated in the line of duty on active duty. In contrast, the CCD stated that while the Department does not use a substantially gainful work standard for others to qualify for leave related to a serious health condition, it understood that the Department was attempting to set a higher standard for the enhanced leave provision for family members of veterans. In keeping with this standard, the CCD suggested that using the standard for Social Security Disability Insurance (SSDI) for a healthcare provider to determine if the injury or illness renders the veteran substantially limited in the ability to work because many veterans with significant service-connected disabilities receive an official determination of SSDI before obtaining a VASRD rating. The commenter suggested that an SSDI determination should qualify a covered veteran under this section along with a medical opinion that the injury or illness is at least related to military service. At the same time, the commenter expressed concern that reliance on an SSDI or Workers' Compensation standard could be unnecessarily restrictive. The CCD suggested that the Department include as an alternative definition the veteran's inability to perform a number of activities of daily living. Senators Harkin and Murray similarly suggested as another option a definition based on a veteran's inability to perform a number of activities of daily living and instrumental activities of daily living. Legal Aid asserted that the Department's statement that private health care providers can make determinations of serious injuries or illnesses in the same way they make similar determinations for Social Security Disability and

Workers' Compensation claims is unnecessarily complicated as not all private healthcare providers make these types of determinations and Workers' Compensation standards vary by state. This commenter requested that this standard be removed, or if it is retained, that the Department provide more guidance. Lastly, the CCD and Senators Harkin and Murray suggested that the Department remove the term service-connected disability and replace it with a disability that is related to military service or a disability or disabilities eligible for service connection because only the VA can officially determine whether a disability is service-connected.

After carefully considering these comments, the Department has decided to retain the proposed definition in § 825.127(c)(2)(iii) with one modification. In response to comments that only the VA can determine if a disability is connected to the individual's military service, the Department has removed the term service-connected disability or disabilities and replaced it with the term a disability or disabilities related to military service in the Final Rule. This change is made to avoid any confusion as to whether a determination of service connection from the VA is required for this definition; the Department does not view this as a substantive change as the FY 2010 NDAA clearly requires that a covered veteran's serious injury or illness have been incurred or aggravated in the line of duty on active duty. As the Department stated in the NPRM, a certification of serious injury or illness under this definition serves only to establish that the veteran has a condition that entitles his or her family member to military caregiver leave under the FMLA. 77 FR 8969. Such a determination provides no basis for a determination of status, rights, or benefits for the VA or other agencies. The VA is the sole agency qualified to make any service-connected rating determination for purposes of VA-related rights or benefits. The Department believes that the modified phrasing in the Final Rule will prevent possible confusion on this issue.

In response to the comments by the Partnership and Senators Harkin and Murray that this definition links the ability of an employee to take military caregiver leave to the veteran's inability to work, the Department emphasizes that the definition includes a physical or mental condition that would substantially impair a veteran's ability to work absent treatment, and therefore does not preclude coverage of veterans who are employed. The comments

illustrate that further clarification of this standard is needed. This definition would cover, for example, a covered veteran with post traumatic stress disorder who is receiving medical treatment and is able to work, but would not be able to do so without treatment, and who needs care from an employee-family member because of this treatment. Thus, this definition recognizes that while a veteran may be able to work, he or she may have a continuing need for treatment for his or her military related injury or illness that, if not treated, would substantially impair his or her ability to secure or follow a gainful occupation. It is the Department's position that in such scenarios, the veteran's family member would be entitled to FMLA caregiver leave to provide care for the veteran, such as driving the veteran to medical appointments or assisting the veteran with basic medical needs. See § 825.124(a). The Department fully supports the goal of returning veterans to the workforce, and does not believe that this definition will undermine that goal.

In addition, in response to the comments urging the Department to adopt the serious health condition standard as the definition of a serious injury or illness of a veteran, the Department notes that an eligible family member is entitled to take 26 workweeks of leave in a single 12-month period under the FMLA military caregiver leave provision. See 29 U.S.C. 2612(a)(3). As the CCD correctly noted, this is an enhanced leave entitlement, as traditional FMLA only allows 12 workweeks of leave for an eligible employee. When Congress passed the FY 2008 NDAA first creating this enhanced leave provision, it defined a serious injury or illness of a current servicemember as an injury or illness that was incurred by the covered servicemember in the line of duty on active duty in the Armed Forces, and that may render the member medically unfit to perform the duties of the member's office, grade, rank, or rating. Public Law 110-181. Congress did not use the existing statutory standard of serious health condition as defined in 29 U.S.C. 2611(11) as the basis for the military caregiver leave entitlement. When Congress passed the FY 2010 NDAA, it required the Secretary to define a serious injury or illness of a covered veteran. Public Law 111-84. Again, Congress did not use the statutory standard of serious health condition as the basis of the entitlement. Because Congress expressly added a new standard for military caregiver

leave for both current servicemembers and covered veterans instead of referencing the existing serious health condition standard, the Department's intent in defining serious injury or illness of a covered veteran was to achieve parity between the definitions of a serious injury or illness for current servicemembers and for covered veterans for this enhanced leave entitlement. As the definition of a serious injury or illness for a current servicemember is linked to the servicemember's inability to perform the duties of his or her office, grade, rank, or rating, and in light of the fact that veterans no longer have an office, grade, rank, or rating to perform, the Department proposed a definition that would link the veteran's injury or illness to a condition that substantially impairs the veteran's ability to secure or maintain a gainful occupation or would do so absent treatment. For these reasons, the Department does not believe it would be appropriate to define a serious injury or illness of a covered veteran as a serious health condition. The Department notes that where a veteran's injury or illness is not a serious injury or illness as defined in this Final Rule, the veteran's family members would still be able to take FMLA leave to care for the veteran if the condition is a serious health condition and the other requirements for FMLA leave are met.

While the Department acknowledges the comments that some of the terms used in this definition are new to the FMLA, the Department believes that health care providers will be able to make the determination of whether an injury or illness substantially impairs the veteran's ability to secure or follow a substantially gainful occupation or would do so absent treatment. The Department declines to further define these terms at this time, as it believes that such determinations will be a fact-specific inquiry that the health care provider will make based on his or her skills, expertise, and experience. As the Department noted in the NPRM, health care providers are currently called upon to make determinations about an individual's ability to work for Social Security and Workers' Compensation claims, and the Department believes that a health care provider can make similar determinations for FMLA requests for military caregiver leave as well. 77 FR 8969. In response to Legal Aid's comment regarding Social Security Disability and Worker's Compensation, the Department clarifies that it did not propose that private health care providers use the

established standards for Social Security Disability or Worker's Compensation evaluations for making serious injury or illness determinations under the proposed definition at § 825.127(c)(2)(iii). Rather, the Department was attempting to illustrate that health care providers already make similar types of determinations regarding an individual's ability to work, and therefore, the Department expects that they have the experience and expertise permitting them to do so for military caregiver leave certifications.<sup>2</sup>

Lastly, the Department has decided not to adopt the CCD's recommendation to use SSDI determinations as another means of establishing a serious injury or illness. It is the Department's understanding that the criteria upon which SSDI determinations are based are distinct from the criteria upon which VASRD ratings are based. In light of the fact that the definition in proposed § 825.127(c)(2)(iii) was intended to mirror a 50 percent or greater VASRD rating, relying on a SSDI determination would not necessarily be an equivalent standard. The Department is concerned that if it were to use SSDI determinations to establish a qualifying serious injury or illness of a covered veteran, parity may not be achieved due to the different criteria on which SSDI determinations are based. Moreover, the SSDI determination does not address whether the veteran's injury or illness was incurred or aggravated in the line of duty on active duty. However, the Department believes that if a servicemember has an SSDI determination, a private health care provider may consider the determination in assessing whether a veteran has a qualifying serious injury or illness.

In addition to the three definitions that the Department proposed in the NPRM, the Department also discussed the VA's Program of Comprehensive Assistance for Family Caregivers (*see Caregivers and Veterans Omnibus Health Services Act of 2010*, Public Law 111-163; 38 CFR Part 71) as another possible means through which the severity of a veteran's injury or illness may be assessed. 77 FR 8969. This program is designed to provide health care, travel, training, and financial

<sup>2</sup> As discussed in § 825.310, when an employee obtains a certification for military caregiver leave from a private health care provider that is not affiliated with DOD, VA, or TRICARE, if the employer has reason to doubt the validity of the certification, he or she may require the employee to obtain a second (or third opinion) at the employer's expense. *See* §§ 825.310(d); 825.307(b), (c).

benefits to certain eligible caregivers of veterans who are eligible for the program. In general, a veteran or servicemember undergoing medical discharge from the Armed Forces is eligible for VA's Program of Comprehensive Assistance for Family Caregivers if the individual has incurred or aggravated a serious injury (including traumatic brain injuries, psychological trauma, or other mental disorders) in the line of duty on or after September 11, 2001; the serious injury renders the individual in need of a minimum of six continuous months of personal care services based on a variety of clinical criteria listed under 38 CFR 71.20 (c)(1)–(4); and it is in the best interest of the individual to participate in the program. *See* 38 CFR 71.20. According to the VA, there are approximately 4,600 participants enrolled in the program, and 80 percent of these participants have a VASRD rating of 50 percent or greater. Based on the eligibility requirements for VA's Program of Comprehensive Assistance for Family Caregivers, the Department believed that most veterans who qualify for the program meet the requirement of having a serious injury or illness as defined in this proposal. The Department invited comment on whether adding enrollment in the VA's program as a fourth alternative to the definition of a serious injury or illness of a covered veteran would be appropriate and would reduce the burden placed on military and veterans' families in seeking FMLA leave.

In response to the Department's inquiry, the CCD, Senators Harkin and Murray, and the Coalition submitted comments in support of making enrollment in the VA's Program of Comprehensive Assistance for Family Caregivers part of the definition of serious injury or illness of a veteran. Additionally, the CCD and Senators Harkin and Murray wrote that the Department should also consider a veteran's eligibility for the program as part of the definition for a serious injury or illness even if the veteran is not enrolled. The Department did not receive any responses that expressed opposition to this possible fourth definition. Therefore, in the Final Rule at § 825.127(c)(2)(iv), the Department adopts a fourth definition of a *serious injury or illness* for a veteran: an injury, including a psychological injury, on the basis of which the covered veteran has been enrolled in the Department of Veterans Affairs Program of Comprehensive Assistance for Family Caregivers will be a qualifying serious injury or illness for military caregiver

leave for a covered veteran. Only actual enrollment by covered veterans in this program will be considered as establishing a qualifying serious injury or illness under this definition. The employee seeking military caregiver leave under this definition does not, however, have to be the designated caregiver for the veteran under the VA's Program of Comprehensive Assistance for Family Caregivers. As with the three other definitions in paragraphs (c)(2)(i) to (iii), enrollment in VA's Program of Comprehensive Assistance for Family Caregivers establishes only that the veteran has a serious injury or illness, and does not mean that the employee is automatically entitled to take FMLA leave. The employee seeking to take FMLA military caregiver leave must qualify as a family member and meet the other eligibility criteria under the FMLA, and the veteran must meet the definition of a *covered veteran* in § 825.127(b)(2). The Department notes that the VA's Program of Comprehensive Assistance for Family Caregivers is open to veterans who were injured on or after September 11, 2001, while FMLA military caregiver leave requires that a veteran have been discharged within five years of the employee's requested leave.

The Department proposed to move the paragraph defining the family members qualified to take military caregiver leave currently in paragraph (b) to paragraph (d) (the numbering of the subparagraphs did not change). No substantive changes were proposed for this paragraph. The Department received several comments, including those submitted by Legal Aid and the North Carolina Justice Center on the definition of next of kin of a covered servicemember that appears in proposed § 825.127(d)(3) urging the Department to expand the definition beyond blood relatives. Two commenters, the Family Equality Council and the Partnership, noted that the repeal of the military's "Don't Ask, Don't Tell" policy means that gay and lesbian servicemembers may now serve openly in the military and that these servicemembers would undoubtedly prefer to be cared for by their same-sex partners or spouses. These commenters suggested that, because the Defense of Marriage Act prevents same-sex couples from being considered spouses for purposes of the FMLA, the Department should expand the definition of next of kin of a covered servicemember to include domestic partners. On a similar note, Twiga stated that Congress intended to provide greater flexibility for military caregiver leave to account for servicemembers relying on care from people other than

spouses, parents, or children. According to Twiga, the requirement of consanguinity is outdated because kinship is predicated on broader relationships, including partners and in-laws. This commenter also asserted that the definition would leave adopted servicemembers, who have no literal blood relatives, with no next of kin. It urged the Department to interpret the statute's blood relative requirement to include caretakers with legal relationships or other family members. Additionally, Twiga suggested that, in the special circumstance of a servicemember who is at risk of suicide, fellow servicemembers of that servicemember should be included in the definition of next of kin of a covered servicemember. Lastly, this commenter suggested that the definition take into account the availability of a particular caregiver and, where the next of kin is not available to provide caregiving, the next of kin of a covered servicemember definition should default to a relative who is close in terms of personal relationship and is available.

The Department cannot modify the definition as requested because the Department is constrained by the statutory definition of next of kin in the FMLA. The statute defines next of kin as "the nearest blood relative." 29 U.S.C. 2611(17). Based on this statutory definition, the Department defined *next of kin of a covered servicemember* in the 2008 Final Rule as the nearest blood relative other than the covered servicemember's spouse, parent, son, or daughter and then provided the order of priority of blood relatives: those who have been granted legal custody; brothers and sisters; grandparents; aunts and uncles; and first cousins. 73 FR 67967–68. In addition, as an alternative to this hierarchy of consanguinity, the 2008 Final Rule provided for the servicemember to designate in writing another blood relative as the nearest blood relative. *Id.* Thus, the 2008 Final Rule adhered to the consanguinity (*i.e.*, blood relationship) element of the statutory definition even in interpreting "nearest" broadly to be based on closeness of personal relationship as an alternative to closest in consanguinity. 73 FR 67968. While a spouse is not a blood relative, the inclusion of spouse among the relatives excluded from the definition of next of kin of a covered servicemember was intended to make clear that the next of kin was an additional family member beyond the covered servicemember's spouse, parents, and children; it was not intended to suggest that the next of kin could be someone unrelated by blood.

Given the specific language used in the statutory definition of next of kin (*i.e.*, "blood relative"), there is no basis to include same-sex partners or spouses, or fellow servicemembers, in the definition of next of kin of a covered servicemember. In response to Twiga's concern regarding adopted servicemembers, the Department notes that adoption creates a parent-child relationship between the adopted child and the adoptive parents with all the rights, privileges and responsibilities that attach to that relationship. *See Black's Law Dictionary* (9th ed. 2009). Therefore, for purposes of military caregiver leave and the definition of next of kin of a covered servicemember, adoption has the legal effect of establishing the same consanguineous relationships with family members that a non-adopted child has to that child's family members. Lastly, the Department notes that in the 2008 Final Rule, it considered but rejected the notion of incorporating a "willing and able" concept into the definition because of the anticipated difficulty in proving and verifying the relative's willingness and ability to provide care. 73 FR 67967.

The Department also received two comments, from Senators Harkin and Murray and the CCD, requesting that the Department clarify that each caregiver who takes care of a covered servicemember is able to take the full 26 weeks of leave individually, including situations when multiple employees need leave simultaneously to care for a single covered servicemember. In response to these comments, the Department notes that the military caregiver leave entitlement belongs to the employee-family member of the covered servicemember. Therefore, other than situations when spouses are employed by the same employer, each employee family member who is entitled to take up to 26 workweeks of military caregiver leave in a single 12-month period can do so independently of whether other caregivers are also taking leave to care for that same covered servicemember. As stated in § 825.124(b), "[t]he employee may need not be the only individual or family member available to care for the family member or the covered servicemember." The Department does not believe that further clarification is necessary. Therefore, the Department adopts paragraph (d) in the Final Rule without modification.

The Department proposed to move the paragraph explaining the single 12-month period currently in paragraph (c) to paragraph (e) (the numbering of the subparagraphs did not change). No substantive changes were proposed for

this paragraph. The Department explained in the NPRM that, because the FY 2010 NDAA establishes two distinct categories of covered servicemembers (*i.e.*, a current member of the Armed Forces and a covered veteran) and because military caregiver leave is applied on a per-covered servicemember per-injury basis, an eligible employee could potentially take military caregiver leave to care for a covered servicemember who is a current member of the Armed Forces and then, at a later point when the same servicemember becomes a covered veteran, could take a subsequent period of military caregiver leave based on the same injury or illness. 77 FR 8969. The Department noted, however, that all of the normal eligibility requirements, such as the hours of service requirement, would apply in such a situation, and that an employee may not take more than a combined total of 26 workweeks of FMLA leave during a single 12-month period. *Id.* The Department sought comment on this interpretation of the single 12-month period limitation.

Two commenters addressed the Department's interpretation of the single 12-month period. Legal Aid approved of the Department's interpretation that employees may take leave for the same servicemember when he or she is a current member of the Armed Forces and again when he or she is a veteran. An individual expressed concern about this interpretation of the single 12-month period, however. She stated that, as she understood the proposed interpretation, it would permit an employee to use two consecutive periods of 26 workweeks of leave (one 26 workweek period to care for a current servicemember, another 26 workweek period to care for a veteran), resulting in 52 consecutive workweeks of leave for an employee. In response to this comment, the Department reiterates that all of the normal eligibility requirements apply. The employee in this commenter's scenario would likely not meet the hours of service requirement in the preceding 12 months if that employee had just taken 26 workweeks of leave to care for a current servicemember. Additionally, an employee may not take more than a combined 26 workweeks of FMLA leave during a single 12-month period. The Department adopts paragraph (e) in the Final Rule without modification.

#### 4. Section 825.309 Certification Requirements for Leave Taken Because of a Qualifying Exigency

Section 825.309 sets forth the certification process and the elements of

a complete certification for qualifying exigency leave. Consistent with the proposed changes in § 825.126, the Department proposed in § 825.309 to substitute covered active duty for active duty and military member or member for covered military member wherever it appears in this section. The Department proposed to delete the phrase in support of a contingency operation from current § 825.309(a) to reflect the expansion of qualifying exigency leave to family of members of the Regular Armed Forces and the fact that this requirement does not apply to members of the Regular Armed Forces. The proposal revised the regulatory language at § 825.309(a) to make it clear that new active duty orders or documentation do not automatically need to be provided 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 military member; rather, in such situations, new active duty orders or documentation need only be provided upon request by the employer. As noted in the NPRM, the proposed change is consistent with the general certification process, which provides that an employer may require certification upon receiving an employee request for qualifying exigency leave. 77 FR 8970. Proposed § 825.309(a) tracked § 825.309(a) in permitting an employee to use either a copy of the military member's active duty orders or other documentation issued by the military to establish that the military member is on covered active duty or call to covered active duty status. However, the Department explained in the NPRM that it had received information from employees and employers indicating that family members have experienced difficulty obtaining copies of active duty orders or that the available documentation is insufficient to comply with current certification requirements. 77 FR 8970. The Department therefore sought comment on whether active duty orders of members of the Regular and Reserve components of the Armed Forces contain sufficient information to determine that the covered active duty involves deployment to a foreign country (and, in the case of the Reserve components, that the deployment is in support of a contingency operation), and, if not, what other documentation would meet the certification requirements. The Department also sought comment on whether employees have experienced difficulty in obtaining copies of active duty orders or other military documents establishing their

family member's covered service, and whether employers have experienced difficulty in confirming covered service. *Id.*

The Partnership and SHRM commented that employees have experienced difficulty obtaining copies of active duty orders, particularly when the servicemember is a member of the Regular Armed Forces. The Letter Carriers reported that a member contacted DOD on behalf of an employee and was unable to secure active duty orders, with DOD citing concern for national security. The Letter Carriers suggested that the determination of whether a military member meets the covered active duty requirement should be left up to the military. They proposed that a standardized certification form could be issued by the appropriate branch of the military or that a section indicating that the military member is on covered active duty, to be signed by the appropriate military official, could be added to the Form WH-384 (FMLA Certification of Qualifying Exigency for Military Family leave) or an equivalent form without requiring that further, sensitive information about the deployment be disclosed. Several commenters, including Senators Harkin and Murray and the North Carolina Justice Center, suggested the regulations should clarify that acceptable "other documentation" permitted under the regulation includes official military correspondence indicating a foreign deployment, such as a letter from the military member's commanding officer.

The Department considered the commenters' concerns that employees experience difficulties in obtaining the active duty orders for members of the Regular Armed Forces. Several factors weigh against adding a new section to the Form WH-384 or creating a separate certification form that a military member could present to the appropriate member of the military member's command to utilize for verification of covered active duty. Obtaining an official signature, especially if the military member is already deployed, would present logistical challenges. Electronic document transmission may not be available at remote deployment locations and postal delays could result in undue delay for the eligible employee. Additionally, the information contained on the Form WH-384 concerning the specific reason for qualifying exigency leave may be personal and raise privacy issues for the employee or the military member. The Department also considered creating an additional form, but believes doing so

could be confusing for employees and administratively burdensome for employers. However, the Department believes that official military correspondence such as a letter from a superior officer in the military member's chain of command will be sufficient to establish that the military member is on covered active duty or under a call to covered active duty and will fulfill the requirements of § 825.309(a). Therefore, the Department adopts proposed § 825.309(a) in the Final Rule without modification.

Current § 825.309(b) addresses information that may be required to support a request for qualifying exigency leave. Consistent with the proposed changes to § 825.126(b)(6), *Rest and Recuperation* qualifying exigency leave, the Department proposed a new paragraph at § 825.309(b)(6) to permit an employer to request a copy of the military member's Rest and Recuperation orders, or other documentation issued by the military indicating that the military member has been granted Rest and Recuperation leave, and the dates of the leave, in order to determine the employee's specific qualifying exigency leave period available for *Rest and Recuperation*. 77 FR 8970. No other changes were proposed to § 825.309(b). SHRM endorsed the Department's proposal. Twiga suggested that the Department and the DOD should agree on a certification form that is easy for a civilian employer to use to verify that the employee's requested period of qualifying exigency leave corresponds with the military member's allotted Rest and Recuperation orders. It is the Department's understanding that the military's Rest and Recuperation orders clearly state the member's dates of leave, and will therefore be sufficient to establish that the employee's requested period of qualifying exigency leave corresponds with the military member's allotted Rest and Recuperation leave. The Department does not believe that it is necessary to create another certification form specific for *Rest and Recuperation* qualifying exigency leave. Accordingly, the Department adopts § 825.309(b)(6) as proposed.

Current § 825.309(c) identifies optional-use Form WH-384, which may be used by an employee when requesting qualifying exigency leave and states that another form containing the same basic information may be used by an employer as long as no information beyond that specified is required. The Department proposed to make minor changes to this form to reflect the FY 2010 NDAA amendments. As discussed above, the Department

proposed to delete the optional-use forms from the Appendices to the regulations. Accordingly, the Department proposed to delete the reference in § 825.309(c) to Appendix G, and proposed to add language explaining that Form WH-384 may be obtained from local WHD offices or the WHD Web site. No other changes were proposed for § 825.309(c). Several comments were received concerning the removal of the forms from the Appendices. Those comments and the Department's decision to remove the forms from the Appendices in the Final Rule are discussed earlier in this preamble. No comments were received on the proposed revisions to Form WH-384. The form is modified to refer to a military member, use the term covered active duty, and contain the requirement that the member be deployed to a foreign country. The Final Rule implements § 825.309(c) as proposed.

Current § 825.309(d) indicates that where a complete and sufficient certification is submitted in support of a request for leave, an employer may not request additional information from an employee. Where the qualifying exigency involves a third party, employers may contact the individual or entity for purposes of verifying the meeting or appointment and the nature of the meeting. Employers may also contact the appropriate unit of the DOD to verify that the military member is on active duty or call to active duty status. The employee's permission is not required to conduct such verifications. The employer may not, however, request any additional information. The Department solicited information on how this provision has been working for employers and employees, specifically whether any privacy issues have arisen for employees and whether any employees have been denied qualifying exigency leave because their employers have been unable to verify their leave requests. The Department also sought information on whether employers have encountered any difficulties in making third-party verifications, and if so, why and whether they have denied an employee leave as a result. 77 FR 8971. The Department received several comments concerning third-party meeting verification and privacy issues related to third-party verification. The National Business Group on Health supported the provision that allows the employer to contact the individual or third parties to verify meetings, appointments, and the purpose of meetings for FMLA purposes and to contact the appropriate unit of DOD to

verify that military members are on active duty or call to active duty status. SHRM commented that there was nothing to justify any change to this provision. World at Work's survey indicated that 18 of the 94 respondents reported that making third-party verifications of qualifying exigency leave is one of their top three challenges in administering qualifying exigency leave. Only nine respondents listed "concern about privacy issues surrounding third-party verification of qualifying exigency leave" as one of their top three challenges in administering the FMLA. By contrast, Legal Aid expressed privacy concerns and asserted that such contacts should occur under very limited circumstances.

Although the commenters were divided on the issue of third-party contact, the Department did not receive any comments addressing administrative difficulties making third party contacts, nor did the Department receive any specific comments from employees or employee advocacy groups indicating that this provision has not been adhered to or has been abused. Accordingly, the Department maintains that where the qualifying exigency involves a third party, employers may contact the third party to verify the meeting and the purpose of the meeting, and may contact the appropriate unit of the DOD to verify that a military member is on covered active duty or call to covered active duty status. The Department makes no changes to § 825.309(d) in the Final Rule.

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

Section 825.310 sets forth the certification process and the elements of a complete certification for military caregiver leave. Current § 825.310(a) permits an employer to require that a request for leave to care for a covered servicemember with a serious injury or illness be supported by a certification issued by an authorized health care provider, defined as: (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. The Department proposed in § 825.310(a)(5) to add health care providers, as defined by regulation in § 825.125, as a fifth component to the definition of an authorized health care provider from whom medical certification can be obtained for a serious injury or illness. The Department based this proposal on its



understanding that in certain circumstances, such as when seeking treatment for a mental health condition, some current servicemembers may wish to seek care from a health care provider unaffiliated with the DOD. As explained in the NPRM, the Department believes that a family member of a current servicemember who is seeking treatment outside of the military's health care network for an injury or illness that was incurred or aggravated in the line of duty on active duty should be eligible for FMLA leave under this provision. 77 FR 8971. The Department noted that the proposed expansion of authorized health care providers would apply to covered veterans as well because veterans may use non-military-affiliated health care providers (private health care providers) rather than DOD, VA, or TRICARE network health care providers. *Id.* Additionally some veterans may no longer be entitled to seek care through DOD or VA affiliated health care providers, or veterans may also be covered by the private health care plans of a spouse or parent and may utilize the services of private health care providers through these plans. Whether it is because there is no VA center in the area or due to other circumstances, the Department stated that families of veterans should be able to rely upon the determination of the veteran's own private health care provider, who otherwise meets the definition of an FMLA health care provider at § 825.125, in determining if the treated condition is a qualifying serious injury or illness. The Department also noted that expanding the pool of health care providers would avoid increasing the administrative burdens on the VA and DOD. *Id.*

The Department expressed concern, however, that private health care providers would not have the specialized information available to DOD, VA, and TRICARE network health care providers that is necessary to make several of the military-related determinations. Therefore, the Department sought public comment on the available processes for a private health care provider to obtain information related to whether an injury or illness was incurred in the line of duty while on active duty or whether the covered servicemember's injury or illness existed before beginning service and was aggravated by service in the line of duty while on active duty. The Department also sought comment on whether the covered servicemember will have a copy of medical records from his or her military service, or whether the covered servicemember, or

family member, would be able to access medical records or other documentation that would support the determination that an injury or illness was incurred in the line of duty while on active duty, and the types of documentation that may be available to the covered servicemember or family member. Finally, the Department requested comment on whether a veteran or family member has access to documentation of a VASRD disability rating. *Id.*

Many of the comments, including those submitted by Senators Harkin and Murray, the North Carolina Justice Center, and the National Business Group on Health, expressed support for the proposal to expand the list of medical providers in § 827.310(a) to include health care providers as defined by the FMLA regulation at § 825.125. The CCD stated that this expansion will reduce the administrative burden on the DOD, VA, and TRICARE network health care providers, while also providing some measure of confidentiality for those family members concerned about the impact on a servicemember's military career of an FMLA application based on certain mental health conditions. Twiga stated that this expansion will make taking leave easier for families. The Partnership affirmed the Department's belief that veterans are frequently treated in private facilities and applauded the proposal. Aon Hewitt supported permitting private health care providers to certify serious injuries or illnesses as long as the Department retains its proposal that employers are permitted to obtain second and third opinions from such providers.

Several comments were received on the private health care provider's ability to determine if a serious injury or illness is related to the servicemember's military service. The Partnership, as well as the National Business Group on Health and the Coalition, requested additional guidance for private health care providers to determine what constitutes a serious injury or illness since private health care providers do not necessarily have experience in providing medical certifications related to military service. Sedgwick Claims Management Services requested that the Department provide private health care providers with directions on how to evaluate whether a caregiver situation applies and to provide such health care providers with the resources to access information necessary to make this determination. This commenter suggested that if private health care providers do not have this necessary information, that they not be added to the list of authorized health care

providers. One individual commenter opposed the proposal based on her belief that it could lead to increased abuse of intermittent leave usage. She expressed concern that a health care provider as defined by the FMLA regulations, is likely to be a family health care provider who would not be able to determine if the medical condition was incurred during or aggravated by the covered servicemember's military duty, and who may be willing, according to the commenter, to certify the frequency and duration of absence requested by the patient. The CCD explained that all veterans receive written notice from the VA of their disability rating, as do servicemembers in the case of a service department disability rating. The CCD further explained that for veterans who have filed claims for disability compensation through the VA, but who have not yet received an official determination of service-connection and a disability rating, veterans or their veterans' service officers may be able to provide documentation to assist the health care provider. It also commented that if a veteran has not received a VASRD rating, and has not received a medical opinion, then the health care provider could make a determination that it is as likely as not that the disability is service-connected, which should be sufficient for FMLA military caregiver leave benefits. According to the CCD, health care providers can also review service medical and administrative records that veterans and their representatives can obtain from the National Personnel Records Center (NPRC) in St. Louis, Missouri. These records may be obtained by submitting a request through the NPRC Web site. The Partnership recommended that the regulations permit the health care provider to contact veteran service officers, with the veteran's permission, since veteran service officers are familiar with the veteran's service record and are often called upon to make similar assessments about their veteran-clients.

With respect to the commenters' request that the Department provide guidance for private health care providers on making medical determinations related to military service, the Department believes that health care providers will be able to make the determinations necessary for a certification, without further regulatory instruction, based on the information provided by the servicemember and any military documentation that may be supplied by the servicemember. The Department understands, based on



consultation with the DOD and VA, that current servicemembers and veterans have access to their medical records for their time during service through eBenefits, an electronic portal provided by the DOD and VA. Veterans may also request their records through their local VA medical facility. In addition, the commenters indicated that veterans who have received a VASRD rating will possess documentation of their disability ratings, which can be produced as part of the medical certification process. While the servicemember is not required to provide the health care provider with military records to complete a certification, if the servicemember does so, the information in these medical records and any other military documentation may aid a health care provider in making a determination that a servicemember's injury or illness is related to the individual's military service. Moreover, private health care providers, while not necessarily familiar with military related determinations, are frequently called upon in conjunction with a patient's Worker's Compensation claim to determine that the patient's medical condition was caused by the patient's work even if the health care provider is not intimately familiar with that patient's particular occupation. Based on their medical experience, private health care providers are able to make such determinations. The Department believes that private health care providers will similarly be able to determine if the servicemember's injury or illness was incurred in or aggravated in the line of duty on active duty. In addition, as discussed in more detail below, if employers have reason to question the certification provided by a private health care provider, employers may seek a second, and if necessary, a third medical opinion. For these reasons, § 825.310(a)(5) is adopted as proposed.

The Department proposed to modify portions of paragraph (b), which sets forth the information an employer may request from the health care provider in order to support the employee's request for leave. The Department proposed to modify the language at the beginning of paragraph (b) and in subparagraphs (1)–(4) to reflect the changes to the statute to add preexisting conditions aggravated by service for current servicemembers and to add leave to care for veterans. Proposed § 825.310(b) was modified to indicate that an authorized health care provider may rely on military-related determinations from an authorized VA representative in addition to an authorized DOD representative.

Consistent with the Department's proposal to allow covered servicemembers to utilize any health care provider as defined in § 825.125, the Department proposed to add a new provision (v) to paragraph (b)(1) clarifying that the medical certification may be provided by any health care provider as defined in § 825.125. The Department proposed to add language to paragraph (b)(2) to allow an employer to obtain information that specifies whether the covered servicemember's injury or illness existed before beginning service and was aggravated by service in the line of duty on active duty. The Department sought comment on what processes are or may be used to determine that an injury or illness existed prior to active duty service and was aggravated by service in the line of duty on active duty. Comment was also sought on the basis that a non-DOD or non-VA health care provider would determine that an injury or illness is a condition that existed before the military member's service and was aggravated in the line of duty on active duty. Proposed paragraph (b)(3) allowed an employer to request the approximate date on which the serious injury or illness commenced or was aggravated and its probable duration. The Department proposed to move the description of the medical facts that must be included in the certification for a serious injury or illness of a current servicemember from current § 825.310(b)(4) to proposed § 825.310(b)(4)(i), without any changes in that subparagraph. The Department proposed to describe in § 825.310(b)(4)(ii) the medical facts that must be included in the certification for an injury or illness of a covered veteran, which tracked the proposed definition of a serious injury or illness of a covered veteran. In light of the Department's consideration of adding enrollment in VA's Program of Comprehensive Assistance for Family Caregivers as a fourth definition of serious injury or illness of a veteran, the Department sought comment on whether the medical documentation required for enrollment in that program provides sufficient medical facts to support the need for FMLA leave. The Department proposed no other changes to § 825.310(b).

The National Business Group on Health generally supported the proposal permitting employers to require this new information in the certification supporting military caregiver leave. The Sedgwick Management Group requested that the criteria for determining a pre-existing condition be clearly stated in

the regulation, and that the FMLA forms contain questions to identify whether such a condition exists in order to reduce potential ambiguity and employer burden in having to make that determination. As noted in the discussion of § 825.127(c)(1), the Department received two comments from Senators Harkin and Murray and the CCD suggesting that the Department should consider participation in or meeting the eligibility requirements of the SCAADL Caregiver Program as establishing a current servicemember's serious injury or illness. The SCAADL program is available to current servicemembers who have a permanent catastrophic injury or illness that was incurred or aggravated in the line of duty, as certified by a licensed DOD or VA physician, and who need assistance from another person to perform the personal functions required in everyday living. *See* 37 U.S.C. 439(b); DODI 1341.12 (May 24, 2012). Twiga expressed concern that requiring servicemembers to disclose medical information could raise privacy issues and possibly deter a servicemember from seeking medical treatment, particularly for mental health issues and for conditions such as alcohol or drug dependence. To address these concerns, Twiga suggested that the regulation make clear that the certification need only describe whether a qualifying serious injury or illness exists, but need not include a description of the specific medical condition.

With respect to the commenters' request that the Department provide guidance for health care providers on making medical determinations regarding preexisting conditions, the Department believes that health care providers will be able to make the determinations necessary for a certification, without further regulatory instruction, based on the information provided by the servicemember and any military medical records the servicemember may provide. The Department believes that documentation indicating a current servicemember's enrollment in the SCAADL program may be considered by a health care provider in determining whether the current servicemember has a serious injury or illness that makes the current servicemember unable to perform the duties of the member's office, grade, rank, or rating. Similarly, SSDI determinations may be considered by private health care providers in determining whether a veteran has a qualifying serious injury or illness. To the extent that additional information is necessary to establish a complete and

sufficient FMLA certification (*e.g.*, information showing the relationship of the employee to the covered servicemember for whom the employee is requesting leave to care, that the injury or illness was incurred or aggravated in military service, the probable duration of the serious injury or illness, and the servicemember's need for care and an estimate of the time period during which care will be needed), the employee seeking leave will be responsible for providing the employer with the additional information. The Final Rule adopts the provision as proposed.

The privacy concerns raised by Twiga, while not directed at the new information that can be required under the proposal, nonetheless merit discussion. As an initial matter, the Department reiterates that the certification of a serious injury or illness, both for a current servicemember and a veteran, addresses only the serious illness or injury related to military service for which the family member seeks leave. Any medical information unrelated to that serious injury or illness is not part of the certification process for FMLA leave. In addition, the same standard applies to the amount of information required for the certification of the serious illness or injury of a covered servicemember as applies to the amount of information required for the certification of serious health condition. As the Department stated in the 2008 Final Rule in the preamble discussion of certification of a serious health condition in § 825.306:

[T]he 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. \* \* \* [T]he 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.

73 FR 68014. Other than the information necessary to show that the servicemember has a qualifying serious injury or illness, as well as the other regulatory requirements (*e.g.*, need for care, probable duration), the certification does not require identification of the servicemember's diagnosis. Inclusion of such information is left to the discretion of the servicemember's health care provider. The Department does not believe that further clarification is necessary.

As noted above in the discussion of § 825.127(c)(2)(iii), the Department removed the term service-connected disability or disabilities in the third definition of a serious injury or illness of a covered veteran and replaced it with the term a disability or disabilities related to military service. This change was in response to comments that only the VA can determine if a disability is service-connected. For the reasons outlined in the discussion of § 825.127 above, the Department makes the same modification to § 825.310(b)(4)(ii)(C) by replacing the term service-connected disability or disabilities with the term a disability or disabilities related to military service.

The Department did not receive any comments in response to its query on whether the medical documentation required for enrollment in VA's Program of Comprehensive Assistance for Family Caregivers provides sufficient medical facts to support the need for FMLA leave. As discussed above in conjunction with § 825.127(c)(2), the Department has decided to add in the Final Rule at § 825.127(c)(2)(iv), a veteran's enrollment in the VA's Program of Comprehensive Assistance for Family Caregivers as the fourth definition for establishing a qualifying serious injury or illness for a covered veteran. The VA has advised the Department that upon enrollment in VA's Program for Comprehensive Assistance for Family Caregivers, the caregiver receives a letter from the VA indicating that the caregiver has been designated and approved as the caregiver for the veteran named in the letter. Therefore, the Final Rule provides in § 825.310(b)(4) that such documentation may be produced as part of the certification process to demonstrate that a covered veteran has a qualifying serious injury or illness under the fourth definition of a serious injury or illness. The Department noted in the NPRM that medical documentation prepared in connection with the VA's Program of Comprehensive Assistance for Family Caregivers may be submitted as part of the FMLA certification process under the second and third alternative definitions of serious injury and illness in § 825.127(c)(2)(ii) and (c)(2)(iii). 77 FR 8972. While that is still the case, documentation establishing enrollment in the program will meet the definition of a serious injury or illness under § 825.127(c)(2)(iv) and therefore will not need to meet the definition under (c)(2)(ii) or (iii). The Department notes that, similar to the treatment of invitational travel orders and

international travel authorizations in § 825.310(e), enrollment documentation for the VA Program for Comprehensive Assistance for Family Caregivers may be used by eligible employee family members other than the designated VA caregiver to support a need for military caregiver leave. However, as the Department explained in the NPRM, to the extent that additional information is necessary to establish a complete and sufficient FMLA certification (*e.g.*, information showing the relationship of the employee to the covered servicemember for whom the employee is requesting leave, that the veteran is within five years of discharge, the probable duration of the serious injury or illness, and the servicemember's need for care and an estimate of the time period during which care will be needed), the employee seeking leave is responsible for providing the employer with the additional information. Therefore, the Department adopts paragraph (b) in the Final Rule with the addition of provision (D) to subparagraph (b)(4)(ii) to permit documentation of enrollment in the VA Program for Comprehensive Assistance for Family Caregivers program to show that the veteran has a qualifying serious injury or illness as defined in § 825.127(c)(2)(iv) of the Final Rule.

The Department proposed to modify portions of § 825.310(c), which sets forth the information an employer may request from the employee or covered servicemember, by adding a new paragraph (c)(6) and renumbering current paragraph (c)(6) as (c)(7). Proposed paragraph (c)(6) permitted an employer to require that the employee or covered servicemember indicate whether the member is a veteran, the date of separation, and whether the separation was other than dishonorable. The proposal also permitted the employer to request documentation confirming this information. It indicated that an eligible employee may provide a copy of the veteran's DD Form 214 (Report of Separation) or other proof of veteran status to satisfy such documentation requirement. Two commenters addressed this subparagraph. The Partnership and the North Carolina Justice Center commented that the Department should use the discharge date on DD Form 214 as the date when the veteran officially transitioned from being active duty to being a veteran. The Department's intention in referencing DD Form 214 in the proposal was to indicate that this form was one available method of showing the veteran's discharge date. Therefore, the Department adopts

paragraph (c) in the Final Rule without modification.

Current § 825.310(d) identifies an optional-use form that may be used to provide certification for military caregiver leave, Form WH-385, Certification for Serious Injury or Illness of a Covered Servicemember for Military Family Leave. The Department proposed to make revisions to this form to implement the statutory amendments. 77 FR 8963. The Department stated in the NPRM that it was considering the development of a new form for certification of military caregiver leave for a covered veteran. 77 FR 8972. The Department sought comments on whether it would be less confusing to develop a separate form or whether adapting the current Form WH-385 would be preferable.

No comments were received on the Department's proposal to revise Form WH-385 to reflect the statutory amendments concerning the definition of a serious injury or illness for current servicemembers. However, the Department received comments supporting the creation of a new form, as well as comments urging the Department to adapt current Form WH-385 to reflect the expansion of military caregiver leave to covered veterans. Aon Hewitt supported the creation of a separate form as this structure would mirror the separate forms available for FMLA leave for a serious health condition for an employee and a family member. Moreover, Aon Hewitt asserted that one form, combining both current servicemembers and covered veterans, would be too cluttered, too long, and harder to use. However, the North Carolina Justice Center and the Partnership recommended that the Department adapt current Form WH-385 for covered veterans in order to avoid confusion and unnecessary complication. The Partnership stated that if the Department does adopt a separate form for covered veterans, then an employee who has previously submitted a form for military caregiver leave for a current servicemember should not have to submit a new certification for leave to care for that same servicemember when he or she becomes a covered veteran.

The Department considered these comments and has decided to create a new form for military caregiver leave for a covered veteran. The Department believes that the addition of a separate form will ultimately be less confusing for employees, employers, and health care providers. Adding information related to the serious injury or illness of a covered veteran to current WH-385 would increase the length and

complexity of the form. Two separate forms, one containing the instructions and information germane to a current servicemember and one containing the instructions and information germane to a covered veteran, will lessen the administrative burden on health care providers. Form WH-385 will continue to be the form for military caregiver leave for current servicemembers, and the form for covered veterans is marked WH-385-V for easy identification. While an eligible family member may take military caregiver leave for a current servicemember, and again for the same servicemember when he or she becomes a covered veteran, the employee must submit a new certification form for each leave request. However, the eligible family member, assuming he or she is asserting that the covered veteran has a qualifying serious injury or the first definition at § 825.127(c)(2)(i), may attach the original certification with appropriate veteran documentation attached as part of the certification for leave to care for the covered veteran.

Form WHD-385 is updated to include injuries and illnesses that pre-existed the servicemember's active duty but were aggravated in the line of duty on active duty. The Department has also amended this form to reflect that a health care provider as defined in § 825.125 may certify a serious injury or illness for a current servicemember and that a serious injury or illness includes a condition that existed before the member's military service and was aggravated by service in the line of duty on active duty in the Armed Forces.

As discussed previously in this preamble, the Department has decided to remove the forms from the Appendices. The forms for military caregiver leave, like the other FMLA forms, are available on the WHD Web site ([www.dol.gov/whd](http://www.dol.gov/whd)) and at local WHD offices. Accordingly, consistent with the proposal, in this Final Rule the reference to Appendix H in paragraph (d) is deleted, and in its place language is inserted stating that the applicable form may be obtained either from a local WHD office or the WHD Web site.

In conjunction with the Department's proposal to allow family members of covered servicemembers to rely upon certifications completed by health care providers that are not affiliated with DOD, VA, or TRICARE, the Department proposed in § 825.310(d) to permit second and third opinions in these instances. As discussed in the NPRM, when a medical certification is completed by a private health care provider unaffiliated with the DOD, VA, or TRICARE network system, the

process is more akin to the certification process for the serious health condition of civilian family members. 77 FR 8972. Consequently, the Department concluded that in such situations there is no basis to prohibit employers from obtaining second and third opinions. For these reasons, the Department proposed in § 825.310(d) to state that second and third opinions are not permitted when the certification has been completed by a DOD health care provider, a VA health care provider, a DOD TRICARE network authorized private health care provider, or a DOD non-network TRICARE authorized private health care provider (identified in § 825.310(a)(1)-(4)), but are permitted when the certification has been completed by a health care provider that is not one of the types identified in § 825.310(a)(1)-(4).

Aon Hewitt and the National Business Group on Health expressed their support for permitting second and third opinions in cases of military caregiver certifications completed by health care providers who are not affiliated with the VA, DOD, or TRICARE. In contrast, the CCD and Twiga opposed this provision. The CCD questioned the logic of permitting second and third opinions, since the current regulation does not permit second and third opinions even though a DOD non-network TRICARE authorized provider could be almost any health care provider, and recommended that the sufficiency of the certification be based on the health care provider's expertise and not his or her affiliation. Twiga expressed the view that second and third opinions are burdensome on military families, especially if a specialist's care is necessary because wait times to see a specialist can be long and additional expenses may be incurred by family members.

After considering these comments, the Department has decided to retain this provision without change in the Final Rule. In response to the CCD's comment that DOD non-network TRICARE authorized providers may be any health care provider, the Department continues to believe that it is appropriate to distinguish between health care providers who are affiliated in some way with DOD, VA, or TRICARE and health care providers who have no such affiliation in permitting second and third opinions on certifications for military caregiver leave. While obtaining second and third opinions may be time consuming, the employee remains provisionally entitled to FMLA leave while obtaining the second (or third) opinion, and the costs associated with a second or third opinion are the responsibility of the employer. *See*

§ 825.307(b). As the Department explained in the NPRM, permitting authorized health care providers as defined in § 825.125 to certify military caregiver leave is more akin to the traditional FMLA certification process for a serious health condition. Therefore, the Department adopts the provision regarding second and third opinions when the certification for military caregiver leave is provided by a health care provider who is not affiliated with DOD, VA, or TRICARE in § 825.310(d) as proposed.

Other than to update internal references, the Department did not propose any changes for § 825.310(e), which addresses the use of invitational travel orders (ITO) or invitational travel authorizations (ITA) issued for medical purposes, in lieu of a certification form. The Department sought comment on the effectiveness of the substitution of ITOs and ITAs in support of a need for military caregiver leave, and no comments were received. The Final Rule adopts § 825.310(e) as proposed.

In light of the modifications to § 825.310(b)(4)(i) and (ii) to permit documentation of a veteran's enrollment in the VA's Program for Comprehensive Assistance for Family Caregivers to show that the veteran has a qualifying serious injury or illness, the Department creates a new paragraph (f) in the Final Rule to address such documentation. Section 825.310(f) of the Final Rule requires an employer that is requiring an employee to submit a certification for leave to care for a covered servicemember to accept as sufficient certification of the servicemember's serious injury or illness documentation indicating the servicemember's enrollment in the VA's Program for Comprehensive Assistance for Family Caregivers. This is similar to the provision in paragraph (e) regarding ITOs and ITAs, except that the documentation indicating the servicemember's enrollment in the VA's Program for Comprehensive Assistance for Family Caregivers serves only to show that the covered veteran has a serious injury or illness, but does not necessarily establish the other requirements necessary for a complete certification. The Final Rule further provides at § 825.310(f) that such documentation is sufficient certification of the servicemember's serious injury or illness regardless of whether the employee is the named caregiver in the enrollment documentation. As with ITOs and ITAs, the Final Rule at § 825.310(f)(1) permits an employer to seek authentication and clarification of the documentation indicating the servicemember's enrollment in the

program under § 825.307, but indicates that an employer may not utilize the second or third opinion process outlined in § 825.307 or the recertification process under § 825.308 when the servicemember's serious injury or illness is shown by documentation of enrollment in this program. Lastly, the Final Rule at § 825.310(f)(2) permits an employer to require that an employee provide confirmation of covered family relationship to the servicemember and documentation, such as a veteran's Form DD-214, showing that the discharge was other than dishonorable and the date of the veteran's discharge when an employee supports his or her request for FMLA leave with documentation of enrollment in this program.

Section 825.310(f) currently states that it is the employee's responsibility to provide the employer with a complete and sufficient certification and describes the consequences of failing to do so. The Department proposed to add text that clarified this requirement, providing that "an employee may not be held liable for administrative delays in the issuance of military documents, despite the employee's diligent, good-faith efforts to obtain such documents." While current § 825.305(b) states that employees who are unable to provide the requested FMLA certification (including certification for military caregiver leave) within 15 days despite their diligent, good faith efforts must be provided with additional time, the Department believed that it was important to reiterate this principle in § 825.310(f). The Department sought to clarify that employees may not be held responsible for administrative delays in the issuance of military documents where a good faith attempt is made by the employee to obtain such documents. Two organizations provided comments on this proposal. Legal Aid commended the Department for making this clarification in § 825.310(f). Twiga suggested that, in light of the burden on military families of obtaining second and third opinions from a non-military-affiliated health care provider, § 825.310(f) should be clarified to "make clear that the extension also applies to second and third opinions of non-military doctors."

In response to Twiga's comment, the Department notes that the current regulations do not prescribe a time frame for completion of second or third opinions. Instead, § 825.307(b) provides that when an employer seeks a second (and third) opinion, the employee is provisionally entitled to the benefits of the FMLA pending the receipt of the

second (and third) opinion. There is no prescribed time within which an employee must obtain the second or third opinion. Therefore, the Department believes that it is unnecessary to state in the regulation that administrative delays in obtaining medical certifications cannot be held against the employee in obtaining second and third opinions. Because the Final Rule creates a new paragraph (f), the Final Rule redesignates proposed § 825.310(f) as § 825.310(g) without modification to the text of the paragraph.

#### *B. Revisions To Implement the AFCTCA Amendments Subpart H—Special Rules Applicable to Airline Flight Crew Employees*

##### 1. Section 825.800 Special Rules for Airline Flight Crew Employees, General

Current § 825.800 contains the definitions of significant terms, phrases, and acronyms used in the regulations. In the NPRM, the Department proposed to move the definitions section of the regulations to § 825.102 to enhance the utility of the regulations. As explained earlier in this preamble, the Department has made that change, leaving § 825.800 available for the use described here.

The AFCTCA established special rules for determining whether airline flight crew employees meet the hours of service requirement for FMLA eligibility, authorized the Department to issue regulations providing a method of calculating leave for airline flight crew employees, and authorized the Department to issue regulations regarding employers' maintenance of certain information for airline flight crew employees. In the NPRM, the Department proposed that the regulations implementing these provisions of AFCTCA be incorporated by topic in §§ 825.110 (employee eligibility), 825.205 (calculation of leave), and 825.500 (recordkeeping). In the Final Rule, the provisions specific to airline flight crew employees are located in a separate, newly titled subpart, Subpart H—Special Rules Applicable to Airline Flight Crew Employees.

Accordingly, § 825.800, *Special rules for airline flight crew employees, general*, explains that airline flight crew employees are subject to special rules for determining employee eligibility and calculation of leave, and that special recordkeeping provisions also apply. Section 825.800 also explains that, except as noted, the other provisions of the FMLA regulations also apply to airline flight crew employees. The proposed revisions concerning the hours of service requirement for airline

flight crew employees are located in § 825.801, *Special rules for airline flight crew employees, hours of service requirement*; the proposed additions regarding calculation of leave for airline flight crew employees, as modified in response to comments, will be located in § 825.802, *Special rules for airline flight crew employees, calculation of leave*; and the proposed addition discussing special recordkeeping requirements for employers of airline flight crew employees will be located in § 825.803, *Special rules for airline flight crew employees, recordkeeping requirements*. The Department believes this reorganization will enhance the utility of the regulations and minimize confusion regarding the rules applicable only to airline flight crew employees. The Department emphasizes, and has noted in the regulatory text, that except as otherwise provided in Subpart H, airline flight crew employees and their employers continue to be subject to all requirements of the FMLA as set forth in part 825, subparts A, B, C, D, E, and G.

## 2. Section 825.801 Special Rules for Airline Flight Crew Employees, Hours of Service Requirement

The AFCTCA established a special hours of service requirement for airline flight crew employees. In the NPRM, the Department proposed to insert into § 825.110(c) language implementing this new requirement. After considering the comments received, the Department has adopted the regulation as proposed in § 825.801.

Proposed § 825.110(c)(2) provided that airline flight crew employees are eligible for FMLA leave if they have worked or been paid for not less than 60 percent of the applicable monthly guarantee and for not less than 504 hours during the previous 12-month period.

Proposed paragraph (c)(2)(i) defined the applicable monthly guarantee for airline flight crew employees on reserve and non-reserve status. As required by the AFCTCA, the Department proposed to define the *applicable monthly guarantee* for non-reserve airline flight crew employees as the number of hours for which an employer has agreed to schedule the employee for any given month. For airline flight crew employees on reserve status, the *applicable monthly guarantee* would be defined as the minimum number of hours for which an employer has agreed to pay such employee for any given month. The Department proposed to refer to airline flight crew employees who are not on reserve status as “line holders” in the definition of applicable

monthly guarantee in proposed § 825.102.

In the first sentence of proposed § 825.110(c)(2)(ii), the Department provided that the number of hours that an airline flight crew employee has worked would be the employee’s duty hours during the previous 12-month period. The Department noted its understanding that while duty hours may not always reflect all hours that would be considered hours worked under the FLSA, duty hours are closely tracked in a similar manner by all employers in the industry. The Department noted its understanding that the schedule for non-reserve employees is based on duty hours, and that duty hours include the *flight or block* hours as determined by the Federal Aviation Administration (FAA) as well as additional time before and after the flight as determined by employer policy or applicable collective bargaining agreement. The Department sought comments on whether this was an accurate interpretation of what comprises non-reserve employees’ scheduled hours or whether some other basis such as flight or block hours would be more appropriate for this calculation.

The second sentence of proposed paragraph (c)(2)(ii) provided that the hours for which an airline flight crew employee has been paid are the number of hours for which the employee received wages. The Department explained that airline flight crew employees are generally paid on an hourly basis, and that these hours are routinely tracked by each airline.

In the NPRM, the Department noted that airline flight crew employees are eligible for FMLA leave if they meet either the hours worked or hours paid requirement. It invited comments on whether the proposed calculation methods are the most appropriate bases for determining whether an airline flight crew employee has met the hours of service requirement.

Finally, the Department proposed to add language to current § 825.110(c)(3), which explains an employer’s burden when it does not maintain accurate records of hours worked for an employee, clarifying the application of this rule to airline flight crew employees.

Few comments were received on the Department’s implementation of the AFCTCA eligibility requirements in proposed § 825.110(c)(2) and (c)(2)(i). Two employee associations, the Air Line Pilots Association (ALPA) and the Association of Flight Attendants (AFA), suggested that where an employer has determined that an employee meets the

504 hours requirement and is prepared to confirm FMLA eligibility based upon that criterion alone, the employer should not have to perform the calculation for determining whether the employee has worked or been paid for 60 percent of the applicable monthly guarantee. Similarly, Airlines for America (A4A)<sup>3</sup> commented that as a matter of administrative efficiency, employers should not be required to look beyond the 504 hours requirement where that criterion is met. A4A suggested that there be a rebuttable presumption that airline flight crew employees who have been paid for 504 hours have satisfied the eligibility requirements.

With reference to the Department’s implementation of the statutory definition of applicable monthly guarantee for airline flight crew employees on reserve and non-reserve status, both ALPA and the International Association of Machinists and Aerospace Workers (IAM) agreed that the Department appropriately defined the applicable monthly guarantee. The ALPA further stated that the Department’s characterization of non-reserve employees as “line holders” reflects common industry parlance. A4A stated that the distinction between line holder and reserve employees has some validity “insofar as the monthly guarantee test for eligibility”.

The vast majority of commenters who addressed the Department’s proposal to use duty hours as the number of hours that an airline flight crew employee has worked for purposes of meeting the hours of service requirement supported the proposal. Employer and employee groups, such as ALPA, AFA, APFA, IAM, United Steelworkers (USW), and US Airline Pilots Association (USAPA), stated that duty hours provide the most uniform basis for determining hours of service for FMLA eligibility purposes, and most accurately represent the amount of time an airline flight crew employee is working in any single day. Senators Harkin and Murray also supported the Department’s use of duty hours to determine the hours an employee has worked for purposes of

<sup>3</sup> A4A is the principal trade and service organization of the U.S. scheduled airline industry. Its members include: Alaska Airlines, Inc.; American Airlines, Inc.; ASTAR Air Cargo, Inc.; Atlas Air, Inc.; Delta Air Lines, Inc.; Evergreen International Airlines, Inc.; Federal Express Corporation; Hawaiian Airlines; JetBlue Airways Corp.; Southwest Airlines Co.; United Continental Holdings; United Parcel Service Co.; and US Airways, Inc. In addition, Air Canada is an A4A associate member, and ABX Air, Inc., Allegiant Air, LLC, Global Air Holdings, Netjets, Inc., and Virgin America participated in A4A’s Labor and Employment Council and joined in its comment.

determining the hours of service requirement, stating that they understand that duty hours are tracked by all airlines, as required by the FAA. In addition, several commenters, including ALPA, Transportation Trades Department, AFL-CIO (TTD), IAM, and USAPA, confirmed the Department's understanding that scheduled hours for line holders encompass duty hours. ALPA, AFA, APFA, IAM, and TTD commented that the term duty hours should also encompass time spent in mandatory training such as ground school and simulator training or training for new aircraft or services as required by the FAA and carriers. AFA further commented that the Department should provide a definition for duty hours in the regulations, explaining all of the duties that may be encompassed within the term, including training time.

Two commenters opposed the Department's use of the term duty hours. Legal Aid stated that hours of service should be measured by hours paid rather than duty hours, arguing that there are many different contractual definitions of on duty within the industry. RAA claimed that defining eligibility as duty hours imposes an "artificial and undefined term upon the industry." RAA suggested that the Department should instead utilize either the carrier's own minimum guarantee components or an industry standard such as flight or block hours.

The Department received few, and only positive, comments regarding its proposal to define hours paid to an airline flight crew employee as the number of hours for which the employee received wages. ALPA stated that the Department proposed an appropriate measure because airline flight crew employees are generally paid on an hourly basis, and such hours are regularly tracked by carriers. AFA agreed that the proposed definition was "appropriate and fair."

Several commenters supported the Department's proposed revision to the explanation of the employer's burden of proof in current § 825.110(c)(3). ALPA, TTD, and IAM stated that the provision appropriately places the burden of proving employee ineligibility if the employer fails to keep accurate records of hours worked or paid, and is consistent with application of the law for non-airline flight crew employees.

After careful consideration of the comments received, the Department has decided to adopt the provisions as proposed, with the aforementioned relocation to Subpart H. Section 825.801(a) explains that airline flight crew employees remain subject to the eligibility requirements in § 825.110

other than those regarding the hours of service requirement. Section 825.801(b) contains the text that appeared in proposed § 825.110(c)(2). (Consistent with this change, the Department has updated the cross references in the definitions of *airline flight crew employee* and *applicable monthly guarantee* in § 825.102 to refer to § 825.801.) Section 825.801(c) explains the exception to the special rules in paragraph (b) for absences from work due to or necessitated by USERRA-covered service, consistent with § 825.110(c)(2). Section 825.801(d) contains the proposed text regarding the employer's burden of proof in the absence of accurate records.

The Department has adopted the definition of *applicable monthly guarantee* as proposed because it received positive comment on this portion of the proposal and the text conforms to the requirements of the AFCTCA. With regard to commenters that requested that the Department approve use of an abridged method for determining whether an employee meets the hours of service requirement, basing eligibility only on the 504-hour criterion, the Department notes that the AFCTCA sets forth a two-part test for eligibility and the Department does not have authority to alter its requirements. The AFCTCA requires that both criteria be met, stating that an employee that has worked or been paid for not less than 60 percent of the applicable monthly guarantee and for not less than 504 hours (not including personal commute time or time spent on vacation leave or sick or medical leave) during the previous 12-month period meets the hours of service eligibility requirement. The Department notes that consistent with the purpose and intent of the FMLA, and the Department's longstanding policy, an employer is not prohibited from providing a more generous leave policy provided the employer complies with the FMLA. See § 825.700(b) (explaining that nothing in the Act is intended to discourage employers from adopting or retaining more generous leave policies than are required). Therefore, if an employer of airline flight crew employees chooses to assume that all employees who meet the 504-hours requirement also meet the 60 percent requirement, the employer may do so, provided that they only deduct from employees' FMLA leave entitlements leave that is covered under the Act.

Additionally, the Department notes that it continues to use the term line holder in the definition of *applicable monthly guarantee* in § 825.102. Because comments confirmed that the

industry uses the term line holder to refer to an airline flight crew employee who is not on reserve status, the Department believes use of this term is appropriate.

The Final Rule will also, as proposed, define an airline flight crew employee's hours worked as duty hours. The response to this proposal was largely positive. As many industry commenters indicated, an airline flight crew employee's typical day of work can include a variety of support duties that begin before a plane takes flight and end after it lands. In contrast to *flight* or *block* hours, duty hours encompasses time spent performing these duties. Furthermore, the inclusion of time worked beyond actual flight time is consistent with the FAA's definition of duty period. See 14 CFR 121.467(a) (defining duty period as "the period of elapsed time between reporting for an assignment involving flight time and release from that assignment"). Furthermore, the Department did not find Legal Aid or RAA's comments opposed to use of the term duty hours persuasive. Even if duty hours are not always precisely or consistently defined by different air carriers, they are, as other commenters noted, the most accurate readily available measure of hours worked in the airline industry. As explained, the alternative definition of hours worked considered by the Department and suggested by RAA, flight or block hours, discounts significant amounts of time when airline flight crew employees are working. RAA's other suggestion, to define hours worked as the hours used by each carrier to measure the applicable monthly guarantee, would similarly undercount time spent working as to many airline flight crew employees because, according to RAA itself, the guarantee is "[t]ypically" based on flight or block hours.

In light of the overwhelming response from commenters that the term duty hours is recognized and widely utilized by carriers and employees in the industry, the Department does not find it necessary to provide further definition of the term in the regulatory text. Further, in response to comments specifically requesting the inclusion of training time in the definition of duty hours, the Department declines to alter the proposed regulatory text but notes that some airline employers pay for training time and to the extent airline flight crew employees are paid for time spent in training, that time will be counted toward the employee's hours of service requirement.

The Department adopts in § 825.801(b)(2) its definition of hours

paid to airline flight crew employees as proposed because, based on the positive comments received, the Department believes that definition is logical, easy to understand, and easy to administer. The Department also inserts a new paragraph § 825.801(c) to address the application of USERRA covered service to airline flight crew employees. This paragraph is consistent with the general provisions concerning USERRA-covered service in determining employees' eligibility found at § 825.110(c)(2).

The Department also adopts the proposed language regarding an employer's burden of proof. Placing the burden of proving employee ineligibility on the employer if the employer does not maintain accurate records of the employee's hours worked or paid is consistent with application of the law to non-airline flight crew employees. This statement, proposed as a revision to current § 825.110(c)(3), is located in § 825.801(d), with some duplication of the text in current § 825.110(c)(3) to provide appropriate context.

### 3. Section 825.802 Special Rules for Airline Flight Crew Employees, Calculation of Leave

The current regulations contain no provision regarding the calculation of FMLA leave specifically for airline flight crew employees. The AFCTCA explicitly authorized the Department to promulgate such regulations.

In the NPRM, the Department proposed to address FMLA leave calculation for airline flight crew employees in § 825.205(d). Proposed § 825.205(d)(1) provided the method for calculating leave usage for airline flight crew employees who are line holders, *i.e.*, who are not on reserve status, based on principles established for the calculation of FMLA leave for eligible employees who are not airline flight crew employees. Specifically, the Department proposed that the employee's scheduled workweek (defined as the number of scheduled duty hours for that workweek) would serve as the basis for calculating FMLA leave usage. The amount of FMLA leave used would be determined on a pro rata or proportional basis.

Proposed § 825.205(d)(2) provided the method for calculating leave usage for airline flight crew employees on reserve status. For those employees, an average of the greater of the applicable monthly guarantee or actual duty hours worked in each of the prior 12 months would be used to calculate the employee's average workweek. The amount of FMLA leave used would be determined on a pro rata or proportional basis. The Department proposed use of the calculation method

described for airline flight crew employees on reserve status for employees who work as both line holders and on reserve status, as this method was flexible enough to encompass both the applicable monthly guarantee and duty hours.

The Department sought comment on these proposed methods of calculation of leave. It also requested comment on industry practice in this area, application of the FMLA regulations to employees who work on both reserve and non-reserve status, and alternative FMLA leave calculation methods. For the reasons stated below, the Department is modifying the method for calculation of leave for airline flight crew employees, and is implementing a uniform leave entitlement for such employees at § 825.802, *Special rules for airline flight crew employees, calculation of leave.*

Comments from both employee and employer groups opposed the Department's proposed methods of FMLA leave calculation for airline flight crew employees. Almost uniformly, commenters representing air carrier employers, flight crew employee organizations, and labor organizations, such as TTD, A4A, IAM, and Senators Harkin and Murray, asserted that due to the unique scheduling practices in the airline industry, the proposed calculation of leave methods would be complicated to administer, cause confusion, and lead to inequitable deductions from employees' FMLA entitlements. Even commenters who appreciated that the Department's proposal was an attempt to treat airline flight crew employees similarly to other employees with variable schedules, such as ALPA, nevertheless opposed the proposal because of its complexity and variability.

The Department received two comments regarding the proposed distinction between line holders and employees on reserve status for leave calculation purposes, both of which were critical. RAA stated that many line holders also work reserve days, while reserves are often assigned lines during their reserve period. A4A cautioned that drawing this distinction for calculation of leave purposes would be inappropriate, because airline flight crew employees do not clearly fit within the Department's proposed categories. Both RAA and A4A suggested that by requiring air carriers to use the 12-month averaging option for employees who worked as both line holders and reserves, the Department was unnecessarily complicating FMLA leave calculation.

There was near consensus among commenters representing both employers and employees in the airline industry regarding an appropriate alternative method for calculating FMLA leave for airline flight crew employees. Employer and employee groups, including IAM, ALPA, TTD, APFA, A4A, AFA, and USAPA, supported the establishment of a uniform FMLA leave entitlement for airline flight crew employees, with a one-day increment for leave use. A4A noted that prior to the AFCTCA, various air carriers had instituted internal FMLA programs, including leave entitlement banks, which have proved to be successful. ALPA, among other commenters, believed this approach would be easier for airline flight crew employees to understand and for employers to administer.

RAA opposed the Department's proposal but did not suggest the establishment of a uniform leave entitlement. Rather, RAA suggested that unique calculation provisions for airline flight crew employees are unnecessary. RAA stated that the Department's two proposed calculation methods are historical methods, long utilized to administer FMLA leave, and that under the current regulations, airline carriers should be able to make the proper distinction as to what method (fractional workweek method versus 12-month averaging) to use based on an individual employee's work schedule, regardless of reserve status.

Although commenters were nearly universally in favor of a uniform FMLA leave entitlement or "bank" for airline flight crew employees, there were several different suggestions regarding the appropriate size of that entitlement. IAM noted that they had already negotiated an entitlement bank of 90 days for flight attendant contracts, and stated that a uniform bank of 84 days (7 days × 12 weeks) for all airline flight crew employees would be a "fair application" of the FMLA entitlement. APFA agreed that all airline flight crew employees should be entitled to a uniform bank of 84 days, and explained that this 84-day bank is currently used by American Airlines. TTD stated that while an 84-day bank was "ideal," a 72-day bank was the "absolute minimum benefit" that should be considered. AFA also suggested a bank of 72 days, contending that this would be the "simplest calculation" for an FMLA entitlement. USAPA and ALPA both supported a bank of 72 days. These commenters explained that a 72-day bank was based on FAA regulations mandating that airline flight crew employees have one 24-hour period off



duty in any 7-day period, giving the employee a maximum possible 6-day workweek. (6 days  $\times$  12 weeks = 72 days of FMLA leave.) A4A suggested significantly smaller numbers, reasoning that for non-airline flight crew employees, the FMLA entitlement represents 23 percent of the average work year (52 weeks divided by 12 weeks) and therefore the uniform entitlement for airline flight crew employees should consist of a reasonable proxy for 23 percent of the average work year for a typical airline flight crew employee. Because of each airline's unique operations, schedules, policies, and collective bargaining agreements, A4A suggested that each air carrier establish its own entitlement based on the average days worked by its airline flight crew employees. A4A provided the example that if a carrier's pilots averaged 200 work days per year, then an allotment bank of 46 days would be the equivalent of 12 weeks (200 days  $\times$  23 percent = 46 days of FMLA leave).

Additionally, APFA urged the Department to provide a definition for "day." APFA believed that a day should be defined as a single scheduled duty period, which they noted is the approach utilized by American Airlines for charging employees for the use of vacation days.

The Department has thoroughly considered the comments, and agrees with the commenters that asserted the unique scheduling practices of the airline industry could make administering FMLA leave as proposed confusing and difficult for airline flight crew employees and their employers. In particular, because of the constantly and widely fluctuating workweeks of many airline flight crew employees, the calculation of leave rules proposed would have created uncertainty about how much intermittent or reduced schedule FMLA leave an employee had used and/or had available. Further, the Department understands that the proposed differentiation between line holders and reserves for purposes of leave calculation is inconsistent with the realities of the airline industry. Although the Department attempted to create a method that was similar to the way other employers and employees calculate FMLA leave, the Department is convinced by the many comments it received that the airline industry is best served by a different system.

The Department adopts in § 825.802(a) a uniform entitlement, expressed as a number of days, for eligible airline flight crew employees taking leave for an FMLA-qualifying reason. The Department believes that a

uniform day entitlement of FMLA leave allows for clear FMLA entitlement calculations for the airline industry. It also reflects a consensus among commenters representing both airline flight crew employees and their employers. The Department has considered RAA's comment and acknowledges that the adopted method does not track employees' actual workweeks as is required for FMLA leave usage for all other types of employees. However, the Department was persuaded by the majority of comments from the airline industry which made clear how difficult the proposed methods of calculation of FMLA leave, from which RAA's proposal would not significantly differ, would be to administer and understand.

Additionally, the Department concludes that the appropriate size of the uniform entitlement is 72 days of leave for one or more of the FMLA-qualifying reasons set forth in §§ 825.112(a)(1)–(5). This number corresponds to the maximum 6-day workweek an airline flight crew employee can work under FAA regulations. (6 days  $\times$  12 workweeks = 72 days of FMLA leave.) *See, e.g.*, TTD, USAFA, AFA, ALPA; *see also* 14 CFR 121.471(d) (mandating that airline flight crew employees have one 24-hour period off duty in any seven-day period). By the same method, the Department concluded that airline flight crew employees are entitled to 156 days of military caregiver leave. (6 days  $\times$  26 workweeks = 156 days of military caregiver leave.)

Section 825.802(b) explains that an employer must account for an airline flight crew employee's intermittent or reduced schedule FMLA leave usage utilizing an increment no greater than one day. In light of the practical realities of the airline industry, the Department agrees with the numerous commenters representing both airline flight crew employees and their employers who agreed that one day is the most suitable increment of FMLA leave. As stated in § 825.802(b)(1), if an airline flight crew employee needs to take FMLA leave for a two-hour physical therapy appointment, the employer may require the employee to use a full day of FMLA leave, during which the employee would not return to work. The entire amount of leave actually taken (in this example, one day) is designated as FMLA leave and would be deducted from the employee's 72-day entitlement. Further, if the employee must miss work for a physical therapy appointment for an FMLA-qualifying reason once a week for eight weeks, the employer may subtract one day each week from the

employee's entitlement, provided that in each instance of leave, the employer restores the employee to work the following day. After eight weeks, if no other FMLA leave had been taken, the employee would have used eight days of FMLA leave and have 64 days of FMLA leave remaining.

The Department emphasizes that the provisions set forth in § 825.802 maintain an FMLA entitlement of 12 workweeks, as required by statute, and assumes a uniform six-day workweek for airline flight crew employees. For example, an airline flight crew employee who takes four weeks of FMLA leave will use 24 days of FMLA leave regardless of how many days he or she was scheduled to work, or for which he or she would have been paid, during that week. (6 days  $\times$  4 workweeks = 24 days of FMLA leave.) Where an airline flight crew employee takes two days of intermittent FMLA leave in one workweek, he or she has taken leave for two days of his or her six-day workweek regardless of the number of days he or she was scheduled to work or for which he or she would have been paid during that week and two days would be subtracted from the employee's leave entitlement.

The Department further emphasizes that the rules set forth in § 825.802, including the use of one-day increments, are applicable only to airline flight crew employees. The AFCTCA specifically provided the Department with authority to promulgate regulations regarding the calculation of leave for airline flight crew employees. Congress clearly contemplated that the general FMLA leave calculation provisions might not be appropriate for flight crew employees. The Department has determined that a special leave calculation rule is necessary in light of the unique scheduling constraints of the airline industry. The one-day increment in § 825.802 applies only to airline flight crew employees. All eligible employees who are not airline flight crew employees, as defined in § 825.102, are subject to the minimum increment rules set forth in § 825.205(a)(1), which, among other requirements, permit the use of FMLA leave in increments no greater than one hour.

Concerning APFA's comment addressing what constitutes a "day," the Department understands a "day" to mean one calendar day, consistent with other provisions of the Act. *See* §§ 825.115; 825.120; 825.126; 825.213; 825.305; 825.308; 825.313. The Department is concerned that accounting for days in any other manner would create administrative difficulties.



Finally, as indicated in § 825.800(b), except as otherwise provided in this subpart, airline flight crew employees and their employers continue to be subject to the requirements of the FMLA as set forth in part 825. In particular, the Department emphasizes that two broadly applicable rules about the calculation of FMLA leave continue to apply to airline flight crew employees despite the special calculation method set out in § 825.802. First, the physical impossibility provision set forth in § 825.205(a)(2) applies to airline flight crew employees. Section 825.802(c) makes this point by explaining that § 825.205, which sets forth rules for calculation of intermittent or reduced schedule FMLA leave for all employees who are not airline flight crew employees, does not apply to airline flight crew employees except for paragraph (a)(2) of that section, the physical impossibility provision. Second, as required by the Act, in all cases, if an employer chooses to restore an employee to work on the same day during which intermittent or reduced schedule FMLA leave is taken, the employee's FMLA leave entitlement may not be reduced by more than the amount of leave actually taken. See 29 U.S.C. 2612(b)(1).

#### 4. Section 825.803 Special Rules for Airline Flight Crew Employees, Recordkeeping Requirements

The current regulations do not contain recordkeeping requirements that apply specifically to employers of airline flight crew employees. In the NPRM, the Department proposed to add a new paragraph, § 825.500(h), that described the statutory requirement, established by AFCTCA, that employers of airline flight crew employees maintain certain records "on file with the Secretary." The Department explained that proposed paragraph (h) provided that records are to be maintained on file by the employer by making, keeping, and preserving records in accordance with the requirements already delineated in § 825.500, with no actual submission to the Secretary unless requested. Proposed § 825.500(h)(1) and (h)(2) outlined additional records that employers of airline flight crew employees must maintain on file. Paragraph (h)(1) required employers of airline flight crew employees to make, keep, and preserve any records or documents that specify the applicable monthly guarantee for each type of employee to whom the guarantee applies, including any relevant collective bargaining agreements or employer policy documents that establish the applicable

monthly guarantee. Proposed paragraph (h)(2) required employers of airline flight crew employees to make, keep, and preserve records of hours scheduled.

The Department received no substantive comments regarding proposed § 825.500(h). The Department adopts the text essentially as proposed, but proposed § 825.500(h) will be located in § 825.803, *Special rules for airline flight crew employees, recordkeeping requirements*.

In the Final Rule, § 825.803(a) makes clear that the requirements of § 825.500 apply to employers of airline flight crew employees. Section 825.803(b) describes, as proposed § 825.500(h)(1) and (h)(2) did, the additional recordkeeping requirements that apply to those employers. The Department has slightly modified proposed paragraph (h)(2); the text of § 825.803(b)(2) now specifies, consistent with the AFCTCA, that employers of airline flight crew employees must make, keep, and preserve records of hours worked and hours paid, as those terms are defined in new § 825.801(b)(2).

#### C. Proposed Revisions Definitions (§ 825.102), Employee Eligibility (§ 825.110), Calculation of Leave (§ 825.205), and Recordkeeping (§ 825.500)

##### 1. Section 825.102 Definitions

In the NPRM, the Department proposed to move § 825.800, which currently contains the definitions of significant terms, phrases, and acronyms used in part 825, to § 825.102, which is currently reserved. The Department intended the reorganization to enhance the utility of the regulations by defining terms before they are used in the substantive provisions. Additionally, the proposed change would organize the regulations to be more consistent with other regulations implementing statutes administered by the WHD.

The Department received comments from the Coalition and SHRM addressing the proposed relocation of the definitions section, both of which supported the change. Therefore, the Department adopts the proposal, and the definitions section appears in the Final Rule as § 825.102.

Discussions of comments regarding the proposed substantive changes to certain definitions, as well as modifications to those definitions, appear in the parts of this preamble addressing each of the relevant substantive regulatory sections to which those definitions correspond.

In the Final Rule, the Department modifies the definitions of the terms *covered servicemember*, *eligible employee*, *serious injury or illness*, and *son or daughter on covered active duty or call to covered active duty status* in § 825.102 to mirror the modifications to the definitions of these terms that are made in the corresponding relevant substantive regulatory sections. In addition, in the Final Rule, the Department adds definitions for the new terms *airline flight crew employee*, *applicable monthly guarantee*, *covered active duty or call to covered active duty status*, and *covered veteran* to § 825.102 to mirror the addition of these terms and their definitions that are made in the corresponding relevant substantive regulatory sections. The Department also updated the cross-references that appear in the definitions of *contingency operation*, *next of kin of a covered servicemember*, *parent of a covered servicemember*, and *son or daughter of a covered servicemember in the Final Rule* in § 825.102. The Department modified the definition of *outpatient status* in the Final Rule in § 825.102 to reflect the fact that this term is only relevant to current servicemembers. The Department also proposed to add, as an aid and service to the reader, definitions of the terms *ITO or ITA*, *key employee*, *military caregiver leave*, *reserve components of the Armed Forces*, and *TRICARE*, which are terms that are already used in the regulations. The Final Rule adopts these definitions as proposed. Lastly, the Department removes, as proposed, the terms *active duty or call to active duty status* and *covered military member* from the Final Rule because these terms are no longer relevant.

##### 2. Section 825.110 Eligible Employee

Section 825.110 sets forth the eligibility standards an employee must meet in order to take FMLA leave. To be eligible, an employee must have been employed by the employer for at least 12 months, must have been employed for at least 1,250 hours of service in the 12-month period immediately preceding the commencement of the leave, and must be employed at a worksite where 50 or more employees are employed by the employer within 75 miles.

The Department proposed revisions to § 825.110(a), (c) and (d) to reflect the AFCTCA's special definition of the hours of service requirement for airline flight crew employees. As explained earlier in this preamble, the Department has decided to place the provisions implementing the AFCTCA in new Subpart H—Special Rules Applicable to Airline Flight Crew Employees.

Proposed § 825.110(c)(2), as well as the proposed addition to § 825.110(d) relevant to airline flight crew employees, are moved to § 825.801, *Special rules for airline flight crew employees, hours of service requirement*, and comments on that topic are discussed in the section of this preamble addressing § 825.801. Because proposed paragraph (c)(2) will now appear in Subpart H, the Department will not implement its proposal to renumber current paragraphs (c)(2) and (c)(3) and cross-references to § 825.801 have replaced references to proposed paragraph (c)(2) in current paragraphs (a)(2) and (c)(1) of § 825.110. Additionally, for accuracy where statements apply to airline flight crew employees as well as other types of employees, the Department has replaced references to 1,250 hours with the term “hours of service requirement” in §§ 825.110(c)(2) and (d), 825.300(b)(3), and 825.702(g). The Department has also inserted, after the references to hours worked in §§ 825.301(b)(2) and 825.702(g), clarification that, as required by AFCTCA and set forth in § 825.801(b), the relevant number for airline flight crew employees only is of hours worked or paid. Corresponding updates are made to the definition of *eligible employee* in § 825.102.

The Department also proposed clarifying edits to §§ 825.110(b), (c), and (d) that were not specific to airline flight crew employees. Two of these changes were to references in the current regulations to the Uniformed Services Employment and Reemployment Act (USERRA). Current § 825.110(b)(2)(i) concerns employee eligibility when there is a break in service occasioned by the fulfillment of the employee’s National Guard or Reserve military service. The Department proposed to modify the language in the first sentence of § 825.110(b)(2)(i) to clarify that the protections afforded by USERRA extend to all military members (active duty and reserve) returning from USERRA-qualifying military service. Current § 825.110(c)(2) provides rules pursuant to USERRA for crediting an employee returning from a National Guard or Reserve obligation with the hours of service that would have been performed but for the military service when evaluating whether the hours of service eligibility requirement has been met. The Department proposed to modify the language in this paragraph in recognition that USERRA rights may extend to certain employees returning to civilian employment from service in the Regular Armed Forces.

The Department received two comments regarding the proposed

references to USERRA in the regulations. The Coalition supported the Department’s proposed change to current § 825.110(c)(2), stating that the language properly aligns with the USERRA regulations. NELA recommended clarification of current § 825.110(c)(2), expressing concern that the reference to the period of military service in the regulatory text could be misconstrued as allowing an employer to count only the amount of time spent performing military duty rather than—as required by the USERRA regulation at 20 CFR 1002.210—the entire length of absence due to or necessitated by military service. Accordingly, NELA suggested that the Department replace the phrase “the period of military service” with “the period of absence from work due to or necessitated by military service.” NELA also suggested similar edits to the definition of eligible employee in proposed § 825.102. NELA also commented that the current definition of eligible employee in § 825.800 includes only National Guard and Reserve service as service that may be credited toward FMLA eligibility requirements, and recommended that the phrase National Guard or Reserve military service obligation in paragraph (1)(i) and the phrase National Guard or Reserve military obligation in paragraph (2)(i) be replaced with USERRA-protected military service obligation.

The Department has carefully considered the comments regarding the proposed changes to the USERRA provisions and has decided to adopt the proposed changes to § 825.110(b)(2)(i) and (c)(2), with modification, as well as corresponding modifications elsewhere in the regulations, in response to comments and for consistency with USERRA regulations. The Department believes the revised language clarifies that these provisions refer to both active and reserve military members. Additionally, the Department agrees that using the language of the USERRA regulations provides consistency and should prevent any misunderstanding concerning the impact of the employee’s military service on his or her entitlement to FMLA, and is therefore implementing NELA’s suggested revisions. The Department is also referring to the protected services as USERRA-covered service throughout the regulations to accurately reflect that these provisions apply to an absence from work due to any service covered by USERRA. Accordingly, the phrase the period of military service is replaced by the period of absence from work due to or necessitated by USERRA-covered service in paragraph (c)(2), and the

Department makes corresponding changes to language in § 825.110(b)(2)(i), the definition of eligible employee in § 825.102, and § 825.702(g), which also addresses the interaction of USERRA and the FMLA. The Department believes that these revisions will ensure that, consistent with the USERRA regulations, the entire absence necessitated by USERRA-protected service will be counted in computing a returning military member’s eligibility.

Finally, the Department also proposed, for purposes of clarity, replacing the general reference to eligibility requirements in the second sentence of § 825.110(d) with a specific reference to the 12-month eligibility requirement. The Department did not receive any comments regarding this proposed revision, and adopts § 825.110(d) as proposed.

### 3. Section 825.205 Increments of FMLA Leave for Intermittent or Reduced Schedule Leave

In the NPRM, the Department proposed several changes to § 825.205 to clarify the existing rules regarding intermittent or reduced schedule FMLA leave and to implement the AFCTCA provisions regarding calculation of FMLA leave for airline flight crew employees. The Department also proposed removing the varying increments of leave rule from this section and sought comment on whether the physical impossibility rule should also be removed. The Department is adopting most of the changes as proposed, declining to adopt others, and making additional clarifying changes in response to comments. The Department is revising the proposed provision regarding the calculation of FMLA leave for airline flight crew employees, but because the Department has relocated the relevant regulatory text to § 825.802, those revisions are discussed in that section of this preamble.

#### Minimum Increment

Current § 825.205(a)(1) defines the permissible increment of intermittent or reduced schedule FMLA leave as an increment no greater than the shortest period of time that the employer uses to account for other forms of leave, provided that it is not greater than one hour and further provided that an employee’s FMLA leave entitlement may not be reduced by more than the amount of leave actually taken. This paragraph also permits employers to utilize different increments of FMLA leave at different times of the day or shift under certain circumstances, a provision referred to in this preamble as

the “varying increments rule.” In the NPRM, the Department proposed three clarifying changes and one substantive change to § 825.205(a)(1). 77 FR 8974.

The Department’s three proposed clarifying changes were intended to more thoroughly explain concepts already set forth in the Act and in paragraph (a)(1). First, the Department proposed re-inserting language used in the 1995 regulation at § 825.203(d) to clarify that an employer may not require an employee to take more leave than is necessary to address the circumstances that precipitated the need for leave. Second, the Department proposed inserting an example to illustrate that when an employer uses different increments to account for different types of leave, the employer must use the smallest of the increments to account for FMLA leave usage. Third, the Department proposed adding language to emphasize that an employer may only reduce an employee’s FMLA entitlement by the amount of leave actually taken, excluding any time after an employee has returned to work.

The Department received few comments addressing these three proposed clarifications to paragraph (a)(1). Labor organizations, such as the Brotherhood of Locomotive Engineers and Trainman (BLET) and United Transportation Union (UTU), supported the proposed clarification regarding the prohibition on requiring an employee to take more FMLA leave than necessary, commenting that “returning this language to the regulations \* \* \* is a needed reminder to employers.” The Equal Employment Advisory Council (EEAC), however, expressed concern that the proposed clarification would result in additional confusion, because “it could be read as requiring employers to return to counting intermittent leave in the smallest increments that their payroll system is capable of calculating.” SHRM also opposed insertion of this language because, SHRM believed, it is redundant and could cause confusion. No commenters addressed the insertion of the example regarding an employer’s use of different increments for different types of leave. As to the third clarification, regarding the prohibition on reducing an employee’s entitlement by more than the amount of leave actually taken, the Coalition acknowledged that this requirement appears in the statute but stated that “[a]bsent a showing the current language has somehow resulted in harm to affected employees, the language should not be amended from its current form.” In contrast, one individual commenter thought that because this third proposed addition is

merely a clarification of an existing requirement, “there is no cogent reason not to include it.”

After careful consideration of the comments regarding the three clarifying changes proposed in paragraph (a)(1), the Department adopts the clarifying language as proposed, with one modification. The Department adopts the proposed language stating that an employer may not require an employee to take more leave than necessary. As explained in the NPRM, the proposed language was reinserted as a clarification of an employer’s statutory obligation. The adopted regulatory text makes clear that this principle does not alter an employer’s obligation to account for FMLA leave in an increment no greater than the smallest increment the employer uses to account for other forms of leave so long as it is not greater than one hour and the employee is not required to take more leave than is necessary. For that reason, the Department disagrees with the comments asserting that the language could be understood to impose a requirement to use the smallest increment made possible by a company’s timekeeping system. In response to those comments, the Department emphasizes that it is not creating a requirement that employers track FMLA leave using the smallest increment possible under their payroll timekeeping systems. Rather, as explained in the 2008 Final Rule, the increment of FMLA leave is determined by the increment of leave used by the employer for other types of leave (subject to a one hour maximum). The regulatory text further explains that the clarifying provision is subject to the physical impossibility rule in paragraph (a)(2) and the special rules for intermittent leave for school employees in §§ 825.601 and 825.602. The Final Rule modifies the proposed language to make clear that this provision is also subject to the unique increment of leave rules for airline flight crew employees in § 825.802.

The Department also adopts the proposed illustrative example regarding an employer’s use of different increments for different types of leave. The Department received no comments addressing this clarifying edit, and continues to believe the new example serves to make § 825.205(a)(1) more understandable.

Additionally, the Department adopts the proposed clarifying language concerning an employer’s obligation to deduct from an employee’s FMLA entitlement only the amount of leave actually taken. As the Coalition acknowledged, the proposed regulatory

text simply restates a statutory requirement. See 29 U.S.C. 2612(b)(1). Furthermore, the Department believes this clarification in the regulatory text will aid employers and employees to better understand the counting of FMLA leave usage when an employee returns to work after intermittent or reduced schedule leave. Accordingly, where an employer chooses to waive its increment of leave policy in order to return an employee to work—for example, where an employee arrives a half hour late to work due to an FMLA-qualifying condition and the employer waives its normal one-hour increment of leave and puts the employee to work immediately—only the amount of leave actually taken by the employee may be counted against the FMLA entitlement.

In addition to proposing specific clarifying language for paragraph (a)(1), the Department also proposed to remove the sentence stating that 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. In the NPRM, the Department noted that its enforcement experience indicated some confusion regarding this provision. Specifically, the Department understands that some employers have interpreted the varying increments rule to permit the use of a larger increment of FMLA leave at certain points in a shift than the increment used for other forms of leave in the same time period.

Employers and employer groups opposed the elimination of the varying increments rule. The rule was one subject of the letter-writing campaign by members of SHRM, and the Department therefore received hundreds of comments stating that eliminating the rule would make administration of FMLA leave more difficult, as the current provision “is important for [] ease in implementing FMLA leave.” In addition, World at Work reported that employers have difficulty administering intermittent FMLA leave, so the Department should “maintain the maximum amount of flexibility for employers” by retaining the varying increments rule. SHRM similarly noted that the varying increments rule gives employers flexibility in administering intermittent or reduced schedule FMLA leave. Furthermore, SHRM members and the Coalition asserted that the varying increment rule discourages employees from using intermittent FMLA leave as an excuse to avoid discipline for arriving late to work. EEAC commented that no confusion

exists in the application of the rule and that employers understand that “they may only count as FMLA leave the shortest increment of time available to all employees for other types of leave during that time period.” Sedgwick Claim Management Services, Inc. and SHRM suggested that the Department clarify, rather than remove, the rule to eliminate any confusion about its application. The Department did not receive any comments in support of deleting the varying increments rule.

After reviewing the comments, the Department has decided to retain the varying increments rule but to modify the regulatory text to clarify the intended application of the rule. The Department did not eliminate the provision because comments from employers, which were universally opposed to that proposal, made clear that the varying increments rule is helpful in administering FMLA leave, and there were no comments supporting the Department’s proposal to delete the rule. The Department is concerned, however, that some employers have found the provisions confusing and has therefore clarified the regulatory text to emphasize that employers who use varying increments of other types of leave may use varying increments of FMLA leave but may not account for FMLA leave in a larger increment than the smallest increment used for any other form of leave during the period in which the FMLA leave is taken. This clarification is meant to better explain that employers may not apply a varying increment of leave only to FMLA leave, but instead must use the varying increment for all types of leave. For example, if an employer usually accounts for all types of leave in increments of 15 minutes, but accounts for all non-FMLA leave for the first hour of the day in 30-minute increments, the employer may also account for FMLA leave in an increment no greater than 30 minutes *only* during the first hour of the day. This modified text is intended as a clarification of the existing varying increment rule, not as a substantive change to the current regulations.

#### Physical Impossibility

Section 825.205(a)(2) sets forth the physical impossibility provision, which provides that where it is physically impossible for an employee to commence or end work mid-way through a shift, the entire period that the employee is forced to be absent is designated as FMLA leave and counted against the employee’s FMLA leave entitlement. The Department revisited this provision in the proposed rule in connection with the AFCTCA because

of the impact of the physical impossibility provision on the airline industry. In the NPRM, the Department proposed adding language to § 825.205(a)(2) clarifying that the period of physical impossibility may not extend beyond the period during which the employer is unable either to permit the employee to work prior to a period of FMLA leave, or to return the employee to work after a period of FMLA leave, because of physical impossibility. The proposed language was intended to emphasize that the physical impossibility provision be applied in only the most limited circumstances and only where it is, in fact, physically impossible to allow the employee to leave his or her shift early or to restore the employee to his or her same position or to an equivalent position at the time the employee no longer needs FMLA leave. The Department also noted that it was considering deleting the physical impossibility provision in its entirety because of concern that employers may be applying the provision where reinstatement was possible but inconvenient and requested comments on whether the provision should be retained.

Employers, employer groups, and industry organizations, a majority of whom represented the airline and railroad industries, opposed the removal of the physical impossibility provision and emphasized that the airline and railroad industries rely on the exception. For example, they stated that when a flight crew member or railroad employee uses intermittent or reduced schedule FMLA leave at a time that causes him or her to miss a flight or trip, the employer must find a replacement employee to fill in for the employee for the duration of the trip, which can sometimes span several days. Commenters including RAA also asserted that for reasons including travel time and contractual agreements, it is usually not possible, and where possible, it is costly, to return the original worker to his or her scheduled trip. Similarly, A4A argued that it is not always possible to assign the original worker to a new trip the day after he or she returns from FMLA leave because collective bargaining agreements often require that employers prioritize giving assignments to employees based on factors such as seniority, work rules on reserve staffing, and minimum and maximum flight hours when making trips available. The Association of American Railroads (AAR) raised analogous concerns.

A4A and AAR also contended that the provision prevents railroad and airline

employees from misusing FMLA leave, because allowing employees to use only a small amount of intermittent or reduced schedule FMLA leave in order to miss work over the entire duration of a trip may create an incentive to manipulate the system. World at Work, as well as the members of SHRM who submitted hundreds of form letters opposed to deletion of the rule in response to the NPRM, emphasized that employers understand the application of the provision is limited and the existing regulation makes clear the provision is meant to apply narrowly. In addition, both SHRM and the AAR noted they were unaware of any evidence that the exception is being misused by employers, and asserted that the provision protects employees because if FMLA protection does not cover the full period during which reinstatement is physically impossible, the employee may be subject to discipline based on the unprotected portion of the leave.

A number of employee advocacy groups and labor organizations also commented on the physically impossibility provision and generally recommended that the Department remove the exception. These commenters, including BLET and UTU, asserted that the railroad and airline industries have used the exception to improperly diminish employees’ FMLA entitlements, because the provision allows employers to deduct more time from an employee’s FMLA entitlement than the employee has asked to use. For example, TTD stated that a flight attendant who needs only a single day of FMLA leave at the beginning of a scheduled five-day trip could lose five days of her FMLA entitlement. Airline employee groups asserted that the airline industry is not adversely affected by employees’ use of intermittent or reduced schedule FMLA leave, and there is no need for the physical impossibility provision. ALPA and AFA noted that flight crew members frequently take short-term leave for a variety of reasons, often without advance notice, so the industry is prepared to address such situations when they arise because of the use of intermittent or reduced schedule FMLA leave.

Both employer and employee groups argued that the statute compels their preferred result concerning this provision. AAR asserted that the statute’s requirement to calculate FMLA leave based on “actual work time” mandates that employers be permitted to deduct from an employee’s FMLA entitlement the entire work period the employee missed when the use of FMLA leave caused him or her to be

unavailable at the time a trip commences. In contrast, ALPA, TTD, and BLET and UTU argued that because the FMLA provides that the use of intermittent or reduced schedule leave “shall not result in a reduction in the total amount of leave to which the employee is entitled \* \* \* beyond the amount of leave actually taken,” 29 U.S.C. 2612(b)(1), deductions from FMLA entitlements for more than the amount of leave needed are prohibited.

Numerous comments addressed how the Department should clarify the physical impossibility provision. SHRM opposed the Department’s proposed clarification, asserting that it is “unnecessary and likely to cause confusion” and that the changes would “[add] little if any clarification.”

Specifically, SHRM contended that the Department’s proposed clarification concerning an “equivalent position” could be misinterpreted to mean that an employer could transfer or reassign to a new position an employee involved in a physical impossibility scenario. Other employer organizations were concerned that the proposed clarifying sentence was meant to indicate that when an employee returns from intermittent or reduced schedule FMLA leave, his or her employer must prioritize assignment to a new trip above the assignment of other employees. For example, AAR asserted that treating FMLA leave users differently by allowing them to jump to the top of the list of employees waiting for assignments would violate the statute. The Coalition also requested that the Department not require employers to demonstrate that no equivalent position exists. Furthermore, some employer groups, such as RAA, suggested that the definition of physical impossibility should include contractual and other restrictions on an employer’s ability to return an employee to work, including requirements in collective bargaining agreements to assign employees to trips based on seniority. Employee groups, including BLET and UTU, opposed any such expansion to the provision. AFA asked the Department to clarify, should it maintain the provision, that for purposes of the airline industry, an “equivalent position” to which an employee may be assigned to allow the return to work after the use of intermittent or reduced schedule FMLA leave includes equivalence regarding the type of trip to which the employee is entitled due to seniority.

Commenters also offered suggestions regarding an employee’s obligation to make him or herself available for work after using intermittent or reduced schedule FMLA leave. A4A suggested

that the Department add language to the provision clarifying that if the employer finds an alternative trip that makes the employee’s return to work after the use of intermittent or reduced schedule FMLA leave possible, the employee must make him or herself available for the trip or accept that the full duration of the original trip will be deducted from the employee’s FMLA entitlement. IAM proposed that flight crew members who miss the beginning of a trip be given two options: take the entire duration of the trip as protected FMLA leave or take one day of FMLA leave and agree to be available to work for the remaining days of the trip, with no FMLA leave deduction for that remaining time if no work assignment is forthcoming.

After careful consideration of the comments, the Department has decided to retain the physical impossibility rule. The Department recognizes the unique circumstances that can make it physically impossible to immediately return employees to work when they need to use intermittent or reduced schedule FMLA leave in certain industries. Although employee groups supported the proposal to remove the rule, they offered only general objections. In addition, the Department notes that the physical impossibility rule is protective of employees who may be subject to disciplinary action because they need to take leave beyond that required for their FMLA condition to account for time not worked due to the physical impossibility. In contrast, under the provision, all of the leave taken due to physical impossibility is counted as FMLA leave. Further, as explained in the 2008 Final Rule, employers have an obligation not to discriminate between employees taking FMLA leave and employees taking other forms of leave in restoring employees or offering alternative work. *See* 73 FR 67978.

With regard to comments asserting that the Act itself mandates a particular result, the Department rejects these contentions. As explained in the 2008 Final Rule, 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 no FMLA provision requires 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. *See* 73 FR 67977.

Furthermore, after consideration of the comments regarding clarification to the physical impossibility rule, the

Department is adopting the clarifying language as proposed. The Department believes that the clarification effectively responds to the concerns raised by employee groups and labor organizations regarding misapplication of the rule by emphasizing the Department’s intent that the physical impossibility rule apply solely to situations in which it is truly physically impossible to return the employee to work. *See* 73 FR 67977.

The Department will not modify the clarifying language in accordance with the suggestions of employer groups because the Department does not consider contractual or other scheduling restrictions to be appropriate reasons to delay an employee’s return to the same or an equivalent position. The FMLA regulations provide that the rights established by the Act may not be diminished by any employment benefit program or plan. The FMLA would supersede a provision of a collective bargaining agreement that allows seniority to take precedence over an employee’s reinstatement to an equivalent position. *See* § 825.700(a). The physical impossibility provision is intended to make a limited allowance for the practical realities of the airline, railroad, and other industries with unique workplaces in which it is physically impossible for employees to leave work early or start work late.

The Department also will not modify the proposed regulatory text referring to an “equivalent position.” In response to SHRM’s comments that the clarifying language concerning “equivalent position” may be misinterpreted, the Department notes that § 825.204 already addresses the limited scenarios in which an employer may transfer or reassign an employee during intermittent leave. Additionally, with regard to comments requesting that the Department define “equivalent position” and state that, in the case of airline flight crew employees, an employee must be returned to the same type of trip, the Department believes addressing this issue in the regulations is unnecessary. The Department has already promulgated a general “equivalent position” regulation, *see* § 825.215, and has further clarified in this preamble that a contractual restriction is not an appropriate reason to delay restoration.

#### Calculation of Leave

Section 825.205(b) addresses the rules concerning the calculation of leave when FMLA leave is taken on an intermittent or reduced schedule basis. The Department proposed only clarifying changes to this paragraph.

The Department proposed to include in the regulatory text language from the 2008 Final Rule preamble to reinforce the requirements that the employee's total available entitlement is 12 workweeks (or 26 workweeks in the case of military caregiver leave), that FMLA leave does not accrue at any particular hourly rate, and that the specific number of hours contained in the workweek is dependent upon the hours the employee would have worked but for the taking of leave. The Department also proposed minor edits making uniform the references to fractions contained in this paragraph. The Department did not receive any comments regarding these changes and adopts paragraph (b) essentially as proposed. The Department makes one correction to the proposed language, changing "but for the FMLA leave" to "but for the use of leave," to accurately reflect the method of calculating an employee's workweek. In addition, because in the Final Rule, the calculation of leave rules for airline flight crew employees appear in § 825.802, the Department has added to paragraph (b) a reference to that section.

#### Overtime

Section 825.205(c) addresses when overtime hours that are not worked may be counted as FMLA leave. The Department proposed to change the term "serious health condition" in the last sentence in paragraph (c) to "FMLA-qualifying reason." In the NPRM, the Department explained that this change would be consistent with the language used in the first sentence of the paragraph to more accurately reflect that overtime hours missed by an employee may be due to any FMLA-qualifying reason. The Department did not receive any comments concerning this proposed change, and adopts the modification in the Final Rule.

#### Calculation of Leave for Airline Flight Crew Employees

Finally, the Department proposed adding a new paragraph (d) to § 825.205 that would provide the method for calculating FMLA leave use for airline flight crew employees. As explained earlier in this preamble, the Department has decided to place all of the regulatory provisions implementing the AFCTCA in Subpart H—Special Rules Applicable to Airline Flight Crew Employees. Accordingly, the Final Rule does not include a paragraph (d) in § 825.205, and the discussion of calculation of FMLA leave for airline flight crew employees appears in the section of this preamble addressing new § 825.802,

Special rules for airline flight crew employees, calculation of leave.

#### 4. Section 825.500 Recordkeeping requirements

Section 825.500 explains the recordkeeping requirements under the FMLA. The Department proposed two changes to this section, both of which it is adopting, although the second addition will appear in a different regulatory section than proposed.

First, the Department proposed to add a new sentence at the end of paragraph (g) setting forth the employer's obligation to comply with the confidentiality requirements of the Genetic Information Nondiscrimination Act of 2008 (GINA), Public Law 110–233. To the extent that records and documents created for FMLA purposes contain family medical history or genetic information as defined in GINA, employers must maintain such records in accordance with the confidentiality requirements of Title II of GINA. GINA permits genetic information, including family medical history, obtained by the employer in FMLA records and documents to be disclosed consistent with the requirements of the FMLA.

The Department received two comments addressing this proposed change. SHRM expressed agreement with this change. The Illinois Credit Union League commented that because the Equal Employment Opportunity Commission (EEOC) is the agency with authority from Congress to administer GINA, the Department "is not and should not be empowered to exercise authority which it is not delegated to use."

The Department adopts the proposed new sentence regarding GINA. While the EEOC is the agency charged with administering GINA, as noted in the NPRM, employers must maintain FMLA records in accordance with the confidentiality requirements of Title II of GINA. The GINA regulations provide a narrow exception to the limitations on disclosure for genetic information obtained by the employer for records and documents to be disclosed consistent with the requirements of the FMLA. See 29 CFR 1635.9. The Department is acting within its authority to require employers to maintain any relevant FMLA records in conformance with applicable GINA confidentiality and disclosure requirements and believes that this provision provides useful guidance to employers regarding their confidentiality obligations in the FMLA process.

The Department also proposed to add paragraph (h), implementing the

AFCTCA statutory requirement that employers of airline flight crew employees maintain certain records on file with the Secretary. The substance of proposed § 825.500(h) will be located in § 825.803, Special rules for airline flight crew employees, recordkeeping requirements. In the Final Rule, § 825.500(h) provides a cross-reference to § 825.803. The discussion of the recordkeeping requirements specific to employers of airline flight crew employees appears with the section of this preamble addressing Subpart H.

#### VII. Paperwork Reduction Act

The Paperwork Reduction Act of 1995 (PRA), 44 U.S.C. 3501 *et seq.*, and its attendant regulations, 5 CFR part 1320, requires that the Department consider the impact of paperwork and other information collection burdens imposed on the public. Under the PRA, an agency may not collect or sponsor the collection of information, nor may it impose an information collection requirement unless it displays a currently valid Office of Management and Budget (OMB) control number. See 5 CFR 1320.8(b)(3)(vi).

OMB has assigned control number 1235–0003 to the FMLA information collections. In accordance with the PRA, the February 15, 2012 NPRM solicited comments on the FMLA information collections. This paperwork burden analysis estimates the burdens for the Final Rule. The Final Rule implements amendments to the military leave provisions made by the FY 2010 NDAA, which extends the availability of FMLA leave for qualifying exigencies to employee-family members of members of the Regular Armed Forces and defines the deployments covered by such leave, and extends FMLA military caregiver leave to employee-family members of certain veterans with a serious injury or illness and expands the provision of such leave to cover serious injuries or illnesses that existed prior to a covered servicemember's active duty and were aggravated in the line of duty while on active duty. The Final Rule also implements the AFCTCA, which establishes special hours of service eligibility requirements for airline flight crew members and flight attendants eligibility requirements for airline flight crew members and flight attendants and authorizes the Department to promulgate regulations regarding the calculation of leave for airline flight crew employees as well as recordkeeping requirements for their employers.

Many of the estimates in the analysis of the paperwork requirements derive from data developed for the Regulatory

Impact Analysis (RIA) under Executive Orders 13563 and 12866. However, the specific needs that the PRA analysis and RIA are intended to meet often require that the data undergo a different analysis to estimate burdens imposed by the paperwork requirements from the analysis used in estimating the effect the regulations will have on the economy. In addition, for certain sections, a range of values is provided in the RIA; the PRA uses the midpoint of those ranges. Consequently, the differing assessment in the PRA analysis and the RIA of the regulatory changes may lead to different results. For example, the PRA analysis measures the additional burden of the information collection on those who are providing information due to the regulatory changes; however, the RIA measures the incremental changes expected to result in the broader economy due to the regulatory changes. Thus, this PRA analysis will calculate the additional paperwork burden in relation to the existing FMLA information collection burden arising from this rule. Conversely, the regulatory definition of collection of information for PRA purposes specifically excludes the public disclosure of information originally supplied by the Federal government to the recipient for the purpose of disclosure to the public. 5 CFR 1320.3(c)(2). The RIA, however, may need to consider the impact of any regulatory changes in such notifications provided by the government. Finally, the PRA definition of burden can exclude the time, effort, and financial resources necessary to comply with a collection of information that would be incurred by persons in the normal course of their activities (e.g., in compiling and maintaining business records) if the agency demonstrates that the reporting, recordkeeping, or disclosure activities needed to comply are usual and customary. 5 CFR 1320.3(b)(2). The RIA, however, must consider the economic impact of any changes in the Final Rule.

On December 31, 2011, the previous approval for the FMLA information collections expired. Accordingly, the Department issued a 60-day notice on September 28, 2011, on the proposed extension of the approval of information collection requirements (paperwork reclearance). The burden analyses that were calculated for the paperwork reclearance only accounted for the increased burdens stemming from the expansion of qualifying exigency leave to the Regular Armed Forces, pursuant to the 2010 NDAA, and the enactment of AFCTCA. The analyses did not

account for the increased burden resulting from the expansion of military caregiver leave to care for covered veterans.<sup>4</sup> OMB approved the request for renewal of the FMLA information collection on February 10, 2012, thereby extending the expiration date to February 28, 2015.

On January 30, 2012, the Department announced that it would be publishing the NPRM proposing changes to the regulations to implement the FY 2010 NDAA and AFCTCA amendments to the FMLA. On February 15, 2012, the NPRM was published in the **Federal Register**. See 77 FR 8960. In the NPRM, the Department specifically solicited comments on the proposed changes to the FMLA information collections. The publication of the NPRM subsequent to the approval of the paperwork reclearance package required the Department to re-conduct the paperwork analyses for the Final Rule. The final burden analyses for this Final Rule are based upon the most recently approved burdens by OMB for the FMLA information collections. A copy of the NPRM was submitted to OMB and on March 28, 2012 OMB requested that the Department resubmit the information collection request upon promulgating the Final Rule and after considering public comments on the FMLA NPRM. The Department did receive one comment on the PRA, which is discussed later in this section.

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 information collection requirements contained in this Final Rule have been approved by OMB under OMB control number 1235-0003 through February 28, 2015. A copy of the information collection request can be obtained at [www.reginfo.gov](http://www.reginfo.gov) or by contacting the WHD as shown in the **FOR FURTHER INFORMATION CONTACT** section of this preamble.

*Circumstances Necessitating Collection:* The Family and Medical Leave Act of 1993 (FMLA), 29 U.S.C. 2601, *et seq.*, requires private sector employers who employ 50 or more

<sup>4</sup> As explained earlier in this preamble, it is the Department's position that the expansion of qualifying exigency leave to the Regular Armed Forces was effective on October 28, 2009, the date the FY 2010 NDAA was enacted. It is also the Department's position that the provisions of the AFCTCA were effective on the date of its passage, December 9, 2009. However, the Department's position is that the provision of the FY 2010 NDAA permitting military caregiver leave to care for certain veterans is not effective until the Department issues regulations defining a *serious injury or illness for a covered veteran* as required by the statute.

employees, all public and private elementary schools, and all public agencies to provide up to 12 weeks of unpaid, job-protected leave during any 12-month period to eligible employees for certain family and medical reasons (*i.e.*, for birth of a son or daughter and to care for the newborn child; for placement with the employee of a son or daughter for adoption or foster care; to care for the employee's spouse, son, daughter, or parent with a serious health condition; because of a serious health condition that makes the employee unable to perform the functions of the employee's job; to address qualifying exigencies arising out of the deployment of the employee's spouse, son, daughter, or parent to covered active duty in the military), and up to 26 workweeks of unpaid, job-protected leave during a single 12-month period to an eligible employee who is the spouse, son, daughter, parent, or next of kin of a covered servicemember for the employee to provide care for the covered servicemember with a serious injury or illness. FMLA section 404 requires the Secretary of Labor to prescribe such regulations as necessary to enforce this Act. 29 U.S.C. 2654. In addition, the FY 2010 NDAA amended the FMLA to expand qualifying exigency leave to employee-family members of the Regular Armed Forces, and military caregiver leave to employee-family members of certain veterans with a serious injury or illness. Public Law 111-84. The FMLA was also amended by the AFCTCA, which created special hours of service eligibility requirement for airline flight crew employees. Public Law 111-119.

The Department's authority for the collection of information and the required disclosure of information under the FMLA stems from the statute and/or the implementing regulations. These third-party disclosures ensure that both employers and employees are aware of and can exercise their rights and meet their respective obligations under FMLA. The required disclosures, which now also include the disclosure of a serious injury or illness for a covered veteran, are listed below.

*A. Employee Notice of Need for FMLA Leave [29 U.S.C. 2612(e); 29 CFR 825.100(d), 825.301(b), 825.302, 825.303].* An employee must provide the employer at least 30 days advance notice before FMLA leave is to begin if the need for the leave is foreseeable based on an expected birth, placement for adoption or foster care, or planned medical treatment for a serious health condition of the employee or of a family member or 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 under the facts and circumstances of the particular case. When an employee seeks leave for the first time for an FMLA-qualifying reason, the employee need not expressly assert rights under the FMLA or even mention the FMLA. The employee must, however, provide sufficient information that indicates that leave is potentially FMLA-qualifying and the timing and anticipated duration of the absence. Such information may include that a condition renders the employee unable to perform the functions of the job, or if the leave is to care 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 whether the employee or the employee's family member is under the continuing care of a health care provider. Sufficient information for leave due to a qualifying family member's call (or impending call) to covered active duty status may include that the military member is on or has been called to covered active duty and that the requested leave is for one of the categories of qualifying exigency leave. An employer, generally, may require an employee to comply with its usual and customary notice and procedural requirements for requesting leave.

**B. Notice to Employee of FMLA Eligibility and Rights and Responsibilities Notice [29 CFR 825.219–.300(b)].** When an employee requests FMLA leave or when the employer acquires knowledge that an employee's leave may be for an FMLA-qualifying reason, the employer must notify the employee—within five business days, absent extenuating circumstances—of the employee's eligibility to take FMLA leave and any additional requirements for taking such leave. The eligibility notice must provide information regarding the employee's eligibility for FMLA leave, and, if the employee is determined not to meet the eligibility criteria, provide at least one reason why the employee is not eligible. The rights and responsibilities notice must detail the specific rights and responsibilities of the employee, and explain any consequences of a failure to meet these responsibilities. If an employee provides notice of a subsequent need for FMLA

leave during the applicable 12-month period due to a different FMLA-qualifying reason, the employer does not have to provide an additional eligibility notice if the employee's eligibility status has not changed. If the employee's eligibility status has changed, then the employer must notify the employee of the change in eligibility status within five business days, absent extenuating circumstances. The rights and responsibilities notice must be provided to the employee each time the eligibility notice is provided to the employee. Form WH-381 allows an employer to satisfy the regulatory requirement to provide employees with specific information concerning eligibility status and with written notice detailing specific rights as well as expectations and obligations of the employee and explaining any consequences of a failure to meet these obligations. *See* § 825.300(b) and (c).

**C. Employee Certifications—Serious Health Condition of Employee or Employee's Family Member, Recertification, Fitness for Duty, Leave for a Qualifying Exigency, and Leave to Care for a Covered Servicemember.**

**1. Medical Certification and Recertification [29 U.S.C. 2613, 2614(c)(3); 29 CFR 825.100(d), 825.305–.308].** An employer may require that an employee's leave due to the employee's own serious health condition that makes the employee unable to perform one or more essential functions of the employee's position or to care for the employee's spouse, son, daughter, or parent with a serious health condition, be supported by a certification issued by the health care provider of the eligible employee or of the employee's family member. In addition, an employer may request recertification under certain conditions. The employer must provide the employee at least 15 calendar days to provide the initial certification, and any subsequent recertification, unless the employee is not able to do so despite his or her diligent good faith efforts. An employer must advise an employee whenever it finds a certification incomplete or insufficient and state in writing what additional information is necessary to make the certification complete and sufficient and must provide the employee seven calendar days (unless not practicable under the particular circumstances despite the employee's diligent good faith efforts) to cure any identified deficiency. The employer may contact the employee's health care provider for purposes of clarification and authentication of the medical certification (whether initial certification or recertification) after the employer has given the employee an

opportunity to cure any identified deficiencies. An employer, at its own expense and subject to certain limitations, may also require an employee to obtain a second and third medical opinion. Form WH-380-E allows an employee requesting FMLA leave for his or her own serious health condition to satisfy the statutory requirement to furnish, upon the employer's request, appropriate certification (including a second or third opinion and recertification) to support the need for leave for the employee's own serious health condition. *See* § 825.305(a). Form WH-380-F allows an employee requesting FMLA leave for a family member's serious health condition to satisfy the statutory requirement to furnish, upon the employer's request, appropriate certification (including a second or third opinion and recertification) to support the need for leave for the family member's serious health condition. *See* § 825.305(a).

**2. Fitness-for-Duty Medical Certification [29 U.S.C. 2614(a)(4); 29 CFR 825.312].** As a condition of restoring an employee whose FMLA leave was occasioned by the employee's own serious health condition that made the employee unable to perform the employee's job, an employer may have a uniformly applied policy or practice that requires all similarly situated employees (*i.e.*, same occupation, same serious health condition) who take leave for such conditions to obtain and present certification from the employee's health care provider that the employee is able to resume work. The employee has the same obligations to participate and cooperate in providing a complete and sufficient certification to the employer in the fitness-for-duty certification process as in the initial certification process. An employer may require that the fitness-for-duty certification specifically address the employee's essential job functions if the employer has provided the employee with a list of those essential functions and notified the employee of the need for a fitness-for-duty certification in the designation notice. Certain managers for an employer, but not the employee's immediate supervisor, may contact a health care provider for purposes of clarifying and authenticating a fitness-for-duty certification. An employer is not entitled to a fitness-for-duty certification for each absence taken on an intermittent or reduced leave schedule; however, an employee may be required to furnish a fitness-for-duty certificate no more often than once every 30 days if an employee has used



intermittent leave during that period and reasonable safety concerns exist.

3. *Certification for Leave for a Qualifying Exigency [29 CFR 825.309]*. An employer may require an employee who requests FMLA leave due to a qualifying exigency to certify the need for leave. In addition, the first time an employee requests leave for a qualifying exigency related to a qualifying family member's active duty status, an employer may require the employee to provide a copy of the military member's active duty orders or other documentation issued by the military that indicates the military member is on covered active duty. Optional form WH-384 allows an employee requesting FMLA leave based on a qualifying exigency to satisfy the statutory requirement to furnish, upon the employer's request, appropriate certification to support leave for a qualifying exigency.

4. *Certification for Leave to Care for Covered Servicemember [29 CFR 825.310]*. An employee who requests FMLA leave to care for a covered servicemember (either a current servicemember or a veteran) may be required by his or her employer to certify the need for leave. An employee requesting FMLA leave based on a covered servicemember's serious injury or illness may satisfy the statutory requirement to furnish, upon the employer's request, a medical certification from an authorized health care provider with optional form WH-385 or WH-385-V. An employer must accept as sufficient certification of leave to care for a current servicemember an invitational travel order or invitational travel authorization (ITO or ITA) issued to the employee or to another family member in lieu of optional form WH-385 or the employer's own form.

D. *Notice to Employees of FMLA Designation [29 CFR 825.300(c)-.301(a)]*. When the employer has enough information to determine whether the leave qualifies as FMLA leave (after receiving a medical certification, for example), the employer must notify the employee within five business days of making such determination whether the leave has or has not been designated as FMLA leave and the number of hours, days or weeks that will be counted against the employee's FMLA leave entitlement. If it is not possible to provide the hours, days or weeks that will be counted against the employee's FMLA leave entitlement (such as in the case of unforeseeable intermittent leave), then such information must be provided upon request by the employee but not more often than once every 30 days if leave is taken during the 30-day

period. If the employer requires paid leave to be substituted for unpaid leave, or that paid leave taken under an existing leave plan be counted as FMLA leave, this designation also must be made at the time of the FMLA designation. In addition, if the employer will require the employee to submit a fitness-for-duty certification, the employer must provide notice of the requirement with the designation notice. Form WH-382 allows an employer to meet its obligation to designate leave as FMLA-qualifying. See 29 CFR § 825.300(d).

E. *Notice to Employees of Change of 12-Month Period for Determining FMLA Entitlement [29 CFR 825.200(d)(1)]*. An employer generally must choose a single uniform method from four options available under the regulations for determining the 12-month period for FMLA leave for reasons other than care of a covered servicemember with a serious injury or illness (which is subject to a set single 12-month period). An employer wishing to change to another alternative is required to give at least 60 days notice to all employees.

F. *Key Employee Notification [29 U.S.C. § 2614(b)(1)(B); 29 CFR 825.217-.219 and 825.300(c)(1)(v)]*. An employer that believes that it may deny reinstatement to a key employee must give written notice to the employee at the time the employee gives notice of the need for FMLA leave (or when FMLA leave commences, if earlier) that he or she qualifies as a key employee. At the same time, the employer must also fully inform the employee of the potential consequences with respect to reinstatement and maintenance of health benefits if the employer should determine that substantial and grievous economic injury to the employer's operations would result if the employer were to reinstate the employee from FMLA leave. If the employer cannot immediately give such notice, because of the need to determine whether the employee is a key employee, the employer must give the notice as soon as practicable after receiving the employee's notice of a need for leave (or the commencement of leave, if earlier). If an employer fails to provide such timely notice it loses its right to deny restoration, even if substantial and grievous economic injury will result from reinstatement.

As soon as an employer makes a good faith determination—based on the facts available—that substantial and grievous economic injury to its operations will result if a key employee who has given notice of the need for FMLA leave or is using FMLA leave is reinstated, the employer must notify the employee in

writing of its determination, including that the employer cannot deny FMLA leave and that the employer intends to deny restoration to employment on completion of the FMLA leave. The employer must serve this notice either in person or by certified mail. This notice must explain the basis for the employer's finding that substantial and grievous economic injury will result, and, if leave has commenced, must provide the employee a reasonable time in which to return to work, taking into account the circumstances, such as the length of the leave and the urgency of the need for the employee to return.

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

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

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

I. *Documenting Family Relationship [29 CFR 825.122(k)]*. An employer may require an employee giving notice of the need for FMLA 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.

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

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

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

If FMLA-eligible employees are not subject to FLSA recordkeeping regulations for purposes of minimum

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

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

The FLSA recordkeeping requirements, contained in Regulations 29 CFR part 516, are currently approved under OMB control number 1215-0018; consequently, this information collection does not duplicate their burden, despite the fact that for the administrative ease of the regulated community this information collection restates them.

*Public Comments:* On February 15, 2012, the Department published a proposed rule and sought comments on the burdens imposed by the information collections covered by the proposed regulations. 77 FR 8960. The same notice provided that comments could also be sent directly to OMB, in accordance with provisions of 5 CFR 1320.11.

As part of the proposed rule, the Department sought public comment regarding the burdens imposed by the information collection contained in this Final Rule. The Department received one comment from an individual identifying himself as a labor-employment attorney stating that the

agency's FMLA information collections are necessary for the proper performance of the functions of the agency. This comment, along with all of the comments relating to the other provisions of the NPRM that were received, are a matter of public record, and posted without change to <http://www.regulations.gov>, including any personal information provided.

*Burden Hours Estimates:* The PRA section of the FMLA NPRM published February 15, 2012 (77 FR 8960) used the 2008 analysis as the baseline to determine the burden increase for this paperwork package, and accounts for respondent and burden increases resulting from the statutory amendments to the FMLA covering qualifying exigency leave, military caregiver leave, and airline flight crew employee eligibility. Subsequent to OMB's clearance of the NPRM, but before its publication in the **Federal Register**, OMB approved the re-clearance of the existing FMLA ICRs under the PRA. That re-clearance reflected increases in respondents and burden stemming from the self-executing portions of the FY 2010 NDAA (qualifying exigency leave for family members of members of the Regular Armed Forces) and the Airline Flight Crew Technical Corrections Act. The following burden analyses are based upon the 2012 re-clearance issued on February 9, 2012, and reflect the increase in respondents and burdens resulting from the extension of military caregiver leave to covered veterans. Additionally, due to refinements in the analysis conducted under E.O. 12866, the number of eligible employees assumed to take leave to care for a covered veteran has decreased.

Except as otherwise noted, the Department bases the following burden estimates on the Regulatory Impact Analysis in the Final Rule and the 2012 paperwork re-clearance. The Department estimates that the FMLA covers 91.1 million workers. The Department estimates 381,000 employers, comprised of 291,000 private businesses and 89,566 government entities, respond to the FMLA collections. For PRA purposes 89,499 employers are assumed to be state, local, or tribal governmental entities and 67 are assumed to be Federal entities. The Department assumes a proportional response burden between the employer entities (74.033172415 percent private, 25.94333834 percent state, local, and tribal governments, and 0.02348951 percent Federal). Within each information collection, the respondents, responses, and burden estimates are rounded to the nearest whole number.

In the interest of transparency, for each FMLA information collection requirement this PRA discussion includes references to the incremental burden changes that would be imposed by the rule, the burden imposed by existing requirements, and the total burden after the rule takes effect.

*A. Employee Notice of Need for FMLA Leave.* The Department estimates that there are 26,908 employees who are newly eligible to take leave to care for a covered veteran under the FY 2010 NDAA. Based on leave usage patterns, 7,000 of these employees will take leave to care for a covered veteran (26 percent of 26,908 employees).

Based on the leave patterns estimated by the Department in the PRIA analysis, the Department estimates that there will be 357,000 employee requests for military caregiver leave.

*New burden:* 357,000 employee respondent notices of leave  $\times$  2 minutes/60 minutes per hour = 11,900 hours.

*Existing burden for this requirement:* 13,829,680 responses and 460,990 hours.

*Total estimated burden requested for this requirement:* 14,186,680 responses and 472,890 hours.

*B. Notice to Employee of FMLA Eligibility and Rights and Responsibilities Notice.* Based on the leave usage patterns for military caregiver leave, the Department is assuming that all subsequent leave requests will be for the same servicemember for whom the leave was originally requested. The employee is required to notify the employer in each instance of the need for leave. But the employer is not required to provide the employee with a notice of eligibility or rights and responsibilities unless the employee's eligibility status changes. For military caregiver leave, 7,000 leave takers will provide 357,000 employee notices of their need for leave, but employers will only have to issue 7,000 eligibility and rights and responsibilities notices.

*New burden:* 7,000 total responses (notices of eligibility and rights and responsibilities)  $\times$  10 minutes/60 minutes per hour = 1,167 hours

*Burden Disaggregation by Sector:*  
Private (74.03317215%): 5,182 responses  $\times$  10 minutes/60 minutes = 864 hours

State, local, tribal (25.943338%): 1,816 responses  $\times$  10 minutes/60 minutes = 303 hours

Federal (0.02348951%): 2 responses  $\times$  10 minutes/60 minutes = 0 hours

*Existing burden requirement:*  
Private: 16,142,733 responses and 7,031,756 hours

State, local, tribal: 5,656,874 responses and 2,464,128 hours  
Federal: 5,121 responses and 2,231 hours

*Total estimated burden requested for this requirement:*

Private: 16,147,915 responses and 7,032,619 hours

State, local, tribal: 5,658,690 responses and 2,464,431 hours  
Federal: 5,123 responses and 2,231 hours

*C. Employee Certifications: Employee Certifications—Serious Health Condition Certification, Recertification, and Fitness-for-Duty Certification; Documenting Call to Military Active Duty; Certification of Qualifying Exigency Due to Call to Military Active Duty; Covered Servicemember's Serious Injury or Illness Certification.*

*1. Medical Certification and Recertification.* The Department assumes that the number of employees who will obtain medical certifications to care for a covered veteran from a health care provider as defined in § 825.125 will be very small as most employees will obtain medical certifications from VA, DOD, TRICARE, or DOD non-network TRICARE providers, which are not subject to second or third opinions or recertifications. As such, the Department assumes that five percent of employees will be asked to obtain a second or third opinion/recertification. Utilizing these assumptions, 7,000 employees taking leave multiplied by 5% asked to provide medical certification results in 350 employees requiring additional certification.

*New burden:* 350 employees  $\times$  20 minutes/60 minutes per hour = 117 hours.

*2. Fitness-for-Duty Medical Certification.* No change from current burden estimate.

*3. Certification of Qualifying Exigency for Military Family Leave.* Although this Final Rule adds parental leave as a new qualifying exigency for FMLA leave the Department did not update the burden because it lacks any data on which to base an estimate of the number of days of qualifying exigency leave that might be taken for parental leave. Therefore, there is no change from the current burden estimate.

*4. Certification for Leave Taken to Care for a Covered Servicemember—Current Servicemember.* Pursuant to the FY 2010 NDAA, an eligible employee-family member may take FMLA leave to care for a current servicemember who has a serious injury or illness that existed before the member's active duty and was aggravated by service in the line of duty while on active duty. At the NPRM stage the Department did not

have sufficient information to develop an estimate of employees who will qualify for military caregiver leave for a covered servicemember with a serious injury or illness that existed prior to the servicemember's active duty and was aggravated in the line of duty on active duty, and, thus, did not revise the current burden analysis for certification of leave to care for a current servicemember. The Department did not receive any comments in response to the NPRM addressing this issue. Consequently, the Department still lacks sufficient information to develop an estimate of employees who will qualify for military caregiver leave for a covered servicemember with a serious injury or illness that existed prior to the servicemember's active duty and was aggravated in the line of duty on active duty. However, as stated in the Regulatory Impact Analysis, the Department believes that the number of servicemembers entering the military with an injury or illness with the potential to be aggravated by service to the point of rendering the servicemember unable to perform the duties of his or her office, grade, rank, or rating is quite small due to the selection process used by the Armed Forces.

*5. Certification for Leave Taken to Care for a Covered Servicemember—Covered Veteran.* The FY 2010 NDAA provided FMLA leave for eligible employees to care for a covered veteran with a serious injury or illness that was incurred in the line of duty on active duty (or existed before the member's active duty and was aggravated in the line of duty on active duty) and manifested itself before or after the member became a veteran. The Department estimates that 7,000 employees will take leave to care for a covered veteran. The Department expects that employers will request certification forms for this leave. The Department estimates that it will take a Human Resources specialist 30 minutes to request, review, and verify the employee's certification papers.

*New burden:* 7,000 responses (certification papers)  $\times$  30 minutes/60 minutes per hour = 3,500 hours.

All new certification and recertification requirements: 7,350 responses and 3,617 hours.

*Existing total burden for this requirement:* 12,118,019 responses and 4,022,236 hours.

*Total estimated burden for this requirement:* 12,125,369 responses and 4,025,853 hours.

*D. Notice to Employees of FMLA Designation.* The Department estimates that each written FMLA designation

notice takes approximately ten minutes to complete.

*New burden:* 7,000 total responses (designation notices) × 10 minutes/60 minutes per hour = 1,167 hours.

*Burden Disaggregation by Sector:* Private (74.03317215%): 5,182 responses × 10 minutes/60 minutes = 864 hours

State, local, tribal (25.943338%): 1,816 responses × 10 minutes/60 minutes = 303 hours

Federal (0.02348951%): 2 responses × 10 minutes/60 minutes = 0 hours

*Existing total burden for this requirement:*

Private: 12,898,914 responses and 3,479,716 hours

State, local, tribal: 4,520,148 responses and 1,219,392 hours

Federal: 4,092 responses and 1,104 hours

*Total estimated burden requested for this requirement:*

Private: 12,904,096 responses and 3,480,580 hours

State, local, tribal: 4,521,964 responses and 1,219,695 hours

Federal: 4,094 responses and 1,104 hours

*E. Notice to Employees of Change of 12-month period of determining FMLA eligibility.* No change from current burden estimate.

*Existing burden for this requirement:*

Private: 7,099,082 respondents and 3,536 hours

State, local, tribal: 2,487,721 respondents and 1,239 hours

Federal: 2,351 respondents and 1 hour

*Total estimated burden requested for this requirement:*

Private: 7,099,082 respondents and 3,536 hours

State, local, tribal: 2,487,721 respondents and 1,239 hours

Federal: 2,351 respondents and 1 hour

*F. Key Employee Notification.* The Department assumes that a very small percentage of employees taking leave to care for a covered veteran will be determined key employees and even fewer of those employees will receive notice from the employer that they intend to exercise the option to not reinstate those employees. As such, the Department does not associate a new burden hour estimate with this

particular provision for employees taking leave to care for a covered veteran.

*Existing burden for this requirement:* Private: 31,676 respondents and 2,640 hours

State, local, tribal: 11,100 respondents and 925 hours

Federal: 11 respondents and 1 hour

*Total estimated burden requested for this requirement:*

Private: 31,676 respondents and 2,640 hours

State, local, tribal: 11,100 respondents and 925 hours

Federal: 11 respondents and 1 hour

*G. Periodic Employee Status Reports.*

The Department estimated in the 2008 paperwork analysis that employers require periodic reports from 25 percent of FMLA leave users, and since it has not received any evidence to believe otherwise, it continues to estimate 25 percent today. The Department also estimates a typical employee would normally respond to an employer's request for a status report; however, to account for any additional burden the regulations might impose, the Department estimates that 10 percent of employees will respond to a request only because of the regulatory requirement, imposing a burden of two minutes per response. The Department also estimates that each such employee provides two annual periodic status reports.

*New burden:* 7,000 leave takers × 25% × 10% = 175 employee responses.

175 employee responses × 2 responses = 350 total responses.

350 responses × 2 minutes/60 minutes = 12 hours.

*Existing burden for this requirement:* 371,547 responses and 12,384 hours.

*Total estimated burden for this requirement:* 371,897 responses and 12,396 hours.

*H. Documenting Family Relationships.* The Department assumes that under the military amendments all employees who take leave will be doing so for a family-related reason. (7,000 leave takers). In the 2008 PRA analysis, the Department estimated that employers may require additional documentation to support a family relationship in five percent of these

cases, and the additional documentation will take five minutes.

*New burden:* 7,000 (employees taking leave for family-related reasons) × 5% (additional documentation) = 350 employees required to document family relationships. 350 employees × 5 minutes/60 minutes per hour = 29 hours.

*Existing burden for this requirement:* 185,681 responses and 15,473 hours.

*Total estimated burden requested for this requirement:* 186,031 responses and 15,502 hours.

*I. Notice to Employee of Pending Cancellation of Health Benefits.* The Department believes that most employees who take leave to care for a covered veteran will be covered by the military member's health benefits and not by his or her employer's health plan. As such, the Department assumes that a very small percentage of employees taking leave for a covered veteran will receive notification of the pending cancellation of his or her health benefits. The Department does not associate a new burden hour estimate with this provision.

*Existing burden for this requirement:*

Private: 105,585 responses and 8,799 hours

State, local, tribal: 37,000 responses and 3,083 hours

Federal: 34 responses and 3 hours

*Total burden requested for this requirement:*

Private: 105,585 responses and 8,799 hours

State, local, tribal: 37,000 responses and 3,083 hours

Federal: 34 responses and 3 hours

*J. General Recordkeeping.* No change from current burden estimate.

*Existing burden for this requirement:*

Private: 9,934,548 responses and 206,970 hours

State, local, tribal: 3,481,350 responses and 72,528 hours

Federal: 3,152 responses and 66 hours

*Total burden requested for this requirement:*

Private: 9,934,548 responses and 206,970 hours

State, local, tribal: 3,481,350 responses and 72,528 hours

Federal: 3,152 responses and 66 hours.

PRA SUMMARY OF BURDEN INCREASE DUE TO THIS RULE

Required disclosure	Existing respondents	Increase in respondents	Existing responses	Increase in responses	Existing burden hours	Increase in burden hours
Employee Notice of Need for FMLA Leave .....	7,249,100	7,000	13,829,680	357,000	460,990	11,900
Notice to Employee of FMLA Eligibility and Rights and Responsibilities Notice: Private .....	211,170	5,182	16,142,733	5,182	7,031,756	864

## PRA SUMMARY OF BURDEN INCREASE DUE TO THIS RULE—Continued

Required disclosure	Existing respondents	Increase in respondents	Existing responses	Increase in responses	Existing burden hours	Increase in burden hours
State, local, tribal .....	74,000	1,816	5,656,874	1,816	2,464,128	303
Federal .....	67	2	5,121	2	2,231	0
Employee Certifications .....	5,461,097	7,350	12,118,019	7,350	4,022,236	3,617
Notice to Employees of FMLA Designation:						
Private .....	211,170	5,182	12,898,914	5,182	3,479,716	864
State, local, tribal .....	74,000	1,816	4,520,148	1,816	1,219,392	303
Federal .....	67	2	4,092	2	1,104	0
Notice to Employee of 12-month Period Change:						
Private .....	21,117	0	7,099,082	0	3,536	0
State, local, tribal .....	7,400	0	2,487,721	0	1,239	0
Federal .....	7	0	2,351	0	1	0
Key Employee Notification:						
Private .....	21,117	0	31,676	0	2,640	0
State, local, tribal .....	7,400	0	11,100	0	925	0
Federal .....	7	0	11	0	1	0
Periodic Employee Status Reports .....	184,852	175	371,547	350	12,384	12
Documenting Family Relationships .....	183,987	350	185,681	350	15,473	29
Notice to Employee of Pending Cancellation of Health Benefits:						
Private .....	105,585	0	105,585	0	8,799	0
State, local, tribal .....	37,000	0	37,000	0	3,083	0
Federal .....	34	0	34	0	3	0
General Record Keeping:						
Private .....	21,117	0	9,934,548	0	206,970	0
State, local, tribal .....	74,000	0	3,481,350	0	72,528	0
Federal .....	67	0	3,152	0	66	0

Grand Total Incremental Increase of Burden Hours = 17,892

Grand Total Annual Burden Hours = 19,027,093 Hours

Persons responding to the various FMLA information collections may be employees of any of a wide variety of businesses. Absent specific wage data regarding respondents, the Department used the median hourly wage for a non-supervisory Human Resources Assistant (Except Payroll and Timekeeping) for May 2010. The median hourly wage is \$17.69 plus 40 percent in fringe benefits (\$24.77). See BLS Occupational Employment Statistics, Occupational Employment and Wages, May 2010 (<http://www.bls.gov/oes/current/oes434161.htm>). The Department estimates total annual respondent costs for the value of their time to be \$471,301,094 (\$24.77 × 19,027,093 total annual burden hours).

*Other Respondent Cost Burdens (Maintenance and Operation):* The Department estimates that it will take approximately 20 minutes to complete the certification for a covered veteran. Thus, the time would equal the employee's time in obtaining the certification. The Department used the median hourly wage for a physician's assistant of \$41.54 plus 40 percent in fringe benefits (\$58.17) to compute a \$19.39 cost for the certification of a serious health condition (\$58.17 × 20

minutes/60 minutes per hour). See BLS Occupational Employment Statistics, Occupational Employment and Wages, May 2010, <http://www.bls.gov/oes/current/oes291071.htm>.

*New burden (covered veterans):* 7,000 medical certifications for covered veterans × \$19.39 cost per certification = \$135,730.

Existing maintenance and operations cost estimate for the existing FMLA information collections: \$163,332,185.

*Grand total of maintenance and operations cost burden for respondents = \$163,467,915.*

The total burden imposed by the FMLA information collections (existing and new) is summarized as follows.

*Agency:* Wage and Hour Division.

*Title of Collection:* Family and Medical Leave Act, as Amended.

*OMB Control Number:* 1235-0003.

*Affected Public:* Individuals or Households; Private Sector—Businesses or other for profits. Not for profit institutions, Farms: State, Local, or Tribal Governments.

*Total estimated number of respondents:* 14,134,414.

*Total estimated number of responses:* 89,305,469.

*Total estimated annual burden hours:* 19,027,093.

*Total estimated annual other cost burdens:* \$163,467,915.

### VIII. Executive Order 12866; Executive Order 13563

Executive Orders 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This rule has been designated a "significant regulatory action" because, although not economically significant under section 3(f) of Executive Order 12866, it raises novel issues of law and policy. Therefore, the rule was reviewed by OMB. The Family and Medical Leave Act (FMLA or Act) is administered by the U.S. Department of Labor, Wage and Hour Division (WHD). The FMLA provides a means for employees to balance their work and family responsibilities by taking unpaid leave for certain reasons. The Act is intended to promote the stability and economic security of families as well as the nation's interest in preserving the integrity of families.

The FMLA applies to any employer in the private sector engaged in commerce

or in an industry or activity affecting commerce who employed 50 or more employees each working day during at least 20 weeks in the current or preceding calendar year; all public agencies and local education agencies; and most Federal employees.<sup>5</sup>

To be eligible for leave, an individual must:

B. Be employed by a covered employer at a worksite that employs at least 50 employees within 75 miles;

C. Have worked at least 12 months for the employer (not necessarily consecutively); and

- Have at least 1,250 hours of service during 12 months preceding the beginning of the FMLA leave (as discussed herein, special hours of service rules apply to airline flight crew employees).

The FMLA provides for job-protected, unpaid leave, which may be continuous or intermittent, and allows for the substitution of paid leave. Employees are entitled to:

- A combined total of 12 workweeks of leave in a 12-month period for:
  - birth and care of the employee's child (within one year);
  - placement with employee of a child for adoption or foster care (within one year);
  - care of a spouse, child, or parent with serious health condition;
  - the employee's own serious health condition; and
  - qualifying exigencies arising out of the fact that the employee's spouse, son, daughter, or parent is a military member and is on covered active duty or has been notified of an impending call or order to covered active duty.

Employees are also entitled to 26 workweeks of leave in a single 12-month period 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.

#### A. Need for Regulation

The changes to the FMLA regulations are primarily to implement statutory amendments to the FMLA's military family leave provisions and separate statutory changes affecting the eligibility requirements for airline flight crewmembers and flight attendants (collectively referred to as airline flight crew employees). The military statutory amendments are designed to make it easier for workers with family in

military service to balance their work and family lives during particularly demanding times without the fear of losing their jobs. 73 FR 68070. The amendments relating to the airline flight crew employees established a special hours of service eligibility requirement in order to address this industry's unique scheduling practices and expand access to FMLA-protected leave for airline flight crew employees.

#### 1. National Defense Authorization Act for Fiscal Year 2010 Amendments

On October 28, 2009, the President signed into law the National Defense Authorization Act for FY 2010 (FY 2010 NDAA), Public Law 111-84. Section 565(a) of the FY 2010 NDAA amends the FMLA. These amendments expand the military family leave provisions added to the FMLA in 2008, which provide qualifying exigency and military caregiver leave for employees with family members who are covered military members.

The FY 2010 NDAA amendments to the FMLA provide that an eligible employee may take FMLA leave for any qualifying exigency arising out of the fact that the employee's spouse, son, daughter, or parent is on (or has been notified of an impending call to) covered active duty in the Armed Forces. Covered active duty for members of a regular component of the Armed Forces means duty during deployment of the member with the Armed Forces to a foreign country. For members of the U.S. National Guard and Reserves it means duty during deployment of the member with the Armed Forces to a foreign country under a call or order to active duty in a contingency operation as defined in section 101(a)(13)(B) of title 10, United States Code. Prior to the FY 2010 NDAA amendments, qualifying exigency leave did not apply to employees with family members serving in a regular component of the Armed Forces.

The FY 2010 NDAA also expands the military caregiver leave provisions of the FMLA. Military caregiver leave entitles an eligible employee who is the spouse, son, daughter, parent, or next of kin of a covered servicemember with a serious injury or illness, to take up to 26 workweeks of FMLA leave in a single 12-month period to care for the covered servicemember. Under the FY 2010 NDAA amendments, the definition of covered servicemember is expanded to include a veteran "who is undergoing medical treatment, recuperation, or therapy for a serious injury or illness" if the veteran was a member of the Armed Forces "at any time during the period of 5 years preceding the date on

which the veteran undergoes that medical treatment, recuperation, or therapy." Prior to the FY 2010 NDAA amendments, military caregiver leave was limited to care for current members of the U.S. Armed Forces, including members of the Regular Armed Forces and members of the National Guard and Reserves.

In addition, the FY 2010 NDAA amends the FMLA's definition of a serious injury or illness for a current member of the U.S. Armed Forces, including National Guard or Reserves, to include not only a serious injury or illness that was incurred by the member in the line of duty on active duty but also one that "existed before the beginning of the member's active duty and was aggravated by service 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. For covered veterans, the term is defined as "a qualifying (as defined by the Secretary of Labor) injury or illness that was incurred by the member in line of duty on active duty in the Armed Forces (or existed before the beginning of the member's active duty and was aggravated by service in line of duty on active duty in the Armed Forces) and that manifested itself before or after the member became a veteran."

#### 2. Airline Flight Crew Technical Amendments

On December 21, 2009, the President signed into law the Airline Flight Crew Technical Corrections Act (AFCTCA), Public Law 111-119. This amendment to the FMLA establishes a special hours of service eligibility provision for airline flight crew employees. This amendment also permits the Secretary of Labor to provide by regulation a method of calculating FMLA leave for airline flight crew employees. Airline flight crew employees continue to be subject to the FMLA's other eligibility requirements.

The amendment provides that an airline flight attendant or flight crewmember meets the hours of service requirement if, during the previous 12-month period, he or she has worked or been paid for:

- Not less than 60 percent of the applicable total monthly guarantee (or its equivalent), and

D. Not less than 504 hours, not including personal commute time, or time spent on vacation, medical, or sick leave.

Prior to this amendment, many flight crew employees were not eligible for FMLA leave because the nature of the airline industry, including regulatory limits on the flying time, prevented

<sup>5</sup> Most Federal employees are covered under Title II of the FMLA (incorporated in Title V, Chapter 63, Subchapter 5 of the U.S. Code), which is administered by the Office of Personnel Management under regulations set forth at 5 CFR part 630, subpart L.

them from meeting the required 1,250 hours of service requirement. Airline employees other than flight crew employees continue to be subject to the 1,250 hours of service eligibility requirement with hours of service determined according to principles established under the FLSA for compensable work time (*i.e.*, hours worked). See § 825.110.

### B. Summary of Public Comments

#### 1. Additional Data

World at Work and Airlines for America (A4A) provided additional data about FMLA usage and administration in their comments; these comments were especially relevant to the data and assumptions used in the economic analysis.

World at Work provided a summary of survey results from a recent "Snapshot Survey" of their members' opinions about issues raised by the NPRM as well as an overview of insights from earlier surveys related to more general FMLA issues. World at Work found that 65 percent of their members have received no requests for qualifying exigency leave and that members must focus most of their time on administration related to intermittent leaves for other FMLA-qualifying reasons. While the most recent results presented in the World at Work comment are derived from a fairly small sample size (93 responses), they provide useful feedback on qualifying exigency leave that is generally consistent with the estimates in the NPRM.

There were numerous general comments on the burden of tracking intermittent FMLA leave; however, absent new data, the Department continues to rely on its previous surveys as the best available data for calculations regarding intermittent leave usage. The Department notes that it is conducting a new survey of employers and employees to obtain current representative data for FMLA leave usage.

A4A provided a detailed comment including information on trends of usage of FMLA-type leave in the airline industry. In the comment, A4A noted that on the enactment of the AFCTCA all airlines implemented the new eligibility standard and there have been few reported disputes of airline flight crew employee eligibility. Additionally, airline experience implementing FMLA-type leave has shown that for airline flight crew employees, intermittent leave is far more common than block leave, likely due to the way this industry schedules work and provides banks of paid leave for many workers.

This commenter further stated that when airline flight crew employees use FMLA leave, they "almost always request and are charged a minimum of one day usage or the hourly equivalent of one paid day." The Department notes that this Final Rule recognizes industry practice and establishes a bank of leave for eligible airline flight crew employees and a minimum increment of one day of leave.

The Department notes that the economic analysis of leave taken by airline flight crew employees as a result of the rule may be an underestimate, because such employees may take more short periods of leave rather than fewer long periods of leave. However, the Department received no data concerning how leave usage by airline flight crew employees may vary from FMLA leave usage by non-airline employees or from the assumption of FMLA leave use contained in the proposed rule: that airline flight crew employees take approximately the same number of FMLA leave periods as the rest of the population of eligible employees. 77 FR 8997. As a result, the costs driven by number of leaves (certifications, notices) may be underestimated; however, it is likely that the underestimated costs are offset by an associated overestimate of costs driven by leave length (maintenance of health benefits).

#### 2. Regulatory Familiarization

Two commenters, Aon Hewitt and the National Coalition to Protect Family Leave, raised concerns about the Department's estimate of the amount of time required for employers to familiarize themselves with the rule. Specifically, both commenters felt that two hours was too low and that it is unclear if this includes time for the employer to make revisions based on its review of the rule. Aon Hewitt observed that its clients usually involve staff in multiple roles to review and make decisions, and that a more appropriate estimate of the time required would be 20 hours for airline companies and 15 hours for all others.

The commenters did not provide justification for why employers already administering FMLA leave should require a 10-fold increase in the amount of time for regulatory familiarization. The Department notes that this rulemaking builds upon changes made in the 2008 Final Rule. Therefore, the Department believes that covered employers are already familiar with the relevant provisions of the FMLA and merely have to apply those provisions to additional groups of workers, or with slight modification for particular types of employees. The Final Rule is limited

in scope and length, limiting the time required for familiarization. Furthermore, the Department believes that most employers will make use of guidance and educational materials from the Department, industry trade groups, franchisers and other organizations to help them review the regulations more efficiently. Accordingly, the Department will leave the assumption as is.

#### 3. Other Costs to Employers

Several individual commenters and the National Business Group on Health raised concerns about the administrative burden to employers of tracking FMLA leaves and rescheduling work. The National Business Group on Health noted "our members, many of whom are the human resources professionals who administer FMLA leave, consistently confirm that compliance with FMLA involves complex and costly processes." An individual, identifying himself as an employment law attorney and human resources professional, agreed with business concerns about the time-consuming task of administering FMLA leave, but also noted that there are creative approaches available to lessen this burden.

These commenters did not provide any additional data or observations on which to base any revisions to the analysis. Based on the survey results presented by World at Work, in 2005 respondents indicated that processing a request for FMLA leave requires 30 minutes to two hours of time, which is consistent with the time estimates used in the economic analysis.

#### 4. Costs to Employees

One commenter discussed the burden of certification costs to employees, noting that for workers with multiple serious conditions the cost of obtaining certifications (and recertifications) could become quite expensive. This commenter noted that he typically pays \$25 to \$55 per certification to the health care provider, depending on specialty.

This range of costs per certification is consistent with the cost the Department cites in the economic analysis. The Department has proposed only minor revisions to the certifications to reflect the statutory amendments under the FMLA but encourages employers to work with employees with multiple conditions to reduce cost.

### C. Summary of Impacts<sup>6</sup>

The Department projects that the average annualized cost of the rule will

<sup>6</sup> On certain provisions, the Department provides a range of estimates. Where the ranges provide a



be somewhat less than \$43 million per year over 10 years. The rule is expected to cost \$53.9 million in the first year, and \$41.3 million per year in subsequent years. The amendment to extend FMLA provisions to airline flight crew employees accounts for 0.7 percent

of first year costs and 0.9 percent in subsequent years, while qualifying exigency and military caregiver leave account for 75.9 percent of first year costs and 99.1 percent of costs in subsequent years. Regulatory familiarization costs account for 23.4

percent of first year costs. The costs related to the provision of health benefits account for the largest share of costs, about 44.0 percent of costs in the first year of the rule, and 57.5 percent of costs each in each of the following years.

TABLE 1—SUMMARY OF IMPACT OF CHANGES TO FMLA <sup>a</sup>

Component	Year 1 (\$1,000)	Year 2 (\$1,000)	Annualized (\$1,000) <sup>b</sup>	
			Real discount rate 3%	Real discount rate 7%
Total .....	\$53.9	\$41.3	\$42.8	\$43.0
<i>Cost of Each Amendment</i>				
Any FMLA regulatory revision .....	12.6	0	1.4	1.7
Flight Crew Technical Amendment .....	0.4	0.4	0.4	0.4
FY 2010 NDAA .....	41.0	41.0	41.0	41.0
<i>NDAA Subtotal Qualifying Exigency</i> .....	25.8	25.8	25.8	25.8
<i>NDAA Subtotal Military Caregiver</i> .....	15.1	15.1	15.1	15.1
<i>Cost of Each Requirement</i>				
Regulatory Familiarization .....	12.6	0	1.4	1.7
Employer Notices .....	17.1	17.1	17.1	17.1
Certifications .....	0.4	0.4	0.4	0.4
Health Benefits .....	23.8	23.8	23.8	23.8

<sup>a</sup> Columns may not sum due to rounding.  
<sup>b</sup> Costs are annualized over 10 years.

D. Industry Profile

The first step in the analysis is to estimate the number of firms, establishments and employees in the public and private sectors that will be impacted by the changes. The Department estimates that there are a total of 7.9 million firms and government agencies with 10.6 million establishments in the U.S.<sup>7</sup> These entities employ 133.4 million workers with an annual payroll of \$5.9 trillion.<sup>8</sup>

Estimated annual revenues equal \$33.2 trillion and estimated net income is \$1.1 trillion.<sup>9</sup>

After identifying and excluding from the analysis those businesses that are not covered by the FMLA, the Department estimates that there are 381,000 covered firms and government agencies with 1.2 million establishments. These firms employ 91.1 million workers that will potentially be impacted by the Final Rule changes. These employers have an

annual payroll of \$5.0 trillion, estimated annual revenues of \$23.7 trillion, and estimated net income of \$1.03 trillion.

Table 2 presents the estimated number of establishments, firms, employment, annual wages, revenue, and net income for all employers; Table 3 presents the same information for covered employers. The following subsection describes in detail the methods and data sources used to develop the industry profile.

TABLE 2—2008 INDUSTRY PROFILE: ALL PRIVATE AND PUBLIC SECTOR EMPLOYERS

NAICS	Industry	Number of firms (1,000)	Number of establishments (1,000)	Employment (1,000)	Annual payroll (\$ bil.)	Estimated revenues (\$ bil.)	Estimated net income (\$ bil.)
11 .....	Agriculture, Forestry, Fishing & Hunting.	86	93	1,084	\$30	\$192	\$2.4
11f .....	Farms .....	2,208	2,205	843	0.02	284	<sup>a</sup>
21 .....	Mining .....	21	30	729	62	265	23.8
22 .....	Utilities .....	7	16	561	47	589	28.5
23 .....	Construction .....	686	789	6,692	348	1,764	13.1
31–33 .....	Manufacturing .....	285	347	12,992	727	5,042	220.0
42 .....	Wholesale Trade .....	341	588	5,901	366	5,217	34.9
44–45 .....	Retail Trade .....	638	1,019	15,737	4,006	5,603	94.0
48–49 .....	Transportation and Warehousing <sup>b</sup> .	154	208	4,981	183	920	14.5
51 .....	Information .....	73	136	2,970	210	830	46.7

summary of information, the midpoint of the range is represented.

<sup>7</sup> Number of firms and establishments includes private industry, farms, and governments.

<sup>8</sup> The Department's analysis is based on: USDA 2007 Census of Agriculture, available at: <http://www.agcensus.usda.gov/Publications/2007/index.asp>; 2007 Annual Survey of State and Local Government Employment and Payroll, available at:

<http://www.census.gov/govs/estimate/>; and Unpublished Special Tabulations produced by the Bureau of Labor Statistics, Quarterly Census of Employment and Wages (QCEW) Program. For more information on the QCEW program, please see the Web site: <http://www.bls.gov/cew/>.

<sup>9</sup> Estimated net income does not include net income for farms. The Department's analysis is based on: U.S. Census Bureau, Statistics of U.S.

Businesses, "Number of Firms, Number of Establishments, Employment, Annual Payroll, and Receipts by Employment Size of the Enterprise for the United States, All Industries—2002"; Unpublished Special Tabulations, BLS; and, IRS, 2007 Statistics of Income, Returns of Active Corporations, Table 5—Selected Balance Sheet, Income Statement, and Tax Items, by sector, by Size of Business Receipts.

TABLE 2—2008 INDUSTRY PROFILE: ALL PRIVATE AND PUBLIC SECTOR EMPLOYERS—Continued

NAICS	Industry	Number of firms (1,000)	Number of establishments (1,000)	Employment (1,000)	Annual payroll (\$ bil.)	Estimated revenues (\$ bil.)	Estimated net income (\$ bil.)
52	Finance and Insurance.	234	459	5,824	492	2,590	114.9
53	Real Estate and Rental and Leasing.	243	342	2,085	91	439	14.6
54	Professional, Scientific & Technical Serv.	695	933	7,876	578	1,476	18.5
55	Management of Companies & Enterprises.	35	48	1,896	179	466	57.0
56	Admin, Support, Waste Mgmt & Remed Serv.	315	432	7,705	255	649	4.0
61	Education Services—Total.	68	85	2,502	97	269	4.7
61a	Education Services—all others.	51	65	1,624	73	185	3.8
61e	Education Services—Elementary and Secondary.	19	20	878	24	83	1.0
62	Health Care and Social Assistance.	594	748	15,911	655	1,750	14.4
71	Arts, Entertainment, and Recreation.	99	116	1,816	62	194	3.0
72	Accommodation and Food Services.	447	592	11,218	189	560	4.2
81&95	Other Services & Auxiliaries.	455	1,112	4,466	128	544	3.3
99	Unclassified	101	140	190	7	30	0.8
	All industries	7,786	10,438	113,978	5,108	29,672	717.3
	Government	90	180	19,386	770	3,537	401.3
	Public and Private Sector Total	7,876	10,618	133,364	5,878	33,209	1,118.6

Sources: BLS Unpublished special tabulations; 2007 Annual Survey of State and Local Government Employment and Payroll; 2007 Census of Government Finance; Census of Agriculture; IRS 2001 Statistics of Income.

<sup>a</sup> Net income for farms is not available.

<sup>b</sup> NAICS code 48–49 includes the Postal Service (Source: www.usps.com, and USPS Annual Report 2008); postal service employees are covered by the final rulemaking while most other Federal employees are covered under FMLA regulations administered by the Office of Personnel Management.

TABLE 3—2008 INDUSTRY PROFILE: COVERED EMPLOYERS

NAICS	Industry	Number of firms (1,000)	Number of establishments (1,000)	Employment (1,000)	Annual payroll (\$ bil.)	Estimated revenues (\$ bil.)	Estimated net income (\$ bil.)
11	Agriculture, Forestry, Fishing & Hunting.	2.0	4.9	538	\$9	\$90	\$1.3
11f	Farms	<sup>a</sup>	<sup>a</sup>	<sup>a</sup>	<sup>a</sup>	<sup>a</sup>	<sup>a</sup>
21	Mining	1.6	5.4	534	54	214	22.1
22	Utilities	0.9	6.4	473	48	504	26.1
23	Construction	19.0	25.9	2,651	181	787	7.0
31–33	Manufacturing	34.9	63.9	10,272	638	4,435	211.7
42	Wholesale Trade	21.3	78.0	3,057	291	2,863	21.1
44–45	Retail Trade	22.3	215.7	10,146	338	3,998	84.8
48–49	Transportation and Warehousing <sup>b</sup> .	8.8	32.7	3,908	216	716	12.8
51	Information	5.0	38.8	2,323	205	693	42.9
52	Finance and Insurance	9.3	115.4	4,008	478	2,195	104.3
53	Real Estate and Rental and Leasing.	5.2	37.5	842	62	163	8.4
54	Professional, Scientific & Technical Serv.	17.4	59.8	4,020	408	789	13.7
55	Management of Companies & Enterprises.	24.3	22.2	1,650	188	334	40.9
56	Admin, Support, Waste Mgmt & Remed Serv.	20.0	52.8	5,416	218	389	2.8

TABLE 3—2008 INDUSTRY PROFILE: COVERED EMPLOYERS—Continued

NAICS	Industry	Number of firms (1,000)	Number of establishments (1,000)	Employment (1,000)	Annual payroll (\$ bil.)	Estimated revenues (\$ bil.)	Estimated net income (\$ bil.)
61 .....	Education Services— Total.	.....	.....	.....	.....	.....	.....
61a .....	Education Services— all others.	3.3	7.6	1,329	67	158	3.5
61e .....	Education Services— Elementary and Sec- ondary.	18.6	20.0	878	24	83	1.0
62 .....	Health Care and Social Assistance.	34.3	114.7	11,364	524	1,202	12.7
71 .....	Arts, Entertainment, and Recreation.	5.8	10.3	1,135	39	116	2.1
72 .....	Accommodation and Food Services.	27.6	105.2	5,956	150	285	3.0
81&95 .....	Other Services & Auxil- iaries.	9.5	51.0	1,260	59	171	1.7
99 .....	Unclassified .....	0.0	0.0	1	0	0	0.0
	All industries .....	291.2	1,068.2	71,761	4,199	20,187	623.7
	Government .....	89.5	180.0	19,386	770	3,537	401.3
Total ..	.....	380.7	1,248.1	91,147	4,969	23,723	1,025.0

Sources: BLS Unpublished special tabulations; 2007 Annual Survey of State and Local Government Employment and Payroll; 2007 Census of Government Finance; Census of Agriculture; IRS 2001 Statistics of Income.

<sup>a</sup> Based on the 2007 Census of Agriculture, about 2% of all farms have more than 10 hired employees, suggesting that the number of covered farms is likely very close to zero. Due to the seasonal nature of farm employment, it is similarly likely that few employees would be eligible for FMLA leave even if the farm were covered.

<sup>b</sup> NAICS code 48–49 includes the Postal Service (Source: www.usps.com, and USPS Annual Report 2008); postal service employees are covered by the final rulemaking while most other Federal employees are covered under FMLA regulations administered by the Office of Personnel Management.

## 1. Methods and Data Sources

The analysis draws on the methods used in the 2008 Final Rule to estimate a profile of employers and employees who will be impacted by the Final Rule. The foundation for the profile is a special tabulation of data produced by the Bureau of Labor Statistics (BLS) Quarterly Census of Employment and Wages (QCEW) Program. The tabulation describes the distribution of establishments and employment by major industry division (two-digit NAICS level) across nine employment size categories. As explained more fully below, the analysis is based on establishment-level data because employer coverage and employee eligibility for the Final Rule is determined, in part, by establishment size.

The number of establishments and employment for each two-digit industry, as defined by the North American Industry Classification System (NAICS), by employment size class, were obtained directly from BLS Quarterly Census of Employment and Wages Business Employment Dynamics (QCEW).<sup>10</sup> The number of farms was obtained from the U.S. Department of Agriculture 2007 Census of Agriculture. The number of governments and number of government workers was

obtained from the U.S. Census of Governments.

The number of firms was determined by distributing the BLS QCEW total number of firms at the two-digit industry level to each size class using the proportion of firms in each size class calculated from the Statistics of U.S. Businesses 2006. The Department used a similar approach to determine the annual payroll within each industry. The total annual payroll at the two-digit industry level was distributed to each of the employment size classes using the proportion of payroll in each size class calculated from the Statistics of U.S. Businesses 2006.<sup>11</sup> Annual wages for government entities were obtained from the U.S. Census of Governments.<sup>12</sup>

In order to determine estimated 2008 revenues for each industry and employment size class, the Department calculated the receipts per employee in each size class from the 2007 Statistics of U.S. Business by aggregating the 2007 size classes to match BLS size classes, then dividing total receipts by the number of employees in each size class.

<sup>11</sup> Statistics of U.S. Businesses, 2006 features a range of size classes; in some cases these size classes were aggregated to match the size classes available in the BLS Quarterly Census of Employment and Wages Business Employment Dynamics data set.

<sup>12</sup> 2007 Annual Survey of State and Local Government Employment and Payroll, available at: <http://www.census.gov/govs/estimate/>.

Then, the Department estimated the BLS worker output index and producer price index for each two-digit sector as a weighted average of industries composing that sector. For sectors where no indices were available, the Department used the median value from those sectors with indices. Finally, to obtain an estimate of 2008 revenues, the Department multiplied receipts per employee in each size class by the 2008 number of employees in each size class, the worker output index and the producer price index. Government revenues were directly obtained from the 2007 Census of Government Finance.<sup>13</sup>

To determine estimated 2008 net income for each industry and employment class size, the Department calculated the average revenues per firm in each size class and calculated the ratio of net income to total receipts using the 2007 IRS Statistics of Income.<sup>14</sup> The estimated average revenue per firm in each size class was used to select an appropriate “size of business receipts” category from

<sup>13</sup> U.S. Census Bureau 2007 Census of Government Finance, available at: [http://www.census.gov/govs/estimate/index.html#state\\_local](http://www.census.gov/govs/estimate/index.html#state_local).

<sup>14</sup> Internal Revenue Service, 2007 Statistics of Income, Returns of Active Corporations, Table 5—Selected Balance Sheet, Income Statement, and Tax Items, by Sector, by Size of Business Receipts.

<sup>10</sup> Unpublished Special Tabulations, BLS.

Statistics of Income for a size class in a particular industry and to generate the ratio of net income to total receipts for that category. The 2007 ratio of net income to total receipts was multiplied by the estimated 2008 revenues in each size class to calculate the estimated 2008 net income. Government net income was estimated by subtracting expenditures from revenues.<sup>15</sup>

2. Covered Employers

The FMLA applies to any employer in the private sector engaged in commerce or in an industry affecting commerce who employed 50 or more employees each working day during at least 20 weeks in the current or preceding calendar year; and all public agencies and local education agencies. Most Federal employees are covered by Title II of the FMLA which is administered by the Office of Personnel Management (OPM).

First, the Department dropped from the profile all establishments in employment size classes of less than 50 employees (*i.e.*, 0—49 employees) except for those in elementary and secondary education. For the purpose of this analysis, all Federal government employers are assumed to be covered by FMLA regulations as administered by the OPM and, therefore, not subject to these revisions; state and local government employees, as well as U.S. Postal Service employees, are covered by this final rulemaking and are included in the profile of covered workers. Additionally, based on estimates from the 2007 Census of Agriculture, it is likely that very few farms employ more than 50 employees, and among those that do, very few of their employees are eligible for FMLA as the seasonal nature of the work limits the total number of hours employees work each year. As a result, this analysis assumes that no farm employers are

covered by FMLA.<sup>16</sup> See Table 3 for a summary of covered employers.

Additionally, the Department used Statistics of U.S. Business, 2006 at the six-digit NAICS level to identify the proportion of employers in NAICS 61 “Education Services” who are categorized as “Elementary and Secondary Education.” This proportion was used to calculate the number of employers in each size class in NAICS 61 that are considered local education agencies, and, therefore, covered by FMLA regardless of size. These employers were subtracted from the broader category of education services, and treated separately by the analysis; the remaining employers in education services with fewer than 50 employees were dropped from the profile.

Next, in the absence of reliable data on the geographic proximity of establishments owned by the same firm, and employment at those establishments, the Department calculated an adjustment factor to account for establishments with fewer than 50 employees at a worksite owned by a firm with more than 50 employees within 75 miles. This is necessary to avoid underestimating the number of covered employers and eligible employees affected by the Final Rule.

The Department calculated this adjustment factor as the midpoint of a range defined by assumptions concerning the proximity of establishments employing fewer than 50 workers owned by the same company. To define one end of this range, the Department takes employment in establishments with more than 50 employees according to the U.S. County Business Patterns of 2007.<sup>17</sup> This essentially assumes that no establishments with fewer than 50 workers and owned by the same company are located within 75 miles of each other, and therefore excludes all

employees in such establishments from the calculation. The other end of this range is defined by taking all employment in firms with greater than 50 employees according to the Statistics of U.S. Businesses 2007 small employment size classes.<sup>18</sup> This assumes that all establishments with fewer than 50 workers owned by the same company are located within 75 miles of each other and includes all such employees in the calculation. The adjustment factor is the midpoint of this range, that is the Department calculated 50 percent of the difference between the higher and lower number of employees to estimate the number of workers at covered worksites of less than 50 employees in 2007. This estimate was then calculated as a percent of total employment in each industry, and that percent multiplied by the total employment in each industry in 2008 to estimate the number of workers at covered worksites of less than 50 employees in 2008. The Department did not attempt to distribute these workers to size classes. This approach was repeated to estimate the number of establishments and annual payroll for this category.<sup>19</sup> The numbers presented in Table 3 are the Department’s best estimates based on this methodology.

E. FMLA Leave Profile

This section describes how, in light of the recent amendments, the Department estimated the number of covered, eligible workers who may be in a position to take qualifying exigency or military caregiver leave and the number of leaves they may take, and the number of covered eligible airline flight crew employees who may take FMLA leave and the number of leaves they may take. Table 4 provides a summary of the estimated leaves, a discussion of the methodology used to produce these estimates follows.

TABLE 4—SUMMARY OF LEAVES TAKEN AS A RESULT OF THE FINAL RULE

Leave taker	Covered service-members and veterans	Number eligible for leave	Number who will take FMLA leave	Number of leaves (1,000)	Days of leave (1,000)	Hours of leave (mil.)
Flight Crew <sup>a</sup> .....	.....	90,560	5,950	8.9	8.9	.....
Pilots .....	.....	41,470	2,070	3.1	3.1	.....
Flight Attendants .....	.....	49,090	3,880	5.8	5.8	.....
NDAA 2010 <sup>b</sup> .....	218,130	219,908	37,896	758	1,311	10.5
Qualifying Exigency .....	197,000	193,000	30,900	401	926	7.4

<sup>15</sup> 2007 Census of Government Finance.

<sup>16</sup> Based on the 2007 Census of Agriculture, about 2% of all farms have more than 10 hired employees, suggesting that the number of covered farms is likely very close to zero. Due to the seasonal nature of farm employment, it is similarly likely that few

employees would be eligible for FMLA leave even if the farm were covered.

<sup>17</sup> U.S. County Business Patterns of 2007, available at [http://www.census.gov/econ/cbp/download/07\\_data/index.htm](http://www.census.gov/econ/cbp/download/07_data/index.htm).

<sup>18</sup> Statistics of U.S. Businesses, available at <http://www.census.gov/econ/susb/>.

<sup>19</sup> This is the same approach used in the 2007 “Preliminary Analysis of the Impacts of Prospective Revision to the Regulation Implementing the FMLA of 1993 at 29 CFR 825” (hereafter, “the 2007 PRIA”). CONSAD Research Corporation, December 7, 2007, pp. 6–8.

TABLE 4—SUMMARY OF LEAVES TAKEN AS A RESULT OF THE FINAL RULE—Continued

Leave taker	Covered service-members and veterans	Number eligible for leave	Number who will take FMLA leave	Number of leaves (1,000)	Days of leave (1,000)	Hours of leave (mil.)
Military Caregiver .....	21,130	26,908	6,966	357	385	3.1

<sup>a</sup> Number eligible for leave represents only those flight crew employees not currently covered by an FMLA-type provision under a CBA; thus, the number of leaves equals new leaves as a result of this rule. The Department did not estimate the number of hours of leave for flight crew employees because the rule establishes a bank of days of leave, to be used in full day increments.

<sup>b</sup> Number of days and hours of leave estimated based on leave profiles, see discussion for more detail.

1. Military Family Leave Under the FMLA

The changes to the military family leave provisions of the FMLA impact a variety of employees and employers across the economy. While these changes do not alter the conditions for employer coverage or employee eligibility under the FMLA, they do change the circumstances under which eligible employees who are family members of covered servicemembers qualify for FMLA leave and, as a result, will affect the number and frequency of FMLA leaves taken for those reasons.

In order to estimate the number of individuals who may take leave under the qualifying exigency or military caregiver provisions as a result of the changes, the Department estimated the number of servicemembers or veterans covered by the amendments, completed an age profile of those individuals and estimated the number of eligible family members or potential caregivers likely to be associated with each age range. This method is described in full detail in Appendix A.

a. Qualifying Exigency

The FY 2010 NDAA amendments to the FMLA provide that an eligible employee may take FMLA leave for any qualifying exigency arising out of the fact that the employee's spouse, son, daughter, or parent is on (or has been

notified of an impending call to) covered active duty in the Armed Forces. For members of a regular component of the Armed Forces, this means duty during deployment to a foreign country. For members of the U.S. National Guard and Reserves, it means duty during deployment to a foreign country under a call or order to active duty under a provision of law referred to in section 101(a)(13)(B) of title 10, United States Code.

To determine the number of eligible employees who may take FMLA leave as a result of this amendment, the Department first estimated the number of servicemembers on covered active duty and the number of family members who may be eligible and employed at a covered employer and then subtracted those servicemembers and family members already entitled to take qualifying exigency leave prior to the FY 2010 NDAA amendments. Clear, consistent data on the number of military personnel deployed in any given year are difficult to find; many sources, for example, do not adequately distinguish military personnel deployed overseas from those stationed overseas. For example, the U.S. Department of Defense publishes an annual report profiling the military community including the distribution of geographic location of active duty members, but without any designation of deployed

versus stationed status.<sup>20</sup> In addition, estimates might vary significantly depending on sources utilized.<sup>21</sup> Furthermore, when deployments do occur, a Congressional Research Service report showed that estimates of personnel involved might vary significantly depending on definition and source. Thus, estimates of "boots on the ground" in Iraq between 2003 and 2008 are only 30 percent to 60 percent of the total involved when personnel outside Iraq are included.<sup>22</sup> Therefore, the Department drew on several data sources to determine the number of servicemembers likely to be called to covered active duty in the Armed Forces annually.

Table 5 provides a summary of deployments of the U.S. Armed Forces from 1960 through 2007. Although composed of the best data found to date, some estimates of personnel deployed appear to use more restrictive definitions than would be covered by the Department's definition of covered active duty. For example, the table shows deployment of 1,200 personnel for operations in Lebanon from 1982 through 1984. However, this appears to include only those Marine Corps troops that were on the ground in Lebanon, but excludes sailors on the Navy support ships that were also deployed in this operation.<sup>23</sup>

TABLE 5—U.S. DEPLOYMENTS AND TOTAL ACTIVE MILITARY PERSONNEL, 1960–2007

Year	Total active military personnel <sup>b</sup>	Deployed personnel		Total deployed as % of total active	Deployment
		Total <sup>a</sup>	Active		
1960 .....	2,490,000	900	900	0.1	Vietnam <sup>c</sup>
1961 .....	2,550,000	3,000	3,000	0.1	
1962 .....	2,690,000	11,000	11,000	0.4	
1963 .....	2,700,000	16,000	16,000	0.6	
1964 .....	2,690,000	23,000	23,000	0.9	
1965 .....	2,720,000	184,000	184,000	6.8	
1966 .....	3,230,000	385,000	385,000	11.9	
1967 .....	3,410,000	486,000	486,000	14.3	

<sup>20</sup> U.S. Department of Defense. Demographics: Profile of the Military Community. Available for the years 2003 to 2010 at <http://www.militaryhomefront.dod.mil/pls/psgprod/f?p=MHF:DETAIL0:0:::CID:20.20.60.70.0.0.0.0.0>.

<sup>21</sup> See, for example, the promisingly, but misleadingly, titled: Kane, T. 2004. Global U.S.

Troop Deployment, 1950–2003. The Heritage Foundation. October 27. accessed at <http://www.heritage.org/research/reports/2004/10/global-us-troop-deployment-1950-2003> on July 7, 2012.

<sup>22</sup> Belasco, A. 2009. Troop Levels in the Afghan and Iraq Wars, FY2001–FY2010: Cost and Other Potential Issues. Congressional Research Service.

July 2. Accessed at <http://www.fas.org/sgp/crs/natsec/R40682.pdf> on July 7, 2012.

<sup>23</sup> For example, the U.S.S. New Jersey provided offshore fire support during this operation; this ship alone has a crew of about 1,900. Thus, this source may use a "boots on the ground" definition.

TABLE 5—U.S. DEPLOYMENTS AND TOTAL ACTIVE MILITARY PERSONNEL, 1960–2007—Continued

Year	Total active military personnel <sup>b</sup>	Deployed personnel		Total deployed as % of total active	Deployment
		Total <sup>a</sup>	Active		
1968	3,490,000	536,000	536,000	15.4	
1969	3,450,000	475,000	475,000	13.8	
1970	2,980,000	335,000	335,000	11.2	
1971	2,630,000	157,000	157,000	6.0	
1972	2,360,000	24,000	24,000	1.0	
1973	2,230,000	50	50	0.0	
1974	2,160,000				
1975	2,100,000				
1976	2,080,000				
1977	2,070,000				
1978	2,060,000				
1979	2,030,000				
1980	2,050,000				
1981	2,080,000				
1982	2,110,000	10,000	10,000	0.5	Lebanon <sup>e</sup> , Grenada <sup>e</sup>
1983	2,120,000	1,200	1,200	0.1	Lebanon <sup>e</sup>
1984	2,140,000	1,200	1,200	0.1	
1985	2,150,000				
1986	2,170,000				
1987	2,170,000				
1988	2,140,000				
1989	2,130,000	27,000	27,000	1.3	Panama <sup>e</sup>
1990	2,050,000				
1991	1,990,000	560,000	476,000	28.1	Iraq (1) <sup>f</sup>
1992	1,810,000	25,800	25,800	1.4	Iraq OSW [f], Somalia <sup>e</sup>
1993	1,710,000	25,800	25,800	1.5	
1994	1,610,000	26,500	26,500	1.7	Somalia <sup>e</sup> , Rwanda <sup>e</sup> , Haiti <sup>e</sup>
1995	1,520,000	12,200	12,200	0.8	Somalia <sup>e</sup> , Haiti <sup>e</sup> , Bosnia <sup>e</sup>
1996	1,470,000	9,300	9,300	0.6	Haiti <sup>e</sup> , Bosnia <sup>e</sup>
1997	1,440,000	1,400	1,400	0.1	Iraq ONW <sup>f</sup>
1998	1,410,000				
1999	1,390,000	37,100	37,100	2.7	Kosovo <sup>f</sup>
2000	1,380,000				
2001	1,390,000	83,400	83,400	6.0	Afghanistan <sup>d</sup>
2002	1,410,000	21,100	21,100	1.5	
2003	1,430,000	237,600	178,200	16.6	Afghanistan [d], Iraq (2) <sup>g</sup>
2004	1,410,000	236,100	177,100	16.7	
2005	1,380,000	258,900	194,200	18.8	
2006	1,380,000	265,400	199,100	19.2	
2007	1,380,000	285,700	214,300	20.7	
Average	2,102,000	99,200	90,800	4.7	Overall, 1960–2007
	2,140,000	144,000	132,000	6.7	Deployment Years Only

<sup>a</sup> Total deployed personnel is equal to the active personnel plus Reserve and/or National Guard personnel.

<sup>b</sup> Kane, T. 2004. Global U.S. Troop Deployment, 1950–2003. The Heritage Foundation. October 27. Available at <http://www.heritage.org/research/reports/2004/10/global-us-troop-deployment-1950-2003> on July 7, 2012.

<sup>c</sup> American War Library. Vietnam War Allied Troop Levels 1960–73. Available at: <http://www.americanwarlibrary.com/vietnam/vwatl.htm> on July 7, 2012.

<sup>d</sup> Belasco, A. 2009. Troop Levels in the Afghan and Iraq Wars, FY2001–FY2010: Cost and Other Potential Issues. Congressional Research Service. July 2. Available at <http://www.fas.org/sgp/crs/natsec/R40682.pdf> on July 7, 2012.

<sup>e</sup> Sarafino, N.M. 1999. Military Interventions by U.S. Forces from Vietnam to Bosnia: Background, Outcomes, and “Lessons learned” for Kosovo. Congressional Research Service. May 20.

<sup>f</sup> U.S. Department of Defense, Deployment Health Clinical Center (DHCC): Deployments by Operation. Available at [http://www.pdhealth.mil/dcs/deploy\\_op.asp](http://www.pdhealth.mil/dcs/deploy_op.asp) on July 7, 2012.

<sup>g</sup> “Contingency Tracking System deployment file for Operation Enduring Freedom and Iraqi Freedom, as of: October 31, 2007.” Available at: <http://veterans.house.gov/Media/File/110/2-7-08/DoDOct2007-DeploymentReport.htm>.

OSW (Operation Southern Watch) and ONW (Operation Northern Watch) refer to operations in support of the Iraqi no-fly zones.

According to the Department of Defense reports on active duty military strengths, the number of troops (including Reserve and National Guard) deployed as part of overseas contingency operations deployments has steadily declined since 2007.<sup>24</sup> As of

December 31, 2008 there were 226,950 servicemembers deployed as part of an overseas contingency operation; by September 30, 2012 there were 146,712 total servicemembers deployed for such an operation.

Supplementing the deployment data with annual active military personnel

counts, the Department estimated the annual number and percent of military personnel deployed on average over the 1960 to 2007 period.<sup>25</sup> Over the entire 48-year period, each year the U.S. deployed on average about 99,200 of its

<sup>24</sup> Active Duty Military Personnel by Service by Region/Country. United States Department of Defense. Retrieved January 24, 2013. Available at:

<http://siadapp.dmdc.osd.mil/personnel/MILITARY/miltop.htm>.

<sup>25</sup> For the years available in the U.S. Department of Defense “Demographics” reports, the numbers of “Active Duty personnel” are consistent with the numbers of “Total Active Military Personnel” listed in Table 5.

2.1 million personnel active military force (4.7 percent) on operations that meet the definition of covered active duty. The overall average covers a wide variation in the timing, duration, and size of those operations; of the 48 years included in Table 5, in:

- 16 years, essentially no personnel were deployed (with the exception of 50 servicemembers in Vietnam in 1973);
- 18 years, 900 to 37,100 personnel were deployed, an average of 15,400 per year (0.8 percent of active servicemembers);
- 14 years (Vietnam and the two Iraq conflicts), deployments ranged from 83,400 to 560,000 personnel, an average of 320,400 per year (13.9 percent of active servicemembers).

Finally, with the exception of the Vietnam and second Iraq conflicts, most of the conflicts listed in Table 5 were for two years or less.

Based on the information provided in Table 5, and acknowledging the limitations of those data, the Department judged that the simple average of 99,200 deployed personnel does not adequately represent the typical number of service personnel on covered active duty in any given year for projecting the costs associated with this rule. The Department also calculated that, on average, 144,000 personnel per year were deployed in the 33 years in which a deployment occurred. Using this figure instead to represent average annual deployments on covered active duty provides a 45 percent cushion to account for data inconsistencies and omissions. Therefore, for the purposes of this analysis, the Department assumes an average of 144,000 military personnel are deployed per year on covered active duty.

Two additional adjustments to this estimate must be made:

- Qualifying exigency leave for eligible family members of National Guard and Reserve personnel was promulgated in 2008.
- Military personnel may deploy more than once in any given year; if their eligible family members use less than the entire allotment of leave on the first deployment (12 weeks), they may use some or all of the remaining leave on subsequent deployments that year.

Data on U.S. military deployments showed that 17 percent of personnel deployed to Iraq in 1991 were Reserve units, while 28 percent of personnel deployed to Iraq between 2003 and 2007 were Reserve or National Guard units.<sup>26</sup> Therefore, the Department adjusted the estimated number of personnel downward by 15 percent for 1991, and 25 percent for 2003 through 2007. Thus, the Department estimates that on average 132,000 active military personnel per year are deployed on covered active duty.

The Department used a Department of Defense news release on typical deployment lengths in the Iraq conflict by service (Army, one year; Navy and Marines, six months; Air Force, three months)<sup>27</sup> to estimate the average number of deployments per person. This average was weighted by the relative percent of active personnel by service deployed to Iraq (Army, 61 percent; Navy and Marines, 28 percent; Air Force, 11 percent)<sup>28</sup> to determine that the military would use 1.49 deployments to maintain one person in Iraq for one year. Thus, deployment of 132,000 personnel might require 197,000 actual deployments per year.

In the 2008 Final Rule, the Department estimated the joint probability that a servicemember will have one or more family members (parent, spouse, or adult child), that those family members will be employed at an FMLA-covered establishment, and

that they would be eligible to take FMLA leave under the qualifying exigency provision (see 2007 PRIA and Appendix A). Applying these joint probabilities to the 197,000 annual deployments, the Department estimates approximately 193,000 family members will be eligible to take FMLA leave to address qualifying exigencies. Military deployments represent a non-routine departure from normal family life to potentially long-term exposure to a high stress, high risk environment, often at relatively short notice. Therefore, the Department assumes the rate at which eligible employees take FMLA leave for this purpose will be twice the rate (about 16 percent) of those taking regular FMLA leave (7.9 percent). The Department does not assert that only 16 percent of family members will take leave for reasons related to the servicemember's deployment, but that 16 percent will use leave designated as FMLA leave for qualifying exigencies. Based on these assumptions, the Department estimates 30,900 family members will take FMLA leave annually to address qualifying exigencies.

In the 2008 Final Rule, the Department developed a profile of the "typical" usage of qualifying exigency leave over the course of a 12-month period for an eligible employee. 73 FR 68051. Under this leave profile, the typical employee will take a one week block of leave upon notification of the deployment of the servicemember, 10 days of unforeseeable leave during deployment, one week of foreseeable leave to join the servicemember while on rest and recuperation, and one week of foreseeable leave post deployment to address qualifying exigencies. *Id.* The revisions to the rule increase foreseeable leave to join a servicemember while the servicemember is on Rest and Recuperation leave. Table 6 summarizes the revised leave pattern.

TABLE 6—PROFILE OF QUALIFYING EXIGENCY LEAVE

Reason	Description	Days	Hours
Notice of Deployment .....	1 week unforeseeable .....	5	40
During Deployment .....	10 days unforeseeable .....	10	80
During Deployment, "Rest and Recuperation" .....	10 days foreseeable .....	10	80
Post Deployment .....	1 week foreseeable .....	5	40
<b>Total .....</b>		<b>30</b>	<b>240</b>

<sup>26</sup> Belasco, A. 2009. Troop Levels in the Afghan and Iraq Wars, FY2001–FY2010: Cost and Other Potential Issues. Congressional Research Service. July 2. Accessed at: <http://www.fas.org/sgp/crs/natsec/R40682.pdf> on July 7, 2012.

"Contingency Tracking System deployment file for Operation Enduring Freedom and Iraqi Freedom, as of: October 31, 2007." Accessed at:

<http://veterans.house.gov/Media/File/110/2-7-08/DoDOct2007-DeploymentReport.htm>.

<sup>27</sup> DOD News Briefing with Secretary Gates and Gen Pace from the Pentagon. April 11, 2007. Available at: <http://www.defense.gov/Transcripts/Transcript.aspx?TranscriptID=3928>. See also Powers, R. 2007. "Joint Chiefs Continue to Examine Deployment Lengths." April 14. Accessed at: <http://usmilitary.about.com/od/terrorism/a/deploylength.htm>.

<http://veterans.house.gov/Media/File/110/2-7-08/DoDOct2007-DeploymentReport.htm>.

<sup>28</sup> "Contingency Tracking System deployment file for Operation Enduring Freedom and Iraqi Freedom, as of: October 31, 2007." Accessed at: <http://veterans.house.gov/Media/File/110/2-7-08/DoDOct2007-DeploymentReport.htm>.



For the purpose of this analysis, the Department is assuming that the average employee will take 10 days of leave to be with their servicemember during rest and recuperation leave. While the Department proposed in the NPRM to increase the number of days of qualifying exigency leave an employee may take for the servicemember's Rest and Recuperation leave to coincide with the number of days provided the servicemember, up to 15 days, the Department does not have a basis at this time to estimate the percentage of servicemembers who would be granted 15 days of Rest and Recuperation or the probability that their family member(s) would join them for the entire Rest and Recuperation leave. Therefore, the Department assumes for the purpose of this analysis that a covered and eligible employee will take 10 days of qualifying exigency leave for the servicemember's Rest and Recuperation leave. The Department invited comment on the amount of Rest and Recuperation leave provided to service personnel and the extent to which employees would take an equal number of days of FMLA qualifying exigency leave to be with their servicemember family member. Several commenters, including the National Association of Letter Carriers, the North Carolina Justice Center, the Partnership, the Military Officers Association of America, Twiga, and the

Coalition confirmed that servicemembers are often granted 15 days of leave for Rest and Recuperation and that family members should be allowed to take an amount of leave that is equal to the amount granted to the servicemember. None of these commenters were able to provide any further information on the percent of servicemembers that are granted five, 10, or 15 days of leave, or the frequency with which family members join them or for how long; therefore, the Department will continue to use the midpoint of 10 days for this analysis. Similarly, because the Department has no data on which to base an estimate of the number of days of qualifying exigency leave that might be taken for parental care, it will continue to use 10 days of unforeseen leave during deployment for this analysis.

Based on this profile, the Department estimates that 30,900 eligible employees will take 926,000 days (7.4 million hours) of FMLA leave annually to address qualifying exigencies under the FY 2010 NDAA amendments. These estimates may vary from 770,000 days (6.2 million hours) if eligible employees average five days of leave to 1.1 million days (8.7 million hours) if they average 15 days of leave when a servicemember is on Rest and Recuperation leave.

The Department acknowledges that estimated qualifying exigency leave also

represents an average of periods with high levels of deployment and active conflict and periods with low or minimal deployments. Therefore, the Department supplements its analysis by considering a "heavy conflict" scenario and a "low conflict" scenario to capture the range of leave usage that may be expected in any given year in the future.

Drawing on the data in Table 5, for the purposes of these cost estimates, the Department defines the low conflict scenario as a year containing no deployment exceeding 40,000 servicemembers, while the heavy conflict scenario is one in which deployments exceed 40,000 servicemembers. Applying this standard to the data in Table 5, the average size of a deployment during the low conflict scenario is 15,400 troops, compared to 320,400 during a period of heavy conflict.

The Department applied the same probabilities of having eligible family members and patterns of leave usage as were used for the average analysis. Using this method, the Department estimates that 2,400 employees will take 72,000 days (576,500 hours) of leave for qualifying exigencies under the low conflict scenario, while 50,100 employees will take 1.5 million days (12 million hours) of leave during periods of heavy conflict. See Table 7.

TABLE 7—ESTIMATED QUALIFYING EXIGENCY LEAVE USAGE UNDER A RANGE OF CONFLICT SCENARIOS

Leave type	Covered service-members or veterans (1,000)	Number of eligible family or caregivers (1,000)	Number of leave takers (1,000)	Days of leave per year (1,000)	Hours of leave per year (1,000)	Leave events per year (1,000)
Low Conflict .....	15	15	2	72	576	31
Average Deployment .....	197	193	31	926	7,393	401
Heavy Conflict .....	320	313	50	1,503	12,023	651

b. Military Caregiver Leave

Military caregiver leave entitles an eligible employee who is the spouse, son, daughter, parent, or next of kin of a covered servicemember to take up to 26 workweeks of FMLA leave in a single 12-month period to care for a covered servicemember with a serious injury or illness. Under the FY 2010 NDAA amendments, the definition of covered servicemember is expanded to include a veteran "who is undergoing medical treatment, recuperation, or therapy for a serious injury or illness" if the veteran was a member of the Armed Forces "at any time during the period of 5 years preceding the date on which the veteran undergoes that medical treatment, recuperation, or therapy." The FY 2010

NDAA amendments define a serious injury or illness for a covered veteran as "a qualifying (as defined by the Secretary of Labor) injury or illness that was incurred by the member in line of duty on active duty in the Armed Forces (or existed before the beginning of the member's active duty and was aggravated by service in line of duty on active duty in the Armed Forces) and that manifested itself before or after the member became a veteran."

The amendments also expand the definition of serious illness or injury to include an injury or illness of a current member of the military that "existed before the beginning of the member's active duty and was aggravated by service in line of duty" and that may cause the servicemember to be unable to

perform the duties of his or her office, grade, rank, or rating. The Department does not attempt in this analysis to estimate the number of additional current servicemembers who may be covered under this expansion of the definition due to the lack of data to support reasonable assumptions on the potential size of this group. However, for the reasons discussed earlier in this preamble, the Department believes it is reasonable to conclude that the number of servicemembers entering the military with an injury or illness with the potential to be aggravated by service to the point of rendering the servicemember unable to perform the duties of his or her office, grade, rank, or rating is quite small due to the

selection process used by the Armed Forces.

To determine the number of eligible employees that may take FMLA leave as a result of the expansion of caregiver leave to family members of covered veterans, the Department first estimated the number of veterans likely to undergo medical treatment for a serious injury or illness, and the number of family members who are employed by a covered employer and who may be eligible to take FMLA leave to care for them. The Department reviewed several summaries of injuries and illnesses among military servicemembers to estimate the rate at which injuries that are sufficiently severe as to require medical care after separation from the military might occur.<sup>29</sup> A number of data limitations make the estimation of serious injury and illness rates problematic:

- The Department of Defense generally publishes data on the number of servicemembers killed or wounded in action, but little about non-combat injuries and illnesses.

- Except for the most severe injuries (e.g., amputations, severe burns, blindness), little is published about the nature or severity of illnesses and injuries.

After determining the number of servicemembers with serious injuries and illnesses separating from the military annually, the Department adjusts the estimate to account for servicemembers that were covered under the 2008 Final Rule and the percent of veterans likely to seek medical care after separation. This baseline number of servicemembers with serious injuries or illnesses differs from the estimate used in the 2008 Final Rule for several reasons. First, the definition of serious injury and illness

has expanded to include injuries or illnesses that existed prior to the servicemember joining the military that were exacerbated by active duty and to reflect the fact that injuries such as PTSD and TBI that manifest following separation from the military have been badly underreported in the past. Second, the analysis relies on improved data sources such as the distribution of servicemembers by VASRD rating. No commenters submitted data or alternative estimates of the numbers of servicemembers who will incur such injuries or illness requiring treatment; the Department reached this estimate based on the following information and analysis.

The Department first estimated the percent of servicemembers that might receive an injury or illness requiring care while in the service or after separation. In 2001, the Department of Veterans Affairs undertook a survey that showed 24 percent of veterans who served during the Gulf War era reported having a service-related disability rating.<sup>30</sup> Service-related disability ratings do not require that the servicemember is totally disabled; the rating might be less than 30 percent (or even zero in the case of a service-related injury that healed prior to separation) however, the mere fact that a servicemember has a rating indicates that a service-related injury occurred.<sup>31</sup>

The Department then examined deployment rates across different time periods. Table 5 indicates that servicemembers deployed during the Gulf War of 1991 account for about 28 percent of the total active military at that time. The same table shows that servicemembers deployed in Operations Enduring Freedom and Iraqi Freedom (Iraq (2)) comprise a smaller percentage

of the active military (roughly 20 percent). However, the Department believes this is an underestimate; because the second Iraq conflict lasted several years, it is likely that many in the active military not deployed at the time of the snapshot were deployed sometime during its duration; conversely, the first Iraq war was relatively brief, and personnel had a smaller likelihood of rotating into the war zone during its duration. Therefore, the Department believes that the percent of active military personnel who were deployed to Afghanistan or Iraq is higher than the calculations in Table 5 show, and that the true percent is similar to the first Iraq conflict: approximately 30 percent of active military personnel were deployed. The Department also concludes that the percent of veterans who received a service-connected disability rating from the first Gulf War era is a reasonable proxy for veterans of the period 2003 through 2007, about 25 percent (rounded up from 24 percent). Thus, the Department expects that at least 25 percent of active military personnel in the post-9/11 era will separate from the military with a disability rating.

Data provided by the Department of Veterans Affairs (VA) indicates that among the population of current veterans with a disability rating, 41.3 percent have a rating of 50 percent or greater (Table 8). Assuming the distribution of disability ratings among servicemembers who will separate from the military in years to come is the same as the distribution of disability ratings of current veterans, the Department estimates that 10 percent (25 percent × 40 percent = 10 percent) of separating servicemembers will have a disability rating of 50 percent or greater.

TABLE 8—2011 DISTRIBUTION OF CURRENT VETERANS BY DISABILITY RATING (DR)

Degree of disability (percent)	Number of current veterans with DR	Percent of current veterans with DR	Cumulative percent of current veterans with DR
0	11,423	0.3	0.3
10	780,978	23.8	24.1
20	440,188	13.4	37.5
30	373,677	11.4	48.9
40	322,635	9.8	58.7
50	214,552	6.5	65.3

<sup>29</sup>The most useful of these sources were: Dole, R. and D. Shalala. *Serve, Support, and Simplify*. Report of the President's Commission on Care for America's Returning Wounded Warriors. July, 2007.

Fischer, H. *United States Military Casualty Statistics: Operation Iraqi Freedom and Operation Enduring Freedom*. CRS Report for Congress. Congressional Research Service, March 25, 2009.

Tanielian, T. and L.H. Jaycox (eds.). *Invisible Wounds: Mental Health and Cognitive Care Needs of America's Returning Veterans*. Research Highlights. RAND Center for Military Health Policy Research. 2008.

U.S. Department of Defense. *DOD Military Injury Metrics Working Group White Paper*. December 2002.

<sup>30</sup>U.S. Department of Veterans Affairs. 2001 National Survey of Veterans. Accessed at: [http://www1.va.gov/VETDATA/docs/SurveysAndStudies/NSV\\_Final\\_Report.pdf](http://www1.va.gov/VETDATA/docs/SurveysAndStudies/NSV_Final_Report.pdf).

<sup>31</sup>Veterans Administration Service Related Disability Rating (VASRD). Accessed at: [http://myarmybenefits.us.army.mil/Home/BenefitLibrary/Federal\\_Benefits\\_Page/Veterans\\_Affairs\\_Schedule\\_for\\_Rating\\_Disabilities\\_\(VASRD\).html](http://myarmybenefits.us.army.mil/Home/BenefitLibrary/Federal_Benefits_Page/Veterans_Affairs_Schedule_for_Rating_Disabilities_(VASRD).html).

TABLE 8—2011 DISTRIBUTION OF CURRENT VETERANS BY DISABILITY RATING (DR)—Continued

Degree of disability (percent)	Number of current veterans with DR	Percent of current veterans with DR (percent)	Cumulative percent of current veterans with DR
60 .....	267,838	8.2	73.4
70 .....	247,636	7.5	81.0
80 .....	192,546	5.9	86.8
90 .....	112,824	3.4	90.3
100 .....	320,059	9.7	100.0

Source: Department of Veterans Affairs.

However, it is possible that a servicemember may not manifest the symptoms of a serious injury or illness at the time of his or her separation, and therefore, not go through the VA disability rating process prior to leaving the service. In 2008, the RAND organization published a report entitled *Invisible Wounds: Mental Health and Cognitive Care Needs of America's Returning Veterans* (Tanielian and Jaycox, 2008) that summarized the results from a survey of servicemembers,<sup>32</sup> and found that among servicemembers who returned from Operation Enduring Freedom and Operation Iraqi Freedom:

- 11.2 percent met the criteria for post-traumatic stress disorder (PTSD) or depression,
- 12.2 percent had likely experienced a traumatic brain injury (TBI),
- 7.3 percent had experienced both a TBI and either PTSD or a TBI and depression, and
- Roughly 50 percent of these servicemembers sought treatment for their symptoms within one year of returning from overseas.

Furthermore, symptoms of such injuries may not appear until several years after the injury was experienced, have traditionally been badly underreported, and are not well understood. Due to the high visibility research performed in this area, and recent initiatives undertaken by the Department of Veterans Affairs,<sup>33</sup> it is reasonable to assume a much higher percentage of these types of injuries will be diagnosed and reported than in previous cohorts of veterans.

Consequently, the Department must also account for veterans who may suffer a serious injury or illness that manifested after their separation from the military. Evidence from the RAND report indicates that approximately 30 percent of servicemembers who were deployed to Afghanistan and Iraq experienced a TBI or met the criteria for PTSD or depression. Data on deployment show that roughly 30 percent of active military personnel were deployed to Afghanistan or Iraq. Assuming that such injuries would result in the equivalent of a Veterans Affairs Schedule for Rating Disabilities (VASRD) rating of at least 50 percent, and did not manifest until after separation from the military, it is reasonable to estimate that 10 percent ( $0.3 \times 0.3 = 0.09$ , then rounding up) of these veterans incurred such an injury or illness that manifested after separation from the military. The Department added this 10 percent of veterans who suffer a post-separation serious injury or illness to the 10 percent of military members who separate from the military with a VASRD rating. Therefore, the estimated percent of veterans likely to have a service-related injury or illness that might require treatment after separation is 20 percent.

In summary, for the purposes of this analysis, the Department assumes that 20 percent of servicemembers may separate from the military with an injury or illness requiring treatment. This may be an overestimate. The Department assumes that of the additional 10 percent of servicemembers who experience a serious injury or illness that might not manifest until well after the event occurs (e.g., PTSD, TBI, or depression), none go through the VA disability rating process. We also assume that all eventually seek treatment within the five-year period as defined in this Final Rule. Both of these assumptions are very conservative, and therefore, likely overestimate the number of servicemembers who may

suffer a serious injury or illness as defined by this rule.

This estimate suffers from a number of qualifications and limitations:

- This injury rate was based on data for military personnel that had a high likelihood of experiencing active combat while in the military; to the extent that future cohorts experience less combat, the injury rate may well be significantly smaller.

- It is not clear that all injuries included in this figure will be severe enough to require treatment.

- Even if the injury is severe, it is unclear that the servicemember will seek treatment; it has long been known that the treatment rate for mental health conditions such as depression amongst the general population is less than 100 percent.

- This estimate does not account for other injuries that might require treatment; however, the Department could find little data on which to base an estimate of such injuries.

- This estimate abstracts from the requirement that treatment must occur within five years of separation for the injury to be eligible for FMLA caregiver leave. Thus, we implicitly assume 100 percent will seek treatment within the five-year period as defined in this Final Rule.

The Department used projections of military personnel separations for fiscal years 2010 through 2036 from the Department of Veterans Affairs as the basis for the average number of personnel (208,000) who might newly seek medical care in a given year, see Table 9.<sup>34</sup> We did not model a medical

<sup>32</sup> A more concise discussion of the findings is available in a RAND research brief: Tanielian, T. et al. 2008 *Invisible Wounds: Mental Health and Cognitive Care Needs of America's Returning Veterans*. Pages 1–3. Accessed at: [http://www.rand.org/pubs/research\\_briefs/RB9336.html](http://www.rand.org/pubs/research_briefs/RB9336.html).

<sup>33</sup> See e.g., DeKosky, S.T., M.D. Ikonovic, and S. Gandy. 2010. *Traumatic Brain Injury—Football, Warfare, and Long-Term Effects*. The New England Journal of Medicine. 363:14. September 30.

U.S. Department of Veterans Affairs. 38 CFR Part 3. Post Traumatic Stress Syndrome. Interim Final Rule. *Federal Register*, Vol. 73, No. 210, p. 64208.

<sup>34</sup> U.S. Department of Veterans Affairs. 2008. *Demographics: Veteran Population Model 2007*. Table 8S. January. Accessed at: <http://www1.va.gov/VETDATA/Demographics/Demographics.asp>. As a check, the FY2010 number of separations are similar to those in the U.S. Department of Defense "Demographics 2009" report (see tables 2.66 and 4.68 for active and reserve separations, respectively). Note: the average number of separations per year in Table 9 has increased from the number reported in the NPRM because the Department now includes Coast Guard separations in the calculation.

care usage pattern for these servicemembers. Because we project this to be an average annual “stream” of cohorts of separating servicemembers, as long as we assume each year’s cohort follows the same usage pattern, the primary factor governing the number of servicemembers requiring treatment is the total number in each cohort that will seek treatment within the five year period as defined in this Final Rule.<sup>35</sup> Since not all veterans will seek medical treatment in the first year following separation, a true time series representation of the number of veterans

seeking medical care would show a “ramp-up” over the first few years until the average annual steady state stream comprised of overlapping multiple cohorts of veterans is reached. That is, we model the steady state stream of veterans seeking medical care as if it starts in year 1; by ignoring the “ramp up” we have over-estimated the number of veterans seeking care and the number of family members taking military caregiver leave in that year. If all cohorts of separating servicemembers follow the same pattern of care usage, then until the steady state is reached, this

overestimate of leave usage is mathematically equivalent to starting the program four years prior to the promulgation date. By using the simplifying assumption of a steady state stream of veterans using the program, we have implicitly already included demand from prior cohorts in the analysis, including those veterans who will benefit from the Final Rule’s exclusion of the period between the enactment of the FY 2010 NDAA amendments and the effective date of this Final Rule in calculating the five year period post-discharge.

TABLE 9—MILITARY SEPARATIONS 2010–2036 BY BRANCH AND PERIOD

Fiscal year	Separations by branch (1,000) <sup>a</sup>						
	Army	Navy	Air Force	Marines	Reserve Forces <sup>b</sup>	Coast Guard <sup>c</sup>	Grand total
2010	77.8	46.9	37.1	28.9	48.3	4.4	243.4
2011	78.4	46.8	37.0	28.8	28.1	4.5	223.6
2012	78.8	46.6	36.9	28.7	18.1	4.6	213.7
2013	79.6	46.7	37.0	28.7	8.0	4.8	204.8
2014	80.0	47.0	37.2	28.8	8.1	4.8	205.7
2015	79.5	46.7	36.9	28.6	8.0	4.8	204.5
2016	79.2	46.5	36.8	28.5	8.0	4.8	203.8
2017	79.6	46.7	37.0	28.6	8.0	4.8	204.8
2018	80.1	47.0	37.2	28.8	8.1	4.8	205.9
2019	80.2	47.1	37.3	28.8	8.1	4.8	206.3
2020	80.2	47.1	37.3	28.8	8.1	4.8	206.2
2021	80.3	47.2	37.4	28.8	8.1	4.8	206.6
2022	81.0	47.6	37.7	29.0	8.1	4.9	208.3
2023	81.0	47.5	37.7	29.0	8.1	4.9	208.3
2024	80.4	47.2	37.5	28.8	8.1	4.8	206.8
2025	79.5	46.7	37.1	28.4	8.0	4.8	204.4
2026	79.6	46.7	37.1	28.5	8.0	4.8	204.7
2027	80.0	46.9	37.3	28.6	8.0	4.8	205.5
2028	79.9	46.9	37.3	28.5	8.0	4.8	205.3
2029	79.5	46.6	37.1	28.4	8.0	4.8	204.3
2030	79.9	46.9	37.3	28.5	8.0	4.8	205.5
2031	80.1	47.0	37.4	28.6	8.0	4.8	206.0
2032	80.0	46.9	37.3	28.5	8.0	4.8	205.5
2033	79.9	46.8	37.3	28.4	8.0	4.8	205.2
2034	79.9	46.9	37.3	28.5	8.0	4.8	205.4
2035	79.9	46.8	37.3	28.4	8.0	4.8	205.2
2036	79.9	46.8	37.3	28.4	8.0	4.8	205.2
Average	.....	.....	.....	.....	.....	.....	208.0

<sup>a</sup> Includes only separations from the five armed services; excludes separations from the Public Health Service (PHS) and National Oceanic and Atmospheric Administration (NOAA).

<sup>b</sup> Reserve Forces include only those who have had active Federal military service (other than for training) as a result of their membership in the reserves or National Guard. Reserve forces with prior active military service in the regular military, are classified according to the branch (Army, Navy, Air Force, Marines) in which they served while in the regular military, notwithstanding their subsequent service in the Reserve Forces.

<sup>c</sup> Coast Guard separations estimated from VETDATA “Non-Defense” separations by determining the current proportion of non-defense personnel in the Coast Guard (84.8%) versus NOAA and PHS.

Source: <http://www.va.gov/VETDATA/Demographics/Demographics.asp>.

The Department is defining a *serious injury or illness of a veteran* as an injury or illness incurred in the line of duty on active duty (or a pre-existing injury or illness aggravated by service in line of

duty on active duty) that manifests itself before or after the member became a veteran and is either: a continuation of a serious injury or illness that was incurred or aggravated when the

covered veteran was a member of the Armed Forces and rendered the servicemember unable to perform the duties of the servicemember’s office, grade, rank, or rating; a physical or

<sup>35</sup> For example, compared to a single cohort separating from the military over 5 years, modeling the separation of that same cohort over 10 years will result in fewer servicemembers from that cohort seeking treatment in any given year. However,

modeling separation over 10 years will result in servicemembers from more cohorts seeking treatment in a given year. Thus, in a steady state, the one effect will cancel out the other. Different models of separation patterns will, however, result

in different numbers of treatments prior to reaching the steady state, and the net present value of the stream of treatments.

mental condition for which the covered veteran has received a VASRD of 50 percent or greater and such VASRD rating is based, in whole or in part, on the condition precipitating the need for military caregiver leave; a condition that substantially impairs the veteran's ability to secure or follow a substantially gainful occupation by reason of a disability or disabilities related to military service, or would do so absent treatment; an injury, including a psychological injury, on the basis of which the covered veteran has been enrolled in the Department of Veterans Affairs Program of Comprehensive Assistance for Family Caregivers. Assuming an annual cohort of 208,000 personnel separate from the military each year, and that about 20 percent of those personnel incurred an injury or illness in service that manifests before or after the servicemember became a veteran, the Department estimates that approximately 42,260 military personnel separating from the military (20.3 percent of 208,000) per year might have family members who may take FMLA caregiver leave, if the regulatory requirements are met. This estimate may be over-inclusive due to data limitations on the severity of service-related injuries and illnesses.

Based on the RAND findings, the Department assumes that about 50 percent of servicemembers will seek treatment as a veteran (*i.e.*, not all the injuries will be severe enough to require treatment beyond active service in the military). Thus, the number of injured servicemembers separating from the military per year who may seek

treatment and with family that may be eligible for caregiver leave is equal to 50 percent of 42,260, or 21,130 per year.<sup>36</sup> Using the previously described calculations of the joint probabilities that a servicemember will have one or more family members eligible for FMLA (*see* Appendix A), the Department estimates that those 21,130 veterans and servicemembers will have 26,908 eligible family members who may qualify for FMLA and act as caregivers.<sup>37</sup> The Department assumes that at least 26 percent of eligible employees, or an average of 7,000 per year, will take FMLA leave to care for a veteran undergoing medical treatment for a serious injury or illness. This assumption is based on a survey of injured servicemembers concerning the impact of their needs on their caregivers. The survey found that about 16 percent of working caregivers used "unpaid leave from their job" and 10 percent "cut back their hours" to care for the servicemember.<sup>38</sup> However, the Department is aware that it is not drawing from a more comprehensive data source and acknowledges the limitations of its estimate. Nevertheless, because the commenters provided no additional data in response to the request for information about this issue in the NPRM, the Department continues to use the best information available.

In the 2008 Final Rule, the Department developed a profile of the "typical" usage of military caregiver leave over the course of a 12-month period for an eligible employee. Under this profile of leave, the typical employee will take a block of four

weeks of unforeseeable leave upon notification of the serious injury or illness, a second block of two weeks of unforeseeable leave following transfer of the covered servicemember to a rehabilitation facility, two one-week blocks of unforeseeable leave for unanticipated complications, and 40 individual days of foreseeable leave to care for the covered servicemember. 73 FR 68051.

This profile is based on a typical leave pattern of an eligible employee caring for an injured or ill servicemember on active duty; for the purpose of this analysis, the profile was adjusted to capture a likely leave pattern for employees taking leave to care for a covered veteran. In this case, the nature of the serious injury or illness is expected to be different from those encountered during active duty. The Department assumes an injury to an active duty servicemember that results in FMLA caregiver leave is likely to be a sudden, severe injury, which necessitates a large block of leave for the employee to travel to be at the bedside of the injured servicemember. Conversely, ongoing treatment for an existing injury or diagnosis and then treatment of an emerging injury or illness (*e.g.*, PTSD, TBI) might call for frequent but short periods of leave for the employee to take the servicemember to appointments and provide other ongoing support. Adjusting the leave profile to account for these differences generates a leave pattern such as that summarized in Table 10.

TABLE 10—PROFILE OF MILITARY CAREGIVER LEAVE—VETERANS

Reason	Description	Days	Hours
Diagnosis, therapy, or recuperation .....	1 week unforeseeable .....	5	40
Travel to appointments and other errands .....	50 days foreseeable .....	50	400
Total .....	.....	55	440

<sup>36</sup> This number accounts for the 14,000 servicemembers whose family members are expected to take military caregiver leave while the servicemember is still in the military as well as the approximately 3,700 participants in the Veterans Affairs Program of Comprehensive Assistance for Family Caregivers. For reasons discussed above, the Department now estimates that 42,260 servicemembers are likely to separate having had injuries or illnesses that would make them eligible for military caregiver, not just the 14,000 servicemembers per year who might require treatment while still on active duty (as estimated in the 2008 rulemaking). Under the proposed rule, the Department erroneously assumed that it had to account for the additional caregiver leave that might have occurred while on active duty due to the

changed baseline estimate. However, although the baseline estimate of eligible servicemembers is now larger, this rule makes no change to caregiver leave while those servicemembers are on active duty. In this rulemaking the Department now only accounts for caregiver leave that occurs after separation and therefore assumes 50 percent of separating servicemembers will require care, instead of 1.5 times the number as it did in the proposed rule. The Department believes that the military's stringent screening procedures result in the intake of few recruits with pre-existing injuries or illnesses that might be aggravated by service. Absent any data on servicemembers with such pre-existing conditions, the Department believes its conservative assumptions used to estimate the number of eligible

caregivers (and the rounding up of those estimates) adequately accounts for these servicemembers.

<sup>37</sup> The Department made one modification to the joint probabilities used for caregiver leave. In addition to family members such as parents, spouses, and adult children, designated "next of kin" are also eligible to take military caregiver leave under FMLA. The Department accounted for this difference by assuming all servicemembers have at least one potential caregiver eligible for FMLA leave.

<sup>38</sup> Christensen et al. Economic Impact on Caregivers of the Seriously Wounded, Ill, and Injured. CNA, April 2009. Available at: <http://www.cna.org/sites/default/files/research/D0019966.A2.pdf>.

Based on this profile, the Department estimates that 7,000 eligible employees will take 385,000 days (3.1 million hours) of FMLA leave annually to act as a caregiver for a veteran who is undergoing treatment for a serious illness or injury. For comparative

purposes, if the definition of serious injury or illness was set more stringently to include disability ratings of 60 percent or greater, then the Department estimates that about 6,400 eligible employees would take 354,000 days (2.8 million hours) of FMLA leave;

if the definition was set more inclusively to include disability ratings of 30 percent or greater, then 8,800 eligible employees would take 485,000 days (3.9 million hours) of FMLA leave. See Table 11.

TABLE 11—ESTIMATED MILITARY CAREGIVER LEAVE USAGE UNDER DIFFERENT DEFINITIONS OF SERIOUS INJURY OR ILLNESS

Leave type	Covered service-members or veterans (1,000)	Number of eligible family (1,000)	Number of leave takers (1,000)	Days of leave per year (1,000)	Hours of leave per year (mil.)	Leave events per year (1,000)
SII VASRD 60%+ .....	19.4	24.7	6.4	354	2.8	328
SII VASRD 50%+ .....	21.1	26.9	7.0	385	3.1	357
SII VASRD 30%+ .....	26.6	33.9	8.8	485	3.9	450

2. Airline Flight Crew FMLA Leave

The changes to the FMLA eligibility requirements for airline flight crew employees do not alter the number of covered employers in the airline industry but increase the number of pilots, co-pilots, flight attendants and flight engineers who are eligible to take FMLA leave, and as a result, will likely increase the total number of FMLA leaves taken by these employees in the airline industry.<sup>39</sup> The amendment changes eligibility such that an airline flight crew employee meets the hours of service requirement if, during the previous 12-month period, he or she has worked or been paid for not less than 60 percent of the applicable total monthly

guarantee (or its equivalent), and worked or been paid for not less than 504 hours, not including personal commute time, or time spent on vacation, medical, or sick leave. Additionally, the rule establishes a bank of 72 days of FMLA leave (156 days for military caregiver leave) for flight crew employees to use in full day increments, and establishes new recordkeeping requirements for the airline industry.

The Department estimated the profile of covered employers in the “Air Transportation” industry, the number of airline flight crew employees who would be eligible for FMLA leave, and the number of leaves they may take. The profile of covered employers, see Table

12 below, was developed by estimating the proportion of NAICS code 48 classified as “Air Transportation” (NAICS 481) in each size class from the 2006 Statistics of U.S. Businesses at the 6-digit NAICS level. This proportion was multiplied by the total number of establishments, firms, employment and payroll in NAICS 48 according to the 2008 BLS special tabulations. Next, employers with fewer than 50 employees were dropped from the profile; as described below, the Department did not attempt to make an adjustment for establishments with fewer than 50 employees that are owned by firms with more than 50 employees in a 75 mile area for this sub-industry.

TABLE 12—2008 COVERED EMPLOYERS IN AIR TRANSPORTATION

Size class (employees)	Firms	Number of establishments	Employment	Annual payroll (\$ mil.)	Estimated revenues (\$ mil.)	Estimated net income (\$ mil.)
50 to 99 .....	118	184	5,098	\$266	\$742	\$4.2
100 to 499 .....	113	544	16,577	919	2,370	23.3
500+ .....	135	2,204	439,315	24,905	70,922	2,295
Total .....	366	2,932	460,990	26,090	74,033	2,323

Source: BLS Special Tabulations, 2008; and Statistics of U.S. Businesses, 2006

Based on conversations with experts in the airline industry, the Department assumes that all potentially eligible airline flight crew employees are employed at a covered worksite. In general, flight crew members are scheduled for flights from a home base, or domicile. A domicile would not only include the airline flight crew employees, but the non-flight crew employees as well; therefore, the

interviewees observed that for most carriers it was very unlikely that airline flight crew employees would be employed at a domicile with fewer than 50 total employees.<sup>40</sup> Next, the Department determined the total number of airline flight crew employees employed in air transportation from the BLS Occupational Employment Statistics for 2008; in 2008 there were about 162,200 airline flight crew

employees. This includes pilots, co-pilots, flight engineers, and flight attendants.

The next step was to determine the proportion of those airline flight crew employees who will be eligible for FMLA leave. Crew members who are paid for 50 to 60 hours per month will, over the course of a 12-month period, be paid for 600 to 720 hours and they will easily meet the hours of service required

<sup>39</sup>The FAA defines a flight crew member as “A pilot, flight engineer, or flight navigator assigned to duty in an aircraft during flight time.” Available at:

<http://www.faa-aircraft-certification.com/faa-definitions.html>.

<sup>40</sup>Rob DeLucia. 2010. Interview with Rob DeLucia of AIR Conference (now A4A), Calvin

Franz and Lauren Jankovic, both of ERG. Janet Zweber. 2010. Interview with Janet Zweber of U.S. Airways Pilots Association, Calvin Franz and Lauren Jankovic, both of ERG.

for eligibility under the AFCTCA. According to sample data provided by the industry, about 80 percent of American Airlines flight attendants are paid for 50 or more hours per month, and this is considered reasonably representative of industry patterns.<sup>41</sup> While a similar distribution of paid hours for pilots is not available, the FAA indicates that most pilots are paid for an average of 75 hours per month; based on this observation, the Department assumes that a similar proportion of pilots, 80 percent, would reach the hours of service required for eligibility. Based on these estimates, about 129,760 airline flight crew employees may be eligible to take FMLA leave.

Many airlines have already incorporated FMLA-type provisions in collective bargaining agreements with pilots and flight attendants. In terms of the costs associated with the number of leaves resulting from the changes, it is important to consider the proportion of airline flight crew employees already taking FMLA-type leave under collective bargaining agreements. Based

on a review of the current FMLA-type leave policies in the labor contracts for 19 air carriers, the Department finds that about 20 percent of pilots and 35 to 40 percent of flight attendants are covered and eligible for FMLA-type leave policies.<sup>42</sup> Assuming that 80 percent of pilots and 63 percent of flight attendants are not currently covered by FMLA-type policies, the Department estimates, as outlined in Table 13, that, of the 129,760 airline flight crew employees that will be eligible, 90,560 are not already covered by an FMLA-type leave policy under a collective bargaining agreement.

Because there is little information available on the FMLA-type leave usage patterns of airline flight crew employees, the Department assumes that flight attendants will use FMLA leave at a similar rate to the rest of the population. Based on interviews with experts in the airline industry, pilots (also co-pilots and flight engineers) tend to use less FMLA-type leave due to different demographic needs and the availability of other types of paid leave.<sup>43</sup> The 2008 PRIA extrapolated

leave usage rates from surveys of FMLA leave usage to estimate expected leave use among the general population for 2007; the Department further extrapolated this number to estimate an expected leave usage rate of 7.9 percent of eligible employees and applied this rate to the number of eligible flight attendants not covered by a collective bargaining agreement.<sup>44</sup> Given that pilots use less FMLA-type leave, the Department used a rate of five percent in its calculation of the estimated number of eligible pilots not covered by a collective bargaining agreement. Based on these estimates and assumptions, just under 6,000 flight attendants, pilots, co-pilots, and flight engineers will take new FMLA leaves under the changes. Assuming that airline flight crew employees will take approximately the same number of leaves per 12-month period as the general population, the Department estimates that each individual will take 1.5 leaves, for a total of 8,930 leaves.<sup>45</sup> Table 13 summarizes the estimates developed in this section.

TABLE 13. ESTIMATED FMLA USAGE BY FLIGHT CREWS

Flight crew	Number of crew <sup>a</sup>	Number of eligible crew <sup>b</sup>	Eligible crew not covered by CBA FMLA-type policy <sup>c</sup>	Eligible crew, not covered by CBA that will take leave <sup>d</sup>	Number of new FMLA leaves <sup>e</sup>
Pilots .....	64,800	51,840	41,470	2,070	3,110
Flight Attendants .....	97,400	77,920	49,090	3,880	5,820
Total .....	162,200	129,760	90,560	5,950	8,930

**Sources:** BLS Occupational Employment Statistics, May 2008, Scheduled Air Transportation; CONSAD Research Corporation, December 7, 2007.

<sup>a</sup> Number of pilots includes: pilots, co-pilots and flight engineers (532011); and commercial pilots (532012)

<sup>b</sup> Eligibility based on estimated proportion of crew members (80%) meeting hours of service requirement.

<sup>c</sup> Based on a sample of CBA for flight attendants about 35% to 40% are currently covered by an FMLA-type provision such that most are eligible to take leave (we assumed a point estimate of 37% for the calculation); for pilots about 20% are currently covered by an FMLA-type provision such that they are eligible to take leave.

<sup>d</sup> Flight attendants take leave at same rate as other industries (7.9%); pilots and other crew use slightly less FMLA leave (5%).

<sup>e</sup> Individuals taking FMLA leave average 1.5 leaves per year.

**F. Costs**

This section describes the costs associated with the changes to FMLA, including: regulatory familiarization, employer and employee notices, certifications, and other costs.

**1. Regulatory Familiarization**

In response to the changes to the FMLA, each employer will need to review the changes and determine what revisions are necessary to their policies, obtain copies of the revised FMLA poster and templates for required notices and certifications, and update their handbooks or other leave-related

materials to incorporate the changes (see General Notice below). This is a one-time cost to each employer, calculated as two hours at the loaded hourly wage of a Human Resources (HR) staff member in the airline industry and one hour in all other industries to complete the tasks described above.<sup>46</sup> Industries

<sup>41</sup> Table "AA Flight Attendant Block Hours and Paid Hours" provided by Interviewee, Rob DeLucia, 2010. Interview with Rob DeLucia of AIR Conference (now A4A), Calvin Franz and Lauren Jankovic, both of ERG. Table available at: [http://www.aanegotiations.com/documents/AAFACHarts\\_7.8.10.pdf](http://www.aanegotiations.com/documents/AAFACHarts_7.8.10.pdf); last accessed on July 7, 2012.

<sup>42</sup> Based on a review of excerpts from the collective bargaining agreements of 19 airlines transmitted to the Department by Steve Schembs,

Association of Flight Attendants—CWA, on January 19, 2010.

<sup>43</sup> Rob DeLucia, 2010. Interview with Rob DeLucia of AIR Conference (now A4A), Calvin Franz and Lauren Jankovic, both of ERG. Janet Zweber, 2010. Interview with Janet Zweber of U.S. Airways Pilots Association, Calvin Franz and Lauren Jankovic, both of ERG.

<sup>44</sup> The extrapolation is used because the survey was performed relatively soon after FMLA was enacted; over time, as employee knowledge of

FMLA provisions has grown, presumably so has FMLA usage.

<sup>45</sup> CONSAD Research Corporation, December 7, 2007

<sup>46</sup> The loaded hourly wage is the regular hourly wage multiplied by 1.3 to account for payroll taxes and any employee benefits. For this analysis we used a loaded hourly wage of about \$27 per hour based on a comparison of two occupations: 43–4161 Human Resources Assistant (loaded hourly wage \$24), and 13–1078 Human Resources Training and



other than the airline industry will need less time for this task because there is no need for them to review the components of the rule pertaining to flight crews and they are already familiar with the requirements of the FMLA, including the FY 2008 NDAA amendments to the FMLA that initially created the military family leave provisions. In the 2008 Final Rule, the Department estimated the FY 2008 NDAA amendments would involve two hours for regulatory familiarization. 73 FR 68047. Because the FY 2010 NDAA amendments are simply an expansion of provisions with which the employers are already familiar, the Department believes one hour is appropriate for that component. The Department requested comment on the suitability of the assumption that regulatory familiarization will require two hours for the airline industry and one hour for all other industries but received few comments on this issue and found no data to justify revising these assumptions. See the Summary of Public Comments for a more detailed discussion of the comments.

## 2. Employer Notices

Under the FMLA, as described in § 825.300, employers are required to provide certain types of notices to employees including FMLA eligibility, employee rights and responsibilities, and employee usage of leave. The estimated time to complete each notice is based on the PRA contained in the 2008 Final Rule. 73 FR 68040.

a. *General Notice.* Every covered employer must provide general notice of the FMLA provisions to all employees; this notice may be provided in employee handbooks or other benefits and leave materials or as a one-time notice to new employees. For the purpose of this analysis, the cost associated with the changes will be a one-time cost to each employer to update the notice provided and is included under regulatory familiarization costs above.

b. *Eligibility Notice and Rights and Responsibilities Notice.* An employer is required to notify an employee of his or her eligibility to take FMLA leave when an employee requests FMLA leave or the employer becomes aware that an employee's leave may be for an FMLA-qualifying reason. The notice must state whether or not the employee is eligible and, if not, the reason the employee is not eligible. Along with the eligibility notice, the employer must include a discussion of employee rights and

obligations, that leave may be designated as FMLA, the applicable 12-month period for leave, certification requirements, and other key details. The cost of these combined notices is calculated as 10 minutes at the loaded hourly wage of an HR staff member to process each notice.

c. *Designation Notice.* The employer is required to determine if leave taken by the employee is for an FMLA-qualifying reason and will be designated and counted as FMLA leave and provide written notice to the employee of this determination. Notice must be provided even if the employer determines that the leave will not be designated as FMLA, and only one notice is required per FMLA reason per 12-month period. The cost of this type of notice is calculated as 10 minutes at the loaded hourly wage of an HR staff member to process each notice.

## 3. Certifications

Under the FMLA, as described in § 825.305, employers are allowed to request certification to support an employee's need for FMLA leave due to his or her own or a family member's serious health condition, the serious injury or illness of a covered servicemember, a qualifying exigency, or to verify an employee's fitness for duty after an absence due to the employee's own health condition.<sup>47</sup> In addition, an employer, at its own expense and subject to certain limitations, may also require an employee to obtain a second and third medical opinion. The costs associated with these certifications include: Employer cost to request, review, and verify the certification and second and third opinions, and employee cost to obtain the certification from the designated authority.

a. *Medical Certification.* This type of certification may be requested of employees who take FMLA leave for their own serious health condition or that of a family member and is obtained from the health care provider. This is a recurring cost to both the employee and the employer for each FMLA leave event that is required to have medical certification. The cost to the employee is calculated as the cost of the visit to the health care provider completing the

<sup>47</sup> An unknown percent of employers require employees to periodically recertify their need for FMLA leave. The Department does not have any data on the percent of employers that require certification, and believe the percent of employers that require recertification is a small percent of those that require certification. Therefore the Department has not attempted to estimate the number of employers that require recertification or the costs associated with it; we expect that these costs are small.

certification, assumed to be approximately \$50 per visit.<sup>48</sup> The cost to the employer is 30 minutes at the loaded hourly wage of an HR staff person to review and verify each certification. The changes in this Final Rule will only impact the usage of FMLA leave for the employee's own or the employee's family member's serious health condition for airline flight crew employees; therefore, for the purposes of this analysis, the additional costs of the changes will only accrue to airline flight crew employees and airline industry employers. (The cost for medical certification for military caregiver leave is discussed below.)

Under the Final Rule the employer may seek a second or third opinion for certification of a serious injury or illness of a covered servicemember if the original certification was obtained from a health care provider other than: A DOD health care provider, a VA health care provider, a DOD TRICARE network authorized private health care provider, or a DOD non-network TRICARE authorized private health care provider. The number of employers able to seek additional opinions on certifications under these circumstances is likely very close to zero, as most current military members and recently separated veterans rely on one of the aforementioned health care providers for care. As a result, the Department did not estimate these costs, which are expected to be minimal.

b. *Qualifying Exigency.* Employees taking FMLA leave for a qualifying exigency may be asked to provide a copy of the relevant military orders or other documentation, and a copy of Form WH-384 Certification of Qualifying Exigency to their employers to substantiate their need for leave. This is a recurring cost to the employer for each FMLA qualifying exigency leave for which the employer requires the employee to provide certification. The cost is calculated as 20 minutes at the loaded hourly wage of an HR staff person to review and verify each certification.

c. *Military Caregiver.* Employees taking FMLA military caregiver leave to care for a covered servicemember with a qualifying illness or injury may be asked to provide medical certification of the condition from an authorized health care provider. This is a recurring cost to both the employee and the employer for each FMLA military caregiver leave event for which the employer requires medical certification. The cost to the employee is calculated as the cost of the visit to the health care provider

<sup>48</sup> CONSAD, December 2007.

completing the certification, assumed to be approximately \$50 per visit.<sup>49</sup> The cost to the employer is 30 minutes at the loaded hourly wage of an HR staff person to review and verify each certification. For the purposes of this analysis, these costs accrue to employees taking FMLA military caregiver leave to care for a covered veteran with a qualifying illness or injury and their employers.

d. *Fitness for Duty.* For certain occupations, employers may desire certification from a medical professional that an employee is well enough to fulfill their duties following an FMLA leave for the employee's own serious health condition. Under prescribed circumstances, an employer may request a fitness-for-duty certification. The cost to the employee is calculated as the cost of the visit to the health care provider completing the certification, assumed to be approximately \$50 per visit.<sup>50</sup> The cost to the employer is 30 minutes at the loaded hourly wage of an HR staff person to review and verify each certification. For the purposes of this analysis, the additional costs of the changes will only accrue to airline flight crew employees and airline industry employers.

#### 4. Other Employer Costs

The FMLA includes employer recordkeeping requirements but those costs are not addressed here. Employers must continue to keep and maintain records under the Final Rule as they are required to do so under the current regulations. Additionally, while the Final Rule implements the statutory amendments that more broadly cover airline flight crew employees, the Department expects that employers in the airline industry have already been tracking hours to comply with the FMLA. Prior to enactment of the AFCTCA, covered airlines were already required to comply with FMLA with respect to employees, such as ticketing agents, baggage handlers, and administrative personnel, as well as some airline flight crew employees. Further, A4A noted that prior to the AFCTCA, various air carriers had instituted internal FMLA programs, including leave entitlement banks, and therefore had been tracking flight crew employees' hours for internal business purposes as well. As such, the Department expects the Final Rule will create minimal additional recordkeeping burdens on airline employers.

a. *Employee Health Benefits.* Employers are required by the FMLA to maintain employee health benefits during their absence on FMLA leave. This is a recurring cost to each employer that is calculated as the cost per hour to cover employee health benefits multiplied by the total number of hours of FMLA leave taken.<sup>51</sup> This cost results from additional reasons an employee may take FMLA leave (qualifying exigency, military caregiver), and additional employees entitled to leave (airline flight crew employees). The Department estimated this cost as part of the 2008 Final Rule and is using the same methodology here, noting that "the marginal costs related to workers taking \* \* \* military family leave \* \* \* result from the cost of providing health insurance during the period the worker is on leave \* \* \* The Department believes these \* \* \* 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." 73 FR 68051. According to the BLS "Employer Costs for Employee Compensation Survey" of June 2008, employers spend an average of \$2.25 per employee per hour worked on health insurance coverage.<sup>52</sup> For the purpose of this analysis, for leaves related to the NDAA the Department used the estimated hours of leave taken, for flight crew leaves the Department assumed each leave is eight hours in length.

b. *Replacement Workers.* In some businesses, employers are able to redistribute work among other employees while an employee is absent on FMLA leave but in other cases the employer may need to hire temporary replacement workers. This process involves costs resulting from recruitment of temporary workers with needed skill sets, training the temporary workers, and lost or reduced productivity of these workers. The cost to compensate the temporary workers is in most cases offset by the amount of wages not paid to the employee absent on FMLA leave.

In the initial FMLA rulemaking in 1993, the Department drew upon available research to suggest that the cost per employer to adjust for workers who are on FMLA leave is fairly small.

<sup>51</sup> The Department notes that this methodology overstates the cost associated with this provision as not all employees who take FMLA leave receive insurance from their employers.

<sup>52</sup> BLS Employment Cost Trends, available at: <http://www.bls.gov/ncs/ect/>. Accessed on July 7, 2012.

58 FR 31810. As in previous rulemakings, the Department requested information from businesses on the impact of different strategies for compensating for workers on leave, particularly the extent to which work is redistributed among other workers, and the costs of recruiting and training temporary workers. With no additional information forthcoming from public comments, we will continue to assume that these costs are fairly small for the purpose of this analysis. Furthermore, most employers subject to this rule change have been implementing the FMLA for some time and have already developed internal systems for work redistribution and recruitment and training of temporary workers. The air transportation industry, however, is an exception to this reasoning and employers in this industry may face additional challenges with respect to scheduling.

Due to the nature of the industry, airlines have varied and complex approaches to scheduling airline flight crew employees for flights.<sup>53</sup> Based on seniority, these employees may bid on their desired domicile (*i.e.*, primary airport), equipment (*i.e.*, type of airplane), and flying schedule (*e.g.*, international, shuttle). Generally, the employees can bid a "line of flying" or a "block" of flights or may bid on a number of days on reserve. According to our interviewees, approximately 15 to 20 percent of employees may be on reserve at any point in time and this amount fluctuates by airline and demand.<sup>54</sup> There are different types of reserve that are loosely based on the proximity of the employee to the airport; an employee on "short call" may be required to arrive at the domicile within 90 minutes, while an employee on "long call" may be given nine hours notice to arrive at the domicile for a flight.

Overall, the scheduling is fairly flexible in order to manage schedule changes; for example, "block holders" can be rescheduled to cover additional flights, flight attendants can engage in "trip trading" or volunteer for open flying time, and airlines can use "dead heading" to fly in a crew from another airport.

There are several key limitations to the flexibility of the system; the primary one being regulatory limits on flying

<sup>53</sup> This discussion is highly generalized and may not represent the practices of a specific airline. The purpose of the discussion is to provide context for understanding the impact of FMLA leave on overall scheduling practices.

<sup>54</sup> Rob DeLucia. 2010. Interview with Rob DeLucia of AIR Conference (now A4A), Calvin Franz and Lauren Jankovic, both of ERG.

<sup>49</sup> CONSAD, December 2007.

<sup>50</sup> CONSAD, December 2007.

time and equipment. This limitation is the most stringent for pilots who have more restrictive limitations on flying time than other flight crew members and who may only fly specific types of aircraft. Additionally, schedule changes due to events such as severe weather can impact scheduling; reserve flight crew members are utilized to make up for cancelled and rescheduled flights.

Based on comments received from A4A and employers in the industry, the Department does not expect the AFCTCA to impose a significant cost on

air transportation employers. The Department believes that the rule will increase the number of flight crew leaves classified as, and thus protected by, FMLA, but does not have data to quantify the amount of any such increase.

*G. Regulatory Impacts*

This section draws on the estimates of potentially affected employees, and the unit costs discussed above to determine the anticipated impact of the final regulations in terms of total cost across

all industries as well as estimated cost per firm and per employee.

1. Projected Regulatory Cost

The total estimated impact of the Final Rule is \$53.9 million in the first year with \$41.3 million in recurring costs in subsequent years. Table 14 summarizes the total estimated costs of the changes to the FMLA by cost type (first year, recurring), amendment (flight crew, military caregiver), and regulatory requirement (familiarization, notices, certifications, benefits).

TABLE 14—SUMMARY OF IMPACT OF CHANGES TO THE FMLA

Component	Year 1 (\$ mil.)	Year 2 (\$ mil.)
Total .....	\$53.9	\$41.3
Cost of Each Amendment:		
Any FMLA regulatory revision .....	12.6	0
Flight Crew Technical Amendment .....	0.4	0.4
NDAAs 2010 .....	41.0	41.0
NDAAs Subtotal Qualifying Exigency .....	25.8	25.8
NDAAs Subtotal Military Caregiver .....	15.1	15.1
Cost of Each Requirement:		
Regulatory Familiarization .....	12.6	0
Employer Notices .....	17.1	17.1
Certifications .....	0.4	0.4
Health Benefits .....	23.8	23.8

**Note:** Columns may not sum due to rounding.

All covered employers will incur costs of \$12.6 million during the first year for regulatory familiarization associated with any new FMLA revision. Other than the initial regulatory familiarization costs that occur only in the first year, all other costs are annual costs; they occur in the first year, and in each subsequent year. Covered employers in the air transportation industry who are not already providing family and medical leave to flight crew employees will incur costs of about \$372,000 per year to implement the changes. Covered employers of workers eligible for military family leave will incur costs of about \$41 million per year as a result of the changes. Looking at the key requirements of the FMLA, most of the costs of the changes will stem from generation of employer notices and maintenance of health benefits in recurring years.

To facilitate the public's understanding of the impact of this Final Rule, the Department provides some alternative assumptions on the utilization of leave and corresponding costs.

The Department estimates the cost of the FY 2010 NDAA as \$41.0 million, with qualifying exigency leave costing \$25.8 million and military caregiver leave costing \$15.1 million. However, under different scenarios, the cost of the FY 2010 NDAA may increase or decrease. The cost of qualifying exigency leave will vary between \$2.0 million and \$41.9 million in times of low conflict and high conflict with 10 days of Rest and Recuperation leave (see Table 7 for leave estimates).<sup>55</sup> As a result, the cost of the FY 2010 NDAA will vary from \$17.1 million in low conflict times and \$57.0 million in high conflict times. The cost of qualifying exigency leave will also change

depending on whether leave taken for Rest and Recuperation is closer to five days or to 15 days. In an average conflict scenario, the cost of qualifying exigency leave might range from \$23.0 million to \$31.4 million, and, thus, the total cost of the FY 2010 NDAA will range from \$38.2 million to \$46.5 million. See Table 15.

Similarly, if the definition of serious injury or illness was set only to include disability ratings of 60 percent or greater (i.e., was more stringent), or alternatively to include more ratings of 30 percent or greater (i.e., was more inclusive), then the cost of military caregiver leave would range from \$13.9 million to \$19.1 million (see Table 11 for leave estimates). As a result, the total cost of the NDAA would vary between \$39.7 million and \$44.9 million. See Table 15.

<sup>55</sup> In addition, no deployments take place in 16 of the 48 years of data examined (33.3 percent), and costs associated with qualifying exigency leave for

deployment would be zero in those years. Low levels of conflict occurred in 18 of 48 years (37.5

percent) and high levels of conflict took place in 14 of 48 years (29.2 percent).

TABLE 15—COST OF THE NDAA UNDER DIFFERENT CONFLICT SCENARIOS, AMOUNTS OF TIME FOR REST AND RECUPERATION LEAVE, AND DEFINITIONS OF SERIOUS INJURY OR ILLNESS

Leave type	Covered service-members or veterans (1,000)	Number of eligible employees (1,000)	Number of leave takers (1,000)	Costs	
				Leave type total (\$ mil.)	NDAA total (\$ mil.)
<b>Qualifying Exigency</b>					
Low Conflict, R&R 10 days .....	15.4	15.0	2.4	\$2.0	\$17.1
Average Deployment, R&R 10 days .....	197.0	192.5	30.8	25.8	41.0
R&R 5 days .....	197.0	192.5	30.8	23.0	38.2
R&R 15 Days .....	197.0	192.5	30.8	28.6	43.7
Heavy Conflict, R&R 10 days .....	320.4	313.1	50.1	41.9	57.0
<b>Military Caregiver</b>					
SII VASRD 60%+ .....	44.0	56.1	14.6	13.9	39.7
SII VASRD 50%+ .....	49.1	62.5	16.3	15.1	41.0
SII VASRD 30%+ .....	65.5	83.5	21.7	19.1	44.9

Table 16 provides the total, net present value and average annualized projected compliance costs over 10 years. Average annualized costs take the entire stream of costs over 10 years, including both first-year costs that are only incurred once, and recurring costs that are incurred every year, and

converts them into a stream of equal annual payments with a net present value equal to the original stream of time-varying costs at the specified real discount rate.

Calculating annualized costs allows the examination of an appropriate measure of average costs (by accounting for the time-value of money) over time

without overestimating impacts by focusing on initial costs, or underestimating impacts by focusing solely on recurring costs. The OMB directs that the streams of costs and benefits should be discounted using three and seven percent real discount rates.

TABLE 16—AVERAGE ANNUALIZED COSTS BY AMENDMENT AND REQUIREMENT

Component	Ten year total (\$ mil.)	Annualized <sup>a</sup>	
		Real discount rate 3% (\$ mil.)	Real discount rate 7% (\$ mil.)
Total .....	\$426	\$42.8	\$43.0
By Amendment:			
Any FMLA revision .....	13	1.4	1.7
Flight Crew Technical Amendment .....	4	0.4	0.4
FY 2010 NDAA .....	410	41.0	41.0
Qualifying Exigency .....	258	25.8	25.8
Military Caregiver .....	151	15.1	15.1
By Requirement:			
Regulatory Familiarization .....	13	1.4	1.7
Employer Notices .....	171	17.1	17.1
Certifications .....	4	0.4	0.4
Health Benefits .....	238	23.8	23.8

<sup>a</sup> Columns may not sum due to rounding.

The results presented in the table show that the Final Rule is projected to cost an average of \$43 million per year over 10 years using a seven percent real discount rate.

The military family leave provisions (FY 2010 NDAA) account for about 96.2 percent of the rule's total annualized cost. In terms of requirements of the rule employer notices and maintenance of health benefits each account for about 40 and 56 percent of the total cost, respectively.

2. Impacts of Projected Cost on Business Income

In this section we review the impact of projected regulatory costs on business

income. To avoid misrepresenting impacts, they are presented in four different ways: first-year costs are the largest, thus the ratio of first-year costs to income (business and worker) represent the most severe impacts that might be incurred in any one year; the ratio of recurring costs to income are more typical impacts—those that can be expected in any year except the first year; finally, average annualized costs, as described above, reflect the overall average over 10 years. Table 17 presents aggregate projected costs, projected costs per firm, and projected costs per firm as a percent of firm revenue and payroll. Costs are also disaggregated by amendment and regulatory requirement.

The projected first year costs of the Final Rule are about \$142 per firm, which is less than one-hundredth of a percent of average annual revenues and payroll. For most firms, the military family leave provisions account for the largest part of this impact, at \$108 per firm. With the exception of regulatory familiarization, first year costs for employer notices, certifications, and the maintenance of health benefits are identical to the amounts incurred in each subsequent year. The cost of the flight crew technical amendments may be a small portion of overall first year costs, but the impact will be concentrated on the air transportation industry. As a result, the cost per firm

is \$1,070 (\$1,016 for airline flight crew leave plus \$54 for regulatory familiarization), which is less than one-hundredth of a percent of average annual revenues or payroll.

The impact of recurring costs will be about \$109 per firm; the military family leave provisions continue to be the driver of the size of the impact due to the cost of employer notices and

maintenance of employee health benefits associated with the requirement.

TABLE 17—IMPACT OF COMPLIANCE COSTS ON FIRM INCOME

Component	Costs		Projected impacts	
	Total cost (\$ mil.)	Cost per firm <sup>a</sup>	Cost per firm as percent of revenues	Cost per firm as percent of payroll
First Year Cost .....	\$53.9	\$142	0.0002	0.0011
<i>By Amendment:</i>				
Any FMLA revision .....	12.6	33	0.0001	0.0003
Flight Crew Technical Amendment .....	0.4	1,016	0.0004	0.0014
FY 2010 NDAA .....	41.0	108	0.0002	0.0008
<i>By Requirement:</i>				
Regulatory Familiarization .....	12.6	33	0.0001	0.0003
Employer Notices .....	17.1	45	0.0001	0.0003
Certifications .....	0.4	1	0.0000	0.0000
Health Benefits .....	23.8	62	0.0001	0.0005
Recurring Cost .....	41.3	109	0.0002	0.0008
<i>By Amendment:</i>				
Any FMLA revision .....	0	0	0.0000	0.0000
Flight Crew Technical Amendment .....	0.4	1,016	0.0004	0.0014
NDAA 2010 .....	41.0	108	0.0002	0.0008
<i>By Requirement:</i>				
Regulatory Familiarization .....	0	0	0.0000	0.0000
Employer Notices .....	17.1	45	0.0001	0.0003
Certifications .....	0.4	1	0.0000	0.0000
Health Benefits .....	23.8	62	0.0001	0.0005
7% Real Discount Rate .....	43.0	113	0.0002	0.0009
<i>By Amendment:</i>				
Any FMLA revision .....	1.7	4	0.0000	0.0000
Flight Crew Technical Amendment .....	0.4	1,016	0.0004	0.0014
NDAA 2010 .....	41.0	108	0.0002	0.0008
<i>By Requirement:</i>				
Regulatory Familiarization .....	1.7	4	0.0000	0.0000
Employer Notices .....	17.1	45	0.0001	0.0003
Certifications .....	0.4	1	0.0000	0.0000
Health Benefits .....	23.8	62	0.0001	0.0005

<sup>a</sup> Calculated as total cost divided by the number of affected firms. For example, first year cost per firm for the flight crew technical amendment is \$372,000 divided by 366 firms.

Table 17 also presents the impact of projected costs on firm and worker income for average annualized costs with a seven percent real discount rate. The results demonstrate that the overall average annualized cost of the rule is \$43 million, or about \$113 per firm (\$1,016 per firm in the air transportation industry). Total cost per firm is approximately two ten-thousandths of one percent of average annual firm revenue. However, it is likely that some of these costs will be borne by the firm and some by the workers; the exact incidence of these impacts will depend on the relative bargaining strength of firms and workers, which will vary by industry.

H. Benefits

The Department anticipates significant benefits resulting from the revisions. Employers that have adopted flexible workplace practices cite many

economic benefits such as reduced worker absenteeism and turnover, improvements in their ability to attract and retain workers, and other positive changes that translate into increased worker productivity. See “Work-Life Balance and the Economics of Workplace Flexibility” at 16, Executive Office of the President, Council of Economic Advisors (March 2010). However, quantifying the benefits is challenging. *Id.* The Department does not attempt to quantify these benefits in this analysis, but does, however, describe the expected benefits of each major revision in the proceeding section.

1. Military Family Leave

The benefits stemming from improving access to military family leave were described in the 2008 Final Rule as follows:

[T]he 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.

73 FR 68069. Based on the preceding analysis, and the availability of recent research examining the impacts of service-connected injuries and illnesses, the Department also anticipates additional benefits to accrue to servicemembers and their families from the FY 2010 NDAA amendments.

Providing job-protected leave for caregivers of covered veterans under the military caregiver provision is expected to have several benefits, including increased family involvement in recovery, improved self-reliance and access to resources for caregivers, and a

reduction in negative outcomes for covered veterans and their families.

Recent research suggests that as many as 30 percent of returning servicemembers may suffer from symptoms of PTSD, major depression, and/or TBI. These individuals often suffer from:

E. Co-morbidities such as anxiety and mood disorders, and substance abuse;

F. increased risk of suicidal ideation and attempts;

G. higher rates of unhealthy behaviors such as smoking, poor diet, and unsafe sex;

H. higher rates of other health problems and mortality; and

I. decreased work productivity in the form of missed work days and decreased performance at work.<sup>56</sup>

While this study focused on active servicemembers, these disorders involve long timeframes for recovery and management of the symptoms, so it is reasonable to conclude that these same issues would impact the servicemember following separation from service. Furthermore, the impact of these disorders, and other serious injuries or illnesses incurred by covered servicemembers and veterans, extends to family members as well. Common issues include marital discord and increased likelihood of divorce, intimate partner violence, poor parenting skills and poor child outcomes, and caregiver burden. In “Economic Impact on Caregivers of the Seriously Wounded, Ill, and Injured,” the authors describe the impact on caregivers as follows:

Family support is critical to patients’ successful rehabilitation. Especially in a prolonged recovery, it is family members who make therapy appointments and ensure they are kept, drive the servicemember to these appointments, pick up medications and make sure they are taken, provide a wide range of personal care, become the impassioned advocates, take care of the kids, pay the bills and negotiate with the benefits offices, find suitable housing for a family that includes a person with a disability, provide emotional support, and, in short, find they have a full-time job—or more—for which they never prepared. When family members give up jobs to become caregivers, income can drop precipitously.<sup>57</sup>

The support provided by caregivers plays a pivotal role in the course of the servicemember’s recovery, as noted in “Invisible Wounds of War”:

The likelihood that the condition will trigger a negative cascade of consequences

<sup>56</sup> Tanielian, Terri and Lisa Jaycox. 2008. Invisible wounds of war: psychological and cognitive injuries, their consequences, and services to assist recovery. RAND. Available at: [www.rand.org](http://www.rand.org).

<sup>57</sup> Christensen, et. al., April 2009, Economic Impact on Caregivers of the Seriously Wounded, Ill, and Injured, CNA, p. 8.

over time is greater if the initial symptoms of the condition are more severe and the afflicted individual has other sources of vulnerability \* \* \* Early interventions are likely to pay long-term dividends in improved outcomes for years to come; so, it is critical to help servicemembers and veterans seek and receive treatment.<sup>58</sup>

Providing caregivers with job-protected FMLA leave to care for their family member who is a covered veteran creates a window of opportunity to interrupt the negative cascade of consequences experienced by sufferers of PTSD, TBI and depression. Furthermore, maintaining the flow of resources and self-sufficiency provided by a secure employment situation ensures that the caregivers are able to maintain their own mental and physical health during the veteran’s recovery process.<sup>59</sup>

At this point, there is not sufficient data to accurately estimate the number of servicemembers suffering from these disorders or the range of severity of symptoms; as a result, we are unable to quantify the benefits of reduced rates of negative outcomes for affected veterans and their families. However, in “Invisible Wounds of War,” RAND developed estimates of costs associated with PTSD, major depression, and TBI stemming from the conflicts in Afghanistan and Iraq. For example:

J. Servicemembers diagnosed with PTSD incur costs of \$5,000–10,000 per servicemember during the first two years after returning home.<sup>60</sup>

K. Servicemembers diagnosed with major depression incur costs of \$15,000–25,000 per servicemember during the first two years after returning home.<sup>61</sup>

L. Servicemembers diagnosed with TBI incur costs of \$27,000–32,000 for a mild case and up to \$268,000–408,000 for severe cases.<sup>62</sup>

The Final Rule will likely reduce these costs, and the costs associated with other negative outcomes associated with these diagnoses; but, at this point in time we do not have sufficient data to estimate the reduction in costs.

## 2. Airline Industry FMLA Leave

As a result of the AFCTA, airline flight crew employees will enjoy all the benefits of FMLA coverage that have

<sup>58</sup> Tanielian and Jaycox, 2008.

<sup>59</sup> Christensen, et. al., 2009, p.9.

<sup>60</sup> RAND, 2008, p. xxiii. Variation due to severity and inclusion, or not, of cost of lives lost to suicide. Costs do not include costs due to substance abuse, domestic violence, homelessness, or family strain.

<sup>61</sup> RAND, 2008, p. xxiii. Costs associated with comorbid PTSD and depression are approximately \$12,000 to 16,000.

<sup>62</sup> RAND, 2008, p. xxiii. Costs presented in 2007 dollars.

been afforded to employees in other industries. Additionally, as discussed in the 2008 Final Rule, employers may see reduced “presenteeism”—the loss of productivity due to employees working while injured or ill—and a resultant increase in overall productivity, workplace safety, and wellness among employees. 73 FR 68071.

## IX. Final Regulatory Flexibility Analysis

The Regulatory Flexibility Act of 1980 (Pub. L. 96–354) requires agencies to evaluate the potential effects of their proposed and final rules on small businesses, small organizations and small governmental jurisdictions. See 5 U.S.C. 603–604. If the rule is not expected to have a significant economic impact on a substantial number of small entities, the RFA allows an agency to certify such, in lieu of preparing an analysis. See 5 U.S.C. 605.

The Department certifies that this Final Rule will not have a significant economic impact on a substantial number of small entities. The FMLA covers private employers of 50 or more employees; employers with fewer than 50 employees are exempt. Therefore, changes to the FMLA regulations by definition will not impact small businesses with less than 50 employees. The Department acknowledges that some small employers that are within the SBA definition of small business (50–500 employees) will still have to comply with the regulation and incur costs. However, based on the analysis in section VIII Executive Order 12866; Executive Order 13563, even if all businesses subject to this Final Rule were considered to be small businesses, the economic impact would not be significant. As discussed above, the initial and recurring annual costs of the rule to all employers will be low. Further, as shown in Table 17, the first year cost per firm is estimated to be \$142 and the recurring cost per year per firm is estimated to be \$109. Therefore, the data and economic implications of the rule do not reveal a significant economic impact on any small entities. The Department also notes that no comments were received from businesses, small or otherwise, regarding the cost of this Final Rule.

### Appendix A: Military Family Leave Profile

In order to estimate the number of individuals who may take leave under the qualifying exigency or military caregiver provisions as a result of the amendments to the FMLA included in the FY 2010 NDAA, the Department estimated (1) The number of active duty

servicemembers whose family members are entitled to qualifying exigency leave and the number of veterans whose family members will be entitled to caregiver leave. (2) the age profile of those servicemembers and veterans, and (3) the ratio of the number of eligible family members or caregivers associated with that age profile. The first estimate is described in more detail in the text of the economic analysis. This appendix provides an explanation of the method used to develop the age profiles and eligible family members.

*A. Overview of Approach*

The Department replicated and updated the method used in the 2008 Final Rule to ensure consistency with previous estimates. In that approach, the Department used data from the Defense Manpower Database, the Current Population Survey, and the decennial Census of Population to estimate the age distribution of servicemembers; the proportion of servicemembers in each

age category with living parents, a spouse, and children (over 18 years of age);<sup>63</sup> and the proportion of those individuals who may be employed by a covered employer. The Department used these estimates to determine the likely number of family members eligible to take leave for a qualifying exigency or to act as a caregiver for a covered veteran.

The first step is to apply the age profile of servicemembers to the estimated number of servicemembers to distribute the number of servicemembers to the age groups. Table A-1 presents the estimated proportion of servicemembers by age range estimated for the 2008 Final rule. The Department aggregated the age groups for this calculation. For example, if the Final Rule was expected to affect 1000 servicemembers then this age profile would estimate that 469 of them would be between the ages of 22 and 30 years old.

TABLE A-1—AGE PROFILE OF SERVICEMEMBERS

General military servicemember age range	Average estimated proportion of military members (percent)
18-21 .....	19.8
22-30 .....	46.9
31-40 .....	24.7
41-50 .....	8.0
51-59 .....	0.6

The next step is to estimate the number of servicemembers in each age group with 0, 1, 2, 3, 4, or 5 eligible family members. Table A-2 presents the estimated percent of servicemembers with the specified number of eligible family members by age range of the servicemember. For example, 44.1 percent of servicemembers aged 31-40 have at least one eligible family member.

TABLE A-2—PROPORTION OF SERVICEMEMBERS WITH “n” ELIGIBLE FAMILY MEMBERS

Age range	Number of eligible family members (in percent)					
	0	1	2	3	4	5
18-21 .....	29.3	49.5	21.0	0.2	0.0	0.0
22-30 .....	27.4	46.5	23.3	2.8	0.0	0.0
31-40 .....	31.1	44.1	21.1	3.6	0.2	0.2
41-50 .....	37.8	40.4	16.9	4.2	0.7	0.1
51-59 .....	45.3	35.4	14.6	3.9	0.7	0.1

Finally, the number of estimated eligible family members for each age group of servicemembers is summed up by multiplying the number of servicemembers in each column by the number of eligible family members. First, the number of servicemembers in each age range is multiplied by the percentage in each cell in that row to determine the number of servicemembers with that number of eligible family members. For example, if there are 1000 servicemembers aged 18-21 then about 293 of them have no eligible family members, about 495 have one eligible family member, about 210 have two eligible family members, and two have three eligible family members.

Next, the number of servicemembers in each category is converted to the total number of eligible family members and

summed across the row to determine the total number of family members for that age range. For each row the calculation is  $(\# * 0) + (\# * 1) + (\# * 2) + (\# * 3) + (\# * 4) + (\# * 5)$  where # represents the number of service members and the integers zero through five represent the number of eligible family members per servicemembers. The equation is modified slightly for estimating the number of eligible caregivers for military caregiver leave; we assume that each servicemember has at least one eligible caregiver and modify the equation to  $(\# * 1) + (\# * 1) + (\# * 2) + (\# * 3) + (\# * 4) + (\# * 5)$  to reflect the fact that servicemembers with no available family members may designate a next of kin to serve as their caregiver.

For example, the number of family members eligible for qualifying exigency

leave for 1000 servicemembers aged 18-21 is equal to  $(293 * 0) + (495 * 1) + (210 * 2) + (2 * 3) + (0 * 4) + (0 * 5)$ ; for 1000 servicemembers aged 18-21 there are 921 eligible family members. In this example, the number of eligible caregivers for military caregiver leave is equal to  $(293 * 1) + (495 * 1) + (210 * 2) + (2 * 3) + (0 * 4) + (0 * 5)$ ; for 1000 servicemembers aged 18-21 there are 1,214 eligible caregivers. Finally, the total number of eligible family members or caregivers is summed across the age groups to estimate the total number of eligible family members or caregivers.

The next two tables present summary tables for a sample calculation assuming 5,000 total servicemembers (Table A-3) and veterans (Table A-4).

<sup>63</sup> Under military caregiver leave a designated next of kin may also take leave to care for a covered

veteran. We accounted for these individuals by

assuming that every covered veteran has at least one caregiver.



TABLE A-3—EXAMPLE CALCULATION OF NUMBER OF ELIGIBLE FAMILY MEMBERS FOR 5000 SERVICEMEMBERS

General military service member age range	Example distribution of servicemembers	ERG's number of servicemen with n # of eligible family members where n =						Number of family members
		0	1	2	3	4	5	
18-21 .....	992.0	290.8	490.6	208.3	2.3	0.0	0.0	914.2
22-30 .....	2,343.0	641.6	1,090.3	544.9	66.2	0.0	0.0	2,378.5
31-40 .....	1,236.3	384.2	545.2	261.4	44.3	2.2	0.2	1,210.8
41-50 .....	398.8	150.7	161.0	67.2	16.6	2.9	0.4	359.1
51-59 .....	29.9	13.5	10.6	4.4	1.2	0.2	0.0	23.8
Total .....	5,000	1,480.8	2,297.6	1,086.2	130.6	5.3	0.7	4,886.5

TABLE A-4—EXAMPLE CALCULATION OF NUMBER OF ELIGIBLE FAMILY MEMBERS FOR 5000 VETERANS

General military service member age range	Example distribution of veterans	ERG's number of servicemen with n # of eligible family members where n =						Number of family members
		0	1	2	3	4	5	
18-21 .....	992.0	290.8	490.6	208.3	2.3	0.0	0.0	1,205.0
22-30 .....	2,343.0	641.6	1,090.3	544.9	66.2	0.0	0.0	3,020.1
31-40 .....	1,236.3	384.2	545.2	261.4	44.3	2.2	0.2	1,595.0
41-50 .....	398.8	150.7	161.0	67.2	16.6	2.9	0.4	509.8
51-59 .....	29.9	13.5	10.6	4.4	1.2	0.2	0.0	37.4
Total .....	5,000	1,480.8	2,297.6	1,086.2	130.6	5.3	0.7	6,367.3

For the NPRM, the Department provided detailed tables illustrating the calculation of the number of eligible family members and caregivers for the Department's estimates of the number of covered servicemembers for qualifying exigency leave, and the number of covered veterans who might seek treatment for a serious injury or illness for military caregiver leave. For the Final Rule, the Department has streamlined the discussion of this method and provides a useful shortcut for developing these estimates.

As long as the distribution of servicemembers with a specified number of eligible family members or caregivers remains the same, *see* Table A-2, then the number of eligible family members or caregivers for any estimated number of servicemembers can be calculated through the use of a ratio instead of performing the full calculation described above. The Department calculated the ratio of eligible family members or caregivers to covered servicemembers by dividing the estimated number of eligible family members by the number of covered servicemembers for qualifying exigency leave, and by dividing the number of eligible caregivers by the number of

veterans for military caregiver leave. Per the examples above in Table A-3 and A-4, the ratios are:

- 0.977 eligible family members per covered servicemember for qualifying exigency leave (4,887/5,000).
- 1.273 eligible caregivers per veteran for military caregiver leave (6,367/5,000).

Note, these ratios are primarily provided as a tool for those who wish to replicate the Department's estimates in this economic analysis; over time, the actual distribution of eligible family members per servicemember by age group will fluctuate with changes in the composition of the military, demographic patterns, and employment with covered employers and will necessitate an updated profile.

#### X. Unfunded Mandates Reform Act

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), Public Law 104-4, establishes requirements for Federal agencies to assess the effects of their regulatory actions on State, local, and tribal governments as well as on the private sector. Under Section 202(a) of UMRA, the Department must generally prepare a written statement, including a cost-benefit analysis, for proposed and

final regulations that "includes any Federal mandate that may result in the expenditure by State, local, and tribal governments, in the aggregate or by the private sector" in excess of \$100 million in any one year (equivalent to \$143 million in 2010 dollars after adjusting for inflation).

State, local, and tribal government entities are within the scope of the regulated community for this regulation. The Department has determined that this rule contains a Federal mandate that is unlikely to result in expenditures of \$143 million or more for State, local, and tribal governments, in the aggregate, or the private sector in any one year. Total costs to government entities do not exceed \$15 million in any single year of the rule. *See* Table 18. Total costs to the private sector do not exceed \$50 million in the first, most costly year of the rule. *See* Table 18. The total first year cost of this rule is estimated at \$53.9 million to the private and public sectors combined. Thus, the Final Rule is not expected to result in any expenditures of \$143 million or more for State, local, and tribal governments, in the aggregate, or the private sector in any one year.

TABLE 18—COMPLIANCE COSTS BY BUSINESS SIZE

Industry	First year (\$ mil.) and percent of total		Recurring (\$ mil.) and percent of total		Annualized (\$ mil.) and percent of total	
Small:						
Private .....	\$30.2	56%	\$23.4	57%	\$24.3	57%
Government .....	\$7.9	15%	\$4.5	11%	\$5.0	12%
Subtotal .....	\$38.1	71%	\$28.0	68%	\$29.3	68%
Non Small:						
Private .....	\$10.1	19%	\$9.0	22%	\$9.1	21%
Government .....	\$5.8	11%	\$4.4	11%	\$4.6	11%
Subtotal .....	\$15.8	29%	\$13.4	32%	\$13.7	32%
Total:						
Private .....	\$40.2	75%	\$32.4	78%	\$33.5	78%
Government .....	\$13.7	25%	\$8.9	22%	\$9.6	22%
Total .....	\$53.9	100%	\$41.3	100%	\$43.0	100%

**XI. Executive Order 13132, Federalism**

The rule does not have federalism implications as outlined in E.O. 13132. Although states are covered employers under the FMLA, the rule does not have substantial direct effects on the states, on the relationship between the Federal government and the states, or on the distribution of power and responsibilities among the various levels of government.

**XII. Executive Order 13175, Indian Tribal Governments**

This rule was reviewed under the terms of E.O. 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 has been prepared.

**XIII. Effects on Families**

The undersigned hereby certifies that this rule will not adversely affect the well-being of families, as discussed under section 654 of the Treasury and General Government Appropriations Act, 1999.

**XIV. Executive Order 13045, Protection of Children**

E.O. 13045 applies to any rule that (1) is determined to be economically significant as defined in E.O. 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 E.O. 13045 because, although it 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.

**XV. Environmental Impact Assessment**

A review of 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, indicates that this rule will not have a significant impact on the quality of the human environment. There is, thus, no corresponding environmental assessment or an environmental impact statement.

**XVI. Executive Order 13211, Energy Supply**

This rule is not subject to E.O. 13211. It will not have a significant adverse effect on the supply, distribution or use of energy.

**XVII. Executive Order 12630, Constitutionally Protected Property Rights**

This rule is not subject to E.O. 12630, because it does not involve implementation of a policy “that has takings implications” or that could impose limitations on private property use.

**XVIII. Executive Order 12988, Civil Justice Reform Analysis**

This rule was drafted and reviewed in accordance with E.O. 12988 and will

not unduly burden the Federal court system. The proposed rule was: (1) Reviewed to eliminate drafting errors and ambiguities; (2) written to minimize litigation; and (3) written to provide a clear legal standard for affected conduct and to promote burden reduction.

**List of Subjects in 29 CFR Part 825**

Employee benefit plans, Health, Health insurance, Labor management relations, Maternal and child health, Teachers.

Signed at Washington, DC, this 30th day of January 2013.

**Mary Beth Maxwell**

*Acting Deputy Administrator, Wage and Hour Division.*

For the reasons set out in the preamble, the Department of Labor amends Chapter V of Title 29, by revising part 825 of the Code of Federal Regulations as follows:

**PART 825—THE FAMILY AND MEDICAL LEAVE ACT OF 1993**

**Subpart A—Coverage Under the Family and Medical Leave Act**

- Sec.
- 825.100 The Family and Medical Leave Act.
- 825.101 Purpose of the Act.
- 825.102 Definitions.
- 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 covered servicemember, spouse, parent, son or daughter, next of kin of a covered servicemember, adoption, foster care, son or daughter on covered active duty or call to covered 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 (military caregiver leave).

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

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- 825.209 Maintenance of employee benefits.
- 825.210 Employee payment of group health benefit premiums.
- 825.211 Maintenance of benefits under multi-employer health plans.
- 825.212 Employee failure to pay health plan premium payments.
- 825.213 Employer recovery of benefit costs.
- 825.214 Employee right to reinstatement.
- 825.215 Equivalent position.
- 825.216 Limitations on an employee's right to reinstatement.
- 825.217 Key employee, general rule.
- 825.218 Substantial and grievous economic injury.
- 825.219 Rights of a key employee.
- 825.220 Protection for employees who request leave or otherwise assert FMLA rights.

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

- 825.300 Employer notice requirements.
- 825.301 Designation of FMLA leave.
- 825.302 Employee notice requirements for foreseeable FMLA leave.
- 825.303 Employee notice requirements for unforeseeable FMLA leave.
- 825.304 Employee failure to provide notice.
- 825.305 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.
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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.
- 825.403 Appealing the assessment of a penalty for willful violation of the posting requirement.
- 825.404 Consequences for an employer when not paying the penalty assessment after a final order is issued.

#### **Subpart E—Recordkeeping Requirements**

- 825.500 Recordkeeping requirements.

#### **Subpart F—Special Rules Applicable to Employees of Schools**

- 825.600 Special rules for school employees, definitions.
- 825.601 Special rules for school employees, limitations on intermittent leave.
- 825.602 Special rules for school employees, limitations on leave near the end of an academic term.
- 825.603 Special rules for school employees, duration of FMLA leave.
- 825.604 Special rules for school employees, restoration to "an equivalent position."

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

- 825.700 Interaction with employer's policies.
- 825.701 Interaction with State laws.
- 825.702 Interaction with Federal and State anti-discrimination laws.

#### **Subpart H—Definitions Special Rules Applicable to Airline Flight Crew Employees**

- 825.800 Definitions. Special rules for airline flight crew employees, general.
- 825.801 Special rules for airline flight crew employees, hours of service requirement.
- 825.802 Special rules for airline flight crew employees, calculation of leave.
- 825.803 Special rules for airline flight crew employees, recordkeeping requirements.

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 military member on active duty or call to covered active duty status (or has been notified of an impending call or order to covered active duty). 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. 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 employer 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 a military member on covered active duty or call to covered active duty status. 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 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).

*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, 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.

*Airline flight crew employee* means an airline flight crewmember or flight attendant as those terms are defined in regulations of the Federal Aviation Administration. *See also* § 825.800(a).

*Applicable monthly guarantee* means:

(1) For an airline flight crew employee who is not on reserve status (line holder), the minimum number of hours for which an employer has agreed to *schedule* such employee for any given month; and

(2) For an airline flight crew employee who is on reserve status, the number of hours for which an employer has agreed to *pay* the employee for any given month. *See also* § 825.801(b)(1).

*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(a)(2).

*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 (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 (i) 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 active duty or call to covered active duty status* means:

(1) In the case of a member of the Regular Armed Forces, duty during the deployment of the member with the Armed Forces to a foreign country; and,

(2) In the case of a member of the Reserve components of the Armed Forces, duty during the deployment of the member with the Armed Forces to a foreign country under a Federal 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* 10 U.S.C. 101(a)(13)(B). *See also* § 825.126(a).

*Covered servicemember* means:

(1) 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, or

(2) A covered veteran who is undergoing medical treatment, recuperation, or therapy for a serious injury or illness.

*Covered veteran* means an individual who was a member of the Armed Forces (including a member of the National Guard or Reserves), and was discharged or released under conditions other than dishonorable at any time during the

five-year period prior to the first date the eligible employee takes FMLA leave to care for the covered veteran. *See* § 825.127(b)(2).

*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 Uniformed Services Employment and Reemployment Rights Act (USERRA), 38 U.S.C. 4301, *et seq.*, covered service obligation (the period of absence from work due to or necessitated by USERRA-covered 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 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 met the hours of service requirement by having been employed for at least 1,250 hours of service with such employer during the previous 12-month period, or for an airline flight crew employee, in the previous 12 months, having worked or been paid for not less than 60 percent of the applicable total monthly guarantee and having worked or been paid for not less than 504 hours, not counting personal commute time, or vacation, medical or sick leave (*see* § 825.801(b)), *except that*:

(i) An employee returning from fulfilling his or her USERRA-covered service obligation shall be credited with the hours of service that would have been performed but for the period of absence from work due to or necessitated by USERRA-covered service in determining whether the employee met the hours of service requirement (accordingly, a person reemployed following absence from work due to or necessitated by USERRA-covered service has the hours that would have been worked for the employer (or, for an airline flight crew employee, would have been worked for or paid by the employer) added to any hours actually worked (or, for an airline

flight crew employee, actually worked or paid) during the previous 12-month period to meet the hours of service requirement); and

(ii) To determine the hours that would have been worked (or, for an airline flight crew employee, would have been worked or paid) during the period of absence from work due to or necessitated by USERRA-covered 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 also § 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.

*Invitational travel authorization (ITA)* or *Invitational travel order (ITO)* are orders issued by the Armed Forces to a family member to join an injured or ill servicemember at his or her bedside. See also § 825.310(e).

*Key employee* means 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. See also § 825.217.

*Mental disability*: See the definition of *Physical or mental disability* in this section.

*Military caregiver leave* means leave taken to care for a covered servicemember with a serious injury or illness under the Family and Medical Leave Act of 1993. See also § 825.127.

*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(d)(3).

*Outpatient status* means, with respect to a covered servicemember who is a current member of the Armed Forces, 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(b)(1).

*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(d)(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.

*Reserve components of the Armed Forces*, for purposes of qualifying exigency leave, include the 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, and retired members of the Regular Armed Forces or Reserves who are called up in support of a contingency operation. See also § 825.126(a)(2)(i).

*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: (1) In the case of a current member of the Armed Forces, including a member of the National Guard or Reserves, an injury or illness that was incurred by the covered servicemember in the line



of duty on active duty in the Armed Forces or that existed before the beginning of the member's active duty and was aggravated by service in the line of duty on active duty in the Armed Forces and that may render the servicemember medically unfit to perform the duties of the member's office, grade, rank, or rating; and

(2) In the case of a covered veteran, an injury or illness that was incurred by the member in the line of duty on active duty in the Armed Forces (or existed before the beginning of the member's active duty and was aggravated by service in the line of duty on active duty in the Armed Forces) and manifested itself before or after the member became a veteran, and is:

(i) A continuation of a serious injury or illness that was incurred or aggravated when the covered veteran was a member of the Armed Forces and rendered the servicemember unable to perform the duties of the servicemember's office, grade, rank, or rating; or

(ii) A physical or mental condition for which the covered veteran has received a U.S. Department of Veterans Affairs Service-Related Disability Rating (VASRD) of 50 percent or greater, and such VASRD rating is based, in whole or in part, on the condition precipitating the need for military caregiver leave; or

(iii) A physical or mental condition that substantially impairs the covered veteran's ability to secure or follow a substantially gainful occupation by reason of a disability or disabilities related to military service, or would do so absent treatment; or

(iv) An injury, including a psychological injury, on the basis of which the covered veteran has been enrolled in the Department of Veterans Affairs Program of Comprehensive Assistance for Family Caregivers. *See also* § 825.127(c).

*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(d)(1).

*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 stood in loco parentis, who is on covered active duty or call to covered active duty status, and who is of any age. *See also* § 825.126(a)(5).

*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.

*TRICARE* is the health care program serving active duty servicemembers, National Guard and Reserve members, retirees, their families, survivors, and certain former spouses worldwide.

#### § 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 of service with 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 five-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 these regulations include:

- (1) Employees of the Postal Service;
- (2) Employees of the Postal Regulatory Commission;
- (3) A part-time employee who does not have an established regular tour of duty during the administrative workweek; and,
- (4) An employee serving under an intermittent appointment or temporary appointment with a time limitation of one year or less.

(c) Employees of other Federal executive agencies are also covered by

these regulations if they are not covered by Title II of FMLA.

(d) Employees of the judicial branch of the United States are covered by these regulations only if they are employed in a unit which has employees in the competitive service. For example, employees of the U.S. Tax Court are covered by these regulations.

(e) For employees covered by these regulations, the U.S. Government constitutes a single employer for purposes of determining employee eligibility. These employees must meet all of the requirements for eligibility, including the requirement that the Federal Government employ 50 employees at the worksite or within 75 miles.

#### **§ 825.110 Eligible employee.**

(a) An eligible employee is an employee of a covered employer who:

(1) Has been employed by the employer for at least 12 months, and  
(2) Has been employed for at least 1,250 hours of service during the 12-month period immediately preceding the commencement of the leave (*see* § 825.801 for special hours of service requirements for airline flight crew employees), 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 Uniformed Services Employment and Reemployment Rights Act (USERRA), 38 U.S.C. 4301, *et seq.*, covered service obligation. The period of absence from work due to or necessitated by USERRA-covered 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 USERRA; or

(ii) A written agreement, including a collective bargaining agreement, exists concerning the employer's intention to rehire the employee after the break in service (*e.g.*, for purposes of the employee furthering his or her education or for childrearing purposes).

(3) If an employee is maintained on the payroll for any part of a week, including any periods of paid or unpaid leave (sick, vacation) during which other benefits or compensation are provided by the employer (*e.g.*, workers' compensation, group health plan benefits, *etc.*), the week counts as a week of employment. For purposes of determining whether intermittent/occasional/casual employment qualifies as at least 12 months, 52 weeks is deemed to be equal to 12 months.

(4) Nothing in this section prevents employers from considering employment prior to a continuous break in service of more than 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 and in § 825.801 containing the special hours of service requirement for airline flight crew employees, whether an employee has worked the minimum 1,250 hours of service is determined according to the principles established under the Fair Labor Standards Act (FLSA) for determining compensable hours of work. *See* 29 CFR part 785. The determining factor is the number of hours an employee has worked for the employer within the meaning of the FLSA. The determination is not limited by methods of recordkeeping, or by compensation agreements that do not accurately reflect all of the hours an employee has worked for or been in service to the employer. Any accurate accounting of actual hours worked under FLSA's principles may be used.

(2) An employee returning from USERRA-covered service shall be credited with the hours of service that would have been performed but for the period of absence from work due to or necessitated by USERRA-covered service in determining the employee's eligibility for FMLA-qualifying leave. Accordingly, a person reemployed following USERRA-covered 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 hours of service requirement. In order to determine the hours that would have

been worked during the period of absence from work due to or necessitated by USERRA-covered service, the employee's pre-service work schedule can generally be used for calculations. *See* § 825.801(c) for special rules applicable to airline flight crew employees.

(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* § 825.102 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. *See* § 825.801(d) for special rules applicable to airline flight crew employees.

(d) The determination of whether an employee meets the hours of service requirement 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 12-month eligibility requirement, 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 military member on covered active duty (or has been notified of an impending call or order to covered active duty status (*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 covered 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 six weeks of leave to care for a healthy, newborn child, each could use an additional six 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(d) 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—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. *See* § 825.802 for special rules applicable to airline flight crew employees.

#### § 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 six weeks of leave to care for a healthy, newly placed child, each could use an additional six 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(d) 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 §§ 825.202–825.205 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. See § 825.802 for special rules applicable to airline flight crew employees.

**§ 825.122 Definitions of covered servicemember, spouse, parent, son or daughter, next of kin of a covered servicemember, adoption, foster care, son or daughter on covered active duty or call to covered active duty status, son or daughter of a covered servicemember, and parent of a covered servicemember.**

(a) Covered servicemember means: (1) 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; or

(2) A covered veteran who is undergoing medical treatment, recuperation, or therapy for a serious injury or illness. *Covered veteran* means an individual who was a member of the Armed Forces (including a member of the National Guard or Reserves), and was discharged or released under conditions other than dishonorable at any time during the five-year period prior to the first date the eligible employee takes FMLA leave to care for the covered veteran. See § 825.127(b)(2).

(b) *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.

(c) *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 (d) of this section. This term does not include parents "in law."

(d) *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.

(e) *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(d)(3).

(f) *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.

(g) *Foster care* means 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.

(h) *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 stood in loco parentis, who is on covered active duty or call to covered active duty status, and who is of any age. See § 825.126(a)(5).

(i) *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. See § 825.127(d)(1).

(j) *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(d)(2).

(k) *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 §§ 825.202–825.205 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 for a qualifying exigency while the employee's spouse, son, daughter, or parent (the military member or member) is on covered active duty or call to covered active duty status (or has been notified of an impending call or order to covered active duty).

(1) *Covered active duty or call to covered active duty status* in the case of a member of the Regular Armed Forces means duty during the deployment of the member with the Armed Forces to a foreign country. The active duty orders of a member of the Regular components of the Armed Forces will generally specify if the member is deployed to a foreign country.

(2) *Covered active duty or call to covered active duty status* in the case of a member of the Reserve components of the Armed Forces means duty during the deployment of the member with the Armed Forces to a foreign country under a Federal 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* 10 U.S.C. 101(a)(13)(B).

(i) For purposes of covered active duty or call to covered active duty status, the Reserve components of the Armed Forces include the 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, and retired members of the Regular Armed Forces or Reserves who are called up in support of a contingency operation pursuant to one of the provisions of law identified in paragraph (a)(2).

(ii) The active duty orders of a member of the Reserve components will generally specify if the 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 and will specify that the deployment is to a foreign country.

(3) *Deployment of the member with the Armed Forces to a foreign country* means deployment to areas outside of the United States, the District of Columbia, or any Territory or possession of the United States, including international waters.

(4) A call to covered 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 (a)(2) of this section.

(5) *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 stood in loco parentis, who is on covered active duty or call to covered

active duty status, and who is of any age.

(b) An eligible employee may take FMLA leave for one or more of the following qualifying exigencies:

(1) *Short-notice deployment.* (i) To address any issue that arises from the fact that the military member is notified of an impending call or order to covered active duty 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 the 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 the 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 the military member;

(3) *Childcare and school activities.* For the purposes of leave for childcare and school activities listed in (i) through (iv) of this paragraph, a child of the military member must be the military member's biological, adopted, or foster child, stepchild, legal ward, or child for whom the military member stands in loco parentis, who is either under 18 years of age or 18 years of age or older and incapable of self-care because of a mental or physical disability at the time that FMLA leave is to commence. As with all instances of qualifying exigency leave, the military member must be the spouse, son, daughter, or parent of the employee requesting qualifying exigency leave.

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

(ii) To provide childcare for a child of the military member 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 the military member;

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

(4) *Financial and legal arrangements.*

(i) To make or update financial or legal arrangements to address the military member's absence while on covered active duty or call to covered 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 military member's representative before a federal, state, or local agency for purposes of obtaining, arranging, or appealing military service benefits while the 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 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 military member, or for the biological, adopted, or foster child, a stepchild, or a legal ward of the military member, or a child for whom the 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 covered active duty or call to covered active duty status of the military member;

(6) *Rest and Recuperation.* (i) To spend time with the military member who is on short-term, temporary, Rest and Recuperation leave during the period of deployment;

(ii) Leave taken for this purpose can be used for a period of 15 calendar days beginning on the date the military member commences each instance of Rest and Recuperation leave;

(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 military member's covered active duty status; and

(ii) To address issues that arise from the death of the military member while on covered active duty status, such as meeting and recovering the body of the military member, making funeral arrangements, and attending funeral services;

(8) *Parental care.* For purposes of leave for parental care listed in (i) through (iv) of this paragraph, the parent of the military member must be incapable of self-care and must be the military member's biological, adoptive, step, or foster father or mother, or any other individual who stood in loco parentis to the military member when the member was under 18 years of age. A parent who is incapable of self-care means that the parent requires active assistance or supervision to provide daily self-care in three or more of the activities of daily living or instrumental activities of daily living. 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. As with all instances of qualifying exigency leave, the military member must be the spouse, son, daughter, or parent of the employee requesting qualifying exigency leave.

(i) To arrange for alternative care for a parent of the military member when the parent is incapable of self-care and the covered active duty or call to covered active duty status of the military member necessitates a change in the existing care arrangement for the parent;

(ii) To provide care for a parent of the military member on an urgent, immediate need basis (but not on a routine, regular, or everyday basis) when the parent is incapable of self-care and the need to provide such care arises from the covered active duty or call to covered active duty status of the military member;

(iii) To admit to or transfer to a care facility a parent of the military member when admittance or transfer is necessitated by the covered active duty or call to covered active duty status of the military member; and

(iv) To attend meetings with staff at a care facility, such as meetings with hospice or social service providers for a parent of the military member, when such meetings are necessary due to circumstances arising from the covered active duty or call to covered active duty status of the military member but not for routine or regular meetings;

(9) *Additional activities.* To address other events which arise out of the military member's covered active duty or call to covered 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.

**§ 825.127 Leave to care for a covered servicemember with a serious injury or illness (military caregiver leave).**

(a) Eligible employees are entitled to FMLA leave to care for a covered servicemember with a serious illness or injury.

(b) *Covered servicemember* means:

(1) 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. *Outpatient status* 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.

(2) A covered veteran who is undergoing medical treatment, recuperation or therapy for a serious injury or illness. *Covered veteran* means an individual who was a member of the Armed Forces (including a member of the National Guard or Reserves), and was discharged or released under conditions other than dishonorable at any time during the five-year period prior to the first date the eligible employee takes FMLA leave to care for the covered veteran. An eligible employee must commence leave to care for a covered veteran within five years of the veteran's active duty service, but the single 12-month period described in paragraph (e)(1) of this section may extend beyond the five-year period.

(i) For an individual who was a member of the Armed Forces (including a member of the National Guard or Reserves) and who was discharged or released under conditions other than dishonorable prior to the effective date of this Final Rule, the period between October 28, 2009 and the effective date of this Final Rule shall not count towards the determination of the five-year period for covered veteran status.

(c) *Serious injury or illness* means:

(1) In the case of a current member of the Armed Forces, including a member of the National Guard or Reserves, means an injury or illness that was incurred by the covered servicemember in the line of duty on active duty in the

Armed Forces or that existed before the beginning of the member's active duty and was aggravated by service in the line of duty on active duty in the Armed Forces, and that may render the member medically unfit to perform the duties of the member's office, grade, rank or rating; and,

(2) In the case of a covered veteran, means an injury or illness that was incurred by the member in the line of duty on active duty in the Armed Forces (or existed before the beginning of the member's active duty and was aggravated by service in the line of duty on active duty in the Armed Forces) and manifested itself before or after the member became a veteran, and is:

(i) a continuation of a serious injury or illness that was incurred or aggravated when the covered veteran was a member of the Armed Forces and rendered the servicemember unable to perform the duties of the servicemember's office, grade, rank, or rating; or

(ii) a physical or mental condition for which the covered veteran has received a U.S. Department of Veterans Affairs Service-Related Disability Rating (VASRD) of 50 percent or greater, and such VASRD rating is based, in whole or in part, on the condition precipitating the need for military caregiver leave; or

(iii) a physical or mental condition that substantially impairs the covered veteran's ability to secure or follow a substantially gainful occupation by reason of a disability or disabilities related to military service, or would do so absent treatment; or

(iv) an injury, including a psychological injury, on the basis of which the covered veteran has been enrolled in the Department of Veterans Affairs Program of Comprehensive Assistance for Family Caregivers.

(d) 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) *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) *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) *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 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(k).

(e) 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 (e) 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 (e) 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 (e) of this section, provided that the employee is entitled to no more than 12 workweeks 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 workweeks of FMLA leave to care for a covered servicemember and 10 workweeks 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 workweeks 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 (e) 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 (e) 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).

(f) 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 (e) 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 military member on covered active duty status (or has been notified of an impending call or order to covered active duty).

(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(e)(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(e)(3).

(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. *See* § 825.802 for special calculation of leave rules applicable to airline flight crew employees.

#### § 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(c) 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 six weeks of leave to care for a parent, each could use an additional six 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 spouse, 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 spouse, 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. An employer may not require an employee to take more leave than is necessary to address the circumstances that precipitated the need for the leave, provided that the leave is counted using the shortest increment of leave used to account for any other type of leave. *See also* § 825.205(a)(2) for the physical impossibility exception, §§ 825.600 and 825.601 for special rules applicable to employees of schools, and § 825.802 for special rules applicable to airline flight crew employees. If an employer uses different increments to account for different types of leave, the employer must account for FMLA leave in the smallest increment used to account for any other type of leave. For example, if an employer accounts for the use of annual leave in increments of one hour and the use of sick leave in increments of one-half hour, then FMLA leave use must be accounted for using increments no larger than one-half hour. If an employer accounts for use of leave in varying increments at different times of the day or shift, the employer may also account for FMLA leave in varying increments, provided that the increment used for FMLA leave is no greater than the smallest increment used for any other type of 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. In all cases, employees may not be charged FMLA leave for periods during which they are working.

(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 and no equivalent position is available, the entire period that the employee is forced to be absent is designated as FMLA leave and counts against the employee's FMLA entitlement. The period of the physical impossibility is limited to the period during which the employer is unable to permit the employee to work prior to a period of FMLA leave or return the employee to the same or equivalent position due to the physical impossibility after a period of FMLA leave. See § 825.214.

(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 eight hours, the employee would use one-fifth ( $\frac{1}{5}$ ) of a week of FMLA leave. Similarly, if a full-time employee who would otherwise work eight hour days works four-hour days under a reduced leave schedule, the employee would use one-half ( $\frac{1}{2}$ ) 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. 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 10 hours of leave would constitute one-third ( $\frac{1}{3}$ ) 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. An employee does not accrue FMLA-protected leave at any particular hourly rate. An eligible employee is entitled to up to a total of 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 the employee would have worked but for the use of leave. See also §§ 825.601 and 825.602, special rules for schools and § 825.802, special rules for airline flight crew employees.

(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, or one-sixth ( $\frac{1}{6}$ ) of a week of FMLA leave. Voluntary overtime hours that an employee does not work due to an FMLA-qualifying reason 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 workweek 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 through 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)–(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). 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 percent 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 two 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 Department's prototype notice (WHD Publication 1420) 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 [www.dol.gov/whd](http://www.dol.gov/whd). 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 and § 825.801 for special hours of service eligibility requirements for airline flight crews. 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. 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 hours of service with 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 optional Form WH-381 (Notice of Eligibility and Rights and Responsibility) to provide such notification to employees. Prototypes are available from the nearest office of the Wage and Hour Division or on the Internet at [www.dol.gov/whd](http://www.dol.gov/whd). 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 not met the hours of service requirement 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 covered active duty or call to covered 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 responsibly answer questions from employees concerning their rights and responsibilities under the FMLA.

(6) A prototype notice of rights and responsibilities may be obtained from local offices of the Wage and Hour Division or from the Internet at [www.dol.gov/whd](http://www.dol.gov/whd). 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 may be obtained from local offices of the Wage and Hour Division or from the Internet at [www.dol.gov/whd](http://www.dol.gov/whd). 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 military member is on covered active duty or call to covered active duty status

(or has been notified of an impending call or order to covered active duty), and that the requested leave is for one of the reasons listed in § 825.126(b); 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 military member is on covered active duty or call to covered active duty status (or has been notified of an impending call or order to covered active duty), that the requested leave is for one of the reasons listed in § 825.126(b), 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. 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-380-E and WH-380-F, 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. Prototype forms WH-380-E and WH-380-F may be obtained from local offices of the Wage and Hour Division or from the Internet at [www.dol.gov/whd](http://www.dol.gov/whd).

(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 employer'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 time frame requested by the employer (which must allow at least 15 calendar days after the employer's request), unless it is not practicable under the particular circumstances to do so despite the employee's diligent, good faith efforts.

(e) *Content.* The employer may ask for the same information when obtaining recertification as that permitted for the original certification as set forth in § 825.306. The employee has the same obligations to participate and cooperate (including providing a complete and sufficient certification or adequate authorization to the health care provider) in the recertification process as in the initial certification process. See § 825.305(d). As part of the information allowed to be obtained on recertification 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 covered active duty or call to covered active duty status (or notification of an impending call or order to covered active duty) of a military member (*see* § 825.126(a)), an employer may require the employee to provide a copy of the military member's active duty orders or other documentation issued by the military which indicates that the military member is on covered active duty or call to covered active duty status, and the dates of the military member's covered 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 may be required by the employer 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 (or notification of an impending call or order to covered active duty) of the same or a different 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;

(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 email address) and a brief description of the purpose of the meeting; and

(6) If the qualifying exigency involves *Rest and Recuperation* leave, a copy of the military member's Rest and Recuperation orders, or other documentation issued by the military which indicates that the military member has been granted Rest and Recuperation leave, and the dates of the military member's Rest and Recuperation leave.

(c) DOL has developed an optional form (Form WH-384) for employees' use in obtaining a certification that meets FMLA's certification requirements. Form WH-384 may be obtained from local offices of the Wage and Hour Division or from the Internet at [www.dol.gov/whd](http://www.dol.gov/whd). 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 military member is on covered active duty or call to covered active duty status (or has been notified of an impending call or order to covered active duty); 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;

(4) A DOD non-network TRICARE authorized private health care provider; or

(5) Any health care provider as defined in § 825.125.

(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) or an authorized VA representative. 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;

(iv) A DOD non-network TRICARE authorized private health care provider; or

(v) A health care provider as defined in § 825.125.

(2) Whether the covered servicemember's injury or illness was incurred in the line of duty on active duty or, if not, whether the covered servicemember's injury or illness existed before the beginning of the servicemember's active duty and was aggravated by service in the line of duty on active duty;

(3) The approximate date on which the serious injury or illness commenced, or was aggravated, 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.

(i) In the case of a current member of the Armed Forces, 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.

(ii) In the case of a covered veteran, such medical facts must include:

(A) Information on whether the veteran is receiving medical treatment, recuperation, or therapy for an injury or illness that is the continuation of an injury or illness that was incurred or aggravated when the covered veteran was a member of the Armed Forces and rendered the servicemember medically unfit to perform the duties of the servicemember's office, grade, rank, or rating; or

(B) Information on whether the veteran is receiving medical treatment, recuperation, or therapy for an injury or illness that is a physical or mental condition for which the covered veteran has received a U.S. Department of Veterans Affairs Service-Related Disability Rating (VASRD) of 50 percent or greater, and that such VASRD rating is based, in whole or in part, on the condition precipitating the need for military caregiver leave; or

(C) Information on whether the veteran is receiving medical treatment, recuperation, or therapy for an injury or illness that is a physical or mental condition that substantially impairs the covered veteran's ability to secure or follow a substantially gainful occupation by reason of a disability or disabilities related to military service, or would do so absent treatment; or

(D) Documentation of enrollment in the Department of Veterans Affairs Program of Comprehensive Assistance for Family Caregivers.

(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) Whether the covered servicemember is a veteran, the date of separation from military service, and whether the separation was other than dishonorable. The employer may require the employee to provide documentation issued by the military which indicates that the covered servicemember is a veteran, the date of separation, and that the separation is other than dishonorable. Where an employer requires such documentation, an employee may provide a copy of the veteran's Certificate of Release or Discharge from Active Duty issued by the U.S. Department of Defense (DD Form 214) or other proof of veteran status. See § 825.127(c)(2).

(7) 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 optional forms (WH-385, WH-385-V) for employees' use in obtaining certification that meets FMLA's certification requirements, which may be obtained from local offices of the Wage and Hour Division or on the Internet at [www.dol.gov/whd](http://www.dol.gov/whd). These optional forms reflect 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, WH-385-V, 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. Second and third opinions under § 825.307 are not permitted for leave to care for a covered servicemember when the certification has been completed by one of the types of health care providers identified in § 825.310(a)(1)-(4). However, second and third opinions under § 825.307 are permitted when the certification has been completed by a health care provider as defined in § 825.125 that is not one of the types identified in § 825.310(a)(1)-(4). 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(k) 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 forms (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(k) when an employee supports his or her request for FMLA leave with a copy of an ITO or ITA.

(f) An employer requiring an employee to submit a certification for leave to care for a covered servicemember must accept as sufficient certification of the servicemember's serious injury or illness documentation indicating the servicemember's enrollment in the Department of Veterans Affairs Program of Comprehensive Assistance for Family Caregivers. Such documentation is sufficient certification of the servicemember's serious injury or illness to support the employee's request for military caregiver leave regardless of whether the employee is the named caregiver in the enrollment documentation.

(1) An employer may seek authentication and clarification of the documentation indicating the servicemember's enrollment in the Department of Veterans Affairs Program of Comprehensive Assistance for Family Caregivers 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 when the servicemember's serious injury or illness is shown by documentation of enrollment in this program.

(2) An employer may require an employee to provide confirmation of covered family relationship to the seriously injured or ill servicemember pursuant to § 825.122(k) when an employee supports his or her request for FMLA leave with a copy of such enrollment documentation. An employer may also require an employee to provide documentation, such as a veteran's Form DD-214, showing that the discharge was other than dishonorable and the date of the veteran's discharge.

(g) Where medical certification is requested by an employer, an employee may not be held liable for administrative delays in the issuance of military documents, despite the employee's diligent, good-faith efforts to obtain such documents. *See* § 825.305(b). 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)-(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. If the Genetic Information Nondiscrimination Act of 2008 (GINA) is applicable, records and documents created for purposes of FMLA containing family medical history or genetic information as defined in GINA shall be maintained in accordance with the confidentiality requirements of Title II of GINA (*see* 29 CFR 1635.9), which permit such information to be disclosed consistent with the requirements of FMLA. 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.

(h) Special rules regarding recordkeeping apply to employers of airline flight crew employees. *See* § 825.803.

#### 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 (USERRA), 38 U.S.C. 4301, *et seq.*, 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 servicemember would be eligible for FMLA leave if the months and hours that he or she would have worked (or, for airline flight crew employees, would have worked or been paid) for the civilian employer during the period of absence due to or necessitated by USERRA-covered service, combined with the months employed and the hours actually worked (or, for airline flight crew employees, actually worked or paid), meet the FMLA eligibility threshold of 12 months of employment and the hours of service requirement. *See* §§ 825.110(b)(2)(i) and (c)(2) and 825802(c).

(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—Special Rules Applicable to Airline Flight Crew Employees**

##### **§ 825.800 Special rules for airline flight crew employees, general.**

(a) Certain special rules apply only to airline flight crew employees as defined in § 825.102. These special rules affect the hours of service requirement for determining the eligibility of airline flight crew employees, the calculation of leave for those employees, and the recordkeeping requirements for employers of those employees, and are issued pursuant to the Airline Flight Crew Technical Corrections Act (AFCTCA), Public Law 111–119.

(b) Except as otherwise provided in this subpart, FMLA leave for airline flight crew employees is subject to the requirements of the FMLA as set forth in Part 825, Subparts A through E, and G.

##### **§ 825.801 Special rules for airline flight crew employees, hours of service requirement.**

(a) An airline flight crew employee's eligibility for FMLA leave is to be determined in accordance with § 825.110 except that whether an airline flight crew employee meets the hours of service requirement is to be determined as provided below.

(b) Except as provided in paragraph (c) of this section, whether an airline flight crew employee meets the hours of service requirement is determined by assessing the number of hours the employee has worked or been paid over the previous 12 months. An airline flight crew employee will meet the hours of service requirement during the previous 12-month period if he or she has worked or been paid for not less than 60 percent of the employee's applicable monthly guarantee and has worked or been paid for not less than 504 hours.

(1) The *applicable monthly guarantee* for an airline flight crew employee who is not on reserve status is the minimum number of hours for which an employer has agreed to schedule such employee for any given month. The *applicable monthly guarantee* for an airline flight crew employee who is on reserve status is the number of hours for which an employer has agreed to pay the employee for any given month.

(2) The hours an airline flight crew employee has worked for purposes of the hours of service requirement is the employee's duty hours during the previous 12-month period. The hours an airline flight crew employee has been paid is the number of hours for which an employee received wages during the previous 12-month period. The 504 hours do not include personal commute time or time spent on vacation, medical, or sick leave.

(c) An airline flight crew employee returning from USERRA-covered service shall be credited with the hours of service that would have been performed but for the period of absence from work due to or necessitated by USERRA-covered service in determining the employee's eligibility for FMLA-qualifying leave. Accordingly, an airline flight crew employee re-employed following USERRA-covered service has the hours that would have been worked for or paid by the employer added to any hours actually worked or paid during the previous 12-month period to meet the hours of service requirement. In order to determine the hours that would have been worked or paid during the period of absence from work due to or necessitated by USERRA-covered service, the employee's pre-service work

schedule can generally be used for calculations.

(d) In the event an employer of airline flight crew employees does not maintain an accurate record of hours worked or hours paid, the employer has the burden of showing that the employee has not worked or been paid for the requisite hours. Specifically, an employer must be able to clearly demonstrate that an airline flight crew employee has not worked or been paid for 60 percent of his or her applicable monthly guarantee or for 504 hours during the previous 12 months in order to claim that the airline flight crew employee is not eligible for FMLA leave.

**§ 825.802 Special rules for airline flight crew employees, calculation of leave.**

(a) *Amount of leave.* (1) An eligible airline flight crew employee is entitled to 72 days of FMLA leave during any 12-month period for one, or more, of the FMLA-qualifying reasons set forth in §§ 825.112(a)(1)–(5). This entitlement is based on a uniform six-day workweek for all airline flight crew employees, regardless of time actually worked or paid, multiplied by the statutory 12-workweek entitlement for FMLA leave. For example, if an employee took six weeks of leave for an FMLA-qualifying reason, the employee would use 36 days

(6 days × 6 weeks) of the employee's 72-day entitlement.

(2) An eligible airline flight crew employee is entitled to 156 days of military caregiver leave during a single 12-month period to care for a covered servicemember with a serious injury or illness under § 825.112(a)(6). This entitlement is based on a uniform six-day workweek for all airline flight crew employees, regardless of time actually worked or paid, multiplied by the statutory 26-workweek entitlement for military caregiver leave.

(b) *Increments of FMLA leave for intermittent or reduced schedule leave.* When an airline flight crew employee takes FMLA leave on an intermittent or reduced schedule basis, the employer must account for the leave using an increment no greater than one day. For example, if an airline flight crew employee needs to take FMLA leave for a two-hour physical therapy appointment, the employer may require the employee to use a full day of FMLA leave. The entire amount of leave actually taken (in this example, one day) is designated as FMLA leave and counts against the employee's FMLA entitlement.

(c) *Application of § 825.205.* The rules governing calculation of intermittent or reduced schedule FMLA leave set forth

in § 825.205 do not apply to airline flight crew employees except that airline flight crew employees are subject to § 825.205(a)(2), the physical impossibility provision.

**§ 825.803 Special rules for airline flight crew employees, recordkeeping requirements.**

(a) Employers of eligible airline flight crew employees shall make, keep, and preserve records in accordance with the requirements of Subpart E of this Part (§ 825.500).

(b) Covered employers of airline flight crew employees are required to maintain certain additional records “on file with the Secretary.” To comply with this requirement, those employers shall maintain:

(1) Records and documents containing information specifying the applicable monthly guarantee with respect to each category of employee to whom such guarantee applies, including copies of any relevant collective bargaining agreements or employer policy documents; and

(2) Records of hours worked and hours paid, as those terms are defined in § 825.801(b)(2).

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