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Subtitle B —Regulations Relating to Labor
Chapter V —Wage and Hour Division, Department of Labor
Subchapter C —Other Laws

Part 825 The Family and Medical Leave Act of 1993

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PART 825—THE FAMILY AND MEDICAL LEAVE ACT OF 1993

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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 employee would continue to pay his or her share during the leave period. The employer may recover its share only if the employee does not return to work for a reason other than the serious health condition of the employee or the employee's covered family member, the serious injury or illness of a covered servicemember, or another reason beyond the employee's control.

(c) An employee generally has a right to return to the same position or an equivalent position with equivalent pay, benefits, and working conditions at the conclusion of the leave. The taking of FMLA leave cannot result in the loss of any benefit that accrued prior to the start of the leave.

(d) The employer generally has a right to advance notice from the employee. In addition, the employer may require an employee to submit certification to substantiate that the leave is due to the serious health condition of the employee or the employee's covered family member, due to the serious injury or illness of a covered servicemember, or because of a qualifying exigency. Failure to comply with these requirements may result in a delay in the start of FMLA leave. Pursuant to a uniformly applied policy, the employer may also require that an employee present a certification of fitness to return to work when the absence was caused by the employee's serious health condition (*see* §§ 825.312 and 825.313). The employer may delay restoring the employee to employment without such certificate relating to the health condition which caused the employee's absence.

§ 825.101 Purpose of the Act.

(a) FMLA is intended to allow employees to balance their work and family life by taking reasonable unpaid leave for medical reasons, for the birth or adoption of a child, for the care of a child, spouse, or parent who has a serious health condition, for the care of a covered servicemember with a serious injury or illness, or because of a qualifying exigency arising out of the fact that the employee's spouse, son, daughter, or parent is 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, as defined in the statute, means a husband or wife. For purposes of this definition, husband or wife refers to the other person with whom an individual entered into marriage as defined or recognized under state law for purposes of marriage in the State in which the marriage was entered into or, in the case of a marriage entered into outside of any State, if the marriage is valid in the place where entered into and could have been entered into in at least one State. This definition includes an individual in a same-sex or common law marriage that either:

(1) Was entered into in a State that recognizes such marriages; or

(2) If entered into outside of any State, is valid in the place where entered into and could have been entered into in at least one State.

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.

[78 FR 8902, Feb. 6, 2013, as amended at 80 FR 10000, Feb. 25, 2015]

§ 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 § 825.102 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.

[78 FR 8902, Feb. 6, 2013, as amended at 82 FR 2230, Jan. 9, 2017]

§ 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.

§§ 825.116-825.118 [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 parents are entitled to FMLA leave for the birth of their child.

(2) Both parents 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 parents are entitled to FMLA leave even if the newborn does not have a serious health condition.

(3) Spouses 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 the spouses 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 spouses 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 spouses 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 birth mother, and would not be subject to the combined limit.

(4) The expectant 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 expectant 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) A spouse is entitled to FMLA leave if needed to care for a pregnant spouse who is incapacitated or if needed to care for her during her prenatal care, or if needed to care for her following the birth of a child if she has a serious health condition. *See* § 825.124.

(6) Both parents 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, spouses 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 expectant 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.

[78 FR 8902, Feb. 6, 2013, as amended at 80 FR 10000, Feb. 25, 2015]

§ 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) Spouses 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 the spouses 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 spouses 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 spouses 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, spouses 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.

[78 FR 8902, Feb. 6, 2013, as amended at 80 FR 10000, Feb. 25, 2015]

§ 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, as defined in the statute,*** means a husband or wife. For purposes of this definition, husband or wife refers to the other person with whom an individual entered into marriage as defined or recognized under state law for purposes of marriage in the State in which the marriage was entered into or, in the case of a marriage entered into outside of any State, if the marriage is valid in the place where entered into and could have been entered into in at least one State. This definition includes an individual in a same-sex or common law marriage that either:

(1) Was entered into in a State that recognizes such marriages; or

(2) If entered into outside of any State, is valid in the place where entered into and could have been entered into in at least one State.

(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.

[78 FR 8902, Feb. 6, 2013, as amended at 80 FR 10001, Feb. 25, 2015]

§ 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) A *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) Spouses 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 the spouses 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.

[78 FR 8902, Feb. 6, 2013, as amended at 80 FR 10001, Feb. 25, 2015]

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.*** Spouses 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 the spouses 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 spouses 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 spouses 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).

[78 FR 8902, Feb. 6, 2013, as amended at 80 FR 10001, Feb. 25, 2015]

§ 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 expectant 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.

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§ 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 ($^1/_5$) 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 ($^1/_2$) 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 ($^1/_3$) 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 ($^1/_6$) 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 § 825.102. 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).

[78 FR 8902, Feb. 6, 2013, as amended at 82 FR 2230, Jan. 9, 2017]

§ 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 $216 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*. 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*. 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 responsively 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.* 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.* 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).

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§ 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*.

(c) If an employee is on FMLA leave running concurrently with a workers' compensation absence, and the provisions of the workers' compensation statute permit the employer or the employer's representative to request additional information from the employee's workers' compensation health care provider, the FMLA does not prevent the employer from following the workers' compensation provisions and information received under those provisions may be considered in determining the employee's entitlement to FMLA-protected leave. Similarly, an employer may request additional information in accordance with a paid leave policy or disability plan that requires greater information to qualify for payments or benefits, provided that the employer informs the employee that the additional information only needs to be provided in connection with receipt of such payments or benefits. Any information received pursuant to such policy or plan may be considered in determining the employee's entitlement to FMLA-protected leave. If the employee fails to provide the information required for receipt of such payments or benefits, such failure will not affect the employee's entitlement to take unpaid FMLA leave. *See* § 825.207(a).

(d) If an employee's serious health condition may also be a disability within the meaning of the Americans with Disabilities Act (ADA), as amended, the FMLA does not prevent the employer from following the procedures for requesting medical information under the ADA. Any information received pursuant to these procedures may be considered in determining the employee's entitlement to FMLA-protected leave.

(e) While an employee may choose to comply with the certification requirement by providing the employer with an authorization, release, or waiver allowing the employer to communicate directly with the health care provider of the employee or his or her covered family member, the employee may not be required to provide such an authorization, release, or waiver. In all instances in which certification is requested, it is the employee's responsibility to provide the employer with complete and sufficient certification and failure to do so may result in the denial of FMLA leave. *See* § 825.305(d).

§ 825.307 Authentication and clarification of medical certification for leave taken because of an employee's own serious health condition or the serious health condition of a family member; second and third opinions.

(a) ***Clarification and authentication.*** If an employee submits a complete and sufficient certification signed by the health care provider, the employer may not request additional information from the health care provider. However, the employer may contact the health care provider for purposes of clarification and authentication of the medical certification (whether initial certification or recertification) after the employer has given the employee an opportunity to cure any deficiencies as set forth in § 825.305(c). To make such contact, the employer must use a health care provider, a human resources professional, a leave administrator, or a management official. Under no circumstances, however, may the employee's direct supervisor contact the employee's health care provider. For purposes of these regulations, *authentication* means providing the health care provider with a copy of the certification and requesting verification that the information contained on the certification form was completed and/or authorized by the health care provider who signed the document; no additional medical information may be requested. *Clarification* means contacting the health care provider to understand the handwriting on the medical

certification or to understand the meaning of a response. Employers may not ask health care providers for additional information beyond that required by the certification form. The requirements of the Health Insurance Portability and Accountability Act (HIPAA) Privacy Rule (*see* 45 CFR parts 160 and 164), which governs the privacy of individually-identifiable health information created or held by HIPAA-covered entities, must be satisfied when individually-identifiable health information of an employee is shared with an employer by a HIPAA-covered health care provider. If an employee chooses not to provide the employer with authorization allowing the employer to clarify the certification with the health care provider, and does not otherwise clarify the certification, the employer may deny the taking of FMLA leave if the certification is unclear. *See* § 825.305(d). It is the employee's responsibility to provide the employer with a complete and sufficient certification and to clarify the certification if necessary.

(b) ***Second opinion.***

(1) An employer who has reason to doubt the validity of a medical certification may require the employee to obtain a second opinion at the employer's expense. Pending receipt of the second (or third) medical opinion, the employee is provisionally entitled to the benefits of the Act, including maintenance of group health benefits. If the certifications do not ultimately establish the employee's entitlement to FMLA leave, the leave shall not be designated as FMLA leave and may be treated as paid or unpaid leave under the employer's established leave policies. In addition, the consequences set forth in § 825.305(d) will apply if the employee or the employee's family member fails to authorize his or her health care provider to release all relevant medical information pertaining to the serious health condition at issue if requested by the health care provider designated to provide a second opinion in order to render a sufficient and complete second opinion.

(2) The employer is permitted to designate the health care provider to furnish the second opinion, but the selected health care provider may not be employed on a regular basis by the employer. The employer may not regularly contract with or otherwise regularly utilize the services of the health care provider furnishing the second opinion unless the employer is located in an area where access to health care is extremely limited (e.g., a rural area where no more than one or two doctors practice in the relevant specialty in the vicinity).

(c) ***Third opinion.*** If the opinions of the employee's and the employer's designated health care providers differ, the employer may require the employee to obtain certification from a third health care provider, again at the employer's expense. This third opinion shall be final and binding. The third health care provider must be designated or approved jointly by the employer and the employee. The employer and the employee must each act in good faith to attempt to reach agreement on whom to select for the third opinion provider. If the employer does not attempt in good faith to reach agreement, the employer will be bound by the first certification. If the employee does not attempt in good faith to reach agreement, the employee will be bound by the second certification. For example, an employee who refuses to agree to see a doctor in the specialty in question may be failing to act in good faith. On the other hand, an employer that refuses to agree to any doctor on a list of specialists in the appropriate field provided by the employee and whom the employee has not previously consulted may be failing to act in good faith. In addition, the consequences set forth in § 825.305(d) will apply if the employee or the employee's family member fails to authorize his or her health care provider to release all relevant medical information pertaining to the serious health condition at issue if requested by the health care provider designated to provide a third opinion in order to render a sufficient and complete third opinion.

(d) ***Copies of opinions.*** The employer is required to provide the employee with a copy of the second and third medical opinions, where applicable, upon request by the employee. Requested copies are to be provided within five business days unless extenuating circumstances prevent such action.

(e) ***Travel expenses.*** If the employer requires the employee to obtain either a second or third opinion the employer must reimburse an employee or family member for any reasonable "out of pocket" travel expenses incurred to obtain the second and third medical opinions. The employer may not require the employee or family member to travel outside normal commuting distance for purposes of obtaining the second or third medical opinions except in very unusual circumstances.

(f) ***Medical certification abroad.*** In circumstances in which the employee or a family member is visiting in another country, or a family member resides in another country, and a serious health condition develops, the employer shall accept a medical certification as well as second and third opinions from a health care provider who practices in that country. Where a certification by a foreign health care provider is in a language other than English, the employee must provide the employer with a written translation of the certification upon request.

§ 825.308 Recertifications for leave taken because of an employee's own serious health condition or the serious health condition of a family member.

(a) ***30-day rule.*** An employer may request recertification no more often than every 30 days and only in connection with an absence by the employee, unless paragraphs (b) or (c) of this section apply.

(b) ***More than 30 days.*** If the medical certification indicates that the minimum duration of the condition is more than 30 days, an employer must wait until that minimum duration expires before requesting a recertification, unless paragraph (c) of this section applies. For example, if the medical certification states that an employee will be unable to work, whether continuously or on an intermittent basis, for 40 days, the employer must wait 40 days before requesting a recertification. In all cases, an employer may request a recertification of a medical condition every six months in connection with an absence by the employee. Accordingly, even if the medical certification indicates that the employee will need intermittent or reduced schedule leave for a period in excess of six months (e.g., for a lifetime condition), the employer would be permitted to request recertification every six months in connection with an absence.

(c) ***Less than 30 days.*** An employer may request recertification in less than 30 days if:

(1) The employee requests an extension of leave;

(2) Circumstances described by the previous certification have changed significantly (e.g., the duration or frequency of the absence, the nature or severity of the illness, complications). For example, if a medical certification stated that an employee would need leave for one to two days when the employee suffered a migraine headache and the employee's absences for his or her last two migraines lasted four days each, then the increased duration of absence might constitute a significant change in circumstances allowing the employer to request a recertification in less than 30 days. Likewise, if an employee had a pattern of using unscheduled FMLA leave for migraines in conjunction with his or her scheduled days off, then the timing of the absences also might constitute a significant change in circumstances sufficient for an employer to request a recertification more frequently than every 30 days; or

(3) The employer receives information that casts doubt upon the employee's stated reason for the absence or the continuing validity of the certification. For example, if an employee is on FMLA leave for four weeks due to the employee's knee surgery, including recuperation, and the employee plays in company softball league games during the employee's third week of FMLA leave, such information might be sufficient to cast doubt upon the continuing validity of the certification allowing the employer to request a recertification in less than 30 days.

(d) ***Timing.*** The employee must provide the requested recertification to the employer within the 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.* 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.* 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, 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.

[78 FR 8902, Feb. 6, 2013, as amended at 82 FR 2230, Jan. 9, 2017]

§ 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).