The House has adopted the regulations in the Notice of Adoption of Substantive Regulations and Transmittal for Congressional Approval which accompany this transmittal letter. The Board, the accompanying Notice be published in the House version of the Congressional Record on the first day on which both Houses are in session following this transmittal.

The Board has adopted the same regulations for the Senate, the House of Representatives, as required by subsection (b)(1), and received the Senate transmittal of the final regulations applicable to the House and the employees of the House; and the House and the Senate passed Con. Res. 337, providing for approval of the final regulations applicable to the House and the employees of the House.

Once approved by Congress, these regulations would supersede and replace the current substantive Board FMLA regulations from 1996.
the Regular Armed Forces for qualifying exigencies arising out of a service member’s deployment; define those deployments covered under these provisions; extend FMLA military caregiver leave to family members of certain veterans with serious injuries or illnesses that existed prior to service and was aggravated in the line of duty on active duty; extend FMLA military caregiver leave to any qualifying exigency arising out of the fact that a covered family member is on active duty or has been notified of an impending call to active duty status in support of a contingency operation; and modify the definition of “spouseˮ. The Board is required pursuant to the CAA to adopt substantive regulations providing for any additional rights and protections applicable to the legislative branch and that protections under the CAA are in line with existing public and private sector protections under the FMLA. The amendment, as amendments, is that Congress use its rulemaking authority to clarify that the rights and protections for legislative branch servicemembers and their family members are consistent with the 2008 and 2010 amendments to the FMLA.

What do the military family leave provisions propose?

Section 585(a) of the NDAA for Fiscal Year 2008 amends the FMLA to provide leave to eligible employees of covered employers to care for a covered family member with a serious injury or illness. This leave is expanded by substituting the term “covered active duty” for “active duty” during the deployment of the member with the Armed Forces to a foreign country and for a member of the Reserve components of the Armed Forces as “duty during the deployment of the Armed Forces to a foreign country under a call or order to active duty under a provision of law referred to in section 101(a)(13)(B) of title 10, United States Code, that is so designated.” Prior to the Fiscal Year 2010 NDAA amendments, there was no requirement that members of the National Guard and Reserves be deployed to a foreign country under a call to active duty status in support of a contingency operation (collectively referred to as “military family leave”). The provisions of this amendment providing FMLA leave to care for a covered servicemember became effective when the law was enacted on January 28, 2008. The provisions of this amendment providing for FMLA leave due to a qualifying exigency arising out of the fact that a covered family member is on active duty or has been notified of an impending call to active duty status were effective on January 16, 2009.

Section 585(a) of the NDAA for Fiscal Year 2010, enacted on October 28, 2009, amends the military family leave provisions of the FMLA. Pub. Law 111-84. The Fiscal Year 2010 NDAA expands the availability of qualifying exigency leave and military caregiver leave. Qualifying exigency leave, which was made available to family members of the National Guard when the service member was a member of the Armed Forces under the Fiscal Year 2008 NDAA, is expanded to include family members of the Regular Armed Forces. The entitlement to qualifying exigency leave is expanded by substituting the term “covered active duty” for “active duty” and defining covered active duty for a member of the Regular Armed Forces as “duty during the deployment of the member with the Armed Forces to a foreign country” and for a member of the Reserve components of the Armed Forces as “duty during the deployment of the Armed Forces to a foreign country under a call or order to active duty under a provision of law referred to in section 101(a)(13)(B) of title 10, United States Code, that is so designated.”

The Fiscal Year 2010 NDAA amendments expand the definition of a “serious injury or illness” for military caregiver leave for current members of the Armed Forces to include an injury or illness that existed prior to service and was aggravated in the line of duty on active duty, 29 U.S.C. § 2611(18)(A). These amendments also expand the military caregiver leave provisions of the FMLA to allow family members to take military caregiver leave to care for certain veterans. The definition of a “covered servicemember,” which is the term the Act uses to indicate the group of military members for whom caregiver leave is provided, is broadened to include a veteran with a serious injury or illness who is receiving medical treatment, recuperation, or therapy, if the veteran was a member of the Armed Forces at any time during the period of five years preceding the date of the medical treatment, recuperation, or therapy, 29 U.S.C. § 2611(18)(B).

What is the effect of amending the definition of “spouse”?

In its Notice of Proposed Rulemaking, the Board modified its definition of spouse and invited comment regarding whether it should adopt the DOL's definition of spouse or revise the definition of spouse with its newly drafted definition.

The Board has determined that no good cause has been shown to modify the definition of spouse found in the DOL’s current regulations and, therefore, adopts the DOL definition. Minor editorial changes have been made to sections 825.120, 825.121, 825.122, 825.127, 825.201 and 825.220 to make gender neutral references to husbands and wives, and mothers and fathers where appropriate, so that they apply equally to opposite-sex and same-sex spouses. The Board uses the terms “spouses” and “parents,” as appropriate, in these regulations. These editorial changes do not change the availability of FMLA leave, but simply clarify its availability for all eligible employees who are legally married.

Procedural Summary

How are substantive regulations proposed and approved under the CAA?

Pursuant to section 304 of the CAA, 2 U.S.C. § 1384, the procedure for proposing and adopting substantive regulations provides that:

(1) The Board of Directors proposes substantive regulations and publishes a general notice of proposed rulemaking in the Congressional Record;

(2) there be a comment period of at least 30 days after the date of publication of the general notice of proposed rulemaking;

(3) after consideration of comments by the Board of Directors, the Board adopts regulations and transmits notice of such action (together with the regulations and a recommendation regarding the method for Congressional approval of the regulations) to the Speaker of the House and President Pro Tempore of the Senate for publication in the Congressional Record;

(4) the adopted regulations are referred to committees for action or for consideration in each chamber by concurrent resolution, or by joint resolution; and
(5) approved regulations are then published in the Congressional Record, with an effective date.

This Notice of Adoption of Regulations is step (5) of the outline set forth above. For more detail, please reference the text of 2 U.S.C. § 1384.

What is the approach taken by these adopted substantive regulations?

The Board will follow the procedures as enumerated above and as required by statute. The Board has reviewed and responded to the comments received under step (3) of the outline above, and made changes where necessary to ensure that the adopted regulations fully implement section 202 of the CAA, and are consistent with the policies particular to the legislative branch.

Are there substantive differences in the adopted regulations for the House of Representatives, the Senate, and other employing offices?

No. The Board of Directors has adopted one set of regulations for all employing offices. The House suggested that separate regulations be adopted by the Board because of its “unique administrative structures.” For the reasons stated in this Notice, the Board finds no need to depart from the text of the regulations. Therefore, if these regulations are approved as adopted, there will be one text applicable to all employing offices and covered employees. See 2 U.S.C. § 133(b)(1).

Are these adopted regulations also recommended by the Office of Compliance’s Executive Director, the Deputy Executive Director for the Senate, and the Deputy Executive Director for the House of Representatives?

Yes. As required by section 304(b)(1) of the CAA, 2 U.S.C. § 1384(b)(1), the substance of these regulations is recommended by the Executive Director, the Deputy Executive Director for the Senate, and the Deputy Executive Director for the House of Representatives.

What are the next steps in the process of promulgation of these regulations?

Pursuant to section 304(b)(4) of the CAA, 2 U.S.C. § 1384(b)(4), the Board of Directors is required to concurrence with Congress. Congress, and the other covered entities and facilities, it therefore recommends that the adopted regulations be approved by concurrent resolution. See 2 U.S.C. § 1331(b).

Are these adopted substantive regulations available to persons with disabilities in an alternate format?

Yes. This Notice of Adopted Regulations and the substantive regulations are available on the OOC’s website, www.compliance.gov, which is compliant with section 508 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. § 794. The notice can also be obtained in large print or Braille. Requests for this Notice in an alternative format should be made to: Alexandria Sabatini, Administrative Assistant, Office of Compliance, 110 Second Street, S.E., Room LA-200, Washington, D.C. 20540; 202-724-9250; FAX: 202-426-1913.

Am I allowed to view copies of comments submitted by others?

Yes. Copies of submitted comments are available for review on the OOC’s website at www.compliance.gov. Copies received at the Office of Compliance, 110 Second Street, S.E., Washington, D.C. 20540-1999, on Monday through Friday (non-federal holidays) between the hours of 8 a.m. and 4:30 p.m.

Summary

The Congressional Accountability Act of 1995 (CAA), PL 104-1, was enacted into law on January 23, 1995. The CAA, as amended, applies the rights and protections of thirteen federal labor and employment statutes to covered employees and employing offices within the legislative branch of the federal government. Section 202 of the CAA applies to employees covered by the CAA, the rights and protections established by sections 101 through 107 of the Family and Medical Leave Act of 1993 (FMLA), 29 U.S.C. §§ 2601—2696. The above provisions of section 202 became effective on January 1, 1997. 2 U.S.C. § 1312.

The purpose of this Notice of Adoption of Regulations, the Board adopts identical regulations for the Senate, the House of Representatives, and the seven Congressional instrumentalities listed below.

The purpose of these amended regulations is to implement section 202 of the CAA. In this Notice of Adoption of Regulations, the Board adopts identical regulations for the Senate, the House of Representatives, and the seven Congressional instrumentalities.

Accordingly:

1. Senate. The amended regulations adopted in this Notice shall apply to employees within the Senate, as recommended by the OOC’s Deputy Executive Director for the Senate.

2. House. The amended regulations adopted in this Notice shall apply to employees within the House of Representatives, as recommended by the OOC’s Deputy Executive Director for the House of Representatives.

3. Certain Congressional instrumentalities. The amended regulations in this Notice shall apply to the following Congressional instrumentalities: The General Accounting Office, the United States Capitol Police, the Congressional Budget Office, the Office of the Architect of the Capitol, the Office of the Clerk of the House of Representatives, the Office of Compliance, and the Office of Technology Assessment; as recommended by the OOC’s Executive Director.

Section-by-Section Discussion and Board Consideration of Comments

This section lists the following is a section-by-section discussion of the adopted regulations. Where a change is made to a regulatory section, that section is discussed. However, as the DOL has significantly reorganized its FMLA regulations, which the Board’s adopted regulations mirror, many of the sections are moved into other areas of the subpart. The Board as a result will use the adopted section and numbers to provide explanation and analysis of changes. In addition, even if a section is not numbered, there may be minor editorial changes or corrections that do not warrant discussion.

In addition, several sections have been restructured and reconceived to improve the accessibility of the information (e.g., guidance on leave for pregnancy and birth of a child is addressed in one consolidated section; an employment notice obligations are combined in one section).

Some commenters suggested that the Board modify the regulations where a comment believed that clarification was needed to resolve potential ambiguities in the FMLA regulations. However, the Board has long held that it will not opine on interpretive ambiguities in the regulations—outside of the adjudicatory context of individual cases. The Board’s rulemaking authority under the CAA is restricted to circumstances where there is an ambiguity in the statutory text and the Secretary of Labor’s substantive regulations. Further, the Board’s adjudicatory function would be undermined if it prejudged substantive regulatory matters.

Therefore, the Board does not find “good cause” to modify a regulation where the request is based on an ostensible need for clarification.

Section by Section Discussion and Board Consideration of Comments

SUBPART A—COVERAGE UNDER THE FAMILY AND MEDICAL LEAVE ACT

As Made Applicable by the CAA

To clarify that the CAA and not the FMLA applies directly to employing offices, the Board has added “as made applicable by the CAA” to the section title at the suggestion of one commenter.

A commenter suggested that the Board clarify that these regulations supersede and replace the Board’s substantive regulations currently applicable to the covered legislative branch entities. To resolve any uncertainty, if approved by Congress, these regulations would necessarily supersede and replace the current substantive Board FMLA regulations.

Section 825.100 The Family and Medical Leave Act

825.100(a). This section allows eligible employees to take FMLA leave for reasons including a qualifying exigency “. . . arising out of the fact that the employee’s spouse, son, daughter, or parent is on active duty status.” One commenter requested the Board add an “ed” to the word “call” for clarity—many of the phrases are phrased out of the fact that the employee’s spouse, son, daughter, or parent is a military member on active duty or called to covered active duty status . . .” The Board finds that the “call to covered active duty status” is a status term appearing in the DOL’s regulations, and finds no good cause to modify DOL’s terminology.

825.100(b). In the proposed regulations, the Board included comments from the OOC’s versions of these regulations with the Senate version. Because there is only one version of these regulations, the italicized and parenthetical language that references separate entities has been deleted from these adopted regulations.

Section 825.102 Definitions

The Board finds good cause to depart from the DOL regulations with respect to some definitions. As discussed above, the Board clarifies that the CAA and any of the ADA applicable to the Office of Compliance would be “as made applicable by the CAA” to the definition of ADA.

In addition, the term “Act” as defined in the DOL regulations and referred to in the FMLA can be confused with the Congressional Accountability Act (CAA). Accordingly, the definition of “Act” is excluded from the Board’s regulations. To avoid any confusion, the definition for “Administrator” in the DOL regulations has been deleted. Similarly, as there is no airline flight crew covered under the CAA, the definition of and all references to “airline flight crew employee” has been deleted in the Board’s regulations.

Because the DOL definitions of “commerce and industry or activity affecting commerce” and “applicable monthly guarantee” include concepts that do not apply to employing offices covered by the CAA, the Board finds good cause to exclude these definitions from the regulations.
“Covered active duty or call to covered active duty status”

One commenter suggested that the regulatory definition improperly expands the covered active duty status definition. The Board had proposed a statutory correction to 2 U.S.C. § 2611 or 2 U.S.C. § 1312 if an expanded definition is intended. The Board finds that the definition is consistent with DOL’s regulation which was intended to expand such coverage under the FMLA in line with the military leave provisions of the FMLA and the National Defense Authorization Acts (NDAA), and therefore does not find good cause to modify its regulation.

“Covered employee”

One commenter suggested that the definition of “Covered employee” does not need to be included in these regulations because that term is defined in 2 U.S.C. §1302(3)–(10) of the CAA. The Board finds no good cause to modify the regulation, and includes the definition of “Covered employee” in its regulations.

“Covered servicemember”

One commenter stated that the regulatory definition is inconsistent with the definition in 2 U.S.C. §2611 (15), and suggested deleting the definition. The Board finds that the proposed definition of “Covered servicemember” is consistent with the DOL’s regulation and that no good cause has been shown to modify the DOL’s regulation.

“Employment office”

One commenter claimed that the regulatory definition is inconsistent with the statutory definition in 2 U.S.C. §2611 (15) and (19), and suggested deletion. The Board finds that the definition of “Employed veteran” is consistent with the DOL’s regulation and that no good cause has been shown to modify the DOL’s regulation.

“Employee”

A commenter noted that the definition of “Employee” in the Board’s regulations is different than the statutory definition of “Eligible employee” under section 202(a)(2)(B), but made no recommendation. Because the DOL’s definition of “Eligible employee” (paragraphs 1(i)(3)(4)(5)(6)(7) in section 825.102) is not consistent with the definition of “Eligible employee” in CAA section 202(a)(2)(B), the Board finds good cause to keep the definition of “Eligible employee” that is used in the current version of the OOC FMLA regulations and to delete the definition as it appears in the DOL regulation.

“Employee employed in an instructional capacity”

One commenter suggested that reference to teachers should be deleted from the regulations because the commenter does not currently employ teachers. The Board finds that this section may be relevant to other employing offices now or in the future, and therefore finds no good cause to delete the definition.

“Employee of the House Representatives”

One commenter suggested correcting the definition of “Employee of the House of Representatives” to state that it does not include any individual employed in subgraphs 2–9 in the definition of covered employer. The Board is following the language of the statute (see 2 U.S.C §1301(7)) and finds no good cause to modify this provision.

“Employee of the Senate”

One commenter suggested that the definition of “Employee of the Senate” should be corrected to include “but not any individual employed by any entity listed in subparagraphs 1, or 3-9. The Board is following the language of the statute (see 2 U.S.C §1301(b)) and finds no good cause to modify this provision.

“Employing office”

One commenter suggested that the definition of “Employing office” need to be included in these regulations because this definition is already covered in 2 U.S.C §1301 of the CAA. The Board finds good cause to keep the definition—modified to the extent that it reflects the unique definition of “Employing office” under the CAA.

“Employment”

One commenter suggested deleting this regulatory definition because it is similar but not the same as the statutory definition found in 2 U.S.C. § 1301(3). The Board finds that the definition of “Employment benefits” is consistent with the DOL’s regulation, and that no good cause has been shown to modify the DOL’s regulation.

“FLSA”

One commenter suggested correcting the Fair Labor Standards Act (29 U.S.C. § 201 et seq.), as made applicable by the Congressional Accountability Act, to clarify that the FLSA applies directly to employing offices, the Board has added “as made applicable by the CAA” to the section title, at the suggestion of a commenter.

“Health care provider”

In the paragraphs defining “Health care provider,” to avoid confusion, the Board is substituting “the Secretary” with “the Department of Labor” to be capable of providing health care services.

One commenter suggested that the definition of “Covered employee” in its regulations is inconsistent with the statutory definition of “Eligible employee” under section 202(a)(2)(B), but made no recommendation. Because the DOL’s regulations define “Health care provider” as “any other person . . . capable of providing health care services . . .” is overly inclusive. The Board finds “Health care provider” is consistent with the DOL’s regulation and good cause has not been shown to modify the DOL’s regulation.

“Outpatient status”

One commenter claimed the definition of “Outpatient status” is different than the statutory definition in 29 U.S.C. §2611(16) and suggested that the Board use the statutory definition. The Board finds that the definition of “Outpatient status” is consistent with the DOL’s regulations and that no good cause has been shown to modify the DOL’s regulations.

“Physical or mental disability”

Under the paragraph defining “physical or mental disability,” the Board has replaced the language from the DOL regulations indicating that 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, defines these terms, and states instead that regulation “is issued by the EEOC “provide guidance to” these terms.” (Italics added).

Because the terms “Person” and “Public agency” are not applicable to employing offices covered by the Board, the Board has also found good cause to exclude these DOL definitions from its proposed regulations.

“Spouse”

One commenter suggested that the Board had proposed to adopt the following definition of “Spouse” that is not the same as the DOL definition:

Spouse means a husband or wife. For purposes of this definition, husband or wife refers to all individuals in lawfully recognized marriages. This definition includes an individual whose marriage is of a same-sex. The definition also includes an individual in a common law marriage that either: (1) was entered into in a State that recognizes such marriage; or (2) if entered into in any State, is valid in the place where entered into and could have been entered into in at least one State.

Another commenter suggested that the Board adopt the DOL’s definition of spouse noting that the Supreme Court’s decision in Obergefell v. Hodges, does not invalidate the DOL’s definition. One commenter suggested that the Board’s proposed definition is inconsistent with the statutory definition (“spouse” means a husband or wife, as the case may be) and the DOL’s regulations. Another commenter suggested that the Board’s proposed definition does not include a requirement that a valid marriage exists, i.e., a marriage may exist by reason of foreign law and thus is not subject to domestic law. The Board had proposed to adopt the DOL’s definition of spouse.

Section 825.104 Covered employing offices.

Three commenters suggested that section 825.104(c) should be deleted because the integrated employer concept does not apply in the context of the CAA. One commenter noted that the integrated employer test, separate entities of a private sector employer will be regarded as a single employer based on an evaluation of such factors as common management, interrelation between operations, centralized control of labor relations, and degree of common ownership/financial control. See 29 C.F.R. §825.104(c)(2). If the integrated employer test is met, all entities in question will be considered one employer, for purposes of counting employees. Under the FMLA, private sector employees engaged in commerce are covered only if 50 or more employees are employed in at least 20 or more calendar workweeks. Under the CAA, however, persons of any sex are covered by the FMLA and the Board will regard all employers as carrying out the same function as a private sector employer. Another commenter suggested that the CAA applies to employees engaged in an industry affecting commerce are covered if 50 or more employees are employed in at least 20 or more calendar workweeks. Under the CAA, however, persons of any sex are covered by the FMLA and the Board will regard all employers as carrying out the same function as a private sector employer.

Section 825.106 Joint employer coverage.

As joint employment relationships are treated differently under the CAA than by the DOL, the Board finds good cause to keep the language in the current OOC regulations in paragraphs (b) through (e) of this section. Also, as it is not applicable under the CAA, the Board finds good cause to exclude from its definitions language relating to Professional Employer Organizations (PEOs) as joint employers. As the DOL has noted, PEOs contract with private employers to provide services that large businesses can afford, but that small businesses cannot afford, such as compliance with government standards, employer liability management, retirement benefits, and other employee benefits. Congress already provides these services for its employees.

Section 825.110 Eligible employees.

This section defines who may be eligible for FMLA leave. One commenter suggested that the provision is inconsistent with the statutory definition of “Eligible employee” that is found in the CAA. The Board has also found good cause to exclude this provision from its adopted regulations.
The Board proposed to adopt unchanged the DOL’s definitions of “serious health condition” and “incapacity plus treatment.” One commenter suggested that these definitions written, which accept minor ailments from FMLA coverage as legislative history would require, could be augmented by a three-day work combination with a visit to a doctor and round of antibiotics, or an otherwise minor ailment in contravention of the FMLA’s intended construction. The commenter requested that the Board increase the days of incapacity from three to five and further require two visits to a healthcare provider within 30 days of the incapacity plus treatment,” as opposed to also allowing one visit to a doctor coupled with “a regimen of continuing treatment.” (See § 825.115) The commenter believed this would cause the FMLA to deviate from the statutory protections of the FMLA.

Section 825.120 Leave for pregnancy, birth, or adoption

Several commenters suggested deleting the following sentence from section 825.120(a)(3): “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” because state law does not apply to the legislative branch.

Further, in this section and other sections throughout the FMLA regulations, any references to spouses who are employed at two different worksites of an employer located more than 75 miles from each other have not been adopted by the Board because such sections are not applicable to the legislative branch.

Two commenters suggested deleting the following sentence from section 825.120(a)(3): “Section 825.121(b) Use of Intermittent and reduced schedule leave.

One commenter suggested that the ref- erence to state law in this section and other sections throughout the FMLA regulations have not been adopted by the Board because state law does not apply to the legislative branch.

The Board finds good cause to delete this reference to state law, and has deleted the last sentence of section 825.120(a)(3) from its adopted regulations.
an employing office, and finds that good
cause to delete this language from its regu-
lations has not been shown.

Section 825.122(b) Covered servicemember
spouse.

Commentators noted that the definition of “spouse” contained in the proposed regula-
tion deviates from the corresponding DOL regula-
tion, and the Board has not shown good
cause to modify its definition. As noted pre-
viously, the Board hereby adopts DOL’s cur-
cent definition of spouse.

Section 825.122(d)(2) Physical or mental dis-
ability.

One commenter suggested replacing “def-
"define these terms” in section 825.122(d)(2) with
“provide guidance for these terms.” As a
basis, the commenter noted that the EEOC’s ADA
defines terms related to physical or mental disabilities but merely
provide guidance in interpreting those
terms. See 161 Cong. Rec. S6707. The Board
finds good cause to deviate from DOL’s lan-
guage with regard to this provision, and re-
places “define these terms” with “provide
guidance for these terms.”

Section 825.125(a)(2)–(3)

One commenter said that “any other per-
son” not only broadens and expands the statu-
tory definition in 29(c) U.S.C. §211(6), and
suggested that the Board use the statutory definition with a
clarification. The Board finds that replacing the DOL’s definition, and that no good cause to modify
the regulation has been shown.

SUBPART B—EMPLOYEE LEAVEENTITLEMENTS UNLESS THE FAMILY AND MEDICAL LEAVE ACT

Section 825.200 Amount of Leave.

825.200(a)(5) One leave former suggested adding “covered”
before “order to” and “active duty” in section 825.200(a)(5). The Board has made the
suggested change.

825.200(b) One commentator suggested that since the
House no longer has a school, the example of a
school closing two weeks for the Christ-
mas/New Year Holiday or for a summer vaca-
tion is not helpful when discussing tem-
porary cessation of business activities. The Board
finds that no good cause has been shown
for modifying DOL’s regulations.

Section 825.202 Intermittent leave or reduced
leave schedule.

825.202(b) One commentator requested additional guid-
ance concerning intermittent leave, claiming the terms “medical necessity” and “to provide care or psychological comfort to a
covered family member with a serious health condition” are too vague. As noted previously, the Board declines to modify DOL’s regulations to resolve potential ambi-
guities.

825.202(d) One commentator suggested that “qualifying exigency” be specifically defined (as
discussed in section 825.112 above). The Board
has determined that no good cause has been shown to modify the DOL regulation, and the Board will not modify DOL’s regulations to resolve potential ambiguities.

Section 825.203 Scheduling of intermittent or reduced
schedule leave.

825.203 One commentator suggested that section
825.203 addresses only situations where inter-
mittent leave is “medically necessary” or “because of a qualifying exigency” and does
not address the circumstances outlined in
section 825.202. Further, the commentator sug-
gests the proposed regulation be rewrite-
ten to address each circumstance proposed in
section 825.202, and to provide “objective spe-
cific notice requirements an employee must
provide to an employing office.” The
commentor also suggested that section 825.203 be
rewritten to consider each of the factors enu-
merated in section 825.203, particularly section 330(c) “Com-
plying with Employing Office Policies,” or
minimally, that section 825.203 should have a
brief discussion of the possible exceptions to the
specific notice requirements an employee must
provide to an employing office.” The Board has
determined that no good cause has been shown to modify the current FMLA regulations.

Section 825.205 Increments of FMLA leave for
intermittent or reduced schedule leave.

825.205(a)–(2) One commentator suggested that the exam-
iples given that include reference to a flight
attendant or a railroad conductor scheduled
to work aboard an airplane or train, or a lab-
oratory worker. These are not useful because
there is no equivalent position available in the
House of Representatives. The commentor suggested using examples that would be
more relevant to the House workplace. Also given
the statement in the definitions section of
the Preamble that all references to “airline
flight crew employee” have been deleted, the
Board finds good cause to delete the phrase
“flight attendant” from the definition because the
origins of these terms do not include these
monitories. The examples given are for illus-
trative purposes only. The Board has de-
termined that no good cause has been shown to modify the current DOL regulation.

Section 825.206 Interaction with the FLSA, as
made applicable by the CAA.

Although the DOL amended its FMLA regu-
lations to reference the list of exempt employees who do not lose their FLSA exempt status despite being pro-
vided unpaid FMLA leave, the Board finds
good cause not to include “computer em-
ployees” to the list of employees who may
qualify as exempt from the overtime and
minimum wage requirements of the FLSA.

Proposed Regulations implementing exemptions from
the overtime pay requirements under the
Fair Labor Standards Act of 1938 (FLSA) for
“computer employees” are more narrowly
worded in the FLSA than OOC FLSA regula-
tions. The OOC’s FMLA regulations do not provide
exemptions for computer employees. Therefore,
the OOC’s adopted FMLA regulations do not include these employees in this sec-
tion.

One commentator suggested that the Board
refer to the OCC’s FMLA regulations con-
cerning “computer employees” to clarify that
these employees may receive compensatory time. The Board has made the
suggested change making the Board’s regula-
tion the same as the current DOL reg-
ulation.

Section 825.206(c) One commentator suggested that the Board
delete “such as leave in excess of 12 weeks in a
year” after “for leave which is more gen-
erous than provided by the FMLA, as made
applicable by the CAA.” The Board finds
that no good cause has been shown to modify
the FMLA regulations.

Section 825.207(f) One commentator suggested that the Board
substitute “as specified in the House workplace.” The Board has determined that the current language suffi-
ciently underscores the fact that the CAA, not the FLSA, applies to employees of the
House of Representatives. The Board sought comments from inter-
ested parties as to whether such a provision is appropriate for the legislative branch.

One commentator suggested that the pro-
posed language is appropriate given the fact
that there is no reason to treat compen-
satory time differently than paid annual or sick leave for purposes of substituting that
time for unpaid FMLA leave.

One commentator suggested substituting “as
specified in the House workplace” for “as
made applicable by the CAA” in section 825.207(f). The Board has determined that the current language suffi-
ciently underscores the fact that the CAA, not the FLSA, applies to employees of the
House of Representatives. The Board sought comments from inter-
ested parties as to whether such a provision is appropriate for the legislative branch.

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that there is no reason to treat compen-
satory time differently than paid annual or sick leave for purposes of substituting that
time for unpaid FMLA leave.

One commentator suggested substituting “as
specified in the House workplace” for “as
made applicable by the CAA” in section 825.207(f). The Board has determined that the current language suffi-
ciently underscores the fact that the CAA, not the FLSA, applies to employees of the
House of Representatives. The Board sought comments from inter-
ested parties as to whether such a provision is appropriate for the legislative branch.

One commentator suggested that the pro-
posed language is appropriate given the fact
that there is no reason to treat compen-
satory time differently than paid annual or sick leave for purposes of substituting that
time for unpaid FMLA leave.
may grant “time off awards” or other non-monetary entitlements to time away from the workplace that do not accrue under the FLSA. However, these grants of time do not necessarily entitle employees to pay, and may not be “cashed out” for wages as this section instructs. The section specifically covers an employee’s use of accrued compensatory time earned in lieu of wages or time paid “under the FLSA.” And the Board finds no good cause to modify the provision.

Section 825.209 Maintenance of employee benefits.

The Board has changed what it believes to be a typographical error in the DOL regulations and cross references this section with section 825.102 and not section 825.800 when referring to the definition of “group health plan.”

Section 825.215 Equivalent position.

Any references from the DOL regulations in this section and other sections to the Employee Office for a project for a specific period time have been deleted from this section. The Board finds that the definition of “successor in interest” has not been adopted by the Board because ERISA does not apply to the legislative branch.

Section 825.216 Limitations on employee’s rights.

This section clarifies that an employee has no greater employment rights than if the employee had been continually employed during the FMLA leave period. The Board questions whether the following employees have the right to leave under the FMLA as stated in section 825.216(a)(3) of the DOL regulations applied to the legislative branch: “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 section 825.216.

The Board proposed that the OOC regulations contain the following language and requested comments from interested parties, especially with respect to caucus or committee employees: “On the other hand, if an employee was hired to perform work for one employer and after that time period has ended, the same employee was assigned to work at another employing office on the same supervisory level of the employing office may be required to restore the employee if it is a successor employing office.”

Two commenters suggested deleting section 825.217(b) because it references the concept of successor liability, a concept they say is inapplicable, and cross-references §825.107 which has been “reserved” by the Board in the proposed regulations.

The concept of “successor in interest” is developed in section 825.107 of the Secretary of Labor’s regulations. The regulations state that “successor in interest” exists by determining whether a successor employer is entitled to the “same or substantially the same business operations,” the “same or substantially the same employee relations,” the “same or substantially the same work force,” the “same or substantially the same supervisory personnel,” the “same or substantially the same machinery equipment,” the “same or substantially the same production methods,” and the “same or substantially the same contracts, orders, and production situations.” However, section 825.107(b)(1) merely states where the successor would not be liable for compensation and benefits lost by reason of the violation of the FMLA and for other actual monetary losses sustained by a direct result of the violation.” In other words, an employee is not entitled to both compensation and other actual monetary losses sustained. Additionally, the commenter suggested removing the cross-reference to section 825.400(c) because it does not outline what remedies are allowed under the CAA; rather, section 825.400(c) merely states where aggrieved employees can find their procedures. Another commenter suggested removing subsection (b) because it is inconsistent with 2 U.S.C. §1381(d)(1) regarding exclusive procedures under the CAA, attempts to “make applicable additional causes of action” by use of the term “manipulation,” and expands the “scope of rights” under the CAA.

The Board finds that no good cause has been shown to modify or delete the DOL regulations because the CAA applies section 825.217(b)(1) of the DOL’s regulations, the CAA’s regulation is the same as the DOL regulation applying that section. While we recognize that the commenters’ arguments may have some merit we found no reason for the Board to make that determination as a part of its rulemaking authority under the CAA.

The Board finds that it is appropriate to reserve section 825.220(b)(1) regarding numerosity.

With respect to a commenter’s suggestion that the Board remove the cross-reference to section 825.220(c)(1) of the DOL’s regulations because it does not outline what remedies are available for violations of the FMLA but merely states where aggrieved covered employees can find the OOC’s complaint procedures, the Board did revisit this section and add the DOL’s remedies section 825.400(c) to its regulations, and moved the reference to its complaint procedures to subsection (d).

Except for the paragraph related to settle-
clarifies that the prohibition against interference includes prohibitions against retaliation as well as discrimination. The Board finds that there is good cause to modify DOL’s language in paragraph (d) of this section.

Sections 1414 and 1415 of the CAA govern awards and settlements made as a result of a party proceeding through OOC or court. While the Board recognizes that parties will now have the right to settle or release FMLA claims without the approval of the OOC or a court, parties still need to release claims which were raised in an OOC process pursuant to CAA sections 1414 and 1415 must still comply with those provisions. Therefore, the Board proposes to add the following language: “Except for settlement agreements covered by sections 1414 and/or 1415 of the Congressional Accountability Act, this does not prevent the settlement or release of FMLA claims by employees based on past employment office conduct without the approval of the Office of Compliance or a court.”

One commenter noted that an employee’s acceptance of a light duty assignment or right to restoration beyond the 12 month FMLA leave frame when the employee’s need for leave subsides or changes. This commenter suggested that the phrase “based on past employment office conduct” found in the third sentence of the section hints of presumptive inappropriate conduct by employing offices that is not necessary to achieve the goal of this sentence. The commenter suggested deleting it. The Board has determined that there is no good cause shown to modify the DOL regulation.

(b) Eligibility notice.

The Board adopts the DOL regulations concerning the leave notice. The Board also adopts the DOL regulations consolidating existing eligibility notice requirements in current sections 825.110 and 825.1 to one section, “Eligibility notice,” finding no good cause to depart from the amendments adopted by the DOL.

The Board adopts section 825.300 regarding the eligibility notice (825.300(b)); the designation notice (825.300(d)); and the consequence of failing to provide notice (825.300(e)).

One commenter agreed that the regulation should be amended to clarify that employing offices are permitted to settle FMLA claims without OOC or court approval unless the settlement agreement is covered by section 1414 or 1415 of the CAA. The commenter further suggested that the phrase “based on past employment office conduct” found in the third sentence of the section hints of presumptive inappropriate conduct by employing offices that is not necessary to achieve the goal of this sentence. The commenter suggested deleting it. The Board has determined that there is no good cause shown to modify the DOL regulation.

825.220(e)

Two commenters suggested that only “covered employees” and “employees,” as defined in sections 101(3) and (4) of the CAA, and not “individuals,” are protected by the CAA; therefore (e) should be deleted. The Board has determined that good cause has been shown to modify the DOL regulations in section 825.220(e). The 1996 Board regulations do not reference the term “individuals.” The Board has determined that the CAA incorporates certain specific responsibilities into the FMLA, and the Board finds no good cause to depart from the amendments adopted by the DOL.

The Board adopts section 825.300 regarding the eligibility notice (825.300(b)); the designation notice (825.300(d)); and the consequence of failing to provide notice (825.300(e)).

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The Board adopts section 825.300 regarding the eligibility notice (825.300(b)); the designation notice (825.300(d)); and the consequence of failing to provide notice (825.300(e)).
each FMLA-qualifying reason per leave year, regardless of whether the leave is taken as a continuous block of leave or on an intermittent or reduced leave schedule basis.

Furthermore, the office must inform the employee of the number of hours that would be designated as FMLA leave, only upon request and no more often than every 30 days if FMLA leave was taken during that period. To the extent it is not possible to provide such information (such as in the case of unforeseeable intermittent leave), the employing office is required to provide such information to the employee every 30 days if the employee took leave during that period. The employing office shall be permitted to notify the employee of the hours counted against the FMLA leave entitlement orally and follow up with written notification on a pay stub at the next pay period (unless the next payday is in less than one week, in which case the notice must be no later than the subsequent payday). If the employing office requires that paid leave be substituted for unpaid leave, or that paid leave taken under an existing leave plan be counted as FMLA leave, the employing office must inform the employee of this designation at the time the leave is designated as FMLA leave.

Although the designation notice has to be in writing, it may be in any form, including a notation on the employee’s pay stub. If the leave is not designated as FMLA leave, the notice may be in the form of a simple written statement. Employing offices can provide an employee with both the eligibility and designation notice at the same time. In cases where the employing office has adequate information to designate leave as FMLA leave when an employee requests leave.

Employing offices must provide written notice of any requirement for a fitness-for-duty certification, including whether the fitness-duty certification will be required at the time of designation of the employee’s position and, if so, to provide a list of the essential functions of the employee’s position. If the employee handbook or other written documents clearly provides that a fitness-for-duty certificate will be required, the oral notice is not required, but oral notice must be provided.

Finally, the employing office is required to notify the employee of the information provided in the designation notice changes. For example, if an employee exhausts his or her FMLA leave entitlement and the leave will no longer be designated as FMLA leave, the employing office must provide the employee with written notice of this change consistent with this section.

One commenter would like clarification that electronic receipt of the “designation notice” is permitted in addition to the written notice of rights and responsibilities. The Board finds good cause to clarify that the designation notice may be distributed electronically. In this regard, the Board notes that the regulations set forth the types of information that an employing office may have to provide in order to put an employing office on notice of the employee’s need for FMLA leave. In those respects, the regulations provide for appropriate equitable or other relief, in the nature of the information necessary to put the employing office on notice of the need for FMLA leave. In these cases, employees must respond to requests from employing offices to explain why the leave is being taken, and employees will be required to respond to such inquiries.

Additionally, the regulations make clear that the requirement that an employee and employing office attempt to work out a schedule without unduly disrupting the employing office’s operations applies only to military caregiver leave. It does not apply to qualifying exigency leave.

Regarding a waiver of notice requirements, one commenter suggested replacing the reference “See 29 C.F.R. 29.5.304” with the more specific reference “See 29 C.F.R. 29.5.294.” The Board notes that in all cases, the Board finds that such a reference would be more direct, but as such would have limited context. Therefore, the Board finds that good cause would be shown for waiving notice under the regulations.

Section 825.300 Employee notice requirements for foreseeable FMLA leave.

The Board proposed to adopt the FMLA amendments with respect to this section. In general, section 825.303 addresses an employer’s obligation to provide notice of the need for foreseeable FMLA leave. This includes requiring an employer to give at least 30 days’ notice of the employee’s leave, when the employee’s leave is foreseeable at least 30 days in advance or “as soon as practicable.” If leave is foreseeable but 30 days’ notice is not practicable. In such cases, employees must respond to requests from employing offices to explain why it was not possible to give 30 days’ notice.

The Board notes that 29 C.F.R. 29.304 clarifies that an employing office may be liable for compensation and benefits lost by reason of the violation, for other actual monetary losses sustained by the employee, and for appropriate equitable or other relief, including employment, reinstatement, promotion, or any other relief tailored to the harm suffered by the employee. One commenter asserted that the proposed regulation section 825.300(c) addresses an employer’s obligation to provide notice when the need for FMLA leave is unforeseeable. Section 825.303 addresses an employer’s obligation to provide notice when the need for FMLA leave is unforeseeable. Section 825.303 addresses an employer’s obligation to provide notice when the need for FMLA leave is unforeseeable. The Board notes that good cause may be shown for waiving notice under the regulations.

Section 825.303 Employee notice requirements for unforeseeable FMLA leave.

The Board proposed to adopt the following language be included in the OOC regulations:
the facts and circumstances of the particular case," but instead of expecting employees to give notice "within no more than one or two working days of learning the need for leave, or circumstances," notice should be provided within the time pre-
scribed by the employing office’s usual and customary notice requirements applicable to such leave. Section 825.301 also retains the current standard that employees need not assert their rights under the FMLA or even mention the FMLA to put employing offices on notice for unforeseen FMLA leave, but adds the same language used in proposed section 825.302 clarifying what information must be provided to give sufficient notice to the employing of-
Ice of the need for FMLA leave. New regula-
tions in section 825.303 add that the em-
ploying office must respond to an employee’s questions designed to de-
termine whether leave is FMLA-qualifying, explaining that calling in “sick” without providing additional information, would not be sufficient notice.

Section 825.304 Employee failure to provide notice.
The Board proposed to adopt the DOL amendments. In this section, Section 825.304 follows the DOL’s reorganiza-
tion of the rules that are applicable to leave foreseeable at least 30 days in advance, leave foreseeable less than 30 days in advance, unforeseeable leave, which the DOL retains the la-
nguage that FMLA leave cannot be delayed due to lack of required employee notice if the employing office has not complied with its notice requirements.

One commenter suggested deleting or amending language that the condition would be satisfied by the employing office’s proper posting, at the worksite where the employee is employed, of the information re-
garding the requirement (currently included in sec-
tion 301(b)(2) of the CAA, 2 U.S.C. § 1381(b)(2)) by the Office of Compliance to the employing office in a manner suitable for posting “because posting is merely one way in which an employing office could provide employees with actual notice of the FMLA’s notice re-
quirements. Another commenter stated that since the FMLA’s posting requirements do not apply to congressional employing offices, the Board has good cause to clarify that an employing office can also meet its notice re-
quirement by providing a written policy, a HIPAA policy to employees, or including an FMLA policy in an employee handbook. The regulation merely suggests a method to provide no-
tice. A good faith determination that it is not necessary by any method. Therefore, the Board has deter-
mined that good cause has not been shown to modify the DOL regulation.

Section 825.305 Certification, general rule.
The Board proposed to adopt the DOL amendments with respect to this section. Under the FMLA, as applied under the CAA, employing offices are permitted to require that employees provide a certification from a health care provider (or their family member’s health care provider, as appro-
piate) to support the need for leave due to a serious health condition. Section 825.305 sets forth the general rules governing em-
ploying office requests for medical certifi-
cation to substantiate an employee’s need for FMLA leave. Section 825.305 applies generally to all types of cer-
tification, including references to “medical certification” or “certification.”

In section 825.305, the employing office should request that an employee furnish cer-
tification from a health care provider at the time the employee gives notice of the need for leave, or, in the case of unforeseen leave, within five business days after the leave commences. This time frame has been in-
creased from three business days after notice of the need for FMLA leave is pro-
vided. Further, the employing office may re-
quest certification at some later date if the employee does not provide the appropriate certification for the appropriateness of the leave or its dura-
tion. This section also adds a 15-day time pe-
riod for providing a requested certification to all cases.

Definitions of incomplete and insufficient certifications have been added in this sec-
tion, as well as a procedure for curing an in-
complete or insufficient certification. This procedure requires that an employing office notify the employee in writing as to what additional information is necessary for the medical certification and provides seven cal-
endar days in which the employee must pro-
vide the additional information. If an em-
ployee fails to submit a complete and suffi-
cient certification, despite the opportunity to cure the deficiency, the employing office may deny the request for FMLA leave. Section 825.305 also deletes an earlier pro-
vision requiring a written request for a certifi-
cation that the DOL has determined that good cause has not been shown to modify DOL regula-
tions.

Section 825.306 Content of medical certifi-
cation for leave taken because of an em-
ployee’s own serious health condition or the serious health condition of a family member.
The Board proposed to adopt the DOL amendments with respect to this section. Section 825.306 addresses the information an employing office must request in the medical certification to substantiate the existence of a serious health condition (of the employee or a family member) and the employee’s need for leave due to the condition. Section 825.306 also provides requirements for an employing office to request, receive, and review medical certification for leave. Section 825.306 also includes language regarding an employee’s consent to contact their health care provider in order to understand the handwriting on the medical certification or to understand the certification in the case of a determin-
ation that good cause has not been shown to modify the DOL regulation.

One commenter suggested deleting “and” from a certification for the request of a second or third opinion because it makes no sense to have a certifi-
cation determination of the need for FMLA leave and replaces it with a provision allow-
ing employing offices to require a new cer-
tification on an annual basis for conditions lasting beyond a single leave year.

Section 825.307 Authentication and clarifica-
tion of medical certification for leave taken because of an employee’s own serious health condition or the serious health condition of a family member.
The Board proposed to adopt the DOL amendments with respect to this section. Section 825.307 addresses the issue of medical certification for leave and clarifies that the regulation would allow an employee to request clarification of a certification from a health care professional to contact the employee’s health care pro-
vider and ensure that the employee’s di-
rect supervisor is not the point of contact. Employee consent to the contact is no longer required. However, before the employing of-
office contacts the employee’s health care pro-
vider for clarification or authentication of the FMLA certification, the employee must first be given an opportunity to cure any defi-
ciciencies in the certification. Section 825.307 also provides requirements for an employing office to request for an authentication, and adds language requiring the employee or the employee’s family member to authorize his or her health care provider to release rele-
vant medical information in the case of a serious health condition at issue if such in-
formation is requested by the second opinion health care provider. Section 825.307 also in-
creases the number of days the employing of-
office has to provide an employee with a re-
quested copy of a second or third opinion from two to five business days. This section on regulations does not apply to the mil-
itary family leave provisions.

One commenter supported allowing an in-
dividual to request a second or third opinion from a health care professional other than a health care professional to contact the health care provider for purposes of clar-
ification and authentication of the medical certification.

One commenter suggested that the “clar-
ification and authentication” creates more confusion than guidance. The commenter suggested that if this language requires an employer to first speak with the employee regarding clar-
ification before it may directly contact the healthcare provider creates an opportunity for miscommunication about the informa-
tion actually needed by the employer, an issue that can be best handled by direct com-
munication. The commenter also believes that requiring employees who may have furnished a fraudulent certifi-
cation to “cure” the defect, and suggests
that section 825.307(c) is deleted. Further, rather than deny an FMLA request for failure to ‘clarify the certification’ as in subsection (a), the commenter suggests that the regulations promulgate a requirement for the employee to provide advanced authorization to the employing office to contact the healthcare provider for clarification or authentication. The Board has determined that member has been shown to modify DOL regulations.

Another commenter suggested that the fourth sentence of § 825.307(a) addressing the issue of who within an employing office may contact the eligible employee’s health care provider to clarify and/or authenticate certification, may be more effectively worded. Specifically, the sentence, which is the same as that in the DOL’s regulation, states that ‘Under no circumstances may the employee’s direct supervisor contact the employee’s health care provider.’ The commenter suggested that this provision would be unworkable with respect to many employing offices of the House, particularly Member offices, due to the statutory limit on the size of those offices. Specifically, under 2 U.S.C. §5321(a), Member offices are permitted to employ no more than 22 employees (this covers the total number of employees for both the Washington, D.C. and district offices). Accordingly, the vast majority of House employing offices do not have separate human resources divisions to assure compliance with this requirement. Therefore, it is not possible for the employee’s direct supervisor (e.g., the District Director or the Chief of Staff) who handles FMLA requests. If the direct supervisor is prohibited from contacting the employee’s health care provider, the employing office would have to find someone else—perhaps a peer/co-worker of the employee seeking FMLA leave or another individual in the employing office may request the same information may be requested by the employing office, no information may be required beyond that specified in this section should not be read to apply HIPAA to employing offices. However, it should be clear that the level of privacy afforded individually-identifiable health information created or held by HIPAA-covered entities is satisfied when this information is shared with an employing office by a HIPAA-covered health care provider. The Board finds that good cause has not been shown to modify the DOL regulation.

One commenter suggested that the regulatory language in subsection (a) referencing the employee’s direct supervisor may be confusing. The Board finds that good cause has not been shown to modify the DOL regulation.

Accordingly, the vast majority of House employing offices do not have separate human resources divisions to assure compliance with this requirement. Therefore, it is not possible for the employee’s direct supervisor (e.g., the District Director or the Chief of Staff) who handles FMLA requests. If the direct supervisor is prohibited from contacting the employee’s health care provider, the employing office would have to find someone else—perhaps a peer/co-worker of the employee seeking FMLA leave or another individual in the employing office may request the same information. This would unnecessarily expand the scope of individuals with knowledge of the employee’s FMLA request, and would be inconsistent with the spirit of the regulations requiring that access to such HIPAA-related information be limited to as few persons as possible to preserve privacy and confidentiality. The commenter also mentioned that it is notable that the DOL regulation applies to employers who have at least 50 employees (29 C.F.R. §825.104(a)), or are public agencies that specifically identify their employees or a human resources office to contact health care providers. The commenter believes that, with respect to the House, there is good cause to modify the regulation. In order to be satisfied, the HIPAA authorization required by the employing office may be used by the employing office, no information may be required beyond that specified in this section should not be read to apply HIPAA to employing offices. However, it should be clear that the level of privacy afforded individually-identifiable health information created or held by HIPAA-covered entities is satisfied when this information is shared with an employing office by a HIPAA-covered health care provider. The Board finds that good cause has not been shown to modify the DOL regulation.

Section 825.308 Recertifications for leave taken because of an employee’s own serious health condition of a family member.

The Board proposed to adopt the DOL amendments covered in this section. Section 825.306 of the regulations addresses the employing office’s ability to seek recertification of an employee’s medical condition. This section has been reorganized to clarify how often employing offices may seek recertification in situations where the minimum duration of the condition, as opposed to the duration of the period of incapacity, exceeds 30 days. The Board may require recertification no more often than every 30 days and only in connection with an absence by a covered military member’s active duty service. While additional information may be provided to the employing office, no information may be required beyond that specified in this section should not be read to apply HIPAA to employing offices. However, it should be clear that the level of privacy afforded individually-identifiable health information created or held by HIPAA-covered entities is satisfied when this information is shared with an employing office by a HIPAA-covered health care provider. The Board finds that good cause has not been shown to modify the DOL regulation.

The Board proposed to adopt the DOL amendments covered in this section. Under the military family leave provisions of the DOL regulations, an employing office may require that leave taken because of a qualifying exigency be supported by a certification and related documentation submitted by the covered military member’s active duty orders or other documentation issued by the military, which indicates that the covered military member has been notified of an impending call to active duty (or notified of an impending call to active duty) in support of a contingency operation, as well as the dates of the covered military member’s active duty status. While a form requesting this basic information may be used by the employing office, no information may be required beyond that specified in this section should not be read to apply HIPAA to employing offices. However, it should be clear that the level of privacy afforded individually-identifiable health information created or held by HIPAA-covered entities is satisfied when this information is shared with an employing office by a HIPAA-covered health care provider. The Board finds that good cause has not been shown to modify the DOL regulation.

Section 825.309 Certification for leave taken because of a covered servicemember’s (military caregiver) exigency.

The Board proposed to adopt the DOL amendments covered in this section. Under the military caregiver leave provisions of the DOL regulations, an employing office may require that leave taken because of a qualifying exigency be supported by a certification and related documentation submitted by the covered military member’s active duty orders or other documentation issued by the military, which indicates that the covered military member has been notified of an impending call to active duty (or notified of an impending call to active duty) in support of a contingency operation, as well as the dates of the covered military member’s active duty status. While a form requesting this basic information may be used by the employing office, no information may be required beyond that specified in this section should not be read to apply HIPAA to employing offices. However, it should be clear that the level of privacy afforded individually-identifiable health information created or held by HIPAA-covered entities is satisfied when this information is shared with an employing office by a HIPAA-covered health care provider. The Board finds that good cause has not been shown to modify the DOL regulation.

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The Board proposed to adopt the DOL amendments covered in this section. Under the military caregiver leave provisions of the DOL regulations, an employing office may require that leave taken because of a qualifying exigency be supported by a certification and related documentation submitted by the covered military member’s active duty orders or other documentation issued by the military, which indicates that the covered military member has been notified of an impending call to active duty (or notified of an impending call to active duty) in support of a contingency operation, as well as the dates of the covered military member’s active duty status. While a form requesting this basic information may be used by the employing office, no information may be required beyond that specified in this section should not be read to apply HIPAA to employing offices. However, it should be clear that the level of privacy afforded individually-identifiable health information created or held by HIPAA-covered entities is satisfied when this information is shared with an employing office by a HIPAA-covered health care provider. The Board finds that good cause has not been shown to modify the DOL regulation.
this section. While the military family leave provisions of the NDAA amended the FMLA’s certification requirements to permit an employer to request certification for leave taken by a covered servicemember’s family member (in some circumstances), the FMLA’s existing certification requirements focus on providing information related to the employee, and do not provide the employee with a list of those essential job functions no later than the employee’s requested leave. This section requires that the employer provide the employee with a list of those essential job functions no later than the employee’s requested leave.

The designation notice must indicate that the certification address the employee’s ability to perform those essential functions. An employer may request that the employee’s health care provider directly, consistent with the procedure in proposed section 825.307(a), for purposes of authenticating or verifying the certification. The employer may request the certification to return to work. Employees are not entitled to the reinstatement section of the Act if they do not provide the required fitness-for-duty certification or request additional FMLA leave.

Section 825.312 also requires that the em-ploying office uniformly apply its policies and procedures, including training of the military family leave provisions of the NDAA amended the FMLA’s certification requirements to permit an employee to request certification for leave taken by a covered servicemember’s family member (in some circumstances), the FMLA’s existing certification requirements focus on providing information related to the employee, and do not provide the employee with a list of those essential job functions no later than the employee’s requested leave. This section requires that the employer provide the employee with a list of those essential job functions no later than the employee’s requested leave.

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Section 825.312 also requires that the em-ploying office uniformly apply its policies and procedures, including training of the military family leave provisions of the NDAA amended the FMLA’s certification requirements to permit an employee to request certification for leave taken by a covered servicemember’s family member (in some circumstances), the FMLA’s existing certification requirements focus on providing information related to the employee, and do not provide the employee with a list of those essential job functions no later than the employee’s requested leave. This section requires that the employer provide the employee with a list of those essential job functions no later than the employee’s requested leave.

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825.312(1) to be added to permit the employing office to conduct fitness for duty certifi-
cations at any time it deems a police officer may not be able to perform the essential functions of the job, and that this is not con-
templated retaliation. The Board has deter-
mind that good cause has not been shown to modify the DOL regulation.

One commenter noted that when an em-
ployee is delayed by the employer from re-
turning to work because the employee has not pro-
vided a fitness-for-duty certification, it is not clear what the employee’s status is.
The commenter suggested that the regula-
tion permit the employing office to carry the em-
ployee’s FMLA leave status (absent without pro-
vided leave) status, or the employee may use approved annual leave until the certifi-
cation is provided. The commenter also sug-
gested the regulation permit a 15 (or re-
tification is not untimely until that period has passed. Employing offices may deny FMLA leave if they fail to provide a timely certification or recertifi-
cation, but the FMLA does not require em-
ploying offices to do so. Employing offices always may choose not to provide a tim-
ely certification and not denying FMLA protection to any absences that occurred during the period in which the certification was delayed.

One commenter suggested that while con-
sistent with the language of the DOL regula-
tion that states, “If the employee never pro-
duce certification, the leave is not FMLA leave,” the proposed regulation nec-
ecessarily begs the question: when can an em-
ploying office plausibly state that the em-
ployee’s FMLA leave has been certified? Given this ambiguity, the commenter sug-
gested that the Board deviate from the DOL lan-
guage and provide more direction in this area by including the last sentence of this sec-
tion to read: “If the employee fails to produce the certification after a reasonable amount of time under the circumstances, the leave is not FMLA leave.” Although there still may be a question of what constitutes a “reasonable amount of time under the cir-
cumstances,” this language, in the com-
menter’s view, provides more clarity on the issue. The Board has determined that no good cause has been shown to modify the DOL regulation.

One commenter suggested that a “grace period” should be provided, as it proposes in section 312(e) above, to bridge the gap be-
tween the expiration of FMLA leave and ter-
minal FMLA leave. As determined, the assum-
ption that no good cause has been shown to modify the DOL regulation.

SUBPART D—Administrative Process
Section 825.400, Administrative Process, gen-
eral rules.

One commenter suggested that section 825.400(a) be added to the CAA specifically addresses the procedures to be followed, and the proposed regulation is duplicative. Additionally, the commenter suggests that section 825.400(c) is not appropriate and should be deleted be-
cause it does not govern “enforcement of the FMLA,” and the citation to a website does not convey that the procedures have been approved by Congress.

Another commenter agreed that there is good cause not to adopt the DOL regulation because the enforcement provisions of the DOL regulation differ from those applicable in CAA actions. However, in section 825.400(c), the commenter suggested that the Board iden-
tify the exact name/nature of the procedures referenced, and also clarify that these proce-
dures only apply to CAA complaints pending before the OOC, not those brought in federal court.

Upon review of the comments regarding section 825.400, the Board has decided to re-
tain section 825.400 in the final regulation, change the title from “Enforce-
ment Mechanisms” to “Administrative Process” and change the subtitle “Enforce-
ment, general rules” to “Administrative Process, general rules.” In addition, the DOL lan-
guage added as section 825.400(c) to the Board’s final regulation describes the rem-
edies available to covered employees for a violation of the FMLA, as made applicable by the CAA.

Sections 825.401–825.404 Filing a complaint with the Federal Government; Violations of the posting requirement; Appealing the amusement of a penalty for willful viola-
tion of the posting requirement; Con-
sequences for an employer when not pay-
ing the penalty assessment after a final order.

These sections do not apply to the CAA and will remain reserved in the OOC regula-
tions.

SUBPART E—RECORDKEEPING REQUIRE-
MENTS
Section 825.500 Recordkeeping requirements.

This section does not apply to the CAA and will remain reserved in the OOC regulations.

SUBPART F—SPECIAL RULES APPLICABLE TO EMPLOYERS OF SCHOOLS TO EMPLOYEES UPON A REQUEST FOR OR INSTRUCTIONAL EMPLOYEES DURING THE THREE-WEEK PERIOD BEFORE THE END OF THE AS MADE APPLICABLE BY THE CAA

Section 825.700 Interaction with employing office’s policies.

The Board proposed to adopt the amend-
ments covered in the DOL regulations under this section. Section 825.700 provides that an employing office may amend office ex-
established by the FMLA through an employ-
ment benefit program or plan, but an em-
ploying office may provide greater leave rights that better accommodate recurring pe-
riods of leave.

One commenter noted that, unlike in the Senate, the House no longer has a school and thus these regulations are inapplicable to the House. The Board finds no good cause to modify the regulation as a whole.

SUBPART G—EFFECT OF OTHER LAWS, EMPLOYING OFFICE PRACTICES, AND COLLECTIVE BARGAINING AGREEMENTS ON EMPLOYEE RIGHTS UNDER FMLA, AS MADE APPLICABLE BY THE CAA

Sections 825.200–825.211 Interactions between federal laws.

The Board proposed to adopt the amend-
ments covered in the DOL regulations under this section. Section 825.200 describes the interaction between the FMLA and the CAA. The Board has determined that no agreement, would be through the grievance process or another section of the CAA, and not under the FMLA provision of the CAA. The Board has determined that no good cause has been shown to modify the DOL regulation.

One commenter objected to the first sen-
tence of this section, suggesting that the Board has determined that no good cause has been shown to modify the DOL regulation.

One commenter notes that subsection (a) limits an employing office’s ability to implement other policies that provide greater employment benefits, impermissibly requiring an employing office to continue a
benefit program that it may no longer be able to afford. Thus, it improperly limits management’s right to determine its own policies. The Board has determined that no good cause has been shown to modify the DOL regulation.

One commenter agrees that the Board should follow the DOL regulation to comply with the court’s decision in Ragsdale v. Wolverine World Wide, 535 U.S. 81 (2002) (holding that an employer may retroactively designate leave as FMLA leave under the Act’s ); however, the commenter urges the Board to further clarify the following language: “An employing office must observe any employment benefit programs that provide greater family or medical leave rights to employees than the rights established by the FMLA.” Specifically, the commenter suggested that the Board clarify what constitutes such employment benefit program or plan. This proposed section discusses a hypothetical example of a collective bargaining agreement which provides for reinstatement rights based on seniority; however, the commenter recommends that the Board offer additional examples (e.g., to clarify whether leave policies at state and federal agencies (ADA)).

The Board has determined that no good cause has been shown to modify the DOL regulations.

Section 825.701 Interaction with State laws.

This DOL section does not apply to the CAA and will remain reserved in the OOC regulations.

Section 825.702 Interaction with anti-discrimination laws, as applied by section 201 of the CAA.

The Board proposed to amend the DOL regulations to incorporate a reference to this section. Section 825.702 addresses the interaction between the FMLA and Federal and State antidiscrimination laws. Section 825.702 discusses the interaction between the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA) and the FMLA. Under USERRA, a returning servicemember would be entitled to FMLA leave if, after including the hours that he or she would have worked for the civilian employing office during the period of military service, the employee would have met the FMLA eligibility threshold. This is not an expansion of FMLA rights through regulation; this is a requirement of USERRA.

With respect to the interaction of the FMLA and ADA, where both laws may apply, the applicability of each statute needs to be evaluated independently.

Further, the reference to employers who receive Federal financial assistance and employers who contract with the Federal government in any way has not been adopted by the Board because federal contractor employers are not covered by the CAA.

One commenter suggested adding “as made applicable by the CAA” between “ADA” and “the employing office.” The same commenter suggested adding “as made applicable by the CAA” after “afford an employee his or her FMLA rights.” The Board has made the suggested changes.

One commenter suggested adding “as made applicable by the CAA” after the or she will have ADA” after “ADA.” The Board made the suggested change.

COMMENTS ON MODEL FORMS:

I. In its final regulations, the DOL removed the following optional-use forms and notices from the Appendix of the regulations, but continued to make them available to the public on the WHD Web site: Forms WH–380–E (Certification of Health Care Provider for Employee’s Serious Health Condition); WH–380–F (Certification of Health Care Provider for Family Member’s Serious Health Condition); WH–381 (Notice of Eligibility and Rights and Responsibilities); WH–392 (Designation Notice); WH–394 (Certification of Qualifying Exigency for Military Family Leave); WH–385 (Certification for Serious Injury or Illness of Current Servicemember for Military Family Leave); and WH–385–V (Certification for Serious Injury or Illness of a Veteran for Military Caregiver Leave).

The Board proposed to revise its forms and to make the following OOC forms available on its website: Form A: Certification of Health Care Provider for Employee’s Serious Health Condition; Form B: Certification of Health Care Provider for Military Family Leave; Form C: Notice of Eligibility and Rights and Responsibilities; Form D: Designation Notice to Employee of FMLA Leave; Form E: Certification of Qualifying Exigency for Military Family Leave; Form F: Certification for Serious Injury or Illness of Covered Servicemember for Military Family Leave; and Form G: Certification for Serious Injury or Illness of a Veteran for Military Caregiver Leave.

The Board proposed that the forms be available on its website: Form A: Certification of Health Care Provider for Employee’s Serious Health Condition; Form B: Certification of Health Care Provider for Military Family Leave; Form C: Notice of Eligibility and Rights and Responsibilities; Form D: Designation Notice to Employee of FMLA Leave; Form E: Certification of Qualifying Exigency for Military Family Leave; Form F: Certification for Serious Injury or Illness of Covered Servicemember for Military Family Leave; and Form G: Certification for Serious Injury or Illness of a Veteran for Military Caregiver Leave.

Substantive Regulations Adopted by the Board of Directors of the Office of Compliance Extending Rights and Protections Under the Family and Medical Act of 1993, as amended, as Made Applicable by the Congressional Accountability Act

FINAL REGULATIONS

Part 825—Family and Medical Leave

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825.3 [Reserved]

825.4 Covered employers.

825.5 [Reserved]

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825.7–825.109 [Reserved]

825.11 Eligible employee.

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825.120 Leave for pregnancy or birth.

825.121 Leave for adoption or foster care.

825.122 Definitions of covered servicemember, spouse, parent, son or daughter, next of kin of a covered servicemember, adoptee, 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.

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825.147 Maintenance of benefits under multi-employer health plans.

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825.151 Equivalent position.

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SUBPART C—EMPLOYEE AND EMPLOYING OFFICE RIGHTS AND OBLIGATIONS UNDER THE FMLA, AS MADE APPLICABLE BY THE CAA.

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SUBPART D—ENFORCEMENT MECHANISMS.

825.400 Enforcement of FMLA rights, as made applicable by the CAA.
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SUBPART E—[Reserved]

SUBPART F—SPECIAL RULES APPLICABLE TO SCHOOL EMPLOYEES, COVERED MILITARY MEMBERS, AND THEIR FAMILIES.

825.600 Special rules for school employees, definitions.
825.601 Special rules for school employees, limitations on intermittent leave.
825.602 Special rules for school employees, duration of FMLA leave.
825.603 Special rules for school employees, limitations on leave near the end of an academic term.
825.604 Special rules for school employees, restoration to an equivalent position.

SUBPART G—EFFECT OF OTHER LAWS, EMPLOYING OFFICE PRACTICES, AND COLLECTIVE BARGAINING AGREEMENTS ON EMPLOYEE RIGHTS UNDER THE FMLA, AS MADE APPLICABLE BY THE CAA.

825.700 Interaction with employing office's policies.
825.701 [Reserved]
825.702 Interaction with anti-discrimination laws as applied by section 201 of the CAA.

825.800 Enforcement of FMLA rights, as made applicable by the Congressionally Accountability Act.

825.100 The Family and Medical Leave Act.

(a) The Family and Medical Leave Act of 1993 (FMLA), as made applicable by the Congressional Accountability Act (CAA), allows eligible employees of an employing office 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 status).

(b) These regulations are issued by the Board of Directors (Board) of the Office of Compliance, pursuant to sections 202(d) and 304 of the CAA, which direct the Board to promulgate regulations implementing section 202 that are the same as substantive regulations promulgated by the Secretary of Labor to implement the statutory provisions referred to in subsection (a) of section 202 of the CAA except as the Board may determine, for good cause shown . . . that a modification of such regulations would be more effective for the implementation of the rights and protections under this section.

(c) The regulations issued by the Board herein are on all matters for which section 202 of the CAA requires regulations to be issued. Specifically, the Board may also promulgate regulations implementing section 202 that are the same as substantive regulations promulgated by the Secretary of Labor to implement the statutory provisions referred to in subsection (a) of section 202 of the CAA.

(d) In promulgating these regulations, the Board has made certain technical and nomenclature changes to the regulations as promulgated by the Secretary. Such changes are intended to make the provisions adopted accord more naturally to situations in the legislative branch. For example, by making these changes, the Board does not intend a substantive difference between these regulations and those of the Secretary from which they are derived. Moreover, such changes, in and of themselves, are not intended to constitute an interpretation of the regulation or of the statutory provisions of the CAA upon which they are based. The Board's considered judgment, based on the information available to it at the time of the promulgation of these regulations, that, with the exception of regulations set forth herein, there are no other substantive regulations promulgated by the Secretary of Labor to implement the statutory provisions referred to in subsection (a) of section 202 of the CAA.

(e) Pursuant to section 304(b)(4) of the CAA, 2 U.S.C. 1384(b)(4), the Board of Directors is required to recommend to Congress a method of approval for these regulations. As the Board has adopted the same regulations for the Senate, the House of Representatives, and the other covered entities and facilities, it, therefore, recommends that the regulations be approved by concurrent resolution of the Congress.

825.101 Purpose of the FMLA.

(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 in support of a covered family member. The FMLA balances the demands of work and family life by ensuring the right of eligible employees to take leave for specified family and medical reasons without being disqualified from reemployment or suffering other penalties under the laws they are employed under.

(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 regarding a chronic serious health condition that is not related to a chronic serious health condition that is the cause of continuing treatment; or

(ii) 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 the health care provider. Examples include Alzheimer’s, a severe stroke, or the terminal stages of a disease.

(b) Continuation of coverage. For purposes of this part:

(1) Eligible employee means:

(i) A member of the Regular Armed Forces on covered active duty or call to covered active duty status. The FMLA supplements the duty 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 structure and stability. It was intended that the FMLA accomplish these purposes in a manner that accommodates the legitimate interests of employers to maintain a stable workforce and enhance their own profitability. It was intended that the FMLA accomplish these purposes 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 their employers 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 children, or even to provide care for other serious illnesses, workers need assurance that they will not be asked to choose between continuing their employment, and meeting family and personal obligations or tending to vital needs at home.

(c) The FMLA is both intended and expected to benefit employees as well as their employers. Acknowledging the direct correlation between stability in the family and productivity in the workplace, FMLA will encourage the development of high-performance organizations. FMLA provides workers with dependable 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:


(3) COBRA means the continuation coverage requirements of Title X of the Consolidated Omnibus Budget Reconciliation Act of 1986 (Pub. Law 99–272, 100 Stat. 229, 29 U.S.C. 1161–1168). The FMLA requires that employers provide at least 12 weeks of job-protected leave to eligible employees, and that employers accommodate employees with serious health conditions, as well as to military members, on a case-by-case basis.落到实处，职工如果因怀孕需要请假，企业必须提供必要的支持。
period of previous employment that occurred more than seven years before the date of the most recent hiring of the employee, unless:

(1) The break in service is occasioned by the full-time employment of a family member of the employee in the Uniformed Services Employment and Reemployment Rights Act (USERRA), 38 U.S.C. § 4301 et seq., coverage times (the layoff is occasioned by absences from work due to or necessitated by USERRA-covered service) must be count in determining whether the employee has been employed for at least 12 months by any remote office, but this section does not provide any greater entitlement to the employee than would be available under the USERRA, as made applicable by the CAA; and

(ii) A written agreement, including a collective bargaining agreement, exists concerning the employee’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 child rearing purposes); and

(2) Whose, 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 an employing office during the previous 12-month period, except that:

(i) An employee returning from fulfilling a covered service obligation shall be credited with the hours of service that would have been performed but for the periods of work due to or necessitated by USERRA-covered service in determining whether the employee met the hours of service requirement (accordingly, a person who has performed absence from work due to or necessitated by USERRA-covered service has the hours that would have been worked for the employing office added to any leave deducted during the previous 12-month period to meet the hours of service requirement); and

(ii) 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 calculating.

Employ means to suffer or permit to work. Employee means an employee as defined by the CAA, or an applicant for employment and a former employee.

Employee employed in an instructional capacity. See the definition of Teacher in this section.

Employee of the Capitol Police means any member or officer of the Capitol Police.

Employee of the House of Representatives means any employee occupying a position the pay for which is disbursed by the Clerk of the House of Representatives, or another official designated by the House of Representatives, or any employment position in an entity that is paid with funds derived from the clerk-hire allowance of the House of Representatives but not any such individual employed by any entity listed in subparagraphs (3) through (9) under the definition of covered employee above.


Employee of the Senate means any employee whose pay is disbursed by the Secretary of the Senate, but not any such individual employed by any entity listed in subparagraphs (3) through (9) under the definition of covered employee above.

Employing Office, as defined by the CAA, means:

(1) The personal office of a Member of the House of Representatives or of a Senator;

(2) A committee of the House of Representatives or the Senate.

(3) Any other office headed by a person with the final authority to appoint, hire, discharge, and set the terms, conditions, or privileges of the employment of an employee of the House of Representatives or the Senate; or

(4) The Office of Congressional Accessibility Services, the United States Capitol Police, the Congressional Budget Office, the Office of the Architect of the Capitol, the Office of Compliance, and the Office of Technology Assessment.

Employment benefits means all benefits provided or made available to employees by an employing office, including group life insurance, health insurance, disability insurance, sick leave, annual leave, educational benefits, and transportation whether such benefits are provided by a practice or written policy of an employing office or through an employee benefit plan. The term does not include non-employment related obligations paid by employees through voluntary deductions such as supplemental insurance coverage.

See also § 825.209(c).

FLSA means the Fair Labor Standards Act (29 U.S.C. § 201 et seq.), as made applicable by the CAA.

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), as made applicable by the CAA.

Group health plan means the Federal Employees Health Benefits Program and any other plan of, or contributed to by, an employing office, but this section does not apply to any plan of, or contributed to by, the Federal Employees Health Benefits Program and any other plan of, or contributed to by, the Federal Employee’s Retirement System, the Federal Employee’s Health Benefits Program, or any individual policy or plan (other than a plan maintained for dependent care services) for costs of premiums for any group health plan or any individual policy or plan for health care services.

Group health plan shall include any plan of, or contributed to by, an employing office, that provides health insurance coverage to the employee’s eligible family members.

Health care provider means:

(1) The policy, as applicable by the CAA, defines health care provider as:

(i) A doctor of medicine or osteopathy who is authorized to practice medicine or surgery in the state in which the doctor practices (as appropriate under Title 29 of the U.S. Code) or

(ii) Any other person determined by the Department of Labor 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 determined 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) Nurses, nurse-midwives, and 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 employing office that the employee or family member submit to examination or certification; and

(iv) Any health care provider from whom an employing office or a 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 whose pay is disbursed by the Secretary of the Treasury, or her or his 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 licensed to diagnose and treat physical or mental health conditions.

Ineligible 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, eating, dressing, and bathing. 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 4 or more days at one time, provided that such leave is taken from an hour or more to several weeks. Examples of intermittent leave would include leave taken on an occasional basis for minor or nonserious injury or illness, leaves of several days at a time spread over a period of six months, such as for chemotherapy.

Invalid travel order (ITO) means 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 employing office within 75 work units of the employee’s worksite. See also § 825.217.

Mental disability: See the definition of Physical or mental disability in this section.

Mental health care provider means a professional in the field of mental health who has been licensed or certified to provide services to the covered servicemember by the state or country in which the covered servicemember resides.

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, son, or daughter, in the following order of priority: blood relatives who have been granted legal custody of the covered servicemember by a court of competent jurisdiction, 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.

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no such designation is made, and there are multiple family members with the same level of relationship to the covered service-
member, all such family members shall be considered as persons served under the terms of the Act, even if kin and may take FMLA leave to provide care to the covered servicemember, either con-
secutively or simultaneously. When such designation is made, the covered service-
member's only next of kin. See also 825.127(d)(3).

Officer of Compliance means the independent office established in the legislative branch under section 301 of the CAA (2 U.S.C. 1381).

Outreach, 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 active or a 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 indi-
vidual who stood in loco parentis to the em-
ployee or employee’s child and who is of any age. See also 825.127(d)(2).

Physical or mental disability means a phys-
ical or mental impairment that substan-
tially limits one or more of the major life ac-
tivities of an individual. Regulations at 29 CFR part 1630, issued by the Equal Employ-
ment Opportunity Commission under the American with Disabilities Act of 1990, 29 U.S.C. 12101 et seq., as amended, provide guidance for these terms.

Reduced leave schedule means a leave sched-
ule 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, in-
clude the Army National Guard of the United States, Army Reserve, Navy Reserve, Marine Corps Reserve, Air Force Reserve, and Coast Guard Reserve, and retired members of the Regular Armed Forces or Reserves who are called to active duty status for a contingency or for training purposes.

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 de-
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 if the need for hospital care is required or unless complications de-
velop. Restorative dental or plastic surgery after an injury or removal of cancerous growths are serious health conditions pro-
vided all the other conditions of this regu-
lation 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, an injury or illness that was incurred by the covered servicemem-
ber 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 render the servicemember medici-
ally unfit to perform the duties of the mem-
ber’s office, grade, rank, or rating; and
(2) In the case of a member of the Reserve components of the Armed Forces, an in-
jury or illness that was incurred by the member in the line of duty on active duty in the Armed Forces (or existed before the begin-
ing of the member’s active duty and was aggravated by service in the line of duty on active duty in the Armed Forces) and mani-
fested itself before or after the member be-
came a veteran, and is: (i) A continuation of a serious injury or ill-
ness that was incurred or aggravated when the covered veteran was a member of the Armed Forces; (ii) Severe VASRD rating is 100 percent or greater; and (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, to covered veteran has been enrolled in the Department of Veterans Affairs Program of Comprehensive Assistance for Family Caregivers. See also 825.126(a)(7).

Son or daughter means a biological, adopt-
ed, or foster child, a stepchild, a legal ward, or a child of a person standing in loco parentis to the 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.”

Spouse means a husband or wife. For pur-
poses of this definition, husband or wife re-
fers to the other person with whom an indi-
vidual entered into marriage as defined or recognized under state law for purposes of determining the time 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 recognized by at least one State. This definition includes an indi-
vidual in a same-sex or common law mar-
riage 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. Teacher (or employee employed in an in-
structional capacity, or instructional em-
ployee) means an employee employed prin-
cipally in an instructional capacity by an educational agency or school whose principal activities involve teaching 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 teaching. All other employees, including auxiliary personnel such as counselors, psychol-
ogists, curriculum specialists, cafeteria workers, maintenance workers, bus drivers, and other primarily noninstructional em-
ployees.

Tricare is the health care program serv-
ing active duty servicemembers, National Guard and Reserve members, retired members and their families, survivors, and certain former spouses worldwide.
(d) If an employing office is designated a primary employing office pursuant to paragraph (c) of this section, only that employing office is responsible for providing notices of FMLA leave, and maintenance of health benefits. Job restoration is the primary responsibility of the primary employing office, and the secondary employing office shall be jointly and severally liable for giving required notices to the employee, for providing FMLA leave, for assuring that health benefits are maintained, and for job restoration. The employee may give notice of need for FMLA leave, as described in 29 CFR 2001, to whichever of these employing offices the employee chooses. If the employee requests restoration to one of these employing offices, that employing office shall be primarily responsible for job restoration, and the other employing office(s) may respond to the employee's request, subject to the limitations in 29 CFR 2001, be responsible for accepting the employee returning from FMLA leave.

(e) Employing offices employ an employee jointly, but fail to designate a primary employing office pursuant to paragraph (c) of this section, then all of these employing offices shall be jointly and severally liable for giving required notices to the employee, for providing FMLA leave, for assuring that health benefits are maintained, and for job restoration. The employee may give notice of need for FMLA leave, as described in 29 CFR 2001 and 29 CFR 2003, to whichever of these employing offices the employee chooses. If the employee requests restoration to one of these employing offices, that employing office shall be primarily responsible for job restoration, and the other employing office(s) may respond to the employee's request, subject to the limitations in 29 CFR 2001, be responsible for accepting the employee returning from FMLA leave.

825.107 [Reserved]

825.108 [Reserved]

825.109 [Reserved]

825.110 Eligible employees:

(a) An eligible employee is a covered employee of an employing office who:

(1) Has been employed by any employing office for at least 12 months, and

(2) Has been employed for at least 1,250 hours during the 12-month period immediately preceding the commencement of the leave.

(b) The 12 months an employee must have been employed by any employing office need not be consecutive months, provided:

(1) Subject to the exceptions provided in paragraph (b)(2) of this section, employment periods preceding a break in service of more than seven years may be counted in determining whether an employee has been employed by any employing office 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 any employing office for at least 12 months when:

(i) The employee's break in service is occasioned by the consent of the employee or the 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 accounted for in determining whether the employee has been employed for at least 12 months.

(ii) A written agreement, including a collective bargaining agreement, exists concerning the employing office'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).

(iii) An employee worked for two or more employing offices sequentially, the time worked will be aggregated to determine whether it equals 12 months.

(iv) If an employee is maintained on the payroll during a period of paid or unpaid leave (sick, vacation) during which other benefits or compensation are provided by the employing office (e.g., Federal Employees' Compensation, group health plan benefits, etc.), the week counts as a week of employment. For purposes of rules governing intermittent or occasional/casual employment, employees meeting the requirement of the eligibility notice given to employees.

(c) If, before beginning employment with an employing office, an employee had been employed by another employing office, the subsequent employing office may count against the employee's FMLA leave entitlement the time the employee was employed by the prior employing office, so long as the prior employing office properly designated the leave as FMLA under these regulations or other applicable requirements.

825.111 [Reserved]

825.112 Qualifying reasons for leave, general rule.

(a) Circumstances qualifying for leave. Employment periods preceding a break in service prescribed in 825.302 and 825.303, to whichever of

825.112(1) If an employee was employed by two or more employing offices during the period in which an employee is the spouse, son, daughter, parent, or next of kin of the covered service member

825.112(2) If an employee was employed by two or more employing offices during the period in which an employee is providing care for a child

825.112(3) If an employee was employed by two or more employing offices during the period in which an employee is caring for an immediate family member

825.112(4) If an employee was employed by two or more employing offices during the period in which an employee is performing other duties

(b) The determination of whether an employee is caring for an immediate family member is made by the employing office. The employee need not maintain an accurate record of hours worked during the period of absence from work due to or necessitated by USERRA-covered service has the hours that would have been worked during the previous 12-month period to meet the hours of service requirement. However, if an employing office chooses to recognize such leave, the employee must do so uniformly, with respect to all employees with similar breaks in service.

(c)(1) An employee who is employed by two or more employers (e.g., either sequentially or concurrently), the hours of service will be aggregated to determine whether the minimum of 1,250 hours has been reached.

(2) Except as provided in paragraph (c)(3) of this section, whether an employee has worked the minimum 1,250 hours of service is determined according to the principles established under the Fair Labor Standards Act (FLSA), as applied by section 203 of the CAA (2 U.S.C. 1313), for determining compensable hours of employment.

(d) The determination of whether an employee is employed by any employing office for at least 12 months, must be made as of the date the employee therefrom.

825.113 Serious health condition.

(a) For purposes of FMLA, a 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 29 CFR 2014 or continuing treatment by a health care provider as defined in 29 CFR 2015.

(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 record 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., a continuing treatment that includes the taking of over-the-counter medications such as
(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 employing office from taking employment action against an employee. The employing office may not take action against the employee because the employee has taken FMLA leave for treatment. However, if the employing office has an established policy, applied in a non-discriminatory manner that has been implemented 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. In addition, the employing office 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 as follows:

(1) Both parents are entitled to FMLA leave for the birth of their child.

(2) 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 is entitled to FMLA leave for a birth expires at the end of the 12-month period beginning on the date of birth. If the employing office permits bonding leave to be taken for the birth of the child, then this FMLA leave will not qualify as FMLA leave. Under this section, both parents are entitled to FMLA leave even if the newborn does not have a serious health condition.

(b) The expectant mother is entitled to FMLA leave due to pregnancy, for prenatal care, or for her own serious health condition if the requirements of 825.114 through 825.115 are met. If the bond leave is taken for the birth of the 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 her or his own serious health condition or to care for a child with a serious health condition.

(c) The 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 the child's 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.

(2) A spouse is entitled to FMLA leave if:

(5) A spouse is entitled to FMLA leave if:

(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 employing office agrees. For example, an employing office and employee may agree to a part-time schedule after the birth to better accommodate the employee’s need for intermittent or reduced leave for the birth of a child, the employing office 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 and federal law (such as the Americans with Disabilities Act, as made applicable by the CAA). Transfer to an alternative position may include altering an existing job to better accommodate the employee’s need for intermittent or reduced leave. The employing office’s agreement is not required for intermittent or reduced leave required by the serious health condition of the expectant mother or newborn child. See 823.202-823.205 for general rules governing the use of intermittent or reduced leave.

Section 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. See 823.501 for special rules applicable to instructional employees of schools.

(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 employing office agrees. Thus, for example, the employing office and employee may agree to a part-time work schedule after the placement for bonding periods, if the office agrees to permit intermittent or reduced schedule leave for the placement for adoption or foster care, the employing office may require the employee to attend counseling, to 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.

(c) An employee may take FMLA leave in order to care for an adopted or foster child with a serious health condition if the requirements of 825.113 through 825.117 are met. Thus, the employee or caregiver 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 parents are employees of the same employing office, provided they have not exhausted their entitlements during the applicable 12-month FMLA period.

(1) Employees may take FMLA leave for birth or placement for adoption or foster care for a total of 12 weeks during the applicable 12-month period for adoption or foster care. See 825.501 for special rules applicable to instructional employees of schools.

Section 825.125 Definitions of covered servicemember, spouse, parent, son or daughter, next of kin of a covered servicemember, adoptive or foster parents of a covered child, and parent of a covered child.

(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. Covered veteran means a member of the Armed Forces (including a member of the National Guard or Reserves), and was a son or daughter as defined in paragraph (d) of this section. This term does not include parents “in law.”

(2) Parent means the biological, adoptive, step or foster parent 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.”

(3) Son or daughter means a biological, adoptive, or foster child, 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 mental or physical incapacity” at the time that FMLA leave is to commence.

(b) Incapable of self-care means that the individual requires active, daily 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 activities such as cleaning, shopping, taking public transportation, paying bills, maintaining a residence, using telephones and directories, using a post office, etc.

(c) 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), (1), and (j), issued by the Equal Employment Opportunity Commission under the Americans with Disabilities Act (ADA), 42 U.S.C. 12101 et seq., provide guidance for these terms.

Section 825.601 for special rules applicable to instructional employees of schools.

(3) A covered child is a child of a member of the Armed Forces, including a covered active duty of the child, son or daughter of a covered child, or parent of a covered child.

(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 employing office agrees. Thus, for example, the employing office and employee may agree to a part-time work schedule after the placement for bonding periods, if the office agrees to permit intermittent or reduced schedule leave for the placement for adoption or foster care, the employing office may require the employee to attend counseling, to 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.

(c) An employee may take FMLA leave in order to care for an adopted or foster child with a serious health condition if the requirements of 825.113 through 825.117 are met. Thus, the employee or caregiver 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 parents are employees of the same employing office, provided they have not exhausted their entitlements during the applicable 12-month FMLA 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 employing office agrees. Thus, for example, the employing office and employee may agree to a part-time work schedule after the placement for bonding periods, if the office agrees to permit intermittent or reduced schedule leave for the placement for adoption or foster care, the employing office may require the employee to attend counseling, to 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.

(c) An employee may take FMLA leave in order to care for an adopted or foster child with a serious health condition if the requirements of 825.113 through 825.117 are met. Thus, the employee or caregiver 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 parents are employees of the same employing office, provided they have not exhausted their entitlements during the applicable 12-month FMLA period.

(1) Employees may take FMLA leave for birth or placement for adoption or foster care for a total of 12 weeks during the applicable 12-month period for adoption or foster care. See 825.501 for special rules applicable to instructional employees of schools.

Section 825.125 Definitions of covered servicemember, spouse, parent, son or daughter, next of kin of a covered servicemember, adoptive or foster parents of a covered child, and parent of a covered child.

(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. Covered veteran means a member of the Armed Forces (including a member of the National Guard or Reserves), and was a son or daughter as defined in paragraph (d) of this section. This term does not include parents “in law.”

(2) Parent means the biological, adoptive, step or foster parent 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.”

(3) Son or daughter means a biological, adoptive, or foster child, 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 mental or physical incapacity” at the time that FMLA leave is to commence.

(b) Incapable of self-care means that the individual requires active, daily 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 activities such as cleaning, shopping, taking public transportation, paying bills, maintaining a residence, using telephones and directories, using a post office, etc.

(c) 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), (1), and (j), issued by the Equal Employment Opportunity Commission under the Americans with Disabilities Act (ADA), 42 U.S.C. 12101 et seq., provide guidance for these terms.

Section 825.601 for special rules applicable to instructional employees of schools.

(3) A covered child is a child of a member of the Armed Forces, including a covered active duty of the child, son or daughter of a covered child, or parent of a covered child.
who is of any age.

adoption, or foster child, stepchild, legal ward, or a child for rules governing leave for foster care.

determining eligibility for FMLA leave.

other individual who stood in loco parentis for rules governing leave for foster care.

(h) Son or daughter on covered active duty or call to covered active duty status means the child, stepchild, legal ward, or a child for whom the employee stood in loco parentis, and who is of any age. See 825.126(a)(5).

(i) Son or daughter of a covered servicemember means the 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).

(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.” See 825.127(d)(2).

Documenting relationships. For purposes of confirmation of family relationship, the employing office 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 employing office is entitled to examine documentation such as a birth certificate, etc., but the employee is entitled to the return of the official document by this process.

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 employer 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 and made applicable by Section 201(a) of the CAAA (2 U.S.C. 1311(a)(3)). 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) Determination. An employing office has the option, in requiring certification from a health care provider, to provide a statement of the essential functions of the employee’s position so that the employee’s health condition is considered to be unable to perform the essential functions of the position.

825.124 Needed to care for a family member or covered servicemember.

(a) The medical certification provision that an employee needs to care for a family member or covered servicemember encompasses both physical and psychological care. It includes situations where, for example, because of the health condition, the family member is unable to care for his or her own basic medical, hygienic, or nutritional needs 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 schedule necessary to care for a family member or covered servicemember includes not only a situation where the care of the 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.

825.125 Definition of health care provider.

(a) The FMLA, as made applicable by the CAAA, 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 Office of Compliance to be capable of providing health care services.

(b) In making a determination referred to in subparagraph (a)(2), and absent good cause to the contrary, the Office of Compliance will follow any determination made by the Department of Labor (under section 101(6)(B) of FMLA (29 U.S.C. 2611(6)(B))) that the person is providing health care services, provided the determination by the Department of Labor was not made at the request of a person who was then a covered employee.

(c) 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) who are authorized to practice in the State and performing within the scope of their practice as defined under State law;

(2) Certified 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, or any Christian Science practitioner other than a Christian Science practitioner, who is performing within the scope of his or her practice as defined by State law, 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.

(d) Any health care provider from whom an employing office or the employing office’s group health plan’s benefits manager will accept certification of the employee’s need for FMLA leave for any reason, including for purposes of covered active duty or call to covered active duty status, the Reserve components of the Armed Forces means duty means duty during the deployment of the member of the Armed Forces to a foreign country.

(e) 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.

(f) 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 active duty) or to reduce schedule necessary to care for a family member or covered servicemember in a foreign country.

(g) Any health care provider from whom an employing office or the employing office’s group health plan’s benefits manager will accept certification of the employee’s need for FMLA leave for any reason, including for purposes of covered active duty or call to covered active duty status, the Reserve components of the Armed Forces means duty means duty during the deployment of the member of the Armed Forces to a foreign country.

(h) 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.
The military member; Cross that are related to the covered active duty
served or promoted by the military, military
covered active duty status of the military
event sponsored by the military that is re-
to attend any official ceremony, program, or
posed to one of the provisions of law identified in paragraph (a)(2) of
the military member is notified of an impending
call or order to covered active duty seven or less
the military member stands in loco parentis, who
of covered active duty or call to covered
active duty status, and who is of any
(b) An eligible employee may take FMLA
leave for one or more of the following qualifying exigencies:
(1) Military
(2) Military events and related activities. (i) To attend
any official ceremony, program, or
related to the covered active duty or call
covered active duty status of the military
member; and
(ii) To attend family support or assistance
programs and informational briefings
sponsored 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, 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 under age 18 years or old age or incapable
of self-care because of a mental or physical
disability at the time that FMLA leave is 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
Brushing teeth, feeding, dressing, and personal
hygiene, bathing, dressing, and eating. In-
strumental 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

(iii) To address other
activities listed in (i) through (iv) of this paragraph, the 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 status of the military
member necessitates a change in the existing childcare
care for these purposes.

(ii) To arrange for alternative childcare for a
child of the military member when the
covered active duty status of the military
member necessitates a change in the existing childcare
care for these purposes.

(iii) To arrange for alternative childcare for a
child of the military member when the
covered active duty status of the military
member necessitates a change in the existing childcare
care for these purposes.

(iv) To address issues that arise from
the death of the military member while
on covered active duty status, such as
arranging for family gatherings, planning for
the funeral of the military member,
making funeral arrangements, and attending
funeral services;

(b) 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 entitled to FMLA leave to care for a covered
service member or covered veteran
within five years of the

(c) FMLA leave to care for a covered service
member

(i) To address other
activities listed in (i) through (iv) of this paragraph, the
parent of the element requesting qualifying exigency leave.

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

(ii) To attend meetings with staff at
the military member will provide
before a federal, state, or local

(iii) To provide care for a parent of the
military member, when such

(iv) To address other
activities listed in (i) through (iv) of this paragraph, the
parent of the element requesting qualifying exigency leave.

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

(ii) To attend meetings with staff at
the military member will provide
before a federal, state, or local

(iii) To provide care for a parent of the
military member, when such

this section may extend beyond the five-year period.

(1) 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 the date the member was discharged or released under conditions other than dishonorable and the effective date of this Final Rule shall not count towards the determination of the five-year period for covered veteran status.

(a) A covered servicemember’s 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 and any other individual who stood in loco parentis to the covered servicemember, this term includes any 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 while 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 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

(ii) A physical or mental condition for which the member 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 have required hospitalization; or

(iv) An injury, including a psychological injury, on the basis of which the covered veteran was enrolled in the Department of Veterans Affairs National Readjustment Home of Comprehensive Assistance for Family Caregivers.

(b) In order to care for a covered servicemember, an eligible employee must be the spouse, son, daughter, or parent, or next of kin of a covered servicemember.

(1) Son or daughter of a covered servicemember means the natural or adopted child of the covered servicemember’s biological, adoptive, or step father or mother, and who is under 18 years of age, or, if a student, a full-time student at a postsecondary educational institution.

(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 the status of next of kin as provided by court decree or statutory provisions, brothers and sisters, grandchildren, aunts and uncles, and first cousins, unless the covered servicemember specifically designated another relative or 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, the member will be considered the covered servicemember’s next of kin and may take FMLA leave to provide care to the covered servicemember, either continuously or intermittently. When such a designation has been made, the designated individual shall be deemed to be the covered servicemember’s only next of kin. For example, if the employing office is permitted to require an employee to provide confirmation of covered family relationship to the covered servicemember pursuant to 285.122(k).

(4) 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.

(a) 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 later regardless of the method used by the employing office 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.

(b) 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 12 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 if the employee has 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 during the 12-month period, the leave period 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.

(c) 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 during any one or more of the following:

(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 newborn 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 employing office. It would apply, for example, even if both the spouses worked at two different worksites. On the other hand, if one spouse is ineligible for FMLA leave, the other spouse would be entitled to a full 26 workweeks.

SUBPART B—EMPLOYEE LEAVE ENTITLEMENTS UNDER THE FAMILY AND MEDICAL LEAVE ACT, AS MADE APPLICABLE BY THE CONGRESSIONAL ACCOUNTABILITY 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 shall be no more than 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 newborn 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.

(3) To care for the employee’s spouse, son, daughter, or parent with a serious health condition;

(4) Because of any qualifying exigency arising out of the fact that the employee’s
employ the same covered employing office 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 own serious health condition, 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 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 employee is entitled to FMLA leave for FMLA-protected purposes from the same employing office. It would apply, for example, even though the spouses are employed at two different worksites of an employing office. It would apply, for example, even though the employee is entitled to FMLA leave for FMLA-protected purposes from the same employing office, if the other spouse is entitled to FMLA leave for FMLA-protected purposes from a different employing office.

\[\text{(g) During the single 12-month period described in paragraph (f), an eligible employee's FMLA leave entitlement is limited to a combined total of 26 workweeks of FMLA leave for any qualifying reason. See 825.127(e)(3).}\]

\[\text{(h) For purposes of determining the amount of leave used by an employee, the fact that a holiday may occur within the year taken as FMLA leave has no effect; the week in which the holiday occurs is counted as a week of FMLA leave. However, if an employee is using FMLA leave in increments of less than one week, the week in which the holiday will not count against the employee's FMLA leave entitlement.}\]

Examples of intermittent leave would include leave taken because of one's own serious health condition, to care for a spouse, parent, son, or daughter with a serious health condition, adoption or foster care, or to care for a covered servicemember with a serious injury or illness. It may also be taken to provide care or psychological support to a covered family member with a serious health condition or a covered servicemember's serious injury or illness. It may be taken to care for a covered servicemember's serious injury or illness. It may also be taken to provide care or psychological support to a covered family member with a serious health condition or a covered servicemember’s serious injury or illness.
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 or on a reduced schedule. An employee taking leave on a reduced schedule may be assigned to an existing or a new alternative position in order to accommodate the employee's need for intermittent or reduced schedule leave.

(a) Minimum increment. (1) When an employee takes FMLA leave on an intermittent or reduced schedule basis, the employing office may use an increment no greater than the shortest period of time that the employing office uses for leave. An employee who takes leave on an intermittent or reduced schedule basis may not take more leave than necessary to address the circumstances that precipitated the need for leave.

(b) Compliance. An employee who takes leave for any type of covered leave must comply with any applicable collective bargaining agreement and Federal law (such as the Americans with Disabilities Act, as made applicable by the CAA). Transfer to an alternative position may include reassignment to an existing or a new alternative position, so as to make them equivalent to the pay and benefits of the employee's regular job. The employing office may not eliminate benefits such as vacation leave where an employing office's normal practice is to account for such benefits on the number of hours worked.

(c) Equivalent pay and benefits. The alternative position for which the employee is qualified and which otherwise would not be provided to the employee, taking into consideration the employee's rate of pay and benefits. An employee who takes leave on an intermittent or reduced schedule basis may not take more leave than is medically necessary. An example of an employee taking leave on a reduced leave schedule basis only if the employing office agrees. Such a schedule reduction might occur, for example, where a part-time employee, who is working a graveyard shift, the employee's assignments, or the employee is a covered servicemember, or if the employee or family member is incapacitated or unable to perform the essential functions of the position because of a 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. An employer may require an employee to begin work mid-way through a shift, such as where a flight attendant or a railroad conductor is scheduled to work aboard an airplane or a train, or where an 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 employee is unable to begin work immediately. Such an attempt on the part of the employer to make such a transfer will be held to be contrary to the prohibited acts provisions of the FMLA, as made applicable by the CAA.

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 not dependent on the specific hours the employee would have worked but for the use of leave. See also 825.601 and 825.602 on special rules.

(2) If an employing office has made a permanent or long-term change in the employee’s schedule (for reasons other than FMLA, and pursuant to the notice of need for FMLA leave), the hours worked under the new schedule are to be used for making this calculation.

(3) An employee’s schedule varies from week to week to such an extent that an employing office 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 worked 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) 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 the hours the employee would have been required to work may be counted against the employee’s FMLA entitlement. In such a case, the employee’s FMLA entitlement may be reduced. An employee’s leave entitlement on a fluctuating workweek basis. 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 to make up for the (8) of a workweek basis. 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, as made applicable by the Congressional Accountability Act.

(a) Leave taken under FMLA, as made applicable by the CAA, may be unpaid. If an employee is otherwise exempt from minimum wage and overtime requirements of the FLSA, as made applicable by the CAA, and as exempt under regulations issued by the Board, at part 541, providing unpaid FMLA-qualifying leave in such an employee’s workweek, the employee to lose the FLSA exemption. 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 employing office 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.

(b) For an employee paid in accordance with a fluctuating workweek method of payment for overtime, where permitted by section 203 of the CAA (2 U.S.C. 1313), the employing office, if any period in which intermittent or reduced schedule FMLA leave is scheduled to be taken, may compensate an employee on an hourly basis and pay 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 employee’s ability to substitute accrued paid leave for FMLA leave. If an employee does not choose to substitute accrued paid leave, the employee for which the employee’s FMLA leave entitlement is calculated may result from injury to the employee’s ability to substitute accrued paid leave for FMLA leave. An employee’s ability to substitute accrued leave, and accrued pursuant to established policies in this section, FMLA, as made applicable by the CAA. Employing offices may not discriminate against employees on the basis of the administration of their paid leave policies.

(c) If an employee uses paid leave under circumstances which do not qualify as FMLA leave, the leave will count against the employee’s FMLA leave entitlement. For example, paid sick leave used for a serious health condition which is not a serious health condition, employer’s own policy/practice under these circumstances, the employee will remain entitled to all the paid leave which is earned or accrued under the terms of 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 this section. If the FMLA leave plan is designated by the employee or the employing office in accordance with 825.112 through 825.115. In such cases, the employing office may designate the leave as FMLA leave and count the leave against the employee’s FMLA leave entitlement.

(e) The FMLA, as made applicable by the CAA, provides that a serious health condition may result from injury to the employee on or off the job. If the employing office 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 employing office may require the substitution of paid leave. However, employing offices and employees may agree, to have paid leave supplement workers’ compensation benefits, such as in the case where a plan only provides replacement income for two-thirds of the employee’s salary.

(f) The FMLA, as made applicable by the CAA, permits an eligible employee to substitute accrued paid leave for FMLA leave if it meets the criteria set forth above in 825.112 through 825.115. In such cases, the employing office may designate the leave as FMLA leave and count the leave against the employee’s FMLA leave entitlement. May result from injury to the employee’s ability to substitute accrued paid leave for FMLA leave. An employee’s ability to substitute accrued leave, and accrued pursuant to established policies in this section, FMLA, as made applicable by the CAA. Employing offices may not discriminate against employees on the basis of the administration of their paid leave policies.

(g) If the employee chooses, or if an employing office requires, substitution of accrued paid leave, the employee must inform the employee’s FMLA leave entitlement.

(h) The FMLA, as made applicable by the CAA, an employing office always has the right to cash out an employee’s compensatory time or to require the employee to use the time by the personal leave requests and is permitted to use accrued compensatory time to receive pay for time taken.
off for an FMLA reason, or if the employing office requires such use pursuant to the FLSA, the time taken may be counted against the employee’s FMLA leave entitlement.

825.208 [Removed and reserved]

825.209 Maintenance of employee benefits.

(a) During any FMLA leave, an employing office must maintain the employee’s coverage under a Federal Employee’s Health Benefits Program (defined in the Internal Revenue Code of 1986 as section 7971 of title 6, relating to employer contributions) or any group health plan (as defined in section 4980B of title 29) the employee was entitled to be covered under before the leave started; or the employee is entitled to reinstatement to the same or an equivalent position if the leave is taken for a FMLA reason; or if the employing office has provided written notice that the payment has not been received, an employer must provide written notice to the employee that the payment has not been received.

(b) An employing office under a multi-employer health plan is responsible for maintaining the employee’s coverage under the plan, and the employee’s options under the plan must continue to be available to the employee for payment of premiums during periods of unexpired FMLA leave.

(c) If FMLA leave is unpaid, the employing office must provide the employee with advance written notice of the terms and conditions under which these payments must be made. See 825.300(c).

(d) An employee using FMLA leave cannot be required to use earned paid leave during a FMLA leave period, or the FMLA leave entitlement in the 12-month period.

(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 to the same or an equivalent position if the leave is taken for a FMLA reason; or if the employing office has provided written notice that the payment has not been received. An employee may choose to continue coverage under the plan with premium payments made by the employee.

(f) Except as required by the Consolidated Omnibus Budget Reconciliation Act of 1985 (COBRA), to maintain health benefits during leave (and to restore such benefits when the employment relationship is exhausted or terminated), any health plan provided prior to the commencement of the leave of the premiums that will become due during a period of FMLA leave. If the employee’s premium payment was lower than the maximum premium required under FMLA if an employee had continued to work instead of taking leave; or

(g) Another system voluntarily agreed to be maintained by the employing office, which may include prepayment of premiums (e.g., through increased payroll deductions when the need for the FMLA leave is foreseeable).

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 an employee to use unpaid FMLA leave than the employee would have been required to pay if the employee had been continuously employed.

(f) An employee who is receiving payments under a multi-employer health plan must resign any system prior to the commencement of the leave of the premiums that will become due during a period of FMLA leave. If the employee’s premium payment was lower than the maximum premium required under FMLA if an employee had continued to work instead of taking leave; or

Another system voluntarily agreed to be maintained by the employing office, which may include prepayment of premiums (e.g., through increased payroll deductions when the need for the FMLA leave is foreseeable).

(f) An employer may not require more of an employee using unpaid FMLA leave than the employee would have been required to pay if the employee had been continuously employed.

(f) An employee who is receiving payments under a multi-employer health plan must resign any system prior to the commencement of the leave of the premiums that will become due during a period of FMLA leave. If the employee’s premium payment was lower than the maximum premium required under FMLA if an employee had continued to work instead of taking leave; or

Another system voluntarily agreed to be maintained by the employing office, which may include prepayment of premiums (e.g., through increased payroll deductions when the need for the FMLA leave is foreseeable).

(f) An employer may not require more of an employee using unpaid FMLA leave than the employee would have been required to pay if the employee had been continuously employed.
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 employing office has established policies regarding other forms of unpaid leave that provide for the employee's leave to cease coverage before the date this letter was given, and if 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 had been provided.

(2) An employing office 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 employing office under FMLA would continue; for example, the employing office continues to have an obligation to reinstate an employee upon return from leave.

(b) The employing office may recover the employee's share of any premium payments missed or due during the leave period during which the employing office 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 return from FMLA leave the employing office 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 otherwise fail to meet any continuation requirements imposed by the plan, including any preexisting condition waiting period, to wait for an open season, or to pass a medical examination to obtain reinstatement of coverage. If an employing office 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 employing office may be liable for benefits lost by reason of the violation, for other necessary losses incurred and as a direct result of the violation, and for appropriate equitable relief tailored to the harm suffered.

825.215 Employing office recovery of benefit costs.

(a) In addition to the circumstances discussed in 825.212(b), an employing office may recover its share of health plan premiums during any 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) A situation beyond the employee's control. Examples of other circumstances beyond the employee's control are necessary broad. They include such situations that choose to stay with a new newborn child who has a serious health condition; an employee's spouse is unexpectedly transferred to a job location more than 40 miles from the employee's home with a newborn child who has a serious health condition; an employee's 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 employee's failure to return, regardless of the reason the employee does not return.

(b) Under some circumstances an employing office may recover its share of benefit costs, e.g., life insurance, disability insurance, etc., by paying the employee's share of premiums during periods of unpaid FMLA leave. For example, an employing office 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 employing office elects to maintain such benefits during the leave, at the conclusion of the leave, the employee is entitled to recovery only the costs incurred for paying the employee's share of any premiums whether or not the employee returns to work.

(c) An employee is entitled 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 employing office requires paid leave to be substituted for FMLA leave, the employing office may not recover its share of health plan premiums for any period of FMLA leave covered by paid leave. Because paid leave provided under a plan covering temporary disabilities plan can be paid leave, such paid leave counts toward the employee's FMLA leave balance and the payment may be denied, unless otherwise required by law, the employee's FMLA leave status for a reason that does not qualify as FMLA leave. For example, if an employee

(e) The amount that self-insured employing offices may recover is limited to only the employing office's share of allowable premiums as would be calculated under COBRA, but excludes the two percent fee for administrative costs.

(f) When an employee fails to return to work, any health and non-health benefit premiums otherwise recoverable during the period of FMLA leave. To the extent recovery is lost, the employing office may recover the costs incurred due to an employee's failure to return. Alternatively, the employing office 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 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 employing office may not require an employee to return to employment if the employee has satisfied all FMLA requirements even if the employee has been replaced or his or her position has been restructured to accommodate the employee. See also 825.106(e) for the obligations of employing offices that are joint employers.

825.215 Equivalent position.

(a) Equivalent position. An equivalent position is one that is comparable in terms of pay, benefits and working conditions, including privileges, prerequisites and status. It must involve the same or substantially similar duties and responsibilities, which must entail substantially equivalent skill, effort, responsibility, and authority.

(b) Recapture of seniority. If an employee is no longer qualified for the position because of the employee's inability to attend a necessary course, renew a license, etc., as a result of FMLA leave, the employee is given a reasonable opportunity to fulfill those conditions upon return to work.

(c) Equivalent Pay. (1) An employee is entitled to any unconditioned 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 employing office'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 substantially equivalent pay premiums, etc., 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 special goal such as hours sold, or perfect attendance, and the employee has not met the goal due to FMLA leave, then the payment may be denied, unless otherwise required by law.
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 employing office, including group life insurance, health insurance, disability insurance, sick leave, annual leave, educational benefits, and pensions, regardless of whether the benefits are provided by a practice or written policy of an employing office through an employee benefit plan.

(1) At the end of an employee’s FMLA leave, an employing office that provides FMLA leave must continue any and all benefits provided during FMLA leave to any employee who had not been on leave when the worksite had been closed, or to offer a promotion to a better position. An employing office would have the responsibility to continue FMLA leave, or to offer a promotion to a better position. However, if an employee had not been on leave when the worksite had been closed, the employee is entitled to transfer 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, and other similar discretionary and non-discretionary payments.

(4) FMLA does not prohibit an employing office from accommodating an employee’s request to be restored to a different shift, schedule, or work location that suits the employee’s personal needs on return from leave, or to offer a promotion to a better position. However, an employee cannot be inducted by the employing office to accept a different position against the employee’s wishes.

(5) 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 reinstallation or to other benefits and conditions of employment than if the employee had been continuously employed during the FMLA leave period. An employing office 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 employing office’s responsibility to continue FMLA leave, maintain group health plan benefits and restore the employee ceases at the time the employee’s FMLA leave period and, therefore, would not be entitled to restoration. Restoration to a job slated for lay-off may not be exempt from the minimum wage and overtime requirements of the FLSA, as made applicable by the CAA.

(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.

(b) An employee who fraudulently obtains leave for an FMLA-protected purpose also cannot be entitled 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 may request a different position against the employee’s wishes.

(d) An employee who fraudulently obtains FMLA leave from an employing office is not protected by the job restoration or maintenance of health benefits provisions of the FMLA, as made applicable by the CAA.

(e) An employing office 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 employing office does not have such a policy may not deny benefits to which an employee is entitled under FMLA, as made applicable by the CAA, 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 covered by the employing office within 75 miles of the employee’s worksite.

(b) The term “salaried” means paid on a salary basis, within the meaning of the Board’s FLSA regulations at part 541, implementing section 203 of the CAAA (2 U.S.C. 1313), regarding employees who may qualify for an exemption from the minimum wage and overtime requirements of the FLSA, as made applicable by the CAA.

(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 employing office within 75 miles of the worksite.

(d) In determining which employees are among the highest paid 10 percent, year-to-year changes 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., benefits or prerequisites.

(e) 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 one establishment of the employing office, the successor employing office may be required to restore the employee if it is a successor employing office.

(f) In addition to the circumstances explained above, an employing office may deny job restoration to salaried eligible employees (key employees, as defined in §825.217(c)), if such key employee is necessary to prevent substantial and grievous economic injury to the operations of the employing office; 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.

(g) 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 may request a different position against the employee’s wishes.

(h) An employing office 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 employing office does not have such a policy may not deny benefits to which an employee is entitled under FMLA, as made applicable by the CAA, on this basis unless the FMLA leave was fraudulently obtained as in paragraph (d) of this section.
825.218 Substantial and grievous economic injury. (a) In order to deny restoration to a key employee, an employing office must determine that the restoration of the employee to employment would cause substantial and grievous economic injury to the operations of the employing office, not whether the absence of the employee would cause such substantial and grievous economic injury. (b) An employing office may take into account its ability to replace on a temporary basis (temporarily do without) the employee on FMLA leave. If permanent replacement is unavoidable, the cost of then reinstating the employee is considered in evaluating both the substantial and grievous economic injury that will occur from restoration; in other words, the effect on the operations of the employing office of reinstating the employee would be an economic 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. (c) Employees cannot waive, nor may employing offices induce employees to waive, their rights under FMLA. For example, employees (or their collective bargaining representatives) cannot trade off the right to FMLA leave against any benefit offered by the employing office. Except for settlement agreements covered by 1414 of the Congressional Accountability Act, this does not prevent the settlement or release of FMLA claims by employees based on past employing office conduct without the approval of the Office of Compliance 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 825.215. 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 may begin at any time after the applicable 12-month FMLA leave year. (d) Key employees, and not merely eligible employees, are protected from retaliation which constitutes interference with a right under the FMLA, as made applicable by the CAA. See 825.702. 825.300 Employing office notice requirement. (a) An employing office shall notify the employee of the potential consequences describing the provisions of the FMLA, for example: 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 may begin at any time after the applicable 12-month FMLA leave year. (d) Key employees, and not merely eligible employees, are protected from retaliation which constitutes interference with a right under the FMLA, as made applicable by the CAA. See 825.702. 825.300 Employing office notice requirement. (a) An employing office shall notify the employee of the potential consequences describing the provisions of the FMLA, for example: 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 may begin at any time after the applicable 12-month FMLA leave year. (d) Key employees, and not merely eligible employees, are protected from retaliation which constitutes interference with a right under the FMLA, as made applicable by the CAA. See 825.702.
as made applicable by the CAA, are available from the Office of Compliance and may be incorporated in such employing office handbooks or written policies.

(2) Each time notice giving FMLA leave does not have written policies, manuals, or handbooks describing employee benefits and leave provisions, the employing office shall provide written notice to the employee of all the employee’s rights and obligations under the FMLA, as made applicable by the CAA. This notice shall be provided to employees each time the eligibility notice is given pursuant to paragraph (c), and in accordance with the provisions of that paragraph. Employing offices shall provide the employee a copy of the FMLA Fact Sheet available from the Office of Compliance to provide such guidance.

(b) Eligibility notice. (1) When an employee requests FMLA leave, or when the employing office acquires knowledge that an employee’s leave may be for an FMLA-qualifying reason, the employing office must notify the employee of the employee’s eligibility to take FMLA leave within five business days, absent extenuating circumstances. See 825.110 for determining eligibility. Employee eligibility is determined and (notice must be provided) at the commencement of the first instance of leave for each FMLA-qualifying reason per 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 is determined and (notice must be provided) for leave on 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 as applicable (e.g., the number of months the employee has been employed by the employing office and the hours of service with the employing office during the 12-month period. Notification of eligibility may be oral or in writing; employing offices may use Form C to provide such notification to employees.

(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, 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., the employee has not met the hours of service requirement in the 12 months preceding the commencement of leave for the subsequent qualifying reason), the employing office must notify the employee of the change in eligibility status within five business days, absent extenuating circumstances.

(c) Rights and responsibilities notice. (1) Employing offices shall provide written notice detailing the specific expectations and obligations of the employee and explaining any consequences of non-compliance with the obligations. This notice shall be provided to the employee each time the eligibility notice is provided pursuant to paragraph (b) of this section and any change has already begun. The notice should be mailed to the employee’s address of record. Such specific notice must include, at a minimum:

(i) That the leave may be designated and counted against the employee’s annual FMLA leave entitlement if qualifying (see 825.304); and provide 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 documentation, such as morbidity/mortality certificate, 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 if leave is not for a FMLA-qualifying reason (e.g., the employee will require the substitution of paid leave, the conditions related to any substitution, and the employee’s entitlement to take unpaid FMLA leave that will not meet the conditions for paid leave (see 825.207));

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

(v) The employee’s status as a key employee and the consequence that restoration may be denied following FMLA leave, explaining the conditions required for such denial (see 825.213);

(vi) The employee’s right to maintenance of benefits during the FMLA leave and restoration to the same or an equivalent job 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 employing office during the employee’s 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 employing office 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 from the employee.

(4) If the specific information provided by the notice of rights and responsibilities changes, the employing office 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, the employing office may need to give notice of the arrangements for making premium payments.

(5) Employing offices are also expected to respond to requests from employees concerning their rights and responsibilities under the FMLA, as made applicable under the CAA. A prototype notice of rights and responsibilities may be obtained in Form C, or from the Office of Compliance. Employing offices may adopt the notice as appropriate to meet these notice requirements.

(6) 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 employing office 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 employing office has enough information to determine whether the leave is being taken for a FMLA-qualifying reason (e.g., after receiving a certification), the employing office must notify the employee whether the leave is being designated as FMLA leave 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 leave taken within a single 12-month period, regardless of whether the leave taken during the qualifying reason will be a continuous block of leave or intermitrent or reduced schedule leave. If the employing office determines that the leave will not be designated as FMLA-qualifying (e.g., the leave is not for a FMLA-qualifying reason but meets all of the requirements of FMLA or the FMLA leave entitlement has been exhausted), the employing office must notify the employee of that determination. If an essential office of the employing office is to be closed for a period, the leave will be substituted for unpaid FMLA leave, or that paid leave taken under an existing leave plan be counted as FMLA leave, the employing office must provide the employee with the designation notice at that time.

(2) If the employing office will require the employee to present a fitness-for-duty certification to be restored to employment, the employing office must provide notice of such requirement with the designation notice. If the employee will require that the fitness-for-duty certification verify the employee’s ability to perform the essential functions of the employee’s position, the employing office 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 employing office’s handbook or other written documents (e.g., timekeeping policies) have fitness-for-duty certification will be required in specific circumstances (e.g., but not necessarily for FMLA leave) the employing office may clearly provide that a fitness-for-duty certification will be required in all circumstances. If such policies clearly provide that a fitness-for-duty certification will be required in all circumstances (e.g., by stating that fitness-for-duty certification will be required in all circumstances), the employing office has access to the information electronically.

(3) The designation notice must be in writing. A prototype designation notice is contained in Form D which may be obtained from the Office of Compliance. If the leave is not designated as FMLA leave because it does not meet the requirements of the FMLA, as made applicable by the CAA, the notice to the employee that the leave is not designated FMLA leave must be in the form of a simple written statement. The designation notice may be distributed electronically so long as it otherwise meets the requirements of this section. The employing office can demonstrate that the employee (who may already be on leave and who may not have access to employment-office-provided computers) has access to the information electronically.

(4) The designation notice must be in writing. A prototype designation notice is contained in Form D which may be obtained from the Office of Compliance. If the leave is not designated as FMLA leave because it does not meet the requirements of the FMLA, as made applicable by the CAA, the notice to the employee that the leave is not designated FMLA leave must be in the form of a simple written statement. The designation notice may be distributed electronically so long as it otherwise meets the requirements of this section. The employing office can demonstrate that the employee (who may already be on leave and who may not have access to employment-office-provided computers) has access to the information electronically.
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 30-day period. Leave counted against the employee's FMLA leave entitlement may be oral or in writing. If such notice is oral, it shall be confirmed in writing if the employee so requests or if the employing office determines that a written form, including a notation on the employee's pay stub, is necessary to provide notice to the employing office of the leave.

(c) Disputes. If there is a dispute between the employing office and the employee as to whether leave qualifies as FMLA leave, it shall resolve the dispute through discussions or, if necessary, through the administrative process. The dispute may be resolved through mediation, whichever is elected. The dispute should be resolved through discussions between the employee and the employing office. Such discussions and the decision must be documented.

(2) If the employee does not designate leave as FMLA leave, the employing office may retroactively designate FMLA leave on the employee's behalf. In such cases, the FMLA leave shall be designated from the date FMLA leave was used. (See section 825.300 for exceptions.)

(3) FMLA leave may be designated as FMLA leave for leave due to more than one FMLA-qualifying reason. An employee should notify the employing office of theFMLA leave as soon as possible. The employee should also notify the employing office of any change in the status of each FMLA-qualifying reason. The employing office may designate FMLA leave as soon as it determines that leave is being used for a FMLA-qualifying reason.

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(5) FMLA leave may be designated as FMLA leave for leave due to more than one FMLA-qualifying reason. An employee should notify the employing office of the FMLA leave as soon as possible. The employee should also notify the employing office of any change in the status of each FMLA-qualifying reason. The employing office may designate FMLA leave as soon as it determines that leave is being used for a FMLA-qualifying reason.

(6) FMLA leave may be designated as FMLA leave for leave due to more than one FMLA-qualifying reason. An employee should notify the employing office of the FMLA leave as soon as possible. The employee should also notify the employing office of any change in the status of each FMLA-qualifying reason. The employing office may designate FMLA leave as soon as it determines that leave is being used for a FMLA-qualifying reason.

(7) FMLA leave may be designated as FMLA leave for leave due to more than one FMLA-qualifying reason. An employee should notify the employing office of the FMLA leave as soon as possible. The employee should also notify the employing office of any change in the status of each FMLA-qualifying reason. The employing office may designate FMLA leave as soon as it determines that leave is being used for a FMLA-qualifying reason.

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an employing office’s questions designed to determine whether an absence is potentially FMLA-qualifying. Failure to respond to reasonable employing office inquiries regarding the leave at issue may result in the loss of FMLA protection if the employing office is unable to determine whether the leave is FMLA-qualifying.

(d) Complying with the employing office policy. An employing office may require an employee to comply with the employing office’s usual and customary notice and procedural requirements for requesting leave, absent unusual circumstances. For example, an employing office may require that written notice be provided to the employing office, upon request, of the need to take FMLA leave, subject to the approval of the health care provider. Such arrangements, subject to the approval of the health care provider, may be made applicable by the CAA. The employing office may delay FMLA-protected leave for one week notice period has been met) the leave may not be delayed or denied.

825.303 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 if the employee was aware of, at the worksite where the employee is employed, of the information regarding the FMLA provided (pursuant to section 301(h)(2)) to employees under the facts and circumstances of the particular case.

(b) Content of notice. An employee shall provide sufficient information for an employing office 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’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 family member is a covered servicemember on 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 employee unable to be present to perform usual and customary care, the family member is a covered servicemember with a serious injury or illness; and the anticipated duration of the absence. An employee who provides written advance notice pursuant to an employing office’s internal rules and procedures may not be required when FMLA leave is involved. If an employee does not comply with an employing office’s usual and customary 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 if the employee was aware of, at the worksite where the employee is employed, of the information regarding the FMLA provided (pursuant to section 301(h)(2)) to employees under the facts and circumstances of the particular case. An employee has an obligation to respond to an employing office’s questions for an employee to have been given the employee’s child has used the inhaler.

(b) Content of notice. An employee shall provide sufficient information for an employing office 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’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 family member is a covered servicemember with a serious injury or illness; and the anticipated duration of the absence. An employee who provides written advance notice pursuant to an employing office’s internal rules and procedures may not be required when FMLA leave is involved. If an employee does not comply with an employing office’s usual and customary notice and procedural requirements, and no unusual circumstances justify the failure to comply, FMLA-protected leave may be delayed or denied.

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285.305 Certification, general rule.

(a) General. An employing office may require that an employee's leave to care for the employee's covered family member with a serious health condition, or the employee's own serious health condition, or the serious health condition of a family member, lasts beyond a single leave year (as defined in 285.200), the employing office may require the employee to provide a new medical certification in each subsequent leave year. Such new medical certifications are authentic and sufficient. An employing office may request that an employee furnish a complete and sufficient certification, including any clarifications necessary to determine if such certifications are authentic and sufficient, 285.208, and 285.310.

(b) 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 285.200), the employing office may require the employee to provide a new medical certification to support the employee's FMLA leave or its duration. The employee must provide the requested certification to the employing office within 15 calendar days after the employing office's request, unless it is not practicable under the particular circumstances to do so despite the employee's diligence, good faith efforts or the employing office's failure to provide more than 15 calendar days after the requesting to return the requested certification.

(c) Complete and sufficient certification. The employee must provide a complete and sufficient certification to the employing office if required by the employing office in accordance with 285.306, 285.309, and 285.310. The employing office shall advise the employee whenever the employing office finds a certification incomplete or insufficient, and shall state in writing what additional information is needed to make the certification complete and sufficient. A certification is considered incomplete if the employing office receives a certification, but one or more of the applicable entries have not been completed. A certification is considered insufficient if the employing office receives a complete certification, but the information provided is vague, ambiguous, or non-responsive. The employing office 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 employing office are not cured in the seven calendar days, the employing office may deny the taking of FMLA leave, in accordance with 285.313. A certification that is not returned to the employing office is not considered complete and sufficient. An employing office may not deny an employee's leave request because of the anticipated consequences of an employee's failure to provide adequate certification. If the employee fails to provide the employing office with 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 employing office may deny the taking of FMLA leave, in accordance with 285.313. 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 employing office to support the employee's FMLA leave. The FMLA applies in any case where an employing office requests a certification permitted by these regulations, whether it is the initial certification, a recertification under this section, or a fitness-for-duty certificate, including any clarifications necessary to determine if such certifications are authentic and sufficient, 285.208, and 285.310.

(d) Consequences. At the time the employing office requests certification, the employing office 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 employing office with 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 employing office may deny the taking of FMLA leave, in accordance with 285.313. 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 employing office to support the employee's FMLA leave.

(e) Timing. In most cases, the employing office 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 circumstances, within five business days after the leave commences. The employing office may request certification at some later time if the employing office has reason to question the completeness of the leave or its duration. The employee must provide the requested certification to the employing office within 15 calendar days after the employing office's request, unless it is not practicable under the particular circumstances to do so despite the employee's diligence, good faith efforts or the employing office's failure to provide more than 15 calendar days after the requesting to return the requested certification.

(f) Annual certification. Whenever the employing office finds a certification incomplete or insufficient, the employing office may require the employee to furnish a complete and sufficient certification, as provided in paragraph (c) of this section, or a fitness-for-duty certificate, including any clarifications necessary to determine if such certifications are authentic and sufficient, 285.208, and 285.310.

(g) Timing. In most cases, the employing office 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 circumstances, within five business days after the leave commences. The employing office may request certification at some later time if the employing office has reason to question the completeness of the leave or its duration. The employee must provide the requested certification to the employing office within 15 calendar days after the employing office's request, unless it is not practicable under the particular circumstances to do so despite the employee's diligence, good faith efforts or the employing office's failure to provide more than 15 calendar days after the requesting to return the requested certification.

(h) Annual certification. Whenever the employing office finds a certification incomplete or insufficient, the employing office may require the employee to furnish a complete and sufficient certification, as provided in paragraph (c) of this section, or a fitness-for-duty certificate, including any clarifications necessary to determine if such certifications are authentic and sufficient, 285.208, and 285.310.
employing office 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 authorization, release, or waiver. In all instances in which certification is requested, it is the employee’s responsibility to provide the employing office with complete and accurate certification and to do so may result in the denial of FMLA leave. See 825.305(d).

825.307 Authentication and clarification of medical certification; reevaluation 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) 30 days and authentication. If an employee submits a complete and sufficient certification signed by the health care provider, the employing office may not request additional information from the health care provider. However, the employing office may contact the health care provider for purposes of clarification and authentication of the medical certification (whether initial certification or recertification) after the employing office has given the employee an opportunity to cure any deficiencies as set forth in 825.303(b). Such contact with the health care provider must not contact the employee’s health care provider, a human resources professional, a leave administrator, or a management official. If the direct supervisor has reason to doubt the validity of a certification stating that an employee will be unavailable for a specified period of time, the employing office must use a health care provider, unless the direct supervisor is also the only individual in the employing office designated to communicate directly with health care providers. If the employee chooses not to provide the employing office with authorization allowing the employer to contact the health care provider, the employing office may not contact the health care provider with a copy of the certification and requesting verification that the information contained on the certification form was completed and authorized by the health care provider who signed the document; no additional medical information may be requested.

Authentication means contacting the health care provider to understand the handwriting on the medical certification or to understand the meaning of a response. Employing offices may seek additional information to verify the certification, but the health care provider, unless the direct supervisor is also the only individual in the employing office designated to communicate directly with health care providers, must not contact the employee’s health care provider. For purposes of the authentication clause, health care provider means the provider of health care services to an employee and the direct supervisor receives specific authorization from the employee to contact the employee’s health care provider. For purposes of this section, an employee must provide the health care provider with a copy of the certification and requesting verification that the information contained on the certification form was completed and 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. Employing offices may seek additional information to verify the certification, but the health care provider, unless the direct supervisor is also the only individual in the employing office designated to communicate directly with health care providers, must not contact the employee’s health care provider. For purposes of the clarification clause, health care provider means the provider of health care services to an employee and the direct supervisor receives specific authorization from the employee to contact the employee’s health care provider. For purposes of this section, an employee must provide the health care provider with a copy of the certification and requesting verification that the information contained on the certification form was completed and authorized by the health care provider who signed the document; no additional medical information may be requested.

(b) 30 days and authentication. If an employee submits a complete and sufficient certification signed by the health care provider, the employing office may not request additional information from the health care provider. However, the employing office may contact the health care provider for purposes of clarification and authentication of the medical certification (whether initial certification or recertification) after the employing office has given the employee an opportunity to cure any deficiencies as set forth in 825.303(b). Such contact with the health care provider must not contact the employee’s health care provider, unless the direct supervisor is also the only individual in the employing office designated to communicate directly with health care providers. If the employee chooses not to provide the employing office with authorization allowing the employer to contact the health care provider, the employing office may not contact the health care provider with a copy of the certification and requesting verification that the information contained on the certification form was completed and authorized by the health care provider who signed the document; no additional medical information may be requested.

(c) Third opinion. If the opinions of the employee’s and the employing office’s designated health care provider are not in agreement, the employing office may request the employee to obtain certification from a third health care provider, again at the employing office’s expense. The employing office must wait 40 days before requesting a recertification if the employee’s and the employing office’s designated health care provider are not in agreement. The third health care provider must be designated or approved jointly by the employing office and the employee. The employing office 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 employing office does not attempt to reach agreement within 40 days, the employing office 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 employing office that refuses to agree to any doctor on a list of specialists in the appropriate field provided by the employee and whom the employing office 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 is visiting in another country, or the certifications as well as second and third opinions 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 employing office 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 employing office 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 employing office 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 maximum duration of the condition is more than 30 days, an employing office 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 a period in excess of six months (e.g., for a lifetime condition), the employing office would be permitted to request recertification every six months in connection with the employee’s absence.

(c) Less than 30 days. An employing office 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 employing office 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 timing of the absences also would constitute a significant change in circumstances sufficient for an employing office to request a recertification more frequently than every 30 days.

(d) If the third opinion is not provided within 30 days of the original certification, the employing office 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 15 days from receipt of an employee’s request, or if the third opinion is not provided within 30 days of the original certification, the employing office must provide the employee with the opinions as well as other 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.

(1) Copies of opinions. The employing office 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 15 days from receipt of an employee’s request, or if the third opinion is not provided within 30 days of the original certification, the employing office must provide the employee with the opinions as well as other 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.

(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 employing office 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 timing of the absences also would constitute a significant change in circumstances sufficient for an employing office to request a recertification more frequently than every 30 days.

(e) Travel expenses. If the employing office requires the employee to obtain either a second or third opinion the employing office must reimburse the employee for any reasonable expenses incurred to obtain the second and third medical opinions. The employing office 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.

(1) Affidavits 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 employing office 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 employing office with a written translation of the certification upon request.

(f) The third opinion is not provided within 30 days of the original certification, the employing office 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 15 days from receipt of an employee’s request, or if the third opinion is not provided within 30 days of the original certification, the employing office must provide the employee with the opinions as well as other 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.
least 15 calendar days after the employing office’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 employing office may ask for the same information when obtaining re-certification as set forth in 825.306. The employee has the same obligations to participate and cooperate (including providing a complete and accurate certification) as required. The approving authority must retain the recertification for leave taken because of a serious health condition, the employing office 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 employing office shall be at the employee’s expense unless the employing office provides otherwise. The employing office may require that any recertification 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 family member (see 825.126(a)), an employing office 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 employing office once. A copy of new active duty orders or other documentation issued by the military may be required by the employing office 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.

(2) The approximate date on which the qualifying exigency commenced or will commence;

(3) 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;

(4) The approximate date on which the serious injury or illness commenced, or was aggravated, and its probable duration;

(5) 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.

(b) Certification for leave taken 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’s 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.

(2) The Office of Compliance has developed an optional form (Form E) for employees’ use in obtaining a certification that meets FMLA’s certification requirements. 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 E, or Form WH-384 (developed by the Department of Labor), or another form containing the same basic information, is required by the employing office; however, no information may be required beyond that specified in this section.

(3) Verification. The employee must submit a complete and sufficient certification to support his or her request for leave because of a qualifying exigency, the employing office being allowed to request information from the employee. However, if the qualifying exigency involves meeting with a third party, the employing office may contact the individual or entity with whom the employee is meeting between the employee and the third party. The employing office may request verification that a military member is meeting for purposes of verifying a meeting or appointment schedule and the nature of the meeting between the employee and the military member or other specified individual. 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 employing office. An employing office may also 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.

(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.

(b) 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 unable to perform the duties of the covered servicemember’s office, grade, rank, or rating and whether the member is receiving medical treatment, recuperation, or therapy; and in the case of a former member of the Armed Forces, such medical facts must include:

(1) 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 a disability rating and that is based, in whole or in part, on the condition precipitating the need for medical caregiver leave;

(2) 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; and

(3) 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 defined in 825.124. The covered servicemember will need care for a single continuous period of time, including any time for treatment and recovery, and an estimate of the beginning and ending dates for this period of time.

(c) 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’s condition, and if so, an estimate of the ultimate 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 of a chronic condition) where there is a medical necessity for the covered servicemember to have such periodic care, which can include assisting in the covered servicemember’s daily activities, and an assessment 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 employing office may also request that such certification set forth the following information in a written statement made by an employee and/or covered servicemember:

(1) The name and address of the employing office 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 (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. Where an employing office requires such documentation, the 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 the time and duration of the leave needed to provide the care.

(d) The Office of Compliance has developed an optional form (Form F) for employees’ use in obtaining certification that meets FMLA’s certification requirements. (See Form F). This optional form reflects certification requirements so as to permit the employee to incorporate information that may support his or her request for leave to care for a covered servicemember with a serious injury or illness. Form F, or Form WH-385 (developed by the Department of Labor), or another form containing the same basic information, may be used by the employing office; 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. The employing office may require authentication and/or clarification of the certification under 825.307. Second and third opinions under 825.307 are not permitted for leave beyond that specified in this section. When the certification has been completed by one of the types of healthcare providers identified in section 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 825.310(b). Recertifications under 825.307 are not permitted for leave to care for a covered servicemember for whom the employee provides confirmation of covered servicemember’s family relationship to the seriously injured or ill servicemember pursuant to 825.122(k) where the lapse in time for recertification is six months or less. In all instances in which recertification is requested, it is the employee’s responsibility to provide the employing office with complete and sufficient certification and failure to do so may result in the denial of FMLA leave. See 825.305(b).

(e) An employing office requiring an employee to submit a certification for leave to care for a covered servicemember must accept as sufficient certification, in lieu of the Office of Compliance’s optional certification form (Form F) or an employing office’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 a 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 to care for a covered servicemember beyond the expiration date of the ITO or ITA is not considered to have provided 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 of the ITO or ITA, an employing office may request that the employee have one of the authorized health care providers listed under 825.310(a) complete the Office of Compliance optional certification form (Form F) or an employing office’s own form, as requisite certification for the remainder of the employee’s necessary leave period.

(2) An employing office may seek authentication and clarification of the ITO or ITA under 825.305(b) when the certification 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 employing office 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 employing office 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 program.

(1) An employing office 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 employing office 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 identified in section 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 825.310(b). Recertifications under 825.307 are not permitted for leave to care for a covered servicemember for whom the employee provides confirmation of covered servicemember’s 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 employer documentation. An employing office 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 required by an employing office, 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).

825.311 Intent to return to work.

(a) An employing office may require an employee to provide certification that meets FMLA’s periodicity on the employee’s status and intent to return to work. The employing office’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 employing office’s obligations under FMLA, as made applicable by the CAA, to maintain health benefits (e.g., employer 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. An employee who is on FMLA leave may have a uniformly-applied policy or practice that requires all similarly-situated employees (i.e., same occupation, same serious health condition) who change their leave status to return to work. An employing office may require that the employee provide the employing office reasonable notice (i.e., within two business days) of the changed circumstances where foreseeable. The employing office may also obtain information on such changed circumstances through requested status reports.

825.312 Fitness-for-duty certification.

(a) An employing office may require an employee whose FMLA leave was occasioned by the employee’s own serious health condition that made the employee unable to perform the job to undergo a fitness-for-duty certification. An employee may not be required to take more FMLA leave than necessary to resolve the circumstance that precipitated the need for leave. An employing office may require that the employee provide the employing office reasonable notice (i.e., within two business days) of the changed circumstances where foreseeable. The employing office may also obtain information on such changed circumstances through requested status reports.

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as in the initial certification process. See 825.305(d).

(b) An employing office may seek a fitness-for-duty certification only with regard to the particular functions of the employee's job that are needed by the employing office to resume work. Additionally, an employing office may require that the certification specifically address the employee's ability to perform all the essential functions of the employee's job. In order to require such a certification, an employing office must provide an employee with a list of the essential functions of the employee's job no later than 15 calendar days from receipt of the notice required by 825.300(d), and must indicate in the designation notice that the certification must address the employee's ability to perform all the essential functions. If the employing office 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 employing office may contact the employee's health care provider for purposes of verifying and authenticating the fitness-for-duty certification. Clarification may be requested only for the serious health condition for which FMLA leave was taken. The employing office 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 825.305(d) to the employee's job or request additional FMLA leave is no longer entitled to reinstatement under the FMLA. See 825.313(d).

(f) An employing office may delay restoration to employment until an employee submits a required fitness-for-duty certification unless the employing office has failed to provide the notice required in paragraph (d) of this section and the employer has not, within the time period the notice required, an employee who does not provide a fitness-for-duty certification or a new medical certification for FMLA leave is no longer entitled to reinstatement under the FMLA. See 825.313(d).

(i) An employing office is not entitled to a certification or to require the employee to submit a medical examination or inquiry just because the employee's job no longer requires the employee to perform the essential functions of the employee's job.

(e) An employing office may delay restoration to employment until an employee submits a required fitness-for-duty certification unless the employing office has failed to provide the notice required in paragraph (d) of this section and the employer has not, within the time period the notice required, an employee who does not provide a fitness-for-duty certification or a new medical certification for FMLA leave is no longer entitled to reinstatement under the FMLA. See 825.313(d).

(j) An employing office is entitled to a certification or to require the employee to submit a medical examination or inquiry just because the employee's job no longer requires the employee to perform the essential functions of the employee's job.

(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 825.305(d) to the employee's job or request additional FMLA leave is no longer entitled to reinstatement under the FMLA. See 825.313(d).

(f) An employing office may delay restoration to employment until an employee submits a required fitness-for-duty certification unless the employing office has failed to provide the notice required in paragraph (d) of this section and the employer has not, within the time period the notice required, an employee who does not provide a fitness-for-duty certification or a new medical certification for FMLA leave is no longer entitled to reinstatement under the FMLA. See 825.313(d).

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days during the period over which the leave is qualified, which has equivalent pay and
ration of the planned treatment; or
particular duration, not greater than the du-
leave would extend, the employing office
counted against the employee’s FMLA leave
intermittently. The period during the sum-
is leave taken consecutively rather than
leave is needed, and may
include one uninterrupted period of leave.
(b) If an instructional employee does not give
to take a full, or a full-time, FMLA leave
see (see 285.302) to be taken intermittently
or on a reduced leave schedule, the employ-
ing office has the option of the employee to stay on leave until the end of the
year and the end of spring each school year.

825.600 Special rules for school employees,
definitions.
(a) Certain special rules apply to employ-
ees of local educational agencies, including
public school and elementary schools
under their jurisdiction, and private ele-
tary and secondary schools. The special rules
do not apply to other kinds of educational
institutions, such as colleges and univer-
sities, trade schools, and preschools.
(b) Educational institutions are covered by
FMLA, as made applicable by the CAA (and
the special rules) to all employees for 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 to work shall be based on the basis of “established school board policies
and practices, private school policies and
practices, and collective bargaining agree-
ments.” The collective bargaining agreements used as a basis for restoration must be in writing,
that has been made available to the employee by the
holding of a school board meeting, must clearly
the employee’s restoration rights upon return from leave. Any
established policy which is as used as the basis for restoration of an employee to an equivalent
position must provide substantially the same
provisions as provided in the FMLA, as made
applicable by the CAA. See 285.400, the
policy or collective bargaining agreement
must provide for restoration to an equiva-
test school board policies and practices, private school policies and
practices, and collective bargaining agree-
ments.” The special rules affect the taking of
leave 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
normal receive if they had been working at
the end of the school year.

825.601 Special rules for school employees,
leaves in instructional leaves.
(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 sum-
nation 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
normal 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 re-
duced leave schedule to care for a family
member with a serious health condition,
to care for a covered service-
member, or to care for a covered service-
member, or to care for a covered service-
member, the employing office 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
academic term (semester), by instructional
teachers, but also athletic coaches,
will begin three weeks before
the end of a term. The regular rules apply except in cir-
cumstances when—
(1) An instructional employee begins leave
more than five weeks before the end of a term. The employment office may require the
employee to continue taking leave until the
end of the term.
(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 be-
cause 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,
dughter, or parent with a serious health
condition; or to care for a covered service-
member. The employing office 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 be-
cause 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,
dughter, or parent with a serious health
condition; or to care for a covered service-
member. The employing office 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) In the case of an employee who is re-
quired to stay out on leave until the end of a
aca-
demic term, only if the employee is ready and able to return
to work shall be charged against the employee’s
FMLA leave entitlement. The employing office
cannot require the employee to stay on leave until the end of the
school term. Therefore, any additional leave requested by the employee before the end of the
school term is not counted as FMLA leave; however, the employing office shall be required to maintain the employee’s group
health insurance and related benefits to the extent of the equivalent job including other
benefits at the conclusion of the leave.

825.602 Special rules for school employees,
limitations on leave near the end of an
academic term.
(a) There are also different rules for in-
teachers, and provide greater family or medical
leave benefits to employees as estab-
lished by the FMLA. Conversely, the rights
established by the FMLA, as made applicable by the CAA, may not be diminished by any
employment benefit program or plan. For ex-
ample, a provision of a collective bargaining agreement (CBA) which provides for rein-
statement to a position that is not equiva-
ent to the employee’s prior position may not be restored to a position requiring additional licensure or certification.

825.700 Interaction with employing office’s
policies.
(a) An employment office must observe any
employment benefit program or plan that
provides greater family or medical leave
benefits to employees as estab-
lished by the FMLA. If an employing office
provides greater unpaid family leave
rights than are afforded by FMLA, the
employing office is not required to extend ad-
tional rights afforded by FMLA, such as
maintenance of health benefits (other than
through COBRA or 5 U.S.C. 8905a, whichever
is applicable), to the additional leave period
not covered by FMLA.
(b) Nothing in the FMLA, as made applica-
able by the CAA, prevents an employing office
from adopting or retaining more generous
leave policies.
modation 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 requires an alternative position under the ADA if the employing office grants because it is not an undue hardship. The employing office advises the employee that the 10-weeks of leave would also be considered FMLA leave and would count towards the employee's FMLA leave entitlement. This designation does not prevent the employee from being provided 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 employing office 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 the same coverage maintained for the remainder of the two-week equivalent of FMLA leave entitlement, notwithstanding an employing office 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 job. 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 may be entitled to FMLA leave as a reasonable accommodation, barring undue hardship; the employee would then be entitled to only the leave that is ordinarily provided by the employing office to part-time employees.

(4) At the end of the FMLA leave entitlement, an employing office 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 employing office's FMLA obligations would be satisfied if the employing office offered the employee an equivalent full-time position. If the employee was unable to perform the essential functions of that equivalent position even with reasonable accommodation, because of a disability, the employing office may 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.

(1) If FMLA entitles an employee to leave, an employing office may not, in lieu of FMLA leave, require an employee to take a job with a reasonable accommodation. However, ADA may require the employing office 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.

(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 employers’ compensation absence and FMLA leave may run concurrently (subject to the employer satisfying FMLA leave requirements). At some point the health care provider providing medical care pursuant to the workers’ compensation benefit plan, the employee is permitted, but not required to accept the position eligible under FMLA leave. 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 for the first week of FMLA leave or able to return to the same or equivalent job the employee left or until the 12-week FMLA leave entitlement is exhausted. See §251.207 (c).

(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, as made applicable by the CAA.

(f) Under Title VII of the Civil Rights Act of 1964, as amended by the Pregnancy Discrimination Act, and as made applicable by the CAA, an employing office should provide the same benefits for women who are pregnant as the employing office provides to other employees with short-term disabilities. Because Title VII does not require employers to be employed for a certain period of time to be protected, an employee employed for less than 12 months by the employing office (and, therefore, not an "eligible employee" under FMLA (applicable by the CAA)) may not be denied maternity leave if the employing office normally provides short-term disability benefits to employees with the same tenure who are experiencing other short-term disabilities.

(g) Under the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA), 29 U.S.C. § 2601 et seq., veterans are entitled to receive all rights and benefits of employment that they would have obtained if they had not been absent due to service in the uniformed services. See 29 C.F.R. 600.221 and 29 C.F.R. 600.210(c).

(h) For further information on Federal antidiscrimination laws applied by section 201 of the CAA (2 U.S.C. 1311), including Title VII of the Civil Rights Act, the ADA, and the Uniformed Service Employment and Reemployment Rights Act of 1994, see the Office of Compliance, EEOC.