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December 15, 2020

Comments by the Office of Employee Advocacy, U.S. House of Representatives
In Response to Notice of Proposed Rulemaking

RE: OCWR Proposed Rules to Implement the Federal Employee Paid Leave Act (FEPLA)
(as published in the Congressional Record – House; Nov. 16, 2020; pages H5760-H5794)

Editorial Notes:

Text highlighted in yellow constitutes language that the Office of Employee Advocacy proposes to add to the Proposed Rule.

Text that has been struck through (example: ~~strike through~~) constitutes language that Employee Advocacy proposes to delete from the current language of the Proposed Rule.

At Section 825.102 *[page H5766, column 3, full paragraph 4]***, the Proposed Rule reads:**

> *Birth* means the delivery of a child. When the term "birth" under this subpart is used in connection with the use of leave before birth, it refers to an anticipated birth.

This should be changed to read:

> *Birth* means the delivery of a child. When the term "birth" under this subpart is used in connection with the use of leave before birth, it refers to an anticipated birth. When the term "birth" under this subpart is used in connection with the use of leave for the birth mother's physical recovery after delivery, it refers to delivery of a living or non-living child.

Reason for proposed change: The definition of "*Birth*" in Section 825.102 should be revised to ensure that employees who intend to deliver a live child and through complications in the birthing process have a birth that results in a deceased child receive the same entitlements during the physical recovery process from the birth as those employees whose birthing process resulted in the birth of a living child.

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At Section 825.102 *[page H5767, column 3, full paragraph 11]***, the Proposed Rule reads, in relevant part:**

> *Employee of the House of Representatives* means any individual 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….

This should be changed to read:

Employee of the House of Representatives means any individual occupying a position the pay for which is disbursed by the ~~Clerk~~ Chief Administrative Officer 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~~ Members' Representational Allowance of the House of Representatives but….

Reason for proposed change: The "*Employee of the House of Representatives*" definition in Section 825.102 should be revised to conform with language updates made through amendments and reforms to the Congressional Accountability Act of 1995 (CAA). The 2018 CAA Reform Act changed the language in the definition of House employees to reference pay that is disbursed by the Office of the Chief Administrative Officer (CAO). Previously, the language described the payor as the Office of the Clerk, rather than the CAO. It is confusing to continue to use language that was changed by the Reform Act. Similarly, the term "clerk-hire allowance" was used in original CAA text in the 1990's, but has long been discarded in Congressional rules, manuals, handbooks and parlance. Although this term is still used in the CAA Reform Act for historical reasons, it is confusing to continue using this outdated and irrelevant term in the procedural rules. The appropriate reference is now the "Members' Representational Allowance (MRA)."

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At Section 825.102 *[page H5768, column 2, full paragraph 12]***, the Proposed Rule reads, in relevant part:**

Intermittent leave means leave taken in separate periods of time due to a single illness or injury, rather than for one continuous period of time, and may include leave of periods from an hour or more to several weeks….

This should be changed to read:

Intermittent leave means leave taken in separate periods of time due to a single birth or child placement event, illness, or injury, rather than for one continuous period of time, and may include leave of periods from an hour or more to several weeks….

Reason for proposed change: The "*intermittent leave*" definition in Section 825.102 should be revised to include paid leave that is now available under the FMLA FEPLA provisions for reasons of birth or placement of a child for foster care or adoption. Such circumstances would not commonly be characterized as "illness or injury"; so, the FMLA definition should be expanded to account for the fact that FEPLA permits intermittent leave for birth or placement (employees can take paid parental leave intermittently if the employee and employer agree).

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At Section 825.102 *[page H5769, column 2, full paragraph 9]***, the Proposed Rule reads:**

> *Son or daughter* means a biological, adopted, or foster child, a stepchild, a legal ward, or a child of a person standing in loco parentis, who is either under age 18, or age 18 or older and "incapable of self-care because of a mental or physical disability" at the time that FMLA leave is to commence.

This should be changed to read:

> *Son or daughter* means a biological, adopted, or foster child, a stepchild, a legal ward, or a child of a person standing in loco parentis, who is either under age 18, or age 18 or older and "incapable of self-care because of a mental or physical disability" at the time that FMLA leave is to commence. As used throughout these Rules, the terms "*son" or "daughter"* shall be interpreted to include a child, stepchild, legal ward, and child(ren) of persons standing in loco parentis, who identify as transgender, gender neutral, gender non-conforming, or non-binary.

Reason for proposed change: The "*son or daughter*" definition in Section 825.102 should be defined to account for circumstances where a child is gender neutral or gender undetermined (e.g., a child identifies as non-binary; a child identifies as gender non-conforming; a child has male and female reproductive organs at birth or placement; etc.). Although such circumstances may not be common, the OCWR procedural rules should not be written in a manner that could be construed to limit Paid Parental Leave (PPL) rights of parents of gender-neutral children. For example, upon learning that an employee is providing foster care for a 14-year old child who identifies as gender non-conforming, an employer should not be able to use the language of the regulations to argue that the employer is not required to provide PPL because the child is not a "son" or "daughter." Importantly, in June 2020, after the President signed FEPLA into law in December 2019, the Supreme Court held in *Bostock v. Clayton County* that employers cannot discriminate based on gender identity. *See Bostock v. Clayton County, GA*, 590 U.S. ____, 140 S. Ct. 1731 (June 15, 2020). Expanding the definition to include protections regarding gender identity would conform to a change in the law after enactment of FEPLA.

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At Section 825.102 *[page H5769, column 1, full paragraph 10]***, the Proposed Rule reads:**

> *Son or daughter of a covered service member* means a covered servicemember's biological, adopted, or foster child, stepchild, legal ward, or a child for whom the covered servicemember stood in loco parentis, and who is of any age. *See also* 825.127(d)(1).

This should be changed to read:

> *Son or daughter of a covered service member* means a covered servicemember's biological, adopted, or foster child, stepchild, legal ward, or a child for whom the covered servicemember stood in loco parentis, and who is of any age. *See also* 825.127(d)(1). As

used throughout these Rules, the terms "s*on or daughter of a covered servicemember"* shall be interpreted to include a covered servicemember's biological, adopted, foster child, stepchild, legal ward, and child(ren) for whom the covered servicemember stood in loco parentis, who are of any age, and who identify as transgender, gender neutral, gender non-conforming, or non-binary.

Reason for proposed change: The definition of "*son or daughter of a covered servicemember*" in Section 825.102 should be revised to account for circumstances where a child is gender neutral or gender undetermined (e.g., a child identifies as non-binary; a child identifies as gender non-conforming; a child has male and female reproductive organs at birth or placement; etc.). Although such circumstances may not be common, the OCWR procedural rules should not be written in a manner that could be construed to limit Paid Parental Leave (PPL) rights of parents of gender-neutral children. For example, upon learning that an employee is providing foster care for a 14-year old child who identifies as gender non-conforming, an employer should not be able to use the language of the regulations to argue that the employer is not required to provide PPL because the child is not a "son" or "daughter." Importantly, in June 2020, after the President signed FEPLA into law in December 2019, the Supreme Court held in *Bostock v. Clayton County* that employers cannot discriminate based on gender identity. *See Bostock v. Clayton County, GA*, 590 U.S. ____, 140 S. Ct. 1731 (June 15, 2020). Expanding the definition to include protections regarding gender identity would conform to a change in the law after enactment of FEPLA.

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At Section 825.102 *[page H5769, columns 1 and 2, full paragraph 11]***, the Proposed Rule reads:**

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

This should be changed to read:

> *Son or daughter on covered active duty or call to active duty status* means the employee's biological, adopted, or foster child, stepchild, legal ward, or a child for whom the employee stood in loco parentis, who is on covered active duty or call to covered active duty status, and who is of any age. *See also* 825.126(a)(5). As used throughout these Rules, the terms "s*on or daughter on covered active duty or call to active duty status"* shall be interpreted to include the employee's biological, adopted, foster child, stepchild, legal ward, and child(ren) for whom the employee stood in loco parentis, who are on covered active duty status, who are of any age, and who identify as transgender, gender neutral, gender non-conforming, or non-binary. *See also* 825.126(a)(5).

Reason for proposed change: The definition of "*son or daughter on covered active duty or call to active duty status*" in Section 825.102 should be revised to account for circumstances where a child is gender neutral or gender undetermined (e.g., a child identifies as non-binary; a child identifies as gender non-conforming; a child has male and female reproductive organs at birth or placement; etc.). Although such circumstances may not be common, the OCWR procedural rules should not be written in a manner that could be construed to limit Paid Parental Leave (PPL) rights of parents of gender-neutral children. For example, upon learning that an employee is providing foster care for a 14-year old child who identifies as gender non-conforming, an employer should not be able to use the language of the regulations to argue that the employer is not required to provide PPL because the child is not a "son" or "daughter." Importantly, in June 2020, after the President signed FEPLA into law in December 2019, the Supreme Court held in *Bostock v. Clayton County* that employers cannot discriminate based on gender identity. *See Bostock v. Clayton County, GA*, 590 U.S. ___, 140 S. Ct. 1731 (June 15, 2020). Expanding the definition to include protections regarding gender identity would conform to a change in the law after enactment of FEPLA.

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At Section 825.121(a) *[page H5772, column 1, first full paragraph]*, **the Proposed Rule reads:**

(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 and to care for the newly placed child as follows as follows:

This should be changed to read:

(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 and to care for the newly placed child as follows~~ as follows~~:

Reason for proposed change: The language in Section 825.121(a) should be revised to delete the second "as follows" to correct a typographical error.

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At Section 825.126(a)(5) *[page H5774, column 1, first full paragraph]***, the Proposed Rule reads:**

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

This should be changed to read:

Son or daughter on covered active duty or call to active duty status means the employee's biological, adopted, or foster child, stepchild, legal ward, or a child for whom

the employee stood in loco parentis, who is on covered active duty or call to covered active duty status, and who is of any age. The terms "*son or daughter on covered active duty or call to active duty status"* shall be interpreted to include the employee's biological, adopted, foster child, stepchild, legal ward, and child(ren) for whom the employee stood in loco parentis, who are on covered active duty status, who are of any age, and who identify as transgender, gender neutral, gender non-conforming, or non-binary.

Reason for proposed change: The definition of "*son or daughter on covered active duty or call to active duty status*" in Section 825.126(a)(5) should be revised to account for circumstances where a child is gender neutral or gender undetermined (e.g., a child identifies as non-binary; a child identifies as gender non-conforming; a child has male and female reproductive organs at birth or placement; etc.). Although such circumstances may not be common, the OCWR procedural rules should not be written in a manner that could be construed to limit Paid Parental Leave (PPL) rights of parents of gender-neutral children. For example, upon learning that an employee is providing foster care for a 14-year old child who identifies as gender non-conforming, an employer should not be able to use the language of the regulations to argue that the employer is not required to provide PPL because the child is not a "son" or "daughter." Importantly, in June 2020, after the President signed FEPLA into law in December 2019, the Supreme Court held in *Bostock v. Clayton County* that employers cannot discriminate based on gender identity. *See Bostock v. Clayton County, GA*, 590 U.S. ____, 140 S. Ct. 1731 (June 15, 2020). Expanding the definition to include protections regarding gender identity would conform to a change in the law after enactment of FEPLA.

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At Section 825.127(d)(1) *[page H5775, column 1, full paragraph 7]***, the Proposed Rule reads:**

Son or daughter of a covered service member means the covered servicemember's biological, adopted, or foster child, stepchild, legal ward, or a child for whom the covered servicemember stood in loco parentis, and who is of any age.

This should be changed to read:

Son or daughter of a covered service member means the covered servicemember's biological, adopted, or foster child, stepchild, legal ward, or a child for whom the covered servicemember stood in loco parentis, and who is of any age. The terms "*son or daughter of a covered servicemember"* shall be interpreted to include a covered servicemember's biological, adopted, foster child, stepchild, legal ward, and child(ren) for whom the covered servicemember stood in loco parentis, who are of any age, and who identify as transgender, gender neutral, gender non-conforming, or non-binary.

Reason for proposed change: The definition of "*son or daughter of a covered servicemember*" in Section 825.127(d)(1) should be revised to account for circumstances where a child is gender neutral or gender undetermined (e.g., a child identifies as non-binary; a child identifies as gender

non-conforming; a child has male and female reproductive organs at birth or placement; etc.). Although such circumstances may not be common, the OCWR procedural rules should not be written in a manner that could be construed to limit Paid Parental Leave (PPL) rights of parents of gender-neutral children. For example, upon learning that an employee is providing foster care for a 14-year old child who identifies as gender non-conforming, an employer should not be able to use the language of the regulations to argue that the employer is not required to provide PPL because the child is not a "son" or "daughter." Importantly, in June 2020, after the President signed FEPLA into law in December 2019, the Supreme Court held in *Bostock v. Clayton County* that employers cannot discriminate based on gender identity. *See Bostock v. Clayton County, GA*, 590 U.S. ___, 140 S. Ct. 1731 (June 15, 2020). Expanding the definition to include protections regarding gender identity would conform to a change in the law after enactment of FEPLA.

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At Section 825.200(a) *[page H5775, column 3, full paragraph 2]***, the Proposed Rule reads, in relevant part:**

> (a) Except in the case of leave to care for a covered servicemember with a serious injury or illness, an eligible employee's FMLA leave entitlement is limited to a total of 12 workweeks of leave during any 12-month period for any one, or more, of the following reasons:
> (1) The birth of the employee's son or daughter, and to care for the newborn child;….

This should be changed to read:

> (a) Except in the case of leave to care for a covered servicemember with a serious injury or illness, an eligible employee's FMLA leave entitlement is limited to a total of 12 workweeks of leave during any 12-month period for any one, or more, of the following reasons:
> (1) The birth of the employee's son or daughter, and/or to care for the newborn child;….

Reason for proposed change: The language in Section 825.200(a)(1) should be revised to add "or" to account for alternative circumstances. To the extent the Section 825.102 definition of "*Birth*" is not revised in line with these Comments above, the FMLA leave entitlement should not be contingent on the birth of a child resulting in the care of a newborn child. There are times when the birth of a child does not result in the care of a newborn child, but the employee should still be entitled to leave to recover from the birth of a child.

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At Section 825.208(a) *[page H5778, column 3, full paragraph 4]***, the Proposed Rule reads, in relevant part:**

> (a) This section provides the basis for determining the periods of unpaid leave for which paid parental leave may be substituted under subpart E of this part, which must be read

with this subpart to establish eligibility. This section addresses substitution of accrued paid leave for unpaid FMLA leave:
(1) For birth of a son or daughter, and to care for the newborn child (See 825.120);….

This should be changed to read:

(a) This section provides the basis for determining the periods of unpaid leave for which paid parental leave may be substituted under subpart E of this part, which must be read with this subpart to establish eligibility. This section addresses substitution of accrued paid leave for unpaid FMLA leave:
(1) For the birth of a son or daughter, and/or to care for the newborn child (See 825.120);….

Reason for proposed change: The language in Section 825.208(a)(1) should be revised to add "or" to account for alternative circumstances. To the extent the Section 825.102 definition of "*Birth*" is not revised in line with these Comments above, the FMLA leave entitlement should not be contingent on the birth of a child resulting in the care of a newborn child. There are times when the birth of a child does not result in the care of a newborn child, but the employee should still be entitled to leave to recover from the birth of a child. Further, the section should be revised to add "the" to correct a typographical error resulting in the missing article.

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At Section 825.208(c)(1) *[page H5779, column 2]***, the Proposed Rule reads, in relevant part:**

(c) *Employee entitlement to substitute*. (1) An employee is entitled substitute paid leave for leave without pay under this subpart, as permitted in this section.

This should be changed to read:

(c) *Employee entitlement to substitute*. (1) An employee is entitled to substitute paid leave for leave without pay under this subpart, as permitted in this section.

Reason for proposed change: The language in Section 825.208(c) should be revised to insert "to." This change will correct the typographical error resulting in the missing conjunction.

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At Section 825.208(d)(2) and (4) *[page H5779, column 2]***, the Proposed Rule reads, in relevant part:**

(2) An employee may retroactively substitute annual leave or sick leave for leave without pay granted under this subpart covering a past period of time, if the substitution is made in conjunction with the retroactive granting of leave without pay.
…
(4) An employee may retroactively substitute paid parental leave for applicable leave without pay granted under this subpart, as provided in 825.505 and subject to the requirements governing paid parental leave in subpart E of this part. If the employee's

leave without pay was not granted on a prospective basis under this subpart, the retroactive substitution of paid parental leave may not be made unless the leave without pay period has been retroactively designated as leave under this subpart.

These subparagraphs should be revised to include examples.

Reason for proposed change: Subsections (2) and (4) of section 825.208(d) should be revised to include examples, because each subsection is confusing. Examples are included in other sections of the procedural rules (*see, e.g.,* 825.200(c), 825.506(b)). Such examples are very helpful to explain a rule when the abstract description of the circumstance is confusing – as is the case for 825.208(d) – and leaves the employee and employer unclear of the situations when the rule would apply and what the employee's rights would be.

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At Section 825.301 *[page H5785, column 2]*, the title of this section should be in a separate line and bolded to conform with the rest of the titles in these Rules.

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At Section 825.501(b) *[page H5791, column 2, full paragraph 6]***, the Proposed Rule reads:**

Paid parental leave means paid time off from an employee's scheduled tour of duty that is authorized under 2 U.S.C. 1312(d)(2)(A) and this subpart and that is granted to an employee who has a current parental role in connection with the child whose birth or placement was the basis for granting unpaid FMLA leave under 825.120 or 825.121. This leave is not available to an employee who does not have a current parental role.

This should be changed to read:

Paid parental leave means paid time off from an employee's scheduled tour of duty that is authorized under 2 U.S.C. 1312(d)(2)(A) and this subpart and that is granted to an employee who has a ~~current~~ continuing parental role during the period of paid leave in connection with the child whose birth or placement was the basis for granting unpaid FMLA leave under 825.120 or 825.121. This leave is not available to an employee who does not have a ~~current~~ continuing parental role.

Continuing parental role means an ongoing responsibility or undertaking, during the period of approved unpaid FMLA leave under 825.120 or 825.121, to raise or care for the child whose birth or placement was the basis for granting the requested unpaid FMLA leave.

Reason for proposed change: Section 825.501 should be revised to reference a "continuing parental role" rather than a "current parental role" for purposes of clarity, and in keeping with the "Section-by-Section Discussion of Proposed Changes to the FMLA Regulations" section

preceding the proposed rules. Specifically, this explanatory section provides, at Page H5764, that the definition of "paid parental leave" intends to make clear that a "parent who does not maintain a *continuing* parental role . . . [is] not eligible for paid parental leave . . . " (emphasis added). Thus, this provision should be revised to define "continuing parental role" for the benefit of employers and employees in making determinations of whether the requirement has been met. "Current parental role" is not only vague and undefined, also the term is subject to abuse. One could argue that "current" means "current as of the enactment of the regulations." Even though such an assertion would not align with the clear intent of the statute, the argument could be made based on plain meaning. Thus, this change is recommended to prevent such an argument.

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At Section 825.502(b)(2) *[page H5791, column 2, (b)(2) sentence 2]***, the Proposed Rule reads, in relevant part:**

> (b)(2) … Notwithstanding paragraph (b)(1) of this section, an employee will be able to use the full amount of paid parental leave only to the extent that there are 12 weeks of available unpaid FMLA leave granted under the birth or placement provisions in 825.112(a)(1); or (2) during the 12-month period referred to in section 102(a)(1) of the FMLA (29 U.S.C. 2612(a)(1)) to which it relates….

This should be changed to read:

> (b)(2) … Notwithstanding paragraph (b)(1) of this section, an employee will be able to use the full amount of paid parental leave only to the extent that there are 12 weeks of available unpaid FMLA leave granted under the birth ~~or~~ and placement provisions in 825.112(a)(1)~~; or~~ and (a)(2) during the 12-month period referred to in section 102(a)(1) of the FMLA (29 U.S.C. 2612(a)(1)) to which it relates….

Reason for proposed change: The language in Section 825.502(b)(2) should be revised to delete a semicolon and add a conjunction ("and") to ensure correct grammar, avoid confusion, and add clarity. The semicolon after "825.112(a)(1)" suggests a list in the disjunctive, but the reference to 825.112(a) should reflect that (b)(2) applies to both types of activities encompassed in 825.112(a), which are birth and placement activities. They are listed in (a)(1) and (a)(2).

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At Section 825.502(d) *[page H5791, column 3, full paragraph 2]***, the Proposed Rule reads:**

> (d) *Treatment of unused leave.* If an employee has any unused balance of paid parental leave that remains at the end of the 12-month period following the birth or placement involved, the entitlement to the unused leave elapses at that time. No payment may be made for unused paid parental leave that has expired. Paid parental leave may not be considered annual leave for purposes of making a lump-sum payment for annual leave or for any other purpose.

This should be changed to read:

(d) *Treatment of unused leave.* If an employee has any unused balance of paid parental leave that remains at the end of the 12-month period following the birth or placement involved, the entitlement to the unused leave elapses at that time. No payment may be made for unused paid parental leave that has expired. Paid parental leave may not be considered annual leave for purposes of making a lump-sum payment for annual leave or for any other purpose. The forfeiture of any unused balance of paid parental leave does not impact an employee's ability to use unpaid FMLA leave for other qualifying reasons, if eligible pursuant to 825.110, 825.112 and 825.200.

Reason for proposed change: Section 825.502(d) should be revised to clarify that the forfeiture of unused paid parental leave does not impact an employee's ability to use unpaid FMLA leave for other qualifying reasons, to the extent that the employee is eligible for such leave in accordance with 825.110, 825.112, and 825.200.

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At Section 825.504(b) *[page H5791, column 3]***, the Proposed Rule reads:**

(b) the limitations in 825.213 (permitting employing offices to recover an amount equal to the total amount of government contributions for maintaining such employee's health coverage if the employee fails to return from leave).

This should be changed to read:

(b) the limitations and entitlements in 825.100(b) and 825.213 (permitting employing offices to recover an amount equal to the total amount of government contributions for maintaining such employee's health coverage if the employee fails to return from leave).

Reason for proposed change: The language in Section 825.504(b) should be revised to include a reference to the requirement in section 825.100(b). Otherwise, notwithstanding the phrase "[s]ubject to 825.504" in section 825.100(b), it is not entirely clear that employers cannot recover their share of health benefit premiums if an employee does not return to work after PPL.

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At Section 825.505(a) *[page H5791, column 3]***, the Proposed Rule reads, in relevant part:**

(a) If an employing office determines that an otherwise eligible employee who could have made an election during a past period to substitute paid parental leave (as provided in 825.502) was physically or mentally incapable of doing so during that past period, the employee may, within 5 workdays of the employee's return to duty status, make an election to substitute paid parental leave for applicable unpaid FMLA leave under 825.502(a) on a retroactive basis….

This should be changed to read:

(a) If an employing office determines that an otherwise eligible employee who could have made an election ~~during~~ for a past leave period to substitute paid parental leave (as provided in 825.502) was physically or mentally incapable of doing so during that past period, the employee may, within 5 workdays of the employee's return to duty status, make an election to substitute paid parental leave for applicable unpaid FMLA leave under 825.502(a) on a retroactive basis….

Reason for proposed change: The language in Section 825.505(a) should be revised to substitute "for" for the term "during" and insert the word "leave," because the phrase "during a past period" is vague, and its meaning is unclear. Other sections in this Subpart that discuss a "period" refer to the "12-month period under 825.200(a)" (*see, e.g.,* 825.502(b)(2)), which could be the "past leave period" referred to this section. Yet, the phrase "during a past period" could also refer to the 12 weeks of leave to which employees are entitled under the FMLA. Revising the section to read "for a past leave period" will help clarify that neither of the foregoing is being discussed in 825.505(a). Rather, the period of time that the section describes is the period of non-duty status taken as leave for a qualifying event.

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At Section 825.505(b)(1) *[page H5791, column 3]***, the Proposed Rule reads:**

(b)(1) If an employing office determines that an otherwise eligible employee is physically or mentally incapable of making an election to substitute paid parental leave (as provided in 825.207), the employing office must, upon the request of a personal representative of the employee, provide conditional approval of substitution of paid parental leave for applicable unpaid FMLA leave on a prospective basis. The conditional approval is based on the presumption that the employee would have elected to substitute paid parental leave for the applicable unpaid FMLA leave.

This should be changed to read:

(b)~~(1)~~ If an employing office ~~determines~~ learns that otherwise eligible employee is physically or mentally incapable of making an election to substitute paid parental leave (as provided in 825.207), the employing office must, upon the request of a personal representative of the employee, provide conditional approval of substitution of paid parental leave for applicable unpaid FMLA leave on a prospective basis. The conditional approval is based on the presumption that the employee would have elected to substitute paid parental leave for the applicable unpaid FMLA leave. An employee may, within 5 workdays of the employee's return to duty status, request to substitute other leave for the paid parental leave.

Reason for proposed change: The subsection label for 825.505(b)(1) should be revised to delete "(1)" as a subsection number, because there is no corresponding (b)(2); the subsection should read "825.505(b)." The language in Section 825.505(b) should be revised to substitute

"learns" for "determines"; because it should not be within the employing office's discretion to "determine" if an employee is incapacitated. Leaving such a determination to the employer is inappropriate, as there is no standard for such a determination. Discretion by the employing office enables subjective determinations, and allows for the influence of improper biases. The fact of an employee's incapacitation could be conveyed by the personal representative referenced in this section, or the employing office may learn of the employee's incapacitation through other channels. Further, the section should be revised to include an option for the employee to rebut the presumption that paid parental leave was desired during the period of incapacitation. The employee might elect to use another form of leave in order to preserve the period of paid parental leave for a later time during the 12-month period. The additional recommended language for 825.505(b), which allows an employee to rebut the presumption of a PPL request upon his/her return to duty, mirrors language in 825.505(a).

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At Section 825.601(a) *[page H5792, column 2]***, the Proposed Rule reads, in relevant part:**

> (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 summer vacation when the employee would not have been required to report for duty is not counted against the employee's FMLA leave entitlement….

This should be changed to read:

> (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 periods during summer, winter and spring vacations when the employee would not have been required to report for duty ~~is~~ are not counted against the employee's FMLA leave entitlement….

Reason for proposed change: The language in Section 825.601(a) should be revised to add all vacation periods during which an employee would not be required to report for duty, and thus exempt all such periods from a school employee's FMLA entitlement. The same justification for exempting summer vacation would apply to extended winter and spring vacations.

[END OF COMMENTS]