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December 17, 2020

BY E-MAIL (Alexander.Ruvinsky@ocwr.gov)
BY FAX (202–426–1913)

Susan Tsui Grundmann
Executive Director
Office of Congressional Workplace Rights
Room LA 200
John Adams Building
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Washington, D.C. 20540-1999

Re: Comments to the Noticed of Proposed Rulemaking Submitted November 16, 2020

Dear Ms. Grundmann:

The Office of the Senate Chief Counsel for Employment ("SCCE") submits the following Comments to the Office of Congressional Workplace Rights ("OCWR") in response to the Notice of Proposed Rulemaking ("NPRM") published in the Congressional Record on November 17, 2020. *See* 165 Cong. Rec. S6983-S7017 (daily ed. Nov. 16, 2020). The OCWR Board of Directors ("Board") submitted the NPRM as part of the Board's obligation to issue regulations implementing section 202 (2 U.S.C. § 1312) of the Congressional Accountability Act of 1995 ("CAA"). *See* 165 Cong. Rec. S6983. Section 202 of the CAA makes sections 101 through 105 of the Family and Medical Leave Act of 1993 (''FMLA''), 29 U.S.C. § 2611 through 2615, applicable to the legislative branch. *See* 2 U.S.C. § 1312(a)(1).

The Board's stated "purpose of [the NPRM] is to propose modifications to the existing legislative branch FMLA substantive regulations under section 202 of the CAA." 165 Cong. Rec. S6984. What the Board has submitted, however, cannot accurately be described as such. The "existing" substantive FMLA regulations that apply to the legislative branch are the regulations approved by Congress in 1996[1] ("Existing FMLA Regulations"). The Board acknowledges that the substantive FMLA regulations it submitted to Congress in 2016[2] ("Unapproved FMLA Regulations") were not approved by Congress. *See* 165 Cong. Rec. S6984. Nevertheless, the Board has chosen to propose modifications to the Unapproved FMLA Regulations rather than to

[1] Senate edition published at 140 Cong. Rec. S3896-S3917 (daily ed. April 23, 1996).
[2] 162 Cong. Rec. H4128–H4168, S4475–S4516 (daily ed. June 22, 2016).

the Existing FMLA Regulations. To confuse matters further, the Board "intends to resubmit [the Unapproved FMLA Regulations] for congressional approval when it submits its request for approval" of the regulations proposed in the NPRM. 165 Cong. Rec. S6984. In other words, the Board plans to ask Congress to approve two different versions of FMLA regulations.

To avoid the inevitable confusion that would be created by congressional approval of two different versions of FMLA regulations, the SCCE recommends that the Board withdraw the NPRM and the Unapproved FMLA Regulations[3] and submit to Congress an NPRM that presents a consolidated and useful set of new FMLA regulations.

Background

On December 20, 2019, the Federal Employee Paid Leave Act ("FEPLA") became law. *See* subtitle A of title LXXVI of division F of the National Defense Authorization Act for Fiscal Year 2020, Public Law 116-92 (Dec. 20, 2019). The FEPLA amended section 202 of the CAA to provide covered employees[4] of the Senate (and other legislative branch entities) the right to up to 12 weeks of paid parental leave for the birth of an employee's newborn child or the placement of a child with an employee for adoption or foster care.

In the spirit of ensuring that the Proposed FMLA Regulations contained in the NPRM are (1) faithful to the rights and obligations conferred by section 202 of the CAA, as modified by the FEPLA[5], and (2) understandable and beneficial for all affected Senate stakeholders, the SCCE recommends several modifications to the Proposed FMLA Regulations, as discussed in Comments below and as discussed and illustrated in the attached redline document.

SCCE's Comments below are organized by the Subpart and section number used in the Proposed FMLA Regulations.

Subpart A – Coverage under the Family and Medical Leave Act

§ 825.102 – Definitions

The Proposed FMLA Regulations introduce numerous definitions in Subpart A that would apply generally to FMLA coverage for covered employees. *See* 165 Cong. Rec. 6990 ("825.102 Definitions. For purposes of this part", meaning all of the regulations that follow). The list of

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[3] Although the Unapproved FMLA Regulations addressed most of the substantive concerns SCCE expressed during OCWR's 2015-2016 rulemaking process, several concerns remain. Accordingly, SCCE's response to the NPRM will incorporate some of the SCCE's unresolved concerns with the Unapproved FMLA Regulations as well as SCCE's concerns regarding the Proposed FMLA Regulations.

[4] The term "covered employee" is defined in section 101(3) of the CAA (2 U.S.C. § 1301(3))

[5] *See Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988) ("An administrative agency's power to promulgate legislative regulations is limited to the authority delegated by Congress.").

definitions includes definitions for the term "birth" and the term "placement." Both definitions are problematic, and should be stricken from the Proposed FMLA Regulations.

Definition of "birth" as proposed:

"*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." 165 Cong. Rec. at S6990.

- The Board explains in the NPRM that the definition of "birth" in section 825.102 clarifies that the term "birth" includes an anticipated birth because unpaid FMLA leave based on birth of a child may be used prior to the actual birth. 165 Cong. Rec. at S6986. That is an incorrect statement of FMLA leave based on birth of a child.
- The definition of "birth" in section 825.102 should be stricken from the Proposed FMLA Regulations:
    - The FMLA regulations promulgated by the Department of Labor ("DOL") address the meaning of "birth" at 29 CFR § 825.120(a)(1) and (2). That is the relevant regulation that the Board must incorporate into the Proposed FMLA Regulations unless the Board can show good cause for modifying that regulation. *See* 2 U.S.C. § 1312(e)(2). Indeed, the Board has incorporated 29 CFR § 825.120(a)(1) and (2) in the Proposed FMLA Regulations as subparagraphs 825.120(a)(1) and (2), respectively. The Board has not shown good cause, however, for modifying the applicable DOL regulation by adding a conflicting definition of "birth" to the Existing FMLA Regulations. Nothing in the FEPLA nor anything unique to the congressional workplace justifies varying from 29 CFR § 825.120(a)(1) or (2) or adding a definition that conflicts with that regulation (see next Comment). The FEPLA does not alter the meaning of birth as that term is understood under the FMLA. Accordingly, the definition of "birth" in section 825.102 should be stricken from the Proposed FMLA Regulations.

- If not entirely stricken, the definition of "birth" in section 825.102 should be revised to eliminate reference to "anticipated birth."

  Birth means the medical event that results in 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.~~

    - The Proposed FMLA Regulations should not be introducing new terms into the FMLA legal schema without (1) statutory authority, or (2) regulatory support under the relevant DOL regulations. Neither the FMLA, as incorporated by the CAA (as amended by the FEPLA), nor the DOL's FMLA regulations, recognizes the concept of "anticipated birth." The only pre-birth concepts recognized and

covered by the FMLA, the CAA and the FEPLA, are pregnancy, prenatal care, and medical conditions related to pregnancy. Those pre-birth concepts are addressed in the DOL regulations in 29 CFR § 825.120 and are covered by Type C FMLA leave (e.g., employee leave to care for pregnant spouse) and Type D FMLA leave (pregnant employee leave due to pregnancy and pregnancy- related medical conditions), *see* 29 U.S.C. § 2612(a)(1)(C)-(D).

- The Proposed FMLA Regulations contain no other reference to the term "anticipated birth," which makes the term's inclusion in section 825.102 unnecessary and confusing. Because "anticipated birth" is not a concept recognized by the FMLA or the DOL's FMLA regulations, use of the term in the Proposed FMLA Regulations without further explanation, leads to obvious potential problems of scope and meaning. For example, if an employee desires to have a baby (and is trying to conceive), leave for procreation activities would arguably fall under leave for an "anticipated birth."
- Apparently, the Board borrowed the section 825.102 definition of "birth" from the Office of Personnel Management's ("OPM") FEPLA regulations.[6] *See* 5 CFR § 630.1202. OPM's proposed FEPLA regulations, however, specifically state that "anticipated birth" leave may be taken only in connection with typical Type C/D FMLA leave circumstances that are associated with pregnancy and pregnancy-related medical conditions, and expressly preclude the use of paid parental leave for an anticipated birth. *See* 5 CFR § 630.1702(b). The Proposed FMLA Regulations do not include this significant clarifying language.
- *See also* Comments below regarding Proposed FMLA Regulation § 825.120.

Definition of "placement" as proposed:

"*Placement* means a new placement of a son or daughter with an employee for adoption or foster care. For example, this excludes the adoption of a stepchild or a foster child who has already been a member of the employee's household and has an existing parent-child relationship with an adopting parent. When the term 'placement'' is used under this subpart in connection with the use of leave before placement has occurred, it refers to a planned or anticipated placement." 165 Cong. Rec. § S6992.

- The Board explains in the NPRM that, "The new definition of placement clarifies that it refers to a new placement. Thus, the term excludes the adoption of a stepchild or a

[6] FEPLA amended 5 U.S.C. § 6382(d) to allow certain executive branch employees to substitute up to 12 weeks of paid parental leave for unpaid FMLA leave taken in connection with the birth of an employee's son or daughter or the placement of a son or daughter with an employee for adoption or foster care. (*See* 5 U.S.C. § 6382(a)(1)(A) and (B).) In response to the FEPLA, OPM added a new subpart - subpart Q (Paid Parental Leave) - to its extensive executive branch leave regulations in part 630 (Absence and Leave) of title 5, Code of Federal Regulations, and made necessary clarifications, changes, and additions consistent with the FEPLA in subpart L (Family and Medical Leave).

foster child who has already been a member of the employee's household and has an existing parent-child relationship with an adopting parent. This definition of placement is consistent with Department of Labor FMLA guidance at https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/2005_08_26_1A_FMLA.pdf. If a foster child is later adopted, the placement has already occurred; there is no new placement with a family that would warrant another use of FMLA leave for the same child." 165 Cong. Rec. at S6986.

- The definition of "placement" in section 825.102 should be stricken from the Proposed FMLA Regulations:
  - The DOL's FMLA regulations address the meaning of "placement" for FMLA leave purposes at 29 CFR § 825.121(a) and (a)(1). That is the relevant regulation that the Board must incorporate into the Proposed FMLA Regulations unless the Board can show good cause for modifying that regulation. *See* 2 U.S.C. § 1312(e)(2). Indeed, the Board has incorporated 29 CFR § 825.121(a) and (a)(1) in the Proposed FMLA Regulations as subparagraphs 825.121(a) and (a)(1), respectively. No good cause exists for modifying the applicable DOL regulation by adding a new definition of "placement" to the Existing FMLA Regulations because nothing in the FEPLA nor anything unique to the congressional workplace justifies varying from 29 CFR § 825.121. The FEPLA does not alter the meaning of placement as that term is understood under the FMLA.
  - See additional comments in the attached redline document.

§ 825.120 – Leave for pregnancy or birth.

Proposed language of subparagraph (a)(7):

"Leave taken because of the birth of a son or daughter of the employee includes leave necessary for an employee who is the birth mother to recover from giving birth, or for an employee who is the other parent to care for the birth mother during her recovery period, even if the employee is not involved in caring for the son or daughter during portions of that recovery."

- Subparagraph (a)(7) of section 825.120 should be stricken from the Proposed FMLA Regulations:
  - The relevant DOL regulation, 29 CFR § 825.120, does not include a subparagraph (a)(7), and the Board has not provided just cause for modifying the relevant DOL regulation to add the language contained in subparagraph (a)(7) of section 825.120.
  - Proposed subparagraph (a)(7) attempts to create two new uses of FMLA leave that are wholly unsupported by the FMLA, the CAA, or the relevant DOL regulations: (1) to allow an employee who is not the spouse of the birth mother

to use Type C FMLA leave to care for the birth mother; and (2) to allow an employee who is a birth parent to use Type A FMLA leave (and corresponding paid parental leave) for a purpose other than caring for and bonding with the newborn child. Similarly, nothing in the FEPLA supports the Board's proposed expansion of the FMLA leave types because the FEPLA did not modify any existing FMLA leave type or create any new FMLA leave type. Accordingly:

- A birth parent who is not the spouse of the birth mother is not entitled to Type C FMLA leave to provide care to the birth mother who is recovering from childbirth. Type C FMLA leave (in the birth parents context) applies only to birth parents who are spouses.
- Birth parents are not entitled to Type A FMLA leave (and corresponding paid parental leave) for the purpose of providing care to anyone other than the newly born child.

- See additional comments in the attached redline document.

Subpart B – Employee Leave Entitlements

§ 825.200 – Amount of leave.

The Board omitted from the Proposed FMLA Regulations the following language from paragraph 825.208(f) of the Existing FMLA Regulation without explanation in the NPRM: "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 FMLA leave taken from the prior employing office."

- Obviously, the omitted language would not properly reside in section 825.208 of the Proposed FMLA Regulation (regarding Substitution of paid leave—special rule for paid parental leave). The Board could (and should) restore the above-quoted language to section 825.200 of the Proposed FMLA Regulations (regarding Amount of leave) as a new paragraph (j). (See proposed edit to section 825.200 in the attached redline.)
  - Although the DOL's FMLA regulations do not contain a similar provision, there is just cause to retain this language from the Existing FMLA Regulations because, unlike the FMLA, the CAA counts prior congressional employment with a different employing office towards a new employee's FMLA eligibility; the FMLA does not count prior employment with a different employer towards a new employee's FMLA eligibility. *See* 2 U.S.C. § 1312(a)(2)(B) ("a covered employee is eligible for FMLA leave if the covered employee has worked for *any employing office* for 12 months and worked for *any* employing office for 1250 hours in the past year." (emphasis supplied)) In other words, a covered employee can count prior employment with other congressional employing offices towards his/her FMLA leave eligibility with a new employing office; correspondingly, the new employing office should be able to count the FMLA leave a covered employee used during the applicable FMLA 12-month period while employed by another

congressional employing office as part of the covered employee's FMLA leave entitlement for that 12-month period.

§ 825.208 – Substitution of paid leave – leave connected to birth or placement.

Proposed paragraphs (a) and (b) of section 825.208 establish when an employee can substitute paid parental leave (hereafter, "PPL") and other forms of paid leave for unpaid Types A and B FMLA leave. Because paragraphs (a) and (b) of section 825.208 cross-reference the entire section 825.120, however, those paragraphs impermissibly expand the entitlement to PPL and the right to demand to substitute paid leave for unpaid leave beyond what Congress provide in the FEPLA.

- The FEPLA provides PPL to congressional employees for Types A and B FMLA leave only (i.e., the purposes described in 29 U.S.C. § 2612(a)(1)(A) and (B)). *See* 2 U.S.C. § 1312(d)(1). The FEPLA does not provide PPL for the other Types of FMLA leave (e.g., the purposes described in 29 U.S.C. § 2612(a)(1)(C) or (D)).
    - Subparagraphs (a)(1)-(6) of section 825.120 describe all birth-related events that could qualify for FMLA leave, which includes events described in 29 U.S.C. § 2612(a)(1)(A), (C) and (D). As just explained, not all FMLA-qualifying birth-related events are covered by Type A FMLA leave. Only the birth-related events described in subparagraphs (a)(1) and (2) of section 825.120 are covered by Type A FMLA leave, *see* 29 U.S.C. § 2612(a)(1)(A). Accordingly, paragraphs (a) and (b) of section 825.208 must be revised to reflect accurately the reach of the FEPLA. (See proposed edits to section 825.208 in the attached redline.)
    - As explained above, subparagraph (a)(7) of section 825.120 describes a birth-related event that does not qualify for FMLA leave. Accordingly, section 825.208 should not cross-reference subparagraph 825.120(a)(7).
- The FEPLA provides congressional employees the right to substitute *any form of paid leave* for unpaid Types A and B FMLA leave only (i.e., the purposes described in 29 U.S.C. § 2612(a)(1)(A) and (B)). *See* 2 U.S.C. § 1312(d)(1). The FEPLA does not provide this expansive leave substitution right for the other Types of FMLA leave (e.g., the purposes described in 29 U.S.C. § 2612(a)(1)(C) or (D)).
    - Subparagraphs (a)(1)-(6) of section 825.120 describe all birth-related events that could qualify for FMLA leave, which includes the events described in 29 U.S.C. § 2612(a)(1)(A), (C) and (D). As just explained, not all FMLA-qualifying birth-related events are covered by Type A FMLA leave. Only the birth-related events described in subparagraphs (a)(1) and (2) of section 825.120 are covered by Type A FMLA leave, *see* 29 U.S.C. § 2612(a)(1)(A). Accordingly, section 825.208 must be revised to reflect accurately the reach of the FEPLA. (See proposed edits to section 825.208 in the attached redline.)
- As explained above, subparagraph (a)(7) of section 825.120 should be stricken from the Proposed FMLA Regulations because it describes a birth-related event that does not

qualify for FMLA leave. Similarly, paragraphs (a) and (b) of section 825.208 should not cross-reference subparagraph 825.120(a)(7). To be clear, the FEPLA did not make any change with respect to the existing scope of Type A (or B) FMLA leave.

Subparagraph (c)(4) of section 825.208 provides that "An employee may request to use annual leave or sick leave without invoking family and medical leave, and, in that case, the employing office exercises its normal authority with respect to approving or disapproving the timing of when the leave may be used."

- Subparagraph (c)(4) of section 825.208 is uncontroversial insofar as it allows an employee to use annual leave or sick leave during a period when the employee takes leave that qualifies for Type A or B FMLA leave but the employee does not request FMLA leave. The employing office can treat that as an ordinary annual or sick leave request and may grant or deny the request applying the office's usual standards.
    - However, subparagraph (c)(4) of section 825.208 could be misinterpreted to have a meaning that conflicts with sections 825.300 and 825.301 of the Proposed FMLA Regulations and is inconsistent with a DOL interpretation letter[7] from 2019, which states, "Once an eligible employee communicates a need to take leave for an FMLA-qualifying reason, neither the employee nor the employer may decline FMLA protection for that leave." Sections 825.300 and 825.301 require employing offices to identify and designate as FMLA leave any employee request for leave that qualifies for FMLA protection, even if the employee does not explicitly "invoke" the FMLA. For example, if an employee were to request to use sick leave immediately following childbirth, "without invoking family and medical leave," subparagraph (c)(4) would permit the employing office to grant or deny the sick leave request and not designate the leave as Type A or D FMLA leave as required by sections 825.300 and 825.301 – even though the employing office has sufficient information to know that the employee is requesting leave that qualifies for both Types of FMLA leave. Accordingly, subparagraph (c)(4) of section 825.208 must be revised to remove the conflict with sections 825.300 and 825.301. (See proposed edit in the attached redline.)
- Paragraph (d) of section 825.208 describes retroactive designation of paid leave for unpaid Types A and B FMLA leave. However, the retroactive designations described in subparagraphs (d)(2)-(4) conflict with the statute governing the compensation and adjustment of compensation of Senate employees. Because subparagraphs (d)(2)-(4) permit retroactive substitution of paid leave for unpaid leave under certain conditions, those subparagraphs would effectively require retroactive changes in rates of compensation, which could be inconsistent with applicable law, depending on the

[7] Located at https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/2019_03_14_1A_FMLA.pdf

timing of the designation and the employee's total rate of compensation.[8] *See* 2 U.S.C. § 4575. The FEPLA does not expressly authorize the retroactive designation of paid leave for unpaid leave, and the FEPLA contains no language suggesting Congress intended to nullify the requirements of 2 U.S.C. §4575 for purposes of retroactive leave designation. Accordingly, subparagraphs (2)-(4) of section 825.208 must be stricken from the Proposed FMLA Regulations. For the foregoing reasons, paragraph (a) of section 825.505 also must be stricken from the Proposed FMLA Regulations.

Subpart C – Rights & Obligations

§ 825.300 Employing office notice requirements.

- Paragraph (e) of section 825.300 has no basis in applicable law and should be stricken.
  - Paragraph (e) of section 825.300 purports to establish a remedy for a right that does not exist under the CAA. Congress explicitly delineated which sections of the FMLA apply to congressional employing offices and their employees. Specifically, the CAA incorporates the "rights and protections established by sections 101 through 105" of the FMLA, and incorporates remedies "as would be appropriate if awarded under" section 107(a)(1) of the FMLA. See 2 U.S.C. §§ 1312(a)(1), (b). Section 109 of the FMLA is not incorporated in the CAA, therefore no legal authority exists for a proposed regulation, such as paragraph 825.300(e), that incorporates requirements and penalties based on section 109 of the FMLA. Accordingly, good cause exists to deviate from DOL regulations based on section 109, and 825.300(e) should be stricken from the Proposed FMLA Regulations.

Subpart D – Administrative process

§ 825.400 Administrative process, general rules

- Significant revision of section 825.400 of the Existing FMLA Regulations is necessary and appropriate, due to statutory changes to Subchapter IV of the CAA. The revised language in section 825.400 of the Proposed FMLA Regulations, however, contains some overstatements and could be worded more carefully to reflect more accurately the new administrative procedures. (See proposed edits to section 825.400 in the attached redline.)

Subpart E – Paid Parental Leave

The Board apparently modeled Subpart E after OPM's FEPLA regulations without regard to the fact that much of the language contained in OPM's FEPLA regulations is largely a result of their

[8] *See also* December 17, 2020, Letter Response to the NPRM submitted by Mr. Ted Ruckner, Financial Clerk, U.S. Senate.

location in the midst of 5 CFR Part 630, which houses OPM's *entire* complex of "Absence and Leave" regulations for the Executive Branch. PPL for the legislative branch does not need its own Subpart in the Proposed FMLA Regulations because the regulations needed to implement the PPL have already been included in the preceding Subparts. The only thing that Subpart E accomplishes is to create confusion through use of imprecise language and inappropriate introduction of OPM's Executive Branch regulatory concepts into the CAA environment. The entire Subpart E should be stricken and its few salvageable paragraphs relocated to section 825.208, which discusses an employee's entitlement to and permitted use of PPL. (See the attached redline for detailed explanation.)

§ 825.506 – Cases of multiple children born or placed in the same time period

No legal basis exists for treating births/placements of multiple children differently for PPL purposes than those events are treated for purposes of Types A and B FMLA leave. As stated above, the FEPLA did not alter any employee's entitlement to Types A and B FMLA leave. The FEPLA created PPL to be a 12-week paid leave entitlement that employees can substitute for unpaid Type A or B FMLA leave. Accordingly, this section 825.506, which attempts to limit an employee's use of up to 12 weeks of PPL for each qualifying Type A or B FMLA leave event, should be stricken.

If you have any questions regarding this Comment letter or the comments and proposed edits contained in the attached redline document, please do not hesitate to reach out to my office.

Respectfully submitted,

Claudia Kostel

Claudia A. Kostel

Attachment

Attachment to SCCE Comment Letter
Dated December 17, 2020

REGULATIONS PROPOSED BY THE BOARD OF DIRECTORS OF THE OFFICE OF COMPLIANCE EXTENDING RIGHTS AND PROTECTIONS UNDER THE FAMILY AND MEDICAL ACT OF 1996, AS AMENDED

Part 825—Family and Medical Leave

825.1 Purpose and scope.

(a) Section 202 of the Congressional Accountability Act (CAA) (2 U.S.C. 1312) applies the rights and protections of sections 101 through 105 of the Family and Medical Leave Act of 1993 (FMLA) (29 U.S.C. 2611–2615) to covered employees. (The term ''covered employee'' is defined in section 101(3) of the CAA (2 U.S.C. 1301(3)). *See* 825.102 of these regulations for that definition.) The purpose of this part is to set forth the regulations to carry out the provisions of section 202 of the CAA.

(b) These regulations are issued by the Board of Directors (Board) of the Office of Congressional Workplace Rights, 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 insofar 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.'' The regulations issued by the Board herein are on all matters for which section 202 of the CAA requires regulations to be issued. Specifically, it is 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 adopted and 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].''

(c) On December 20, 2019, Congress enacted the Federal Employee Paid Leave Act (subtitle A of title LXXVI of division F of the National Defense Authorization Act for Fiscal Year 2020, Public Law 116-92, December 20, 2019) (FEPLA). FEPLA amended the FMLA to allow most civilian Federal employees, including eligible employees in the legislative branch, to substitute up to 12 weeks of paid parental leave (PPL) for unpaid FMLA leave granted in

Commented [A1]: This document contains (1) the Subpart titles and (2) only the sections of the Proposed FMLA Regulations that are the subject of Comment or proposed edits by the SCCE.

connection with the birth of an employee's son or daughter or for the placement of a son or daughter with an employee for adoption or foster care.

In order to implement FEPLA in the legislative branch, the Board is amending its substantive FMLA regulations pursuant to the CAA rulemaking procedures set forth at sections 202(d) and 304 of the CAA. The Secretary of Labor has not promulgated FEPLA regulations, however, because FEPLA does not extend PPL to private sector employees or other employees directly covered by FMLA title I. The Board has determined that these circumstances constitute good cause for modification of its substantive FMLA regulations in order to effectively implement FEPLA's rights and protections to Federal civilian employees in the legislative branch.

(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. However, 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.

(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 adopted regulations be approved by concurrent resolution of the Congress.

SUBPART A—COVERAGE UNDER THE FAMILY AND MEDICAL LEAVE ACT, AS MADE APPLICABLE BY THE CONGRESSIONAL ACCOUNTABILITY ACT

* * * *

825.102 Definitions.

For purposes of this part:

ADA means the Americans with Disabilities Act (42 U.S.C. 12101 et seq., as amended), as made applicable by the Congressional Accountability Act.

Commented [A2]: This statement is not entirely accurate as some of the changes sought by the Board in the Proposed Regulations, would create substantive differences with the DOL's FMLA regulations that are not attributable to situations in the legislative branch or to FEPLA's mandate.

Birth means the medical event that results in 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.~~

CAA means the Congressional Accountability Act of 1995 (Pub. Law 104–1, 109 Stat. 3, 2 U.S.C. 1301 et seq., as amended).

* * * *

Eligible employee as defined in the CAA, means:

(1) For purposes of leave under subparagraphs (a)(1) or (a)(2) of section 825.112 [or subsections (A) or (B) of section 102(a)(1) of the FMLA], a covered employee as defined in the CAA.

Commented [A3]: Correction of typographical error.

(2) For purposes of leave under subparagraphs (a)(3)-(6) of section 825.112 [or subsections (C)-(F) of section 102(a)(1) of the FMLA], a covered employee who has been employed for a total of at least 12 months in any employing office on the date on which any FMLA leave is to commence, except that an employing office need not consider any period of previous employment that occurred more than seven years before the date of the most recent hiring of the employee, unless:

(i) The break in service is occasioned by the fulfillment of the employee's Uniformed Services Employment and Reemployment Rights Act (USERRA), 38 U.S.C. 4301, et seq., covered service obligation (the period of absence from work due to or necessitated by USERRA covered service must be also counted in determining whether the employee has been employed for at least 12 months by any employing 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); or

(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); and

(3) Who, on the date on which any FMLA leave is to commence, has met the hours of service requirement by having been employed for at least 1,250 hours of service with an

employing office during the previous 12–month period, *except that*:

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

(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 calculations; and

(iii) Any service on active duty (as defined in 29 U.S.C. 2611(14)) by a covered employee who is a member of the National Guard or Reserves shall be counted as time during which such employee has been employed in an employing office for purposes of paragraph (3) of this section.

* * * *

Family and medical leave means an employee's entitlement to up to 12 workweeks (or 26 workweeks in the case of leave under 825.127) of unpaid leave for certain family and medical needs, as prescribed under the FMLA, as made applicable by the CAA.

* * * *

Physical or mental disability means a physical or mental impairment that substantially limits one or more of the major life activities of an individual. Regulations at 29 CFR part 1630, issued by the Equal Employment Opportunity Commission under the Americans with Disabilities Act (ADA), 42 U.S.C. 12101 et seq., as amended, provide guidance for these terms.

Placement means a new placement of a son or daughter with an employee for adoption or foster care. ~~For example, this excludes the adoption of a stepchild or a foster child who has already been a member of the employee's household and has an existing parent-child relationship with an adopting parent. When the term "placement" is used under this subpart in connection with the use of leave before placement has occurred, it refers to a planned or anticipated placement.~~

Commented [A4]: Edited for accuracy.

Commented [A5]: The statutory language in the FMLA as incorporated by the CAA does not support limiting placements to a "new placement." The relevant DOL regulation does not limit placements to "new" placements. See 29 CFR 825.112(a)(2). In addition, the example cited ignores the potential reality that an employee could foster a child, the child is returned to the child's biological parent(s), and subsequently is reunited with the employee as either a foster child or adopted child, either of which would likely necessitate a new period of adjustment or acclimation by and with the employee. The 2005 DOL opinion letter cited by the Board pertained to a specific situation and is not a legitimate basis for making such a sweeping regulatory change.

Commented [A6]: This is another example of the introduction of new, but undefined nomenclature into the FMLA regulations where such additional, undefined terms are not needed and will only create confusion. Section 825.121 of the existing FMLA regulations thoroughly defines which events are encompassed by leave for placements (adoptive or foster care).

* * * *

825.111 Eligible employee, birth or placement.

For purposes of leave under ~~subparagraphs (a)(1) or (a)(2) of 825.112~~ [subsections (A) or (B) of section 102(a)(1) of the FMLA] (29 U.S.C. § 2612(a)(1)(A) or (B)):

(a) an eligible employee is a covered employee of an employing office; and

(b) the eligibility requirements of section 825.110 shall not apply. ~~*See also* 825.120-21.~~

825.112 Qualifying reasons for leave, general rule.

(a) Circumstances qualifying for leave. Employing offices covered by FMLA as made applicable by the CAA are required to grant leave to eligible employees:

(1) For birth of a son or daughter, and to care for the newborn child (*See* 825.120(a)(1)-(6));

(2) For the placement of a son or daughter with the employee for adoption or foster care and the care of such son or daughter (*See* 825.121);

(3) To care for the employee's spouse, son, daughter, or parent with a serious health condition (*See* 825.113 and 825.122);

(4) Because of a serious health condition that makes the employee unable to perform the functions of the employee's job (*See* 825.113 and 825.123);

(5) Because of any qualifying exigency arising out of the fact that the employee's spouse, son, daughter, or parent is a military member on covered active duty (or has been notified of an impending call or order to covered active duty status) (*See* 825.122 and 825.126); and

(6) To care for a covered servicemember with a serious injury or illness if the employee is the spouse, son, daughter, parent, or next of kin of the covered servicemember (*See* 825.122 and 825.127).

(b) *Equal Application.* The right to take leave under FMLA, as made applicable by the CAA, applies equally to male and female employees. A father, as well as a mother, can take family leave for the birth, placement for adoption, or foster care of a child.

(c) *Active employee.* In situations where the employing office/employee relationship has been interrupted, such as an employee who has been on layoff, the employee must be recalled or otherwise be re-employed before being eligible for FMLA leave. Under such circumstances, an eligible employee is immediately entitled to further FMLA leave for a qualifying reason.

Commented [A7]: This cross-reference is inaccurate due to overbreadth.

Commented [A8]: This cross-reference is inaccurate due to overbreadth.

Commented [A9]: Edited to exclude subparagraph (a)(7) of section 825.120 because it describes leave that does not qualify for FMLA leave.

* * * *

825.120 Leave for pregnancy or birth.

(a) *General rules.* Eligible employees are entitled to FMLA leave for pregnancy or birth of a son or daughter and to care for the newborn child as follows:

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

(2) Both parents are entitled to FMLA leave to be with the healthy newborn child (i.e., bonding time) during the 12-month period beginning on the date of birth. An employee's entitlement to FMLA leave for a birth expires at the end of the 12-month period beginning on the date of the birth. Leave for a birth must be concluded within this 12-month period. If the employing office permits bonding leave to be taken beyond this period, such 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.

(3) Spouses who are eligible for FMLA leave and are employed by the same employing office may be limited to a combined total of 12 weeks of leave during any 12-month period if the leave is taken for birth of the employee's son or daughter or to care for the child after birth, for placement of a son or daughter with the employee for adoption or foster care or to care for the child after placement, or to care for the employee's parent with a serious health condition. This limitation on the total weeks of leave applies to leave taken for the reasons specified as long as the spouses are employed by the same employing office. It would apply, for example, even though the spouses are employed at two different worksites of an employing office. On the other hand, if one spouse is ineligible for FMLA leave, the other spouse would be entitled to a full 12 weeks of FMLA leave. Where spouses both use a portion of the total 12-week FMLA leave entitlement for either the birth of a child, for placement for adoption or foster care, or to care for a parent, the spouses would each be entitled to the difference between the amount he or she has taken individually and 12 weeks for FMLA leave for other purposes. For example, if each spouse took six weeks of leave to care for a healthy, newborn child, each could use an additional six weeks due to his or her own serious health condition or to care for a child with a serious health condition.

(4) The expectant mother is entitled to FMLA leave for incapacity due to pregnancy, for

prenatal care, or for her own serious health condition following the birth of the child. An expectant mother may take FMLA leave before the birth of the child for prenatal care or if her condition makes her unable to work. The expectant mother is entitled to leave for incapacity due to pregnancy even though she does not receive treatment from a health care provider during the absence, and even if the absence does not last for more than three consecutive calendar days.

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

(6) Both parents are entitled to FMLA leave if needed to care for a child with a serious health condition if the requirements of 825.113 through 825.115 and 825.122(d) are met. Thus, spouses may each take 12 weeks of FMLA leave if needed to care for their newborn child with a serious health condition, even if both are employed by the same employing office, provided they have not exhausted their entitlements during the applicable 12-month FMLA leave period.

~~(7) Leave taken because of the birth of a son or daughter of the employee includes leave necessary for an employee who is the birth mother to recover from giving birth, or for an employee who is the other parent to care for the birth mother during her recovery period, even if the employee is not involved in caring for the son or daughter during portions of that recovery period.~~

Commented [A10]: Leave for recovery from childbirth is already covered in subsection (4).

Commented [A11]: See detailed discussion in the Comment letter.

(b) *Intermittent and reduced schedule leave.* An eligible employee may use intermittent or reduced schedule leave after the birth to be with ~~a~~ the employee's healthy newborn child only if the employing office agrees. For example, an employing office and employee may agree to a parttime work schedule after the birth. If the employing office agrees to permit intermittent or reduced schedule 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 leave required by the serious health condition of the expectant mother or newborn child. *See* 825.202– 825.205 for general rules governing the use of intermittent and reduced schedule leave. *See* 825.121 for rules governing leave for adoption or foster care. *See* 825.601 for special rules applicable to instructional employees of schools.

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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 is limited to a total of 12 workweeks of leave during any 12-month period for any one, or more, of the following reasons:

(1) The birth of the employee's son or daughter, and to care for the newborn child; (2) The placement with the employee of a son or daughter for adoption or foster care, and to care for the newly placed child;

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

(4) Because of a serious health condition that makes the employee unable to perform one or more of the essential functions of his or her job; and

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

(b) An employing office is permitted to choose any one of the following methods for determining the 12-month period in which the 12 weeks of leave entitlement described in paragraph (a) of this section occurs:

(1) The calendar year;

(2) Any fixed 12-month leave year, such as a fiscal year or a year starting on an

employee's anniversary date;

(3) The 12-month period measured forward from the date any employee's first FMLA leave under paragraph (a) begins; or

(4) A "rolling" 12-month period measured backward from the date an employee uses any FMLA leave as described in paragraph (a).

(c) Under methods in paragraphs (b)(1) and (b)(2) of this section an employee would be entitled to up to 12 weeks of FMLA leave at any time in the fixed 12-month period selected. An employee could, therefore, take 12 weeks of leave at the end of the year and 12 weeks at the beginning of the following year. Under the method in paragraph (b)(3) of this section, an employee would be entitled to 12 weeks of leave during the year beginning on the first date FMLA leave is taken; the next 12-month period would begin the first time FMLA leave is taken after completion of any previous 12-month period. Under the method in paragraph (b)(4) of this section, the "rolling" 12-month period, each time an employee takes FMLA leave the remaining leave entitlement would be any balance of the 12 weeks which has not been used during the immediately preceding 12 months. For example, if an employee has taken eight weeks of leave during the past 12 months, an additional four weeks of leave could be taken. If an employee used four weeks beginning February 1, 2008, four weeks beginning June 1, 2008, and four weeks beginning December 1, 2008, the employee would not be entitled to any additional leave until February 1, 2009. However, beginning on February 1, 2009, the employee would again be eligible to take FMLA leave, recouping the right to take the leave in the same manner and amounts in which it was used in the previous year. Thus, the employee would recoup (and be entitled to use) one additional day of FMLA leave each day for four weeks, commencing February 1, 2009. The employee would also begin to recoup additional days beginning on June 1, 2009, and additional days beginning on December 1, 2009. Accordingly, employing offices using the rolling 12-month period may need to calculate whether the employee is entitled to take FMLA leave each time that leave is requested, and employees taking FMLA leave on such a basis may fall in and out of FMLA protection based on their FMLA usage in the prior 12 months. For example, in the example above, if the employee needs six weeks of leave for a serious health condition commencing February 1, 2009, only the first four weeks of the leave

would be FMLA-protected.

(d)(1) Employing offices will be allowed to choose any one of the alternatives in paragraph (b) of this section for the leave entitlements described in paragraph (a) of this section provided the alternative chosen is applied consistently and uniformly to all employees. An employing office wishing to change to another alternative is required to give at least 60 days' notice to all employees, and the transition must take place in such a way that the employees retain the full benefit of 12 weeks of leave under whichever method affords the greatest benefit to the employee. Under no circumstances may a new method be implemented in order to avoid the CAA's FMLA leave requirements.

(2) [Reserved]

(e) If an employing office fails to select one of the options in paragraph (b) of this section for measuring the 12-month period for the leave entitlements described in paragraph (a), the option that provides the most beneficial outcome for the employee will be used. The employing office may subsequently select an option only by providing the 60-day notice to all employees of the option the employing office intends to implement. During the running of the 60-day period any other employee who needs FMLA leave may use the option providing the most beneficial outcome to that employee. At the conclusion of the 60-day period the employing office may implement the selected option.

(f) An eligible employee's FMLA leave entitlement is limited to a total of 26 workweeks of leave during a single 12-month period to care for a covered servicemember with a serious injury or illness. An employing office shall determine the single 12- month period in which the 26 weeks of leave entitlement described in this paragraph occurs using the 12-month period measured forward from the date an employee's first FMLA leave to care for the covered servicemember begins. *See* 825.127(e)(1).

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

(h) For purposes of determining the amount of leave used by an employee, the fact that a holiday may occur within the week taken as FMLA leave has no effect; the week is counted as a

week of FMLA leave. However, if an employee is using FMLA leave in increments of less than one week, the holiday will not count against the employee's FMLA entitlement unless the employee was otherwise scheduled and expected to work during the holiday. Similarly, if for some reason the employing office's business activity has temporarily ceased and employees generally are not expected to report for work for one or more weeks (e.g., a school closing two weeks for the Christmas/New Year holiday or the summer vacation or an employing office closing the office for repairs), the days the employing office's activities have ceased do not count against the employee's FMLA leave entitlement. Methods for determining an employee's 12-week leave entitlement are also described in 825.205.

(i)(1) If employing offices jointly employ an employee, and if they designate a primary employing office pursuant to 825.106(c), the primary employing office may choose any one of the alternatives in paragraph (b) of this section for measuring the 12-month period, provided that the alternative chosen is applied consistently and uniformly to all employees of the primary employing office including the jointly employed employee.

(2) If employing offices fail to designate a primary employing office pursuant to 825.106(c), an employee jointly employed by the employing offices may, by so notifying one of the employing offices, select that employing office to be the primary employing office of the employee for purposes of the application of paragraphs (d) and (e) of this section.

(j) 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 FMLA leave taken from the prior employing office during the applicable FMLA 12-month period.

* * * *

825.208 Substitution of paid leave—special rule for paid parental leave.

(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 also 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(a)(1) and (2));

Commented [A12]: See discussion of section 825.208 in the Comment letter.

(2) For the placement of a son or daughter with the employee for adoption or foster care and the care of such son or daughter (*See* 825.121(a) and (a)(1));

(b) *Leave connected to birth or placement.* (1) For unpaid ~~family and medical leave taken under 825.120 or 825.121~~ leave described in paragraph (a) of this section (and that ~~which~~ corresponds to 29 U.S.C. 2612(1)(A) or (B), respectively) an employee may elect to substitute—

(i) Up to 12 workweeks of paid parental leave in connection with the occurrence of a birth or placement, as provided in subpart E of this part; and

(ii) Any additional paid annual, vacation, personal, family, medical, or sick leave provided by the employing office to such employee.

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

(2) An employing office may not require that an employee first use all or any portion of the leave described in subparagraph (b)(1)(ii) of this section before being allowed to use the leave described in subparagraph (b)(1)(i) of this section.

(3) An employing office may not require an employee to substitute paid leave for leave without pay as described in paragraph (b)(1)(ii) of this section.

(4) An employee may request to use annual leave or sick leave for the reasons described in paragraph (a) of this section without invoking family and medical leave, and, in that case, the employing office exercises its normal authority with respect to approving or disapproving the timing of when the leave may be used. If the employing office grants the leave request, the employing office must designate the leave as Type A or B FMLA leave, as applicable, in accordance with sections 825.300 and 825.301. If the employing office denies the leave request and the employee subsequently renews the leave request and invokes family and medical leave, then the employing office must grant the leave request and designate the leave as Type A or B FMLA leave, as applicable, in accordance with sections 825.300 and 825,301.

(d) *Notification by employee and retroactive substitution.* ~~(1)~~ An employee must notify the employing office of the employee's election to substitute paid leave for leave without pay under this section prior to the date such paid leave commences (i.e., no retroactive substitution)~~, except as provided in paragraphs (d)(2) through (d)(4) of this section~~.

~~(2) An employee may retroactively substitute annual leave or sick leave for leave without~~

Commented [A13]: Recommend either deleting "(1)" or adding a subsection (b)(2) as Reserved.

Commented [A14]: This is a defined term (see section 825.102), which when combined with the reference to sections 825.120 and 825.121, incorrectly expands the PPL benefit to Types C and D FMLA leave.

Commented [A15]: See discussion of section 825.208 in the Comment letter.

Commented [A16]: Correcting a typographical error.

Commented [A17]: Correcting a typographical error.

Commented [A18]: According to paragraph (a), the application of the entire section 825.208 is limited to the specific leave types described in paragraph (a). Accordingly, the reference to "this subpart" (entire subpart B) is incorrect.

Commented [A19]: Clarifying the limits of the prohibition described in paragraph (c)(3).

~~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.~~

~~(3) An employee may retroactively substitute transferred (donated) annual leave for leave without pay granted under this subpart.~~

~~(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.~~

* * * *

825.212 Employee failure to pay health plan premium payments.

(a) (1) In the absence of an established employing office policy providing a longer grace period, an employing office's obligations to maintain health insurance coverage cease under FMLA if an employee's premium payment is more than 30 days late. In order to drop the coverage for an employee whose premium payment is late, the employing office must provide written notice to the employee that the payment has not been received. Such notice must be mailed to the employee at least 15 days before coverage is to cease, advising that coverage will be dropped on a specified date at least 15 days after the date of the letter unless the payment has been received by that date. If the employing office has established policies regarding other forms of unpaid leave that provide for the employing office to cease coverage retroactively to the date the unpaid premium payment was due, the employing office may drop the employee from coverage retroactively in accordance with that policy, provided the 15-day notice was given. In the absence of such a policy, coverage for the employee may be terminated at the end of the 30-day grace period, where the required 15-day notice has been provided.

(2) An 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 by the employee for any FMLA 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 the employee's 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 be required to meet any qualification requirements imposed by the plan, including any new preexisting condition waiting period, to wait for an open season, or to pass a medical examination to obtain reinstatement of coverage. If an 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 actual monetary losses sustained as a direct result of the violation, and for appropriate equitable relief tailored to the harm suffered.

Commented [A20]: Correcting a typographical error.

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825.216 Limitations on an employee's right to reinstatement.

(a) An employee has no greater right to reinstatement or to other benefits and conditions of employment than if the employee had been continuously employed during the FMLA leave period. An 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 is laid off, provided the employing office has no continuing obligations under a collective bargaining agreement or otherwise. An employing office would have the burden of proving that an employee would have been laid off during the FMLA leave period and, therefore, would not be entitled to restoration.

Restoration to a job slated for lay-off when the employee's original position is not would not meet the requirements of an equivalent position.

(2) If a shift has been eliminated, or overtime has been decreased, an employee would not be entitled to return to work that shift or the original overtime hours upon restoration. However, if a position on, for example, a night shift has been filled by another employee, the employee is entitled to return to the same shift on which employed before taking FMLA leave.

(3) If an employee was hired for a specific term or only to perform work on a discrete project, the employing office has no obligation to restore the employee if the employment term or project is over and the employing office would not otherwise have continued to employ the employee. ~~On the other hand, if an employee was hired to perform work for one employing office for a specific time period, and after that time period has ended, the work was assigned to another employing office, the successor employing office may be required to restore the employee if it is a successor employing office.~~

Commented [A21]: The concept of "successor employing office" does not exist in the Senate.

(b) 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 denial 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.

(c) If the employee is unable to perform an essential function of the position because of a physical or mental condition, including the continuation of a serious health condition or an injury or illness also covered by workers' compensation, the employee has no right to restoration to another position under the FMLA. The employing office's obligations may, however, be governed by the Americans with Disabilities Act (ADA), as amended and as made applicable by the CAA. *See* 825.702.

(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) If the 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 which 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.

* * * *

825.220 Protection for employees who request leave or otherwise assert FMLA rights.

(a) The FMLA, as made applicable by the CAA, prohibits interference with an employee's rights under the law, and with legal proceedings or inquiries relating to an employee's rights. More specifically, the law contains the following employee protections:

(1) An employing office is prohibited from interfering with, restraining, or denying the exercise of (or attempts to exercise) any rights provided by the FMLA, as made applicable by the CAA.

(2) An employing office is prohibited from discharging or in any other way discriminating against any covered employee (whether or not an eligible employee) for opposing or complaining about any unlawful practice under the FMLA, as made applicable by the CAA.

(3) All employing offices are prohibited from discharging or in any other way discriminating against any covered employee (whether or not an eligible employee) because that covered employee has—

(i) Filed ~~any charge~~ a claim, or has instituted (or caused to be instituted) any proceeding under or related to the FMLA, as made applicable by the CAA;

(ii) Given, or is about to give, any information in connection with an inquiry or proceeding relating to a right under the FMLA, as made applicable by the CAA;

(iii) Testified, or is about to testify, in any inquiry or proceeding relating to a right under the FMLA, as made applicable by the CAA.

(b) Any violations of the FMLA, as made applicable by the CAA, or of these regulations constitute interfering with, restraining, or denying the exercise of rights provided by the FMLA, as made applicable by the CAA. An employing office may be liable for compensation and benefits lost by reason of the violation, for other actual monetary losses sustained as a direct result of the violation, and for appropriate equitable or other relief, including employment,

Commented [A22]: Nomenclature correction.

reinstatement, promotion, or any other relief tailored to the harm suffered. ~~*See* 825.400(c)~~.

Commented [A23]: Incorrect cross-reference.

Interfering with the exercise of an employee's rights would include, for example, not only refusing to authorize FMLA leave, but discouraging an employee from using such leave. It would also include manipulation by a covered employing office to avoid responsibilities under FMLA, for example:

(1) [Reserved]

(2) Changing the essential functions of the job in order to preclude the taking of leave; or

(3) Reducing hours available to work in order to avoid employee eligibility.

(c) The FMLA's prohibition against interference prohibits an employing office from discriminating or retaliating against an employee or prospective employee for having exercised or attempted to exercise FMLA rights. For example, if an employee on leave without pay would otherwise be entitled to full benefits (other than health benefits), the same benefits would be required to be provided to an employee on unpaid FMLA leave. By the same token, employing offices cannot use the taking of FMLA leave as a negative factor in employment actions, such as hiring, promotions or disciplinary actions; nor can FMLA leave be counted under no fault attendance policies. *See* 825.215.

(d) Employees cannot waive, nor may employing offices induce employees to waive, their rights under FMLA. For example, employees (or their collective bargaining representatives) cannot trade off the right to take FMLA leave against some other benefit offered by the employing office. Except for settlement agreements covered by 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 employing office conduct without the approval of the Office of Congressional Workplace Rights or a court. Nor does it prevent an employee's voluntary and uncoerced acceptance (not as a condition of employment) of a light duty assignment while recovering from a serious health condition. *See* 825.702(d). An employee's acceptance of such light duty assignment does not constitute a waiver of the employee's prospective rights, including the right to be restored to the same position the employee held at the time the employee's FMLA leave commenced or to an equivalent position. The employee's right to restoration, however, ceases at the end of the applicable 12–month FMLA leave year.

(e) Covered employees, and not merely eligible employees, are protected from retaliation for opposing (e.g., filing a complaint about) any practice which is unlawful under the FMLA, as made applicable by the CAA. They are similarly protected if they oppose any practice which they reasonably believe to be a violation of the FMLA, as made applicable by the CAA, or regulations.

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

825.300 Employing office notice requirements.

(a)(1) If an employing office has any eligible employees and has any written guidance to employees concerning employee benefits or leave rights, such as in an employee handbook, information concerning both entitlements and employee obligations under the FMLA, as made applicable by the CAA, must be included in the handbook or other document. For example, if an employing office provides an employee handbook to all employees that describes the employing office's policies regarding leave, wages, attendance, and similar matters, the handbook must incorporate information on FMLA rights and responsibilities and the employing office's policies regarding the FMLA, as made applicable by the CAA. Informational publications describing the provisions of the FMLA, as made applicable by the CAA, are available from the Office of Congressional Workplace Rights and may be incorporated in such employing office handbooks or written policies.

(2) If such an employing office does not have written policies, manuals, or handbooks describing employee benefits and leave provisions, the employing office shall provide written guidance to an employee concerning 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 notice is given pursuant to paragraph (c), and in accordance with the provisions of that paragraph. Employing offices may duplicate and provide the employee a copy of the FMLA Fact Sheet available from the Office of Congressional Workplace Rights 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 definition of an eligible employee. Employee eligibility is determined (and notice must be provided) at the commencement of the first instance of leave for each FMLA-qualifying reason in the applicable 12–month period. *See* 825.127(c) and 825.200(b). All FMLA absences for the same qualifying reason are considered a single leave and employee eligibility as to that reason for leave does not change during the applicable 12-month period.

(2) The eligibility notice must state whether the employee is eligible for FMLA leave as defined in 825.110. If the employee is not eligible for FMLA leave, the notice must state at least one reason why the employee is not eligible, including as applicable the number of months the employee has been employed by the 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, and the employee's eligibility status has not changed, no additional eligibility notice is required. If, however, the employee's eligibility status has changed (e.g., if the employee has not met the hours of service requirement in the 12 months preceding the commencement of leave for the subsequent qualifying reason), 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 a failure to meet these obligations. This notice shall be provided to the employee each time the eligibility notice is provided pursuant to paragraph (b) of this section. If leave has already begun, the notice should be mailed to the employee's address of record. Such specific notice must include, as appropriate:

(i) That the leave may be designated and counted against the employee's annual FMLA leave entitlement if qualifying (*See* 825.300(c) and 825.301) and the applicable 12- month period for FMLA entitlement (*See* 825.127(c), 825.200(b), (f), and (g));

(ii) Any requirements for the employee to furnish certification of a serious health

condition, serious injury or illness, or qualifying exigency arising out of covered active duty or call to covered active duty status, and the consequences of failing to do so (*See* 825.305, 825.309, 825.310, 825.313);

(iii) If applicable, the employee's right to substitute paid parental leave for unpaid FMLA leave for a birth or placement (*See* 825.208) and the employee's right to substitute paid leave generally, whether the employing office will require the substitution of paid leave, the conditions related to any substitution, and the employee's entitlement to take unpaid FMLA leave if the employee does not meet the conditions for paid leave (*See* 825.207);

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

(v) The employee's status as a key employee and the potential consequence that restoration may be denied following FMLA leave, explaining the conditions required for such denial (*See* 825.218);

(vi) The employee's right to maintenance of benefits during the FMLA leave and restoration to the same or an equivalent job upon return from FMLA leave (*See* 825.214 and 825.604); and

(vii) The employee's potential liability for payment of health insurance premiums paid by the employing office during the employee's unpaid FMLA leave if the employee fails to return to work after taking FMLA leave (*See* 825.213, 825.504).

(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 form.

(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 leave, the employing office may need to give notice of the arrangements for making premium payments.

(5) Employing offices are also expected to responsively answer questions from employees concerning their rights and responsibilities under the FMLA, as made applicable under the CAA.

(6) A prototype notice of rights and responsibilities may be obtained in Form C, or from the Office of Congressional Workplace Rights. Employing offices may adapt the prototype notice as appropriate to meet these notice requirements. The notice of rights and responsibilities may be distributed electronically so long as it otherwise meets the requirements of this section.

(d) *Designation notice.* (1) The 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 will be designated and will be counted as FMLA leave within five business days absent extenuating circumstances. Only one notice of designation is required for each FMLA-qualifying reason per applicable 12– month period, regardless of whether the leave taken due to the qualifying reason will be a continuous block of leave or intermittent or reduced schedule leave. If the employing office determines that the leave will not be designated as FMLA-qualifying (e.g., if the leave is not for a reason covered by FMLA or the FMLA leave entitlement has been exhausted), the employing office must notify the employee of that determination. Subject to 825.208, if the employing office requires paid leave to be substituted for unpaid FMLA leave, or that paid leave taken under an existing leave plan be counted as FMLA leave, the employing office must inform the employee of this designation at the time of designating the FMLA leave.

(2) If the employing office has sufficient information to designate the leave as FMLA leave immediately after receiving notice of the employee's need for leave, the employing office may provide the employee with the designation notice at that time.

(3) 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 employing office will require that the fitness-for-duty certification address 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 (if any) describing the employing office's leave policies clearly provide that a fitness-for- duty certification will be required in specific circumstances (e.g., by stating that fitness- for-duty certification will be required in all cases of back injuries for employees in a certain occupation), the employing office is not required to provide written notice of the requirement with the designation notice, but must provide oral notice no later than with the designation notice.

(4) The designation notice must be in writing. A prototype designation notice is contained in Form D which may be obtained from the Office of Congressional Workplace Rights. 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 as FMLA leave may 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 and the employing office can demonstrate that the employee (who may already be on leave and who may not have access to employing office-provided computers) has access to the information electronically.

(5) If the information provided by the employing office to the employee in the designation notice changes (e.g., the employee exhausts the FMLA leave entitlement), the employing office shall provide, within five business days of receipt of the employee's first notice of need for leave subsequent to any change, written notice of the change.

(6) The employing office must notify the employee of the amount of leave counted against the employee's FMLA leave entitlement and, if applicable, the employee's paid parental leave entitlement. If the amount of leave needed is known at the time the employing office designates the leave as FMLA-qualifying, the employing office must notify the employee of the

number of hours, days, or weeks that will be counted against the employee's FMLA leave entitlement in the designation notice. If it is not possible to provide the hours, days, or weeks that will be counted against the employee's FMLA leave entitlement (such as in the case of unforeseeable intermittent leave), then the employing office must provide notice of the amount of leave counted against the employee's FMLA leave entitlement and, if applicable, paid parental leave entitlement, upon the request by the employee, but no more often than once in a 30–day period and only if leave was taken in that period. The notice of the amount of leave counted against the employee's FMLA entitlement and, if applicable, paid parental leave entitlement may be oral or in writing. If such notice is oral, it shall be confirmed in writing no later than the following payday (unless the payday is less than one week after the oral notice, in which case the notice must be no later than the subsequent payday). Such written notice may be in any form, including a notation on the employee's pay stub.

~~(c) *Consequences of failing to provide notice.* Failure to follow the notice requirements set forth in this section may constitute an interference with, restraint, or denial of the exercise of an employee's FMLA rights. An employing office may be liable for compensation and benefits lost by reason of the violation, for other actual monetary losses sustained as a direct result of the violation, and for appropriate equitable or other relief, including employment, reinstatement, promotion, or any other relief tailored to the harm suffered. *See* 825.400(c).~~

Commented [A24]: See Comment letter.

Commented [A25]: Incorrect cross-reference.

825.301 Designation of FMLA leave.

(a) *Employing office responsibilities.* The employing office's decision to designate leave as FMLA-qualifying must be based only on information received from the employee or the employee's spokesperson (e.g., if the employee is incapacitated, the employee's spouse, adult child, parent, doctor, etc., may provide notice to the employing office of the need to take FMLA leave). In any circumstance where the employing office does not have sufficient information about the reason for an employee's use of leave, the employing office should inquire further of the employee or the spokesperson to ascertain whether leave is potentially FMLA- qualifying. Once the employing office has acquired knowledge that the leave is being taken for a FMLA qualifying reason, the employing office must notify the employee as provided in 825.300(d).

(b) *Employee responsibilities.* An employee giving notice of the need for FMLA leave

does not need to expressly assert rights under the FMLA, as made applicable by the CAA, or even mention the FMLA to meet his or her obligation to provide notice, though the employee would need to state a qualifying reason for the needed leave and otherwise satisfy the notice requirements set forth in 825.302 or 825.303 depending on whether the need for leave is foreseeable or unforeseeable. An employee giving notice of the need for FMLA leave must explain the reasons for the needed leave so as to allow the employing office to determine whether the leave qualifies under the FMLA, as made applicable by the CAA. If the employee fails to explain the reasons, leave may be denied. In many cases, in explaining the reasons for a request to use leave, especially when the need for the leave was unexpected or unforeseen, an employee will provide sufficient information for the employing office to designate the leave as FMLA leave. An employee using accrued paid leave may in some cases not spontaneously explain the reasons or their plans for using their accrued leave. However, if an employee requesting to use paid leave for a FMLA-qualifying reason does not explain the reason for the leave and the employing office denies the employee's request, the employee will need to provide sufficient information to establish a FMLA- qualifying reason for the needed leave so that the employing office is aware that the leave may not be denied and may designate that the paid leave be appropriately counted against (substituted for) the employee's FMLA leave entitlement. Similarly, an employee using accrued paid vacation leave who *seeks* an extension of unpaid leave for a FMLA-qualifying reason will need to state the reason. If this is due to an event which occurred during the period of paid leave, the employing office may count the leave used after the FMLA-qualifying reason against the employee's FMLA leave entitlement.

(c) *Disputes.* If there is a dispute between an employing office and an employee as to whether leave qualifies as FMLA leave, it should be resolved through discussions between the employee and the employing office. Such discussions and the decision must be documented.

(d) *Retroactive designation*. If an employing office does not designate leave as required by 825.300, the employing office may retroactively designate leave as FMLA leave with appropriate notice to the employee as required by 825.300 provided that the employing office's failure to timely designate leave does not cause harm or injury to the employee. In all cases where leave would qualify for FMLA protections, an employing office and an employee can

mutually agree that leave be retroactively designated as FMLA leave.

(e) *Remedies*. If an employing office's failure to timely designate leave in accordance with 825.300 causes the employee to suffer harm, it may constitute an interference with, restraint of, or denial of the exercise of an employee's FMLA rights. An employing office may be liable for compensation and benefits lost by reason of the violation, for other actual monetary losses sustained as a direct result of the violation, and for appropriate equitable or other relief, including employment, reinstatement, promotion, or any other relief tailored to the harm suffered. ~~*See 825.400(c).*~~ For example, if an employing office that was put on notice that an employee needed FMLA leave failed to designate the leave properly, but the employee's own serious health condition prevented him or her from returning to work during that time period regardless of the designation, an employee may not be able to show that the employee suffered harm as a result of the employing office's actions. However, if an employee took leave to provide care for a son or daughter with a serious health condition believing it would not count toward his or her FMLA entitlement, and the employee planned to later use that FMLA leave to provide care for a spouse who would need assistance when recovering from surgery planned for a later date, the employee may be able to show that harm has occurred as a result of the employing office's failure to designate properly. The employee might establish this by showing that he or she would have arranged for an alternative caregiver for the seriously-ill son or daughter if the leave had been designated timely.

Commented [A26]: Incorrect cross-reference.

825.302 Employee notice requirements for foreseeable FMLA leave.

(a) *Timing of notice*. An employee must provide the employing office at least 30 days advance notice before FMLA leave is to begin if the need for the leave is foreseeable based on an expected birth, placement for adoption or foster care, planned medical treatment for a serious health condition of the employee or of a family member, or the planned medical treatment for a serious injury or illness of a covered servicemember. If 30 days' notice is not practicable, such as because of a lack of knowledge of approximately when leave will be required to begin, a change in circumstances, or a medical emergency, notice must be given as soon as practicable. For example, an employee's health condition may require leave to commence earlier than anticipated before the birth of a child. Similarly, little opportunity for notice may be given before placement

for adoption. For foreseeable leave due to a qualifying exigency, notice must be provided as soon as practicable, regardless of how far in advance such leave is foreseeable. Whether FMLA leave is to be continuous or is to be taken intermittently or on a reduced schedule basis, notice need only be given one time, but the employee shall advise the employing office as soon as practicable if dates of scheduled leave change or are extended, or were initially unknown. In those cases where the employee is required to provide at least 30 days' notice of foreseeable leave and does not do so, the employee shall explain the reasons why such notice was not practicable upon a request from the employing office for such information.

(b) As soon as practicable means as soon as both possible and practical, taking into account all of the facts and circumstances in the individual case. When an employee becomes aware of a need for FMLA leave less than 30 days in advance, it should be practicable for the employee to provide notice of the need for leave either the same day or the next business day. In all cases, however, the determination of when an employee could practicably provide notice must take into account the individual facts and circumstances.

(c) *Content of notice*. An employee shall provide at least verbal notice sufficient to make the employing office aware that the employee needs FMLA-qualifying leave, and the anticipated timing and duration of the leave. Depending on the situation, such information may include that a condition renders the employee unable to perform the functions of the job; that the employee is pregnant or has been hospitalized overnight; whether the employee or the employee's family member is under the continuing care of a health care provider; if the leave is due to a qualifying exigency, that a military member is on covered active duty or call to covered active duty status (or has been notified of an impending call or order to covered active duty), and that the requested leave is for one of the reasons listed in 825.126(b); if the leave is for a family member, that the condition renders the family member unable to perform daily activities, or that the family member is a covered servicemember with a serious injury or illness; and the anticipated duration of the absence, if known. When an employee seeks leave for the first time for a FMLAqualifying reason, the employee need not expressly assert rights under the FMLA, as made applicable by the CAA, or even mention the FMLA. When an employee seeks leave due to a FMLA-qualifying reason, for which the employing office has previously provided FMLAprotected

leave, the employee must specifically reference the qualifying reason for leave or the need for FMLA leave. In all cases, the employing office should inquire further of the employee if it is necessary to have more information about whether FMLA leave is being sought by the employee, and obtain the necessary details of the leave to be taken. In the case of medical conditions, the employing office may find it necessary to inquire further to determine if the leave is because of a serious health condition and may request medical certification to support the need for such leave. *See* 825.305. An employing office may also request certification to support the need for leave for a qualifying exigency or for military caregiver leave. *See* 825.309, 825.310. When an employee has been previously certified for leave due to more than one FMLAqualifying reason, the employing office may need to inquire further to determine for which qualifying reason the leave is needed. An employee has an obligation to respond to 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 request may result in denial 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 set forth the reasons for the requested leave, the anticipated duration of the leave, and the anticipated start of the leave. An employee also may be required by an employing office's policy to contact a specific individual. Unusual circumstances would include situations such as when an employee is unable to comply with the employing office's policy that requests for leave should be made by contacting a specific number because on the day the employee needs to provide notice of his or her need for FMLA leave there is no one to answer the call-in number and the voice mail box is full. Where an employee does not comply with the employing office's usual notice and procedural requirements, and no unusual circumstances justify the failure to comply, FMLA-protected leave may be delayed or denied. However, FMLA- protected leave may not be delayed or denied where the employing office's policy requires notice to be given sooner than set forth in paragraph (a) of this section and the

employee provides timely notice as set forth in paragraph (a) of this section.

(e) *Scheduling planned medical treatment.* When planning medical treatment, the employee must consult with the employing office and make a reasonable effort to schedule the treatment so as not to disrupt unduly the employing office's operations, subject to the approval of the health care provider. Employees are ordinarily expected to consult with their employing offices prior to the scheduling of treatment in order to work out a treatment schedule which best suits the needs of both the employing office and the employee. For example, if an employee who provides notice of the need to take FMLA leave on an intermittent basis for planned medical treatment neglects to consult with the employing office to make a reasonable effort to arrange the schedule of treatments so as not to unduly disrupt the employing office's operations, the employing office may initiate discussions with the employee and require the employee to attempt to make such arrangements, subject to the approval of the health care provider. *See* 825.203 and 825.205.

(f) Intermittent leave or leave on a reduced leave schedule must be medically necessary due to a serious health condition or a serious injury or illness. An employee shall advise the employing office, upon request, of the reasons why the intermittent/reduced leave schedule is necessary and of the schedule for treatment, if applicable. The employee and employing office shall attempt to work out a schedule for such leave that meets the employee's needs without unduly disrupting the employing office's operations, subject to the approval of the health care provider.

(g) An employing office may waive employees' FMLA notice requirements. *See* 825.304(e).

Commented [A27]: Correcting cross-reference.

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SUBPART D—ADMINISTRATIVE PROCESS

825.400 Administrative process, general rules.

(a) The Procedural Rules of the Office of Congressional Workplace Rights set forth the procedures that apply to the administrative processes for considering and resolving alleged violations of the laws made applicable by the CAA, including the FMLA. The Rules include procedures for filing claims and participating in administrative dispute resolution proceedings at the Office of Congressional

Workplace Rights, including procedures for the conduct of hearings and for appeals to the Board of Directors. The Procedural Rules also address other matters of general applicability to the dispute Resolution process and to the operations of the Office.

(b) If an employing office has violated one or more provisions of FMLA, as incorporated by the CAA, and if justified by the facts of a particular case, an employee may receive one or more of the following: wages, employment benefits, or other compensation denied or lost to such employee by reason of the violation; or, where no such tangible loss has occurred, such as when FMLA leave was unlawfully denied, any actual monetary loss sustained by the employee as a direct result of the violation, such as the cost of providing care, up to a sum equal to 26 weeks of wages for the employee in a case involving leave to care for a covered servicemember or 12 weeks of wages for the employee in a case involving leave for any other FMLA qualifying reason. In addition, the employee may be entitled to interest on such sum, calculated at the prevailing rate. An amount equaling the preceding sums may also be awarded as liquidated damages unless such amount is reduced by the ~~court~~ hearing officer or the Board because the violation was in good faith and the employ~~er~~ing office had reasonable grounds for believing the employ~~er~~ing office had not violated the ~~Act~~CAA. When appropriate, the employee may also obtain appropriate equitable relief, such as employment, reinstatement and promotion. When the employ~~er~~ing office is found in violation, the employee may recover a reasonable attorney's fee, reasonable expert witness fees, and any other costs as would be appropriate if awarded under section 2000e-5(k) of Title 42.~~other costs of the action from the employer in addition to any judgment awarded by the court~~.

(c) The Procedural Rules of the Office of Congressional Workplace Rights are found at 165 Cong. Rec. H4896 (daily ed. June 19, 2019) and 165 Cong. Rec. S4105 (daily ed. June 19, 2019), and may also be found on the Office's website at www.ocwr.gov.

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SUBPART E—PAID PARENTAL LEAVE

825.500 Purpose, applicability, and employing office responsibilities.

(a) *Purpose*. This subpart provides regulations to govern the granting of paid parental leave to eligible employees. ~~Since paid parental leave may only be substituted for unpaid leave~~

Commented [A28]: These Proposed FMLA Regulations already have an entire section containing the "special rule" regarding PPL. See Section 825.208. As explained below and in the Comment letter, there is no need for this Subpart E.

~~granted following a birth or placement under specific provisions of the Family and Medical Leave Act in title 29, United States Code—specifically, section 2612(a)(1)(A) and (B) in 5 U.S.C. chapter 29—this subpart links to subpart B (Family and Medical Leave) of this part.~~

(b) *Applicability*. (1) Except as otherwise provided in this paragraph (b), this subpart applies to eligible employees ~~to whom subpart B of this part applies,~~ as ~~provided~~ described in 825.111.

(2) The OCWR will defer to supplemental regulations on paid parental leave issued by the Library of Congress pursuant to the authority in 29 USC 2617, provided those supplemental regulations are consistent with the regulations in this subpart.

(3) This ~~subpart~~ section applies to ~~a~~ births or placements occurring on or after October 1, 2020.

(c) *Employing office responsibilities*. ~~The head of an~~ An employing office ~~having~~ that has employees covered by this subpart is responsible for the proper administration of this subpart, including the responsibility of informing employees of their entitlements and obligations.

825.501 Definitions.

~~(a) *Applicability of subpart B definitions.* The definitions of terms in 825.102 are applicable in this subpart to the extent the terms are used, except that, to the extent any definitions of terms have been further revised in 825.501(b), the provisions of that section shall apply for purposes of this subpart.~~

(b) Other definitions. In this subpart—

Employing Office means an employing office as defined in 2 U.S.C. 1301(a)(9). ~~When the term "employing office" is used in the context of an employing office making determinations or taking actions, it means the employing office head or management officials who are authorized (including by delegation) to make the given determination or take the given action.~~

Child ~~means a son or daughter as defined in 825.102 whose birth or placement is the basis for entitlement to paid parental leave.~~

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.~~

Commented [A29]: This text, apparently copied from the OPM's FEPLA regulations, does not make sense in the context of the Proposed FMLA Regulations.

Commented [A30]: This text, apparently copied from the OPM's FEPLA regulations, does not make sense in the context of the Proposed FMLA Regulations

Commented [A31]: The provisions of paragraph (b) should be stated in section 825.208.

Commented [A32]: Neither the CAA nor the FEPLA contains a provision placing individual responsibility on anyone for compliance with this subpart; in accordance with the CAA, only an employing office can be responsible for FEPLA compliance.

Commented [A33]: This entire section is unnecessary because all relevant terms have been defined (and redefined) or described in Subparts A and B.

Commented [A34]: Correcting typographical error. Section 825.102 is in Subpart A of the Proposed FMLA Regulations.

Commented [A35]: Employing office is already defined in section 825.102.

Commented [A36]: This sentence, copied from an OPM regulation (5 CFR 630.1602), does not make sense in the context of the Proposed FMLA Regulations

Commented [A37]: Child is already defined in section 825.102.

Commented [A38]: Paid parental leave is already fully described in section 825.208.

Commented [A39]: This paragraph, copied from an OPM regulation (5 CFR 630.1702) contains Executive Branch terms like "scheduled tour of duty" that have particular meaning in OPM's absence and leave regulatory scheme, but have no meaning in the Senate.

Unpaid FMLA leave ~~means leave without pay granted under the Family and Medical Leave Act (FMLA) regulations in subpart B of this part.~~

825.502 Leave entitlement.

~~(a) *Election.* An employee may elect to substitute available paid parental leave for any unpaid FMLA leave granted under 825.120 or 825.121 (which correspond to 29 U.S.C. 2612(a)(1)(A) or (B), respectively) in connection with the occurrence of a birth or placement. *See* 825.208.~~

(b) *Available paid parental leave.* ~~(1) The paid parental leave that is available for purposes of paragraph (a) of this section is 12 workweeks in connection with the birth or placement involved.~~

(2) Since an employee may use only 12 weeks of unpaid FMLA leave in any 12-month period under 825.200(a), any use of unpaid FMLA leave not associated with paid parental leave may affect an employee's ability to use the full 12 weeks of paid parental leave within a single 12-month period. 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. The availability of paid parental leave will depend on when the employee uses various types of unpaid FMLA leave relative to any 12-month period established under 825.200(b).

~~(c) *Leave usage.* (1) An employing office may not require an employee to use accrued paid annual, vacation, personal, family, medical, or sick leave as a condition to be met before the employee uses paid parental leave. An employee may request to use annual leave or sick leave without invoking unpaid FMLA leave under subpart B of this part, and, if the request is granted, the employing office exercises its normal authority with respect to approving or disapproving the timing of when the leave may be used.~~

~~(2) An employee with a seasonal work schedule may not use paid parental leave during the off-season period designated by the employing office—the period during which the employee is scheduled to be released from work and placed in nonpay status.~~

Commented [A40]: "Unpaid FMLA leave" is used 43 times in these Proposed FMLA Regulations – 32 uses of the phrase appear prior to this "definition" – that is because FMLA leave is, by law, leave without pay. It needs no definition.

Commented [A41]: An employee's right to elect to take PPL is already fully explained in section 825.208. This entire paragraph (a) is unnecessary.

Commented [A42]: The amount of PPL available to an employee is already fully explained in section 825.208. This subparagraph (b)(1) is unnecessary.

Commented [A43]: Edited for clarity.

Commented [A44]: To the extent that this subparagraph (b)(2) provides any new information, it should be included in section 825.208, with the rest of the discussion regarding an employee's entitlement to and use of PPL.

Commented [A45]: An employee's right to elect or decline to substitute paid leave for unpaid Types A and B FMLA leave is already fully explained in section 825.208. This subparagraph (c)(1) is unnecessary.

Commented [A46]: The Senate (and likely other entities of the legislative branch) does not have seasonal workers. This subparagraph (c)(2) is unnecessary.

(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.

825.503 Pay during leave.

(a) The pay an employee receives when using paid parental leave shall be the same pay the employee would receive if the employee were using annual leave.

~~(b) The pay received during paid parental leave may not include Sunday premium pay. (*See* section 624 of the Treasury and General Government Appropriations Act, 1999, Public Law 105–277, div. A, 101(h), October 21, 1998.)~~

825.504 Work obligation.

Paid parental leave under this subpart shall apply without regard to:

~~(a)~~ the limitations in subparagraphs (E), (F), or (G) of section 6382(d)(2) of title 5, United States Code (requiring employees of executive branch agencies to agree in writing to work for the executive branch agency for at least 12 months after returning from leave); or

(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).

825.505 Cases of employee incapacitation.

~~(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. Such a retroactive election shall be effective on the date that such an election would have been effective if the employee had not been incapacitated at the time.~~

(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

Commented [A47]: This paragraph (d) should be included in section 825.208, with the rest of the discussion regarding an employee's entitlement to and use of PPL.

Commented [A48]: This paragraph (a) should be included in section 825.208, with the rest of the discussion regarding an employee's entitlement and use of PPL.

Commented [A49]: This paragraph (b) was copied from an OPM regulation (5 CFR 630.1704(c)) and has no application to Senate employing offices and employees.

Commented [A50]: The statutory limitations referred to in this paragraph (a) only apply to Executive Branch employees and are not included in the FEPLA provisions that apply to congressional employees. It should be removed from the regulations.

Commented [A51]: This exception to section 825.213 should be included as a paragraph in 825.213 or included in section 825.208 with the rest of the discussion regarding an employee's use of PPL.

Commented [A52]: See discussion regarding subparagraphs (d)(2)-(4) of section 825.208 which would permit retroactive designations of paid leave for unpaid leave.

Commented [A53]: This paragraph (b) should be included in section 825.208 with the rest of the discussion regarding an employee's election to use PPL.

Commented [A54]: Correcting a typographical error.

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.

~~825.506 Cases of multiple children born or placed in the same time period.~~

~~(a) If an employee has multiple children born or placed on the same day, the multiple child birth/placement event is considered to be a single event that triggers a single entitlement of up to 12 weeks of paid parental leave under 825.502(b).~~

~~(b) If an employee has one or more children born or placed during the 12-month period following the date of an earlier birth or placement of a child of the employee, the provisions of this subpart shall be independently administered for each birth or placement event. Any paid parental leave substituted for unpaid FMLA leave during the 12-month period beginning on the date of a child's birth or placement shall count towards the 12-week limit on paid parental leave described in 825.502(b) applicable in connection with the birth or placement involved. The substitution of paid parental leave may count toward multiple 12-week limits to the extent that there are multiple ongoing 12-month periods beginning on the date of an applicable birth or placement, each of which encompasses the day on which the leave is used. Therefore, whenever paid parental leave is substituted during periods of time when separate 12-month periods (each beginning on a date of birth or placement) overlap, the paid parental leave will count toward each affected period's 12-week limit. For example, if an employee has a child born on June 1 and another child placed for adoption on October 1 of the same year, each event would generate entitlement to substitute up to 12 weeks of paid parental leave during the separate 12-month periods beginning on the date of the birth and on the date of the placement, respectively. Those two 12-month periods would be June 1-May 31 and October 1-September 30. The overlap period for these two 12-month periods would be October 1-May 31. If the employee substitutes paid parental leave during that overlap period, that amount of paid parental leave would count towards both the 12-week limit associated with the birth event and the 12-week limit associated with the placement event.~~

Commented [A55]: See Comment letter for discussion regarding section 825.506.

Commented [A56]: Sometimes multiples are born hours apart on separate days. In very rare cases, multiples may be delivered weeks apart.

Commented [A57]: This seems inconsistent with the definitions in section 825.102.

~~825.507 Records.~~

~~*Record of usage of paid parental leave.* An employing office must maintain an accurate record of an employee's usage of paid parental leave.~~

Commented [A58]: The FEPLA does not authorize OCWR to impose a new recordkeeping requirement on Senate employing offices.

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SUBPART F—SPECIAL RULES APPLICABLE TO EMPLOYEES OF SCHOOLS

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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.