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December 17, 2020

VIA ELECTRONIC MAIL
Office of Congressional Workplace Rights
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Re: Comments to the Notice of Proposed Rulemaking Concerning the Family and Medical Leave Act and the Federal Employee Paid Leave Act

The United States Capitol Police ("USCP" or the "Department") submits the following comments in response to the November 16, 2020 Notice of Proposed Rulemaking ("NPRM") published by the Office of Workplace Rights ("OCWR"). As a general matter, the Department agrees with the proposed changes and the immediate need to incorporate the Federal Employee Paid Leave Act ("FEPLA") within the OCWR regulations. The Department also appreciates the revised definition of the term "spouse" and other clarifying language incorporated into the NPRM. We are concerned, however, that certain language OCWR has adopted directly from the Office of Personnel Management is not adequately tailored to the legislative branch and may not clearly convey the intent and application of the new rule.

Part 825.1(c), *Purpose and Scope*, as proposed, contains language which excludes USCP sworn employees (or police officers) from the purpose and scope of the new regulations. The provision states that there is good cause to modify the regulations in order to effectively implement FEPLA's right and protections to "Federal *civilian employees* in the legislative branch." (*emphasis* added). The USCP workforce is comprised of civilian and sworn employees. We strongly urge OCWR to amend this proposal so both civilian and sworn USCP employees are expressly covered by the Family and Medical Leave Act ("FMLA") regulations and its newly incorporated FEPLA provisions.

Part 825.100(d), the *Family and Medical Leave Act*, as proposed, suggests that FMLA leave may be delayed when an employee does not comply with the FMLA notification requirements. This subparagraph should also apprise employees that FMLA leave may be denied, and the employee designated as Absent Without Leave, for failing to comply with the notification requirements outlined in Part 825.301(b), *Employee Responsibilities*.

Part 825.120(a)(3), *Leave for Pregnancy or Birth*, as proposed, indicates that spouses who are employed by a the same employing office "*may be* limited to a combined total of 12-weeks of leave."(*emphasis* added) This provision seemingly grants employing offices the

discretion to determine whether spouses are entitled to 12-weeks of individual or combined FEPLA leave for births or placements. The final rule should plainly indicate whether this is the intent of the provision or identify the instances when spouses would otherwise be limited to a combined 12-weeks of FEPLA leave.

Part 825.120(a)(7), *Leave for Pregnancy of Birth*, as proposed, is unclear. This subparagraph discusses the need for an employee-spouse to care for a birthing mother. The final clause of the subparagraph states, "even if the employee is not involved in caring for the son or daughter during portions of that recovery period." It is unclear what the proposed regulations intends to convey through this clause, but USCP would recommend deleting it from the subparagraph.

Parts 825.121(a)(3), *Leave for Adoption or Foster Care*, and 825.201(b), *Same employing office limitation*, as proposed, contain similar language regarding the availability of FEPLA leave for employee-spouses. The USCP urges OCWR to clarify whether employing offices have discretion to grant the entire 12-week entitlement to both employee spouses; and, if not, OCWR should identify the circumstances when FEPLA leave must be separated or combined for those eligible employees.

Part 825.301, *Designation of FMLA Leave*, as proposed, authorizes the employing office to designate FMLA qualifying leave as FMLA leave on the employee's behalf. This provision should also explain that once an employing office properly designates the absence as FMLA leave, the employee cannot overturn the designation. The employee may substitute the unpaid leave for paid leave, pursuant to Part 825.207 and 208, but the designated leave will count toward the 12-week FMLA entitlement.

Part 825.305(a), *Certification, General Rule*, as proposed, does not address employee certification requirements for births or placements under the FEPLA. This subparagraph should clarify that employing offices may request certification for all FMLA and FEPLA leave categories, including births or placements. Certification for a births or placements may include a birth certificate or a document from an adoption or foster care agency regarding the placement. This subparagraph should also explain that certification is necessary to determine both employee eligibility for FMLA and FEPLA leave and when that eligibility expires.

Part 825.312(f), *Fitness for Duty Certification*, as proposed, states that an employing office may not terminate an employee while awaiting a fitness for duty certification. This provision improperly infringes on management's right to terminate employment under appropriate circumstances, unrelated to FMLA leave, and should not be adopted in the final rule. Furthermore, Part 825.312(g), as proposed, seemingly grants unfettered discretion to disregard Part 825.312, in its entirety, "if the terms of the collective bargaining agreement govern an employee's return to work." It is unclear whether the proposed regulations intended to nullify Part 825.312 through collective bargaining.

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Part 825.505(b), *Cases of Employee Incapacitation*, as proposed, authorizes the employing offices to prospectively grant paid parental leave when an employee is mentally or physically incapacitated and the employee's personal representative requests it. This provision should also explain that once an employing office prospectively designates the absence as paid parental leave, the employee cannot overturn the designation. The designated leave will count toward the 12-week FMLA/FEPLA entitlement.

Part 825.700, *Interaction with Employing Office's Policies*, as proposed, contradicts the Part 825.312(f), *Fitness for Duty Certification,* which allows a collective bargaining agreement to govern an employee's return to work. OCWR should reconcile these provisions.

Sincerely,

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