

**SUPPORTING STATEMENT  
THE FAMILY AND MEDICAL LEAVE ACT OF 1993  
REGULATIONS, 29 C.F.R. PART 825  
OMB CONTROL NO. 1215-0181**

1. The Family and Medical Leave Act of 1993 (FMLA), 29 U.S.C. § 2601, *et seq.*, requires private sector employers of 50 or more employees and public agencies to provide up to 12 weeks of unpaid, job-protected leave during any 12-month period to “eligible” employees for certain family and medical reasons. Leave must be granted to “eligible” employees because of the birth of a child and to care for the newborn child; because of the placement of a child with the employee for adoption or foster care, because the employee is needed to care for a family member (child, spouse, or parent) with a serious health condition, or because the employee’s own serious health condition makes the employee unable to perform one or more of the essential functions of his or her job. FMLA section 404 requires the Secretary of Labor to prescribe such regulations as necessary to enforce this Act.

A. Employee Notice of Need for FMLA Leave [FMLA § 102(e); 29 C.F.R. §§ 825.100(d), .208(a), .302, and .303]

An employee giving notice of the need for FMLA leave must explain the reasons for leave in sufficient detail so as to allow the employer to determine that the leave qualifies under the Act.

B. Notice to Employees of FMLA Rights [29 C.F.R. §§ 825.208(b), .301(a), (b) and (c)]

If a FMLA-covered employer has any FMLA-eligible employees and has any written guidance available to employees concerning employee benefits or leave rights (e.g., an employee handbook), information concerning FMLA rights and obligations must be included. If no such written guidance exists, it must be provided to an employee each time he or she requests FMLA leave.

In addition, when an employee requests FMLA leave, an employer must provide the employee with written notice detailing the specific expectations and obligations of the employee during FMLA leave and explaining any consequences of a failure to meet these obligations. This notice must be provided at least once in each six-month period that the employee gives first notice of a need for FMLA leave. However, if the specific information required to be furnished in the employer’s notice changes, then notice of the changed information must be provided in response to any subsequent notice from the employee of a need for FMLA leave.

C. Medical Certifications and Recertifications [FMLA §§ 103, 104(c)(3); 29 C.F.R. §§ 825.100(d), .305, .306, .307 and .308]

An employer may require that an employee’s leave to care for the employee’s seriously-ill spouse, son, daughter, or parent, or due to the employee’s own serious

health condition that makes the employee unable to perform one or more essential functions of the employee's position, be supported by a certification issued by the health care provider of the eligible employee or of the ill family member. Recertification can be requested by an employer under the conditions prescribed in section 825.308 of the FMLA regulations.

D. Fitness-for-Duty Medical Certifications [FMLA § 104(a)(4); 29 C.F.R. §§ 825.100(d) and .310]

As a condition for restoring an employee whose FMLA leave was occasioned by the employee's own serious health condition that rendered the employee unable to perform one or more of the essential functions of the employee's job, an employer may have a uniformly applied policy or practice that requires all similarly-situated employees (i.e., same occupation, same serious health condition) who take leave for such conditions to obtain and present certification from the employee's health care provider stating that the employee is able to resume work.

E. Notice to Employees of Change of 12-Month Period for Determining FMLA Entitlement [29 C.F.R. § 825.200(d)(1)]

An employer may choose a single uniform method from any of four options for determining the 12-month period in which the 12-week entitlement occurs for purposes of FMLA leave. An employer wishing to change to a different 12-month period is required to give at least 60 days notice to all employees of the change.

F. Key Employee Notifications [FMLA § 104(b); 29 C.F.R. § 825.219; 29 C.F.R. § 825.301(b)(1)(vi)]

An employer must notify an employee who intends to take FMLA leave that he or she is considered to be a "key employee" for whom the employer may deny job restoration at the conclusion of FMLA leave because restoration will cause "substantial and grievous economic injury to the operations of the employer." An employer must also advise the key employee when it is determined that restoration will be denied. (Normally, the notification described is part of the general notification described in item B. above, for which no additional burden is assessed.)

After notice has been given by the employer that the employee is a key employee and that the employee's restoration will be denied because it would be injurious to the employer's business operations, the employee is still entitled to take FMLA leave and then request reinstatement at the end of the FMLA leave period. At that time, the employer must reassess whether a "substantial and grievous economic injury" will result from restoration and notify the employee in writing if job restoration is being denied.

G. Recordkeeping [FMLA § 106; 29 C.F.R. § 825.500]

FMLA section 106 provides that employers shall make, keep, and preserve records pertaining to FMLA in accordance with the recordkeeping requirements of the Fair Labor Standards Act (FLSA) and any FMLA regulations issued by the Secretary of Labor. Under this statutory authority, no employer or plan, fund, or program shall be required to submit books or records more than once during any 12-month period unless the DOL has reasonable cause to believe a violation of FMLA exists or is investigating a complaint.

Under Regulations 29 C.F.R. § 825.500, employers must maintain basic payroll and identifying payroll data, including name, address, and occupation; rate or basis of pay and terms of compensation; daily and weekly hours worked per pay period; additions to or deductions from wages; and total compensation paid. In addition, employers subject to FMLA must keep (1) the dates FMLA leave is taken; (2) hours of FMLA leave (if taken in increments of less than a full day); (3) if in writing, copies of employee notices to employers of their intention to use FMLA leave; (4) copies of notices required by FMLA to be furnished to employees; (5) copies of any documents (including written and electronic records) describing employee benefits or employer policies/practices regarding the taking of paid and unpaid leaves of absence; (6) premium payments of employee benefits; and (7) records of any dispute between an employer and employee regarding an employer's designation of leave as FMLA leave, including a written statement of the reasons for the designation and the reasons for the disagreement.

For FLMA-eligible employees not subject to FLSA recordkeeping regulations for purposes of minimum wage and/or overtime compliance, an employer need not keep a record of actual hours worked, as otherwise required under the FLSA recordkeeping regulations at 29 C.F.R. § 516.2(a)(7), provided that (1) eligibility for FMLA leave is presumed for any employee who has been employed for at least 12 months; and (2) with respect to employees who take FMLA leave intermittently or on a reduced leave schedule, the employer and employee agree on the employee's normal schedule or average hours worked each workweek and reduce such agreement to a written record.

The FLSA recordkeeping requirements are contained in Regulations, 29 C.F.R. Part 516, and are currently approved under OMB control number 1215-0017; consequently, this information collection does not duplicate their burden.

2. These recordkeeping requirements are necessary in order for the DOL to carry out its statutory obligation under section 106 of FMLA to investigate and ensure employer compliance. By requiring employers to maintain these records, the DOL is able to determine employer compliance.

Because these collections involve third-party notifications between the employer and the employee, the WHD created optional Forms WH-380 and WH-381 to assist employees and employers in meeting their regulatory notification obligations under the FMLA. Form WH-380 allows employees who are requesting FMLA leave based on a serious health condition to satisfy a mandatory requirement to furnish a medical certification (when requested) from their health care provider, including second or third opinions and recertifications. *See* 29 C.F.R. § 825.306. Form WH-381 allows employers to satisfy mandatory requirements to provide employees taking FMLA-leave with written notice detailing specific expectations and obligations of the employee and explaining any consequences of a failure to meet these obligations. *See* 29 C.F.R. § 825.301(b). These collections are necessary to ensure that both employers and employees are aware of and can exercise their rights and meet their respective obligations under FMLA.

3. As provided in 29 C.F.R. § 825.500(b), there is no particular order or form of records prescribed by the regulations for this information collection. The preservation of records in such forms as microfilm or automated word or data processing memory is acceptable, provided the information is maintained and adequate facilities are available to the DOL for inspection, copying, and transcription of the records. In addition, photocopies of records are also acceptable under the regulations.

Aside from the basic requirement that all third-party notifications—except the employee’s FMLA request—be in writing, there are no restrictions on the method of transmission. Some of the notifications may be met by use of DOL-prepared publications, *e.g.*, FMLA Fact Sheet available on the Wage and Hour Division (WHD) Web site at <http://www.dol.gov/esa/regs/compliance/whd/whdfs28.htm>. and Optional Forms WH-380 <http://www.dol.gov/esa/regs/compliance/whd/fmla/wh380.pdf> and WH-381 <http://www.dol.gov/esa/forms/whd/WH-381.pdf> . These latter two forms are in a PDF, fillable format for downloading and printing. Since the recordkeeping requirements covered by this information collection may be kept in any form, the Government Paperwork Elimination Act (GPEA) requirements to provide an electronic option are inapplicable.

4. There is no duplication of these third-party notification requirements except as explained in item 1.G. above. Basic records required to be kept under FLSA by regulation are acceptable for compliance with FMLA regulations and need not be duplicated. The additional records required to be kept under the FMLA regulations are records that would ordinarily be maintained by an employer for monitoring employee leave in the usual and ordinary course of business and must only be made available for inspection, copying, and transcription by the DOL.
5. This information collection does not have a significant impact on a substantial number of small entities. Because the FMLA only covers public agencies and private employers of 50 or more employees, small entities (i.e., employers with fewer than 50 employees) are exempt, thereby limiting FMLA coverage to an estimated 391,000 employers. (Source: County Business Patterns, 2004, U.S. Census Bureau, <http://censtats.census.gov/cgi-bin/cbpnaic/cbpsel.pl>). Because the basic records required

under FLSA and FMLA are also maintained by employers as a matter of usual or customary business practices due to requirements of other government agencies (e.g., IRS and the Social Security Administration), the additional FMLA recordkeeping requirements are only necessary for the enforcement and administration of that Act. For example, to further minimize the burden of requiring employer notices to be provided to the eligible employees at the onset of FMLA leave, the regulations limit the frequency of these notices to no more than once in each six-month period, unless specific information to be furnished in the notice has changed since it was last provided to the employee. *See* 29 C.F.R. § 825.301(c).

6. It is the statutory responsibility of the DOL to ensure employer compliance with FMLA. The records to be filed and maintained during the time FMLA leave is anticipated or being taken are necessary for the Department to determine compliance. Without the third-party notifications required by the law and/or regulations, employers and employees would have difficulty complying with their rights and obligations under FMLA.
7. Employees are required to provide the employer with at least 30 days advance notice of the need for leave before the FMLA leave begins if the leave is foreseeable. *See* 29 C.F.R. § 825.302 (a). The employee must provide the employer with notice of FMLA leave as soon as practicable when the circumstances requiring the need for leave are not foreseeable. *Id.* An employee must also fulfill a request for medical certification within 15 days after the employer's request. *See* 29 C.F.R. § 825.305. Within a reasonable time after notice of the need for leave is given by the employee, usually one or two business days, the employer must also provide notice to the employee detailing the employer's specific expectations for the employee. *See* 29 C.F.R. § 825.301. Because of the unforeseeable and often urgent nature of the need for FMLA leave, notice and response times must be of short duration to ensure that employers and employees are sufficiently informed and can exercise their rights and obligations under FMLA.

Except for the requirement to maintain records on a weekly basis to ensure compliance with FMLA, there are no special obligations.

8. The DOL published a Federal Register Notice on March 22, 2007 [72 FR 13530] inviting public comment about this information collection. The agency received no comments.
9. The DOL makes no payments or gifts to respondents completing these recordkeeping requirements.
10. The DOL makes no assurances of confidentiality to respondents. As a practical matter, the DOL would only disclose records/information collected under these requests in accordance with the provisions of the Freedom of Information Act, 5 U.S.C. § 552, and the attendant regulations, 29 C.F.R. Part 70, and the Privacy Act, 5 U.S.C. § 552a, with its attendant regulations 29 C.F.R. Part 71.

Under Regulations 29 C.F.R. §§ 825.213(a)(3), 825.305, 825.308, and 825.310, an employer may require medical certification, or recertification, to support a request for leave because of a serious health condition or to support a determination that an employee is able to return to work or unable to return because of a serious health condition. Records and documents relating to medical certifications, recertifications or medical histories of employees or employees' family members, shall be maintained as confidential medical records in separate files/records from usual personnel files and, if the American's With Disabilities Act is applicable, be maintained in conformance with ADA confidentiality requirements, except that (1) supervisors and managers may be informed regarding necessary restrictions on the work or duties of an employee and necessary accommodations; (2) first aid and safety personnel may be informed (when appropriate) if the employee's physical or medical condition might require emergency treatment; and (3) government officials investigating compliance with FMLA (or other pertinent laws) shall be provided relevant information upon request. *See* 29 C.F.R. § 825.500(g).

11. FMLA section 103 authorizes employers to request that their employees submit medical certifications and recertifications to substantiate the need for FMLA leave. Because of the personal and sensitive nature of a request for leave under the FMLA, information submitted by employees on medical certifications and recertifications in an effort to support a request for FMLA leave may contain sensitive information. However, as noted in item #10 above, access to such information is limited.
12. The DOL has based these burden estimates on a 2000 FMLA Survey entitled, "Balancing the Needs of Families and Employers: Family and Medical Leave Surveys, 2000 Update." No updated survey has been completed since that time. The 2000 FMLA Survey Update estimates that there were approximately 84 to 94 million "eligible" employees, i.e. employees who worked for a covered employer for at least a year and for at least 1,250 hours of service for that employer prior to the beginning of leave. The 2000 FMLA Survey Update further estimates that between 2.2 and 3.3 million (employee survey) or 4.6 and 6.1 million (establishment survey) employees take FMLA leave annually. For this burden estimate, the DOL estimates that 4.15 million (mid-point between 2.2 and 6.1 million) employees take FMLA leave annually. They work for an estimated 391,000 covered employers. (Source: County Business Patterns, 2004, U.S. Census Bureau, <http://censtats.census.gov/cgi-bin/cbpnaic/cbpsel.pl>). DOL has based other burden estimates used are based on enforcement experience.

A. Employee Notice of Need for FMLA Leave [FMLA § 102(e); 29 C.F.R. § 825.100(d), .208(a), .302, and .303]

The DOL estimates that each employee notice to the employer of the need to take FMLA leave will take approximately one minute for 4.15 million employees annually.

4.15 million employee notices to employers x 1 minutes/60 mins = **69,167** hours

B. Notice to Employees of FMLA Rights [29 C.F.R. § 825.208(b), .301(a), (b) and (c)]

The DOL estimates providing guidance regarding FMLA rights and obligations in employee handbooks, and other such material takes approximately ten minutes per covered employer.

391,000 covered employers x 10 minutes/60 minutes = **65,167** hours

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The DOL estimates that each written notice to an employee of their FMLA rights takes approximately five minutes for 4.15 million employees annually. Optional Form WH-381 may be used to satisfy this requirement.

4.15 million notices to employees x 5 minutes/60 minutes = **345,833** hours

**TOTAL BURDEN HOURS FOR EMPLOYEE NOTICES = 69,167 + 65,167 + 345,833 = 480,167 HOURS**

C. Medical Certifications and Recertifications [FMLA § 103, 104(c)(3); 29 C.F.R. § 825.100(d), .305, .306, .307 and .308]

The DOL estimates that 80 percent of the approximately 4.15 million employees taking FMLA leave annually do so because of their own serious health condition or that of a family member (3.32 million). It is further estimated that 50 percent of the employers request medical certifications from these employees for 1.66 million medical certifications. Each initial medical certification by a health care provider takes 20 minutes. The optional Form-380 may be used to satisfy this requirement.

1.66 million initial medical certifications x 20 minutes/60 mins = **553,333** hours.

It is estimated that 10 percent of these 1.66 million employees are requested to provide second and third medical certifications or 166,000 second and third medical opinions annually, each taking 20 minutes.

166,000 2<sup>nd</sup>/3<sup>rd</sup> opinion medical certifications x 20 minutes/60 mins = **55,333** hours

It is estimated that 5 percent of the 1.66 million employees are requested to provide medical recertifications annually.

1.66 mill employees x 5% = 83,000 recertifications x 20 minutes/60 mins = **27,667** hours

**TOTAL BURDEN HOURS FOR MEDICAL CERTIFICATIONS AND RECERTIFICATIONS = 553,333 + 55,333 + 27,667 = 636,333 HOURS**

D. Fitness-for-Duty Medical Certifications [FMLA § 104(a)(4); 29 C.F.R. §§ 825.100(d) and .310]

The DOL estimates that 5 percent of the 4.15 million employees on FMLA leave annually are required to submit fitness-for-duty medical certifications and that each fitness-for-duty medical certification takes approximately 10 minutes.

4.15 million employees x 5% = 207,500 employees x 10 minutes/60mins = **34,583** hours

**TOTAL BURDEN HOURS FOR FITNESS-FOR-DUTY MEDICAL CERTIFICATIONS = 34,583 HOURS**

E. Notice to Employees of Change of 12-Month Period for Determining FMLA Entitlement [29 C.F.R. § 825.200(d)(1)]

The DOL estimates that annually 10 percent of the 391,000 employers (39,100 employers) providing FMLA leave will choose to change their 12-month period for determining FMLA eligibility and be required to notify employees of the change. Each notification would take approximately 10 minutes.

39,100 employers x 10 minutes/60 minutes = **6,517** hours

**TOTAL BURDEN HOURS FOR EMPLOYER NOTICE TO EMPLOYEES OF CHANGE OF 12-MONTH PERIOD – 6,517 HOURS**

F. Key Employee Notifications [FMLA § 104(b); 29 C.F.R. § 825.219]

The first notice to an employee that he or she is considered a key employee will be part of the employee notice of rights and obligations whose burden has been estimated in item #12.B. above. Accordingly, no additional burden is estimated.

The DOL estimates that 1 percent of the 4.15 million employees taking FMLA leave annually or 41,500 key employees receive notification from their employers of their intent to deny the employee job restoration at the conclusion of FMLA leave. Each notification would take approximately 5 minutes.

41,500 employees x 5 minutes/60 mins = **3,458** hours

The DOL also estimates that half of these employees (20,750 employees) will receive a second notice from the employer denying job reinstatement where job restoration is requested by a key employee at the conclusion of FMLA leave.

20,750 employees x 5 minutes/60 mins = **1,729** hours



**TOTAL BURDEN HOURS FOR KEY EMPLOYEE NOTIFICATIONS = 3458 + 1729 = 5,187 HOURS**

G. Recordkeeping [FMLA § 106; 29 C.F.R. § 825.500]

Records required to be kept by employers subject to FMLA would generally be kept by employers as a normal part of customary, prudent business practices, even if the regulatory requirements did not exist. However, to account for those instances in which some covered employers might not otherwise keep all the FMLA records required, we would estimate that it would take approximately 3 minutes annually per “eligible” employee utilizing FMLA leave to record and/or file the information required by the regulations. This would result in a total annual recordkeeping burden of 207,500 hours:

4.15 million employees x 3 minutes = **207,500** hours

**TOTAL BURDEN FOR FMLA RECORDKEEPING - 207,500 HOURS**

**GRAND TOTAL ANNUAL BURDEN HOURS = 1,370,287 HOURS**

Persons needing FMLA health medical certifications may be employees of any of a wide variety of businesses. Absent specific wage data regarding respondents, the DOL has used the average hourly rate of non-supervisory workers on non-farm payrolls for February 2007 of \$17.21 to estimate respondent costs. See *The Employment Situation, April 2007*, DOL, Bureau of Labor Statistics.

([http://www.bls.gov/news.release/archives/empsit\\_05042007.pdf](http://www.bls.gov/news.release/archives/empsit_05042007.pdf).) The DOL estimates total annual respondent costs to be \$23,582,639.27. ( $\$17.21 \times 1,370,287 \text{ hours} = \$23,582,639.27$ )

13. Employee respondents, upon their employer’s request must obtain a certification of the serious health condition from a health care provider. Often office staff complete the form for the health care providers signature and, in other cases, the health care provider completes it. While most health care providers do not charge for completing these certifications, some do. The DOL estimates completion of Form WH-380 takes about 20 minutes and a fitness for duty certification to be 10 minutes; thus the time would equal the respondent’s time in obtaining the certification. The agency has used the February 2007 wage rate for education and health services of \$17.76 to compute a \$5.92 cost for Form WH-380 ( $\$17.74/60 \times 20 = \$5.92$ ) and \$2.96 cost for fitness for duty certifications ( $\$17.76/60 \times 10 = \$2.96$ ) See *Id.* (1,909,000 total medical certifications x \$5.92 = \$11,301,280) + (207,500 fitness for duty x 2.96 = \$614,200) = \$11,915,480.00)
14. The following are estimated Federal costs for the printing/duplication and mailing of the subject forms upon request to employers and employees:

Printing Costs

**Form WH-380** (Certification of Health Care Provider)

1,909,000 forms x 2.5¢ = \$47,725

**Form WH-381** (Employer Response to Employee Request for FMLA Leave)

4.15 million forms x 1.5¢ = \$62,250

**Total Printing Costs - \$109,975**

Mailing Costs

**WH-380** (Certification of Health Care Provider)

1.909 million forms x 39¢ postage = \$744,510

1.909 million mailing envelopes x 3¢ = \$57,270

**WH-381** (Employer Response to Employee Request for Family or Medical Leave)

4.15 million forms x 39¢ = \$1,618,500

4.15 million mailing envelopes x 3¢ = \$124,500

**Total Mailing Costs - \$2,544,780**

**TOTAL ESTIMATED ANNUAL FEDERAL COSTS - \$2,654,755**

15. Burden estimates in this paperwork submission have increased due to the use of current census data to determine the number of covered employees and current BLS data to determine the cost of the burden hours. Moreover, the number of respondents increased to 6,657,500 (6.658 million rounded) from 6,656,500 (6.657 million rounded)—or by 1,000 respondents, and the total annual responses increased to 15,058,850 (15.059 million rounded) from 15,057,750 (15.058 million rounded)—or by 1,100 total responses. Burden hours increased slightly from 1,370,103 to 1,370,288 hours, or an adjustment of 185 hours. Prior paperwork packages for this information collection did not separately state costs associated with obtaining medical certifications. DOL efforts to quantify that figure result in an increase of = \$11,915,480.00 in operational costs.
16. The DOL does not publish this information.
17. The DOL will display the expiration dates for OMB clearances on all items relative to these recordkeeping requirements.
18. The DOL does not seek an exception to the certification requirements.