Paperwork Reduction Act

In accordance with requirements of the Paperwork Reduction Act (PRA), 44 U.S.C. 3501 et seq., and its attendant regulations, 5 CFR part 1320, the DOL seeks to minimize the paperwork burden for individuals, small businesses, educational and nonprofit institutions, Federal contractors, State, local and tribal governments, and other persons resulting from the collection of information by or for the agency. The PRA typically requires an agency to provide notice and seek public comments on any proposed collection of information contained in a proposed rule. See 44 U.S.C. 3506(c)(2)(B); 5 CFR 1320.8. Persons are not required to respond to the information collection requirements as contained in this proposal unless and until they are approved by the OMB under the PRA at the final rule stage.

This "paperwork burden" analysis estimates the burdens for the proposed regulations as drafted. In addition and as already discussed, the military family leave provisions of H.R. 4986 amend the FMLA to provide leave to eligible employees of covered employers to care for covered servicemembers and because of any qualifying exigency arising out of the fact that a covered family member is on active duty or has been notified of an impending call to active duty status in support of a contingency operation. The new statutory provisions will be codified at 29 U.S.C. 2612(e)(2) and (e)(3). The earlier preamble discussion on Family Leave in Connection with Injured Members of the Armed Forces and Qualifying Exigencies Related to Active Duty provides a fuller explanation of the specific provisions and issues on which the Department seeks public comments. Because of the need to issue regulations as soon as possible so that employees and employers are aware of the respective rights and obligations regarding military family leave under the FMLA, the Department anticipates issuing, after full consideration of the comments

received in response to this Notice, final regulations that will include necessary revisions to the currently proposed FMLA information collections.

As will be more fully explained later, many of the estimates in the analysis of the "paperwork" requirements derive from data developed for the Preliminary Regulatory Impact Analysis (PRIA) under E.O. 12866. However, the specific needs that the PRA analysis and PRIA are intended to meet often require that the data undergo a different analysis to estimate the burdens imposed by the "paperwork" requirements from the analysis used in estimating the effect the regulations will have on the economy. Consequently, the differing treatment that must be undertaken in the PRA analysis and the PRIA may result in different results. For example, the PRA analysis measures the total burden of the information collection; however, the PRIA measures the incremental changes expected to result from the proposed regulatory changes. Thus, the PRA analysis will calculate a paperwork burden for an information collection that remains unchanged from the current regulation and the PRIA will not consider that item. Conversely, the regulatory definition for "collection of information" for PRA purposes specifically excludes the public disclosure of information originally supplied by the Federal government to the recipient for the purpose of disclosure to the public. 5 CFR 1320.3(c)(2). The PRIA, however, may need to consider the impact of any regulatory changes in such notifications provided by the government. For example, in the context of the proposed FMLA changes, the general notice that employers currently must develop and provide to their workers is proposed to be replaced with a notice using wording provided by the DOL that employers must periodically provide to their employees. This proposed DOL-provided FMLA notice would not be a "collection of information" for PRA purposes; therefore, the proposal reduces burden for PRA

purposes. The PRIA, however, must address the economic impact of the frequency with which employers must provide the DOL's FMLA notice under the proposed change to the regulations. Finally, the PRA definition of "burden" can exclude the time, effort, and financial resources necessary to comply with a collection of information that would be incurred by persons in the normal course of their activities (e.g., in compiling and maintaining business records). 5 CFR 1320.3(b)(2). The PRIA, however, must consider the economic impact of any changes in the proposed regulation.

Circumstances Necessitating Collection: The FMLA 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 (i.e., for birth of a son or daughter, and to care for the newborn child; for placement with the employee of a son or daughter for adoption or foster care; to care for the employee's spouse, son, daughter, or parent with a serious health condition; and because of a serious health condition that makes the employee unable to perform the functions of the employee's job). FMLA section 404 requires the Secretary of Labor to prescribe such regulations as necessary to enforce this Act. 29 U.S.C. 2654. The proposed regulations provide for the following information collections, many of which are third-party notifications between employers and employees.

A. Employee Notice of Need for FMLA Leave [29 U.S.C. 2612(e); 29 CFR 825.100(d), 825.301(b), 825.302, and 825.303]. An employee must provide the employer 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, or planned medical treatment for a serious health condition of the employee or of a family member. 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 under the facts and circumstances of the particular case. In neither case must an employee expressly assert rights under the FMLA or even mention the FMLA. The employee must, however, provide information that indicates that a condition renders the employee unable to perform the functions of the job, or if the leave is for a family member, that the condition renders the family member unable to perform daily activities; the anticipated duration of the absence; and whether the employee or the employee's family member intends to visit a health care provider or has a condition for which the employee or the employee's family member is under the continuing care of a health care provider. An employer, generally, may require an employee to comply with its usual and customary notice and procedural requirements for requesting leave.

B. Notice to Employee of FMLA Eligibility [29 CFR 825.219 and 825.300(b)]. When an employee requests FMLA leave or when the employer acquires knowledge that an employee's leave may be for an FMLA-qualifying condition, the employer must notify the employee within five business days of the employee's eligibility to take FMLA leave and any additional requirements for qualifying for such leave. This eligibility notice must provide information regarding the employee's eligibility for FMLA leave, detail the specific responsibilities of the employee, and explain any consequences of a failure to meet these responsibilities. The employer generally must provide the notice the first time in each six-month period that an employee gives notice of the need for FMLA leave; however, if the specific information provided by the notice changes with respect to a subsequent period of FMLA leave, the employer would need to provide an updated notice.

C. Medical Certification and Recertification [29 U.S.C. 2613, 2614(c)(3); 29 CFR 825.100(d) and 825.305 through 825.308]. 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. The proposal provides that the employer may contact the employee's health care provider for purposes of clarification and authentication of the medical certification (whether initial certification or recertification) after the employer has given the employee an opportunity to cure any deficiencies. In addition, an employer must advise an employee whenever it finds a certification incomplete or insufficient and state in writing what additional information is necessary to make the certification complete and sufficient. An employer, at its own expense and subject to certain limitations, also may require an employee to obtain a second and third medical opinion. In addition, an employer may also request recertification under certain conditions. The employer must provide the employee at least 15 calendar days to provide the initial certification and any subsequent recertification. The proposed regulations would provide that the employer must provide seven calendar days (unless not practicable under the particular circumstances despite the employee's diligent good faith efforts) to cure any deficiency identified by the employer.

D. Notice to Employees of FMLA Designation [29 CFR 825.300(c) 825.301(a)]. When the employer has enough information to determine whether the leave qualifies as FMLA leave (after receiving a medical certification, for example), the employer must notify the employee within five business days of making such determination whether the leave has or has not been

designated as FMLA leave and the number of hours, days or weeks that will be counted against the employee's FMLA leave entitlement. 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 such information must be provided every 30 days to the employee if leave is taken during the prior 30-day period. If the employer requires paid leave to be substituted for unpaid leave, or that paid leave taken under an existing leave plan be counted as FMLA leave, this designation also must be made at the time of the FMLA designation.

E. Fitness-for-Duty Medical Certification [29 U.S.C. 2614(a)(4); 29 CFR 825.100(d) 825.310]. As a condition of restoring an employee whose FMLA leave was occasioned by the employee's own serious health condition that made the employee unable to perform 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 that the employee is able to resume work. The employee has the same obligations to participate and cooperate in providing a complete and sufficient certification to the employer in the fitness-for-duty certification process as in the initial certification process. The DOL is also proposing in § 825.310(g) that an employer be permitted to require an employee to furnish a fitness-for-duty certificate every 30 days if an employee has used intermittent leave during that period and reasonable safety concerns exist.

F. Notice to Employees of Change of 12-Month Period for Determining FMLA Entitlement [29 CFR 825.200(d)(1)]. An employer generally must choose a single uniform method from four options available under the regulations for determining the 12-month period in

which the 12-week entitlement occurs for purposes of FMLA leave. An employer wishing to change to another alternative is required to give at least 60 days' notice to all employees.

G. Key Employee Notification [29 U.S.C. 2614(b)(1)(B); 29 CFR 825.219 and 825.300(b)(3)(vi)]. An employer that believes that it may deny reinstatement to a key employee must give written notice to the employee at the time the employee gives notice of the need for FMLA leave (or when FMLA leave commences, if earlier) that he or she qualifies as a key employee. At the same time, the employer must also fully inform the employee of the potential consequences with respect to reinstatement and maintenance of health benefits if the employer should determine that substantial and grievous economic injury to the employer's operations would result if the employer were to reinstate the employee from FMLA leave. If the employer cannot immediately give such notice, because of the need to determine whether the employee is a key employee, the employer must give the notice as soon as practicable after receiving the employee's notice of a need for leave (or the commencement of leave, if earlier). If an employer fails to provide such timely notice it loses its right to deny restoration, even if substantial and grievous economic injury will result from reinstatement.

As soon as an employer makes a good faith determination—based on the facts available—that substantial and grievous economic injury to its operations will result if a key employee who has given notice of the need for FMLA leave or is using FMLA leave is reinstated, the employer must notify the employee in writing of its determination; that the employer cannot deny FMLA leave; and that the employer intends to deny restoration to employment on completion of the FMLA leave. The employer must serve this notice either in person or by certified mail. This notice must explain the basis for the employer's finding that substantial and

grievous economic injury will result, and, if leave has commenced, must provide the employee a reasonable time in which to return to work, taking into account the circumstances, such as the length of the leave and the urgency of the need for the employee to return.

An employee may still request reinstatement at the end of the leave period, even if the employee did not return to work in response to the employer's notice. The employer must then determine whether there will be substantial and grievous economic injury from reinstatement, based on the facts at that time. If the employer determines that substantial and grievous economic injury will result from reinstating the employee, the employer must notify the employee in writing (in person or by certified mail) of the denial of restoration.

H. Periodic Employee Status Reports [29 CFR 825.300(b)(4) and 825.309]. An employer may require an employee to provide periodic reports regarding the employee's status and intent to return to work.

I. Notice to Employee of Pending Cancellation of Health Benefits [29 CFR 825.212(a)]. Unless an employer establishes a policy providing a longer grace period, an employer's obligation to maintain health insurance coverage ceases 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 employer 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 and advise the employee 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.

J. Documenting Family Relationship [29 CFR 825.122(f)]. An employer may require an employee giving notice of the need for leave to provide reasonable documentation or statement

of family relationship. This documentation may take the form of a child's birth certificate, a court document, a sworn notarized statement, a submitted or signed tax return, etc. The employer is entitled to examine documentation such as a birth certificate, etc., but the employee is entitled to the return of the official document submitted for this purpose.

K. Recordkeeping [29 U.S.C. 2616; 29 CFR 825.500]. The FMLA provides that employers shall make, keep, and preserve records pertaining to the FMLA in accordance with the recordkeeping requirements of Fair Labor Standards Act section 11(c), 29 U.S.C. § 211(c), and regulations issued by the Secretary of Labor. This statutory authority provides that 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 the FMLA exists or is investigating a complaint.

Employers must maintain basic payroll and identifying employee 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; dates FMLA leave is taken by FMLA eligible employees (available from time records, requests for leave, etc., if so designated). Leave must be designated in records as FMLA leave; leave so designated may not include leave required under State law or an employer plan which is not also covered by FMLA; if FMLA leave is taken by eligible employees in increments of less than one full day, the hours of the leave; copies of employee notices of leave furnished to the employer under FMLA, if in writing, and copies of all eligibility notices given to employees as required under FMLA and these regulations; any documents (including written and electronic records) describing employee benefits or employer policies and practices regarding the taking of paid and

unpaid leaves; premium payments of employee benefits; records of any dispute between the employer and an eligible employee regarding designation of leave as FMLA leave, including any written statement from the employer or employee of the reasons for the designation and for the disagreement.

Covered employers with no eligible employees must maintain the basic payroll and identifying employee data already discussed. Covered employers that jointly employ workers with other employers must keep all the records required by the regulations with respect to any primary employees, and must keep the basic payroll and identifying employee data with respect to any secondary employees.

If FMLA-eligible employees are not subject to FLSA recordkeeping regulations for purposes of minimum wage or overtime compliance (i.e., not covered by, or exempt from, FLSA), an employer need not keep a record of actual hours worked (as otherwise required under FLSA, 29 CFR 516.2(a)(7)), provided that: eligibility for FMLA leave is presumed for any employee who has been employed for at least 12 months; and 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 week and reduce their agreement to a written record.

Employers must maintain records and documents relating to any medical certification, recertification or medical history of an employee or employee's family member, created for FMLA purposes as confidential medical records in separate files/records from the usual personnel files. Employers must also maintain such records in conformance with any applicable ADA confidentiality requirements; except that: supervisors and managers may be informed

regarding necessary restrictions on the work or duties of an employee and necessary accommodations; first aid and safety personnel may be informed, when appropriate, if the employee's physical or medical condition might require emergency treatment; and government officials investigating compliance with the FMLA, or other pertinent law, shall be provided relevant information upon request.

The FLSA recordkeeping requirements, contained in 29 CFR part 516, are currently approved under Office of Management and Budget (OMB) control number 1215-0017; consequently, this information collection does not duplicate their burden, despite the fact that for the administrative ease of the regulated community this information collection restates them.

L. Military Family Leave [29 U.S.C. §§ 2612(e), 2613]: The military family leave provisions of H.R. 4986 extend to the new leave provision related to care for a servicemember the FMLA's existing requirements for employees to provide advance notice when the need for leave is foreseeable based on planned medical treatment, and for making reasonable efforts to schedule planned medical treatment so as not to disrupt unduly the employer's operations. The military family leave provisions of H.R. 4986 also provide for new notice requirements for leave taken due to qualifying exigencies whenever the need for such leave is foreseeable. The military family leave provisions of H.R. 4986 require that eligible employees provide notice to the employer that is "reasonable and practicable" in these circumstances.

The military family leave provisions of H.R. 4986 allow employers to apply the FMLA's existing medical certification requirements for serious health conditions to leave taken to care for a covered servicemember. In addition, the military family leave provisions of H.R. 4986 also

permit the Secretary of Labor to prescribe a new certification requirement to leave taken because of a qualifying exigency arising out of a servicemember's active duty or call to active duty.

The earlier preamble discussion on Family Leave in Connection with Injured Members of the Armed Forces and Qualifying Exigencies Related to Active Duty provides a fuller explanation of the specific provisions and issues on which the Department seeks public comments.

Purpose and Use: The WHD has created optional use Forms WH-380, WH-381, and the proposed WH-382 to assist employees and employers in meeting their FMLA third-party notification obligations. Form WH-380 allows an employee requesting FMLA leave based on a serious health condition to satisfy the statutory requirement to furnish, upon the employer's request, a medical certification (including a second or third opinion and recertification) from the health care provider. See 825.306 and 825.307 and Appendices B, D, and E. Form WH-381 allows an employer to satisfy the regulatory requirement 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 825.301(b). Form WH-382 allows an employer to meet its obligation to designate an absence as FMLA leave. See 825.300(c) and 825 .301(a). While the use of the DOL forms is optional, the regulations require employers and employees to make the third-party disclosures that the forms cover. The FMLA third-party disclosures ensure that both employers and employees are aware of and can exercise their rights and meet their respective obligations under FMLA.

The recordkeeping requirements are necessary in order for the DOL to carry out its statutory obligation under FMLA section 106 to investigate and ensure employer compliance. The WHD uses these records to determine employer compliance.

Information Technology: The proposed regulations continue to prescribe no particular order or form of records. See § 825.500(b). The preservation of records in such forms as microfilm or automated word or data processing memory is acceptable, provided the employer maintains the information and provides adequate facilities to the DOL for inspection, copying, and transcription of the records. In addition, photocopies of records are also acceptable under the regulations. Id.

Aside from the basic requirement that all third-party notifications be in writing, with a possible exception for the employee's FMLA request that depends on the employer's leave policies, there are no restrictions on the method of transmission. Respondents may meet many of their notification obligations by using DOL-prepared publications available on the WHD Web site. These forms are in a PDF, fillable format for downloading and printing. The employers may keep recordkeeping requirements covered by this information collection in any form, including electronic.

Minimizing Duplication: The FMLA information collections do not duplicate other existing information collections. In order to provide all relevant FMLA information in one set of requirements, the recordkeeping requirements restate a portion of the records employers must maintain under the FLSA. Employers do not need to duplicate the records when basic records maintained to meet FLSA requirements also document FMLA compliance. The additional records required by the FMLA regulations, with the exception of specifically tracking FMLA

leave, are records that employers ordinarily maintain for monitoring employee leave in the usual and ordinary course of business. The regulations do impose, however, a three-year minimum time limit that employers must make the records available for inspection, copying, and transcription by the DOL. The DOL minimizes the FMLA information collection burden by accepting records maintained by employers as a matter of usual or customary business practices. The DOL also accepts records kept due to requirements of other governmental requirements (e.g., records maintained for tax and payroll purposes). The DOL has reviewed the needs of both employers and employees to determine the frequency of the third-party notifications covered by this collection to establish frequencies that provide timely information with the least burden. The DOL has further minimized burden by developing prototype notices for many of the third-party disclosures covered by this information collection.

Agency Need: The DOL is assigned a statutory responsibility to ensure employer compliance with the FMLA. The DOL uses records covered by the FMLA information collection to determine compliance, as required of the agency by FMLA section 107(b)(1). 29 U.S.C. 2617(b)(1). Without the third-party notifications required by the law and/or regulations, employers and employees would have difficulty knowing their FMLA rights and obligations.

Special Circumstances: 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 FMLA rights and obligations. The discussion above outlines the circumstances necessitating the information collection and provides the details of when employees and employers must provide certain notices.

Employers must maintain employee medical information they obtain for FMLA purposes as confidential medical records in separate files/records from the usual personnel files. Employers must also maintain such records in conformance with any applicable ADA confidentiality requirements, except that: supervisors and managers may be informed regarding necessary restrictions on the work or duties of an employee and necessary accommodations; first aid and safety personnel may be informed (when appropriate) if the employee's physical or medical condition might require emergency treatment; and government officials investigating compliance with FMLA (or other pertinent law) shall be provided relevant information upon request.

Public Comments: On December 1, 2006, the DOL published a Request for Information (RFI) in the Federal Register inviting public comment about the FMLA paperwork requirements and other issues. 71 FR 69504. On June 28, 2007, the DOL published a report that summarized the comments received in response to the RFI. 72 FR 35550. The DOL also engaged various stakeholders representing the interests of employees, employers, and healthcare providers to discuss the FMLA information collection requirements. The proposed FMLA regulations reflect the results of these efforts.

The DOL seeks additional public comments regarding the burdens imposed by information collections contained in this proposed rule. In particular, the DOL seeks comments that: evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

enhance the quality, utility and clarity of the information to be collected; and minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submissions of responses. Commenters may send their views about these information collections to the DOL in the same way as all other comments (e.g., through the regulations.gov Web site). All comments received will be made a matter of public record, and posted without change to http://www.regulations.gov, including any personal information provided.

An agency may not conduct an information collection unless it has a currently valid OMB approval, and the DOL has submitted the identified information collections contained in the proposed rule to the OMB for review under the PRA under Control Number 1215-0181. See 44 U.S.C. 3507(d); 5 CFR 1320.11. While much of the information provided to the OMB in support of the information collection request appears in this preamble, interested parties may obtain a copy of the full supporting statement by sending a written request to the mail address shown in the "Addresses" section at the beginning of this preamble or by visiting the http://www.reginfo.gov/public/do/PRAMain website.

In addition to having an opportunity to file comments with the DOL, comments about the paperwork implications of the proposed regulations may be addressed to the OMB. Comments to the OMB should be directed to: Office of Information and Regulatory Affairs, Attention OMB Desk Officer for the Employment Standards Administration (ESA), Office of Management

and Budget, Room 10235, Washington, DC 20503, Telephone: 202-395-7316/Fax: 202-395-6974 (these are not toll-free numbers).

Confidentiality: The DOL makes no assurances of confidentiality to respondents. Much of the information covered by this information collection consists of third-party disclosures. Employers generally must maintain records and documents relating to any medical certification, recertification, or medical history of an employee or employee's family members as confidential medical records in separate files/records from usual personnel files. Employers must also generally maintain such records in conformance with any applicable ADA confidentiality requirements. As a practical matter, the DOL would only disclose agency investigation records of materials subject to this collection in accordance with the provisions of the Freedom of Information Act, 5 U.S.C. 552, and the attendant regulations, 29 CFR part 70, and the Privacy Act, 5 U.S.C. 552a, and its attendant regulations, 29 CFR part 71.

Hours Burden Estimates: The DOL bases the following burden estimates on the estimates the PRIA presented elsewhere in this document, except as otherwise noted. The DOL estimates 77.1 million employees were eligible for FMLA leave in 2005. The FMLA applied to approximately 415,000 private business establishments and State and local governments in 2005. See County Business Patterns, 2005, U.S. Census Bureau, http://censtats.census.gov/cgi-bin/cbpnaic/cbpsel.pl; and Census of Governments, Volume 3, Public Employment, Compendium of Public Employment: 2002 at 248-249, http://www.census.gov/prod/2004pubs/gc023x2.pdf. The PRIA data also suggest 7 million employees took FMLA leave in 2005.

A. Employee Notice of Need for FMLA Leave. While employees normally will provide general information regarding their absences, the regulations may impose requirements for workers to provide their employers with more detailed information than might otherwise be the case. The DOL estimates that providing this additional information will take approximately two minutes per employee notice of the need to take FMLA leave. In addition, Westat Report data indicate about 75 percent of FMLA users take leave in a single block, 15 percent take leave in two blocks, and 10 percent take leave in more than two blocks. See 2000 Westat Report at 2-3, http://www.dol.gov/esa/whd/fmla/fmla/chapter2.pdf. The DOL, consequently, estimates FMLA leave takers, on a per capita basis, annually provide 1.5 notices of the need for FMLA leave. In addition, the PRIA estimates some employees who are not eligible for FMLA protections will make some 2,200,000 requests for FMLA leave.

(7,000,000 FMLA covered employee respondents x 1.5 valid responses [i.e., notices to employers]) + 2,200,000 ineligible FMLA requests = 12,700,000 total responses

12,700,000 total responses x 2 minutes/60 minutes per hour = 423,333 hours

B. Notice to Employee of FMLA Eligibility. The DOL estimates that each written notice to an employee of FMLA eligibility, rights, and responsibilities takes approximately ten minutes. Consistent with the estimates for the number of notices employees provide, the DOL estimates that employers will provide 12,700,000 FMLA eligibility notices to employees. Employers may use optional Form WH-381 to satisfy this requirement.

12,700,000 total responses x 10 minutes/60 minutes per hour = 2,116,667 hours

C. Medical Certification and Recertification. The DOL estimates 81.5 percent of employees taking FMLA leave do so because of their own serious health condition or that of a

family member. See 2000 Westat Report at 2-5, http://www.dol.gov/esa/whd/fmla/fmla/chapter2.pdf. The DOL also estimates 92 percent of these employees provide medical certifications. See 2000 Westat Report at A-2-51. Additionally, the DOL estimates that second or third opinions and/or recertifications add 15 percent to the total number of certifications and that employees spend an average of 20 minutes in obtaining the certifications. Employers may have employees use optional Form WH-380 to satisfy this requirement.

7,000,000 employees taking FMLA leave x 81.5% rate for serious health condition x 92% asked to provide initial medical certifications = 5,248,600 employee respondents

5,248,600 employee respondents x 1.15 responses = 6,035,890 total responses

6,035,890 total responses x 20 minutes/60 minutes per hour = 2,011,963 hours

The DOL associates no paperwork burden with the portion of this information collection employers complete, since—even absent the FMLA—similar information would customarily appear in their internal instructions requesting a medical certification or recertification. The DOL accounts for health care provider burdens to complete these certifications as a "maintenance and operation" cost burden, discussed later.

D. Notice to Employees of FMLA Designation. The DOL estimates that each written FMLA designation notice takes approximately ten minutes and that there are 10,500,000 FMLA leaves taken each year. Employers can designate FMLA leave at the same time they provide the eligibility notice about 25 percent of the time, based on the number of instances where employers request a medical certification. According to a 2005 WorldatWork survey, 28.6 percent of absences result from either chronic or permanent/long term conditions. (See FMLA Perspectives

and Practices: Survey of WorldatWork Members, April 2005, WorldatWork, Figure 9a, p. 8.) Assuming that this applies to FMLA leave takers, the DOL estimates that the notices will have to be sent to about 2,000,000 workers (i.e., 28.6% of 7 million) taking FMLA for either chronic or permanent/long term conditions. For purposes of estimating the paperwork burden, the DOL assumes that for workers with chronic conditions (either temporary or permanent) ten additional notices will have to be provided each year to each of these employees.

7,875,000 initial notices + 20,000,000 additional notices = 27,875,000 total responses

27,875,000 total responses x 10 minutes/60 minutes per hour = 4,645,833 hours

E. Fitness-for-Duty Medical Certification. The DOL estimates that 367,000 employees will each have to provide one fitness for duty certification and 44,000 employees will each have to provide three such certifications, for a total of 499,000 certifications provided by 411,000 employees and that each fitness for duty certification will require ten minutes of the employee's time.

499,000 responses x 10 minutes/60 minutes per hour = 83,167 hours

The DOL accounts for health care provider burdens to complete these certifications as a "maintenance and operation" cost burden, discussed later.

F. Notice to Employees of Change of 12-Month Period for Determining FMLA Entitlement. The DOL estimates that annually 10 percent of FMLA covered employers choose to change their 12-month period for determining FMLA eligibility and must notify employees of the change, requiring approximately 10 minutes per change.

415,000 covered employers x 10% response rate = 41,500 respondents

41,500 respondents x 10 minutes/60 minutes = 6917 hours

G. Key Employee Notification. The "key employee" status notification to an employee is part of the employee eligibility notice; accordingly, the DOL associates no additional burden for the initial notification. The DOL estimates that annually 10 percent of employers notify one employee of the intent not to restore the employee at the conclusion of FMLA leave. In addition, the DOL estimates half of these cases will require the employer to issue a second notice from the employer to address a key employee's subsequent request for reinstatement. Finally, the DOL estimates each key employee notification takes approximately 5 minutes. The DOL associates no paperwork burden with the employee requests, since these employees would ordinarily ask for reinstatement even if the rule were not to exist.

415,000 covered employers x 10% response rate = 41,500 employer respondents

41,500 employer respondents x 1.5 responses = 62,250 total responses

62,250 total responses x 5 minutes/60 minutes = 5188 hours

H. Periodic Employee Status Reports. The DOL estimates employers require periodic reports from 25 percent of FMLA leave users (based on the percentage of FMLA leave takers with absences lasting more than 30 days). See 2000 Westat Report at A-2-29, http://www.dol.gov/esa/whd/fmla/fmla/appendixa-2.pdf. The DOL also estimates a typical employee would normally respond to an employer's request for a status report; however, to account for any additional burden the regulations might impose, the DOL estimates a 10 percent response rate and a burden of two minutes per response. The DOL also estimates that each such respondent annually provides two periodic status reports. While the DOL believes most employers would only seek these reports in accordance with customary business practices, the agency has accounted for any potential additional employer burden in the "Eligibility Notice."

7,000,000 FMLA leave takers x 25% rate of employer requests x 10% regulatory burden = 175,000 employee respondents

175,000 employee respondents x 2 responses = 350,000 total responses

350,000 total responses x 2 minutes/60 minutes per hour = 11,667 hours

I. Notice to Employee of Pending Cancellation of Health Benefits. The DOL estimates the regulations require employers send notifications of not having received health insurance premiums to 2% of leave takers, based on the number of employees indicating they have lost benefits. For purposes of estimating the paperwork burden associated with this information collection, the DOL expects that unique respondents would send all responses. See 2000 Westat Report at 4-4, http://www.dol.gov/esa/whd/fmla/fmla/chapter4.pdf. The DOL also estimates each notification will take 5 minutes.

7,000,000 FMLA leave takers x 2% rate notification = 140,000 respondents and responses

140,000 responses x 5 minutes/60 minutes per hour = 11,667 hours

J. Documenting Family Relationships. The DOL estimates 50% of FMLA leave takers do so for "family" related reasons, such as caring for a newborn or recently adopted child or a qualifying family member with a serious health condition. See 2000 Westat Report at 2-5, http://www.dol.gov/esa/whd/fmla/fmla/chapter2.pdf. The DOL also estimates employers require additional documentation to support a family relationship in 5 percent of these cases, and the additional documentation requires 20 minutes.

7,000,000 employees taking FMLA leave x 50% rate for family leave x 5% response rate = 175,000 employee respondents

175,000 x 20 minutes/60 minutes per hour = 58,333 hours

K. General Recordkeeping. The DOL estimates the FMLA imposes an additional general recordkeeping burden on each employer that equals 1.25 minutes for each notation of an employee absence.

10,500,000 total records x 1.25 minutes/60 minutes per hour = 218,750 hours

L. Military Family Leave. This "paperwork burden" analysis estimates the burdens for the proposed regulations as drafted. The Department anticipates issuing, after full consideration of the comments received in response to the Proposed Rule, final regulations that will include necessary revisions to the currently proposed FMLA information burden estimates to account for the military family leave provisions of H.R. 4986.

GRAND TOTAL ANNUAL BURDEN HOURS = 9,593,485 HOURS

Persons responding to the various FMLA information collections 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 September 2007 of $17.62 plus 40 percent for fringe benefits to estimate respondent costs. See The Employment Situation, November 2007, at DOL, Bureau of Labor Statistics (BLS) (http://www.bls.gov/news.release/archives/empsit_12072007.pdf). The DOL estimates total annual respondent costs for the value of their time to be $236,652,088 ($17.62 x 1.4 x 9,593,485 hours).

Other Respondent Cost Burdens (Maintenance and Operation): Employees seeking FMLA leave for a serious health condition must obtain, upon their employer's request, a certification of the serious health condition from a health care provider. Often the heath care

provider's office staff completes the form for the provider's signature. In other cases, the health care provider personally completes it. While most health care providers do not charge for completing these certifications, some do. The DOL estimates completion of Form WH-380 to take about 20 minutes and a fitness-for-duty certification to require 10 minutes; thus, the time would equal the respondent's time in obtaining the certification. The DOL has used the 2005 average hourly wage rate for a physician's assistant of $36.49 plus 40 percent in fringe benefits to compute a $17.03 cost for Form WH-380 ($51.09 x 20 minutes/60 minutes per hour) and $8.52 cost for fitness-for-duty certifications ($51.09 x 10 minutes/60 minutes per hour) See National Compensation Survey 2005, DOL, BLS.

The DOL also attributes an average $1.00 cost for each documentation of a family relationship to cover notary costs when an employee does not have other documentation available.

6,035,890 total medical certifications x $17.03 cost per certification =	$102,791,207
499,000 fitness-for-duty certifications x $8.52 cost per certification =	$4,251,480
+ 175,000 documentations of family relationship x $1.00 each =	$175,000
Total Maintenance and Operations Cost Burden for Respondents	$107,217,687

Federal Costs: The Federal costs that the DOL associates with this information collection relate to printing/duplicating and mailing the subject forms. The DOL also estimates it will annually provide an average of one copy of each form covered by this information collection to each FMLA-covered employer, and that the agency will mail all forms simultaneously to any given requestor. The DOL further estimates information technology costs will offset some of the

printing and duplicating costs in an equal amount; therefore, the agency is presenting only the costs of the latter:

415,000 WH-380s (Certification of Health Care Provider) x 4 pages = 1,660,000 pages

415,000 WH-381s (Notice to Employee of FMLA Eligibility) x 2 pages = 830,000 pages

415,000 WH-382s (Notice to Employee of FMLA Designation) x 1 page = 415,000 pages

Total Forms = 1,245,000, Total pages = 2,905,000

2,905,000 pages x $0.03 printing costs =	$87,150
1,245,000 forms x $0.03 envelopes =	$37,350
1,245,000 forms x $0.41 postage =	$510,450
Total Estimated Annual Federal Costs =	$634,950

Displaying OMB Expiration Date: The DOL will display the expiration dates for OMB clearances on the DOL forms cleared under this information collection.