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

1. Circumstances Necessitating Collection: The Family and Medical Leave Act of 1993 (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). 29 U.S.C. § 2612(a). In addition, the National Defense Authorization Act for FY 2008 amended the FMLA to provide for new military family leave entitlements that provide additional job-protected leave rights to eligible employees who provides care for certain injured servicemembers or because of any qualifying exigency (as determined by Department of Labor Regulations) arising out of the fact that covered family members are on active duty or have been notified of an impending call or order to active duty in the Armed Forces in support of a contingency operation. Pub. L. No. 110-181, 585(a)(s)-(3)(D). The Secretary of Labor is to prescribe such regulations as necessary to enforce the FMLA. 29 U.S.C. § 2654.

   A. Employee's Notice of Need for FMLA Leave [29 U.S.C. § 2612(e); 29 C.F.R. §§ 825.100(d), -.301(b), -.302, -.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 (1) an expected birth, placement for adoption or foster care, (2) planned medical treatment for a serious health condition of the employee or of a qualifying family member, or to care for a qualifying servicemember who is undergoing medical treatment, recuperation, or therapy, is otherwise in outpatient status, or is otherwise on the temporary disability retired list, for a serious injury or illness incurred by the member in the line of duty while on active duty in the Armed Forces that may render the servicemember medically unfit to perform the duties of the servicemember's office, grade, rank, or rating. 29 U.S.C. § 2612(e); 29 C.F.R.§§ 825.100(d), -.301(b), 302. 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. 29 U.S.C. § 2612(e); 29 C.F.R.§ 825.302(b), .- 303(a). If the need for leave results from a qualifying exigency because the spouse, or a son, daughter, or parent, of the employee is on active duty, or due to the notification of an impending call or order to active duty in support of a contingency operation, the employee must give notice as soon as is reasonable and practicable under the facts and circumstances of the particular case. 29 U.S.C. § 2612(e); 29 C.F.R. § 825.302.

An employee giving notice of the need for FMLA leave does not need to expressly assert rights under the Act or even mention the FMLA to meet the 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 the regulations. 29 C.F.R. § 825.301(b). The employee must provide at least verbal notice sufficient to make the employer aware that the employee needs FMLA-qualifying leave, including the reason for the leave and the anticipated timing and duration of the leave. *Id*. §§ 825.301(b), -.302(c), -.303. When an employee seeks leave for the first time for a FMLA-qualifying reason, the employee need not expressly assert rights under the FMLA or even mention the FMLA. *Id*. §§ 825.302(c), -303(b). When an employee seeks leave due to a FMLA-qualifying reason, for which the employer has previously provided FMLA-protected leave, the employee must specifically reference the qualifying reason for leave or the need for FMLA leave. *Id*. An employee has an obligation to respond to an employer's questions designed to determine whether an absence is potentially FMLA-qualifying. *Id*. An employer, generally, may require an employee to comply with its usual and customary notice and procedural requirements for requesting leave. *Id*. §§ 825.302(d), -.303(c).

B. Notice to Employee of FMLA Eligibility and Rights and Responsibilities [29 C.F.R. § 825.300(b), (c)]. When an employee requests FMLA leave, or when the employer acquires knowledge that an employee's leave may be for an FMLA-qualifying reason, the employer must notify the employee within five business days absent extenuating circumstances of the employee's eligibility to take FMLA leave. *Id*. § 825.300(b)(1). The eligibility notice must state whether the employee is eligible for FMLA leave. *Id*. § 825.300(b)(2). If the employee is not eligible for FMLA leave, the notice must state at least one reason why the employee is not eligible. If, at the time an employee provides notice of a subsequent need for FMLA leave during the leave year due to a different FMLA-qualifying reason, the employee's eligibility status has not changed, no additional eligibility notice is required. *Id*. § 825.300(b)(3). If, however, the employee's eligibility status has changed, the employer must notify the employee of the change in eligibility status within five business days, absent extenuating circumstances. *Id*.

Employers must also provide written notice detailing the specific expectations and obligations of the employee and explaining any consequences of a failure to meet these obligations. *Id*. § 825.300(c). This notice must be provided to the employee each time the eligibility notice is provided. If leave has already begun, the notice should be mailed to the employee's address of record. *Id*. 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 and the employer's 12-month period for FMLA entitlement; (ii) any requirements for the employee to furnish medical certification of a serious health condition and the consequences of failing to do so; (iii) the employee's right to substitute paid leave, whether the employer 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; (iv) any requirement for the employee to make any premium payments to maintain health benefits and the arrangements for making such payments, and the possible consequences of a 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 job restoration may be denied following FMLA leave, explaining the conditions required for such denial; (F) the employee's rights to maintenance of benefits during the FMLA leave and restoration to the same or an equivalent job upon return from FMLA leave; and (vi) the employee's potential liability for payment of health insurance premiums paid by the employer during the employee's unpaid FMLA leave if the employee fails to return to work after taking FMLA leave. *Id*. The notice of rights and responsibilities may include other information—*e.g.*, whether the employer will require periodic reports of the employee's status and intent to return to work. *Id*. § 825.300(c)(2). If the specific information provided by the notice of rights and responsibilities changes, the employer must, 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. *Id*. § 825.300(c)(4). For example, if the initial leave period was paid leave and the subsequent leave period would be unpaid leave, the employer may need to give notice of the arrangements for making premium payments. Employers are also expected responsively to answer questions from employees concerning their rights and responsibilities under the FMLA. *Id*. § 825.300(c)(5).

C. Employee Certifications–Serious Health Condition Certification, Recertification, and Fitness-for-Duty Certification; Documenting Call to Military Active Duty; Certification of Qualifying Exigency Due to Call to Military Active Duty; Covered Servicemember's Serious Injury or Illness Certification [29 U.S.C. §§ 2613, 2614; 29 C.F.R. §§ 825.100(d), -.213(a)(3), -.216(b), -.305—.310, -.312].

(1) *Serious Health Condition Certification, Including Recertification and Fitness-For Duty Certification:* An employer may require that an employee's leave to care for the employee's covered family member with a serious health condition or qualifying servicemember with a serious injury or illness or due to the employee's own serious health condition that makes the employee unable to perform one or more of the essential functions of the employee's position, be supported by a certification issued by the health care provider of the employee or the employee's family member. 29 U.S.C. §§ 2613, 2614(c)(3); 29 C.F.R. §§ 825.100(d), -.305(a), -.306(e). In circumstances when the employee or a family member is visiting in another country, or a family member resides in another country, and a serious health condition develops, the employer must accept a medical certification as well as second and third opinions from a health care provider who practices in that country. *Id*. § 825.306(f). Where a certification by a foreign health care provider is in a language other than English, the employee must provide the employer with a written translation of the certification upon request. *Id*.

When leave is taken because of an employee's own serious health condition, or the serious health condition of a family member, an employer may require an employee to obtain a medical certification from a health care provider that sets forth the following information:

(a) The name, address, telephone number, and fax number of the health care provider and type of medical practice, including pertinent specialization. 29 C.F.R. § 825.306(a)(1)

(b) The approximate date on which the serious health condition commenced, and its probable duration. 29 U.S.C. § 2613(b)(1), (2); 29 C.F.R. § 825.306(a)(2).

(c) A statement or description of appropriate medical facts regarding the patient's health condition for which FMLA leave is requested. 29 U.S.C. § 2613(b)(3); 29 C.F.R. § 825.306(a)(3). The medical facts must be sufficient to support the need for leave. *Id*. Such medical facts may include information on symptoms, diagnosis, hospitalization, doctor visits, whether medication has been prescribed, any referrals for evaluation or treatment (physical therapy, for example), or any other regimen of continuing treatment. *Id*.

(d) If the employee is the patient, information sufficient to establish that the employee cannot perform the essential functions of the employee's job as well as the nature of any other work restrictions and the likely duration of such inability. 29 U.S.C. § 2613(b)(4)(B); 29 C.F.R. § 825.306(a)(4).

(e) If the patient is a covered family member with a serious health condition, information sufficient to establish that the family member is in need of FMLA protected care and an estimate of the frequency and duration of the leave required to care for the family member. 29 U.S.C. § 2613(b)(4)(A); 29 C.F.R. § 825.306(a)(5).

(f) If an employee requests leave on an intermittent or reduced schedule basis for planned medical treatment of the employee's or a covered family member's serious health condition, information sufficient to establish the medical necessity for such intermittent or reduced schedule leave and an estimate of the dates and duration of such treatments and any periods of recovery. 20 U.S.C. § 2613(b)(5); 29 C.F.R. § 825.306(a)(6).

(g) If an employee requests leave on an intermittent or reduced schedule basis for the employee's serious health condition, including pregnancy, that may result in unforeseeable episodes of incapacity, information sufficient to establish the medical necessity for such intermittent or reduced schedule leave and an estimate of the frequency and duration of the episodes of incapacity. 29 U.S.C. § 2613(b)(6); 29 C.F.R. § 825.306(a)(7); and

(h) If an employee requests leave on an intermittent or reduced schedule basis to care for a covered family member with a serious health condition, a statement that such leave is medically necessary to care for the family member and an estimate of the frequency and duration of the required leave. 29 U.S.C. § 2613(b)(7); 29 C.F.R. § 825.306(a)(8).

The employee must provide a complete and sufficient medical certification to the employer within 15 calendar days after the employer's request, unless it is not practicable under the particular circumstances to do so despite the employee's diligent, good faith efforts or the employer provides more than 15 calendar days to return the requested certification. 29 C.F.R. §§ § 825.300(c), -.305(b). A certification is considered incomplete if the employer receives a certification, but one or more of the applicable entries have not been completed. *Id*. § 825.305(b). A certification is considered insufficient if the employer receives a complete certification, but the information provided is vague, ambiguous, or non-responsive. *Id*. The employer must provide the employee with seven calendar days (unless not practicable under the particular circumstances despite the employee's diligent good faith efforts) to cure any such deficiency. *Id*. A certification that is not returned to the employer is not considered incomplete or insufficient, but constitutes a failure to provide certification. *Id*. The employee bears the cost of the initial medical certification.

If an employee is on FMLA leave running concurrently with a workers' compensation absence and the provisions of the workers' compensation statute permit the employer or the employer's representative to request additional information from the employee's workers' compensation health care provider, the FMLA does not prevent the employer from following the workers' compensation provisions and information received under those provisions may be considered in determining the employee's entitlement to FMLA-protected leave. *Id*. § 825.306(c). Similarly, an employer may request additional information in accordance with a paid leave policy or disability plan that requires greater information to qualify for payments or benefits, if the employer informs the employee that the additional information only needs to be provided in connection with receipt of such payments or benefits. *Id*. Any information received pursuant to such policy or plan may be considered in determining the employee's entitlement to FMLA-protected leave. *Id*. If the employee fails to provide the information required for receipt of such payments or benefits, the employee's entitlement to take unpaid FMLA leave will not be affected. *Id*. If an employee's serious health condition may also be a disability within the meaning of the Americans with Disabilities Act (ADA), the FMLA does not prevent the employer from following the procedures for requesting medical information under the ADA. *Id*. § 825.306(d). Any information received pursuant to these procedures may be considered in determining the employee's entitlement to FMLA-protected leave. *Id*. While an employee may choose to comply with the certification requirement by providing the employer with an authorization, release, or waiver allowing the employer to communicate directly with the health

care provider of the employee or his or her covered family member, the employee may not be required to provide such an authorization, release, or waiver. *Id*. § 825.306(e).

The employer is entitled to authenticate and clarify the certification 29 C.F.R. §§ 825.307(a)-(c), -.308. Specifically, 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. *Id*. § 825.307(a). To make such contact, the employer must use a health care provider, a human resources professional, a leave administrator, or a management official. *Id*. Under no circumstances, however, may the employee's direct supervisor contact the employee's health care provider. *Id*. "Authentication" means providing the health care provider with a copy of the certification and requesting verification that the information contained on the certification form was completed and/or authorized by the health care provider who signed the document; no additional medical information may be requested and the employee's permission is not required. *Id*. "Clarification" means contacting the health care provider to understand the handwriting on the medical certification or to understand the meaning of a response. *Id*. Employers may not ask health care providers for additional information beyond that required by the certification form. *Id*. Contact between the employer and the employee's health care provider for purposes of clarification must comply with the requirements of the Health Insurance Portability and Accountability Act ("HIPAA") Privacy Rule (*see* 45 C.F.R. parts 160 and 164). *Id*. It is the employee's responsibility to provide the employer with a complete and sufficient certification or to provide the health care provider with sufficient authorization from the employee or the employee's family member to clarify the certification so that it is complete and sufficient. *Id*.

An employer who has reason to doubt the validity of a medical certification may require the employee to obtain a second opinion at the employer's expense. 29 U.S.C. § 2613(c), (d); 29 C.F.R. § 825.307(b), (c), (e). The employee or the employee's family member must authorize his or her health care provider to release all relevant medical information pertaining to the serious health condition at issue if requested by the health care provider designated to provide a second opinion in order to render a sufficient and complete second opinion. 29 C.F.R. § 825.307(b)(1). If the opinions of the employee's and the employer's designated health care providers differ, the employer may require the employee to obtain certification from a third health care provider, again at the employer's expense. *Id*. § 825.307(c). This third opinion is final and binding. *Id*. The third health care provider must be designated or approved jointly by the employer and the employee. *Id*. The employer and the employee must each act in good faith to attempt to reach agreement on whom to select for the third opinion provider. *Id*. If the employer does not attempt in good faith to reach agreement, the employer will be bound by the first certification. *Id*. If the employee does not attempt in good faith to reach agreement, the employee will be bound by the second

certification. *Id*. In addition, the employee or the employee's family member must authorize his or her health care provider to release all relevant medical information pertaining to the serious health condition at issue if requested by the health care provider designated to provide a third opinion in order to render a sufficient and complete third opinion. *Id*. The employer is required to provide the employee with a copy of the second and third medical opinions, where applicable, upon request by the employee. *Id*. § 825.307(d). Requested copies are to be provided within five business days unless extenuating circumstances prevent such action. *Id*.

An employer may require an employee to provide periodic recertification from a health care provider of the serious health condition requiring FMLA-protected leave. 29 U.S.C. § 2613(e). Generally, an employer may request recertification no more often than every 30 days and only in connection with an absence by the employee. 29 C.F.R. § 825.308(a). If the medical certification indicates that the minimum duration of the condition is more than 30 days, an employer must wait until that minimum duration expires before requesting a recertification, unless paragraph (c) of this section applies. *Id*. § 825.308(b). For example, if the medical certification states that an employee will be unable to work, whether continuously or on an intermittent basis, for 40 days, the employer must wait 40 days before requesting a recertification. *Id*. In all cases, an employer may request a recertification of a medical condition every six months in connection with an absence by the employee. *Id*. Accordingly, even if the medical certification indicates that the employee will need intermittent or reduced schedule leave for a period in excess of six months (*e.g.*, for a lifetime condition), the employer would be permitted to request recertification every six months in connection with an absence. *Id*. An employer may request recertification in less than 30 days if:

(a) The employee requests an extension of leave. *Id*. § 825.308(c)(1).

(b) Circumstances described by the previous certification have changed significantly (*e.g.*, the duration or frequency of the absence, the nature or severity of the illness, complications). *Id*. § 825.308(c)(2). For example, if a medical certification stated that an employee would need leave for one to two days when the employee suffered a migraine headache and the employee's absences for his/her last two migraines lasted four days each, then the increased duration of absence might constitute a significant change in circumstances allowing the employer to request a recertification in less than 30 days. *Id*. Likewise, if an employee had a pattern of using unscheduled FMLA leave for migraines in conjunction with his/her scheduled days off, then the timing of the absences also might constitute a significant change in circumstances sufficient for an employer to request a recertification more frequently than every 30 days. *Id*.; or

(c) The employer receives information that casts doubt upon the employee's stated reason for the absence or the continuing validity of the certification. *Id*.

§ 825.308(c)(3). For example, if an employee is on FMLA leave for four weeks due to the employee's knee surgery, including recuperation, and the employee plays in company softball league games during the employee's third week of FMLA leave, such information might be sufficient to cast doubt upon the continuing validity of the certification allowing the employer to request a recertification in less than 30 days. *Id*.

The employee must provide the requested recertification to the employer within the time frame requested by the employer (which must allow at least 15 calendar days after the employer's request), unless it is not practicable under the particular circumstances to do so despite the employee's diligent, good faith efforts. *Id*. § 825.308(d). The employer may ask for the same information when obtaining recertification as that permitted for the original certification. *Id*. § 825.308(e). The employee has the same obligations to participate and cooperate (including providing a complete and sufficient certification or adequate authorization to the health care provider) in the recertification process as in the initial certification process. *Id*. As part of the information allowed to be obtained on recertification for leave taken because of one's own serious health condition, a family member's serious health condition, the employer may provide the health care provider with a record of the employee's absence pattern and ask the health care provider if the serious health condition and need for leave is consistent with such a pattern. *Id*. Any recertification requested by the employer is at the employee's expense, unless the employer provides otherwise. *Id*. § 825.308(f). No second or third opinion on recertification may be required. *Id*.

Pursuant to a uniformly applied policy, the employer may require an employee to present a certification of fitness to return to work when the absence was caused by the employee's serious health condition. 29 U.S.C. § 2614(a)(4); 29 C.F.R. §§ 825.100(d), -.312(a). The employee has the same obligations to participate and cooperate (including providing a complete and sufficient certification or providing sufficient authorization to the health care provider to provide the information directly to the employer) in the fitness-for-duty certification process as in the initial certification process. *Id*. § 825.312(a). An employer may seek a fitness-for-duty certification only with regard to the particular health condition that caused the employee's need for FMLA leave. *Id*. § 825.312(b). The certification from the employee's health care provider must certify that the employee is able to resume work. *Id*. Additionally, an employer may require that the certification specifically address the employee's ability to perform the essential functions of the employee's job. *Id*. The employer may contact the employee's health care provider for purposes of clarifying and authenticating the fitness-for-duty certification. *Id*., s*ee also Id*. § 825.307(a). Clarification may be requested only for the serious health condition for which FMLA leave was taken. *Id*. An employer is not entitled to a certification of fitness to return to duty for each absence taken on an intermittent or reduced leave schedule; however, an employer is entitled to a certification of fitness to return to duty for such absences up to once every 30 days if reasonable safety concerns exist regarding the

employee's ability to perform his or her duties, based on the serious health condition for which the employee took such leave. *Id*. § 825.312(f). If an employer chooses to require a fitness-for-duty certification under such circumstances, the employee will be required to submit a fitness-for-duty certification unless one has already been submitted within the past 30-days. *Id*. Alternatively, an employer can set a different interval for requiring a fitness-for-duty certification as long as it does not exceed once every 30 days and as long as the employer advises the employee of the requirement in advance of the employee taking the intermittent or reduced schedule leave. *Id*. If State or local law or the terms of a collective bargaining agreement govern an employee's return to work, those provisions are applied to the fitness for duty certification requirement. *Id*. § 825.312(g).

When an employee fails to return to work because of the continuation, recurrence, or onset of a serious health condition, thereby precluding the employer from recovering its (share of) health benefit premium payments made on the employee's behalf during a period of unpaid FMLA leave, the employer may require medical certification of the employee's or the family member's serious health condition. 29 U.S.C. § 2614(c)(3); 29 C.F.R. § 825.213(a)(3). The employee is required to provide medical certification, at the employee's expense, within 30 days from the date of the employer's request. 29 C.F.R. § 825.213(a)(3).

(2) *Documenting Call to Military Active Duty:* The first time an employee requests leave because of a qualifying exigency arising out of a particular active duty or call to active duty order of a covered family member, an employer may require an employee to provide a copy of the covered family member's active duty orders or other documentation issued by the military which indicates that the covered family member is on active duty or call to active duty status in support of a contingency operation, and the dates of the covered family member's active duty service. *Id*. § 825.309(a). This information need only be provided to the employer once. *Id*. A copy of new active duty orders or other documentation issued by the military must be provided to the employer if the need for leave because of a qualifying exigency arises out of a different active duty or call to active duty order of the same or a different covered family member. *Id*.

An employer may contact an appropriate unit of the Department of Defense to request verification that a covered military member has been called to active duty status (or notified of an impending call to active duty status) in support of a contingency operation; no additional information may be requested and the employee's permission is not required. *Id*.

(3) *Certification of Covered Qualifying Exigency:* Each time leave is first taken for one of the qualifying exigencies specified in the regulations, an employer may require an employee to provide a certification that sets forth the following information:

(a) A statement or description, signed by the employee, of appropriate facts regarding the qualifying exigency for which FMLA leave is requested. The facts must be sufficient to support the need for leave. *Id*. § 825.309(b)(1). Such facts should include information on the type of qualifying exigency for which leave is requested and any available written documentation which supports the request for leave; such documentation, for example, may include a copy of a meeting announcement for informational briefings sponsored by the military, a document confirming an appointment with a counselor or school official, or a copy of a bill for services for the handling of legal or financial affairs. *Id*.

(b) The approximate date on which the qualifying exigency commenced or will commence. *Id*. § 825.309(b)(2).

(c) If an employee requests leave because of a qualifying exigency for a single, continuous period of time, the beginning and end dates for such absence. *Id*. § 825.309(b)(3).

(d) If an employee requests leave because of a qualifying exigency on an intermittent or reduced schedule basis, an estimate of the frequency and duration of the qualifying exigency. *Id*. § 825.309(b)(4). And

(e) If the qualifying exigency involves meeting with a third party, appropriate contact information for the individual or entity with whom the employee is meeting (such as the name, title, organization, address, telephone number, fax number, and e-mail address) and a brief description of the purpose of the meeting. *Id*. § 825.309(b)(5).

If an employee submits a complete and sufficient certification to support the request for leave because of a qualifying exigency, the employer may not request additional information from the employee. *Id*. § 825.309(d). However, if the qualifying exigency involves meeting with a third party, the employer may contact the individual or entity with whom the employee is meeting for purposes of verifying a meeting or appointment schedule and the nature of the meeting between the employee and the specified individual or entity. *Id*. The employee's permission is not required in order to verify meetings or appointments with third parties, but no additional information may be requested by the employer. *Id*.

(4) *Covered Servicemember's Serious Injury or Illness Certification:* When leave is taken to care for a covered servicemember with a serious injury or illness, an employer may require an employee to obtain a certification completed by an authorized health care provider of the covered servicemember. 29 U.S.C. § 2613; 29 C.F.R. § 825.310(a). If the authorized health care provider is unable to make certain military-related determinations outlined below, the authorized health care provider may rely on determinations from an authorized Department of Defense

(DOD) representative. 29 C.F.R. § 825.310(b). An employer may request that the health care provider provide the following information:

(a) The name, address, and appropriate contact information (telephone number, fax number, and/or email address) of the health care provider, the type of medical practice, the medical specialty, and whether the health care provider is one of the following: (a) a DOD health care provider; (b) a VA health care provider; (c) a DOD TRICARE network authorized private health care provider; or (d) a DOD non-network TRICARE authorized private health care provider. 29 C.F.R. § 825.310(b)(1).

(b) Whether the covered servicemember's injury or illness was incurred in the line of duty on active duty. *Id*. § 825.310(b)(2).

(c) The approximate date on which the serious injury or illness commenced, and its probable duration. *Id*. § 825.310(b)(3).

(d) A statement or description of appropriate medical facts regarding the covered servicemember's health condition for which FMLA leave is requested. *Id*. § 825.310(b)(4). The medical facts must be sufficient to support the need for leave. *Id*. Such medical facts must include information on whether the injury or illness may render the covered servicemember medically unfit to perform the duties of the servicemember's office, grade, rank, or rating and whether the member is receiving medical treatment, recuperation, or therapy. *Id*.

(e) Information sufficient to establish that the covered servicemember is in need of care, and whether the covered servicemember will need care for a single continuous period of time, including any time for treatment and recovery, and an estimate as to the beginning and ending dates for this period of time. *Id*. § 825.310(b)(5).

(f) If an employee requests leave on an intermittent or reduced schedule basis for planned medical treatment appointments for the covered servicemember, whether there is a medical necessity for the covered servicemember to have such periodic care and an estimate of the treatment schedule of such appointments. *Id*. § 825.310(b)(6).

(g) If an employee requests leave on an intermittent or reduced schedule basis to care for a covered servicemember for other than scheduled follow-up treatment appointments, whether there is a medical necessity for the covered servicemember to have such periodic care, which can include assisting in the covered servicemember's recovery, and an estimate of the frequency and duration of the periodic care. *Id*. § 825.310(b)(7).

In addition, an employer may also request that such certification set forth the following information provided by an employee and/or covered servicemember:

(a) The name and address of the employer of the employee requesting leave to care for a covered servicemember, the name of the employee requesting such leave, and the name of the covered servicemember for whom the employee is requesting leave to care. *Id*. § 825.310(c)(1).

(b) The relationship of the employee to the covered servicemember for whom the employee is requesting leave to care. *Id*. § 825.310(c)(2).

(c) Whether the covered servicemember is a current member of the Armed Forces, the National Guard or Reserves, and the covered servicemember's military branch, rank and current unit assignment. *Id*. § 825.310(c)(3).

(d) Whether the covered servicemember is assigned to a military medical facility as an outpatient or to a unit established for the purpose of providing command and control of members of the Armed Forces receiving medical care as outpatients (such as a medical hold or warrior transition unit), and the name of the medical treatment facility or unit. *Id*. § 825.310(c)(4).

(e) Whether the covered servicemember is on the temporary disability retired list. *Id*. § 825.310(c)(5).

(f) A description of the care to be provided to the covered servicemember and an estimate of the leave needed to provide the care. *Id*. § 825.310(c)(6).

An employer may seek authentication and/or clarification of an employee's submitted certification. *Id*. § 825.310(d). However, second and third opinions under are not permitted for leave to care for a covered servicemember. *Id*. Additionally, recertifications are not permitted for leave to care for a covered servicemember. *Id*. An employer requiring an employee to submit a certification for leave to care for a covered servicemember, must accept as sufficient certification "invitational travel orders" ("ITOs") or "invitational travel authorizations" ("ITAs") issued to any family member to join an injured or ill servicemember at his or her bedside. *Id*. § 825.310(e). An ITO or ITA is sufficient certification for the duration of time specified in the ITO or ITA. *Id*. An eligible employee who provides an ITO or ITA to support his or her request for leave may not be required to provide any additional or separate certification that leave taken on an intermittent basis during the period of time specified in the ITO or ITA is medically necessary. *Id*. An ITO or ITA is sufficient certification for an employee entitled to take FMLA leave to care for a covered servicemember regardless of whether the employee is named in the order or authorization. If an employee will need leave to care for a covered servicemember beyond the expiration date specified in an ITO or ITA, an employer may request that the employee have an authorized health care provider complete the certification, as requisite certification for the remainder of the employee's necessary leave period. *Id*. § 825.310(e)(1). An employer may seek authentication and clarification of the ITO or ITA. *Id*. § 825.310(e)(2). An employer may not utilize the second or third

opinion process or the recertification process during the period of time in which leave is supported by an ITO or ITA. *Id*. In all instances in which certification is requested, it is the employee's responsibility to provide the employer with complete and sufficient certification and failure to do so may result in the denial of FMLA leave. *Id*. § 825.310(f).

D. Notice to Employees of FMLA Designation [29 C.F.R. §§ 825.127(c)(4), -.300(d), -.301, -.305(c), -312]. The employer 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. *Id*. §§ 825.300(d)(1), -.301(a). When the employer has enough information to determine whether the leave is being taken for an FMLA-qualifying reason, the employer must notify the employee within five business days absent extenuating circumstances whether the leave will be designated and will be counted as FMLA leave. *Id*. Only one notice of designation is required for each FMLA-qualifying reason per FMLA leave year, 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 employer determines that the leave will not be designated as FMLA-qualifying, the employer must notify the employee of that determination. *Id*. If the employer 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 employer must inform the employee of this designation at the time of designating the FMLA leave. *Id*. If the employer will require the employee to present a fitness-for-duty certification to be restored to employment, the employer must provide notice of such requirement no later than with the designation notice. *Id*. § 825.312(d), (f), . If the employer will require that the fitness-for-duty certification address the employee's ability to perform the essential functions of the employee's position, the employer must so indicate in the designation notice, and must include a list of the essential functions of the employee's position. *Id*. §§ 825.300(c)(3), -.312(d). If the employer handbook or other written documents (if any) describing the employer'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 employer 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. *Id*. §§ 825.300(c)(3), -.312(f). The designation notice must be in writing. *Id*. § 825.300(d)(4). If the leave is not designated as FMLA leave because it does not meet the requirements of the Act, the notice to the employee that the leave is not designated as FMLA leave may be in the form of a simple written statement. *Id*. If the information provided by the employer to the employee in the designation notice changes, the employer must 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. *Id*. § 825.300(d)(5). The employer must notify the employee of the amount of leave counted against the employee's FMLA leave entitlement. *Id*. § 525.300(d)(6). If the amount of leave needed is known at the time the employer

designates the leave as FMLA-qualifying, the employer 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. *Id*. 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 employer must provide notice of the amount of leave counted against the employee's FMLA 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. *Id*. The notice of the amount of leave counted against the employee's FMLA entitlement may be oral or in writing. *Id*. If such notice is oral, it must 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). *Id*. Such written notice may be in any form, including a notation on the employee's pay stub. *Id*.

If an employer cannot designate leave because of an incomplete or insufficient medical certification, the employer must advise an employee whenever the employer finds a certification incomplete or insufficient, and the employer must state in writing what additional information is necessary to make the certification complete and sufficient. *Id*. § 825.305(c). The employer must provide the employee with seven calendar days (unless not practicable under the particular circumstances despite the employee's diligent good faith efforts) to cure any such deficiency. *Id*.

E. Notice to Employees of Change of 12-Month Period for Determining FMLA Entitlement [29 C.F.R. § 825.200(d)(1), (e)]. 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. *Id*. § 825.200(b). An employer wishing to change to another alternative is required to give at least 60 days' notice to all employees. *Id*. § 825.200(d)(1), (e).

F. Key Employee Notification [29 U.S.C. § 2614(b)(1)(B); 29 C.F.R. §§ 825.219, -.300(c)(1)(v)]. An employer who believes that reinstatement may be denied 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. *Id*. §§ 825.219(a), -.300(c)(1)(v). 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 will result if the employee is reinstated from FMLA leave. *Id*. If such notice cannot be given immediately because of the need to determine whether the employee is a key employee, it must be given as soon as practicable after being notified of a need for leave (or the commencement of leave, if earlier). *Id*. However, an employer who fails to provide such timely notice loses its right to deny restoration even if substantial and grievous economic injury will result from reinstatement. *Id*. 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 it cannot deny FMLA leave, and that it intends to deny restoration to employment on completion of the FMLA leave. *Id*. § 825.219(b). The employer must serve this notice either in person or by certified mail. *Id*. 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. *Id*. After notice to an employee has been given that substantial and grievous economic injury will result if the employee is reinstated to employment, an employee is still entitled to 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 unless the employer determines there will be substantial and grievous economic injury from reinstatement, based on the facts at that time. *Id*. § 825.219(d). If it is determined that substantial and grievous economic injury will result, the employer must notify the employee in writing (in person or by certified mail) of the denial of restoration. *Id*.

G. Periodic Employee Status Reports [29 U.S.C. § 2614(a)(5); 29 C.F.R. § 825.311]. An employer may require an employee on FMLA leave to report periodically on the employee's status and intent to return to work. 29 U.S.C. § 2614(a)(5); 29 C.F.R. § 825.311(a). The employer's policy regarding such reports may not be discriminatory and must take into account all of the relevant facts and circumstances related to the individual employee's leave situation. 29 C.F.R. § 825.311(a). It may be necessary for an employee to take a different amount leave than originally anticipated. *Id*. § 825.311(c). The employer may require that the employee provide the employer reasonable notice (*i.e.*, within two business days) of the changed circumstances where foreseeable. *Id*. The employer may also obtain information on such changed circumstances through requested status reports. *Id*.

H. Notice to Employee of Pending Cancellation of Health Benefits [29 C.F.R. § 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. *Id*. § 825.212(a)(1). 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. *Id*. 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. *Id*.

I. Documenting Family Relationship, Including Servicemember's Designation of Next of Kin [29 C.F.R. §§ 825.122(d), (j), -.127(b)(3), -.310(d), (e)(3)].

(1) *Family Relationships:* An employer may require an employee giving notice of the need for leave to provide reasonable documentation or statement of family relationship when FMLA leave is requested because of a family member. *Id*. §§ 825.122(j), -.310(d). This documentation may take the form of a simple statement from the employee, or a child's birth certificate, a court document, *etc*. *Id*. § 825.122(j). 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. *Id*.

(2) *Servicemember's "Next of Kin" Designation:* The "next of kin of a covered servicemember" is the nearest blood relative other than the servicemember's spouse, parent, son, or daughter, in the following order of priority: blood relatives who have been granted legal custody of the servicemember by court decree or statutory provisions, brothers or sisters, grandparents, aunts or uncles, and first cousins, unless the servicemember has specifically designated in writing another blood relative as his or her nearest blood relative for purposes of military caregiver leave under the FMLA. *Id*. §§ 825.122(d), -.127(b)(3). When such designation has been made, the designated individual is deemed to be the servicemember's only "next of kin." *Id*.

J. General FMLA Recordkeeping [29 U.S.C. § 2616; 29 C.F.R. § 825.500]. The FMLA requires covered employers to 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. 29 U.S.C. § 2616(b); 29 C.F.R. § 825.500(a). This statutory authority provides that no employer or plan, fund, or program can 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. 29 U.S.C. § 2616(c); 29 C.F.R. § 825.500(c).

No particular order or form of records is required. 29 C.F.R. § 825.500(b). The FMLA regulations establish no requirement that any employer revise its computerized payroll or personnel records systems to comply. *Id*. However, employers must keep the records specified by these regulations for no less than three years and make them available for inspection, copying, and transcription by representatives of the Department of Labor upon request. *Id*. The records may be maintained and preserved on microfilm or other basic source document of an automated data processing memory provided that adequate projection or viewing equipment is available, that the reproductions are clear and identifiable by date or pay period, and that extensions or transcriptions of the information required herein can be and are made available upon request. *Id*. Records kept in computer form must be made available for transcription or copying. *Id*. Covered employers who have eligible employees must maintain records that must disclose the following:

(1) 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. *Id*. § 825.500(c)(1).

(2) Dates FMLA leave is taken by FMLA eligible employees (*e.g.*, available from time records, requests for leave, *etc*., if so designated). *Id*. § 825.500(c)(2). 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. *Id*.

(3) If FMLA leave is taken by eligible employees in increments of less than one full day, the hours of the leave. *Id*. § 825.500(c)(3).

(4) Copies of employee notices of leave furnished to the employer under FMLA, if in writing, and copies of all written notices given to employees as required under FMLA and these regulations and sections referring to military leave notices). *Id*. § 825.500(c)(4). Copies may be maintained in employee personnel files. *Id*.

(5) Any documents (including written and electronic records) describing employee benefits or employer policies and practices regarding the taking of paid and unpaid leaves. *Id*. § 825.500(c)(6).

(6) Premium payments of employee benefits. *Id*. § 825.500(c)(6).

(7) 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. *Id*. § 825.500(c)(7).

Covered employers with no eligible employees must maintain the records set forth in paragraph (c)(1) of this section. *Id*. § 825.500(d).

Covered employers in a joint employment situation must keep all the required records with respect to any primary employees. *Id*. § 825.500(e). Joint employers must also keep 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 with respect to any secondary employees. *Id*.

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 *Id*. § 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. *Id*. § 825.500(f)(1). 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 week and reduce their agreement to a written record that is maintained in accordance with the regulations. *Id.* § 825.500(f)(2).

Employers must maintain records and documents relating to certifications, recertifications, or medical histories of employees or employees' family members, created for FMLA purposes, as confidential medical records in separate files/records from the usual personnel files, and if the ADA is also applicable, such records must be maintained in conformance with ADA confidentiality requirements (*see* 29 C.F.R. § 1630.14(c)(1)), except that:

(1) Supervisors and managers may be informed regarding necessary restrictions on the work or duties of an employee and necessary accommodations. *Id.* § 825.500(g)(1).

(2) First aid and safety personnel may be informed (when appropriate) if the employee's physical or medical condition might require emergency treatment. *Id.* § 825.500(g)(2). And

(3) Government officials investigating compliance with FMLA (or other pertinent law) must be provided relevant information upon request, *Id.* § 825.500(g)(3).

The FLSA recordkeeping requirements, contained in Regulations 29 C.F.R. part 516, are currently approved under 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.

2. Purpose and Use: With the exception of the general recordkeeping requirements, the FMLA information collections are all third-party disclosures. 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 the FMLA. Non-compliance with the disclosures on the part of employees may result in their losing FMLA protections. Employer non-compliance with the third-party disclosures to employees may result in a determination that the employer has unlawfully interfered with or restrained an employee's exercise of FMLA rights, and subject the employer to civil action. 29 U.S.C. §§ 2615(a), 2617. The recordkeeping requirements allow employers to demonstrate their compliance with FMLA requirements, and the Wage and Hour Division uses the records for this purpose.

The WHD has created optional use Forms WH-380-E, WH-380-F, WH-381, WH-382, WH-384, and WH-385 to assist employees and employers in meeting their FMLA third-party notification obligations. Forms WH-380-E and WH-380-F allow 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, recertification, fitness for duty certification, or certification that they cannot) from the health care provider. *See* 29 C.F.R. 825 §§ .306-.307. Employees use Form-380-E for their own family serious health condition and WH-380-F for their qualifying family members. 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), .301(a). Form WH-384 may be used to certify a qualifying exigency related to military service amendments to the FMLA, and Form WH-385 is used to certify a serious illness or injury under the NDAA amendments to the FMLA. 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 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.

3. Information Technology: The regulations prescribe no particular order or form of records. *See* § .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.

4. Minimizing Duplication: The FMLA third-party disclosures do not duplicate other existing federal information collections. Parallel information provides under state laws affording FMLA-like protections can be used to satisfy the federal requirements. 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 that are cleared under OMB Control Number 1215-0017. 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.

5. Small Entities: 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 and giving the text employers must use, in accordance with FMLA section 109 (29 U.S.C. § 2619), in providing a general notice to employees of their FMLA rights and responsibilities.

6. Agency Need: The DOL is assigned a statutory responsibility to ensure employer compliance with the FMLA. The DOL uses records covered by this 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, employers and employees would have difficulty knowing their FMLA rights and obligations.

7. 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. Item 1 discusses the details of when employers and employees 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) must be provided relevant information upon request.

8. Public Comments: On February 11, 2008, the DOL published a Notice of Proposed Rulemaking in the *Federal Register* that invited public comment about the FMLA

paperwork requirements and other issues. The DOL received no substantive comments that affected the methodology for estimating the paperwork burden imposed by the FMLA information collections; however, many comments addressed the substantive information collection requirements that have been considered. In order to facilitate a full understanding of all the issues involved, the public comments addressing FMLA information collections are discussed in the applicable portions of the preamble to the final rule.

9. Payments or Gifts: The DOL makes no payments or gifts to respondents completing these information collections.

10. Confidentiality: The DOL makes no assurances of confidentiality to respondents. Much of the information covered by this information collection consists of third-party disclosures. As explained in Item 1-J, 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 C.F.R. part 70, and the Privacy Act, 5 U.S.C. § 552a, and its attendant regulations 29 C.F.R. part 71.

11. Sensitive Questions: The FMLA authorizes employers to require their employees to submit a medical certification, including a second or third opinion and subsequent recertifications, to substantiate the need for FMLA leave. These records may contain sensitive information, because of the personal and delicate nature of a request for FMLA leave; however, as noted in Item 1-J, the regulations specify how employers must limit access to such information.

12. Burden Hours Estimates: Except as otherwise noted, the DOL bases the following burden estimates on the Paperwork Reduction Act supporting statement or the Preliminary Regulatory Impact Analysis, 73 Fed. Reg. 7940, related to the February 11, 2008, FMLA NPRM (73 Fed. Reg. 7876) that did not change as a result of the final rule published on November 17, 2008 (73 Fed. Reg. 67934). The DOL estimates the FMLA covers 95.8 million workers. The DOL estimates 285,237 employers, of which 211,170 are private businesses and 74,067 are governmental entities, respond to the FMLA information collections. 73 Fed. Reg. 7943. For PRA purposes, 74,000 employers are assumed to be state, local, and tribal governmental entities and 67 are assumed Federal entities. The DOL assumes a proportional response burden between the employer entities (74.033172415 percent private, 25.94333834 percent state, local and tribal governments, and 0.02348951 percent Federal). The DOL also estimates that 12.7 million employees will request to take an average of 1.5 leaves each for "traditional" FMLA purposes (*i.e.*, leave because of a serious health condition or due to the birth or adoption of a child); however, the DOL estimates that only 7,139,100 employees seeking traditional FMLA

leave will actually be both eligible for FMLA and request it for a truly qualifying purpose. The FMLA regulations require employers to respond to all FMLA requests, in order to bring closure to the requests, even when the leave does not qualify for FMLA protection; thus, the DOL claims a burden for the employer responses to some 5,563,900 employees requesting FMLA that will be denied. The DOL assumes half of these invalid requests will be because the leave requestor is not an eligible employee and the other half of the denials will be because the basis for the leave itself is not for a qualifying reason. In addition, 110,000 employees will take an average of 13 leaves each for qualifying exigencies under the NDAA amendments to the FMLA, and 29,100 employees will take an average of 44 FMLA leaves to care for a qualifying servicemember. Within each information collection the total respondents, total responses, and total burden estimates are rounded to the nearest whole number.

A. Employee's 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/chapter2.pdf.

Category	Respondents	x	Response Rate	Total Responses
Traditional FMLA	7,139,100	x	1.5	10,708,650
Qualifying Exigency	110,000	x	13	1,430,000
Servicemember Care	29,100 (Duplicated)	x	44	1,280,400
Unduplicated Totals	7,249,100			13,419,050

Per capita number of responses = 1.85113324 (13,419,050/7,249,100)

13,419,050 total responses x 2 minutes = 447,302 hours

B. Notice to Employee of FMLA Eligibility and Rights & Responsibilities.

The DOL believes all covered employers with eligible employees will need to notify their employees of their FMLA eligibility. To provide finality to all FMLA leave requests, the notice must be provided to all FMLA leave requestors, even those who do not qualify for leave. The DOL estimates that each notice to an employee of FMLA eligibility, rights, and responsibilities takes approximately 10 to 30 minutes, depending on whether the employee is found eligible for FMLA leave. The DOL assumes, for purposes of this estimate, that 2,781,950 employees will each make average of 1.5 leave requests (total 4,172,925) will receive responses that they are not

eligible for FMLA, and those responses each take 10 minutes. The DOL estimates all other responses (including 13,419,050 for eligible employees who take qualifying leave and 4,172,925 responses to eligible employees who seek FMLA protections for non-FMLA purposes) take 30 minutes, because of the mandatory disclosure of employee rights and responsibilities.

Category	Total Responses	x	Response Time	Hours Burden
Not Eligible	4,172,925	x	10 minutes	695,488
Eligible	17,591,975	x	30 minutes	8,795,988
Unduplicated Totals	21,764,900			9,491,476

The DOL has further refined the response burden as follows:
Per capita responses = 76.304616862 (21,764,900 responses/285,237 respondents)
Per capita average response time = 26.165457227 minutes (21,764,900 responses/9,491,476 hours)

Burden Disaggregation

Sector	Responses	x	Response Time	=	Hours Burden
Private (74.03317215 %)	16,113,246	x	26.165457227 minutes	=	7,026,841
State, local, tribal (25.943338 %)	5,646,542	x	26.165457227 minutes	=	2,462,406
Federal (0.02348951 %)	5112	x	26.165457227 minutes	=	2229
Unduplicated Totals	21,764,900	x	26.165457227 minutes	=	9,491,476

C. Employee Certifications–Serious Health Condition Certification, Recertification, and Fitness-for-Duty Certification; Documenting Call to Military Active Duty; Certification of Qualifying Exigency Due to Call to Military Active Duty; Covered Servicemember's Serious Injury or Illness Certification.

The DOL estimates 81.5 percent of traditional FMLA leave is because of a serious health condition. *See 2000 Westat Report* at 2-5, http://www.dol.gov/esa/whd/fmla/chapter2.pdf. This includes 52.4 percent for employee's serious health conditions. *Id*. The DOL also estimates employers require employees to provide medical certifications in 92 percent of traditional leave cases for a serious health condition. *See 2000 Westat Report* at A-2-51. http://www.dol.gov/esa/whd/fmla/appendixa-2.pdf. Additionally, the DOL estimates that second or third opinions and/or recertifications add 15 percent (apportioned for PRA purposes as 10 percent recertifications and five percent second/third opinions) to the total number of certifications. The DOL also estimates ten percent of employees taking FMLA leave for their own serious health condition must submit one fitness-for-duty duty certification and five percent of intermittent leave users will be asked to present an average of three such certifications because of reasonable safety concerns. 73 Fed. Reg. 7952. Consistent with the pattern for requesting medical certifications, the DOL assumes employers will require certifications for 92 percent of the leaves employees take for either qualifying exigencies or caring for a covered servicemember under the NDAA amendments to the FMLA. Finally, the DOL

estimates employees spend an average of 20 minutes in obtaining and providing the certifications, with the exception of providing the call to military active duty. The DOL estimates documenting calls to active duty will take 10 minutes.

Respondents

7,139,100 traditional FMLA leave takers x .815 response rate for serious condition x 0.92 response request rate =	5,352,897
110,000 Military-FMLA leave takers x 0.92 response request rate =	101,200
Total	5,454,097

Responses

10,708,650 eligible "traditional" leave requests x 0.815 serious health condition rate x 0.92 initial certification request rate =	8,029,346
8,029,346 initial certifications x 0.15 second/third/recertification rate =	1,204,402
5,611,333 initial certifications (employee's own condition) x 0.10 non-intermittent fitness-for-duty certification request rate =	561,133
5,611,333 initial certifications (employee's own condition) x 0.05 intermittent fitness-for duty response request rate x 3 frequency rate =	841,700
110,000 calls to active duty x 0.92 response rate =	101,200
1,430,000 qualifying exigency leave request rates x 0.92 response rate =	1,315,600
29,100 care for qualifying servicemember leave requests x 0.92 response request rate =	26,772
Total	12,080,153

Per capita number of responses = 1.6664348678 (12,080,153 responses/5,454,097 respondents)

Burden Hours

Type	Responses	x	Response Time =	Hours
Call to active duty documentation	101,200	x	10 minutes =	16,867
All other certifications	11,978,953	x	20 minutes =	3,992,984
Total	12,080,153			4,009,851

Per capita average response time = 19.9162262266 minutes (12,080,153 responses/4,009,851 hours).

Generally, the DOL associates no paperwork burden with the portion of this information collection applicable to employers, since—even absent the FMLA—similar information would customarily appear in their internal instructions requesting a medical certification or recertification. In addition, employers only seek second or third opinions are permissive under the statute; thus, employers seek them only when to do so makes prudent business sense. The burden for employer recordkeeping requirements for the certifications is subsumed in the general FMLA recordkeeping

estimate. The DOL accounts for health care provider burdens to complete medical certifications as a "maintenance and operation" cost burden, discussed later and it is apportioned to employees.

D. Notice to Employees of FMLA Designation.

The DOL estimates that all covered employers with eligible employees will need to provide notify their employees whether leave has been designated as FMLA-protected. The DOL estimates that each written FMLA designation notice takes approximately 10-30 minutes to prepare, depending on whether the employer must notify the employee in writing of any additional information needed to provide a complete and sufficient certification or explain why the leave does not qualify. While the employer must state that leave does not qualify in writing, the explanation of why may be oral. The DOL further estimates employers will have to explain why leave does not qualify in 4,172,925 instances (same number as employees found not to be eligible) and take 20 minutes. The DOL further estimates that about 13,210,400 qualifying leaves will take minutes. Finally, the DOL estimates 3,302,600 (25 percent of qualifying leaves) leave requests will require additional information and require the employer to complete an addition designation notice that will take 30 minutes in order to explain what additional information is needed.

Category	Total Responses	x	Response Time	Hours Burden
Designated	9,907,800	x	10	1,651,300
Not designated	4,172,925	x	20	1,390,975
Additional information needed	3,302,600	x	30	1,651,300
Total	17,383,325			4,693,575

Per capita responses = 60.943444 (17,383,325 responses/285,237 respondents)
Per capita response time = 16.20026663 minutes (17,383,325 responses/4,693,575 hours).

Burden Disaggregation

Sector	Responses	x	Response Time =	Hours Burden
Private (74.03317215 %)	12,869,427	x	16.200267 min. =	3,474,803
State, local, tribal (25.94333834 %)	4,509,815	x	16.200267 min. =	1,217,670
Federal (0.02348951 %)	4083	x	16.200267 min. =	1102
Unduplicated Totals	17,383,325	x	16.200267 min.	4,693,575

E. 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. The DOL also assumes these employers also employ ten percent of the 95.8 million workers covered by the FMLA. These notifications can be

accomplished via email or posting and require about approximately 10 minutes for the employer's entire workforce.

285,237 covered employers x 10% response rate = 28,524 respondents
95.8 covered employees x 10% = 9,580,000 responses.
Per capita responses = 335.857523489 (9,580,000/28,634)
Per capita response time = 1.79336117 seconds

Total Responses	x	Response Time	Hours Burden
9,580,000	x	1.79336117	4772

Burden Disaggregation

Sector	Respondents	Responses x	Response Time =	Hours Burden
Private (74.03317215 %)	21,117	7,092,303 x	1.79336117 sec. =	3533
State, local, tribal (25.943338 %)	7400	2,485,346 x	1.79336117 sec. =	1238
Federal (0.02348951 %)	7	2351 x	1.79336117 sec. =	1
Unduplicated Totals	28,524	9,580,000 x	1.79336117 sec. =	4772

F. Key Employee Notification.

The "key employee" status notification to an employee is part of the employee eligibility notice; accordingly, that notice includes the 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.

285,237 covered employers x 10 % response rate = 28,524 respondents
28,524 respondents x 1.5 responses = 42,786 responses (Due to rounding, one additional response appears in the burden disaggregation chart)
42,786 responses x 5 minutes = 3566 hours

Burden Disaggregation

Sector	Respondents	Responses x	Response Time =	Hours Burden
Private (74.03317215 %)	21,117	31,676 x	5 min. =	2640
State, local, tribal (25.943338 %)	7400	11,100 x	5 min. =	925
Federal (0.02348951 %)	7	11 x	5 min. =	1
Unduplicated Totals	28,524	42,787 x	5 min. =	3566

G. Periodic Employee Status Reports. The DOL estimates employers require periodic reports from 25.5 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/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."

Traditional FMLA 7,249,100 FMLA leave takers x 0.255 employer request rate x 10% regulatory burden = 184,852 respondents.

184,852 respondents x 2 responses = 369,704 responses

369,704 total responses x 2 minutes = 12,323 hours

H. Notice to Employee of Pending Cancellation of Health Benefits. Based on the number of employees indicating they have lost benefits, the DOL estimates half of FMLA covered employers are each send one FMLA leave taker a notification of not having received health insurance premiums. *See 2000 Westat* Report at 4-4, http://www.dol.gov/esa/whd/fmla/chapter4.pdf . For purposes of estimating the paperwork burden associated with this information collection, the DOL estimates that unique respondents would send all responses, and each notification will take 5 minutes.

Burden Disaggregation

Sector	Respondents/Responses	x	Response Time =	Hours Burden
Private (74.03317215 %)	105,585	x	5 min. =	8799
State, local, tribal (25.9433384 %)	37,000	x	5 min. =	3083
Federal (0.02348951 %)	34	x	5 min. =	3
Unduplicated Totals	144,982	x	5 min. =	12,082

I. Documenting Family Relationships. The DOL estimates 50 percent of traditional 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/chapter2.pdf. All leave takers for the NDAA amendments to the FMLA will do so for family members The DOL also estimates employers require additional documentation to support a family relationship in 5 percent of these cases (2.5 percent for traditional FMLA and 5 percent for military FMLA leave users), and the additional documentation requires 5 minutes.

Category	Leave Takers	x	Response Rate	Respondents
Traditional FMLA	7,139,100	x	.025	178,478
Military FMLA	110,000	x	.050	5500
Totals	7,249,100			183,987

183,987 x 5 minutes = 15332 hours

J. General Recordkeeping. The DOL estimates the FMLA imposes an additional general recordkeeping burden on each FMLA covered employer that equals 1.25 minutes for each FMLA leave; thus, the number of responses equals the number of FMLA leaves.

13,419,050 responses x 1.25 minutes = 279,564 hours
Per capita responses = 47.0452641137 (13,419,050/285,237)

Burden Disaggregation

Sector	Responses	x	Response Time =	Hours Burden
Private (74.03317215 %)	9,934,548	x	1.25 min. =	206,970
State, local, tribal (25.9433384 %)	3,481,350	x	1.25 min. =	72,528
Federal (0.02348951 %)	3152	x	1.25 min. =	66
Unduplicated Totals	13,419,050	x	1.25 min. =	279,564

GRAND TOTAL ANNUAL BURDEN HOURS = 18,969,645 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*, 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 $467,943,203 ($17.62 x 1.4 x 18,969,645 hours).

13 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 the

initial medical certifications and fitness-for-duty certifications ($51.09 x 20 minutes) and $8.52 cost for fitness-for-duty certifications ($51.09 x 10 minutes) *See National Compensation Survey 2005*, DOL, BLS.

8,859,053 (8,029,346 initial medical certifications + 802,935 recertifications + 26,772 servicemember certifications) x $17.03 cost per certification =	$150,869,673
402,833 fitness-for-duty certifications x $8.52 cost per certification =	$11,952,137
Total Maintenance and Operations Cost Burden for Respondents	**$162,821,810**

[$162,821,810 ÷ (8,859,053 + 402,833)] = $17.60 per capita response cost

14. 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 receive 415,000 requests to provide one copy of each form covered by this information collection, and that the agency will mail all forms simultaneously to any given requestor.

415,000 Forms WH-380-E x 4 pages =	1,660,000 pages
415,000 Forms WH-380-F x 4 pages =	1,660,000 pages
415,000 Forms WH-381 x 2 pages =	830,000 pages
415,000 Forms WH-382 x 1 page =	415,000 pages
415,000 Forms WH-384 x 3 pages =	1,0245,000 pages
415,000 Forms WH-385 x 4 pages =	1,660,000 pages

Total Forms = 1,245,000, Total pages = 7,470,000

7,470,000 pages x $0.03 printing costs =	$224,100
415,000 mailings x $1.03 ($0.03 envelopes + $1.00 postage) =	$427,450
Total Estimated Annual Federal Costs =	**$651,550**

15. Changes in Burden: The estimated annual number of responses has increased by 73,326,725 from 15,058,850 to 88,385,575, of which 14,827,012 are statutorily based and the result of the NDAA amendments to the FMLA; 4,669 are based on discretionary programmatic changes reflecting additions to and deletions from specific notification requirements that have resulted from changes to the regulations; and 58,495,044 are based on adjustments, which include, among other things, improved information on the number of respondents subject to the FMLA paperwork requirements, the fact that prior efforts to calculate burden often used aggregate totals per respondent and did not break out each individual third-party disclosure or recordkeeping activity, and a reconsideration of whether certain regulations impose a burden beyond what employees and employers customarily would do in the absence of the regulations. Estimated annual burden time has also increased from 1,370,288 hours to 18,969,645 hours, an increase of 17,599,357 hours, based, in part, on regulatory changes (e.g., 10,502,599 hours), and DOL's departure from prior burden calculations that often used aggregate totals per respondent instead of breaking out each individual third-party disclosure or recordkeeping activity, as done in this submission. The estimated annual cost burden has increased from

$11,915,480 to $162,821,810, due to an increase in maintenance and operations costs of $150,906,330, of which $455,927 are based on statutory changes, and the remaining increase due, in part, to the reasons mentioned above, as well as, increased wage rates and other costs for persons completing the information collections.

The more than 15,000 comments received in response to the FMLA Request for Information and subsequent 4689 comment submissions received on the FMLA NPRM have clarified to the DOL that the FMLA regulations impose significant paperwork burdens on both employers and employees that the agency has not previously fully estimated. For example, prior efforts to quantify the burden considered an employee to provide only a single notification of the need for FMLA leave, consistent with the regulatory language; however, the practical working of the FMLA requires that an employee needing intermittent leave for a chronic serious health condition actually must provide sufficient information to make the employer aware that the employee needs FMLA-qualifying leave for each individual absence. Similarly, while an employee might routinely provide very general information regarding the reason for an absence, the FMLA information collection requires some additional specificity. The absence of this information would preclude an employer from knowing whether the FMLA applies to a particular absence and result in the employee not receiving FMLA protections for it. The DOL previously also believed that the simple statement used to document family relationships or copy of a birth certificate, among other possible documents, required under the original regulations imposed no PRA burden; however, the rulemaking process has caused the DOL to reevaluate this position. In addition, the DOL previously counted certain notifications (*e.g.* employers' notifying employees of a change in the FMLA 12-month period, or all FMLA recordkeeping activities) as a single notice/ recordkeeping action, instead of individual notifications/notations being made to/on each individual employee.

As noted above in Item 8, the DOL received no substantive comments affecting the methodology for estimating the paperwork burden imposed by the FMLA information collections; however, many comments addressed the substantive information collection requirements that have been considered. Although the public comments addressing FMLA information collections are discussed in detail in the applicable portions of the preamble to the final rule, we will discuss major issues here. The public comments made clear that both employees and employers need additional information from each other in order to balance the right of employees to take protected leave with employer's needs. The final rule contains a number of discretionary changes to the FMLA information collections to meet the needs of both groups. To help employer's understand when an employee may be entitled to FMLA protections, the final regulatory changes require employees to provide additional clarifying information when requesting FMLA leave; consequently the DOL has increased the per response estimate for this information collection from one minute to two minutes. Likewise, while most employers might customarily notify an employee that a particular absence counts against a specific leave category (*e.g.*, sick or vacation leave) the FMLA regulations require notice to the employee that the leave will also count against the employee's annual 12-week FMLA leave entitlement and employers must track these individual absences as counting against

the legal entitlement in their records. The final FMLA rule also adds a requirement for the employer to notify the employee of the reasons why the employee is not eligible or that the employee has no FMLA leave available.

Additionally, the final rule provides that under certain circumstances employers may require an employee using intermittent FMLA leave to provide a fitness for duty medical certification under circumstances where such a certification may not be required under the existing rules. Similarly, the final rule clarifies the frequency with which employers may request recertification of a serious health condition and reduce burden for many chronic and long-term conditions.

The final regulation also replaces a provision that employers provide a general FMLA notice or use the FMLA fact sheet for inclusion in employee handbooks with a requirement to provide the text of the FMLA poster to all employees at establishments where the employer has FMLA eligible employees. This change will result in an elimination of all PRA burden for the disclosure, as the government now provides the text of the information. Much of the detailed information employees received in these previous notices will now be provided in the rights and responsibilities notices; however, the general information is enhanced in order to provide better information to employees.

16. Publication: This information collection does not entail information that the DOL will publish.

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

18. Certification Requirements: The DOL does not seek an exception to the OMB certification requirements.