SUPPORTING STATEMENT
THE FAMILY AND MEDICAL LEAVE ACT OF 1993
REGULATIONS, 29 C.F.R. PART 825
OMB CONTROL NO. 1235-0003

1. Circumstances Necessitating Collection: The Family and Medical Leave Act of 1993 (FMLA), 29 U.S.C. § 2601, et seq., requires private sector employers who employ 50 or more employees, all public and private elementary schools, and all 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; because of a serious health condition that makes the employee unable to perform the functions of the employee's job; to address qualifying exigencies arising out of the deployment of the employee's spouse, son, daughter, or parent to covered active duty in the military), and up to 26 workweeks of unpaid, job protected leave during a single 12-month period to care for a covered servicemember with a serious injury or illness who is the spouse, son, daughter, parent, or next of kin to the employee. FMLA section 404 requires the Secretary of Labor to prescribe such regulations as necessary to enforce this Act. 29 U.S.C. § 2654. In addition, the National Defense Authorization Act for FY 2010 amended the FMLA to expand qualifying exigency leave to employee-family members of the Regular Armed Forces. Pub. L. 111-84. The FMLA was also amended by the Airline Flight Crew Technical Corrections Act, which amended the hours of service eligibility requirement for airline flight crew members. Pub. L. 111-19.

WHD Publication 1420 allows employers to satisfy the general notice requirement. See § 825.300(a).

A. Employee Notice of Need for FMLA Leave [29 U.S.C. § 2612(e); 29 CFR §§ 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 an expected birth, placement for adoption or foster care, or planned medical treatment for a serious health condition of the employee or of a family member or planned medical treatment for a serious injury or illness of a covered servicemember. If 30 days notice is not practicable, such as because of a lack of knowledge of approximately when leave will be required to begin, a change in circumstances, or a medical emergency, notice must be given as soon as practicable under the facts and circumstances of the particular case. When an employee seeks leave for the first time for an FMLA-qualifying reason, the employee need not expressly assert rights under the FMLA or even mention the FMLA. The employee must, however, provide sufficient information that indicates that leave is potentially FMLA-qualifying and the timing and anticipated duration of the absence. Such information may include that a condition renders the employee unable to perform the functions of the job, or if the leave is to care for a family member, that the condition renders the family member unable to perform daily activities or, that the family

member is a covered servicemember with a serious injury or illness, and whether the employee or the employee's family member is under the continuing care of a health care provider. Sufficient information for leave due to a qualifying family member's call (or impending call) to active duty status may include that the military member is on or has been called to covered active duty and that the requested leave is for one of the categories of qualify exigency leave. An employer, generally, may require an employee to comply with its usual and customary notice and procedural requirements for requesting leave.

B. Notice to Employee of FMLA Eligibility and Rights and Responsibilities Notice [29 CFR §§ 825.219 -.300(b)]. When an employee requests FMLA leave or when the employer acquires knowledge that an employee's leave may be for an FMLA-qualifying reason, the employer must notify the employee—within five business days, absent extenuating circumstances—of the employee's eligibility to take FMLA leave and any additional requirements for taking such leave. The eligibility notice must provide information regarding the employee's eligibility for FMLA leave, and, if the employee is determined not to meet the eligibility criteria, provide at least one reason why the employee is not eligible. The rights and responsibilities notice must detail the specific rights and responsibilities of the employee, and explain any consequences of a failure to meet these responsibilities. If an employee provides notice of a subsequent need for FMLA leave during the applicable 12-month period due to a different FMLA-qualifying reason, the employer does not have to provide an additional eligibility notice if the employee's eligibility status has not changed. If the employee's eligibility status has changed, then the employer must notify the employee of the change in eligibility status within five business days, absent extenuating circumstances. The rights and responsibilities notice must be provided to the employee each time the eligibility notice is provided to the employee. Form WH-381 allows an employer to satisfy the regulatory requirement to provide employees with specific information concerning eligibility status and with written notice detailing specific rights as well as expectations and obligations of the employee and explaining any consequences of a failure to meet these obligations. See § 825.300(b) and (c).

C. Employee Certifications – Serious Health Condition of Employee or Employee's Family Member, Recertification, Fitness for Duty, Leave for a Qualifying Exigency, and Leave to Care for a Covered Servicemember.

1. Medical Certification and Recertification [29 U.S.C. §§ 2613, 2614(c)(3); 29 CFR §§ 825.100(d), -.305—.308]. An employer may require that an employee's leave due to the employee's own serious health condition that makes the employee unable to perform one or more essential functions of the employee's position or to care for the employee's spouse, son, daughter, or parent with a serious health condition, be supported by a certification issued by the health care provider of the eligible employee or of the employee's family member. In

addition, an employer may request recertification under certain conditions. The employer must provide the employee at least 15 calendar days to provide the initial certification, and any subsequent recertification, unless the employee is not able to do so despite his or her diligent good faith efforts. An employer must advise an employee whenever it finds a certification incomplete or insufficient and state in writing what additional information is necessary to make the certification complete and sufficient and must provide the employee seven calendar days (unless not practicable under the particular circumstances despite the employee's diligent good faith efforts) to cure any identified deficiency. 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 identified deficiencies. An employer, at its own expense and subject to certain limitations, may also require an employee to obtain a second and third medical opinion. Form WH-380-E allows an employee requesting FMLA leave for his or her own serious health condition to satisfy the statutory requirement to furnish, upon the employer's request, appropriate certification (including a second or third opinion and recertification) to support the need for leave for the employee's own serious health condition. See § 825.305(a). Form WH-380-F allows an employee requesting FMLA leave for a family member's serious health condition to satisfy the statutory requirement to furnish, upon the employer's request, appropriate certification (including a second or third opinion and recertification) to support the need for leave for the family member's serious health condition. See § 825.305(a).

2. Fitness-for-Duty Medical Certification [29 U.S.C. § 2614(a)(4); 29 CFR § 825.312]. As a condition of restoring an employee whose FMLA leave was occasioned by the employee's own serious health condition that made the employee unable to perform the employee's job, an employer may have a uniformly-applied policy or practice that requires all similarly-situated employees (i.e., same occupation, same serious health condition) who take leave for such conditions to obtain and present certification from the employee's health care provider that the employee is able to resume work. The employee has the same obligations to participate and cooperate in providing a complete and sufficient certification to the employer in the fitness-for-duty certification process as in the initial certification process. An employer may require that the fitness-for-duty certification specifically address the employee's essential job functions if the employer has provided the employee with a list of those essential functions and notified the employee of the need for a fitness-for-duty certification in the designation notice. Certain managers for an employer, but not the employee's immediate supervisor, may contact a health care provider for purposes of clarifying and authenticating a fitness-for-duty certification. An employer is not entitled to a fitness-for-duty certification for each absence taken on an intermittent or reduced leave schedule; however, an employee may be required to furnish a

fitness-for-duty certificate no more often than once every 30 days if an employee has used intermittent leave during that period and reasonable safety concerns exist.

3. Certification for Leave for a Qualifying Exigency [29 CFR 825.309]. An employer may require an employee who requests FMLA-leave due to a qualifying exigency to certify the need for leave. In addition, the first time an employee requests leave for a qualifying exigency related to a qualifying family member's active duty status, an employer may require the employee to provide a copy of the military member's active duty orders or other documentation issued by the military that indicates the military member is on covered active duty. Optional form WH-384 allows an employee requesting FMLA leave based on a qualifying exigency to satisfy the statutory requirement to furnish, upon the employer's request, appropriate certification to support leave for a qualifying exigency.

4. Certification for Leave to Care for Covered Servicemember [29 CFR 825.310]. An employee who requests FMLA leave to care for a covered servicemember may be required by his or her employer to certify the need for leave. An employee requesting FMLA leave based on a covered servicemember's serious injury or illness, may satisfy the statutory requirement to furnish, upon the employer's request, a medical certification from an authorized health care provider with optional form WH-385. An employer must accept as sufficient certification of leave to care for a covered servicemember an invitational travel order or invitational travel authorization (ITO or ITA) issued to the employee or to another family member in lieu of optional form WH-385 or the employer's own form.

D. Notice to Employees of FMLA Designation [29 CFR §§ 825.300(c) -.301(a)]. When the employer has enough information to determine whether the leave qualifies as FMLA leave (after receiving a medical certification, for example), the employer must notify the employee within five business days of making such determination whether the leave has or has not been designated as FMLA leave and the number of hours, days or weeks that will be counted against the employee's FMLA leave entitlement. If it is not possible to provide the hours, days or weeks that will be counted against the employee's FMLA leave entitlement (such as in the case of unforeseeable intermittent leave), then such information must be provided upon request by the employee but not more often than once every 30 days if leave is taken during the 30-day period. If the employer requires paid leave to be substituted for unpaid leave, or that paid leave taken under an existing leave plan be counted as FMLA leave, this designation also must be made at the time of the FMLA designation. In addition, if the employer will require the employee to submit a fitness-for-duty certification, the employer must provide notice of the requirement with the designation notice. Form WH-382 allows an employer to meet its obligation to designate leave as FMLA-qualifying. See § 825.300(d).

E. Notice to Employees of Change of 12-Month Period for Determining FMLA Entitlement [29 CFR § 825.200(d)(1)]. An employer generally must choose a single uniform method from four options available under the regulations for determining the 12-month period for FMLA leave reasons other than care of a covered servicemember with a serious injury or illness (which is subject to a set "single 12-month period"). An employer wishing to change to another alternative is required to give at least 60 days notice to all employees.

F. Key Employee Notification [29 U.S.C. § 2614(b)(1)(B); 29 CFR §§ 825.217 -.219 and 825.300(c)(1)(v)]. An employer that believes that it may deny reinstatement to a key employee must give written notice to the employee at the time the employee gives notice of the need for FMLA leave (or when FMLA leave commences, if earlier) that he or she qualifies as a key employee. At the same time, the employer must also fully inform the employee of the potential consequences with respect to reinstatement and maintenance of health benefits if the employer should determine that substantial and grievous economic injury to the employer's operations would result if the employer were to reinstate the employee from FMLA leave. If the employer cannot immediately give such notice, because of the need to determine whether the employee is a key employee, the employer must give the notice as soon as practicable after receiving the employee's notice of a need for leave (or the commencement of leave, if earlier). If an employer fails to provide such timely notice it loses its right to deny restoration, even if substantial and grievous economic injury will result from reinstatement.

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

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

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

H. Notice to Employee of Pending Cancellation of Health Benefits [29 CFR § 825.212(a)]. Unless an employer establishes a policy providing a longer grace period, an employer's obligation to maintain health insurance coverage ceases under FMLA if an employee's premium payment is more than 30 days late. In order to drop the coverage for an employee whose premium payment is late, the employer must provide written notice to the employee that the payment has not been received. Such notice must be mailed to the employee at least 15 days before coverage is to cease and advise the employee that coverage will be dropped on a specified date at least 15 days after the date of the letter unless the payment has been received by that date.

I. Documenting Family Relationship [29 CFR § 825.122(j)]. An employer may require an employee giving notice of the need for FMLA leave to provide reasonable documentation or statement of family relationship. This documentation may take the form of a simple statement from the employee, or a child's birth certificate, a court document, etc. The employer is entitled to examine documentation such as a birth certificate, etc., but the employee is entitled to the return of the official document submitted for this purpose.

J. General FMLA Recordkeeping [29 U.S.C. § 2616; 29 CFR § 825.500]. The FMLA provides that employers shall make, keep, and preserve records pertaining to the FMLA in accordance with the recordkeeping requirements of Fair Labor Standards Act section 11(c), 29 U.S.C. § 211(c), and regulations issued by the Secretary of Labor. This statutory authority provides that no employer or plan, fund, or program shall be required to submit books or records more than once during any 12-month period unless the Department has reasonable cause to believe a violation of the FMLA exists or is investigating a complaint.

Covered employers who have eligible employees must maintain basic payroll and identifying employee data, including name, address, and occupation; rate or basis of pay and terms of compensation; daily and weekly hours worked per pay period; additions to or deductions from wages; total compensation paid; and dates FMLA leave is taken by FMLA eligible employees (available from time records, requests for leave, etc., if so designated). Leave must be designated in records as FMLA leave and leave so designated may not include leave required under State law or an employer plan which is not also covered by FMLA; if FMLA leave is taken by eligible employees in increments of less than one full day, the hours of the leave; copies of employee notices of leave furnished to the employer under FMLA, if in writing, and copies of all eligibility notices given to employees as required under

FMLA and these regulations; any documents (including written and electronic records) describing employee benefits or employer policies and practices regarding the taking of paid and unpaid leaves; premium payments of employee benefits; records of any dispute between the employer and an eligible employee regarding designation of leave as FMLA leave, including any written statement from the employer or employee of the reasons for the designation and for the disagreement.

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

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

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

The FLSA recordkeeping requirements, contained in Regulations 29 CFR part 516, are currently approved under OMB control number 1215-0018; 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: The WHD created optional use forms: WHD Publication 1420, WH-380-E, WH-380-F, WH-381, WH-382, WH-384, and WH-385, to assist employers and employees in meeting their FMLA third-party notification obligations. WHD Publication

1420 allows employers to satisfy the general notice requirement. See § 825.300(a). Form WH-380-E allows an employee requesting FMLA-leave for his or her own serious health condition to satisfy the statutory requirement to furnish, upon the employer's request, appropriate certification (including a second or third opinion and recertification) to support the need for leave for the employee's own serious health condition. See § 825.305(a). Form WH-380-F allows an employee requesting FMLA leave for a family member's serious health condition to satisfy the statutory requirement to furnish, upon the employer's request, appropriate certification (including a second or third opinion and recertification) to support the need for leave for the family member's serious health condition. See § 825.305(a). 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 § 825.300(b) and (c). Form WH-382 allows an employer to meet its obligation to designate leave as FMLA-qualifying. See § 825.301(a). Form WH-384 allows an employee requesting FMLA leave based on a qualifying exigency to satisfy the statutory requirement to furnish, upon the employer's request, appropriate certification to support leave for a qualifying exigency. See § 825.309. Form WH-385 currently allows an employee requesting FMLA leave based on an active duty covered servicemember's serious injury or illness to satisfy the statutory requirement to furnish, upon the employer's request, a medical certification from an authorized health care provider. See § 825.310.

While use of the Department's forms is optional, the regulations require employers and employees to make the third-party disclosures that the forms cover. The FMLA third-party disclosures ensure that both employers and employees are aware of and can exercise their rights and meet their respective obligations under FMLA.

The recordkeeping requirements are necessary in order for the Department 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 § 825.500(b). The preservation of records in such forms as microfilm or automated word or data processing memory is acceptable, provided the employer maintains the information and provides adequate facilities to the Department 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 Department-prepared publications available on the WHD Web site, www.dol.gov/whd. 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 information collections do not duplicate other existing information collections. In order to provide all relevant FMLA information in one set of requirements, the recordkeeping requirements restate a portion of the records employers must maintain under the FLSA. Employers do not need to duplicate the records when basic records maintained to meet FLSA requirements also document FMLA compliance. With the exception of records specifically tracking FMLA leave, the additional records required by the FMLA regulations are records that employers ordinarily maintain in the usual and ordinary course of business. The regulations do impose, however, a three-year minimum time limit that employers must maintain the records. The Department minimizes the FMLA information collection burden by accepting records maintained by employers as a matter of usual or customary business practices, to the extent those records meet FMLA requirements. The Department also accepts records kept due to requirements of other governmental requirements (*e.g.*, records maintained for tax and payroll purposes). The Department 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 Department has further minimized burden by developing prototype notices for many of the third-party disclosures covered by this information collection.

5. Small Entities: This information collection does not have a significant impact on a substantial number of small entities. The Department minimizes the FMLA information collection burden by accepting records maintained by employers as a matter of usual or customary business practices. The Department also accepts records kept due to requirements of other governmental requirements (*e.g.*, records maintained for tax and payroll purposes). The Department 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 Department 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, in addition to the prototype optional use forms.

6. Agency Need: The Department is assigned statutory responsibility to ensure employer compliance with the FMLA. The Department 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. Section 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) shall be provided relevant information upon request.

8. Public Comments: On September 28, 2011, the Department published a notice seeking comments on the burdens imposed by these information collections. 76 FR 60089.

   The Department received several comments in response to the 60-day notice published in the Federal Register. The Department appreciates the time and effort taken by the commenters to submit their feedback. Many of the commenters, including Equal Rights Advocates, the Employment Law Center of the Legal Aid Society in California, the Legal Aid Society of Middle Tennessee and Cumberland, the National Women's Law Center, and the National Partnership for Women and Families, raised concerns that the medical certification forms for the employee's own serious health condition and that of a family member (WH-380-E and WH-380-F), in their current form, ask overbroad, irrelevant, and invasive questions concerning the patient's medical information.

   Equal Rights Advocates, the National Women's Law Center, and the National Partnership for Women and Families also suggested that the Department create a new optional-use model form that combines the current FMLA fact sheet with a form that employees can elect to use to request FMLA leave. Equal Rights Advocates and the National Partnership for Women and Families also suggesting combining each respective medical certification form with the Designation Notice (WH-382). These commenters also suggested that the forms be updated to reflect the expanded provisions of the FMLA pursuant to the 2010 National Defense Authorization Act.

   The Legal Aid Society of Middle Tennessee and Cumberland suggested adjusting the reading level of the optional-use forms so that more employees would be able to read and understand the forms. This commenter also suggested changing the format of the FMLA poster (form 1420) into a question and answer presentation to make it easier to read. Other revisions to the poster to include more information for employees, as well as other

modifications to the language on the Eligibility and Rights and Responsibilities form (form WH-381) were also proposed.

The commenter Vigilant, along with the Legal Aid Society of Middle Tennessee and Cumberland, suggested that the Department modify the language on the Eligibility and Rights and Responsibilities, Designation, and medical certification forms. A commenter from the American Waterworks suggested changes to the optional use forms that would eliminate some of the information that is currently requested on the forms.

The Department believes that implementing the suggested changes identified above would require amending the FMLA regulations. At this time, the Department is not proposing to change the prototype forms, but will consider the commenter's suggestions when it reviews the regulations in the future. Additionally, the Department anticipates that the FMLA employer and employee survey, that it is issuing, will also provide feedback about the utility of the forms, as well as employer and employee concerns. The Department will wait until all this data is gathered to engage in rulemaking concerning the FMLA forms.

The commenter from the American Waterworks also commented that the Department's time estimates are too low – that it takes longer to complete the paperwork, answer employee questions, and have the employee obtain the medical certification. However, the commenter did not offer alternative time estimates. The Department's time estimates only concern the time it takes for the respondent to complete the form. It does not take into account the time spent reviewing the forms, answering employee questions, or the time taken by the employee to obtain the medical certification. Accordingly, the Department will not adjust its time estimates for completing the required forms.

The commenter Vigilant requested that the Department alter the format of the optional use forms so that employers and employees can electronically save the PDF forms with the information entered by the employer. The optional use forms are currently available on the Department's Web site, www.dol.gov/whd in PDF-fillable form. Employers and employees with commercial Adobe Acrobat software can enter data into these forms and save them electronically. The Department will explore possibilities to make this option more widely available to employers and employees. Vigilant also requested that the Department make the optional-use forms available in word processing format so that employers can customize the forms to fit their policies. The optional-use forms are official government forms and may not be altered. Employers are not required to use these forms, but may not request more information than what is permitted by the regulations.

The Family Equality Council submitted a comment requesting that "reasonable documentation or statement of family relationship" be interpreted broadly so that an affidavit from the employee as to the family relationship would be sufficient. Current §

825.122(j) permits an employee to submit a "simple statement" to comply with the employer's requirement that that the family relationship be documented.

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

10. Confidentiality: The Department makes no assurances of confidentiality to respondents. Much of the information covered by this information collection consists of third-party disclosures. As explained in Section 1-M, 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 Department 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 re-certifications, 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 Section 1-M, the regulations specify how employers must limit access to such information.

12. Burden Hours Estimates: Except as otherwise noted, the Department bases the following burden estimates on the Paperwork Reduction Act supporting statement or the Preliminary Regulatory Analysis, 73 FR 7940, related to the February 11, 2008, FMLA NPRM (73 FR 7876) that did not change as a result of the final rule published on November 17, 2008. 73 FR 67934. The Department estimates that the FMLA covers 95.8 million workers. The Department estimates 285,237 employers, of which 211,170 are private businesses and 74,067 are governmental entities, respond to the FMLA information collections. 73 FR 7943. For PRA purposes, 74,000 employers are assumed to be state, local, tribal, governmental entities and 67 are assumed Federal entities. The Department 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). Within each information collection, the respondents, response, and burden estimates are rounded to the nearest whole number.

A. Employee notice of need for FMLA leave. While employees normally will provide general information regarding their absences, the regulations may impose requirements for workers to provide their employers with more detailed information than might otherwise be the case. The Department estimates that providing this additional information will take approximately two minutes per employee notice of the need to take FMLA leave.

The Department estimates that there are 193,000 employees who are newly eligible to take leave for a qualifying exigency under the FY 2010 NDAA.[1] Based on leave usage patterns, 30,900 of these employees will take leave for a qualifying exigency (16 percent of 193,000 employees). Based on the leave patterns estimated by the Department in the 2008 final rule, the Department estimates that there will be 401,700 employee requests for qualifying exigency leave. 73 FR 68051.

The Department also estimates that there are 129,760 flight crew members eligible to take FMLA leave. However, some of these employees may already be entitled to leave similar to FMLA leave, with similar notification requirements, under collective bargaining agreements. Discounting these employees, the Department anticipates, pursuant to AFCTCA, that there are 90,560 airline flight crew employees who are newly entitled to FMLA leave. Of these employees, 5 percent of eligible pilots and 7.9 percent of eligible flight attendants will take FMLA leave, resulting in a total estimate of 5,951 airline flight crew employees who will take FMLA leave. The Department also anticipates that each of these employees will provide his or her employer with 1.5 notices of need for FMLA leave, totaling 8,930 employee requests for FMLA leave.

New burden: 410,630 responses (employee notices of leave) x 2 minutes/60 minutes per hour = 13,688 hours.

Existing employee notification requirements unaffected by this NPRM already impose an estimated burden of 13,419,050 responses and 447,302 hours.

Total burden for this requirement is estimated to be 13,829,680 responses and 460,990 hours.

B. Notice to employee of FMLA eligibility and rights and responsibilities. The Department believes all covered employers with eligible employees will notify their employees of their FMLA leave eligibility. The Department estimates that each written notice to an employee of FMLA eligibility and notice of rights and responsibilities takes approximately ten minutes. The number of eligibility and rights and responsibilities notices that employers must provide is equal to the number of leave takers.[2] The Department estimates that employers will

[1] Provisions of the FY 2010 NDAA expanding qualifying exigency leave to cover qualifying exigencies arising from the foreign deployment of a family member in the Regular Armed Forces became effective on the date of enactment, October 29, 2009. The number of employees eligible to take FMLA leave has increased as a result, which the Department estimates to be 30,900.

[2] Based on the leave patterns for qualifying exigency leave, the Department is assuming that all subsequent leave requests will be for the same servicemember for whom the leave was originally requested. The employee is required to notify the employer in each instance of the need for leave. But the employer is not required to provide the employee with a notice of eligibility or rights and responsibilities notice each time the employee requests the leave unless the employee's eligibility status changes. For qualifying exigency leave, 30,900 leave takers will provide 401,700 employer notices of their need for leave. However, employers will only have to issue 30,900 eligibility notices and rights and responsibilities notices.

However, for the eligible employees who are airline flight crew members, the Department is assuming that each of the employees' 1.5 employer notices of the need for leave are for different FMLA-qualifying reasons, and therefore employers will need to provide a notice of eligibility and a notice of rights and responsibilities for each

provide 39,830 FMLA eligibility and rights and responsibilities notices to employees for employee-family members of members of the Regular Armed Forces and newly eligible airline flight crew employees. Employers may use optional Form WH-381 to satisfy this requirement.

New burden: 39,830 total responses (notices of eligibility and rights and responsibilities) x 10 minutes/60 minutes per hour = 6,638 hours

Burden Disaggregation by Sector

Private (74.03317215%): 29,487 responses x 10 minutes/60 minutes = 4,914 hours
State, local, tribal (25.943338%): 10,333 responses x 10 minutes/60 minutes = 1,722 hours
Federal (0.02348951%): 9 responses x 10 minutes/60 minutes = 2 hours

Total burden for employee notice of eligibility and rights and responsibilities by sector:

Private: 16,142,733 responses and 7,031,755 hours
State, local, tribal: 5,656,875 responses and 2,464,128 hours
Federal: 5,121 responses and 2,231 hours

Total burden for employee notice of eligibility and rights and responsibilites is estimated to be 21,804,729 responses and 9,498,114 hours.

C. Employee Certifications

1. Medical certification and recertification. The Department estimates that 90 percent of airline flight crew employees who take FMLA leave will do so for a serious health condition of their own or that of a family member. The Department also assumes, due to the safety concerns of the airline industry that employers will require 90 percent of these employees provide medical certification of their own serious health condition. As it did in the 2008 paperwork analysis, and with no present reason to change its estimate, the Department further estimates that second or third opinions and/or recertifications add 15 percent to the total number of certifications, and that employees spend 20 minutes in obtaining the certifications. Employers may have employees use optional Forms WH-380-E and WH-380-F to satisfy this statutory requirement.

5,951 airline flight crew employees taking leave x 90% rate for a serious health condition x 90% of employees asked to provide initial medical documentation = 4,820 employees providing initial medical certification.

New burden: 4,820 x 1.15 subsequent medical certifications = 5,543 total employee medical certifications.

---

request for leave. 5,951 leave takers will issue 8,930 employer notices for leave (5,951 x 1.5 leaves = 8,930 notices). Employers will issue 8,930 eligibility and rights and responsibilities notices.

5,543 x 20 minutes/60 minutes per hour = 1,848 hours.

The Department does not associate a paperwork burden with the portion of this information collection that employers complete since – even absent the FMLA – similar information would customarily appear in their internal instructions requesting a medical certification or recertification. The Department accounts for health care provider burdens to complete these certifications as a "maintenance and operation" cost burden, which is discussed later.

2. Fitness-for-duty medical certification. The Department assumes that the Federal Aviation Authority (FAA) requires airline flight crew employees, specifically pilots and flight attendants, to receive regular medical evaluations as a condition of their continued employment. Therefore the Department estimates that 50 percent of airline pilots and 10 percent of flight attendants will be required to submit fitness-for-duty medical certifications pursuant to the FMLA regulations. The Department estimates that completing a fitness-for-duty certification will take an employee ten minutes.

New burden: 1,423 responses (employee certifications) x 10 minutes/60 minutes per hour = 237 hours.

3. Certification of qualifying exigency for military family leave. The Department estimates that 30,900 employee-family members will be eligible to take FMLA leave to address qualifying exigencies due to the expansion of qualifying exigency leave under the FY 2010 NDAA to certain family members of members of the Regular Armed Forces. The Department estimates that employers will request certification from 30,900 employees for qualifying exigency leave. Employers may use optional Form WH-384 to satisfy this requirement. The Department further estimates that it will take approximately 20 minutes for a Human Resources staff member to request, review, and verify the employee's certification papers.

New burden: 30,900 total responses (employee qualifying exigency leave certifications) x 20 minutes/60 minutes per hour = 10,300 hours.

4. Certification for Leave Taken to Care for a Covered Servicemember – Current Servicemember. Pursuant to the FY 2010 NDAA, an eligible employee-family member may take FMLA leave to care for a current servicemember who has a serious injury or illness that existed before the member's active duty and was aggravated by service in the line of duty while on active duty. At this time the Department does not have sufficient information to develop an estimate of employees who will qualify for military caregiver leave for a covered servicemember with a serious injury or illness that existed prior to the servicemember's active duty and was aggravated in the line of duty on active duty. Accordingly, the Department will not revise the current burden analysis for certification of leave to care for a current servicemember at this time.

All new certification and recertification requirements as a result of the 2010 NDAA and AFCTCA impose a burden of 37,866 responses and 12,385 hours.

All existing certification and recertification requirements already impose an estimated burden of 12,080,153 responses and 4,009,851 hours.

Total burden for employee certifications requirement is estimated to be 12,118,019 responses and 4,022,236 hours.

D. Notice to employees of FMLA designation. The Department estimates that each written FMLA designation notice takes approximately 10 minutes to complete.

New burden: 39,830 total responses (designation notices) x 10 minutes/60 minutes per hour = 6,638 hours.

Burden Disaggregation by Sector

Private (74.03317215%): 29,487 responses x 10 minutes/60 minutes = 4,914 hours
State, local, tribal (25.943338%): 10,333 responses x 10 minutes/60 minutes = 1,722 hours
Federal (0.02348951%): 9 responses x 10 minutes/60 minutes = 2 hours

Total burden for employee notice of eligibility and rights and responsibilities by sector:

Private: 12,898,914 responses and 3,479,716 hours
State, local, tribal: 4,520,148 responses and 1,219,392 hours
Federal: 4,092 responses and 1,104 hours

Total burden for this requirement is estimated to be 17,423,154 responses and 4,700,212 hours.

E. Notice to employees of change of 12-month period of determining FMLA eligibility. The Department assumes that 10 percent of covered airline employers will choose to change their 12-month period for determining eligibility since the AFCTCA. The Department also assumes these employers will employ 10 percent of newly added eligible employees in the airline industry. The Department continues to estimate from the 2008 analysis that it will take an employer 10 minutes to make this employee notification, and this time was amortized to 1.79336117 seconds per individual response.

90,560 newly added employees in the airline industry x 10% for employers who change the period = 9,056 responses.

9,056 responses x 1.79336117 = 5 hours.

Burden Disaggregation by Sector

Since there is a minimal change to this information collection, the Department is not listing the burden disaggregation by sector. The private sector and state, local, tribal government sectors are affected. Three hours are attributed to the private sector, for a total of 7,099,007 responses and 3,536 hours. One hour is attributed to the state, local, tribal government sector, for a total of 2,490,070 responses and 1,240 hours. There is not a change attributed to the federal sector.

Total burden for this requirement (all sectors) is estimated to be 9,589,056 responses and 4,777 hours.

F. Key Employee Notification. The Department assumes that a very small percentage of airline flight crew employees will be determined key employees. As such, the Department does associate a burden hour estimate with this provision.

Total burden for this requirement is estimated to be 42,787 responses and 3,566 hours.

G. Periodic employee status reports. The Department estimated in the 2008 paperwork analysis that employers require periodic status reports from 25 percent of FMLA-leave users, and since it has not received any evidence to believe otherwise, it continues to estimate 25 percent today. The Department also estimates that a typical employee would normally respond to an employer's request for a status report; however to account for any burden the regulations may impose, the Department estimates that 10 percent of employees will respond to the request only because of the regulatory requirement, imposing a burden of two minutes per response. The Department also estimates that each such employee provides two periodic status reports.

New burden: 36,851 leave takers x 25% rate of employer requests x 10% of employees who comply due to the regulations = 921 employee responses.

921 employee responses x 2 responses = 1,843 total responses.

1,843 responses x 2 minutes/60 minutes = 61 hours.

Total burden for this requirement is estimated to be 371,547 responses and 12,384 hours.

H. Documenting Family Relationships. As it did in the 2008 analysis, the Department estimates that 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. 73 FR 7939. As such, the Department assumes that 50 percent of airline flight crewmembers who take leave will take it for family reasons. (2,976 of 5,951 leave takers). Under the 2010 NDAA all employees who take leave will be doing so for a family-related reason. (30,900 leave takers).

As it did in the 2008 analysis, the Department estimates that employers may require additional documentation to support a family relationship in five percent of these cases, and the additional documentation will require 5 minutes.

New burden: 33,876 (employees taking leave for family-related reasons) x 5% (additional documentation) = 1,694 employees required to document family relationships.

1,694 employees x 5 minutes/60 minutes per hour = 141 hours.

Total burden for this requirement is estimated to be 185,681 responses and 15,473 hours.

I. Notice to employee of pending cancellation of health benefits. Pursuant to the AFCTCA, airline flight crew employees are newly eligible to take FMLA-qualifying leave. However, the Department believes employer policies and agreements that airline flight crew employees may be a party to preclude employers from canceling employees' health benefits. Therefore, at this time the Department will not revise the current burden analysis for employee notice of pending cancellation of health benefits.

Total burden for this requirement is estimated to be 142,619 responses and 11,885 hours.

J. General Recordkeeping. The Department believes that the FMLA does not impose any additional burden on employers in the airline industry, as the records required to be maintained by the FMLA should already be maintained by the employers as part of their usual and customary business practices. Therefore, the Department is not proposing a new burden hour estimate for this provision.

Total burden for this requirement is estimated to be 13,419,050 responses and 279,564 hours.

GRAND TOTAL ANNUAL BURDEN HOURS = 19,009,201 HOURS[3]

13. Other Respondent Cost Burdens (Maintenance and Operation): Airline flight crew employees seeking FMLA leave for their own serious health condition or the serious health condition of a family member, must obtain, upon their employers' request, a certification of their own or family member's serious health condition. Similarly, employees seeking FMLA leave for military caregiver leave must obtain, upon their employer's request, a certification of the covered servicemember's serious injury or illness. Often the health care provider's office staff completes the form for the provider's signature. In other cases, the health care provider personally completes it. The Department assumes that while most health care providers do not charge for completing these certifications, some do.

The Department estimates that it will take approximately 20 minutes to complete a certification for a serious health condition, and 10 minutes to complete a fitness for duty certification. The time would equal the employee's time in obtaining the certification. The Department used the median hourly wage for a physician's assistant of $41.54 plus 40 percent in fringe benefits to compute cost of $19.39 for the certification of a serious health condition ($58.17 x 20 minutes/60 minutes per hour), and $9.69 for the fitness-for-duty certification. See BLS Occupational Employment Statistics, Occupational Employment and Wages, May 2010, http://www.bls.gov/oes/current/oes291071.htm.

The Department estimates that it will take approximately 20 minutes to complete the certification for a covered servicemember. Thus, the time would equal the employee's

[3] The total number of burden hours is slightly less than the amount requested in the 60-day notice. The Department attributes this difference to its failure to capture all the respondents in the 60-day notice.

time in obtaining the certification. The Department used the median hourly wage for a physician's assistant of $41.54 plus 40 percent in fringe benefits to compute cost of $19.39 for the certification to care for covered veteran ($58.17 x 20 minutes/60 minutes per hour). See BLS Occupational Employment Statistics, Occupational Employment and Wages, May 2010, http://www.bls.gov/oes/current/oes291071.htm.

New burden: medical certifications x $19.39 cost per certification = $107,479.

1,423 fitness-for-duty certifications x $9.69 cost per certification = $13,789.

23,095 certifications for military caregiver leave x $19.39 cost per certification = $447,812.

The maintenance and operations cost estimate for the existing FMLA information collections is $569,080.

Grand total of maintenance and operations cost burden for respondents = $163,390,890.

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

415,000 Forms WH-380-E (Certification of Health Care Provider for Employee's Serious Health Condition) x 4 pages =
1,660,000 pages

415,000 Forms WH-380-F (Certification of Health Care Provider for Family Member's Serious Health Condition) x 4 pages =
1,660,000 pages

415,000 Forms WH-385 (Certification for Serious Injury or Illness of a Covered Servicemember) x 4 pages =
1,660,000 pages

415,000 Forms WH-384 (Certification for a Qualifying Exigency) x 3 pages = 1,245,000

415,000 Forms WH-381 (Notice to Employee of FMLA Eligibility and Rights and Responsibilities) x 2 pages =
830,000 pages

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

Total Forms = 6
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: Compared to the last OMB clearance of the FMLA information collections on December 14, 2008, this request reflects an overall burden increase of 39,556 hours, which result from amendments to the FMLA, which expanded qualifying exigency leave to employee-family members of members of the Regular Armed Forces and changed the hours of service eligibility requirement for airline flight crews. In addition, this request reflects 540,747 additional responses and $569,080 in increased maintenance and operation costs, which also stem from the FMLA amendments. The changed paperwork burden estimates stem from (1) the fact that the 2010 NDAA expanded qualifying exigency leave to employee-family members of the Regular Armed Forces; (2) the Airline Flight Crew Technical Amendments Act changed the eligibility requirements for airline flight crew employees; (3) increased wages rates for persons completing the information collections and other higher costs, as discussed in Sections 12-14 of the supporting statement; and (6) improved information on the number of respondents subject to the FMLA paperwork requirements.

    The Department is proposing one minor formatting change to the optional-use FMLA forms to reflect the new Department of Labor organizational structure by removing the "Employment Standards Administration" from the forms' headings.

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

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

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