

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

The agency is updating collections in 29 CFR 825 (RIN number 1215-AB76, 1235-AA03). This paperwork burden analysis estimates the burdens for the Final Rule. The Final Rule implements amendments to the military leave provisions made by the FY 2010 NDAA, which extends the availability of FMLA leave for qualifying exigencies to employee-family members of members of the Regular Armed Forces and defines the deployments covered by such leave, and extends FMLA military caregiver leave to employee-family members of certain veterans with a serious injury or illness and expands the provision of such leave to cover serious injuries or illnesses that existed prior to a covered servicemember's active duty and were aggravated in the line of duty while on active duty. The Final Rule also implements the AFCTCA, which establishes special hours of service eligibility requirements for airline flight crew members and flight attendants eligibility requirements for airline flight crew members and flight attendants and authorizes the Department to promulgate regulations regarding the calculation of leave for airline flight crew employees as well as recordkeeping requirements for their employers.

On December 31, 2011, the previous approval for the FMLA information collections expired. Accordingly, the Department issued a 60-day notice on September 28, 2011, on the proposed extension of the approval of information collection requirements (paperwork re-clearance). The burden analyses that were calculated for the paperwork re-clearance only accounted for the increased burdens stemming from the expansion of qualifying exigency leave to the Regular Armed Forces, pursuant to the 2010 NDAA, and the enactment of AFCTCA. The analyses did not account for the increased burden resulting from the expansion of military caregiver leave to care for covered veterans.¹ OMB approved the request for renewal of the FMLA information collection on February 10, 2012, thereby extending the expiration date to February 28, 2015.

On January 30, 2012, the Department announced that it would be publishing the NPRM proposing changes to the regulations to implement the FY 2010 NDAA and AFCTCA amendments to the FMLA. On February 15, 2012, the NPRM was published in the Federal Register. See 77 FR 8960. The publication of the NPRM subsequent to the approval of the paperwork re-clearance package required the Department to re-conduct the paperwork analyses for the Final Rule to account for the employees who may now take FMLA leave to care for a covered veteran. The final burden analyses for this Final Rule are based upon the most recently approved burdens by OMB for the FMLA information collections. A copy of the NPRM was submitted to OMB and on March 28, 2012 OMB requested that the Department resubmit the information collection request upon promulgating the Final Rule and after considering public comments on the FMLA NPRM.

¹ It is the Department's position that the expansion of qualifying exigency leave to the Regular Armed Forces was effective on October 28, 2009, the date the FY 2010 NDAA was enacted. It is also the Department's position that the provisions of the AFCTCA were effective on the date of its passage, December 9, 2009. However, the Department's position is that the provision of the FY 2010 NDAA permitting military caregiver leave to care for certain veterans is not effective until the Department issues regulations defining a serious injury or illness for a covered veteran as required by the statute.

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 an eligible employee who is the spouse, son, daughter, parent, or next of kin of a covered servicemember for the employee to provide care for the covered servicemember with a serious injury or illness. 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 FY 2010 NDAA amended the FMLA to expand qualifying exigency leave to employee-family members of the Regular Armed Forces and military caregiver leave to employee-family members of certain veterans with a serious injury or illness. Pub. L. 111-84. The FMLA was also amended by the AFCTCA, which created special hours of service eligibility requirement for airline flight crew employees. Pub. L. 111-119.

A. Employee Notice of Need for FMLA Leave [29 U.S.C. 2612(e); 29 CFR 825.100(d), 825.301(b), 825.302, 825.303]. An employee must provide the employer at least 30 days advance notice before FMLA leave is to begin if the need for the leave is foreseeable based on an expected birth, placement for adoption or foster care, or planned medical treatment for a serious health condition of the employee or of a family member 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 covered 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 qualifying 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. Optional-use 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), 825.305, 825.308]. 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. Optional-use 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). Optional-use 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 (either a current servicemember or a veteran) 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-use Form WH-385 for a current servicemember and Form WH-385-V for a covered veteran. An employer must accept as sufficient certification of leave to care for a current 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-use 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. Optional0-use form WH-382 allows an employer to meet its obligation to designate leave as FMLA-qualifying. See 29 CFR 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(k)]. 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) and Genetic Information Nondiscriminatory Act (GINA) 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 1235-0018; 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. The Department created a new optional use form for the certification of leave to care for a covered veteran, Form WH-380-V. 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. The Department developed new optional use form for the certification for a serious injury or illness of a covered veteran, Form WH-385-V.

While the 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 website, www.dol.gov/whd. These forms are in 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, including records that must be maintained by covered employers in the airline industry as outlined in proposed § 825.500(h), 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 the 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 a 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 February 15, 2012, the Department published a proposed rule and sought comments on the burdens imposed by the information collections covered by the proposed regulations. 77 FR 8960. The same notice provided that comments could also be sent directly to OMB, in accordance with provisions of 5 C.F.R. 1320.11.

As part of the proposed rule, the Department sought public comment regarding the burdens imposed by the information collection contained in this Final Rule. The Department received one comment from a self-described labor-employment attorney stating that the agency's FMLA information collections are necessary for the proper performance for the functions of the agency. This comment, along with all the comments relating to the NPRM that were received, is a matter of public record, and posted without change to <http://www.regulations.gov>, including any personal information provided.

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-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 and GINA 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-J, the regulations specify how employers must limit access to such information.

12. Burden Hours Estimates:

The PRA section of the FMLA NPRM published February 15, 2012 (77 FR 8960) used the 2008 analysis as the baseline to determine the burden increase for this paperwork package, and accounts for respondent and burden increases resulting from the statutory amendments to the FMLA covering qualifying exigency leave, military caregiver leave, and airline flight crew eligibility. Subsequent to OMB's clearance of the NPRM, but before its publication in the Federal Register, OMB approved the re-clearance of the existing 2008 FMLA ICRs under the PRA. That reclearance reflected increases in respondents and burden stemming from the self-executing portions of the FY 2010 NDAA (qualifying exigency leave for family members of

members of the Regular Armed Forces) and the AFCTCA. The following burden analyses are based upon the 2012 re-clearance issued on February 9, 2012, and reflect the increase in respondents and burdens resulting from the extension of military caregiver leave to covered veterans. Additionally, due to refinements in the analysis conducted under E.O. 12866, the number of eligible employees assumed to take leave to care for a covered veteran has decreased.

Except as otherwise noted, the Department bases the following burden estimates on the Regulatory Impact Analysis in the Final Rule and the 2012 paperwork reclearance. The Department estimates that the FMLA covers 91.1 million workers. The Department estimates 381,000 employers, comprised of 291,000 private businesses and 89,566 government entities, respond to the FMLA collections. For PRA purposes 89,499 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, responses, and burden estimates are rounded to the nearest whole number.

Required Disclosure	Existing Respondents	Increase in Respondents	Existing Responses	Increase in Responses	Existing Burden Hours	Increase in Burden Hours
Employee Notice of Need for FMLA Leave	7,249,100	7,000	13,829,680	357,000	460,990	11,900
Notice to Employee of FMLA Eligibility and Rights and Responsibilities Notice						
Private	211,170	5,182	16,142,733	5,182	7,031,756	864
State, local, tribal	74,000	1,816	5,656,874	1,816	2,464,128	303
Federal	67	2	5,121	2	2,231	0
Employee Certifications	5,461,097	7,350	12,118,019	7,350,000	4,022,236	3,500,617
Notice to Employees of FMLA Designation						
Private	211,170	5,182	12,898,914	5,182	3,479,716	864
State, local, tribal	74,000	1,816	4,520,148	1,816	1,219,392	303
Federal	67	2	4,092	2	1,104	0
Notice to Employee of 12-month Period Change						
Private	21,117	0	7,099,082	0	3,536	0
State, local, tribal	7,400	0	2,487,721	0	1,239	0
Federal	7	0	2,351	0	1	0
Key Employee Notification						
Private	21,117	0	31,676	0	2,640	0
State, local, tribal	7,400	0	11,100	0	925	0
Federal	7	0	11	0	1	0

Periodic Employee Status Reports	184,852	175	371,547	350	12,384	12
Documenting Family Relationships	183,987	350	185,681	350	15,473	29
Notice to Employee of Pending Cancellation of Health Benefits						
<i>Private</i>	105,585	0	105,585	0	8,799	0
<i>State, local, tribal</i>	37,000	0	37,000	0	3,083	0
<i>Federal</i>	34	0	34	0	3	0
General Record Keeping						
<i>Private</i>	21,1170	0	9,934,548	0	206,970	0
<i>State, local, tribal</i>	74,000	0	3,481,350	0	72,528	0
<i>Federal</i>	67	0	3,152	0	66	0

A. Employee Notice of Need for FMLA Leave.

The Department estimates that there are 26,908 employees who are newly eligible to take leave to care for a covered veteran under the FY 2010 NDAA. Based on leave usage patterns, 7,000 of these employees will take leave to care for a covered veteran (26 percent of 26,908 employees).

Based on the leave patterns estimated by the Department in the PRIA analysis, the Department estimates that there will be 357,000 employee requests for military caregiver leave.

Burden: 357,000 employee respondent notices of leave x 2 minutes/60 minutes per hour = 11,900 hours.

Existing burden for this requirement: 13,829,680 responses and 460,990 hours.

Total burden requested for this requirement: 14,186,680 responses and 472,890 hours.

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

Based on the leave usage patterns for military caregiver 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 unless the employee's eligibility status changes. For military caregiver leave, 7,000 leave takers will provide 357,000 employer notices of their need for leave, but employers will only have to issue 7,000 eligibility and rights and responsibilities notices.

New burden: 7,000 total responses (notices of eligibility and rights and responsibilities) x 10 minutes/60 minutes per hour = 1,167 hours

Burden Disaggregation by Sector

Private (74.03317215%): 5,182 responses x 10 minutes/60 minutes = 864 hours

State, local, tribal (25.943338%): 1,816 responses x 10 minutes/60 minutes = 303 hours

Federal (0.02348951%): 2 responses x 10 minutes/60 minutes = 0 hours

Existing burden requirement:

Private: 16,142,733 responses and 7,031,755 hours

State, local, tribal: 5,656,874 responses and 2,464,128 hours

Federal: 5,121 responses and 2,231 hours

Total burden requested for this requirement:

Private: 16,147,915 responses and 7,032,619 hours

State: 5,658,690 responses and 2,464,431 hours

Federal: 5,123 responses and 2,231 hours

C. Employee Certifications: 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.

1. Medical Certification and Recertification.

The Department assumes that the number of employees who will obtain medical certifications to care for a covered veteran from a health care provider as defined in § 825.125 will be very small as most employees will obtain medical certifications from VA, DOD, TRICARE, or DOD non-network TRICARE providers, which are not subject to second or third opinions or recertifications. As such, the Department assumes that five percent of employees will be asked to obtain a second or third opinion/recertification. Utilizing these assumptions, 7,000 employees taking leave multiplied by 5 percent asked to provide medical certification results in 350 employees requiring additional certification.

New burden: 350 employees X 20 minutes/60 minutes per hour = 117 hours.

2. Fitness-for-Duty Medical Certification. No change from current burden estimate.

3. Certification of Qualifying Exigency for Military Family Leave. Although the Final Rule adds parental leave as a new qualifying exigency for FMLA leave the Department did not update the burden because it lacks any data on which to base an estimate of the number of days of qualifying exigency leave that might be taken for parental leave. Therefore, there is no change from the current burden estimate.

4. Certification for Leave Taken to Care for a Covered Servicemember – Current Servicemember.

The Department did not receive any comments in response to the NPRM addressing this issue. Consequently, the Department still lacks 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. However, as stated in the RIA, the Department believes that the number of servicemembers entering the military with an injury or illness with the potential to be aggravated by service to the point of rendering the servicemember unable to perform the duties of his or her office, grade, rank, or rating is quite small due to the selection process used by the Armed Forces.

5. Certification for Leave Taken to Care for a Covered Servicemember – Covered Veteran.

The FY 2010 NDAA provided FMLA leave for eligible employees to care for a covered veteran with a serious injury or illness that was incurred in the line of duty on active duty (or existed before the member's active duty and was aggravated in the line of duty on active duty) and manifested itself before or after the member became a veteran. The Department estimates that 7,000 employees will be eligible to take leave to care for a covered veteran. The Department expects that employers will request certification forms for this leave. The Department estimates that it will take a Human Resources specialist 30 minutes to request, review, and verify the employee's certification papers.

New burden: 7,000 responses (certification papers) X 30 minutes/60 minutes per hour = 3,500 hours.

All new certification and recertification requirements as a result of this Final Rule impose a burden of 7,350 responses and 3,617 hours.

Existing total burden for this requirement is 12,118,019 responses and 4,022,236 hours.

Total burden for this requirement is estimated to be 12,125,369 responses and 4,025,853 hours.

D. **Notice to Employees of FMLA Designation.**

The Department estimates that each written FMLA designation notice takes approximately ten minutes to complete.

Burden: 7,000 total responses (designation notices) x 10 minutes/60 minutes per hour = 1,167 hours.

Burden Disaggregation by Sector:

Private (74.03317215%): 5,182 responses x 10 minutes/60 minutes = 864 hours

State, local, tribal (25.943338%): 1,816 responses x 10 minutes/60 minutes = 303 hours

Federal (0.02348951%): 2 responses x 10 minutes/60 minutes = 0 hours

Existing total burden for this requirement:

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 requested for this requirement:

Private: 12,904,096 responses and 3,480,580 hours
State, local, tribal: 4,521,964 responses and 1,219,695 hours
Federal: 4,094 responses and 1,104 hours

E. Notice to Employees of Change of 12-month period of determining FMLA eligibility.

No change from current burden estimate.

Existing burden for this requirement:

Private: 7,099,082 respondents and 3,536 hours
State, local, tribal: 2,487,721 respondents and 1,239 hours
Federal: 2,351 respondents and 1 hour

Total burden requested for this requirement:

Private: 7,099,082 respondents and 3,536 hours
State, local, tribal: 2,487,721 respondents and 1,239 hours
Federal: 2,351 respondents and 1 hour

F. Key Employee Notification.

The Department assumes that a very small percentage of employees taking leave to care for a covered veteran will be determined key employees and even fewer of those employees will receive notice from the employer that they intend to exercise the option to not reinstate those employees. As such, the Department does not associate a new burden hour estimate with this particular provision for employees taking leave to care for a covered veteran.

Existing burden for this requirement:

Private: 31,676 respondents and 2,640 hours
State, local, tribal: 11,100 respondents and 925 hours
Federal: 11 respondents and 1 hour

Total burden requested for this requirement:

Private: 31,676 respondents and 2,640 hours
State, local, tribal: 11,100 respondents and 925 hours
Federal: 11 respondents and 1 hour

G. Periodic Employee Status Reports.

The Department estimated in the 2008 and 2012 paperwork analyses that employers require periodic 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 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 Department estimates that 10 percent of employees will respond to a 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 annual periodic status reports.

7,000 leave takers x 25% x 10% = 175 employee responses.
175 employee responses x 2 responses = 350 total responses.
350 responses x 2 minutes/60 minutes = 12 hours.

Existing burden for this requirement is 371,547 responses and 12,384 hours.

Total burden for this requirement is estimated to be 371,897 responses and 12,396 hours.

H. **Documenting Family Relationships.**

The Department assumes that under the military amendments all employees who take leave will be doing so for a family-related reason. (7,000 leave takers.) In the 2008 PRA analysis, the Department estimated that employers may require additional documentation to support a family relationship in five percent of these cases, and the additional documentation will take five minutes.

New burden: 7,000 (employees taking leave for family-related reasons) x 5% (additional documentation) = 350 employees required to document family relationships.
350 employees x 5 minutes/60 minutes per hour = 29 hours.

Existing burden for this requirement: 185,681 responses and 15,473 hours

Total burden requested for this requirement: 186,031 responses and 15,502 hours.

I. **Notice to Employee of Pending Cancellation of Health Benefits.**

The Department believes that most employees who take leave to care for a covered veteran will be covered by the military member's health benefits and not by his or her employer's health plan. As such, the Department assumes that a very small percentage of employees taking leave for a covered veteran will receive notification of the pending cancellation of his or her health benefits. The Department does not associate a new burden hour estimate with this provision.

Existing burden for this requirement:

Private: 105,585 responses and 8,799 hours

State, local, tribal: 37,000 responses and 3,083 hours

Federal: 34 responses and 3 hours

Total burden requested for this requirement:

Private: 105,585 responses and 8,799 hours

State, local, tribal: 37,000 responses and 3,083 hours

Federal: 34 responses and 3 hours

J. General Recordkeeping.

No change from current burden estimate.

Existing burden for this requirement:

Private: 9,934,548 responses and 206,970 hours

State, local, tribal: 3,481,350 responses and 72,528 hours

Federal: 3,152 responses and 66 hours

Total burden requested for this requirement:

Private: 9,934,548 responses and 206,970 hours

State, local, tribal: 3,481,350 responses and 72,528 hours

Federal: 3,152 responses and 66 hours.

GRAND TOTAL ANNUAL BURDEN HOURS = 19,027,093 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 Department used the median hourly wage for a non-supervisory Human Resources Assistant (Except Payroll and Timekeeping) for May 2010. The median hourly wage is \$17.69 plus 40 percent in fringe benefits. See BLS Occupational Employment Statistics, Occupational Employment and Wages, May 2010 (<http://www.bls.gov/oes/current/oes434161.htm>). The Department estimates total annual respondent costs for the value of their time to be \$471,301,094 (\$24.77 x 19,027,093 total annual burden hours).

13. Other Respondent Cost Burdens (Maintenance and Operation):

The Department estimates that it will take approximately 20 minutes to complete the certification for a covered veteran. Thus, 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 a \$19.39 cost for the certification of a serious health condition (\$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 (covered veterans): 7,000 medical certifications for covered veterans x \$19.39 cost per certification = \$135,730.

The existing maintenance and operations cost estimate for the existing FMLA information collections is \$163,332,185.

Grand total of maintenance and operations cost burden for respondents = \$163,467,915.

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:

381,000 Forms WH-380-E x 4 pages = 1,524,000 pages

381,000 Forms WH-380-F x 4 pages = 1,524,000 pages

381,000 Forms WH-381 x 2 pages = 762,000 pages

381,000 Forms WH-382 x 1 page = 381,000 pages

381,000 Forms WH-384 x 3 pages = 1,143,000 pages

381,000 Forms WH 385 x 4 pages = 1,524,000

381,000 Forms WH-385-V (Certification of a Serious Injury or Illness for a Covered Servicemember – Covered Veteran) x 4 pages = 1,524,000

Total Forms = 2,667,000

Total pages = 8,382,000

8,382,000 pages x \$0.03 printing costs = \$251,460

381,000 mailings x \$1.03 (\$0.03 envelopes + \$1.00 postage) = \$392,430

Total Estimated Annual Federal Costs = \$643,890

Total Estimated Annual Federal Costs = \$643,890

15. Changes in Burden: Compared to the last OMB clearance of the FMLA information collections on February 9, 2012, this request reflects an overall burden increase of 17,892 hours that results from proposed regulatory changes. In addition, this request reflects an increase of 379,050 responses, which also stem from proposed regulatory changes, and a difference of \$135,730 in maintenance and operations costs. The changed paperwork burden estimates stem from the expansion of FMLA-leave to employees to care for covered veterans with serious injuries or illnesses; and increased wages rates for persons completing the information collections and other higher costs, as discussed in Item 13 of the supporting statement.

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.