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 information collections in 29 C.F.R. 825 to reflect proposed changes to the regulations which will result in an increase in the number of responses to certain collections of information covered by this information collection request (ICR). The Department proposes to amend the definition of "spouse" under the Family and Medical Leave Act of 1993 (FMLA) in light of the United States Supreme Court's decision in United States v. Windsor, 133 S. Ct. 2675 (2013), which found section 3 of the Defense of Marriage Act (DOMA) to be unconstitutional. The proposed definition of spouse includes all legally married spouses as defined or recognized under State law for purposes of marriage in the State in which the marriage was entered into or, in the case of a marriage entered into outside of any State, if the marriage is valid in the place where entered into and could have been entered into in at least one State. This definition includes an individual in a same-sex or common law marriage that either was entered into in a State that recognizes such marriages or, if entered into outside of any State, is valid in the place where entered into and could have been entered into in at least one State.

Under the proposed definition of spouse, individuals in same-sex marriages would be able to take FMLA leave to care for their same-sex spouse, a stepchild to whom they do not stand in loco parentis, or a stepparent by virtue of their parent's same-sex marriage, without regard to their state of residence. Accordingly, the proposed regulations, which do not substantively alter the FMLA but instead allow leave to be taken on the basis of an employee's same-sex marriage, will impact some of the information collections.

Note to reviewer: This supporting statement is being provided in conjunction with an NPRM. No changes have been made to items 3-7, 9-11, 14, and 16-18 from the previously approved ICR.

A. Justification

1. Circumstances Necessitating Information 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 the birth of a son or daughter and to care for a newborn child; for the 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.

The Department's authority for the collection of information and the required disclosure of information under the FMLA stems from the statute and/or the implementing regulations. These 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 required disclosures are listed below.

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. Note that the 30-day leave notice requirement does not apply to 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 employer must also provide a rights and responsibilities notice, which details 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 the consequences of 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 -.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. 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. 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]. While the fitness-for-duty medical certification will not be impacted by the proposed rule, the following description is provided since this type of certification is still part of the overall information collection.

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-use 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. Optional-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

No Wage and Hour Division (WHD) forms are impacted by the proposed regulations. The following information is provided as a reference for the overall information collection.

The WHD created optional-use forms: WHD Publication 1420, WH-380-E, WH-380-F, WH-381, WH-382, WH-384, WH-385, and WH-385-V 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 § 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 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; Form WH-385-V allows an employee requesting FMLA leave based on a covered veteran'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 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 general requirement that all third-party notifications be in writing, 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. Employers may maintain records in any format, including electronic, when adhering to the recordkeeping requirements covered by this information collection.

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 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 Americans with Disabilities Act and Genetic Information Nondiscrimination Act 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

This information collection is being submitted in association with an NPRM in order to implement the changes in how the Defense of Marriage Act is interpreted subsequent to the Supreme Court determination in *United States v. Windsor*.

The Department has asked for public comment on its proposed rule and the information collections. The NPRM also informs the public that comments on the information collection requirements may be sent to the Office of Management and Budget.

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 recertifications, to substantiate the need for FMLA leave. These records may contain sensitive information because of the personal and delicate nature of a request for FMLA leave; however, as noted in Section 1-J, 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 section of the FMLA Final Rule published on February 6, 2013 (78 FR 8834). The Department follows the methodology from the 2013 FMLA Final Rule.

The Department estimates that the FMLA covers 91.1 million workers. The Department estimates that 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, or tribal governmental entities, and 67 employers are assumed to be 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.

Because covered, eligible employees in same-sex marriages are already eligible to take FMLA leave for most FMLA qualifying reasons (e.g., own health condition, own child's health condition, etc.), the Department sought to develop an estimate that focuses only on new leaves that employees can take to care for their same-sex spouse or stepchildren (i.e., children to whom the employee does not stand *in loco parentis*)[1]

Based on 2010 American Community Survey (ACS) data[2], the Department estimates that there are **305,000 individuals in a same-sex marriage**.

Based on ACS estimates, both partners are employed in 45.2 percent of same-sex married households. We assume that one partner is employed in the remaining 54.8 percent of same-sex married households. Thus, **72.6 percent of all partners in same-sex married households are employed.** [The Department arrived at this 72.6 percent calculation as follows: 305,000 individuals divided by 2 = 152,500 households. 152,500 households x .452 = 68,930 households where both partners are employed. We assume that one individual per household is employed; thus, 152,500 + 68,930 = 221,430 households that have either one or both individuals employed. 221,430 divided by 305,000 = 0.726 → 72.6%.]

Applying this percentage to the number of individuals in a same-sex marriage, we estimate that **221,400 individuals in same-sex marriages are employed** (305,000 x .726 = 221,430 → rounded to 221,400).

Based on a 2012 DOL survey, 59.2 percent of employed individuals are covered by and eligible to take FMLA leave. Thus, we estimate that **131,100 individuals are covered by and eligible for FMLA** (221,400 x .592 = 131,068.80 → rounded to 131,100).

Also based on the 2012 DOL survey's findings on leave usage patterns, 16.8% of covered, eligible, married employees actually take FMLA leave per year. Accordingly, we estimate that up

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[1] Due to limited data availability, the Department was not able to include leave for same-sex stepparents in its burden estimates. The Department believes that this number is negligible, and that the overestimate is sufficiently generous to include stepparents.

[2] Daphne Lofquist. Same-Sex Couple Households: American Community Survey Briefs. September 2011. Pg. 3.

to **22,000 employees who are FMLA-eligible may take leave each year as a result of this proposed definitional change** (131,100 x .168 = 22,024.80 → rounded to 22,000). It is important to note that this figure of 22,000 employees represents the estimate of all FMLA leave takers with same-sex partners. These same employees already would qualify for many types of FMLA leave (i.e., leave for themselves, their child, their parent, etc.).

Further, based on the 2012 DOL survey finding that 1.5 is the average number of leaves per taker, **individuals in same-sex marriages will take 33,000 leaves** (22,000 employees x 1.5 leaves per taker = 33,000). It is important to note that this figure of 33,000 represents the estimate of all FMLA leaves taken by same-sex partners for any FMLA reason, including leaves which they were *already* eligible to take (i.e., leave for themselves, their child, their parent, etc.) in addition to leaves that a covered employee in a same-sex marriage may take for the employee's same-sex spouse, stepchild to whom they do not stand in loco parentis, and stepparent.

The 2012 DOL survey found that 17.6 percent of FMLA leave is used to take care of an employee's parent, child, or spouse; 1.4 percent of FMLA leave is for qualifying exigency purposes; and 1.4 percent of FMLA leave is for military caregiver purposes. Note that disaggregation into leaves for "spouse" only (or "child" only) is not available. The 17.6 percent estimate includes leave taken for the category of "employee's parent, child, or spouse."

Applying these percentages to the 33,000 FMLA leaves yields the following:

- 5,800 leaves related to care of an employee's parent, child, or spouse (33,000 x .176=5,808 → rounded to 5,800);
- 460 leaves for qualifying exigency (33,000 x .014 = 462 → rounded to 460); and
- 460 leaves for military caregiver (33,000 x .014 = 462 → rounded to 460).

To arrive at our best estimate of new leaves that may be taken as a result of the change in policy, the Department assumes that half (2,900) of the 5,800 leaves for the employee's parent, child, or spouse would be taken for the employee's same-sex spouse, stepchild, or stepparent, in recognition of the fact that an employee with a same-sex partner is already able to take leave to care for the employee's parent or child,.

In sum, the Department estimates that:

> **2,900** new FMLA leaves will be taken for an employee's same-sex spouse, stepchild, or stepparent;
> **460** new FMLA leaves will be taken for qualifying exigency purposes; and
> **460** new FMLA leaves will be taken for military caregiver purposes.

TOTAL: **3,820** ***new leaves may be taken as a result of the change in policy.***

These 3,820 new leaves will be taken by 2,547 individuals (3,820 leaves divided by 1.5 leaves per taker = 2,546.67 → rounded to 2,547 leave takers).

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	7,256,100	0	14,186,680	3,820	472,890	127
Notice to Employee of FMLA Eligibility and Rights and Responsibilities Notice						
Private	216,352	0	16,147,915	2,828	7,032,620	471
State, local, tribal	75,816	0	5,658,690	991	2,464,431	165
Federal	69	0	5,123	1	2,231	0
Employee Certifications	5,468,447	0	12,125,369	3,292	4,025,853	1,174
Notice to Employees of FMLA Designation						
Private	216,352	0	12,904,096	2,828	3,480,580	471
State, local, tribal	75,816	0	4,521,964	991	1,219,695	165
Federal	69	0	4,094	1	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	185,027	0	371,897	0	12,396	0
Documenting Family Relationships	184,337	0	186,031	64	15,502	5
Notice to Employee of Pending Cancellation of Health Benefits						
Private	105,585	0	105,585	0	8,799	0
State, local, tribal	37,000	0	37,000	0	3,083	0
Federal	34	0	34	0	3	0
General Record Keeping						
Private	211,170	0	9,934,548	0	206,970	0
State, local, tribal	74,000	0	3,481,350	0	72,528	0
Federal	67	0	3,152	0	66	0
Unduplicated Totals			89,305,469	14,816	19,027,093	2,578

A. <u>Employee Notice of Need for FMLA Leave</u>.

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.

As explained above, the Department estimates that there are 3,820 new leaves that may be taken as a result of this proposed regulatory change.

> <u>New burden</u>: 3,820 employee respondent notices of leave x 2 minutes/60 minutes per hour = 127.33 → rounded to 127 hours.

Existing employee notification requirements unaffected by this NPRM already impose an estimated burden of: 14,186,680 responses and 472,890 hours.

Total burden requested for this requirement: 14,190,500 responses and 473,017 hours.

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

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 Department estimates that employers will provide 3,820 FMLA eligibility and rights and responsibilities notices to employees who are now able to take leave to care for a same-sex spouse, stepchild, or stepparent. Employers may use optional Form WH-381 to satisfy this requirement.

> New burden: 3,820 total responses (notices of eligibility and rights and responsibilities) x 10 minutes/60 minutes per hour = 636.67 hours → rounded to 637 hours.

Burden Disaggregation by Sector
Private (74.03317215%): 2,828 responses x 10 minutes/60 minutes = 471 hours
State, local, tribal (25.943338%): 991 responses x 10 minutes/60 minutes = 165 hours
Federal (0.02348951%): 0.9 responses x 10 minutes/60 minutes = 0.15 hours

Existing burden requirement:
Private: 16,147,915 responses and 7,032,620 hours
State: 5,658,690 responses and 2,464,431 hours
Federal: 5,123 responses and 2,231 hours

Total burden requested for this requirement:
Private: 16,150,743 responses and 7,033,091 hours
State: 5,659,681 responses and 2,464,596 hours
Federal: 5,124 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 estimates that 90 percent of employees who take FMLA leave will do so for a serious health condition of their own or that of a family member. As it did in the 2013 Final Rule, and with no present reason to change its estimate, the Department estimates that employers will require 90 percent of these employees to provide medical certification of the serious health condition. 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.

2,547 employees taking leave x 90% rate for a serious health condition x 90% of employees asked to provide initial medical documentation = 2,063 employees providing initial medical certification.

New burden: 2,063 x 1.15 subsequent medical certifications = 2,372 total employee medical certifications.

2,372 x 20 minutes/60 minutes per hour = 790.67 hours → rounded to 791 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.

As employees who are newly able to take FMLA leave to care for a same-sex spouse, stepchild, or stepparent were able to take FMLA leave for themselves prior to the proposed regulations, the fitness-for-duty medical certification is not impacted by this proposed rule. Accordingly, the Department did not calculate a burden for this certification.

3. Certification of Qualifying Exigency for Military Family Leave.

The Department estimates that there will be 460 new leaves to address qualifying exigencies due to employees who are newly able to take FMLA leave for exigencies arising from their spouse's, stepchild's, or stepparent's covered military service. The Department estimates that employers will request certification from 460 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: 460 total responses (employee qualifying exigency leave certifications) x 20 minutes/60 minutes per hour = 153.33 hours → rounded to 153 hours.

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

The Department estimates that 460 employees will be eligible to take leave to care for a covered servicemember. 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: 460 responses (certification papers) X 30 minutes/60 minutes per hour = 230 hours.

All new certification and recertification requirements as a result of this Final Rule impose a burden of 3,292 responses and 1,174 hours.

Existing total burden for this requirement is *12,125,369* responses and *4,025,853* hours.

Total burden for this requirement is estimated to be 12,128,661 responses and 4,027,027 hours.

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

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

New Burden: 3,820 total responses (designation notices) x 10 minutes/60 minutes per hour = 636.67 hours → rounded to 637 hours.

Burden Disaggregation by Sector:
Private (74.03317215%): 2,828 responses x 10 minutes/60 minutes = 471 hours
State, local, tribal (25.943338%): 991 responses x 10 minutes/60 minutes = 165 hours
Federal (0.02348951%): 0.9 responses x 10 minutes/60 minutes = 0.15 hours

Existing total burden 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

Total burden requested for this requirement:
Private: 12,906,924 responses and 3,481,051 hours
State, local, tribal: 4,522,955 responses and 1,219,860 hours
Federal: 4,095 responses and 1,104 hours

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

Because the proposed regulations do not change who is eligible for FMLA leave, this type of notice is not impacted by the proposed rule. Accordingly, the Department did not calculate a burden for this notice.

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**.

Key employee notification will not be impacted by the proposed rule. Employees could be designated as "key employees" whether they are taking leave for themselves or for their same-sex spouse, stepchild, or stepparent. Accordingly, the Department did not calculate a burden for this notification.

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 (no change):
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.**

Periodic employee status reports will not be impacted by the proposed rule. Accordingly, the Department did not calculate a burden for this item.

Existing burden for this requirement is 371,897 responses and 12,396 hours.

Total burden for this requirement is to be 371,897 responses and 12,396 hours (no change).

H. **Documenting Family Relationships**.

As it did in the 2008 analysis, the Department estimates that 50 percent of FMLA leave takers do so for "family" related reasons, such as caring for a newborn or recently adopted child or a qualifying family member with a serious health condition. 73 FR 7939. As such, the Department

assumes that 50 percent of employees who take leave will take it for family reasons. (1,273.5 of 2,547 leave takers[3] → rounded to 1,274 leave takers).
As it did in the 2013 Final Rule, 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: 1,274 (employees taking leave for family-related reasons) x 5% (additional documentation) = 63.7 → rounded to 64 employees required to document family relationships.

64 employees x 5 minutes/60 minutes per hour = 5.33 → rounded to 5 hours.

Existing burden for this requirement: 186,031 responses and 15,502 hours

Total burden requested for this requirement: 186,095 responses and 15,507 hours.

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

This type of notice will not be impacted by the proposed rule, since the proposed rule does not increase the number of leave takers. The existing burden will capture such employee notices that pertain to an employee's same-sex spouse or stepchild. Accordingly, the Department did not calculate a burden for this item.

Existing 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

Total burden requested for this requirement (no change):
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.**

The proposed rule will not impose any additional recordkeeping burden on employers, as employers are already maintaining these records as part of their usual and customary business

[3] We calculated the number of leave takers as follows: 3,820 new leaves divided by 1.5 leaves per taker = 2,546.67 → rounded to 2,547 leave takers.

practices as well as under the current FMLA requirements. Accordingly, the Department did not calculate a general recordkeeping burden.

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 (no change):
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 = 19,029,671 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 2013. The median hourly wage is $18.12 plus 40 percent in fringe benefits. See Supplementary Document "HR Assistant - OES434161 - May 2013." The Department estimates total annual respondent costs for the value of their time to be $482,782,753 ($25.37 x 19,029,671, total annual burden hours).

13. Other Respondent Cost Burdens (Maintenance and Operation)

An employee seeking leave may incur an expense for completion of the medical certification. The Department estimates that it will take approximately 20 minutes to complete the certification. 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 $44.70 plus 40 percent in fringe benefits to compute a $20.86 cost for the certification of a serious health condition ($62.58 x 20 minutes/60 minutes per hour). See Supplementary Document "Physician Assistant - OES291071 - May 2013."

New burden: 3,292 medical certifications x $20.86 cost per certification = $68,671.

The existing maintenance and operations cost estimate for the existing FMLA information collections is $163,467,915.

Grand total of maintenance and operations cost burden for respondents = $163,536,586.

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 April 11, 2013, this request reflects an overall burden increase of 2,578 hours that results from proposed regulatory changes. In addition, this request reflects an increase of 14,816 responses, which also stem from proposed regulatory changes, and a difference of $68,671 in maintenance and operations costs. The changed paperwork burden estimates stem from the expansion of FMLA leave to employees to care for same-sex spouses or stepchildren, regardless of their state of residence, 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 forms cleared under this information collection.

18. Certification Requirements

The Department does not seek an exception to OMB certification requirements.