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 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). This also includes the renewal of the information collection related to the FMLA. The Department is amending 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 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 final rule's 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 final rule, which does not substantively alter the FMLA but instead allows leave to be taken on the basis of an employee's same-sex marriage, will impact some of the information collections.

Additionally, the Department is submitting this ICR for renewal as it expires February 2015.

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 among 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 these 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

The Department published the NPRM for this rulemaking related to changes to the definition of "spouse" on June 27, 2014 and invited the public to comment on the impact of the proposed regulations to paperwork burdens. 79 FR 36445. Only one submission, which was from an individual commenter, addressed the collection burden of this rulemaking. The Department appreciates the time and effort taken by this commenter to submit their feedback.

This commenter expressed concerns regarding the form WH-380-F. The Department understands this commenter's concerns to extend to both the medical certification form for an employee's own serious health condition and that for a family member (WH-380-E and WH-380-F, respectively). This commenter asserted that this form asks overbroad, unnecessary and invasive questions concerning the patient's medical information. The Department notes that Form WH-380-F, as revised, or another form containing the same basic information, may be used by the employer; however, no information may be required beyond that specified in §§825.306, 825.307, and 825.308. In all instances the information on the form must relate only to the serious health condition for which the current need for leave exists. The Department believes that that the certification forms strike the appropriate balance between an employer's need for sufficient information to determine whether the health condition for which leave is sought qualifies as a serious health condition and employee privacy.

This same commenter asserted that the 20 minute estimate of the time required of a health care professional to complete this form is inaccurate and may not be cost-effective; the commenter did not offer alternative time estimates. The Department's time estimates only concern the time it takes for the respondent to complete the form. It does not take into account answering employee questions, or the time taken by the employee to obtain the medical certification. Accordingly, the Department declines to adjust its time estimates for completing the required forms.

The Department also published a request for comments concerning the renewal of the information collection of optional use forms related to the FMLA on September 11, 2014. 79 FR 54299. Only one submission, which was from the U.S. Equal Employment Opportunity Commission (EEOC), addressed the collection burden of this reclearance. The Department appreciates the time and effort taken by this commenter to submit their feedback. The EEOC

suggested the inclusion of language consistent with the Genetic Information Nondiscrimination Act (GINA) on some of the forms. In response to this comment, the Department in consultation with its legal advisor has proposed new language on four of the FMLA forms. This language alerts employers to GINA's confidentiality and disclosure requirements and advises health care providers completing a medical certification not to submit certain genetic information that GINA prohibits employers from intentionally acquiring.

The Department received no other comments regarding the collection burden of this rulemaking and reclearance.

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

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 among 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.

The Department has reviewed its PRA submissions since the 2008 National Defense Authorization Act (NDAA) Amendments and concludes that the number of respondents (employees who work for covered employers and are eligible employees who actually take FMLA leave) is approximately 7,182,916. This number is derived from the 7,000,000 employees estimated to take FMLA leave prior to the NDAA Amendments of 2008. The final rule published November 17, 2008 (73 FR 67934) confirmed the estimate first identified in the Department's PRIA set out in the NPRM February 11, 2008 (73 FR 7944) and established the 7,000,000 figure as a baseline. The Department further estimated additional respondents for two new leave reasons resulting from the NDAA Amendments: 110,000 employees eligible to take leave related to qualifying exigency and 29,100 employees eligible to take leave related to the care of a covered military servicemember. See 73 FR 68045. This is a total of 7,139,100 respondents who would take FMLA leave annually (7,000,000 + 110,000 + 29,100).

The 2010 NDAA amended the FMLA again, increasing the number of people who would take FMLA leave as follows: 30,900 instances of leave related to, qualifying exigency due to the broadening of the reasons for qualifying exigency leave, + 15,522 additional instances of leave related to care for a covered veteran. Also incorporated in the 2012 update, the Airline Flight Crew Technical Corrections Act (AFTCA) changed the eligibility rules for employees who are part of an airline flight crew and estimated that 5,950 employees would take FMLA leave during the year as a result. Lastly, the 2013 FMLA final rule publication decreased its 2012 NPRM estimation of the number of employees who were eligible to take leave related to the care of a covered servicemember from 15,522 to 6,966. Adding all those figures together, the Department estimates total respondents to be 7,182,916 (7,139,100 + 30,900 + 5,950 + 6,966). See 78 FR 8836.

The current change in regulations does not add any new respondents. The Department estimates that those covered and eligible employees in same-sex marriages are likely already taking leave for a different qualifying FMLA leave reason and so are not new respondents. However, as these employees will now also be able to take leave to care for a spouse, there will be additional responses as a result of this rulemaking.

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 instances of leave 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 2013 American Community Survey (ACS) data[2], the Department estimates that 251,695 **same-sex couples report themselves as married, representing 503,390 individuals in same-sex marriages**. Based on

[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.

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: 503,390 individuals divided by 2 = 251,695 households. 251,695 households x .452 = 113,766 households where both partners are employed, representing 227,532 individuals (113,766 x 2). We assume that one individual per household is employed in the remaining 137,929 households (251,695 x .548), representing 137,929 individuals Thus, 227,532 + 137,929 = 365,461 employed individuals living in same-sex households in same-sex marriages. 365,461 divided by 503,390 = 0.726 or 72.6 percent.

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 **216,353 same-sex, married individuals are covered by and eligible for FMLA** (365,461 x .592).

Also based on the 2012 DOL survey's findings on leave usage patterns, 16.8 percent of covered, eligible, married employees actually take FMLA leave per year. Accordingly, we estimate that **36,347 same-sex, married employees are FMLA-covered, FMLA-eligible, and actually take FMLA leave each year** (216,353 x .168).

In order to calculate new responses based on the number of same-sex, married employees who are FMLA-covered, FMLA-eligible, and actually take FMLA leave each year, the Department applied past findings of the average number of instances of taking FMLA per type of reason for leave (i.e., traditional, qualifying exigency, or military caregiver). Generally, the 2012 DOL survey found that respondents each request to take an average of 1.5 leaves per year. Regarding the NDAA changes, the 2008 final rule asserted that an average of employees who took leave for a qualifying exigency request an average of 13 leaves per year.

The 2008 final rule also stated that related to military caregiver leave to care for a current servicemember employees request an average of 44 leaves per year. Meanwhile, the 2013 indicated that related to military caregiver leave to care for a covered veteran employees request an average of 51 leaves per year. The Department estimates a weighted average for an employee who takes military caregiver leave at 45.4 occasions of taking leave per year ((29,100 respondents x 44 responses) + (6,966 respondents x 51 responses) → 1,280,400 + 355,266 = 1,635,666 → 1,635,666 / (29,100 + 6,966) = 45.4).

To determine total new occasions for taking leave, the Department first totaled the number of respondents per type of leave, then determined the percentage that respondents for each type of leave represent of all total respondents, and, lastly, applied these percentages and the average

[2] U.S. Census Bureau, 2013. American Community Survey 1-year data file. Table 1: Household Characteristics of Opposite-Sex and Same-Sex Couple Households; and Table 2: Household Characteristics of Same-Sex Couple Households by Assignment Status. Available at: http://www.census.gov/hhes/samesex/.

occasions for taking leave per type of leave to the Department's estimate of 36,347 same-sex, married employees who are FMLA-covered, FMLA-eligible and actually take FMLA leave per year. These calculations are as follows:

Traditional FMLA leave respondents: 7,000,000 + 5,950 = 7,005,950
Qualifying Exigency leave respondents: 110,000 + 30,900 = 140,900
Military Caregiver (all) leave respondents: 29,100 + 6,966 = 36,066
Total respondents: 7,182,916

Percentage that each type of leave represents of all total respondents:
Traditional FMLA leave respondents: 7,005,950 / 7,182,916 = 0.9754 or 97.54 percent
Qualifying Exigency leave respondents: 140,900 / 7,182,916 = 0.0196 or 1.96 percent
Military Caregiver (all) leave respondents: 36,066 / 7,182,916 = 0.0050 or 0.50 percent

36,347 employees x 0.9754 x 1.5 = 53,180 requests to take leave
36,347 employees x 0.0196 x 13 = 9,256 requests to take leave
36,347 employees x 0.0050 x 45.4 = 8,263 requests to take leave
Total requests to take leave by individuals in same-sex marriages: 70,699

It is important to note that this figure of 70,699 represents the estimate of all FMLA instances of leave taken by same-sex, married partners for any FMLA reason, including instances for which they were *already* eligible to take (i.e., leave for themselves, their child, their parent, etc.) in addition to instances of leave that a covered employee in a same-sex marriage may take to care for the employee's same-sex spouse, stepchild to whom they do not stand in loco parentis, and stepparent.

The 2008 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 instances of leave for "spouse" only or "child" only is not available.

Applying these percentages to the 70,699 FMLA requests to take leave yields the following:

- 12,443 requests to take leave related to care of an employee's parent, child, or spouse (70,699 x .176;
- 990 requests to take leave related to qualifying exigency (70,699 x .014); and
- 990 requests to take leave related to military caregiver (70,699 x .014).

To arrive at our best estimate of new instances of leave that may be taken as a result of the change in policy, the Department assumes that half (6,222) of the 12,443 instances of leave 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 summary, the Department estimates that:

- **6,222** new FMLA requests to take leave will be made for care of an employee's same-sex spouse, stepchild, or stepparent;
- **990** new FMLA requests to take leave will be made for qualifying exigency purposes; and
- **990** new FMLA requests to take leave will be made for military caregiver purposes.

TOTAL: ***8,202 new requests to take leave may result due to the change in policy.***

These 8,202 new requests to take leave will be made by 4,246 individuals:
6,222 requests / 1.5 average requests to take traditional FMLA leave = 4,148 individuals
990 requests / 13 average requests to take leave for qualifying exigency purposes = 76 individuals
990 requests / 45.4 weighted average requests to take leave for all military caregiver purposes = 22 individuals
4,148 + 76 + 22 = 4,246 individuals

A. Employee Notice of Need for FMLA Leave.

While employees normally will provide general information regarding their absences, the regulations may impose requirements for workers to provide their employers with more detailed information than might otherwise be the case. The Department estimates that providing this additional information will take an employee approximately 2 minutes per employee notice of the need to take FMLA leave.

As explained above, the Department has estimated that there are 7,182,916 existing respondents. To determine the number of existing, valid responses the Department applied the average number of responses per type of leave respondent, as detailed above. This calculation is as follows:

Traditional FMLA leave respondents: 7,005,950 x 1.5 responses =	10,508,925
Qualifying Exigency leave respondents: 140,900 x 13 responses =	1,831,700
Military Caregiver (active-duty) leave respondents: 29,100 x 44 responses =	1,280,400
Military Caregiver (veteran) leave respondents: 6,966 x 51 responses =	355,266
Total responses:	*13,976,291*

The Department also anticipates the additional submission of 2,200,000 existing, invalid responses, in which cases either the employer was not covered or the employee was not eligible for leave. This provides for a total of 16,176,291 existing responses (13,976,291 + 2,200,000).

Existing burden hours: 539,210 hours (16,176,291 responses x 2 minutes per response / 60 minutes per hour).

New employee hours burden: 273 hours (8,202 new responses x 2 minutes / 60 minutes per hour)

Total burden requested for this requirement: 16,184,493 responses (16,176,291 + 8,202) and 539,483 employee hours burden (539,210 hours + 273 hours).

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

The Department assumes that, in response to each employee notice of need for FMLA leave, all covered employers with eligible employees will notify their employees of their FMLA leave eligibility. Covered employers with eligible employees are in this instance the respondents and are estimated to be 291,000 private, 89,499 state, local, and tribal, and 67 federal employers, as discussed above. The Department estimates that each written notice to an employee of FMLA eligibility and notice of rights and responsibilities takes an employer approximately 10 minutes. Employers may use optional Form WH-381 to satisfy this requirement.

Existing burden requirement
Private (74.03317215%): 11,975,821 responses (of 16,176,291) and 1,995,970 hours (11,975,821 x 10 minutes / 60 minutes per hour)
State, local, tribal (25.943338%): 4,196,670 responses (of 16,176,291) and 699,445 hours (4,196,670 x 10 minutes / 60 minutes per hour)
Federal (0.02348951%): 3,800 responses (of 16,176,291) and 633 hours (3,800 x 10 minutes / 60 minutes per hour)
Existing burden totals: 16,176,291 responses and 2,696,048 employer hours

New burden requirement: 1,367 employer hours burden (8,202 total responses x 10 minutes / 60 minutes per hour)

New burden disaggregation by sector
Private (74.03317215%): 6,072 responses (of 8,202) x 10 minutes / 60 minutes = 1,012 hours
State, local, tribal (25.943338%): 2,128 responses (of 8,202) x 10 minutes / 60 minutes = 355 hours
Federal (0.02348951%): 2 responses (of 8,202) x 10 minutes / 60 minutes = 0.33 hours

Total burden requested for this requirement
Private: 11,981,893 responses (11,975,821 + 6,072) and 1,996,982 hours (1,995,970 + 1,012)
State: 4,198,798 responses (4,196,670 + 2,128) and 699,800 hours (699,445 + 355)
Federal: 3,802 responses (3,800 + 2) and 634 hours (633.33 + 0.33)
Total sum burden: 16,184,493 responses and 2,697,416 employer hours burden

C. Employee Certifications*: Employee Certifications–Serious Health Condition Certification, Recertification, and Fitness-for-Duty Certification; 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 72.8 percent of employees who take FMLA leave will do so for a serious health condition of their own or that of a family member. *See Family and Medical Leave in 2012: Technical Report* at pp. 69-70, http://www.dol.gov/asp/evaluation/fmla/FMLA-2012-Technical-Report.pdf. As it did in the 2013 final rule, the Department estimates that employers will require 92 percent of these employees to provide medical certification of the serious health condition. The Department further estimates that second or third opinions and recertifications add 15 percent to the total number of medical certifications, and that both employees and health care providers spend an average of 20 minutes in obtaining and completing each certification. Employers may have employees use optional Forms WH-380-E and WH-380-F to satisfy this statutory requirement.

As previously detailed, the Department anticipates that 8,202 new instances of leave will be taken by 4,246 individuals. Of that total of individuals, the 76 related to qualifying exigency leave are here excluded, as employees taking leave for qualifying exigency purposes do not need to complete medical certifications or recertifications.

4,170 (4,246 – 76) employees taking leave x 0.728 rate for a serious health condition x 0.92 of employees required to provide initial medical documentation = 2,793 employees providing initial medical certification.

Existing responses burden: 7,005,950 eligible traditional FMLA leave respondents x 1.5 average responses per respondent x 0.728 serious health condition rate x 0.92 response request rate x 1.15 original and second/third/recertification rate = 8,094,226 responses

New responses burden:
2,793 x 1.15 initial and subsequent medical certifications = 3,212 responses

Existing hours burdens:
8,094,226 responses x 20 employee minutes / 60 minutes per hour = 2,698,075 hours

New hours burdens:
3,212 responses x 20 employee minutes / 60 minutes per hour = 1,071 hours

TOTAL = 8,097,438 responses (8,094,226 + 3,212)

TOTAL = 2,699,146 Hours (2,698,075 + 1,071)

2. Fitness-for-Duty Medical Certification.

The Department estimates that 54.6 percent of traditional FMLA leave is taken for an employee's own serious health condition. *See Family and Medical Leave in 2012: Technical Report* at pp. 69-70. The Department further estimates that 10 percent of employees taking FMLA leave for their own serious health condition must submit one fitness-for-duty medical certification, 5 percent of intermittent leave users will be asked to present an average of 3 such certifications because of reasonable safety concerns, and that both employees and health care providers spend an average of 10 minutes completing the fitness-for-duty certification. 73 FR 7952. The Department does not associate an employer 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. Specific to this regulatory change, 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 this rulemaking, the fitness-for-duty medical certification is not impacted by this final rule. Accordingly, the Department did not calculate a new burden for this certification.

Existing responses burden:

7,005,950 eligible traditional FMLA leave respondents x 1.5 average responses per respondent 0.546 rate of taking leave for one's self x 0.10 non-intermittent fitness-for-duty certification response request rate x 1 frequency rate =	573,787
7,005,950 eligible traditional FMLA leave respondents x 1.5 average responses per respondent x 0.546 rate of taking leave for one's self x 0.05 intermittent fitness-for-duty certification response request rate x 3 frequency rate =	860,681
Total existing fitness-for-duty certification responses:	*1,434,468*

Existing hours burdens:

1,434,468 responses x 10 minutes / 60 minutes per hour =	239,078 hours

3. Certification of Qualifying Exigency for Military Family Leave.

The Department estimates that there will be 990 new instances of leave 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 and that employers will request appropriate certification from each such employee. 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 Assistant to request, review, and verify the employee's certification papers.

Existing responses burden: 140,900 qualifying exigency respondents (110,000 + 30,900) x 1.5 average responses per respondent x 0.92 response rate = 194,442 responses

New responses burden: 990 responses

Existing hours burden: 194,442 responses x 20 minutes / 60 minutes per hour = 64,814 hours

New hours burden: 990 responses x 20 minutes / 60 minutes per hour = 330 hours

TOTAL: 195,432 responses (194,442 + 990)

TOTAL: 65,144 Hours (64,814 + 330)

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

The Department estimates that there will be 990 new instances of leave to care for a covered servicemember due to employees who are newly able to take FMLA leave and expects that employers will request appropriate certification from each such employee. The Department estimates that it will take a Human Resources Assistant 20 minutes to request, review, and verify the employee's certification papers and 20 minutes for a health care provider to complete the certification papers.

Existing responses burden: 36,066 qualifying exigency respondents (29,100 + 6,966) x 1.5 average responses per respondent x 0.92 response rate = 49,771 responses

New responses burden: 990 responses

Existing hours burden
49,771 responses x 20 minutes / 60 minutes per hour = 16,590 hours

New hours burden

990 responses x 20 minutes / 60 minutes per hour = 330 hours

TOTAL: 50,761 Responses (49,771 + 990)

TOTAL: 16,920 Hours (16,590 + 330)

Total Burden Requested for this Requirement

Existing responses burden: 9,772,907 responses (8,094,226 medical certifications + 1,434,468 fitness-for-duty certifications + 194,442 qualifying exigency certifications + 49,771 military caregiver certifications)

New responses burden: 5,192 new responses (3,212 medical certifications + 990 qualifying

exigency certifications + 990 certifications)

Total responses burden requested for this requirement: 9,778,099 responses (9,772,907 + 5,192)

Existing hours burden: 3,018,557 hours (2,698,075 medical certification hours + 239,078 fitness-for-duty certification hours + 64,814 Qualifying exigency + 16,590 Covered Servicemember)

New hours burden: 1,731 new certification hours (1,071 + 0 + 330 + 330)

TOTAL RESPONSES: 9,778,099 (8,097,438 + 1,434,468 + 195,432 + 50,761)

TOTAL HOURS BURDEN: 3,020,288 (2,699,146 + 239,078 + 65,144 + 16,920)

D. Notice to Employees of FMLA Designation.

The Department estimates that each written FMLA designation notice takes employers approximately 10 minutes to complete.

Existing burden requirement
Private (74.03317215%): 11,975,821 responses (of 16,176,291) and 1,995,970 hours (11,975,821 x 10 minutes / 60 minutes per hour)
State, local, tribal (25.943338%): 4,196,670 responses (of 16,176,291) and 699,445 hours (4,196,670 x 10 minutes / 60 minutes per hour)
Federal (0.02348951%): 3,800 responses (of 16,176,291) and 633 hours (3,800 x 10 minutes / 60 minutes per hour)
Existing burden totals: 16,176,291 responses and 2,696,048 employer hours

New employer hours burden: 1,367 hours (8,202 new responses x 10 minutes / 60 minutes per hour)

New burden disaggregation by sector
Private (74.03317215%): 6,072 responses x 10 minutes / 60 minutes = 1,012 hours
State, local, tribal (25.943338%): 2,128 responses x 10 minutes / 60 minutes = 355 hours
Federal (0.02348951%): 2 responses x 10 minutes / 60 minutes = 0.33 hours

Total burden requested for this requirement
Private: 11,981,893 responses (11,975,821 + 6,072) and 1,996,982 hours (1,995,970 + 1,012)
State, local, tribal: 4,198,798 responses (4,196,670 + 2,128) and 699,800 hours (699,445 + 355)
Federal: 3,802 responses (3,800 + 2) and 634 hours (633.33 + 0.33)
Total sum burden: 16,184,493 responses burden and 2,697,416 employer hours burden

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

The Department estimates that annually ten percent of FMLA-covered employers choose to change their 12-month period for determining FMLA eligibility and must notify their employees of the change. These employers are estimated to be 291,000 private, 89,499 state, local, and tribal, and 67 federal employers, as discussed above. Also, the Department assumes that these employers employ ten percent of the 91.1 million workers (9,100,000) covered by the FMLA. These notifications can be accomplished via e-mail or posting hard copies and requires approximately ten minutes of the employer to provide notice to the employer's entire workforce. Because this final rule does not change who is eligible for FMLA leave, this type of notice is not impacted by this rulemaking. Accordingly, the Department did not calculate a new burden for this notice.

Existing respondents
Private: 29,100 employers or respondents (291,000 x 0.10)
State, local, tribal: 8,950 employers or respondents (89,499 x 0.10)
Federal: 7 employers or respondents (67 x 0.10)

Existing and current total burden for this requirement (no change)
Private (74.03317215%): 6,737,019 responses (of 9,100,000) and 4,850 hours (29,100 x 10 minutes / 60 minutes per hour)
State, local, tribal (25.943338%): 2,360,844 responses (of 9,100,000) and 1,492 hours (8,950 x 10
minutes / 60 minutes per hour)
Federal (0.02348951%): 2,138 responses (of 9,100,000) and 1 hour (7 x 10 minutes / 60 minutes per hour)
Total sum burden: 9,100,001 responses burden and 6,343 employer hours burden

F. Key Employee Notification.

The Department estimates that annually 10 percent of FMLA-covered employers notify one key employee of the intent not to restore the employee at the conclusion of FMLA leave. These employers are estimated to be 291,000 private, 89,499 state, local, and tribal, and 67 federal employers, as discussed above. In addition, the Department estimates that half of these cases will require the employer to issue a second notice to address a key employee's subsequent request for reinstatement. The Department estimates each key employee notification takes the employer approximately 5 minutes to complete and issue. However, key employee notification will not be impacted by this rulemaking because 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 new burden for this notification.

Existing respondents
Private: 29,100 employers or respondents (291,000 x 0.10)
State, local, tribal: 8,950 employers or respondents (89,499 x 0.10)

Federal: 7 employers or respondents (67 x 0.10)

Existing and current total burden requirement (no change)
Private: 29,100 responses (29,100 employers x 1 key employee notice) and 2,425 hours (29,100 x 5 minutes / 60 minutes per hour)
State, local, tribal: 8,950 responses (8,950 employers x 1 key employee) and 746 hours (8,950 x 5 minutes / 60 minutes per hour)
Federal: 7 responses (7 employers x 1 key employee notice) and 1 hour (7 x 5 minutes / 60 minutes per hour)
Total sum burden: 38,057 responses burden and 3,172 employer hours burden

G. Periodic Employee Status Reports.

The Department estimates that employers require periodic reports from 25.5 percent of FMLA leave takers, which is based on the percentage of FMLA leave takers with absences lasting more than 30 days. See 2000 Westat Report at A-2-29, http://www.dol.gov/whd/fmla/toc.htm. The Department also estimates that a typical employee would normally respond to an employer's request for a status report; however, to account for any additional burden the regulations might impose, the Department estimates a 10 percent response rate and a burden of 2 minutes of employee time per response. The Department further estimates that each such respondent annually provides 2 periodic status reports. While the Department believes most employers would only seek these reports in accordance with customary business practices, the agency has accounted for any potential additional employer burden in the "Eligibility Notice." Periodic employee status reports will not be impacted by this final rule. Accordingly, the Department did not calculate a new burden for this item.

Existing burden requirement
7,182,916 FMLA leave takers x 0.255 employer request rate x 0.10 response rate = 183,164 respondents
183,164 respondents x 2 responses per year = 366,328 responses
366,328 x 2 minutes / 60 minutes per hour = 12,211 hours
Total burden for this requirement (no change): 366,328 responses burden and 12,211 employee hours burden

H. Documenting Family Relationships.

As it did in the 2008 analysis, the Department estimates that approximately 50 percent of FMLA leave takers take leave for reasons related to family, such as caring for a newborn or recently adopted child or qualifying family member with a serious health condition. 73 FR 7939. As such, the Department assumes that fifty percent of employees who will now take leave as a result of this rulemaking will take it for family reasons: 2,123 leave taker respondents (4,246 x 0.50). As it did in the 2013 final rule, the Department estimates that employers may require additional documentation to support a family relationship in 5 percent of these cases, which would require an additional 5 minutes of employee time per case.

Existing burden requirement:
7,182,916 FMLA leave taker respondents x 0.05 required to provide additional documentation = 359,146 responses
359,146 responses x 5 minutes / 60 minutes per hour = 29,929 employee hours

New burden:
2,123 respondents x 0.05 required to provide additional documentation = 106 responses
106 responses x 5 minutes / 60 minutes per hour = 9 employee hours

Total burden for this requirement: 359,252 responses burden (359,146 + 106) and 29,938 employee hours burden (29,929 + 9).

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

Based on the number of employees indicating they have lost benefits, the Department estimates that half of FMLA-covered employers send one FMLA leave taker per year a notification of not having received health insurance premiums. See 2000 Westat Report at 4-4, http://www.dol.gov/whd/fmla/toc.htm. These employers are estimated to be 291,000 private, 89,499 state, local, and tribal, and 67 federal employers, as discussed above. For purposes of estimating the paperwork burden associated with this information collection, the Department estimates that unique respondents would send all responses, and each notification will take 5 minutes of employer time. This type of notice will not be impacted by this rulemaking, since the final 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 new burden for this item.

Existing respondents
Private: 145,500 respondents (291,000 x 0.50)
State, local, tribal: 44,750 respondents (89,499 x 0.50)
Federal: 34 respondents (67 x 0.50)

Existing burden requested for this requirement
Private: 145,500 responses (145,500 respondents x 1 notice) and 12,125 hours (145,500 x 5 minutes / 60 minutes per hour)
State, local, tribal: 44,750 responses (44,750 respondents x 1 notice) and 3,729 hours (44,750 x 5 minutes / 60 minutes per hour)
Federal: 34 responses (34 respondents x 1 notice) and 3 hours (34 x 5 minutes / 60 minutes per hour)

Total burden requested for this requirement (no change)
Private: 145,500 responses and 12,125 hours
State, local, tribal: 44,750 responses and 3,729 hours
Federal: 34 responses and 3 hours

Total sum burden: 190,284 responses burden and 15,857 employer hours burden

J. General Recordkeeping.

The Department estimates that the FMLA imposes an additional general recordkeeping burden on each FMLA-covered employer that equals 1.25 minutes for each FMLA instance of leave; thus, the number of responses equals the number of FMLA instances of leave. The new burden for this requirement reflects the Department's aforementioned estimate of 8,202 new instances of leave.

Existing respondents
Traditional FMLA leave respondents: 7,000,000 + 5,950 = 7,005,950
Qualifying Exigency leave respondents: 110,000 + 30,900 = 140,900
Military Caregiver leave respondents: 29,100 + 6,966 = 36,066

Existing responses burden
Traditional FMLA: 10,508,925 responses (7,005,950 x 1.5 instances)
Qualifying Exigency FMLA: 1,831,700 responses (140,900 x 13 instances)
Military Caregiver FMLA: 1,637,396 responses (36,066 x 45.4 instances)
Total existing responses burden: 13,978,021 responses

New responses burden: 8,202 responses

Existing employer hours burden: 291,209 employer hours (13,978,021 responses x 1.25 minutes / 60 minutes per hour)

New employer hours burden: 171 employer hours (8,202 responses x 1.25 minutes / 60 minutes per hour)

Existing burden for this requirement disaggregated by sector
Private (74.03317215%): 10,348,372 responses (of 13,978,021) and 215,591 hours (of 291,209)
State, local, tribal (25.943338%): 3,626,365 responses (of 13,978,021) and 75,549 hours (of 291,209)
Federal (0.02348951%): 3,283 responses (of 13,978,021) and 68 hours (of 291,209)

New burden for this requirement disaggregated by sector
Private (74.03317215%): 6,072 responses (of 8,202) and 127 hours (of 171)
State, local, tribal (25.943338%): 2,128 responses (of 8,202) and 44 hours (of 171)
Federal (0.02348951%): 2 responses (of 8,202) and 0 hours (of 171)

CALCULATING TOTAL BURDENS ESTIMATES

Total Estimate Responses for this Requirement

Total existing responses: 82,333,617 responses (16,176,291 + 16,176,291 + (8,094,226 + 1,434,468 + 194,442 + 49,771) + 16,176,291 + 9,100,001 + 38,057 + 366,328 + 359,146 + 190,284 + 13,978,021)

Total new responses: 38,106 responses (8,202 + 8,202 + (3,212 + 0 + 990 + 990) + 8,202 + 0 + 0 + 0 + 106 + 0 + 8,202)

GRAND TOTAL ANNUAL RESPONSES = 82,371,724 RESPONSES (rounded) (82,333,617 + 38,106)

Total Estimate Burden Hours for this Requirement

Total Burden Hours: 9,313,503 (rounded) (9,308,584 + 4,918)

Total Estimate Burden Costs for this Requirement

While the Department does claim employee hours burdens, as captured above, employee hours burdens regarding this requirement, it does not claim an associated burden cost for this time.

Persons responding to the various FMLA information collections may be employees of any of a wide variety of businesses. Therefore, absent specific wage data regarding respondent employers, when calculating employer burden costs 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, which results in a total hourly rate of $25.37 (($18.12 x 0.40) + $18.12). See BLS Occupational Employment Statistics, Occupational Employment and Wages, May 2013 (http://www.bls.gov/oes/current/oes434161.htm).

Total Estimate Burden Cost for this Requirement

9,313,503 hours - x $25.37 per hour = $236,283,571.11 ($124,770 (rounded) from this rule)

13. Other Respondent Cost Burdens (Maintenance and Operation)

Employees seeking FMLA leave for a serious health condition must obtain, upon their employer's request, a certification of the serious health condition from a health care provider. Often the heath care provider's office staff completes the form for the provider's signature. In other cases, the health care provider personally completes it. While most health care providers do not charge for completing these certifications, some do. The DOL estimates completion of Form WH-380 to take about 20 minutes and a fitness-for-duty certification to require 10 minutes; thus, the time would equal the respondent's time in obtaining the certification. To determine operations and maintenance costs the Department calculated health care provider burden cost to

capture the cost of time spent completing medical certifications, the Department used the median hourly wage for a Physician's Assistant of $44.70 plus 40 percent in fringe benefits, which results in a total hourly rate of $62.58 (($44.70 x 0.40) + $44.70). See BLS Occupational Employment Statistics, Occupational Employment and Wages, May 2013, http://www.bls.gov/oes/current/oes291071.htm

1. Medical Certification and Recertification

8,094,226 responses x 20 health care provider minutes / 60 minutes per hour = 2,698,075 hours

3,212 responses x 20 health care provider minutes / 60 minutes per hour = 1,071 hours

2. Fitness-for-Duty Medical Certification

1,434,468 responses x 10 health care provider minutes / 60 minutes per hour = 239,078 hours

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

and Covered Veterans

49,771 responses x 20 health care provider minutes / 60 minutes per hour = 16,590 hours

990 responses x 20 health care provider minutes / 60 minutes per hour = 330 hours

Total operations and maintenance costs:

Existing health care provider hours burden: 2,953,743 hours (2,698,075 medical certification hours + 239,078 fitness-for-duty certification hours + 16,590 military caregiver certifications)

New health care provider hours burden: 1,401 hours (1,071 medical certification hours and 330 military caregiver certifications)

Total health care provider hours burden requested for this requirement: 2,955,144 hours (2,953,743+ 1,401)

2,698,075 + 1,071 + 239,078 + 16,590 + 330 = 2,955,144 hours

TOTAL: 2,955,144 hours x $62.58 = $184,932, 912 ($108,326 (rounded) from this rule).

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 of the 381,000 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 (or x 2 two-sided pages) = 1,524,000 pages

381,000 Forms WH-380-F x 4 pages (or x 2 two-sided pages) = 1,524,000 pages

381,000 Forms WH-381 x 2 pages (or x 1 two-sided pages) = 762,000 pages

381,000 Forms WH-382 x 1 page (or x 1 two-sided pages) = 381,000 pages

381,000 Forms WH-384 x 3 pages (or x 2 two-sided pages) = 1,143,000 pages

381,000 Forms WH 385 x 4 pages (or x 2 two-sided pages) = 1,524,000 pages

381,000 Forms WH-385-V x 4 pages (or x 2 two-sided pages) = 1,524,000 pages

Total Forms = 2,667,000 (381,000 FMLA-covered employers x 7 forms)
Total pages = 8,382,000
Total printed pieces of paper for one copy of each form = 12 (2 + 2 + 1 + 1 + 2 + 2 + 2)

8,382,000 pages x \$0.03 printing costs per page =	\$251,460
381,000 mailings x \$1.43 (\$0.03 envelopes + \$1.40 postage to mail 1 flat envelope and 12 pages) =	\$533,400
Total Estimated Annual Federal Costs =	*\$784,860*

15. Changes in Burden

There is a slight increase upon existing responses, burden hours, and burden costs associated with this final rule. The changed paperwork burden estimates stem from two fundamental changes. First, the expansion of FMLA leave to employees to care for same-sex spouses and the stepchildren or stepparents of same-sex spouses, regardless of their state of residence. Second, increased wage rates for persons completing the information collections and other higher costs, as discussed in Item 13 of the supporting statement. The federal costs have also increased, in spite of utilizing double-sided printing, due to increases in postage prices.

However, the respondents, responses, burden hours, and burden costs will now appear to be significantly lower than in the most recent FMLA rulemaking supporting statement. These changes principally stemmed from the Department's detection of the duplicative counting of respondents in an earlier rulemaking. This supporting statement has corrected those mathematical equations. Because some of those calculations result in different numbers of responses, burden hours and burden costs, the Department has carefully detailed the basis and steps to its current computations. Another change to this supporting statement, also for the purposes of clarity and transparency, is more clearly detailing the Department's attribution of hours and costs to employees, health care providers, and employers, respectively.

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 OMB certification requirements.

B. Collections of Information Employing Statistical Methods

This information collection does not employ statistical methods.