

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

The Department proposes to revise its information collection request (ICR) related to the Family and Medical Leave Act (FMLA). The Department proposes to update the optional-use forms associated with the collection in order to improve customer service, increase compliance, and reduce burden on the public. The Department proposes to revise the forms to incorporate “plain language,” use check boxes instead of unstructured data fields where appropriate, add color coding to alert the employer, employee and health care provider which fields are available for their completion, increase font size for readability, and to expand instructions to clarify for the public how to accurately complete the optional-use forms. With the revised forms, the Department hopes to reduce the number of forms returned for additional information because they are considered incomplete or contain insufficient information. The Department also proposes to reduce the amount of time it takes to complete some of the optional-use forms, thereby reducing public burden. In doing so, information collection burden estimates have been updated resulting in a change in the hours and cost burdens covered by the ICR. The Department proposes to ease the function of the documentation process by better structuring the forms used to collect and provide information where required. A health care provider's multidisciplinary staff members can use their expertise to achieve the documentation's intent to provide sufficient information about a leave need accurately in a less time-consuming way. The Department is submitting this ICR as a revision.

**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 and secondary 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 service member 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 the 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, e.g. 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 one or more of the essential 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. For leave due to a qualifying exigency, notice must be provided as soon as practicable, regardless of how far in advance such leave is foreseeable. 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; 824.300(b) and (c)]. When an employee requests FMLA leave or when the employer acquires knowledge that an employee's leave may be for a 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 -.310]. 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 medical 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].

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 or optional-use 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(d) -.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 requires the use of a single 12-month period measured forward from the first date of leave for this reason). 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 (instead of taking the leave) 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(c)(2)]. 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 Nondiscrimination Act (GINA) confidentiality requirements; except that: supervisors and managers may be informed regarding necessary restrictions on the work or duties of an employee and necessary accommodations; first aid and safety personnel may be informed, when appropriate, if the employee's physical or medical condition might require emergency treatment; and government officials investigating compliance with the FMLA, or other pertinent law, shall be provided relevant information upon request.

The FLSA recordkeeping requirements, contained in Regulations 29 CFR part 516, are currently approved under OMB control number 1235-0018; consequently, this information collection does not duplicate their burden, despite the fact that for the administrative ease of the regulated community this information collection restates them.

## 2. Purpose and Use

The regulations require employers and employees to make third-party disclosures. The FMLA third-party disclosures ensure that both employers and employees are aware of and can exercise their rights and meet their respective obligations under FMLA. With these regulations in mind, the WHD created the following 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 eligibility notice and written notice detailing specific expectations and obligations of the employee and explaining any consequences of a failure to meet these obligations. See 25 § 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.

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.

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](http://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 received 139 comments on the proposed revisions to the FMLA forms during the 60-day comment period that ended on October 4, 2019. Some of the comments did not address the PRA. The Department received comments from a broad array of constituencies, including employer and industry associations, individual workers, worker advocacy groups, law firms (representing both employers and employees), educational organizations and representatives, state and local governments, and other interested members of the public. All timely received comments are available for viewing at [www.reginfo.gov](http://www.reginfo.gov).

Some of the comments the Department received were general statements of support or opposition. The Department has carefully considered the timely submitted comments addressing the proposed changes. Substantive concerns raised in the comments are discussed below, along with the Department's responses to those comments.

The Department received some comments that are beyond the scope of this proposed revision. For example, some commenters asked for edits that could only be undertaken through changes to the FMLA or its implementing regulations. For example, one commenter requested the addition of an option certifying the employee can work a "light duty" position. Another requested the Department charge the Health Care Provider (HCP) for incorrectly completing medical certification forms and a third asked that we prohibit HCPs from charging for completion of the forms. The underlying statute may only be altered by Congress and FMLA regulations can only be revised through notice and comment rulemaking. Additionally, a few comments did not address the forms revisions, but rather sought technical assistance from the Department. The Department proposed certain changes for consistency across all forms: added color-coding to sections specific to the employer, employee, or health care providers; clarified instructions;

use of bold font for emphasis; changed format from open questions to statements to be confirmed by checking a box; removed unnecessary blank lines; reordered and renumbered information, sections, and subsections for flow; and, rephrased for plain language. The Department also made changes to standardize headings, font sizes, and other related style features of the forms. A complete list of changes is uploaded into ROCIS and the substantive changes and comments are addressed below.

a. Proposed Changes to Form WH-381, Eligibility and Rights & Responsibilities Notice

The Department proposed to divide information sections into three parts, adding checkboxes and aligned text boxes to fulfill the Department's 508 compliance obligations, added options to identify type of certification requested, added information documenting family relationships, and added instructions.

Several commenters identified a potential conflict in the text of the form that stated that leave was available when, in fact, the leave may not be available in all instances. The Department agreed and deleted the portion of the sentence stating leave was available.

More than a few commenters recommended that the Department add information that would allow the employer to make a determination whether leave to care for a son or daughter over age 18 may be available. The Department agreed with the recommendation and added a checkbox option to identify if a child is over age 18 and incapable of self-care because of a physical or mental disability. One commenter asked that the Department consider adding clarification with respect to the definition of spouse to include common law marriage. In response, the Department has added the definition of spouse, which includes a husband or wife as defined or recognized in the state where the individuals was married, to the form. The added language clarifies the definition is inclusive of common law and same-sex marriages.

Several commenters requested we clarify family relationships with respect to *in-loco parentis* relationships especially. Some requested we add an "Other" category to the listed family relationships. The Department declined to add a category for "Other." The Department agrees, however, that clarification was needed and added clarifying language regarding *in loco parentis* to this section, added checkboxes to specify a child under or over age 18, and added clarifying language regarding "statement of relationship" to the Additional Information Needed section.

Two commenters requested a revision to checkbox options under "substitution of paid leave" to reflect that some or all of the leave may be paid. The Department agreed and added clarifying language. The Department also revised the list of checkboxes and added an "other" section to allow employers to self-identify the reason for the absence. Under Part C: Maintain Health Benefits, a commenter thought there might be some confusion and the Department added guidance on responsibilities for paid versus unpaid leave.

b. Proposed Changes to form WH-382, Designation Notice

In addition to the changes highlighted above, the Department also proposed adding a reason for leave option, adding sections for incomplete or insufficient certification, and adding guidance that medical release requests for second or third opinions are limited only to the serious health condition at issue. One commenter raised a concern about lack of information concerning required designation as outlined in a recent DOL opinion letter. The Department agreed and added the information to the instructions for the employer.

Three commenters suggested use of plain language and consistent word choice throughout. The Department agreed and revised the forms accordingly. For example, the Department now uses “child” throughout, instead of “son or daughter.”

c. Proposed Changes to form WH-380-E, Certification for the Employee’s Serious Health Condition

In addition to conforming changes highlighted above, the Department proposed adding the date the employer learned of leave as a new information collection, added the website address to allow persons to find more information, added information about a certification request for bonding time with a newborn baby, added email as a method of contact for the health care provider, created checkbox options for the health care provider to give medical information, moved the essential job functions into its own section and added a disclaimer about state or local laws regarding medical information.

One commenter asked that the definition of incapacity be included in the form. The Department responded by adding the definition of incapacity to the instructions. The Department proposed reorganization of information requested of the health care provider in forms WH-380-E and WH-380-F, separating information requested about the condition from information requested about the need for leave or need for care. The Department received several positive comments about the reorganization, but other commenters requested that there be an option to check “none of the above apply,” or objected that the reorganization requires the health care provider to make a legal determination about the meaning of a serious health condition under the FMLA. The Department agreed to add a “none of the above” option. The Department retained the reorganization but deleted several requests for information that were unnecessary or repeated. The requests for information are consistent with regulatory requirements and prior versions of the forms, which allow the health care provider to verify the nature of an employee’s or an employee’s family member’s health condition, according to their medical expertise.

Some commenters requested that the Department allow more space for the health care provider to provide other appropriate medical facts and the diagnosis, while others requested that diagnosis not be included because of potential conflicts with state laws. The Department added examples of other appropriate medical facts. The Department declined to make other

changes as there is a description of the medical facts, including reference to diagnosis, in the instructions that precede the section. Additionally, there is no requirement that a patient's diagnosis be disclosed. Several commenters requested the addition of space to list dates of visits twice per year for chronic conditions. The Department declines to do so as the information request is not necessary. A chronic condition under the FMLA is one that requires periodic visits (defined as at least twice a year) for treatment by a health care provider, or by a nurse under direct supervision of a health care provider. Providing specific information about the dates of periodic visits is not necessary for the health care provider's professional assessment of the treatment the condition requires.

One commenter recommended inclusion of "safe harbor" language from the Genetic Information Nondiscrimination Act of 2008 (GINA) in the WH-380 and WH-380-F instructional references. The Department declined and opted to retain the current language, which includes a regulatory reference to the requested additional GINA information. Commenters suggested adding date prompts in the forms and the Department agreed and incorporated them throughout the forms. One requester asked that the Department delete the instruction with respect to bonding with a healthy, newborn child. The Department declines to do so because bonding time is a qualifying reason for leave without need for medical certification. A certification of a serious health condition would be appropriate when an employee requests leave to provide care for an infant with a qualifying serious health condition.

A few commenters recommended adding an option under medical information for "none of the above." The Department agrees and has added the option. Commenters requested adding examples for serious health conditions. The Department agrees and has added several examples, where appropriate. Two commenters requested adding an example of behavioral health. The Department agrees and has added the examples. A commenter requested the addition of text for scheduled medical visits. The Department agrees and has added the text. More than one commenter indicated it was not clear whether the reduced work schedule was the time that the employee could work versus could not work. The Department agrees and has added clarifying text. One commenter provided suggested text to clarify frequency and duration for intermittent leave use. The Department agreed and has incorporated the suggested text. The Department also added clarifying text addressing essential job functions.

d. Proposed Changes to form WH-380-F, Certification for Family Member's Serious Health Condition

The Department made changes to the WH-380-F to conform with changes outlined above to the WH-380-E, such as, the Department has added *in-loco parentis* language and the definition of spouse to the form. The Department made similar conforming changes for care for a child over age 18 with a physical or mental disability.

A commenter questioned whether the employee, rather than the health care provider, should give the best estimate of the reduced leave schedule or other amount of leave needed to provide the care. The Department declines to make the change as the health care provider certifies the medical condition of the employee's family member, not the employee's schedule needs. The WH-380-F provides for a health care provider's certification that an employee's family member's need for care may be met, at least in part, by an employee's request for FMLA leave. The certification allows the employee to provide information about the leave needed to the employer for the employer to verify whether the leave request is FMLA-qualifying. The employee need not be the only individual, or even the only family member, available to provide care to the family member with a serious health condition and the employee is not required to furnish information about the availability of other caregivers. For example, a health care provider may certify that a patient needs around-the-clock care and an employee requests leave for one week to substitute care-giving normally provided by others. The health care provider certification in this instance is that the patient needs full-time care, not that an employee needs any particular amount of leave from work. Some commenters asked for a birthdate of the family member as doctor's offices frequently use that information to retrieve patients' records. The Department declines to add this to the form as this is an unnecessary, additional collection of information for FMLA leave purposes.

e. Proposed Changes to form WH-384, Qualifying Exigency

In addition to the above-mentioned conforming changes, the Department proposed adding a date learned of leave line, added stronger guidance, and added regulatory citations. The Department proposed adding textbox options for qualifying exigency.

The Department received few comments on this form. However, one commenter stated that the Department incorporated too many checkboxes. The Department, in response, revised the form to use fewer checkboxes and standardized the format used for the checkboxes across all forms.

f. Proposed Changes to form WH-385, Military Caregiver Leave

In addition to the above-mentioned conforming changes, the Department proposed adding instructions, added information about invitational travel orders and invitational travel authorizations (ITO/ITA), added information about administrative delays, added checkboxes in several areas, added an entry for the health care provider email, added an instruction that the health care provider print his/her name, and added checkboxes for health care provider to distinguish between military versus nonmilitary types of provider.

The Department received no substantial comments specific to this form. In response to comments, the Department made changes to text around the servicemember's relationship to the employee, to the format of the patient's need for care, and to the text of instructions to be

consistent with changes to the WH-380-E and WH-380-F, and to reduce the total number of pages of the proposed revision.

g. Proposed Changes to form WH-385-V, Military Caregiver Leave for Veterans

In addition to the already mentioned conforming changes and comments, the Department proposed adding “need for care” instructions and information about injury occurring in the line of duty. One commenter suggested moving the question regarding discharge to earlier in the form. In response, the Department kept the information at the current location but added clarifying language regarding discharge status.

General comments

Several commenters suggested deleting a question added to the WH-380-E, WH-380-F, WH-384, WH-385, and WH-385-V forms about the date the employer learned of the need for leave. The Department agreed with these commenters’ suggestion and has deleted the question on the final version of the medical certification and military family leave certification forms. The question remains on the WH-381 notice of eligibility and rights and responsibilities, as it exists on the current form. The Department received several comments on the length of forms, location of the instructions, and redundant questions. The Department responded by limiting all forms to no more than four pages and revised the forms throughout by moving the instructions to the front and eliminating redundant or repetitive questions, where appropriate. The Department received a number of comments that addressed the amount of time it would likely to take to complete the forms. Some commenters thought it may take more time to complete forms, others suggested the new format and checkboxes made it easier. As a result, the Department made no change to the time allotted to complete the proposed forms.

Some commenters thought text on the forms that states the certification due date “must be at least 15 days from the date the certification is given to the employee” should more closely reflect the regulatory text which identifies that the timing for the certification should be “within 15 calendar days after the employer’s request, unless it is not practicable under the particular circumstances to do so despite the employee’s diligent, good faith efforts or the employer provides more than 15 calendar days to return the requested certification.” The Department changed text on the WH-380-E, WH-380-F, WH-381, and WH-384 to, “Must allow at least 15 calendar days from the date requested, unless it is not feasible despite the employee’s diligent, good faith efforts,” to address these concerns.

Customer Discovery

Employers may use the DOL optional-use FMLA forms to obtain information to determine whether leave requests qualify as FMLA leave and to provide information, or notices, to



employees about various rights and responsibilities under the law. Employers are the primary users of the forms because they are responsible for complying with written notice requirements and, in the case of the health care provider and military family leave certification forms, they are the requestors of information. Before drafting revisions, WHD sought feedback from the employer community at a national conference of leave administrators by distributing comment cards and hosting a roundtable session for feedback about the layout and content of the forms. This comment card was approved by OMB under control number 1235-0088 prior to collection. Respondents included legal advisors, third party administrator staff, and human resource professionals.

WHD also heard from employees and health care providers, orally and in writing, for revision pointers, and drew on feedback received during educational and like activities related to its enforcement authority for the FMLA.

#### 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 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 there are 87.2 million FMLA eligible workers. The Department also estimates that 392,127 employers respond to the FMLA collections. These 392,127 employers consist of 290,304 (= 392,127 x .74033172415) private businesses, and 101,823 (= 392,127-290,304) government entities. Of the government entities, 101,731 (= 392,127 x .2594333834) are assumed to be state, local, or tribal governmental employers, and 92 (= 392,127 x .0002348951) are assumed to be Federal government employers.<sup>1</sup> The Department estimates that the number of respondents (i.e. employees who work for covered employers, who are FMLA eligible, and who actually take FMLA leave) to be approximately 6,889,489.<sup>2</sup>

### **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 indicating that the leave is potentially FMLA-qualifying. 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. The Department proposes no burden estimate change to the employee notice of need for FMLA leave emerging out of this revision and therefore no change to the burden estimates for the collection.

As explained above, the Department has estimated that there are 6,889,489 respondents. To determine the number of valid responses the Department applied the average number of responses per type of leave respondent. This calculation is as follows:

Traditional FMLA leave respondents: 6,719,336 <sup>3</sup> x 1.5 responses <sup>4</sup> =	10,079,004
Qualifying Exigency leave respondents: 135,020 x 13 responses =	1,755,260
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<sup>1</sup> The Department assumes the following proportional response burden among the employer entities: private, 74.033172415 percent; state, local, and tribal governments, 25.94333834 percent; and federal, 0.02348951 percent.

Within each information collection, the respondents, responses, and burden estimates are rounded to the nearest whole number.

<sup>2</sup> This number is derived by multiplying 87.2 million FMLA eligible workers by the ratio of 7,182,916 respondents in the 2015 ICR to 91.1 million FMLA eligible workers in the 2015 ICR. That is: 87,200,000 x 7,182,916/91,100,000 = 87,200,000 x .079 = 6,888,800 respondents. This number needed to be disaggregated by employer type (see footnote 3). Due to rounding, when the disaggregated totals were summed the product yielded 6,889,489 (= 6,719,336+135,020+28,244+6,889).

Military Caregiver (active-duty) leave respondents: 28,244 x 44 responses =	1,242,736
Military Caregiver (veteran) leave respondents: 6,889 x 51 responses =	351,339
<i>Total responses:</i>	13,428,339

The Department also anticipates the additional submission of 2,200,000 invalid responses where either the employer was not covered or the employee was not eligible for leave.

Response burden grand total: 15,628,339 responses (13,428,339 + 2,200,000).

Hours Burden: 520,945 hours (15,628,339 responses x 2 minutes per response / 60 minutes per hour).

*Total burden requested for requirement A: 15,628,339 responses and 520,945 employee hours burden.*

## **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 290,304 private, 101,731 state, local, and tribal, and 92 federal employers, as discussed above (see footnote 1). 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. The Department provides optional-use form WH-381, Notice of Eligibility and Rights & Responsibilities. Revisions to the optional-use form include:

- Font size standardized, check boxes added, and selected text bolded for emphasis
- The form has been reorganized into proposed Section I, Notice of Eligibility, Section II, Additional Information Needed, and Section III, Notice of Rights & Responsibilities;

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<sup>3</sup> The disaggregated number of respondents was determined as follows: Total respondents x 2015 percent of respondent type of total 2015 respondents. Accordingly, Traditional FMLA, 6,888,800 x .9754 = 6,719,336; Exigency, 6,888,800 x .0196 = 135,020; Military caregiver active duty, 6,888,800 x .0041 = 28,244; Military caregiver veteran, 6,888,800 x .0010 = 6,889. The 2015 percent of respondent type of total respondents was calculated as follows: Traditional FMLA 7,005,950/7,182,916 = 97.54%; Exigency 140,900/7,182,916= 1.96%; Military caregiver active duty 29,100/7,182,916= 0.41%; and Military caregiver veteran 6,966/7,182,916 = 0.1%

<sup>4</sup> The 1.5 traditional FMLA leave requests per year per respondent number are from a 2012 DOL survey. The Department estimates that there are 13 qualifying exigency leave requests per year per respondent, 44 military caregiver- active duty leaves per year per respondent, and 51 military caregiver- veteran leaves per year per respondent.

- The employee name line has been added to the top of all pages to avoid confusion should the pages become separated;
- Some clarifying language changes are inserted.
- Text and checkboxes aligned
- Instructions modified to precede subparts

While the Department believes the changes to the optional-use WH-381 streamline completion of the document by employers and make it easier to complete, we do not claim any burden reduction for this particular form. The Department believes an average of ten minutes continues to be sufficient for completion of the notice. As a result, the Department does not change the underlying burden estimate.

Responses and hours burden requirement B:

*Private* (74.03317215%): 11,570,155 responses (=15,628,339 total responses from above x .7403317215) and 1,928,359 hours (= 11,570,155 x 10 minutes / 60 minutes per hour)

*State, local, tribal* (25.943338%): 4,054,513 responses (= 15,628,339 x .25943338) and 675,752 hours (= 4,054,513 responses x 10 minutes / 60 minutes per hour)

*Federal* (0.02348951%): 3,671 responses (15,628,339 x .0002348951) and 612 hours (3,671 x 10 minutes/60 minutes per hour)

*Total burden requested for requirement B:* 15,628,339 responses and 2,604,723 employer hours

**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>. 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. The Department provides optional-use forms WH-380-E, Certification of Health Care Provider for Employee’s Serious Health Condition and WH-380-F, Certification of Health Care Provider for Family Member’s Serious Health Condition and WH-385, Certification for Serious Injury or Illness of a Current Servicemember for Military Family Leave and WH-385-V, Certification for Serious Injury or

Illness of a Veteran for Military Caregiver Leave, for use in obtaining medical information used in determining the need for FMLA leave. The Department proposes to revise these optional-use forms as listed below:

#### **WH-380-E Certification of Health Care Provider for Employee's Serious Health Condition**

##### **Revisions:**

- Current WH-380-E has three sections. In the revised form, the employee section was deleted.
- Employee name can be filled in at the top of every page.
- New line for health care provider's name to be printed; new line for health care provider email address.
- Part A medical information items rearranged; response requests follow the order of serious health condition definitions in the regulations.
- Examples added to medical conditions.
- "None of the above" option added to medical conditions.
- Deleted questions about treatment and periods of incapacitated that were duplicated in different sections.
- Format for completion of information about amount of leave, such as the frequency and duration of leave needed on an intermittent basis, reworked.
- All Part A and Part B items for response have been numbered.
- Instead of responding to yes or no questions, health care providers can check boxes to provide the appropriate medical information.
- Where written responses are necessary, providers have one or two lines to comment, rather than multiple lines.
- Providers have option to indicate whether overnight stay, incapacity, treatment, etc. has already occurred or is anticipated.
- New Part C subsection to address confusion surrounding question 3 on the current form, about whether the employee is able to perform any of his or her job functions.
- Short instructions added to subsections; health care provider guidance expanded; FMLA serious health condition list added to the end of the form.
- Standardized font size for improved readability.
- Selected text bolded for emphasis.

#### **WH-380-F Certification of Health Care Provider for Family Member's Serious Health Condition**

##### **Revisions**

- Except as noted, revisions to the WH-380-F are consistent with changes to the WH-380-E. As with the WH-380-E, the medical information subsection was reorganized to follow the regulatory order of serious health condition definitions; questions were rewritten in the

form of statements for the health care provider to affirm; duration and frequency descriptions reworked; and so on.

- In the WH-380-F, however, the employee section is maintained. This section was revised to provide check boxes for the employee to indicate the family relation and type of care to be provided, and prompts for filling in the amount of FMLA leave needed have been added.
- In Part B of the current WH-380-F, questions about the medical necessity for care of the patient are repeated four times. With the revision, the health care provider is asked once to confirm that care for the patient is medically necessary, and gives examples of types of care that may be provided.

The Department believes the reorganization of the forms, addition of color-coding to sections specific to the employer, employee, or health care providers, and clarification of instructions reduces the burden for each of the forms from 20 minutes on average to 15 minutes on average. As a result, the Department has recalculated burdens associated with these optional-use forms.

#### Responses and hours burden requirement C-1:

Responses: 6,719,336 traditional FMLA leave respondents x 1.5 average responses per respondent x 0.728 percentage serious health condition as FMLA leave reason x 0.92 percentage of employees' with this leave reason asked for medical certification x 1.15 original certification plus second/third opinion recertification rate = 7,763,091 responses burden

Hours: 7,763,091 responses x 15 employee minutes/60 minutes per hour = 1,940,773 hours burden

*Total burden requested for requirement C-1: 7,763,091 responses and 1,940,773 hours*

#### 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. 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. The Department proposes no change to the burden estimate of 10 minutes.

Responses and hours burden requirement C-2:

Responses

6,719,336 traditional FMLA leave respondents x 1.5 average responses per respondent x 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 = 550,314

6,719,336 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 = 825,470

Total responses: 1,375,784

Hours:

1,375,784 responses x 10 minutes / 60 minutes per hour = 229,297 hours

*Total burden requested for requirement C-2: 1,375,784 responses and 229,297 hours*

3. Certification of Qualifying Exigency for Military Family Leave.

The Department estimates that it will take approximately 15 minutes for a Human Resources Assistant to request, review, and verify the employee's certification papers. The Department proposes to revise optional-use form WH-384, Certification of Qualifying Exigency for Military Family Leave. The proposed changes are:

**WH-384 Certification of Qualifying Exigency for Military Family Leave**

Revisions

- Line for employee name on every page.
- Employee signature line deleted.
- Family relationship check box options added to Section II.
- Questions in Section II reworded as statements for the employee to confirm by check box.
- The name of the Part A subsection changed from Qualifying Reason for Leave to Covered Active Duty Status.
- Part B changed from Amount of Leave Needed to Appropriate Facts, and check box options provided for the employee to indicate the qualifying exigency category. Question (1) on the current form deleted, and employee prompted to describe activities after checking the box for the relevant category.
- Part C changed from Third Party Information to Amount of Leave Needed. Schedule information request revised in the manner of the WH-380 forms. Rest and Recuperation leave information added.
- Part D changed to Third Party Information.

- Added family relationship check box options to Section II.

Color coding to designate areas completed by the employer and employee, check boxes and clarified instructions lead the Department to drop the estimated time to complete the optional-use form to fifteen minutes.

#### Responses and hours burden requirement C-3

##### Responses:

135,020 qualifying exigency respondents x 1.5 average responses per respondent x 0.92 percentage of employees' with this leave reason asked for medical certification = 186,328 responses.

##### Hours:

186,328 responses x 15 minutes / 60 minutes per hour = 46,582 hours

*Total burden requested for requirement C-3: 186,328 responses and 46,582 hours*

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

The Department estimates that it will take a health care provider 15 minutes to complete the military caregiver certification papers. Time spent by the Human Resources Assistant in review and verification of the certification papers is captured under item D below: *Notice to Employees of FMLA Designation*. The Department provides optional-use forms WH-385, Certification for Serious Injury or Illness of a Current Servicemember for Military Family Leave and WH-385-V, Certification for Serious Injury or Illness of a Veteran for Military Caregiver Leave, for use in obtaining medical information used in determining the need for FMLA leave. The Department proposes to revise these optional-use forms as listed below:

#### **WH-385 Certification for Serious Injury or Illness of Covered Servicemember**

##### Revisions

- Employee name lines on every page.
- The first page of the current form is only instructions. Form revised so the instructions are directed to employee, employer, and health care provider in different sections.
- Questions rewritten as statements to be confirmed by check box.
- Added check box options for employee to describe the type of care to be provided.
- Health care provider information section reformatted with drop down option for confirming type of provider (DOD, VA, DOD TRICARE, etc.).
- Order of medical information requested begins with date condition started and estimate of how long the condition will last, consistent with the WH-380-E and -F.



- Bolding of key words consistent with style of WH-380-E and –F.

### **WH-385-V**

#### **Certification for Serious Injury or Illness of a Veteran for Military Caregiver Leave**

##### Revisions

- Changes are consistent with changes to the WH-385.
- In Part B of the revised form, added option for the employee to select “honorable” or “dishonorable” discharge.

The Department believes the reorganization and streamlining of the forms, addition of color-coding to sections specific to the employer, employee, or health care providers, and clarification of instructions reduces the burden for each of the forms. The Department therefore proposes to reduce the average burden from 20 minutes on average to 15 minutes on average. As a result, the Department has recalculated burdens associated with these optional-use forms.

##### Responses and hours burden requirement C-4:

##### Responses:

35,133 military caregiver respondents x 1.5 average responses per respondent x 0.92 percentage of employees' with this leave reason asked for medical certification = 48,484 responses

##### Hours:

48,484 responses x 15 minutes / 60 minutes per hour = 12,121 hours

*Total burden requested for requirement C-4: 48,484 responses and 12,121 hours*

##### **Total Burden Requested for Requirement C**

Total Responses: 9,373,687 (C-1: 7,763,091 + C-2: 1,375,784 + C-3: 186,328 + C-4: 48,484)

Total Hours: 2,228,773 (C-1: 1,940,773 + C-2: 229,297 + C-3: 46,582 + C-4: 12,121)

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

The Department estimates that each written FMLA designation notice takes employers approximately 10 minutes to complete. The Department proposes to revise the optional-use form WH-382, Designation Notice. The proposed changes are:

### **WH-382 Designation Notice**

### Revisions

- Employee name line added to top of pages.
- Check boxes and bolding of items throughout.
- “On date\_\_\_\_ we received information,” added on page one.
- Leave denied option moved from the end of the form.
- Additional information needed section is expanded with separate headers for incomplete or insufficient certification and second and third opinions.
- Separate response options for incomplete or insufficient; definitions of “incomplete” and “insufficient” provided.
- Changes to substitution of paid leave options and return-to-work requirements.

While the Department has added check boxes for convenience and made formatting changes which we think will make the form easier to complete, the Department is not changing the burden estimate of 10 minutes. As a result, the burden hours are unchanged for this particular optional-use form.

### Responses and hours burden requirement D:

*Private* (74.03317215%): 11,570,155 responses (=15,628,339 total responses from above x .7403317215) and 1,928,359 hours (= 11,570,155 x 10 minutes / 60 minutes per hour)

*State, local, tribal* (25.943338%): 4,054,513 responses (= 15,628,339 x .25943338) and 675,752 hours (= 4,054,513 responses x 10 minutes / 60 minutes per hour)

*Federal* (0.02348951%): 3,671 responses (15,628,339 x .0002348951) and 612 hours (3,671 x 10 minutes/60 minutes per hour)

*Total burden requested for requirement D:* 15,628,339 responses and 2,604,723 employer hours

### **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. Total number of employers is estimated to be 290,304 private, 101,731 state, local, and tribal, and 92 federal employers, as discussed above (see item 12 on page 11). Also, the Department assumes that employers who change their 12-month period for determining FMLA eligibility employ ten percent of the 87.2 million workers (8,720,000) covered by the FMLA. These notifications can be accomplished via e-mail or posting hard copies and they require approximately 10 minutes for the employer to notify their entire workforce. The Department proposes no changes to the burden estimate.

### Respondents by sector:

Private: 29,030 employers or respondents (= 290,304 x 0.10)

The Family and Medical Leave Act of 1993, as amended  
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State, local, tribal: 10,173 employers or respondents (= 101,731 x 0.10)

Federal: 9 employers or respondents (= 92 x 0.10)

Responses and hours burden requirement E:

*Private* (74.03317215%): 6,455,693 responses (= 8,720,000 x .7403317215) and 4,838 hours (= 29,030 respondents x 10 minutes / 60 minutes per hour)

*State, local, tribal* (25.943338%): 2,262,259 responses (= 8,720,000 x .25943338) and 1,696 hours (= 10,173 respondents x 10 minutes / 60 minutes per hour)

*Federal* (0.02348951%): 2048 responses (= 8,720,000 x .0002348951) and 2 hour (= 9 respondents x 10 minutes / 60 minutes per hour)

*Total burden requested for requirement E: 8,720,000 responses and 6,536 hours*

**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. Total number of employers are estimated to be 290,304 private, 101,731 state, local, and tribal, and 92 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. The Department proposes no changes to the burden estimate of five minutes.

Respondents by sector:

Private: 29,030 employers or respondents (= 290,304 x 0.10)

State, local, tribal: 10,173 employers or respondents (= 101,731 x 0.10)

Federal: 9 employers or respondents (= 92 x 0.10)

Responses and hours burden requirement F:

*Private*: 43,545 responses (= 29,030 employers x 1.5 key employee notice) and 3,629 hours (= 43,545 x 5 minutes / 60 minutes per hour)

*State, local, tribal*: 15,260 responses (= 10,173 employers x 1.5 key employee) and 1,272 hours (= 15,260 x 5 minutes / 60 minutes per hour)

*Federal*: 14 responses (9 employers x 1.5 key employee notices) and 1 hour (14 x 5 minutes / 60 minutes per hour)

*Total burden requested for requirement F: 58,819 responses and 4,902 hours.*

**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. 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." The Department proposes no change to the burden estimate for this requirement.

Responses and hours burden requirement G:

$6,889,489 \text{ leave takers}^5 \times 0.255 \text{ request rate} \times 0.10 \text{ response rate} = 175,682 \text{ respondents}$   
 $175,682 \text{ respondents} \times 2 \text{ responses per year} = 351,364 \text{ responses}$   
 $351,364 \times 2 \text{ minutes} / 60 \text{ minutes per hour} = 11,712 \text{ hours}$

*Total burden requested for requirement G: 351,364 responses and 11,712 hours.*

**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. As such, the Department assumes that fifty percent of employees who take leave will take it for family reasons. 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. The Department proposes no change to the burden estimate for documenting family relationships.

Responses and hours burden requirement H:

$6,889,489 \text{ FMLA leave taker respondents} \times 0.05 \text{ required to provide additional documentation} = 344,474 \text{ responses}$   
 $344,474 \text{ responses} \times 5 \text{ minutes} / 60 \text{ minutes per hour} = 28,706 \text{ employee hours}$

*Total burden requested for requirement H: 344,474 responses and 28,706 hours.*

**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. Total number of employers is estimated to be

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<sup>5</sup> See page 11 of this document: "The Department ...estimates that the number of potential respondents (i.e. employees who work for covered employers, who are FMLA eligible, and who actually take FMLA leave) to be approximately 6,889,489." See also footnote 2.

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290,304 private, 101,731 state, local, and tribal, and 92 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. The Department proposes no change to the burden estimate regarding cancellation of health benefits.

Respondents by sector

*Private:* 145,152 respondents (=290,304 x 0.50)  
*State, local, tribal:* 50,866 respondents (=101,731 x 0.50)  
*Federal:* 46 respondents (=92 x 0.50)

Responses and hours burden requirement I:

*Private:* 145,152 responses (=145,152 respondents x 1 notice) and 12,096 hours (=145,152 x 5 minutes / 60 minutes per hour)  
*State, local, tribal:* 50,866 responses (=50,866 respondents x 1 notice) and 4,239 hours (=50,866 x 5 minutes / 60 minutes per hour)  
*Federal:* 46 responses (=46 respondents x 1 notice) and 4 hours (=46 x 5 minutes / 60 minutes per hour)

*Total burden requested for requirement I: 196,064 responses and 16,339 hours.*

**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 Department proposes no change to the burden estimate.

Respondents by leave type:

Traditional FMLA leave respondents: 6,719,336  
Qualifying Exigency leave respondents: 135,020  
Military Caregiver leave respondents: 28,244 (active duty); 6,889 (veterans)

Responses and hours burden requirement J:

Responses:

Traditional FMLA: 10,079,004 responses (= 6,719,336 x 1.5 instances) +  
Qualifying Exigency FMLA: 1,755,260 responses (= 135,020 x 13 instances) +  
Military Caregiver FMLA: 1,594,075 responses (= (28,244 x 44 instances) + (6,889 x 51 instances)) = 13,428,339 total responses burden.

Hours:

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279,757 employer hours (=13,428,339 total responses x 1.25 minutes / 60 minutes per hour)

Responses and hours burden for requirement J disaggregated by sector:

Private (74.03317215%): 9,941,425 responses (=13,428,339 x .7403317215) and 207,113 hours (= 279,757 x .7403317215)

State, local, tribal (25.943338%): 3,483,759 responses (= 13,428,339 x .25943338) and 72,578 hours (= 279,757 x .25943338)

Federal (0.02348951%): 3,154 responses (= 13,428,339 x .0002348951) and 66 hours (= 279,757 x .0002348951)

Total burden requested for requirement J: 13,428,338 responses and 279,757 hours.

**CALCULATING TOTAL BURDENS ESTIMATES**

**Total Estimated Responses Burden for All Requirements**

**GRAND TOTAL ANNUAL RESPONSES = 79,357,763** (= requirement A: 15,628,339 + B: 15,628,339 + C: 9,373,687\* + D: 15,628,339 + E: 8,720,000 + F: 58,819 + G: 351,364 + H: 344,474 + I: 196,064 + J: 13,428,338)

\*C = sub-requirement c-1: 7,763,091 + c-2: 1,375,784 + c-3: 186,328 + c-4: 48,484

**Total Estimated Hours Burden for All Requirements**

**Grand Total Hours = 8,307,116** (= requirement A: 520,945 + B: 2,604,723 + C: 2,228,773\* + D: 2,604,723 + E: 6,536 + F: 4,902 + G: 11,712 + H: 28,706 + I: 16,339 + J: 279,757)

\*C = sub-requirement c-1: 1,940,773 + c-2: 229,297 + c-3: 46,582 + c-4: 12,121

**Total Estimated Burden Costs for All Requirements**

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 2018. The median hourly wage is \$19.42 plus 46 percent in fringe benefits and 17% in overhead costs, which results in a total hourly rate of \$31.65 (= (\$19.42 + \$8.93 + \$3.30). See BLS Occupational Employment Statistics, Occupational Employment and Wages, May 2018 (<http://www.bls.gov/oes/current/oes434161.htm>).

Total Estimated Burden Costs:

**\$262,920,221 (= 8,307,116 hours x \$31.65 per hour)**

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Data Collection	Number of Respondents	No. of Responses per Respondent	Total Responses	Average Burden per Response (in hours)	Total Burden Hours	Hourly Wage Rate and Total Cost Burden
A. Employee Notice of Need for FMLA Leave	Traditional: 6,719,336  Exigency leave: 135,020  Military caregiver-active duty: 28,244  Military caregiver-veteran: 6889	Traditional: 1.5  Exigency leave: 13  Military caregiver-active duty: 44  Military caregiver-veteran:	Traditional 10,079,004  Exigency: 1,755,260  Military caregiver-active duty: 1,242,736  Military caregiver-veteran	2 minutes/60 minute hour	520,945	

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	Total: 6,889,489	51	351,339  Total: 13,428,339 + 2,200,000 invalid responses =  Grand Total: <b>15,628,339</b>		
<b>B. Notice to Employee of FMLA Eligibility and Rights and Responsibilities Notice</b>			15,628,339 (see A)	10 minutes/60 minute hour	2,604,723
<b>C-1. Employee Medical Certification and Recertification</b>	Traditional: 6,719,336	Traditional: 1.5/ respondent x .0728 % serious health condition x 0.92% asked for medical cert x1.15 original cert plus 2 <sup>nd</sup> /3 <sup>rd</sup> opinion	7,763,091	15 minutes/60 minute hour	1,940,773
<b>C-2. Employee Fitness-for-Duty Medical Certification</b>	Traditional: 6,719,336	a) 1 fitness report: 1.5/respondent x 0.546 rate of taking leave x 0.10 response request rate x 1 frequency;  b) 3 fitness reports:	a) 550,314  b)825,470  Total 1,375,784	10 minutes/60 minute hour	229,297



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		1.5/respondent x 0.546 rate of taking leave x 0.05 response request rate x 3 frequency			
<b>C-3. Employee Certification of Qualifying Exigency for Military Family Leave</b>	135,020	1.5/respondent x 0.92% asked for medical certification	186,328	15 minutes/60 minute hour	46,582
<b>C-4. Employee Certification Care for Servicemembers /Veteran</b>	35,133	1.5/respondent x 0.92 % asked for medical certification	48,484	15 minutes/ 60 minute hour	12,121
<b>D. Employer Notice to Employees of FMLA Designation</b>			15,628,339 (see A)	10 minutes/ 60 minute hours	2,604,723
<b>E. Employer Notice to Employees of Change in 12-month Period</b>	39,212	10% x total FMLA covered Employees= 87.2 million x 0.10 = 8,720,000	8,720,000	39,212 respondent employers x 10 minutes/60 minute hour	6,536
<b>F. Employer Key Employee Notice</b>	39,212	1.5/respondent	58,819 <sup>6</sup>	5 minutes/60 minute hour	4,902
<b>G. Employee Status Report</b>	175,682	2/respondent	351,364	2 minutes/60 minute hour	11,712
<b>H. Employee Documenting Family Relationship</b>	6,889,489 FMLA leave takers	5% x leave taker respondents	344,474	5 minutes/60 minute hour	28,706

<sup>6</sup> Slight differences in numbers are a product of rounding and disaggregation to capture information on a sector basis in the report.

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<b>I. Employer Notice to Employee of Cancellation of Health Benefits</b>	196,064	1/respondent	196,064	5 minutes/60 minute hour	16,339	
<b>J. General Recordkeeping</b>	Traditional: 6,719,336	Traditional: 1.5/respondent	Traditional: 10,079,004			
	Exigency Leave: 135,020	Exigency Leave: 13/respondent	Exigency Leave: 1,755,260			
	Military Caregiver-active duty: 28,244	Military Caregiver-active: 44/respondent	Military Caregiver-active: 1,242,736	1.25 minutes/ 60 minute hour	279,757	
	Military Caregiver-veteran: 6,889	Military Caregiver-veteran: 51/respondent	Military Caregiver-veteran: 351,339			
		Grand Total= <b>13,428,338</b>				
<b>Totals:</b>			<b>79,357,763</b>		<b>8,307,116</b>	
<b>Total Burden Cost (hours) x \$26.26</b>						<b>8,307,116x \$31.65=</b>

		<b>\$262,920,221</b>
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### 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 health 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 Department estimates completion of serious health condition certification to take about 20 minutes and a fitness-for-duty certification to require 10 minutes.

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 \$52.22 plus 46 percent in fringe benefits plus 17% in overhead costs, which results in a total hourly rate of \$85.11 (= (\$52.22 + \$24.02 + \$8.87). See BLS Occupational Employment Statistics, Occupational Employment and Wages, May 2018, <https://www.bls.gov/oes/current/oes291071.htm>

#### C-1. Medical Certification and Recertification:

7,763,091 responses x 15 health care provider minutes / 60 minutes per hour = 1,940,773 hours

#### C-2. Fitness-for-Duty Medical Certification:

1,375,784 responses x 10 health care provider minutes / 60 minutes per hour = 229,297 hours

#### C-4. Certification for Leave Taken to Care for a Covered Servicemember (active duty and Veterans):

48,484 responses x 15 health care provider minutes / 60 minutes per hour = 12,121 hours

*Total health care provider hours burden: 2,182,191 hours (= 1,940,773 medical certification hours + 229,297 fitness-for-duty certification hours + 12,121 military caregiver certifications)*

*Total operations and maintenance costs:*  
**\$185,726,276 (= 2,182,191 hours x \$85.11)**

### 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 392,127 FMLA-covered employers, 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:

392,127 Forms WH-380-E x 4 pages (or x 2 two-sided pages) = 1,568,508 pages

392,127 Forms WH-380-F x 4 pages (or x 2 two-sided pages) = 1,568,508 pages

392,127 Forms WH-381 x 2 pages (or x 1 two-sided pages) = 784,254pages

392,127 Forms WH-382 x 1 page (or x 1 two-sided pages) = 392,127 pages

392,127 Forms WH-384 x 3 pages (or x 2 two-sided pages) = 1,176,381 pages

392,127 Forms WH 385 x 4 pages (or x 2 two-sided pages) = 1,568,508 pages

392,127 Forms WH-385-V x 4 pages (or x 2 two-sided pages) = 1,568,508 pages

Total Forms = 2,744,899 (392,127 FMLA-covered employers x 7 forms)

Total pages = 8,626,794

Total printed (front and back) pieces of paper for one copy of each form = 12 (=2 + 2 + 1 + 1 + 2 + 2 + 2)

8,626,794 pages/2 for front and back printing x \$0.03 printing costs per page = \$129,402

392,121 mailings x \$1.43 (\$0.03 envelopes + \$1.40 postage to mail 1 flat envelope and 12 pages)  
= \$560,733

*Total Estimated Annual Federal Costs = \$690,135 (= \$129,402 + \$560,733)*

#### 15. Changes in Burden

There is a decrease in burden hours due to the revision of the optional-use forms. The Department estimates that streamlining of the forms, addition of check boxes, color coding of the portion of the form completed by the employer, employee and health care provider and realignment of the instructions to those particular sections will reduce the time and effort needed to complete the optional-use forms. The Department proposes to ease the function of the documentation process by better structuring the forms used to collect and provide information where required. A health care provider's multidisciplinary staff members can use their expertise

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to achieve documentation's intent to provide sufficient information about a leave need accurately in a less time consuming way.

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.