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OFFICE OF PERSONNEL MANAGEMENT

5 CFR Part 630

RIN 3206–AG43

Absence and Leave; Sick Leave for Adoption

AGENCY: Office of Personnel Management.

ACTION: Final rule.

SUMMARY: The Office of Personnel Management is issuing final regulations to permit employees to use sick leave for purposes related to adoption of a child.

EFFECTIVE DATE: June 21, 1995.

FOR FURTHER INFORMATION CONTACT:
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SUPPLEMENTARY INFORMATION: On December 2, 1994, the Office of Personnel Management (OPM) published interim regulations (59 FR 62272) implementing section 629(b) of Public Law 103–329, the Treasury, Postal Service and General Government Appropriations Act for fiscal year 1995, September 30, 1994. Section 629(b) amended 5 U.S.C. 6307 to permit employees to use sick leave for purposes related to the adoption of a child. Section 629(b) also directed OPM to prescribe regulations to allow an employee to substitute sick leave retroactively for all or any portion of annual leave used by an employee for adoption-related purposes between September 30, 1991, and September 30, 1994.

The 60-day comment period ended on January 31, 1995. OPM received comments from six individuals and two organizations that supported adoptive families. Following is a summary of the comments.

Use of Sick Leave for Bonding With the Child

All commenters supported the use of sick leave for adoption-related purposes. One commenter applauded OPM's philosophy of not attempting to specify all of the circumstances in which the use of sick leave for adoption-related activities would be appropriate and opposed any greater specificity in the final rule. However, many other commenters were concerned about the limitations on using sick leave for bonding with the adopted child. The commenters believed that adoptive parents should be provided the same maternity benefits as those accorded birth parents.

Three commenters noted that it is important to the health and well-being of an adoptive child to allow adoptive parents a period of absence from work after the child arrives in the home to assist the adopted child in acclimating to new surroundings and adjusting to new family members. The commenters believe this is particularly important when the adopted child is not a newborn, has not previously bonded with an adult, and is going through a period of tremendous confusion and upheaval.

One commenter stated that by permitting sick leave to be used only for periods during which an adoptive parent is ordered or required by the adoption agency or by a court to be absent from work to care for the adopted child sends a message to adoptive parents and their children that they are different and should be accorded disparate treatment. An organization stated that adoption agencies are turning away from requiring an adoptive parent to be home to care for a newly adopted child, recognizing that this imposes a hardship on the family and restricts the pool of eligible families for children waiting for adoption. However, the organization further stated that although adoption agencies recognize that it may be impossible to require new adoptive parents to stay home, they encourage them to do so.

Some of the commenters believe adoptive mothers are treated in a discriminatory manner because they are not entitled to maternity leave as are biological mothers. One commenter stated that it is routine practice for the birth mother to be granted weeks or months of ''maternity'' sick leave without requiring strict medical justification. The commenter noted that requiring an adoptive parent to justify each court, agency, or social-worker visit imposes a stricter standard. One commenter suggested that OPM should recognize the reality of maternity leave for biological mothers—i.e., while sick leave would appear to be granted for the welfare of the mother, it is in fact used for the welfare of the child. Another commenter believed the absence of a provision to afford sick leave to birth fathers, and by extension to adoptive fathers, for maternity/bonding purposes is discriminatory and should be corrected.

Contrary to the belief of most of the commenters, Federal employees, including birth mothers, do not have an automatic entitlement to ''maternity leave.'' Sick leave is granted to a birth mother only for the period of incapacitation as a result of physical or mental illness, injury, pregnancy, childbirth, or medical examinations or treatments. Agencies may grant sick leave only when supported by evidence that is administratively acceptable. When determined necessary, an agency may require medical certification. The birth mother must use annual leave and/or leave without pay for absences from work beyond the period of incapacitation—e.g., for care of the newborn, bonding with the child, and other childcare responsibilities.

The birth father is allowed up to 13 days of sick leave each leave year to provide care for a family member under OPM's final sick leave regulations published in **Federal Register** on December 2, 1994 (59 FR 62266). OPM's regulations are consistent with the Federal Employees Family Friendly Leave Act (Public Law 103–388, October 22, 1994). The birth father may use sick leave to care for the birth mother during pregnancy and recovery from childbirth. This may include accompanying the birth mother to doctor's appointments, attending to the birth mother in the hospital or other health care facility, or caring for the birth mother during the period of incapacitation. Again, the agency may grant sick leave only when supported by evidence that is administratively acceptable, including medical certification when required.

Adoptive parents may request sick leave for adoption-related purposes including, but not limited to,

appointments with adoption agencies, social workers, and attorneys; court proceedings; required travel; and for any periods during which an adoptive parent is ordered or required by the adoption agency or by a court to be absent from work to care for the adopted child. Agencies may require employees to provide evidence that is administratively acceptable to the agency in support of a request for sick leave for adoption-related purposes.

There is no provision in law or regulation to permit the use of sick leave by birth parents or adoptive parents who voluntarily choose to be absent from work to bond with a birth or adopted child. In addition, we believe granting sick leave to an adoptive mother for bonding purposes for a period of the time equal to that received by a birth mother for incapacitation as a result of childbirth would discriminate against adoptive fathers. The adoptive mother would receive a greater entitlement to use sick leave for bonding purposes than would an adoptive father. We believe the administration of the sick leave program in no way discriminates against either birth or adoptive parents. The Equal Employment Opportunity Commission found OPM's interim regulations on sick leave for adoption to be ''consistent with Federal equal employment opportunity law and policy.''

Another commenter declared that OPM's interim rule is inconsistent with the intent of the Family and Medical Leave Act of 1993 (FMLA). The commenter believes the FMLA intends for adoption and childbirth to be treated in the same manner and that employees should receive the same amount of leave for these purposes.

The FMLA provides an employee with a total of up to 12 workweeks of *unpaid* leave during any 12-month period for the birth of a son or daughter; the adoption/foster care of a son or daughter; or the serious health condition of the employee or his or her spouse, son, daughter, or parent. By law, an employee may elect to substitute paid leave for unpaid leave under the FMLA, but such substitution must be consistent with current laws and regulations. OPM believes the regulations are consistent with the FMLA in that employees are entitled to 12 weeks of unpaid leave for either the birth or adoption of a child. If the employee chooses to substitute paid sick leave for unpaid leave under the FMLA, he or she may do so, but only in those situations where the use of sick leave would otherwise be permitted by law or regulation.

A commenter maintained that since the law (5 U.S.C. 6307) permits agencies to advance a maximum of 30 days of sick leave for purposes relating to the adoption of a child, Congress intended adoptive parents to have entitlement to 6 weeks (30 days) of sick leave for adoption and bonding. However, the legislative history of the 1-year experimental program created by Public Law 101–509 to test the feasibility of granting sick leave for adoption-related purposes does not support the contention that Congress intended an entitlement to sick leave for bonding purposes. Congress did recognize the time-consuming aspects of adoption and wished to make sick leave available for adoption-related purposes. Representative Frank Wolf, sponsor of the program, spoke of eliminating ''an impediment to adoption faced by Federal workers—the fact that current Federal leave policies require adoptive parents to take annual leave, their vacation time, when arranging an adoption. This measure would simply put adoptive parents in the Federal work force on an equal footing with biological parents, who are currently allowed to take sick leave for prenatal doctor visits.'' (See Congressional Record, Extension of Remarks, May 24, 1990, page E1757.) There is no indication that Congress intended to entitle adoptive parents to more paid leave than is available to birth parents.

We recognize the importance of and need for bonding time for both birth and adoptive parents and their new children. However, we continue to believe annual leave and leave without pay are the appropriate means to secure time with the newborn or newly-adopted child. In addition, agencies have the authority to advance annual leave to employees. The new entitlement to use sick leave to fulfill the legal and administrative requirements for adoption will allow an adoptive parent to conserve his or her annual leave and ensure the availability of annual leave for the period of bonding with the child. In addition, the FMLA provides 12 weeks of leave without pay for childbirth or adoption and can be used alone or in conjunction with annual and sick leave, where appropriate, to provide adequate time off for both birth and adoptive parents. OPM believes no change is necessary in the interim regulations.

Retroactive Substitution of Sick Leave for Annual Leave

As required by section 629(b) of Public Law 103–329, OPM's interim regulations permit an employee to substitute sick leave retroactively for all or any portion of any annual leave used by the employee for adoption-related purposes between September 30, 1991, and September 30, 1994. One commenter believed permitting an employee to substitute sick leave retroactively for annual leave used for purposes of adoption unfairly penalized birth fathers because birth fathers cannot substitute sick leave retroactively for annual leave used for the birth of a child.

The Federal Employees Family Friendly Leave Act and OPM's final sick leave regulations permit most Federal employees to use a total of up to 104 hours (13 days) of sick leave each leave year to give care or otherwise attend to a family member or to make arrangements for or attend the funeral of a family member. There are no provisions in law or regulation permitting the retroactive substitution of sick leave for annual leave used for these purposes. In contrast, the retroactive substitution of sick leave for annual leave taken for adoption-related purposes is an entitlement under section 629(b) of Public Law 103–329.

Another commenter suggested that when the substitution of sick leave for annual leave results in an annual leave balance that exceeds the maximum annual leave ceiling allowed for carryover into the next leave year, OPM should allow an employee 3 years to use the excess annual leave. OPM addressed this issue in the ''Supplementary Information'' accompanying the interim regulations. The agency and employee should be aware of an employee's obligation to schedule and use excess annual leave before the end of the year. Forfeited annual leave may not be restored unless the employee meets the conditions specified in 5 U.S.C. 6304(d). We caution employees to apply for the substitution of sick leave for annual leave used for adoption-related purposes early enough in the leave year to allow sufficient time to schedule and use the credited annual leave before the end of the leave year. We believe no change is necessary in the regulations.

The same commenter recommended that OPM indicate what is a ''reasonable'' period of time for an agency to comply with the employee's request for substitution. The commenter suggested a period of 6 weeks. The amount of time needed to comply with an employee's request for retroactive substitution will vary depending on the number of applications received and the quality of the documentation/evidence submitted that specifies the period(s) and amount(s) of annual leave that were used. OPM extended the time period by 1 year, to September 30, 1996, for an

employee to submit a written application to have his or her leave accounts adjusted. We believe this will make it possible for all affected employees to benefit from this provision. Therefore, OPM has not revised the regulation in this regard.

Miscellaneous Leave Administration Amendments

On December 2, 1994, OPM issued final sick leave regulations to permit most Federal employees to use a total of up to 104 hours of sick leave each leave year to provide care for a family member or to make arrangements for or attend the funeral of a family member. An employee may use up to 40 hours of his or her accrued sick leave for these purposes without regard to the amount of leave remaining in his or her sick leave account. An employee may use up to 64 additional hours of sick leave if he or she maintains a balance of at least 80 hours in his or her sick leave account.

OPM received many telephone inquiries concerning whether agencies may advance sick leave for the purpose of satisfying the 80-hour sick leave balance requirement. Although this matter was addressed briefly in the ''Supplementary Information'' accompanying the final regulations, we are using this opportunity to further clarify the regulation at 5 CFR 630.401(c).

The 40 hours of sick leave that may be used for family care or bereavement purposes may be advanced. Agencies may not advance sick leave so that an employee may meet the requirement to maintain a balance of 80 hours of sick leave in his or her account or to use additional sick leave for these purposes. The intent of the statutory 80-hour minimum sick leave balance requirement is that an employee should retain at least 80 hours of accrued sick leave in his or her account for use in the event of the employee's own incapacitation for duty—i.e., without the necessity of requesting advanced leave or shared leave. To advance an additional amount of sick leave (beyond the 40 hours every employee is entitled to use for family care or bereavement purposes) would circumvent the intent of the law. Therefore, we are amending section 630.401(c) to state that leave may not be advanced for the purpose of meeting the requirement to retain a minimum sick leave balance or using additional sick leave for family care or bereavement purposes.

OPM is also using this opportunity to make a technical correction in 5 CFR 630.201, Definitions. In the interim regulations to incorporate certain incentive awards and pay and leave administration rules contained in the provisionally retained Federal Personnel Manual material published in the **Federal Register** on December 28, 1994 (59 FR 66629), the numbering of paragraphs (7) through (9) of 5 CFR 630.201(b) was incorrect. The numbering of paragraphs (7) through (9) has been corrected as follows: (7) *Medical certificate;* (8) *Uncommon tour of duty*; and (9) *United States.*

Regulatory FlexibilityAct

I certify that these regulations will not have a significant economic impact on a substantial number of small entities because they will affect only Federal employees and agencies.

List of Subjects in 5 CFR Part 630

Government employees.

U.S. Office of Personnel Management.

James B. King,

Director.

Accordingly, OPM is amending part 630 of title 5 of the Code of Federal Regulations as follows:

PART 630—ABSENCE AND LEAVE

1. The authority citation for part 630 continues to read as follows:

Authority: 5 U.S.C. 6311; § 630.301 also issued under Public Law 103–356 (108 Stat. 3410); § 630.303 also issued under 5 U.S.C. 6133(a); §§ 630.306 and 630.308 also issued under 5 U.S.C. 6403(d)(3), Public Law 103–337 (108 Stat. 2663); subpart D also issued under Public Law 103–329 (108 Stat. 2423); § 630.501 and subpart F also issued under E.O. 11228, 30 FR 7739, June 16, 1965, 3 CFR 1974 Comp., p. 163; subpart G also issued under 5 U.S.C. 6305; subpart H issued under 5 U.S.C. 6326; subpart I also issued under 5 U.S.C. 6332 and Public Laws 100–566 (102 Stat. 2834) and 103–103 (107 Stat. 1022); subpart J also issued under 5 U.S.C. 6362 and Public Laws 100–566 and 103–103; subpart K also issued under Public Law 102–25 (105 Stat. 92); and subpart L also issued under 5 U.S.C. 6387 and Public Laws 103–3 (107 Stat. 23).

Subpart D—Sick Leave

§ 630.201 [Amended]

2. Section 630.201 is amended by redesignating the first paragraph (b)(8) as paragraph (b)(9), paragraph (b)(7) as new paragraph (b)(8), and the existing second paragraph (b)(8) as paragraph (b)(7).

3. In § 630.401, paragraph (c) is revised to read as follows:

§ 630.401 Grant of sick leave.

* * * * *

(c) To be granted any sick leave for the purposes described in paragraphs (a)(3) or (4) of this section during any leave year in an amount exceeding a total of 40 hours (or, in the case of a part-time employee or an employee with an uncommon tour of duty, the average number of hours in the employee's scheduled tour of duty each week), the employee concerned shall retain in his or her sick leave account a balance of at least 80 hours (or, in the case of a part-time employee or an employee with an uncommon tour of duty, an amount equal to twice the average number of hours in the employee's scheduled tour of duty each week). No sick leave may be advanced under 5 U.S.C. 6307(d) for the purpose of meeting the requirement to retain a minimum sick leave balance or for using additional sick leave for the purposes described in paragraphs (a)(3) and (4) of this section when such use would otherwise cause the employee's sick leave balance to fall below the minimum required.

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Subpart I—Voluntary Leave Transfer Program

§ 630.907 [Amended]

3. In § 630.907 paragraph (c) introductory text, remove the words ''of chapter I''; in paragraph (d)(2), remove the second occurrence of the word ''by'' and add in its place the word ''to''.

Subpart J—Voluntary Leave Bank Program

§ 630.1101 [Amended]

4. In § 630.1011 paragraph (b)(2), remove the word ''affect'' and add in its place the word ''effect''.

5. In addition to the amendments set forth above, in 5 CFR part 630, subparts I and J, remove the words ''or work'' in the following places:

§§ 630.905, 630.907, 630.1007, 630.1008 [Amended]

(a) Section 630.905 (b) and (c);

(b) Section 630.907(a)(1), (a)(2), and (d)(1);

(c) Section 630.1007 (b) and (c); and

(d) Section 630.1008(a)(1), (a)(2), and (d)(1).

[FR Doc. 95–12411 Filed 5–19–95; 8:45 am]

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