

# Proposed Rules

Federal Register

Vol. 63, No. 156

Thursday, August 13, 1998

This section of the FEDERAL REGISTER contains notices to the public of the proposed issuance of rules and regulations. The purpose of these notices is to give interested persons an opportunity to participate in the rule making prior to the adoption of the final rules.

## OFFICE OF PERSONNEL MANAGEMENT

### 5 CFR Part 630

RIN 3206-AI35

#### Family and Medical Leave

**AGENCY:** Office of Personnel Management.

**ACTION:** Proposed rule with request for comments.

**SUMMARY:** The Office of Personnel Management is issuing proposed regulations on the Family and Medical Leave Act of 1993 to ensure that both employees' and agencies' rights are protected and their responsibilities fulfilled.

**DATES:** Comments must be received on or before October 13, 1998.

**ADDRESSES:** Comments may be sent or delivered to Donald J. Winstead, Assistant Director for Compensation Administration, Office of Personnel Management, Room 7H31, 1900 E Street NW., Washington, DC 20415; FAX (202) 606-0824; or email to [payleave@opm.gov](mailto:payleave@opm.gov).

**FOR FURTHER INFORMATION CONTACT:** Jo Ann Perrini, (202) 606-2858, FAX (202) 606-0824, or email to [payleave@opm.gov](mailto:payleave@opm.gov).

**SUPPLEMENTARY INFORMATION:** On December 5, 1996, the Office of Personnel Management (OPM) published final regulations (61 FR 64441) to implement the requirements set forth in sections 6381 through 6387 of title 5, United States Code, as added by Title II of the Family and Medical Leave Act of 1993 (FMLA) (Public Law 103-3, February 5, 1993). The final regulations became effective on January 6, 1997. The FMLA provides eligible Federal employees with a total of 12 administrative workweeks of unpaid leave during any 12-month period for (a) the birth of a son or daughter and care of the newborn; (b) the placement of a child with the employee for adoption or foster care; (c) the care of the employee's spouse, son, daughter, or parent with a

serious health condition; or (d) a serious health condition of the employee that makes the employee unable to perform the essential functions of his or her position. OPM's regulations implementing the FMLA are found in subpart L of part 630 of title 5, Code of Federal Regulations.

Questions and concerns continue to be received by OPM on an employee's obligation to notify the agency of his or her intent to use family and medical leave and provide required medical certification of the serious health condition. We are issuing these proposed regulations to ensure that both employees and agencies are complying with the requirements of the Act.

We believe it is Congress' intent to provide Federal employees with an entitlement to FMLA leave in a fair and equitable manner while minimizing the impact of such leave on an employing agency. Although individual situations may require some flexibility in meeting the notification and medical certification requirements of the Act, employees remain responsible for meeting their obligations under the FMLA.

#### Invoking Entitlement to Family and Medical Leave

There is a major difference between Title I and Title II of the FMLA in terms of the responsibility of an employer versus an employee to invoke entitlement to FMLA leave. Under section 102(c)(2) of Title I of the FMLA, which covers non-Federal employees, an employee may elect, or an employer may require the employee to substitute paid leave for unpaid leave under the FMLA, except that nothing in that section would require an employer to provide paid sick leave in any situation in which the employing agency would not normally provide sick leave. The Department of Labor's (DOL's) regulations implementing Title I of the FMLA therefore require the employer to designate leave, paid or unpaid, as FMLA leave and to give notice of such designation to the employee. In addition, if an employee does not initially request substitution of paid leave for unpaid leave under the FMLA, DOL's regulations permit the employer to require the employee to substitute appropriate paid leave for unpaid leave.

In contrast, 5 U.S.C. 6382 (as added by section 201 of Title II of the FMLA) states that an employee may elect to

substitute any of the employee's accrued or accumulated annual or sick leave for unpaid leave under the FMLA, except that nothing in section 201 would require an agency to provide paid sick leave in any situation in which the employing agency would not normally provide sick leave. OPM's regulations implementing Title II of the FMLA for Federal employees therefore require employees to take responsibility for invoking their entitlement to FMLA leave. In addition, an employee may elect to substitute paid leave, as appropriate, for leave without pay under the FMLA. An agency may not designate leave, paid or unpaid, as FMLA leave unless it has obtained confirmation from an employee of his or her intent to use FMLA leave and the employee chooses to substitute appropriate paid leave for FMLA leave. The requirement that the employee must initiate action to take FMLA leave is consistent with all other Federal leave policies and programs in that the employee is responsible for requesting leave or other time off from work. The 12 workweeks of unpaid leave under the FMLA are in addition to any annual leave, sick leave, or other leave or compensatory time off available to an employee, and an employee may choose to take FMLA leave in combination with any other available leave.

In most cases, an employee must provide the employing agency with not less than 30 days notice of his or her intention to take FMLA leave. An employee is responsible for giving adequate notice of his or her intent to use FMLA leave so that agencies may (1) determine that the employee's need for leave is consistent with the purposes for which FMLA leave may be used and (2) provide guidance concerning an employee's rights and obligations under the FMLA. If an employee seeks to invoke his or her entitlement to FMLA leave retroactively, an agency may be severely hampered in fulfilling its statutory responsibilities for administering the FMLA. Therefore, we propose to add a sentence to § 630.1203(b) to state that an employee may not retroactively invoke his or her entitlement to leave under the FMLA.

#### Additional Evidence

Agencies have asked whether they may request additional evidence to support a claim that an employee used

FMLA leave to care for a spouse, son, daughter, or parent. For example, an agency may wish to request that an employee obtain and provide to the agency his or her child's school attendance records coinciding with the period during which the employee used FMLA leave. Currently, OPM's regulations in § 630.1206(f) permit agencies to require that a request for FMLA leave for birth or adoption or foster care be supported by evidence that is administratively acceptable to the agency. We believe the law permits an agency to establish a policy that requires an employee to submit administratively acceptable evidence that would support the use of FMLA leave for any of the cited purposes. Therefore, we propose to revise § 630.1206(f) to permit agencies to require that a request for FMLA leave be supported by evidence that is administratively acceptable to the agency. Such a policy must be nondiscriminatory and made known to all employees.

#### Medical Certification

In its final regulations, OPM did not establish a time limit for submitting the medical certification of a serious health condition. However, after careful reconsideration, we believe a Governmentwide time limit for submitting medical certification for FMLA leave is necessary to ensure that the entitlements provided under the FMLA are provided to all Federal employees in a fair and consistent manner. Therefore, we propose to revise § 630.1207(a) to ensure that employees are given at least 15 workdays in which to provide written medical certification of a serious health condition. In addition, § 630.1207(d) and (e) would be revised to give employees 15 workdays in which to submit a second or third written medical certification.

If an employee is unable to provide the requested medical certification before FMLA leave begins, or if the agency requires a second opinion under § 630.1207(d) and the medical treatment requires the leave to begin, the agency must grant provisional leave pending final written certification that must be received by the agency no later than 15 workdays after the date the FMLA leave began. We believe it is Congress' intent that in all circumstances, employees be required to provide complete medical certification, when requested by an agency, within a reasonable period based on the circumstances involved.

#### Insufficient Notification and Medical Certification

The law and regulations require employees to provide notification and

medical certification (if requested by the agency) for FMLA leave. When an employee requests FMLA leave immediately for a medical emergency and either cannot provide medical certification or submits incomplete medical certification, the agency must grant the employee provisional leave under § 630.1207(g). However, if the employee does not comply with the agency's requests for sufficient medical certification, the employee is not entitled to leave under the FMLA. To reinforce this principle, we propose to add paragraph (l) to § 630.1208 to state that an employee who does not comply with the notification requirements in § 630.1206, and who does not provide medical certification that includes all the information required by law and OPM's regulations in § 630.1207(b), is not entitled to FMLA leave. Further, the employee would not receive any of the employment and benefit protections in § 630.1208.

Agencies are reminded that their FMLA notification and medical certification requirements may be less stringent than those contained in an agency's leave restriction policies. However, agencies' policies or procedures for providing notification of FMLA leave or medical certification may not be more stringent than the requirements in §§ 630.1206 and 630.1207(b).

#### Miscellaneous

We propose to add a sentence to § 630.1203(e) to state that any Federal holidays that occur during the period in which an employee is on FMLA leave will be counted toward the 12-week entitlement to FMLA leave. In addition, § 630.1201(b)(1)(ii)(B) and (b)(3)(i) would be revised as requested by the Department of Veterans Affairs to identify employees of the Veterans Health Administration that are covered by title II of the FMLA.

#### Regulatory Flexibility Act

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

#### List of Subjects in 5 CFR Part 630

Government employees.  
Office of Personnel Management.  
**Janice R. Lachance,**  
*Director.*

Accordingly, OPM proposes to amend 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 is revised to read as follows:

**Authority:** 5 U.S.C. 6311; § 630.301 also issued under Pub. L. 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. 6304(d)(3), Pub. L. 102-484, 106 Stat. 2722, and Pub. L. 103-337, 108 Stat. 2663; subpart D also issued under Pub. L. 103-329, 108 Stat. 2423; § 630.501 and subpart F also issued under E.O. 11228, 30 FR 7739, 3 CFR, 1974 Comp., p. 163; subpart G also issued under 5 U.S.C. 6305; subpart H also issued under 5 U.S.C. 6326; subpart I also issued under 5 U.S.C. 6332, Pub. L. 100-566, 102 Stat. 2834, and Pub. L. 103-103, 107 Stat. 1022; subpart J also issued under 5 U.S.C. 6362, Pub. L. 100-566, and Pub. L. 103-103; subpart K also issued under Pub. L. 102-25, 105 Stat. 92; subpart L also issued under 5 U.S.C. 6387 and Pub. L. 103-3, 107 Stat. 23; and subpart M also issued under 5 U.S.C. 6391 and Pub. L. 105-18, 111 Stat. 158.

#### Subpart L—Family and Medical Leave

2. Section 630.1201(b)(1)(ii)(B) and (b)(3)(i) are revised to read as follows:

##### § 630.1201 Purpose, applicability, and administration.

\* \* \* \* \*

(b) \* \* \*

(1) \* \* \*

(ii) \* \* \*

(B) An employee of the Veterans Health Administration appointed under title 38, United States Code, in occupations listed in 38 U.S.C. 7401(1);

\* \* \* \* \*

(3) \* \* \*

(i) An employee of the Veterans Health Administration appointed under title 38, United States Code, in occupations listed in 38 U.S.C. 7401(1) shall be governed by the terms and conditions of regulations prescribed by the Secretary of Veterans Affairs;

\* \* \* \* \*

3. In § 630.1203, a sentence is added at the end of paragraph (b) and a sentence is added at the end of paragraph (e) to read as follows:

##### § 630.1203 Leave entitlement.

\* \* \* \* \*

(b) \* \* \* An employee may not retroactively invoke his or her entitlement to family and medical leave.

\* \* \* \* \*

(e) \* \* \* Any holidays authorized under 5 U.S.C. 6103 or by Executive order that occur during the period in which the employee is on family and medical leave shall be counted toward the 12-week entitlement to family and medical leave.

\* \* \* \* \*

4. In § 630.1206, paragraph (f) is revised to read as follows:

**§ 630.1206 Notice of leave.**

\* \* \* \* \*

(f) An agency may require that a request for leave under § 630.1203(a) be supported by evidence that is administratively acceptable to the agency.

5. In § 630.1207, the second sentence in paragraph (a) is revised and a sentence is added at the end of paragraphs (d), (e), and (g) to read as follows:

**§ 630.1207 Medical certification.**

(a) \* \* \* Except as provided in paragraph (g) of this section, an employee shall provide the written medical certification signed by the health care provider no later than 15 workdays after the date the agency requests such medical certification.

\* \* \* \* \*

(d) \* \* \* Except as provided in paragraph (g) of this section, an employee shall provide the second written medical certification signed by the health care provider no later than 15 workdays after the date the agency requests such medical certification.

(e) \* \* \* Except as provided in paragraph (g) of this section, an employee shall provide the third written medical certification signed by the health care provider no later than 15 workdays after the date the agency requests such medical certification.

\* \* \* \* \*

(g) \* \* \* The medical certification signed by the health care provider must be received by the agency no later than 15 workdays after the date the family and medical leave began.

\* \* \* \* \*

6. In § 630.1208, paragraph (l) is added to read as follows:

**§ 630.1208 Protection of employment and benefits.**

\* \* \* \* \*

(l) An employee who does not comply with the notification requirements in § 630.1206 and does not provide medical certification signed by the health care provider that includes all of the information required in § 630.1207(b) is not entitled to family and medical leave.

[FR Doc. 98-21741 Filed 8-12-98; 8:45 am]

BILLING CODE 6325-01-P

**DEPARTMENT OF THE TREASURY****Office of Thrift Supervision****12 CFR Part 555**

[No. 98-77]

RIN 1550-AB00

**Electronic Operations**

**AGENCY:** Office of Thrift Supervision, Treasury.

**ACTION:** Supplemental notice of proposed rulemaking.

**SUMMARY:** On October 3, 1997, the Office of Thrift Supervision (OTS) published a notice of proposed rulemaking (NPR) to streamline and update its electronic operations regulations. Today's supplemental notice of proposed rulemaking (Supplemental NPR) seeks comment on additional proposed rules that would require each savings association to notify OTS before it establishes a transactional web site. Savings associations that present supervisory or compliance concerns may be subject to additional procedural requirements.

**DATES:** Comments must be received on or before September 14, 1998.

**ADDRESSES:** Send comments to Manager, Dissemination Branch, Records Management and Information Policy, Office of Thrift Supervision, 1700 G Street, NW., Washington DC 20552; Attention Docket No. 98-77. These submissions may be hand-delivered to 1700 G Street, NW., from 9:00 a.m. to 5:00 p.m. on business days; they may be sent by facsimile transmission to FAX Number (202) 906-7555 or by e-mail public.info@ots.treas.gov. Those commenting by e-mail should include their name and telephone number. Comments will be available for inspection at 1700 G Street, NW., from 9:00 a.m. until 4:00 p.m. on business days.

**FOR FURTHER INFORMATION CONTACT:** Richard Bennett, Counsel (Banking and Finance), (202) 906-7409; Karen A. Osterloh, Assistant Chief Counsel, (202) 906-6639; Paul D. Glenn, Special Counsel, Chief Counsel's Office, (202) 906-6203; Paul J. Robin, Program Analyst, Compliance Policy, (202) 906-6648; or Paul R. Reymann, Policy Analyst, Supervision Policy, (202) 906-5645, Office of Thrift Supervision, 1700 G Street NW., Washington, DC 20552.

**SUPPLEMENTARY INFORMATION:****I. Background**

On October 3, 1997, OTS published a notice of proposed rulemaking (NPR) to streamline and update its regulations

relating to electronic operations.<sup>1</sup> The NPR followed an April 2, 1997 advance notice of proposed rulemaking (ANPR) seeking comment on all aspects of banking affected by electronic operations.<sup>2</sup>

The ANPR was designed to elicit information to enhance OTS's understanding of new electronic banking technologies and the impact of these technologies on the regulation of Federal savings associations.<sup>3</sup> The ANPR asked a series of questions concerning the types of restrictions or requirements OTS should impose on electronic operations, including Internet banking.<sup>4</sup>

Based on the information obtained through the ANPR, the NPR proposed to amend OTS's electronic operations regulations to address advances in technology and to permit prudent innovation through the use of emerging technology by Federal savings associations. The NPR noted that OTS would continue to gain additional experience with electronic technology and might issue more specific guidance regulating particular elements of electronic operations.<sup>5</sup>

The comment period on the NPR closed on December 2, 1997. OTS received nine comment letters on the NPR from five Federal savings associations, two trade associations, and two technology firms. One commenter argued that OTS should establish a procedure to review and approve new products or services, in order to protect the safety and soundness of the industry. Another commenter urged OTS not to require a Federal savings association to obtain the OTS's prior approval before adopting new technologies "unless absolutely necessary to ensure industry-wide safety and soundness."

After considering these comments and reflecting on its supervisory experience and knowledge, OTS believes that safety and soundness and compliance considerations currently warrant the agency receiving advance notice of industry use of one developing technology—transactional web sites. Such web sites allow savings association customers to use the Internet to conduct a wide variety of financial transactions. They may, however, also pose particular security, compliance, and privacy risks, as discussed more fully in Part II.A., below. The notice requirement will enable OTS to better

<sup>1</sup> 62 FR 51817 (October 3, 1997).<sup>2</sup> 62 FR 15626 (April 2, 1997).<sup>3</sup> See 62 FR at 15631 and 15633.<sup>4</sup> See 62 FR at 15633.<sup>5</sup> 62 FR at 51820.