

Proposed Rules

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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-AL91

Absence and Leave; Family and Medical Leave

AGENCY: U.S. Office of Personnel Management.

ACTION: Proposed rule.

SUMMARY: The U.S. Office of Personnel Management is issuing proposed regulations that would provide an eligible employee up to 26 administrative workweeks of leave under the Family and Medical Leave Act (FMLA) to care for a member of the Armed Forces, including a member of the National Guard or Reserves, who is injured in the line of duty while on active duty. The proposed regulations would also amend the rules on advancing sick leave, including sick leave that may be substituted for FMLA unpaid leave to care for a covered servicemember and sick leave that may be used to provide care for a family member and/or for bereavement purposes, or in certain other circumstances. Finally, we are also proposing organizational changes to the existing sick leave and FMLA regulations to enhance reader understanding and administration of these programs.

DATES: Comments must be received on or before October 26, 2009.

ADDRESSES: You may submit comments, identified by RIN number "3206-AL91" using either of the following methods:

Federal eRulemaking Portal: <http://www.regulations.gov>. Follow the instructions for submitting comments.

Mail: Jerome D. Mikowicz, Deputy Associate Director, Center for Pay and Leave Administration, U.S. Office of Personnel Management, Room 7H31, 1900 E Street, NW., Washington, DC 20415-8200.

FOR FURTHER INFORMATION CONTACT: Doris Rippey by telephone at (202) 606-

2858; by fax at (202) 606-0824; or by e-mail at pay-performance-policy@opm.gov.

SUPPLEMENTARY INFORMATION: The U.S. Office of Personnel Management (OPM) is issuing proposed regulations to implement section 585(b) of the National Defense Authorization Act for Fiscal Year 2008 (NDAA) (Pub. L. 110-181, January 28, 2008) that amends the Family and Medical Leave Act (FMLA) provisions in 5 U.S.C. 6381-6383 (applicable to Federal employees) to provide that a Federal employee who is the spouse, son, daughter, parent, or next of kin of a covered servicemember with a serious injury or illness is entitled to a total of 26 administrative workweeks of leave during a single 12-month period to care for the covered servicemember. The covered servicemember must be a current member of the Armed Forces, including a member of the National Guard or Reserves, who has a serious injury or illness incurred in the line of duty on active duty for which he or she is undergoing medical treatment, recuperation, or therapy, is otherwise in outpatient status, or is otherwise on the temporary disability retired list. The proposed regulations would also permit an employee to substitute annual or sick leave, including advanced annual or sick leave, for any part of the 26-week period of unpaid FMLA leave to care for a covered servicemember. In addition, OPM is proposing to update its sick leave regulations to support agencies in planning for pandemic influenza. We are also proposing to clarify our current regulations regarding the advancement of up to 104 hours of sick leave to provide care for a family member and/or for bereavement purposes, and the amount of sick leave that may be advanced for other conditions specified under 5 CFR 630.401(a). We are also proposing organizational changes to the sick leave and FMLA regulations to enhance reader understanding and administration of the programs.

The amendments to the FMLA became effective on the date of their enactment, January 28, 2008. On February 1, 2008, OPM issued a Compensation Policy Memorandum (CPM 2008-04), outlining the changes in Federal employee pay and leave laws resulting from the enactment of the NDAA, including the changes to the FMLA statute. (*See* <http://www.opm.gov/oca/compmemo/2008/2008-04.asp>.)

In this memorandum, OPM stated that agencies were expected to follow the NDAA statutory provisions upon the effective date provided in law. Agencies are to continue implementing the statute to the best of their ability until OPM final regulations are issued.

In accordance with 5 U.S.C. 6387, OPM is required to prescribe regulations that are consistent, to the extent appropriate, with those prescribed by the Secretary of Labor to carry out title I of the FMLA. The Department of Labor (DOL) issued its final regulations on November 17, 2008 (73 FR 67934) to implement section 585(a) of the NDAA, amending title I of the FMLA, and to make other substantive changes to the DOL FMLA regulations based upon stakeholder meetings, rulings of the U.S. Supreme Court and other Federal courts, DOL's experience administering the law, information from Congressional hearings, and public comments filed with the Office of Management and Budget (OMB) as described by OMB in three annual reports to Congress on the FMLA's costs and benefits. In developing the NDAA portion of its regulations, DOL consulted with the Department of Defense (DOD), the Department of Veterans Affairs (VA), and a number of military service organizations to provide regulations that reflect the unique circumstances facing military families when a servicemember is deployed in support of a contingency operation and injured in the line of duty on active duty. To the extent appropriate, OPM is prescribing regulations consistent with the DOL regulations, as revised to incorporate the NDAA amendments. In order to expedite the implementation of the NDAA provisions for the Federal workforce, our regulations are addressing only the provisions in section 585(b) of the NDAA. After we issue final regulations incorporating the NDAA provisions in our current FMLA regulations, we will further review DOL's final rule to determine whether any additional changes are needed in our regulations. If changes are necessary, we will publish a proposed rule.

We are also considering whether a comprehensive review of OPM's FMLA regulations is needed to identify any problems or concerns that our stakeholders have encountered when

reading and applying the provisions of subpart L, Family and Medical Leave, in part 630 of title 5, Code of Federal Regulations. Our FMLA regulations were initially published in 1993, and agencies have had ample experience in administering FMLA provisions. We expect it would be relatively easy for agencies to provide specific examples and feedback on how they believe our regulations could be improved. Any future OPM review would operate within the then-current FMLA statutory provisions. We are asking agencies for their recommendations on what significant changes, if any, are needed within the existing OPM FMLA regulatory framework.

We are also proposing to reorganize the FMLA regulations in subpart L and the sick leave regulations in subpart D to enhance the reader's understanding of the regulations and make it easier to find relevant topics within the regulatory text.

Subpart D, Sick Leave

Overview of Sick Leave Changes

Under 5 U.S.C. 6307(d), an agency may, when required by the exigencies of the situation, advance up to 30 days of sick leave for a serious disability or ailment, or for purposes relating to the adoption of a child. Under 5 CFR 630.401(f) in OPM's current regulations, an agency may advance a maximum of 30 days of sick leave to a full-time employee at the beginning of a leave year or at any time thereafter when required by the exigencies of the situation for a serious disability or ailment of the employee or a family member, or for purposes relating to the adoption of a child. OPM is proposing to update these regulations to permit an agency to advance sick leave to an employee to care for a covered servicemember, pursuant to the NDAA amendments. These proposed regulations also support agencies in dealing with possible outbreaks of pandemic influenza and other serious communicable diseases, by permitting an agency to grant accrued or accumulated sick leave to an employee providing care for a family member who has been exposed to a serious communicable disease, and by permitting an agency to advance sick leave when an employee or a family member has been exposed to a serious communicable disease. Further, these proposed regulations generally clarify the amount of sick leave that may be advanced for conditions specified under § 630.401(a).

Advanced Sick Leave To Care for a Covered Servicemember

The NDAA amended the FMLA to authorize Federal employees up to 26 administrative workweeks (1040 hours for a full-time employee) of unpaid FMLA leave to care for a covered servicemember with a serious injury or illness. Once an employee has invoked FMLA leave under §§ 630.1203(b) and 630.1204 of the proposed regulations, the NDAA amendments to 5 U.S.C. 6382(d) allow an employee to substitute any accrued or accumulated annual or sick leave for any period of leave without pay. For a full-time employee, the 480-hour (12-week) limitation per leave year on the use of sick leave to care for a family member with a serious health condition under current § 630.401(c) does not apply because the employee may substitute accrued or accumulated sick leave for any or all of the 26 administrative workweeks of unpaid leave to care for a covered servicemember. We believe it is also appropriate to allow the use of advanced sick leave for this purpose within certain limits, provided the employee has invoked FMLA under §§ 630.1203(b) and 630.1204. Although an employee may use up to 26 administrative workweeks of accrued and accumulated sick leave during a single 12-month period if he or she invokes FMLA to care for a covered servicemember, we provide under proposed § 630.402(a)(1)(v) and (b) that an agency may advance sick leave only to the extent that the employee is not indebted for more than 240 hours (30 days) of advanced sick leave at any time. An agency may not advance any sick leave to care for a covered servicemember under § 630.402(a)(1)(v) if the employee has not invoked FMLA to care for a covered servicemember under §§ 630.1203(b) and 630.1204.

For example, a relatively new employee learns that her husband is injured by gunfire in the line of duty on active duty. The employee is entitled to 26 weeks of unpaid leave under the FMLA to care for a covered servicemember; however, she has a combined total of only 160 hours (4 weeks) of accrued and accumulated annual leave and sick leave. The employee requests advanced sick leave, and the agency approves the maximum amount allowable of 240 hours (30 days). The agency may advise the employee that she also can apply for donated annual leave under the voluntary leave transfer program (5 CFR part 630, subpart I) to liquidate the advanced sick leave and cover a portion

of the remaining 26 weeks of unpaid leave.

Sick Leave for Pandemic Influenza and Other Serious Communicable Diseases

OPM also is proposing to update its sick leave regulations to support agencies' planning for pandemic influenza and other serious communicable diseases. The current sick leave regulations at § 630.401(a)(5) entitle an employee to use accrued or accumulated sick leave when it has been determined by the health authorities having jurisdiction or by a health care provider that the employee's presence on the job would jeopardize the health of others because of the employee's exposure to a communicable disease (e.g., Federal or State quarantine or isolation order).

We propose to amend § 630.401(a)(3) to entitle an employee to use accrued or accumulated sick leave to provide care for a family member when it has been determined by the health authorities having jurisdiction or by a health care provider that the family member's presence in the community would jeopardize the health of others because of the family member's exposure to a communicable disease, whether or not the family member has actually contracted the communicable disease. In general, this situation would only arise for serious communicable diseases, such as communicable diseases where federal isolation and quarantine are authorized under Executive Order 13295, as amended by Executive Order 13375, consistent with 42 U.S.C. 264(b). The current consolidated list of communicable diseases for which federal isolation and quarantine are authorized includes: cholera; diphtheria; infectious tuberculosis; plague; smallpox; yellow fever; viral hemorrhagic fevers; Severe Acute Respiratory Syndrome (SARS); and influenza that causes or has the potential to cause a pandemic. This list provides types of diseases that result in Federal quarantine and may be revised by the President as the need arises. As a result, this list of diseases is illustrative and not exhaustive. We request comment on whether additional changes to the regulatory text would help clarify the limited cases in which the situation would meet this threshold.

In order to use sick leave in this situation, the relevant health authorities or a health care provider must first make a determination that the family member's presence in the community would jeopardize the health of others because of the family member's exposure to a communicable disease. Secondly, the employee must actively

be providing care for the family member. For example, a minor child of an employee could have been exposed to a communicable disease such as smallpox, and a determination has been made by the relevant health authorities or the health care provider that the child's presence at daycare or at school could jeopardize the health of other children. The employee could use sick leave to provide care for that child at home until it is determined whether or not the child has contracted the disease. The proposed amendment to § 630.401(b) would limit the amount of accrued or accumulated sick leave available for this purpose to 104 hours per leave year, unless the family member contracts the communicable disease. Upon determination by health care officials that the family member has contracted the disease, the employee is entitled to use up to 12 weeks of sick leave in a leave year to care for a family member with a serious health condition under § 630.401(c).

Based on comments received from agencies related to OPM's existing pandemic guidance, we are also proposing to change our regulations under § 630.402(a)(1)(iii) to permit agencies to advance a maximum of 240 hours (30 days) of sick leave to an employee if it has been determined by the health authorities having jurisdiction or by a health care provider that the employee's presence on the job would jeopardize the health of others because of exposure to a communicable disease. Similarly, we propose under § 630.402(a)(2)(iii) an advancement of a maximum of 104 hours (13 days) of sick leave in a leave year to an employee to provide care for a family member who would, as determined by the health authorities having jurisdiction or by a health care provider, jeopardize the health of others by that family member's presence in the community because of exposure to a communicable disease.

We believe these proposed regulatory changes are consistent with the intent of Federal sick leave laws and would benefit agencies and employees, especially in the event of a health crisis resulting in an outbreak of pandemic influenza or another communicable disease.

Proposed Regulations on Advanced Sick Leave

OPM is also proposing to insert a new section at § 630.402 that reinstates a longstanding practice that is not in our current regulations regarding the advancement of up to 104 hours (13 days) of sick leave to provide general care for a family member and/or for bereavement purposes. In this section,

we are also proposing to specify the amount of sick leave that may be advanced for other conditions listed under § 630.401(a).

OPM's proposed regulations at § 630.402(a)(1) would permit an agency to advance up to 240 hours (30 days) of sick leave to a full-time employee (1) who is incapacitated for the performance of his or her duties by physical or mental illness, injury, pregnancy, or childbirth; (2) for a serious health condition of the employee or a family member; (3) when the employee would, as determined by the health authorities having jurisdiction or by a health care provider, jeopardize the health of others by his or her presence on the job because of exposure to a communicable disease; (4) for purposes relating to the adoption of a child; or (5) for the care of a covered servicemember with a serious injury or illness, provided the employee has invoked FMLA in accordance with §§ 630.1203(b) and 630.1204. We are also proposing under § 630.402(a)(2) that an agency may advance up to 104 hours (13 days) of sick leave to a full-time employee when he or she (1) receives medical, dental, or optical examination or treatment; (2) provides care for a family member who is incapacitated by a medical or mental condition or attends to a family member receiving medical, dental, or optical examination or treatment; (3) provides care for a family member who would, as determined by the health authorities having jurisdiction or by a health care provider, jeopardize the health of others by that family member's presence in the community because of exposure to a communicable disease; or (4) makes arrangements necessitated by the death of a family member or attends the funeral of a family member.

Under proposed § 630.402(a), the maximum amount of sick leave that may be advanced is 240 hours (30 days). Under proposed § 630.402(b), an employee may not be indebted for more than 240 hours (30 days) at any point in time. For a part-time employee (or an employee on an uncommon tour of duty), the maximum amount of sick leave an agency may advance, and for which an employee may be indebted, must be prorated according to the number of hours in the employee's regularly scheduled administrative workweek.

Substitution of Sick Leave for Unpaid FMLA Leave To Care for a Covered Servicemember

The NDAA also amended 5 U.S.C. 6382(d) to provide that an employee may elect to substitute any of the

employee's accrued or accumulated annual or sick leave for any part of the 26-week period of unpaid FMLA leave to care for a covered servicemember. We are proposing a new § 630.403 in the sick leave regulations to implement this change, which provides that the amount of sick leave that an employee may substitute for unpaid FMLA leave when taking FMLA leave to care for a covered servicemember may not exceed a total of 26 administrative workweeks in a single 12-month period, or, for a part-time employee or an employee with an uncommon tour of duty, a prorated amount of sick leave equal to 26 times the average number of hours in his or her scheduled tour of duty each week.

Subpart L, Family and Medical Leave Definitions

In § 630.1202 of the proposed regulations, we added definitions for *active duty*, *contingency operation*, *covered servicemember*, *next of kin of a covered servicemember*, *outpatient status*, *parent of a covered servicemember*, *serious injury or illness*, *single 12-month period*, and *son or daughter of a covered servicemember*—all of which are new terms applicable only to taking FMLA leave to care for a covered servicemember.

Active duty is defined in law (5 U.S.C. 6381(7)) to mean duty under a call or order to active duty under a provision of law referred to in § 101(a)(13)(B) of title 10. OPM's proposed regulations provide an expanded version of this definition for clarity and to enhance the reader's understanding.

Contingency operation is defined in law at 10 U.S.C. 101(a)(13). We are proposing to adopt this statutory definition in our regulations to mean a military operation that is designated by the Secretary of Defense as an operation in which members of the Armed Forces are or may become involved in military actions, operations, or hostilities against an enemy of the United States or against an opposing military force; or results in the call or order to, or retention on, active duty of members of the uniformed services under section 688, 12301(a), 12302, 12304, 12305, or 12406 of title 10 of the United States Code, chapter 15 of title 10 of the United States Code, or any other provision of law during a war or during a national emergency declared by the President or Congress.

Covered servicemember is defined in law (5 U.S.C. 6381(8)) to mean a member of the Armed Forces who is undergoing medical treatment, recuperation, or therapy as an outpatient, or is otherwise on the

temporary disability retired list, for a serious injury or illness.

For the reasons outlined in our discussion of “Who Is a Covered Servicemember,” we have altered the statutory definition slightly to clarify that a covered servicemember must be a *current member* of the Armed Forces, or a member on the temporary disability retired list, but may not be a former member of the Armed Forces, National Guard, or Reserve, or a member on the permanent disability retired list. The proposed definition therefore reads: “*Covered servicemember* means a current member of the Armed Forces, including a member of the National Guard or Reserves, who is undergoing medical treatment, recuperation, or therapy, is otherwise in outpatient status, or is otherwise on the temporary disability retired list, for a serious injury or illness incurred in the line of duty on active duty, but does not include former members of the Armed Forces, former members of the National Guard and Reserves, and members on the permanent disability retired list.”

Next of kin of a covered servicemember. The NDAA amendments provide that a covered servicemember’s “next of kin” is eligible to take FMLA leave to care for the covered servicemember and defines the term *next of kin* as the “nearest blood relative” of a covered servicemember (5 U.S.C. 6381(10)).

After consultation with appropriate stakeholders, DOL expanded the definition of *next of kin of a covered servicemember*. We are adopting the DOL definition with modifications to the appropriate citations to our regulations.

Outpatient status is defined in law (5 U.S.C. 6381(9)), with respect to a covered servicemember, to mean “the status of a member of the Armed Forces assigned to (A) a military medical treatment facility as an outpatient; or (B) a unit established for the purpose of providing command and control of members of the Armed Forces receiving medical care as outpatients.” We are adopting this statutory definition of *outpatient status* in our proposed regulations.

Parent of a covered servicemember. Under FMLA, the terms “parent” and “parent of a covered servicemember” refer to different circumstances for purposes of FMLA leave eligibility. Under 5 U.S.C. 6382(a)(1)(C), an employee is entitled to “basic” FMLA leave to care for his or her parent if the parent has a serious health condition. However, under 5 U.S.C. 6382(a)(3), in the context of leave to care for a covered servicemember, the parent is the

employee who has the entitlement to take FMLA leave to care for a son or daughter. Since the entitlement to leave is expressed differently in the two statutory provisions, the definition of *parent* in the current regulations (which is—“*parent* means a biological parent or an individual who stands or stood in loco parentis to an employee when the employee was a son or daughter. This term does not include parents ‘in law’”) does not accurately describe the meaning of *parent* as it is used in the context of leave to care for a covered servicemember. Accordingly, in § 630.1202, we propose a separate definition of *parent of a covered servicemember* to mean a “covered servicemember’s biological, adoptive, step or foster father or mother, or any other individual who stands or stood in loco parentis to the covered servicemember. This term does not include parents-in-law.”

Based on the new definition of *parent of a covered servicemember*, we also made a conforming change to the definition of *in loco parentis* to add a reference to covered servicemembers so that the definition now reads: “*In loco parentis* refers to the situation of an individual who has day-to-day responsibility for the care and financial support of a child or, in the case of an employee or a covered servicemember, who had such responsibility for the employee or the covered servicemember when either was a child. A biological or legal relationship is not necessary.”

Serious injury or illness is defined in law (5 U.S.C. 6381(11)), in the case of a member of the Armed Forces, to mean an injury or illness incurred by the member in the line of duty on active duty in the Armed Forces that may render the member medically unfit to perform the duties of the member’s office, grade, rank, or rating. Consistent with the approach taken by DOL in its final rule, we are changing the statutory definition of *serious injury or illness* slightly in our proposed regulations to use the term “covered servicemember,” so the definition in the proposed regulations reads: “*Serious injury or illness* means an injury or illness incurred by a covered servicemember in the line of duty on active duty that may render the servicemember medically unfit to perform the duties of the servicemember’s office, grade, rank, or rating.”

Single 12-month period is described in DOL’s final rule to mean the period that “begins on the first day the eligible employee takes FMLA leave to care for a covered servicemember and ends 12 months after that date.” 29 CFR 825.127(c)(1). We are proposing a new

definition: “*Single 12-month period* means the period beginning on the first day the employee takes FMLA leave to care for a covered servicemember with a serious injury or illness and ending 12 months after that date in accordance with section 630.1205(b) and (c)”.

Son or daughter of a covered servicemember. With respect to who may take leave to care for a covered servicemember, the NDAA amends 5 U.S.C. 6382(a)(3) to provide that such leave is available to an employee who is the “spouse, son, daughter, parent, or next of kin of a covered servicemember.” Under the existing FMLA definition of *son or daughter* (5 U.S.C. 6381(6)), a son or daughter must either be (A) under 18 years of age, or (B) 18 years of age or older and incapable of self-care because of a mental or physical disability. Applying this definition to the leave to care for a covered servicemember entitlement would mean that most, if not all, adult children would not be permitted to use this entitlement to take leave to care for a parent who is a covered servicemember. This is so even though the same adult child could take “basic” FMLA leave (*i.e.*, leave under 5 U.S.C. 6382(a)(1)(C) and § 630.1203(a)(3)) to care for his or her parent who is a covered servicemember if the parent’s serious injury or illness also qualified as a serious health condition under the FMLA. Since applying the current definition of *son or daughter* for purposes of leave to care for a covered servicemember would severely undermine the clear intent of the NDAA provisions, DOL created a new term, *son or daughter of a covered servicemember*, for purposes of FMLA leave taken to care for a covered servicemember. We concur with DOL’s opinion that such a result was not intended, and accordingly, § 630.1201 of the proposed rule establishes a separate definition of *son or daughter of a covered servicemember* for the purpose of leave to care for a covered servicemember, which is “a covered servicemember’s biological, adopted, or foster child, stepchild, legal ward, or a child for whom the covered servicemember stood in loco parentis, and who is of any age.”

Entitlement to Leave To Care for a Covered Servicemember

Under the NDAA, section 6382(a) of title 5, U.S. Code, was amended by adding a new section to entitle an employee who is the spouse, son, daughter, parent, or next of kin of a covered servicemember to a total of 26 administrative workweeks of leave during a 12-month period to care for the covered servicemember. This leave is

available only during a single 12-month period.

We added proposed § 630.1203(b) to describe an employee's entitlement to use a total of 26 administrative workweeks of unpaid leave during a single 12-month period to care for a covered servicemember with a serious injury or illness if the employee is the spouse, son, daughter, parent, or next of kin of a covered servicemember.

Consistent with DOL regulations, OPM is applying this entitlement on a per-covered servicemember, per-serious injury or illness basis, such that an employee may be entitled to take more than one period of up to 26 administrative workweeks of leave if the leave is to care for different covered servicemembers or to care for the same covered servicemember with a subsequent serious injury or illness, as long as no more than 26 administrative workweeks of leave is taken within any single 12-month period as described in proposed § 630.1205(b).

Per covered servicemember. An employee who has previously invoked FMLA leave to care for a covered servicemember in a single 12-month period may subsequently invoke FMLA leave in order to care for a different covered servicemember in a different single 12-month period. If the single 12-month periods applicable to the different covered servicemembers do not overlap, the employee may take up to 26 administrative workweeks of leave during each single 12-month period. If the single 12-month periods applicable to the different covered servicemembers do overlap, the employee may take no more than 26 administrative workweeks of leave during any single 12-month period. However, in no case may an employee take more than 26 administrative workweeks of leave during any single 12-month period as described in proposed § 630.1205(b) and (c).

For example, on February 4, 2008, an employee invokes FMLA leave to care for a covered servicemember (her son) who was injured in the line of duty while on active duty. Since she first uses the leave on February 4, 2008, the single 12-month period for her son's care begins on February 4, 2008, and ends on February 3, 2009. She uses a total of 17 weeks out of the 26 week entitlement, between February 4 and May 30, 2008. On June 18, 2008, the employee's husband is seriously injured in the line of duty while on active duty and qualifies as a covered servicemember for FMLA purposes. The employee invokes her FMLA entitlement to care for her husband but she is limited to no more than 9 weeks

of FMLA leave to care for her husband between June 18, 2008, and February 3, 2009, because of the limit of 26 weeks of leave in any single 12-month period. If her husband continues to need care after the single 12-month period ends for her son (February 3, 2009), the employee may use an additional 17 weeks to care for her husband until the single 12-month period entitlement for her husband expires on June 17, 2009.

Per serious injury or illness. An employee may take more than one single 12-month period of up to 26 administrative workweeks of leave to care for a covered servicemember with more than one serious injury or illness only when the serious injury or illness is a subsequent serious injury or illness, including a manifestation of a second serious injury or illness at a later time. An employee may not take a subsequent period of leave to care for a covered servicemember who experiences an aggravation or complication of an earlier serious injury or illness. If the different single 12-month periods applicable to the different serious injuries or illnesses do not overlap, the employee may take up to 26 administrative workweeks of leave during each single 12-month period. If the single 12-month periods applicable to the different serious injuries or illnesses do overlap, the employee may take no more than 26 administrative workweeks of leave during any single 12-month period. In no case may an employee take more than 26 administrative workweeks of leave within any single 12-month period as described in proposed § 630.1205(b) and (c).

For example, on June 23, 2008, an employee has a daughter who is seriously injured in the line of duty while on active duty by a road-side bomb. The employee is entitled to use 26 weeks of FMLA leave to care for his daughter, a covered servicemember. The single 12-month period for the daughter's care begins on June 24, 2008, when the employee first uses the leave, and ends on June 23, 2009. The employee takes 16 weeks of FMLA leave to care for his daughter, and the daughter recovers and returns to active duty before the end of the single 12-month period. However, in July, 2009, the daughter is injured in the line of duty while on active duty by a sniper. The employee is entitled to use another 26 weeks of FMLA leave to care for his daughter because the subsequent injury provides the employee with a new 26-week entitlement, and the previous single 12-month period has expired.

In this same example, however, if the daughter's second injury by sniper attack occurred in January of 2009 and

the employee first took leave to care for his daughter for that injury on January 7, 2009, (*i.e.*, the single 12-month periods overlapped) the employee is limited to no more than 10 weeks of FMLA leave to care for his daughter between January 7, 2009, and June 23, 2009, because of the limit of 26 weeks of FMLA leave in any single 12-month period. An overlapping single 12-month period begins with the employee's use of leave as of January 7, 2009, and runs until January 6, 2010. If the employee uses 10 weeks of leave to care for his daughter between January 7, 2009, and June 23, 2009, he would then be able to use an additional 16 weeks of leave as of June 24, 2009, until the expiration of the second single 12-month period on January 6, 2010.

As DOL has expressed in its final regulations, applying this entitlement on a per-injury, per-covered servicemember basis acknowledges the reality that servicemembers are injured and treated and then re-injured again on active duty. We would add that some employees have multiple family members who are in the military and, therefore, may have more than one family member who is injured in the line of duty on active duty. Also, we believe there will be relatively few instances in which an employee will have more than one covered servicemember for whom he or she needs to provide care, or a covered servicemember with a subsequent serious illness or injury. However, if an employee is faced with such circumstances, he or she should have access to FMLA leave to care for a covered servicemember.

Who Is a Covered Servicemember

In order for an employee to be entitled to take FMLA leave to care for a servicemember, the NDAA amendments require that the servicemember be a "covered servicemember" who is undergoing medical treatment, recuperation, or therapy, otherwise in outpatient status, or on the temporary disability retired list for a "serious injury or illness" that "may render the member medically unfit to perform the duties of the member's office, grade, rank, or rating." See definitions of *covered servicemember* at 5 U.S.C. 6381(8), *serious injury or illness* at 5 U.S.C. 6381(11), and *outpatient status* at 5 U.S.C. 6381(9).

In light of the NDAA's focus on a covered servicemember's ability to perform his or her military duties when determining whether the servicemember has a "serious injury or illness" (*i.e.*, a determination must be made that the injury or illness "may render the

member medically unfit to perform the duties of the member's office, grade, rank, or rating"), DOL regulations specifically exclude a serious injury or illness that manifests itself after the servicemember has left military service. Consistent with DOL's regulations, we added proposed § 630.1203(b)(3) to provide that an employee may not take leave under this paragraph to care for former members of the Armed Forces, former members of the National Guard and Reserves, and members on the permanent disability retired list.

Invoking FMLA Entitlement

We are proposing to reorganize the FMLA regulations in title 5 to create a new § 630.1204 describing the process for invoking the FMLA entitlements, in which we are adding language to account for amendments made by the NDAA. There are certain conditions that would provide an employee an entitlement to both "basic" FMLA leave to care for a family member with a serious health condition under § 630.1203(a)(3) and FMLA leave to care for a covered servicemember under § 630.1203(b). This would be the case, for example, if an employee had a spouse or parent who was a covered servicemember, because the serious injury or illness of the covered servicemember would also fit the definition of *serious health condition*. We address this situation in proposed § 630.1204, to which we are adding a new paragraph (c) to clarify that when an employee invokes his or her entitlement to FMLA leave for a circumstance that could qualify under § 630.1203(a)(3) (*i.e.* "basic" FMLA leave to care for a family member with a serious health condition) or § 630.1203(b) (*i.e.*, FMLA leave to care for a covered servicemember), the FMLA leave must be designated as being taken under § 630.1203(b). The higher 26-week entitlement applies in this case. Leave to care for a covered servicemember is to be applied on a per-covered servicemember, per-serious injury or illness basis. If, after the single 12-month period for leave to care for a covered servicemember is exhausted, the covered servicemember is still in need of care, the employee may take FMLA leave for any necessary subsequent care as "basic" FMLA leave to care for a family member with a serious health condition under § 630.1203(a)(3), subject to all requirements relating to use of such leave.

Application of the 12-Month FMLA Periods

With the creation of the new entitlement for leave to care for a covered servicemember, there are now two distinct 12-month periods during which FMLA leave may be used. The 12-month period referred to in § 630.1203(a) begins on the date the employee first takes leave for a family or medical need specified in § 630.1203(a) and provides an entitlement to 12 administrative workweeks of unpaid leave in a 12-month period. The "single 12-month period" referred to in proposed § 630.1203(b) begins on the first day the employee takes FMLA leave to care for a covered servicemember and provides up to 26 administrative workweeks of unpaid leave during a 12-month period. Proposed § 630.1205 is being added to explain the application of the two 12-month periods and how they interact with each other.

Consistent with DOL regulations, we clarify in § 630.1205(b)(1) that any leave used under an employee's 12-week FMLA entitlement prior to the first use of leave to care for a covered servicemember does not count towards the "single 12-month period" under § 630.1203(b).

For example, on February 25, 2008, an employee invokes her entitlement to basic FMLA for the birth of her child. She is in her 8th week of FMLA leave (April 17, 2008) when she receives word that her husband was seriously hurt in the line of duty while on active duty. On April 18, 2008, the employee invokes the 26-week FMLA leave entitlement to care for her husband. She is entitled to use up to 26 weeks of FMLA leave from April 18, 2008, to April 17, 2009, for this purpose. The time period during which she used basic FMLA leave does not count toward the 26-week entitlement during a single 12-month period. We note that the employee is not required to invoke the 26-week leave entitlement immediately. She may delay invoking the 26-week entitlement until such time as she is needed to provide care for her husband. Once the employee invokes her 26-week leave entitlement and begins to care for her husband, the single 12-month period begins. In this example, the employee may choose to exhaust her full 12-week basic FMLA entitlement for the birth of a child first, and then invoke the 26-week FMLA entitlement after her husband is released from the hospital and returns home.

In another example, the employee's first use of FMLA leave is on April 18,

2008, when she invokes the 26-week FMLA leave entitlement to care for her husband who was seriously injured in the line of duty while on active duty. She is entitled to use up to 26 weeks of FMLA leave during the single 12-month period from April 18, 2008, to April 17, 2009. On November 25, 2008, the employee's daughter is diagnosed with leukemia which entitles the employee to 12 weeks of "basic" FMLA leave under current 5 CFR 630.1203(a)(3), and she invokes her entitlement on this date. At this point, the employee has used a total of 23 weeks of FMLA leave to care for a covered servicemember in order to care for her husband and has 3 weeks of FMLA leave to care for her husband or daughter between November 25, 2008, and April 17, 2009. On April 18, 2009, the employee can use the remaining 9 weeks of "basic" FMLA leave to care for her daughter for additional care related to the leukemia.

We state in paragraph (b)(2) that if an employee does not take all of his or her 26 administrative workweeks of leave entitlement to care for a covered servicemember during this single 12-month period, the remaining part of his or her 26 administrative workweeks of leave entitlement to care for the covered servicemember is forfeited. In paragraph (b)(3), we explain that when an employee takes leave to care for more than one covered servicemember or for a subsequent serious injury or illness of the same covered servicemember, and the "single 12-month periods" corresponding to the different leave entitlements to care for a covered servicemember overlap, the employee is limited to taking no more than 26 administrative workweeks of leave in each single 12-month period.

Certification for Leave Taken To Care for a Covered Servicemember

Specific Requirements

The NDAA amended the FMLA certification requirements (5 U.S.C. 6383(f)) to permit an agency to require that a request for leave to care for a covered servicemember "be supported by a certification issued at such time and such manner as the Office of Personnel Management may by regulation prescribe." The NDAA amendments regarding entitlement to FMLA leave to care for a covered servicemember contain specific certification requirements that are unique to military servicemembers. The certification requirements for a family member's serious health condition under current § 630.1207 do not adequately address the certification requirements unique to military

servicemembers. Specifically, the NDAA provision defining *covered servicemember* requires that the servicemember be (1) undergoing medical treatment, recuperation, or therapy; (2) otherwise in outpatient status; or (3) on the temporary disability retired list because of a serious injury or illness. (5 U.S.C. 6381(8)) The NDAA provisions further provide that a serious injury or illness means an injury or illness incurred by the member in the line of duty on active duty in the Armed Forces that may render the member medically unfit to perform the duties of the member's office, grade, rank, or rating (5 U.S.C. 6381(11)). Therefore, we are proposing to create new § 630.1211 on medical and other certification for leave to care for a covered servicemember that sets forth separate certification requirements for leave to care for a covered servicemember.

This section provides that an agency may require certification that provides information specific to the NDAA requirements for taking leave to care for a covered servicemember, including: (1) Whether the covered servicemember has incurred a serious injury or illness; (2) whether the injury or illness may render the covered servicemember medically unfit to perform the duties of the member's office, grade, rank, or rating; (3) whether the injury or illness was incurred by the member in the line of duty on active duty; (4) whether the covered servicemember is undergoing medical treatment, recuperation, or therapy, is otherwise on outpatient status, or is otherwise on the temporary disability retired list; and (5) the family relationship of the employee to the covered servicemember.

Besides the information specific to the NDAA requirements for taking leave to care for a covered servicemember, this section also provides that the certification for leave to care for a covered servicemember should also contain certain other information. This information includes: (1) The probable duration of the injury or illness; (2) frequency and duration of leave required; and (3) if leave is requested on an intermittent or reduced schedule basis, an estimate of the frequency and duration of such leave. These provisions are consistent, as appropriate, with the regulations promulgated by DOL in its final rule.

Authorized Health Care Providers

Section 630.1211(a) of the proposed rule lists the health care providers that may complete the medical certification form. As described in the DOL regulations, DOL consulted with DOD and VA, and learned that

servicemembers with a serious injury or illness may receive care from a number of different health care providers, including DOD health care providers, VA health care providers, or DOD TRICARE military health system authorized private health care providers.¹ Members of the National Guard and Reserves and members on the temporary disability retired list are more likely to receive care from DOD TRICARE authorized private health care providers, especially if the servicemember resides in a rural or remote area. Consequently, and consistent with the DOL final rule, § 630.1211(a) provides that any one of the following health care providers may complete the certification: (1) A DOD health care provider; (2) a VA health care provider; (3) a DOD TRICARE network authorized private health care provider; or (4) a DOD non-network TRICARE authorized private health care provider.

Use of DOL Certification Form (WH-385)

Paragraph (b) of proposed § 630.1211 provides the information that is required from health care providers, and paragraph (c) provides the information that is required from the employee and/or covered servicemember. DOL has developed an optional form (Form WH-385) for employees' use in obtaining certification that meets FMLA's certification requirements for leave to care for a covered servicemember. This form can be found at <http://www.dol.gov/esa/whd/forms/WH-385.pdf> and may be used by Federal agencies. The new form includes two additional categories of internal DOD casualty assistance designations used by DOD health care providers ((VSI) Very

¹ TRICARE is the health care program serving active duty service members, National Guard and Reserve members, retirees, their families, survivors and certain former spouses worldwide. As a major component of the Military Health System, TRICARE brings together the health care resources of the uniformed services and supplements them with networks of civilian health care professionals, institutions, pharmacies, and suppliers to provide access to high-quality health care services while maintaining the capability to support military operations. To be eligible for TRICARE benefits, one must be registered in the Defense Enrollment Eligibility Reporting System (DEERS). See <http://tricare.mil/mybenefit/home/overview/WhatIsTRICARE>. The Military Health System is a partnership of medical educators, medical researchers, and health care providers and their support personnel worldwide. This DOD enterprise consists of the Office of the Assistant Secretary of Defense for Health Affairs; the medical departments of the Army, Navy, Marine Corps, Air Force, Coast Guard, and Joint Chiefs of Staff; the Combatant Command Surgeons; and TRICARE providers (including private sector health care providers, hospitals, and pharmacies). See <http://mhs.osd.mil/aboutMHS.aspx>.

Seriously Ill/Injured and (SI) Seriously Ill/Injured) that also meet the standard of serious injury or illness.) Consistent with past practice, OPM is not developing its own form, but encourages Federal agencies to use DOL's Form WH-385 to ensure the correct information is gathered for FMLA approval. (Federal agencies should also continue to use DOL's Form WH-380 for "basic" FMLA leave certification, but not the new DOL Forms WH-380-E or WH-380-F. The latter were generated by DOL as part of its final FMLA regulations and are based on changes to DOL's FMLA regulations which do not apply to our proposed regulations.)

Request for Military-Related Information

In the supplementary information accompanying DOL's final regulations, DOL stated that, based on consultation with DOD, it was DOL's understanding that every covered servicemember will have a DOD representative who can serve as a point of contact for health care providers should they need information regarding the military-related determinations requested in the FMLA certification form. For example, the most seriously injured or ill covered servicemembers (*i.e.*, those servicemembers with injuries DOD terms catastrophic or severe) will have either a "Federal Recovery Coordinator" or "Recovery Care Coordinator" assigned to assist the covered servicemember and his or her family. Therefore, proposed § 630.1211(b) provides that if the authorized health care provider is unable to make certain military-related determinations, the health care provider may complete the certification form by relying on determinations from an authorized DOD representative, such as a DOD recovery care coordinator.

No Recertification for Leave To Care for a Covered Servicemember

Proposed section 630.1211(d) specifies that (as is the case with the certification process for leave taken to care for a family member with a serious health condition) no information may be required beyond that specified in this certification section. It also states that an agency may seek authentication or clarification of the certification. Since FMLA leave to care for a covered servicemember is a per-serious injury or illness entitlement limited to a single 12-month period, we do not believe that a recertification process, such as that provided for under current 5 CFR 630.1207(j) for "basic" FMLA leave, is necessary for leave to care for a covered servicemember. Also, since several of

the amendments made by the NDAA contain specific requirements that are unique to military servicemembers and that only the military can determine (such as whether the serious injury or illness was incurred in the line of duty on active duty), we believe that, consistent with DOL regulations, it would be inappropriate to permit a second or third opinion process such as that provided for "basic" FMLA leave under current § 630.1207(d) and (e). Therefore, § 630.1211(d) also states that second and third opinions and recertifications are not permitted for leave to care for a covered servicemember.

Invitational Travel Orders (ITOs) or Invitational Travel Authorizations (ITAs)

Proposed section 630.1211(e) provides that an agency requiring an employee to submit a certification for leave to care for a covered servicemember must accept the submission of "invitational travel orders" ("ITOs") or "invitational travel authorizations" ("ITAs") issued for medical purposes as sufficient certification of the employee's request for leave to care for a covered servicemember.

As described in DOL's regulations, based on consultation with DOD, DOL believes, and we concur, that the issuance of such orders or authorizations qualifies a servicemember as a covered servicemember for purposes of the FMLA provisions governing leave to care for a covered servicemember. The issuance of an ITO or ITA for medical purposes permits the named family member of the injured or ill servicemember to travel immediately to the servicemember's bedside, at DOD's expense. These ITOs or ITAs for medical purposes are not routinely issued by DOD, but rather only when the servicemember is, at minimum, seriously injured or ill. In its regulations, DOL further indicated its understanding that, in such cases, the ITO or ITA is issued to a servicemember's family upon the direction of a DOD health care provider and will state on its face that the travel order or authorization is for "medical purposes."

We agree that permitting ITOs or ITAs to serve as sufficient certification is appropriate in light of the fact that DOD has determined that the injury or illness incurred by the servicemember is serious enough to warrant the immediate presence of a family member at the servicemember's bedside. Moreover, in many circumstances where

ITOs or ITAs are issued, it may be extremely difficult for an employee to provide an agency an otherwise timely certification that complies with the requirements of this section. This approach accommodates an agency's right to obtain a sufficient certification from an employee in order to verify the employee's entitlement to FMLA leave to care for a covered servicemember.

Section 630.1211(e) further provides that an ITO or ITA issued to any family member to join an injured or ill covered servicemember at his or her bedside is sufficient certification regardless of whether the employee is named in the ITO or ITA. These provisions are consistent with those provided in DOL's final rule. Thus, for example, a covered servicemember's son may submit an ITO issued to the covered servicemember's spouse to support the son's request for FMLA leave to care for the covered servicemember during the time period specified by the ITO. DOD does not issue an ITO or ITA to every family member of an injured or ill covered servicemember who might be eligible to take FMLA leave to care for the covered servicemember. In some situations, the servicemember may have additional family members who are eligible to take FMLA leave to care for the covered servicemember, even if DOD has not authorized an ITO for that person. For example, an ITO or ITA can be issued to the spouse of a servicemember without also being issued to a servicemember's parents, children, or siblings. We agree with DOL's determination, as indicated in DOL's regulations, that all family members of a covered servicemember who are eligible to take FMLA leave to care for the covered servicemember should be able to rely on DOD's issuance of an ITO or ITA as sufficient certification to support a request for FMLA leave during the period covered by the ITO or ITA.

Given the seriousness of the injuries or illness incurred by a covered servicemember whose family member receives an ITO or ITA, and the immediate need for the family member at the covered servicemember's bedside, our intention is to remove as many certification impediments for the employee as possible for the duration of the order or authorization. Accordingly, § 630.1211(e)(1) further provides that an ITO or ITA is sufficient certification for the duration of the time specified in the ITO or ITA, and that during this time, an employee may take leave to care for the covered servicemember in a continuous block of time or on an intermittent basis. Section 630.1211(e)(2) states that an employee

who provides an ITO or ITA to support his or her request for leave may not be required to provide any additional or separate certification that leave taken on an intermittent basis during the period of time specified in the ITO or ITA is medically necessary.

If an employee needs leave to care for a covered servicemember beyond the expiration date specified in an ITO or ITA, paragraph (e)(3) of § 630.1211 permits an agency to request that the employee have one of the authorized health care providers listed under § 630.1211(a) furnish the required certification for the remainder of the employee's necessary leave period. This is consistent with the approach taken by DOL in its final rule. Permitting this additional certification, if an agency chooses to request it, allows the agency to obtain information about the employee's continued need for leave once the ITO or ITA expires, including specific information regarding the covered servicemember's injury or illness and its expected duration, since the ITO or ITA will not provide the agency with such information initially. As DOL stated in its final rule, once an ITO or ITA expires, the employee will be in a better position to have an authorized health care provider furnish a complete certification as to the servicemember's medical condition and the employee's continuing need for leave. Paragraphs (e)(4) and (e)(5) of § 630.1211 state, respectively, that when an employee supports his or her request for leave with an ITO or ITA, a health care provider of the agency may seek authentication and clarification of the ITO or ITA, but the agency may not require a second and third opinion or use a recertification process.

Further Certification Requirements

Paragraphs (f)–(i) of proposed § 630.1211 parallel similar provisions in the certification requirements for "basic" FMLA leave. Paragraph (f) provides that the agency must grant provisional leave pending final written certification if the employee cannot provide the certification before leave begins, or if the agency questions the validity of the original certification provided by the employee and the medical treatment requires the leave to begin. Paragraph (g) states that an employee must provide certification to the requesting agency within 15 calendar days of the agency's request, unless it is not practicable to do so under the particular circumstances, despite the employee's diligent, good-faith efforts, in which case the employee must provide the certification within a reasonable period of time, but no later

than 30 calendar days after the agency's request. Paragraph (h) states that if the employee fails to provide the requested certification after the leave has commenced, the agency may charge the employee as absent without leave (AWOL) or allow the employee to request that the provisional leave be charged as leave without pay or to the employee's annual and/or sick leave account. Paragraph (i) addresses the security and confidentiality of this certification.

Qualifying Exigency Leave

The amendments made by the NDAA provided DOL with the authority to establish "qualifying exigency leave" for employees covered by DOL's regulations. See 29 CFR 825.126. This type of leave helps families of members of the National Guard and Reserves manage family affairs when a family member is on active duty. Qualifying exigencies for which employees can use FMLA leave are: (1) Short-notice deployment; (2) military events and related activities; (3) childcare and school activities; (4) financial and legal arrangements; (5) counseling; (6) rest and recuperation; (7) post-deployment activities; and (8) additional activities not encompassed in the other categories that the employer and employee agree qualify as exigencies and agree to the timing and duration of the leave. The NDAA amendments did not provide this benefit to Federal employees; therefore, it is not included in OPM's proposed regulations. OPM requests comments on whether we should pursue legislation to obtain this benefit for the Federal workforce.

OPM is publishing subpart L, Family and Medical Leave, in its entirety because of the extent of the additions and the reorganization of the text.

E.O. 12866, Regulatory Review

This rule has been reviewed by the Office of Management and Budget in accordance with E.O. 12866.

Regulatory Flexibility Act

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

List of Subjects in 5 CFR 630

Government employees.
Office of Personnel Management.
John Berry,
Director.

Accordingly, OPM is proposing to amend 5 CFR part 630 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; § 630.205 also issued under Pub. L. 108-411, 118 Stat 2312; § 630.301 also issued under Pub. L. 103-356, 108 Stat. 3410 and Pub. L. 108-411, 118 Stat 2312; § 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. 105-18, 111 Stat. 158; 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. 102-25, 105 Stat. 92.

* * * * *

2. In § 630.401, remove paragraph (f) and revise paragraphs (a)(3) and (b) to read as follows:

§ 630.401 Granting sick leave.

(a) * * *

(3) Provides care for a family member—

(i) Who is incapacitated by a medical or mental condition or attends to a family member receiving medical, dental, or optical examination or treatment;

(ii) With a serious health condition; or

(iii) Who would, as determined by the health authorities having jurisdiction or by a health care provider, jeopardize the health of others by that family member's presence in the community because of exposure to a communicable disease;

* * * * *

(b) The amount of sick leave granted to an employee during any leave year for the purposes described in paragraphs (a)(3)(i), (a)(3)(iii), and (a)(4) of this section may not exceed a total of 104 hours (or, for a part-time employee or an employee with an uncommon tour of duty, the number of hours of sick leave he or she normally accrues during a leave year).

* * * * *

§§ 630.402 through 630.406 [Redesignated as § 630.404 through 630.408].

3a. Redesignate §§ 630.402 through 630.406 as §§ 630.404 through 630.408 respectively, and add new §§ 630.402 and 630.403 to read as follows:

§ 630.402 Advancing sick leave.

(a) At the beginning of a leave year or at any time thereafter when required by

the exigencies of the situation, an agency may advance sick leave in the amount of:

(1) Up to 240 hours to a full-time employee—

(i) Who is incapacitated for the performance of his or her duties by physical or mental illness, injury, pregnancy, or childbirth;

(ii) For a serious health condition of the employee or a family member;

(iii) When the employee would, as determined by the health authorities having jurisdiction or by a health care provider, jeopardize the health of others by his or her presence on the job because of exposure to a communicable disease;

(iv) For purposes relating to the adoption of a child; or

(v) For the care of a covered servicemember with a serious injury or illness, provided the employee is exercising his or her entitlement under §§ 630.1203(b) and 630.1204.

(2) Up to 104 hours to a full-time employee—

(i) When he or she receives medical, dental or optical examination or treatment;

(ii) To provide care for a family member who is incapacitated by a medical or mental condition or to attend to a family member receiving medical, dental, or optical examination or treatment;

(iii) To provide care for a family member who would, as determined by the health authorities having jurisdiction or by a health care provider, jeopardize the health of others by that family member's presence in the community because of exposure to a communicable disease; or

(iv) To make arrangements necessitated by the death of a family member or to attend the funeral of a family member.

(b) Two hundred forty hours is the maximum amount of advanced sick leave an employee may have to his or her credit at any one time. For a part-time employee (or an employee on an uncommon tour of duty), the maximum amount of sick leave an agency may advance must be prorated according to the number of hours in the employee's regularly scheduled administrative workweek.

§ 630.403 Substitution of sick leave for unpaid family and medical leave to care for a covered servicemember.

The amount of accumulated and accrued sick leave which an employee may substitute for unpaid family and medical leave under § 630.1203(b) may not exceed a total of 26 administrative workweeks in a single 12-month period

(or, for a part-time employee or an employee with an uncommon tour of duty, an amount of sick leave equal to 26 times the average number of hours in his or her scheduled tour of duty each week).

3b. Revise paragraphs (b) and (c) of § 630.502 to read as follows:

§ 630.502 Sick leave recredit.

* * * * *

(b) Except as provided in § 630.407 and in paragraph (c) of this section, an employee who has had a break in service is entitled to a recredit of sick leave (without regard to the date of his or her separation), if he or she returns to Federal employment on or after December 2, 1994, unless the sick leave was forfeited upon reemployment in the Federal Government before December 2, 1994.

(c) Except as provided in § 630.407, an employee of the government of the District of Columbia who was first employed by the government of the District of Columbia before October 1, 1987, who has had a break in service is entitled to a recredit of sick leave (without regard to the date of his or her separation), if he or she returns to Federal employment on or after December 2, 1994, unless the sick leave was forfeited upon reemployment in the Federal Government before December 2, 1994.

* * * * *

4. Revise subpart L to read as follows:

Subpart L—Family and Medical Leave

- 630.1201 Purpose, applicability, and administration.
- 630.1202 Definitions.
- 630.1203 Leave entitlement.
- 630.1204 Invoking FMLA entitlement.
- 630.1205 Application of the 12-month FMLA periods.
- 630.1206 Non-standard workschedules and holidays.
- 630.1207 Intermittent leave or reduced leave schedule.
- 630.1208 Substitution of paid leave.
- 630.1209 Notice of leave.
- 630.1210 Medical certification for basic FMLA leave for serious health condition of the employee or family member.
- 630.1211 Medical and other certification for leave to care for a covered servicemember.
- 630.1212 Protection of employment and benefits.
- 630.1213 Health benefits.
- 630.1214 Greater leave entitlements.
- 630.1215 Records and reports.

§ 630.1201 Purpose, applicability, and administration.

(a) *Purpose.* This subpart provides regulations to implement sections 6381 through 6387 of title 5, United States Code. This subpart must be read together with those sections of law.

Sections 6381 through 6387 of title 5, United States Code, provide a standard approach to providing family and medical leave to Federal employees by prescribing an entitlement to a total of 12 administrative workweeks of unpaid leave during any 12-month period for certain family and medical needs, as specified in § 630.1203(a) of this part, and an entitlement to a total of 26 administrative workweeks of unpaid leave during a single 12-month period to care for a covered servicemember with a serious injury or illness, as specified in § 630.1203(b) of this part.

(b) *Applicability.* (1) Except as otherwise provided in paragraph (b)(2) of this section, this subpart applies to any employee who—

(i) Is defined as an “employee” under 5 U.S.C. 6301(2), excluding employees covered under paragraph (b)(2) of this section; and

(ii) Has completed at least 12 months of service (not required to be 12 recent or consecutive months) as—

(A) An employee, as defined under 5 U.S.C. 6301(2), excluding any service as an employee under paragraph (b)(2) of this section;

(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);

(C) A “teacher” or an individual holding a “teaching position,” as defined in section 901 of title 20, United States Code; or

(D) An employee identified in section 2105(c) of title 5, United States Code, who is paid from nonappropriated funds.

(2) This subpart does not apply to—

(i) An individual employed by the government of the District of Columbia;

(ii) An employee serving under a temporary appointment with a time limitation of 1 year or less;

(iii) An intermittent employee, as defined in 5 CFR 340.401(c); or

(iv) Any employee covered by Title I or Title V of the Family and Medical Leave Act of 1993 (Pub. L. 103–3, February 5, 1993). The Department of Labor has issued regulations implementing Title I at 29 CFR part 825.

(3) For the purpose of applying sections 6381 through 6387 of title 5, United States Code—

(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) is subject to regulations prescribed by the Secretary of Veterans Affairs;

(ii) A “teacher” or an individual holding a “teaching position,” as defined in section 901 of title 20, United States Code, is subject to regulations

prescribed by the Secretary of Defense; and

(iii) An employee identified in section 2105(c) of title 5, United States Code, who is paid from nonappropriated funds is subject to regulations prescribed by the Secretary of Defense or the Secretary of Transportation, as appropriate.

(4) The regulations prescribed by the Secretary of Veterans Affairs, Secretary of Defense, or Secretary of Transportation under paragraph (b)(3) of this section must, to the extent appropriate, be consistent with the regulations prescribed in this subpart and the regulations prescribed by the Secretary of Labor to carry out Title I of the Family and Medical Leave Act of 1993 at 29 CFR part 825.

(c) *Administration.* The head of an agency having employees subject to this subpart is responsible for the proper administration of this subpart.

§ 630.1202 Definitions.

In this subpart:

Accrued leave has the meaning given that term in § 630.201 of this part.

Accumulated leave has the meaning given that term in § 630.201 of this part.

Active duty means duty under a call or order to active duty in support of a contingency operation pursuant to:

(1) Section 688 of title 10 of the United States Code, which authorizes ordering to active duty retired members of the Regular Armed Forces and members of the Retired Reserve retired after 20 years for length of service, and members of the Fleet Reserve or Fleet Marine Corps Reserve;

(2) Section 12301(a) of title 10 of the United States Code, which authorizes ordering all reserve component members to active duty in the case of war or national emergency declared by Congress, or when otherwise authorized by law;

(3) Section 12302 of title 10 of the United States Code, which authorizes ordering any unit or unassigned member of the Ready Reserve to active duty in time of national emergency declared by the President after January 1, 1953, or when otherwise authorized by law;

(4) Section 12304 of title 10 of the United States Code, which authorizes ordering any unit or unassigned member of the Selected Reserve and certain members of the Individual Ready Reserve to active duty;

(5) Section 12305 of title 10 of the United States Code, which authorizes the suspension of promotion, retirement or separation rules for certain Reserve components;

(6) Section 12406 of title 10 of the United States Code, which authorizes

calling the National Guard into Federal service in certain circumstances;

(7) Chapter 15 of title 10 of the United States Code, which authorizes calling the National Guard and State militia into Federal service in the case of insurrections and national emergencies; or

(8) Any other provision of law during a war or during a national emergency declared by the President or Congress.

Administrative workweek has the meaning given that term in § 610.102 of this chapter.

Adoption refers to a legal process in which an individual becomes the legal parent of another's child. The source of an adopted child—*i.e.*, whether from a licensed placement agency or otherwise—is not a factor in determining eligibility for leave under this subpart.

Contingency operation means a military operation that:

(1) Is designated by the Secretary of Defense as an operation in which members of the Armed Forces are or may become involved in military actions, operations, or hostilities against an enemy of the United States or against an opposing military force; or

(2) Results in the call or order to, or retention on, active duty of members of the uniformed services under section 688, 12301(a), 12302, 12304, 12305, or 12406 of title 10 of the United States Code, chapter 15 of title 10 of the United States Code, or any other provision of law during a war or during a national emergency declared by the President or Congress.

Covered servicemember means a current member of the Armed Forces, including a member of the National Guard or Reserves, who is undergoing medical treatment, recuperation, or therapy, is otherwise in outpatient status, or is otherwise on the temporary disability retired list, for a serious injury or illness incurred in the line of duty on active duty, but does not include former members of the Armed Forces, former members of the National Guard and Reserves, and members on the permanent disability retired list.

Employee means an individual to whom this subpart applies as described under § 630.1201(b).

Essential functions means the fundamental job duties of the employee's position, as defined in 29 CFR 1630.2(n). An employee who must be absent from work to receive medical treatment for a serious health condition is considered to be unable to perform the essential functions of the position during the absence for treatment.

Family and medical leave (or FMLA leave) means an employee's entitlement

to 12 or 26 administrative workweeks of unpaid leave for certain family and medical needs, as prescribed under sections 6381 through 6387 of title 5, United States Code.

Foster care means 24-hour care for children in substitution for, and away from, their parents or guardian. Such placement is made by or with the agreement of the State as a result of a voluntary agreement by the parent or guardian that the child be removed from the home, or pursuant to a judicial determination of the necessity for foster care, and involves agreement between the State and foster family to take the child. Although foster care may be with relatives of the child, State action is involved in the removal of the child from parental custody.

Health care provider means, for purposes of leave taken under § 630.1203(a)(3) or (4)—

(1) A licensed Doctor of Medicine or Doctor of Osteopathy or a physician who is serving on active duty in the uniformed services and is designated by the uniformed service to conduct examinations under this subpart;

(2) Any health care provider recognized by the Federal Employees Health Benefits Program or who is licensed or certified under Federal or State law to provide the service in question;

(3) A health care provider as defined in paragraph (2) of this definition who practices in a country other than the United States, who is authorized to practice in accordance with the laws of that country, and who is performing within the scope of his or her practice as defined under such law;

(4) A Christian Science practitioner listed with the First Church of Christ, Scientist, in Boston, Massachusetts; or

(5) A Native American, including an Eskimo, Aleut, and Native Hawaiian, who is recognized as a traditional healing practitioner by native traditional religious leaders who practices traditional healing methods as believed, expressed, and exercised in Indian religions of the American Indian, Eskimo, Aleut, and Native Hawaiians, consistent with Public Law 95-314, August 11, 1978 (92 Stat. 469), as amended by Public Law 103-344, October 6, 1994 (108 Stat. 3125).

(6) For purposes of leave taken to care for a covered servicemember under § 630.1205(b), see the list of authorized health care providers at § 630.1211(a)(1) through (4).

In loco parentis refers to the situation of an individual who has day-to-day responsibility for the care and financial support of a child or, in the case of an employee or a covered servicemember,

who had such responsibility for the employee or the covered servicemember when either was a child. A biological or legal relationship is not necessary.

Incapacity means the inability to work, attend school, or perform other regular daily activities because of a serious health condition or treatment for or recovery from a serious health condition.

Intermittent leave or leave taken intermittently means leave taken in separate blocks of time, rather than for one continuous period of time, and may include leave periods of 1 hour to several weeks. Leave may be taken for a period of less than 1 hour if agency policy provides for a minimum charge for leave of less than 1 hour under § 630.206(a).

Leave without pay means an absence from duty in a nonpay status. Leave without pay may be taken only for those hours of duty comprising an employee's basic workweek.

Next of kin of a covered servicemember means the nearest blood relative other than the covered servicemember's spouse, parent, son, or daughter, in the following order of priority:

(1) Blood relatives who have been granted legal custody of the covered servicemember by court decree or statutory provisions;

(2) Brothers and sisters;

(3) Grandparents;

(4) Aunts and uncles; and

(5) First cousins, unless the covered servicemember has specifically designated in writing another blood relative as his or her nearest blood relative for purposes of leave taken under § 630.1203(b). When such designation has been made, the designated individual is deemed to be the covered servicemember's only next of kin. When no such designation is made, and there are multiple family members with the same level of relationship to the covered servicemember, all such family members will be considered the covered servicemember's next of kin and may take FMLA leave to provide care to the covered servicemember, either consecutively or simultaneously.

Outpatient status means, with respect to a covered servicemember, the status of a member of the Armed Forces assigned to—

(1) A military medical treatment facility as an outpatient; or

(2) A unit established for the purpose of providing command and control of members of the Armed Forces receiving medical care as outpatients.

Parent means a biological parent or an individual who stands or stood in loco

parentis to an employee when the employee was a *son or daughter*. This term does not include parents-in-law.

Parent of a covered servicemember means a covered servicemember's biological, adoptive, step or foster father or mother, or any other individual who stands or stood in loco parentis to the covered servicemember. This term does not include parents-in-law.

Reduced leave schedule means a work schedule under which the usual number of hours of regularly scheduled work per workday or workweek of an employee is reduced. The number of hours by which the daily or weekly tour of duty is reduced are counted as leave for the purpose of this subpart.

Regularly scheduled work has the meaning given that term in § 610.102 of this chapter.

Regularly scheduled administrative workweek has the meaning given that term in § 610.102 of this chapter.

Serious health condition. (1) Serious health condition means an illness, injury, impairment, or physical or mental condition that involves—

(i) Inpatient care (*i.e.*, an overnight stay) in a hospital, hospice, or residential medical care facility, including any period of incapacity or any subsequent treatment in connection with such inpatient care; or

(ii) Continuing treatment by a health care provider that includes (but is not limited to) examinations to determine if there is a serious health condition and evaluations of such conditions if the examinations or evaluations determine that a serious health condition exists. Continuing treatment by a health care provider may include one or more of the following—

(A) A period of incapacity of more than 3 consecutive calendar days, including any subsequent treatment or period of incapacity relating to the same condition, that also involves—

(1) Treatment two or more times by a health care provider, by a health care provider under the direct supervision of the affected individual's health care provider, or by a provider of health care services under orders of, or on referral by, a health care provider; or

(2) Treatment by a health care provider on at least one occasion that results in a regimen of continuing treatment under the supervision of the health care provider (*e.g.*, a course of prescription medication or therapy requiring special equipment to resolve or alleviate the health condition).

(B) Any period of incapacity due to pregnancy or childbirth, or for prenatal care, even if the affected individual does not receive active treatment from a health care provider during the period

of incapacity or the period of incapacity does not last more than 3 consecutive calendar days.

(C) Any period of incapacity or treatment for such incapacity due to a chronic serious health condition that—

(1) Requires periodic visits for treatment by a health care provider or by a health care provider under the direct supervision of the affected individual's health care provider,

(2) Continues over an extended period of time (including recurring episodes of a single underlying condition); and

(3) May cause episodic rather than a continuing period of incapacity (*e.g.*, asthma, diabetes, epilepsy, etc.). The condition is covered even if the affected individual does not receive active treatment from a health care provider during the period of incapacity or the period of incapacity does not last more than 3 consecutive calendar days.

(D) A period of incapacity that is permanent or long-term due to a condition for which treatment may not be effective. The affected individual must be under the continuing supervision of, but need not be receiving active treatment by, a health care provider (*e.g.*, Alzheimer's, severe stroke, or terminal stages of a disease).

(E) Any period of absence to receive multiple treatments (including any period of recovery) by a health care provider or by a provider of health care services under orders of, or on referral by, a health care provider, either for restorative surgery after an accident or other injury or for a condition that would likely result in a period of incapacity of more than 3 consecutive calendar days in the absence of medical intervention or treatment (*e.g.*, chemotherapy/radiation for cancer, physical therapy for severe arthritis, dialysis for kidney disease).

(2) Serious health condition does not include routine physical, eye, or dental examinations; a regimen of continuing treatment that includes the taking of over-the-counter medications, bed-rest, exercise, and other similar activities that can be initiated without a visit to the health care provider; a condition for which cosmetic treatments are administered, unless inpatient hospital care is required or unless complications develop; or an absence because of an employee's use of an illegal substance, unless the employee is receiving treatment for substance abuse by a health care provider or by a provider of health care services on referral by a health care provider. Ordinarily, unless complications arise, the common cold, the flu, earaches, upset stomach, minor ulcers, headaches (other than migraines), routine dental or

orthodontia problems, and periodontal disease are not serious health conditions. Allergies, restorative dental or plastic surgery after an injury, removal of a cancerous growth, or mental illness resulting from stress may be serious health conditions only if such conditions require inpatient care or continuing treatment by a health care provider.

Serious injury or illness means an injury or illness incurred by a covered servicemember in the line of duty on active duty that may render the servicemember medically unfit to perform the duties of the servicemember's office, grade, rank, or rating.

Single 12-month period means the period beginning on the first day the employee takes FMLA leave to care for a covered servicemember with a serious injury or illness and ending 12 months after that date in accordance with section 630.1205(b) and (c).

Son or daughter means a biological, adopted, or foster child; a step child; a legal ward; or a child of a person standing in loco parentis who is—

(1) Under 18 years of age; or
 (2) 18 years of age or older and incapable of self-care because of a mental or physical disability. A son or daughter incapable of self-care requires active assistance or supervision to provide daily self-care in three or more of the "activities of daily living" (ADLs) or "instrumental activities of daily living" (IADLs). Activities of daily living include adaptive activities such as caring appropriately for one's grooming and hygiene, bathing, dressing, and eating. Instrumental activities of daily living include cooking, cleaning, shopping, taking public transportation, paying bills, maintaining a residence, using the telephones and directories, using a post office, etc. A "physical or mental disability" refers to a physical or mental impairment that substantially limits one or more of the major life activities of an individual as defined in 29 CFR 1630.2 (h), (i) and (j).

Son or daughter of a covered servicemember means a covered servicemember's biological, adopted, or foster child, stepchild, legal ward, or a child for whom the covered servicemember stood in loco parentis, and who is of any age.

Spouse means an individual who is a husband or wife pursuant to a marriage that is a legal union between one man and one woman, including common law marriage between one man and one woman in States where it is recognized.

Tour of duty has the meaning given that term in § 610.102 of this chapter.

§ 630.1203 Leave entitlement.

(a) *12-week entitlement for basic FMLA leave.* An employee is entitled to a total of 12 administrative workweeks of unpaid leave during any 12-month period for one or more of the following reasons:

(1) The birth of a son or daughter of the employee and the care of such son or daughter;

(2) The placement of a son or daughter with the employee for adoption or foster care;

(3) The care of a spouse, son, daughter, or parent of the employee, if such spouse, son, daughter, or parent has a serious health condition; or

(4) A serious health condition of the employee that makes the employee unable to perform any one or more of the essential functions of his or her position.

(b) *26-week entitlement for FMLA leave to care for a covered servicemember.* (1) An employee is entitled to a total of 26 administrative workweeks of unpaid leave during a single 12-month period to care for a covered servicemember with a serious injury or illness if the employee is the spouse, son, daughter, parent, or next of kin of a covered servicemember as defined in § 630.1202.

(2) The leave entitlement described in this section is to be applied on a per-covered servicemember, per-serious injury or illness basis such that an employee may be entitled to take more than one period of up to 26 administrative workweeks of leave if the leave is to care for different covered servicemembers or to care for the same covered servicemember with a subsequent serious injury or illness, except that no more than 26 administrative workweeks of leave may be taken within any single 12-month period as described in § 630.1205(b).

(i) *Per covered servicemember.* Subject to § 630.1205(b) and the conditions in paragraphs (b)(2)(i)(A) through (C) of this section, an employee may take more than one period of up to 26 administrative workweeks of FMLA leave to care for more than one covered servicemember.

(A) An employee who has previously invoked FMLA leave to care for a covered servicemember in a single 12-month period may subsequently invoke FMLA leave to care for a different covered servicemember in a different single 12-month period.

(B) If the single 12-month periods applicable to the different covered servicemembers do not overlap, the employee may take up to 26 administrative workweeks of leave during each single 12-month period. If

the single 12-month periods applicable to the different covered servicemembers do overlap, the employee may take no more than 26 administrative workweeks of leave during any single 12-month period. In no case may an employee take more than 26 administrative workweeks of leave during any single 12-month period, as described in § 630.1205(b) and (c).

(C) For purposes of applying paragraphs (b)(2)(i)(A) and (B) of this section, the beginning of each period of leave to care for each covered servicemember begins a new single 12-month period.

(ii) *Per serious injury or illness.* Subject to § 630.1205(b) and the conditions in paragraphs (b)(2)(i)(A) through (C) of this section, an employee may take more than one single 12-month period of up to 26 administrative workweeks of leave to care for a covered servicemember with more than one serious injury or illness only when the serious injury or illness is a subsequent serious injury or illness, including a manifestation of a second serious injury or illness at a later time. An employee may not take a subsequent period of leave to care for a covered servicemember who experiences an aggravation or complication of an earlier serious injury or illness.

(A) An employee who has previously invoked FMLA leave to care for a covered servicemember in a single 12-month period may subsequently invoke FMLA leave to care for the same covered servicemember in a different single 12-month period for a different serious injury or illness.

(B) If the different single 12-month periods applicable to the different serious injuries or illnesses do not overlap, the employee may take up to 26 administrative workweeks of leave during each single 12-month period. If the different single 12-month periods applicable to the different serious injuries or illnesses do overlap, the employee may take no more than 26 administrative workweeks of leave during any single 12-month period. In no case may an employee take more than 26 administrative workweeks of leave within any single 12-month period, as described in § 630.1205(b) and (c).

(C) For purposes of applying paragraphs (b)(2)(i)(A) and (B) of this section, the beginning of each period of leave to care for each separate serious injury or illness begins a new single 12-month period.

(3) An employee may not take leave under this paragraph to care for a former member of the Armed Forces, a former member of the National Guard or

Reserves, or a member on the permanent disability retired list.

(c)(1) An employee may take only the amount of family and medical leave that is necessary to manage the circumstances that prompted the need for leave under paragraph (a) or (b) of this section.

(2) An employee's entitlement to the use of leave under paragraphs (a) and (b) of this section is applied in accordance with § 630.1205.

(d) Each agency must inform its employees of their entitlements and responsibilities under this subpart, including the requirements and obligations of employees.

§ 630.1204 Invoking FMLA entitlement.

(a) An employee must invoke his or her entitlement to family and medical leave under § 630.1203(a) or (b), subject to the notification and medical certification requirements in §§ 630.1209, 630.1210, or 630.1211.

(b) An employee may not retroactively invoke his or her entitlement to family and medical leave. However, if an employee and his or her personal representative are physically or mentally incapable of invoking the employee's entitlement to FMLA leave *during the entire period* in which the employee is absent from work for an FMLA-qualifying purpose under § 630.1203(a) or (b), the employee may retroactively invoke his or her entitlement to FMLA leave within 2 workdays after returning to work. In such cases, the incapacity of the employee must be documented by a written medical certification from a health care provider. In addition, the employee must provide documentation acceptable to the agency, explaining the inability of his or her personal representative to contact the agency and invoke the employee's entitlement to FMLA leave during the entire period in which the employee was absent from work for an FMLA-qualifying purpose.

(c) When an employee invokes his or her entitlement to FMLA leave for a circumstance which could qualify under both § 630.1203(a)(3) and § 630.1203(b), then the FMLA leave must be designated as being taken under § 630.1203(b). The higher 26-week entitlement applies in this case. The single 12-month period starts upon first use of leave for this purpose. Leave to care for a covered servicemember is to be applied on a per-covered servicemember, per-serious injury or illness basis, as described under § 630.1203(b)(2). Once the single 12-month period for leave to care for a covered servicemember is exhausted in accordance with 630.1205(b), leave for

any necessary subsequent care may be taken under § 630.1203(a)(3) subject to all requirements relating to use of such leave.

(d) An agency may not place an employee on family and medical leave and may not subtract leave from an employee's entitlement to leave under § 630.1203(a) or (b) unless the agency has obtained confirmation from the employee or his or her personal representative of the employee's intent to invoke his or her entitlement to leave under paragraph (a) or (b) of this section. An employee's notice of his or her intent to take leave under § 630.1209 may suffice as the employee's confirmation.

§ 630.1205 Application of the 12-month FMLA periods.

(a) *12-week entitlement for basic FMLA leave.* The 12-month period referred to in § 630.1203(a) begins on the date an employee first takes leave under this subpart for a family or medical need specified in § 630.1203(a) and continues for 12 months.

(1) An employee is not entitled to 12 additional administrative workweeks of leave until the previous 12-month period ends and an event or situation occurs that entitles the employee to another period of family or medical leave. (This may include a continuation of a previous situation or circumstance.)

(2) The entitlement to leave under § 630.1203(a)(1) and (2) expires at the end of the 12-month period beginning on the date of birth or placement. Leave for a birth or placement must be concluded within this 12-month period. Leave taken under § 630.1203(a)(1) and (2) may begin prior to, or on the actual date of, birth or placement for adoption or foster care, and the 12-month period referred to in § 630.1203(a) begins on that date.

(b) *26-week entitlement for FMLA leave to care for a covered servicemember.* The single 12-month period described in § 630.1203(b) begins on the first day the employee takes FMLA leave to care for a covered servicemember and ends 12 months after that date.

(1) Any leave used under § 630.1203(a) prior to the first use under § 630.1203(b) does not count towards the single 12-month period under this paragraph.

(2) If an employee does not take all of his or her 26 administrative workweeks of leave entitlement to care for a covered servicemember during this single 12-month period, the remaining part of his or her 26 administrative workweeks of leave entitlement to care for the covered servicemember is forfeited.

(3) When an employee takes leave to care for more than one covered servicemember or for a subsequent serious injury or illness of the same covered servicemember, and the single 12-month periods corresponding to the different leave entitlements to care for a covered servicemember overlap, the employee is limited to taking a combined total of no more than 26 administrative workweeks of leave in each single 12-month period.

(c) *Limit of combined total of 26 weeks.* During any single 12-month period described in paragraph (b) of this section, an employee's FMLA leave entitlement is limited to a combined total of 26 administrative workweeks of FMLA leave for any reason under § 630.1203 (a) and (b).

§ 630.1206 Non-standard workschedules and holidays.

(a) *Part-time and uncommon tours of duty.* Leave under § 630.1203(a) and (b) is available to full-time and part-time employees. The appropriate total of administrative workweeks (12 if taken under § 630.1203(a), and 26 if taken under § 630.1203(b)) will be made available equally for a full-time or part-time employee in direct proportion to the number of hours in the employee's regularly scheduled administrative workweek. The appropriate number (*i.e.*, 12 or 26) of administrative workweeks of leave will be calculated on an hourly basis and will equal 12 or 26 times the average number of hours in the employee's regularly scheduled administrative workweek. If the number of hours in an employee's administrative workweek varies from week to week, a weekly average of the hours scheduled over the 12 or 26 weeks prior to the date leave commences must be used as the basis for this calculation.

(b) *Holidays.* Any holidays authorized under 5 U.S.C. 6103 or by Executive order and nonworkdays established by Federal statute, Executive order, or administrative order that occur during the period in which the employee is on family and medical leave may not be counted toward the employee's 12 or 26-week entitlement to family and medical leave.

(c) *Change in schedule.* If the number of hours in an employee's regularly scheduled administrative workweek is changed during the 12-month period of family and medical leave, the employee's entitlement to any remaining family and medical leave will be recalculated based on the number of hours in the employee's current regularly scheduled administrative workweek.

§ 630.1207 Intermittent leave or reduced leave schedule.

(a) Leave under § 630.1203(a)(1) or (2) may not be taken intermittently or on a reduced leave schedule unless the employee and the agency agree to do so.

(b) Leave under § 630.1203(a)(3) or (4) may be taken intermittently or on a reduced leave schedule when medically necessary, subject to §§ 630.1209 and 630.1210(b)(6). Leave under § 630.1203(b) may be taken intermittently or on a reduced leave schedule when medically necessary, subject to §§ 630.1209, 630.1211(b)(7) and (8) and 630.1211(e)(1) and (2).

(c) If an employee takes leave under § 630.1203(a)(3) or (4) or § 630.1203(b) intermittently or on a reduced leave schedule that is foreseeable based on planned medical treatment, recovery from a serious health condition, or care of a covered servicemember, the agency may place the employee temporarily in an available alternative position for which the employee is qualified and that can better accommodate recurring periods of leave. Upon returning from leave, the employee is entitled to be returned to his or her permanent position or an equivalent position, as provided in § 630.1212(a).

(d) For the purpose of applying paragraph (c) of this section, an alternative position need not consist of equivalent duties, but must be in the same commuting area and must provide—

(1) An equivalent grade or pay level, including any applicable locality payment under 5 CFR part 531, subpart F; special rate supplement under 5 CFR part 530, subpart C; or similar payment or supplement under other legal authority;

(2) The same type of appointment, work schedule, status, and tenure; and

(3) The same employment benefits made available to the employee in his or her previous position (*e.g.*, life insurance, health benefits, retirement coverage, and leave accrual).

(e) The agency must determine the available alternative position that has equivalent pay and benefits consistent with Federal laws, including the Rehabilitation Act of 1973 (29 U.S.C. 701) and the Pregnancy Discrimination Act of 1978 (42 U.S.C. 2000e).

(f) Only the amount of leave taken intermittently or on a reduced leave schedule, as these terms are defined in § 630.1202 of this part, may be subtracted from the total amount of leave available to the employee under § 630.1206 (a) and (c).

§ 630.1208 Substitution of paid leave.

(a) Except as provided in paragraph (b) of this section, leave taken under § 630.1203(a) or (b) must be leave without pay.

(b) An employee may elect to substitute the following paid leave for any or all of the period of leave without pay to be taken under § 630.1203(a) or (b):

(1) Accrued or accumulated annual or sick leave under subchapter I of chapter 63 of title 5, United States Code, consistent with current law and regulations governing the granting and use of annual or sick leave under subparts C and D of this part;

(2) Advanced annual leave under 5 U.S.C. 6302(d) or sick leave under 5 U.S.C. 6307(d) and § 630.402 approved under the same terms and conditions that apply to any other agency employee who requests advanced annual or sick leave; and

(3) Leave made available to an employee under the Voluntary Leave Transfer Program or the Voluntary Leave Bank Program consistent with subparts I and J of this part.

(c) An agency may not deny an employee's right to substitute paid leave under paragraph (b) of this section for any or all of the period of leave without pay to be taken under § 630.1203(a) or (b), consistent with current law and regulations.

(d) An agency may not require an employee to substitute paid leave under paragraph (b) of this section for any or all of the period of leave without pay to be taken under § 630.1203(a) or (b).

(e) An employee must notify the agency of his or her intent to substitute paid leave under paragraph (b) of this section for the period of leave without pay to be taken under § 630.1203(a) or (b) prior to the date such paid leave commences. An employee may not retroactively substitute paid leave for leave without pay previously taken under § 630.1203(a) or (b).

§ 630.1209 Notice of leave.

(a) If the need for leave taken under § 630.1203(a) or (b) is foreseeable based on an expected birth, placement for adoption or foster care, planned medical treatment for the serious health condition of employee or of a family member, or the planned medical treatment for a serious injury or illness of a covered servicemember, the employee must provide notice to the agency of his or her intention to take leave not less than 30 calendar days before the date the leave is to begin. If 30 calendar days notice is not practicable (e.g., due to lack of knowledge of approximately when leave

will be required to begin, a change in circumstances, a medical emergency, or the date of birth or placement or planned medical treatment requires leave to begin within 30 calendar days), the employee must provide such notice as soon as is practicable.

(b) If the need for leave taken under § 630.1203(a)(3) or (4) or (b) is foreseeable based on planned medical treatment, the employee must consult with the agency and make a reasonable effort to schedule medical treatment so as not to disrupt unduly the operations of the agency, subject to the approval of the health care provider. The agency may, for justifiable cause, request that an employee reschedule medical treatment, subject to the approval of the health care provider.

(c) If the need for leave taken under § 630.1203(a) or (b) is not foreseeable (e.g., a medical emergency, the serious injury of a covered servicemember, or the unexpected availability of a child for adoption or foster care), and the employee cannot provide 30 calendar days' notice of his or her need for leave, the employee must provide notice within a reasonable period of time appropriate to the circumstances involved. If necessary, notice may be given by an employee's personal representative (e.g., a family member or other responsible party). If the need for leave is not foreseeable and the employee is unable, due to circumstances beyond his or her control, to provide notice of his or her need for leave, the leave may not be delayed or denied.

(d) If the need for leave taken under § 630.1203(a) or (b) is foreseeable, and the employee fails to give 30 calendar days' notice with no reasonable excuse for the delay of notification, the agency may delay the taking of leave under § 630.1203(a) or (b) until at least 30 calendar days after the date the employee provides notice of his or her need for family and medical leave.

(e) An agency may waive the notice requirements under paragraph (a) of this section and instead impose the agency's usual and customary policies or procedures for providing notification of leave. The agency's policies or procedures for providing notification of leave must not be more stringent than the requirements in this section. However, an agency may not deny an employee's entitlement to leave under § 630.1203(a) or (b) if the employee fails to follow such agency policies or procedures.

(f) An agency may require that a request for leave under § 630.1203(a)(1) and (2) be supported by evidence that is

administratively acceptable to the agency.

§ 630.1210 Medical certification for basic FMLA leave for serious health condition of the employee or family member.

(a) An agency may require that a request for leave under § 630.1203(a)(3) or (4) be supported by written medical certification issued by the health care provider of the employee or the health care provider of the spouse, son, daughter, or parent of the employee, as appropriate. An agency may waive the requirement for an initial medical certificate in a subsequent 12-month period if the leave under § 630.1203(a)(3) or (4) is for the same chronic or continuing condition.

(b) The written medical certification must include—

(1) The date the serious health condition commenced;

(2) The probable duration of the serious health condition or a statement that the serious health condition is a chronic or continuing condition with an unknown duration, including whether the patient is presently incapacitated and the likely duration and frequency of episodes of incapacity;

(3) The appropriate medical facts within the knowledge of the health care provider regarding the serious health condition, including a general statement as to the incapacitation, examination, or treatment that may be required by a health care provider;

(4) For the purpose of leave taken under § 630.1203(a)(3)—

(i) A statement from the health care provider that the spouse, son, daughter, or parent of the employee requires psychological comfort and/or physical care; needs assistance for basic medical, hygienic, nutritional, safety, or transportation needs or in making arrangements to meet such needs; and would benefit from the employee's care or presence; and

(ii) A statement from the employee on the care he or she will provide and an estimate of the amount of time needed to care for his or her spouse, son, daughter, or parent;

(5) For the purpose of leave taken under § 630.1203(a)(4), a statement that the employee is unable to perform one or more of the essential functions of his or her position or requires medical treatment for a serious health condition, based on written information provided by the agency on the essential functions of the employee's position or, if not provided, discussion with the employee about the essential functions of his or her position; and

(6) In the case of certification for intermittent leave or leave on a reduced

leave schedule under § 630.1203(a)(3) or (4) for planned medical treatment, the dates (actual or estimates) on which such treatment is expected to be given, the duration of such treatment, and the period of recovery, if any, or specify that the serious health condition is a chronic or continuing condition with an unknown duration and whether the patient is presently incapacitated and the likely duration and frequency of episodes of incapacity.

(c) The information on the medical certification must relate only to the serious health condition for which the current need for family and medical leave exists. The agency may not require any personal or confidential information in the written medical certification other than that required by paragraph (b) of this section. If an employee submits a completed medical certification signed by the health care provider, the agency may not request new information from the health care provider. However, a health care provider representing the agency, including a health care provider employed by the agency or under administrative oversight of the agency, may contact the health care provider who completed the medical certification, with the employee's permission, for purposes of clarifying the medical certification.

(d) If the agency doubts the validity of the original certification provided under paragraph (a) of this section, the agency may require, at the agency's expense, that the employee obtain the opinion of a second health care provider designated or approved by the agency concerning the information certified under paragraph (b) of this section. Any health care provider designated or approved by the agency may not be employed by the agency or be under the administrative oversight of the agency on a regular basis unless the agency is located in an area where access to health care is extremely limited—e.g., a rural area or an overseas location where no more than one or two health care providers practice in the relevant specialty, or the only health care providers available are employed by the agency.

(e) If the opinion of the second health care provider differs from the original certification provided under paragraph (a) of this section, the agency may require, at the agency's expense, that the employee obtain the opinion of a third health care provider designated or approved jointly by the agency and the employee concerning the information certified under paragraph (b) of this section. The opinion of the third health

care provider is binding on the agency and the employee.

(f) To remain entitled to family and medical leave under § 630.1203(a)(3) or (4), an employee or the employee's spouse, son, daughter, or parent must comply with any requirement from an agency that he or she submit to examination (though not treatment) to obtain a second or third medical certification from a health care provider other than the individual's health care provider.

(g) If the employee is unable to provide the requested medical certification before leave begins, or if the agency questions the validity of the original certification provided by the employee and the medical treatment requires the leave to begin, the agency must grant provisional leave pending final written medical certification.

(h) An employee must provide the written medical certification required by paragraphs (a), (d), (e), and (g) of this section, signed by the health care provider, no later than 15 calendar days after the date the agency requests such medical certification. If it is not practicable under the particular circumstances to provide the requested medical certification no later than 15 calendar days after the date requested by the agency despite the employee's diligent, good-faith efforts, the employee must provide the medical certification within a reasonable period of time under the circumstances involved, but no later than 30 calendar days after the date the agency requests such medical certification.

(i) If, after the leave has commenced, the employee fails to provide the requested medical certification, the agency may—

(1) Charge the employee as absent without leave (AWOL); or

(2) Allow the employee to request that the provisional leave be charged as leave without pay or charged to the employee's annual and/or sick leave account, as appropriate.

(j) At its own expense, an agency may require subsequent medical recertification on a periodic basis, but not more than once every 30 calendar days, for leave taken for purposes relating to pregnancy, chronic conditions, or long-term conditions, as these terms are used in the definition of *serious health condition* in § 630.1202. For leave taken for all other serious health conditions and including leave taken on an intermittent or reduced leave schedule, if the health care provider has specified on the medical certification a minimum duration of the period of incapacity, the agency may not request recertification until that period

has passed. An agency may require subsequent medical recertification more frequently than every 30 calendar days, or more frequently than the minimum duration of the period of incapacity specified on the medical certification, if the employee requests that the original leave period be extended, the circumstances described in the original medical certification have changed significantly, or the agency receives information that casts doubt upon the continuing validity of the medical certification.

(k) To ensure the security and confidentiality of any written medical certification under §§ 630.1210 or 630.1212(h), the medical certification shall be subject to the provisions for safeguarding information about individuals under subpart A or part 293 of this chapter.

§ 630.1211 Medical and other certification for leave to care for a covered servicemember.

(a) An agency may require that a request for leave under § 630.1203(b) be supported by a written medical certification issued by an authorized health care provider of the covered servicemember. For purposes of leave taken to care for a covered servicemember under § 630.1203(b), any one of the following health care providers may complete such a certification:

(1) A United States Department of Defense (DOD) health care provider;

(2) A United States Department of Veterans Affairs (VA) health care provider;

(3) A DOD TRICARE network authorized private health care provider; or

(4) A DOD non-network TRICARE authorized private health care provider.

(b) *Required information from health care provider.* An agency may request that the health care provider provide any or all of the information listed below. (If the authorized health care provider is unable to make certain military-related determinations outlined below, the authorized health care provider may rely on determinations from an authorized DOD representative, such as a DOD recovery care coordinator):

(1) The name, address, and appropriate contact information (telephone number, fax number, and/or e-mail address) of the health care provider, the type of medical practice, the medical specialty, and which of the categories listed in paragraph (a) of this section describes the health care provider;

(2) Whether the covered servicemember has incurred a serious injury or illness;

(3) Whether the covered servicemember's serious injury or illness was incurred in the line of duty on active duty;

(4) The approximate date on which the serious injury or illness commenced, and its probable duration;

(5) A statement or description of appropriate medical facts regarding the covered servicemember's health condition for which FMLA leave is requested. The medical facts must be sufficient to support the need for leave. Such medical facts must include information on whether the serious injury or illness may render the covered servicemember medically unfit to perform the duties of the covered servicemember's office, grade, rank, or rating and whether the member is receiving medical treatment, recuperation, or therapy;

(6) Information sufficient to establish that the covered servicemember is in need of care, (*i.e.*, requires psychological comfort and/or physical care; needs assistance for basic medical, hygienic, nutritional, safety, or transportation needs or in making arrangements to meet such needs; and would benefit from the employee's care or presence) and whether the covered servicemember will need care for a single continuous period of time, including any time for treatment and recovery, and an estimate as to the beginning and ending dates of this period of time;

(7) If an employee requests leave on an intermittent or reduced schedule basis for planned medical treatment appointments for the covered servicemember, whether there is a medical necessity for the covered servicemember to have such periodic care and an estimate of the treatment schedule of such appointments; and

(8) If an employee requests leave on an intermittent or reduced schedule basis to care for a covered servicemember other than for planned medical treatment (*e.g.*, episodic flare-ups of a medical condition), whether there is a medical necessity for the covered servicemember to have such periodic care, which can include assisting in the covered servicemember's recovery, and an estimate of the frequency and duration of the periodic care.

(c) *Required information from employee and/or covered servicemember.* In addition to the information that may be required under § 630.1211(b), an agency may also require that such certification set forth

the following information provided by an employee and/or covered servicemember:

(1) The name and address of the employing agency of the individual requesting leave to care for a covered servicemember, the name of the employee requesting such leave, and the name of the covered servicemember for whom the employee is requesting leave to care;

(2) The relationship of the employee to the covered servicemember for whom the employee is requesting leave to care;

(3) Whether the covered servicemember is a current member of the Armed Forces or the National Guard or Reserves, and the covered servicemember's military branch, rank, and current unit assignment;

(4) Whether the covered servicemember is assigned to a military medical facility as an outpatient or to a unit established for the purpose of providing command and control of members of the Armed Forces receiving medical care as outpatients (such as a medical hold or warrior transition unit), and the name of the medical treatment facility or unit;

(5) Whether the covered servicemember is on the temporary disability retired list; and

(6) A description of the care to be provided to the covered servicemember and an estimate of the amount of leave needed by the employee to provide the care.

(d) No information may be required beyond that specified in this section. In all instances, the information on the certification must relate only to the serious injury or illness for which the current need for leave exists. An agency may seek authentication and/or clarification of the certification. However, second and third opinions such as those outlined in § 630.1210(d) and (e) or recertifications such as those outlined in § 630.1210(j) are not permitted for leave to care for a covered servicemember.

(e) An agency requiring an employee to submit a certification for leave to care for a covered servicemember must accept as sufficient certification "invitational travel orders" (ITOs) or "invitational travel authorizations" (ITAs) issued to any family member to join an injured or ill covered servicemember at his or her bedside. An ITO or ITA is sufficient certification for an employee entitled to take FMLA leave to care for a covered servicemember regardless of whether the employee is named in the order or authorization.

(1) An ITO or ITA is sufficient certification for the duration of time

specified in the ITO or ITA. During that time period, an employee may take leave to care for the covered servicemember in a continuous block of time or on an intermittent basis.

(2) An employee who provides an ITO or ITA to support his or her request for leave may not be required to provide any additional or separate certification that leave taken on an intermittent basis during the period of time specified in the ITO or ITA is medically necessary.

(3) If an employee will need leave to care for a covered servicemember beyond the expiration date specified in an ITO or ITA, an agency may request that the employee have one of the authorized health care providers listed under § 630.1211(a) complete the required certification form as certification for the remainder of the employee's necessary leave period.

(4) An agency may seek authentication and clarification of the ITO or ITA.

(5) An agency may not use a second or third opinion process such as those outlined in § 630.1210(d) and (e), or the recertification process such as that outlined in § 630.1210(j), for the period of time in which leave is supported by an ITO or ITA.

(f) If the employee is unable to provide the requested medical certification before leave begins, or if the agency questions the validity of the original certification provided by the employee and the medical treatment requires the leave to begin, the agency must grant provisional leave pending final written medical certification.

(g) An employee must provide the written medical certification required by paragraphs (a), (b), and (f) of this section, signed by the health care provider, no later than 15 calendar days after the date the agency requests such medical certification. If it is not practicable under the particular circumstances to provide the requested medical certification no later than 15 calendar days after the date requested by the agency despite the employee's diligent, good-faith efforts, the employee must provide the medical certification within a reasonable period of time under the circumstances involved, but no later than 30 calendar days after the date the agency requests such medical certification.

(h) If, after the leave has commenced, the employee fails to provide the requested medical certification, the agency may—

(1) Charge the employee as absent without leave (AWOL); or

(2) Allow the employee to request that the provisional leave be charged as leave without pay or charged to the

employee's annual and/or sick leave account, as appropriate.

(i) To ensure the security and confidentiality of any written medical certification under § 630.1211, the medical certification shall be subject to the provisions for safeguarding information about individuals under subpart A of part 293 of this chapter.

§ 630.1212 Protection of employment and benefits.

(a) Any employee who takes leave under § 630.1203(a) or (b) is entitled, upon return to the agency, to be returned to—

(1) The same position held by the employee when the leave commenced; or

(2) An equivalent position with equivalent benefits, pay, status, and other terms and conditions of employment.

(b) For the purpose of applying paragraph (a)(2) of this section, an equivalent position must be in the same commuting area and must carry or provide at a minimum—

(1) The same or substantially similar duties and responsibilities, which must entail substantially equivalent skill, effort, responsibility, and authority;

(2) An equivalent grade or pay level, including any applicable locality payment under 5 CFR part 531, subpart F; special rate supplement under 5 CFR part 530, subpart C; or similar payment or supplement under other legal authority;

(3) The same type of appointment, work schedule, status, and tenure;

(4) The same employment benefits made available to the employee in his or her previous position (*e.g.*, life insurance, health benefits, retirement coverage, and leave accrual);

(5) The same or equivalent opportunity for a within-grade increase, performance award, incentive award, or other similar discretionary and non-discretionary payments, consistent with applicable laws and regulations; however, the entitlement to be returned to an equivalent position does not extend to intangible or unmeasurable aspects of the job;

(6) The same or equivalent opportunity for premium pay consistent with applicable law and regulations under 5 CFR part 550, subpart A, or 5 CFR part 551, subpart E; and

(7) The same or equivalent opportunity for training or education benefits, consistent with applicable laws and regulations, including any training that an employee may be required to complete to qualify for his or her previous position.

(c) As a result of taking leave under § 630.1203(a) or (b), an employee must

not suffer the loss of any employment benefit accrued prior to the date on which the leave commenced.

(d) Except as otherwise provided by or under law, a restored employee is not entitled to—

(1) The accrual of any employment benefits during any period of leave; or

(2) Any right, benefit, or position of employment other than any right, benefit, or position to which the employee would have been entitled had the employee not taken the leave.

(e) For the purpose of applying paragraph (d) of this section, the same entitlements and limitations in law and regulations that apply to the position, pay, benefits, status, and other terms and conditions of employment of an employee in a leave without pay status apply to any employee taking leave without pay under this part, except where different entitlements and limitations are specifically provided in this subpart.

(f) An employee is not entitled to be returned to the same or equivalent position under paragraph (a) of this section if the employee would not otherwise have been employed in that position at the time the employee returns from leave.

(g) An agency may not return an employee to an equivalent position where written notification has been provided that the equivalent position will be affected by a reduction in force if the employee's previous position is not affected by a reduction in force.

(h) As a condition of returning an employee who takes leave under § 630.1203(a)(4), an agency may establish a uniformly applied practice or policy that requires all similarly-situated employees (*i.e.*, same occupation, same serious health condition) to obtain written medical certification from the health care provider of the employee that the employee is able to perform the essential functions of his or her position. An agency may delay the return of an employee until the medical certification is provided. The same conditions for verifying the adequacy of a medical certification in § 630.1210(c) apply to the medical certification to return to work. No second or third opinion on the medical certification to return to work may be required. An agency may not require a medical certification to return to work during the period the employee takes leave intermittently or under a reduced leave schedule under § 630.1207.

(i) If an agency requires an employee to obtain written medical certification under paragraph (h) of this section before he or she returns to work, the

agency must notify the employee of this requirement before leave commences or to the extent practicable in emergency medical situations, and must pay the expenses for obtaining the written medical certification. An employee's refusal or failure to provide written medical certification under paragraph (h) of this section may be grounds for appropriate disciplinary or adverse action, as provided in part 752 of this chapter.

(j) An agency may require an employee to report periodically to the agency on his or her status and intention to return to work. An agency's policy requiring such reports must take into account all of the relevant facts and circumstances of the employee's situation.

(k) An employee's decision to invoke FMLA leave under §§ 630.1203(a) or (b) and 630.1204 does not prohibit an agency from proceeding with appropriate actions under part 432 or part 752 of this chapter.

(l) An employee who does not comply with the notification requirements in § 630.1209 and does not provide medical certification signed by the health care provider that includes all of the information required in §§ 630.1210(b) and 630.1211(b) and (c), as applicable, is not entitled to family and medical leave.

§ 630.1213 Health benefits.

An employee enrolled in a health benefits plan under the Federal Employees Health Benefits Program (established under chapter 89 of title 5, United States Code) who is placed in a leave-without-pay status as a result of entitlement to leave under § 630.1203(a) or (b) may continue his or her health benefits enrollment while in the leave-without-pay status and arrange to pay the appropriate employee contributions into the Employees Health Benefits Fund (established under section 8909 of title 5, United States Code). The employee must make such contributions consistent with 5 CFR 890.502.

§ 630.1214 Greater leave entitlements.

(a) An agency must comply with any collective bargaining agreement or any agency employment benefit program or plan that provides greater family or medical leave entitlements to employees than those provided under this subpart. Nothing in this subpart prevents an agency from amending such policies, provided the policies comply with the requirements of this subpart.

(b) The entitlements established for employees under this subpart may not be diminished by any collective

bargaining agreement or any employment benefit program or plan.

(c) An agency may adopt leave policies more generous than those provided in this subpart, except that such policies may not provide entitlement to paid time off in an amount greater than that otherwise authorized by law or provide sick leave in any situation in which sick leave would not normally be allowed by law or regulation.

(d) The entitlements under sections 6381 through 6387 of title 5, United States Code, and this subpart do not modify or affect any Federal law prohibiting discrimination. If the entitlements under sections 6381 through 6387 of title 5, United States Code, and this subpart conflict with any Federal law prohibiting discrimination, an agency must comply with whichever statute provides greater entitlements to employees.

§ 630.1215 Records and reports.

(a) So that OPM can evaluate the use of family and medical leave by Federal employees and provide the Congress and others with information about the use of this entitlement, each agency must maintain records on employees who take leave under this subpart and submit to OPM such records and reports as OPM may require.

(b) At a minimum, each agency must maintain the following information concerning each employee who takes leave under this subpart:

(1) The employee's rate of basic pay, as defined in 5 CFR 550.103;

(2) The occupational series for the employee's position;

(3) The number of hours of leave taken under § 630.1203(a) and (b), including any paid leave substituted for leave without pay under § 630.1208(b); and

(4) Whether leave was taken—

(i) Under § 630.1203(a)(1), (2), or (3);

(ii) Under § 630.1203(a)(4); or

(iii) Under § 630.1203(b).

(c) When an employee transfers to a different agency, the losing agency must provide the gaining agency with information on leave taken under § 630.1203(a) or (b) by the employee during the 12 months prior to the date of transfer. The losing agency must provide the following information:

(1) The beginning and ending dates of the employee's 12-month period, as determined under § 630.1205(a) or (b); and

(2) The number of hours of leave taken under § 630.1203(a) or (b) during the employee's 12-month period or single 12-month period, respectively, as

determined under § 630.1205(a) or (b), respectively.

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DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Part 927

[Doc. No. AMS-FV-09-0037; FV09-927-1 PR]

Pears Grown in Oregon and Washington; Increased Assessment Rate

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Proposed rule.

SUMMARY: This rule would increase the assessment rate established for the Processed Pear Committee (PPC) for the 2009-2010 and subsequent fiscal periods from \$6.25 to \$8.41 per ton for "summer/fall" pears for canning. The PPC is responsible for local administration of the marketing order regulating the handling of pears for processing grown in Oregon and Washington. Assessments upon handlers of pears for processing are used by the PPC to fund reasonable and necessary expenses of the program. The fiscal period for the marketing order begins July 1 and ends June 30. The assessment rate would remain in effect indefinitely unless modified, suspended or terminated.

DATES: Comments must be received by September 25, 2009.

ADDRESSES: Interested persons are invited to submit written comments regarding this rule. Comments must be sent to the Docket Clerk, Marketing Order Administration Branch, Fruit and Vegetable Programs, AMS, USDA, 1400 Independence Avenue, SW., STOP 0237, Washington, DC 20250-0237; Fax: (202) 720-8938; or Internet: <http://www.regulations.gov>. Comments should reference the docket number and the date and page number of this issue of the **Federal Register** and will be available for public inspection in the Office of the Docket Clerk during regular business hours, or can be viewed at: <http://www.regulations.gov>. All comments submitted in response to this rule will be included in the record and will be made available to the public. Please be advised that the identity of the individuals or entities submitting the comments will be made public on the Internet at the address provided above.

FOR FURTHER INFORMATION CONTACT:

Susan M. Coleman or Gary D. Olson, Northwest Marketing Field Office, Marketing Order Administration Branch, Fruit and Vegetable Programs, AMS, USDA, 1220 SW., Third Avenue, Suite 385, Portland, OR 97204; Telephone: (503) 326-2724; Fax: (503) 326-7440; or E-mail:

Sue.Coleman@ams.usda.gov or *GaryD.Olson@ams.usda.gov*.

Small businesses may request information on complying with this regulation by contacting Jay Guerber, Marketing Order Administration Branch, Fruit and Vegetable Programs, AMS, USDA, 1400 Independence Avenue, SW., STOP 0237, Washington, DC 20250-0237; Telephone: (202) 720-2491; Fax: (202) 720-8938; or E-mail: *Jay.Guerber@ams.usda.gov*.

SUPPLEMENTARY INFORMATION: This rule is issued under Marketing Order No. 927, as amended (7 CFR 927), regulating the handling of pears grown in Oregon and Washington, hereinafter referred to as the "order." The order is effective under the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601-674), hereinafter referred to as the "Act."

The Department of Agriculture (USDA) is issuing this rule in conformance with Executive Order 12866.

This rule has been reviewed under Executive Order 12988, Civil Justice Reform. Under the marketing order now in effect, Oregon and Washington pear handlers are subject to assessments. Funds to administer the order are derived from such assessments. It is intended that the assessment rate as proposed herein would be applicable to all assessable pears beginning July 1, 2009, and continue until amended, suspended, or terminated. This rule will not preempt any State or local laws, regulations, or policies, unless they present an irreconcilable conflict with this rule.

The Act provides that administrative proceedings must be exhausted before parties may file suit in court. Under section 608c(15)(A) of the Act, any handler subject to an order may file with USDA a petition stating that the order, any provision of the order, or any obligation imposed in connection with the order is not in accordance with law and request a modification of the order or to be exempted therefrom. Such handler is afforded the opportunity for a hearing on the petition. After the hearing USDA would rule on the petition. The Act provides that the district court of the United States in any district in which the handler is an