

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-AN49

Administrative Leave, Investigative Leave, Notice Leave, and Weather and Safety Leave

AGENCY: Office of Personnel Management.

ACTION: Proposed rule.

SUMMARY: The Office of Personnel Management proposes to issue new regulations on the granting and recording of administrative leave, investigative leave, notice leave, and weather and safety leave. The Administrative Leave Act of 2016 created these new categories of statutorily authorized paid leave and established parameters for their use by Federal agencies. The regulations will provide a framework for agency compliance with the new statutory requirements.

DATES: Comments must be received on or before August 14, 2017.

ADDRESSES: You may submit comments, identified by RIN 3206-AN49 using one of the following methods:

Federal eRulemaking Portal:
www.regulations.gov. Follow the instructions for submitting comments.

Email: pay-leave-policy@opm.gov.

FOR FURTHER INFORMATION CONTACT: Kurt Springmann or Julie Ohr by email at pay-leave-policy@opm.gov or by telephone at (202) 606-2858.

SUPPLEMENTARY INFORMATION: The Office of Personnel Management (OPM) is issuing proposed regulations to implement the Administrative Leave Act of 2016, enacted under section 1138 of the National Defense Authorization Act for Fiscal Year 2017 (Pub. L. 114-328, 130 Stat. 2000, December 23, 2016). The Administrative Leave Act of 2016, hereafter referred to as “the Act,” added three new sections in title 5 of the U.S. Code that provide for specific categories of paid leave and requirements that

shall apply to each: § 6329a Regarding administrative leave; § 6329b regarding investigative leave and notice leave; and § 6329c regarding weather and safety leave.

Background

Prior to passage of the Act, agencies granted paid excused absences (often called “administrative leave”) to employees based on the broad management authority in 5 U.S.C. 301-302, which allows heads of agencies to prescribe regulations for the government of their organizations. This authority does not expressly address excused absence and thus does not set parameters on its use. However, some direction on use of the excused absence authority was provided in Comptroller General decisions and in OPM guidance.

In the sense of Congress provisions in section 1138(b) of the Act, Congress expressed the need for legislation to address concerns that usage of administrative leave had sometimes exceeded reasonable amounts and resulted in significant costs to the Government. Congress wanted agencies to (1) use administrative leave sparingly and reasonably, (2) consider alternatives to use of administrative leave when employees are under investigation, and (3) act expeditiously to conclude investigations and either return the employee to duty or take an appropriate personnel action. Congress also wanted agencies to keep accurate records regarding the use of administrative leave for various purposes.

In drafting the Act, Congress considered an October 2014 report entitled “Federal Paid Administrative Leave,” which was prepared by the Government Accountability Office (GAO). (See GAO Report 15-79.) At the request of Congress, GAO examined the paid administrative leave policies at selected Federal agencies, reviewed practices in recording and reporting of paid administrative leave, and described categories of purposes for which large amounts of paid administrative leave have been charged. GAO found that agency policies on administrative leave varied and that some employees were on administrative leave for long periods (primarily due to extended personnel investigations), which had significant cost implications. GAO also found problems in agencies’ recording and

reporting practices with respect to administrative leave. The GAO report was cited in Congressional committee reports on draft bills addressing the use of administrative leave for Federal employees. (See House Report 114-520, August 25, 2016, accompanying H.R. 4359 and Senate Report 114-292, July 6, 2016, accompanying S. 2450.) Those committee reports also include useful background information on the development of legislation that eventually culminated in the passage of the Administrative Leave Act of 2016.

New Subparts in 5 CFR Part 630

In this proposed regulation, OPM proposes to add three new subparts to 5 CFR part 630 that correspond to the three new statutory sections in 5 U.S.C. chapter 63: Subpart N, Administrative Leave (implementing 5 U.S.C. 6329a); Subpart O, Investigative Leave and Notice Leave (implementing 5 U.S.C. 6329b); and Subpart P, Weather and Safety Leave (implementing 5 U.S.C. 6329c).

Administrative leave is permitted—at an agency’s discretion but subject to statutory and regulatory requirements—when an agency determines that no other paid leave is available under other law. Under § 6329a(b)(1), an agency may place an employee on administrative leave for no more than 10 total workdays in any given calendar year.

Investigative leave and notice leave are permitted—at an agency’s discretion but subject to statutory and regulatory requirements—when an agency determines that an employee must be removed from the workplace while under investigation or during a notice period (*i.e.*, the period after the employee has received a proposed notice of adverse action before a final decision is made and takes effect). These two types of leave may be used only when an authorized agency official determines, through evaluation of baseline factors, that the continued presence of the employee in the workplace may pose a threat to the employee or others, result in the destruction of evidence relevant to an investigation, result in loss of or damage to Government property, or otherwise jeopardize legitimate Government interests. Before using these two types of leave, agencies must consider options to avoid or minimize the use of paid leave, such as changing the employee’s

duties or work location. Use of investigative leave is subject to time limitations and special approvals for extensions.

Weather and safety leave is permitted—at an agency's discretion but subject to statutory and regulatory requirements, agency policies, and lawful collective bargaining provisions—when an agency determines that employees cannot safely travel to and from, or perform work at, their normal worksite, a telework site, or other approved location because of severe weather or other emergency situations. There are no time limitations with respect to this type of leave.

Both the law and the proposed regulations address recordkeeping and reporting requirements with which agencies must comply. Agencies must keep separate records on each type of leave: Administrative leave, investigative leave, notice leave, and weather and safety leave.

In the latter portion of this Supplementary Information, we present a section-by-section explanation for the regulations in each subpart (N, O, and P).

Effective Date

The Act directs OPM to prescribe (*i.e.*, publish) regulations to carry out the new statutes on administrative leave, investigative leave, notice leave, and weather and safety leave no later than 270 calendar days after the Act's enactment on December 23, 2016—*i.e.*, September 19, 2017. (See 5 U.S.C. 6329a(c)(1), 6329b(h)(1), and section 6329c(d).) The Act further directs that agencies “revise and implement the internal policies of the agency” to meet the statutory requirements pertaining to administrative leave, investigative leave, and notice leave no later than 270 calendar days after the date on which OPM issues its regulations. (See 5 U.S.C. 6329a(c)(2) and 6329b(h)(2).) There is no similar agency implementation provision in the law governing weather and safety leave.

When OPM issues final regulations, we intend to specify that the regulations for subparts N and O (dealing with administrative leave and investigative/notice leave, respectively) will take effect 270 days after publication by specifying a separate “implementation date.” Consistent with the statutory provisions, agencies will have 270 calendar days following the date of publication of the final regulations to revise and implement internal policies to meet the new requirements. That will give agencies time to develop internal policies and procedures, including necessary changes in recordkeeping and

reporting systems. OPM intends to further specify that subpart P (dealing with weather and safety leave) will take effect 30 days after the date of publication of the final regulations. However, we expect to delay enforcing the requirement that agencies separately report weather and safety leave to OPM until the 270th day following publication of the final regulations.

Amendment to Annual and Sick Leave Regulations

In OPM's regulations dealing with general provisions for annual and sick leave (5 CFR subpart B), we propose to remove the second sentence in § 630.206(a), which reads: “If an employee is unavoidably or necessarily absent for less than one hour, or tardy, the agency, for adequate reason, may excuse him without charge to leave.” This regulation was not an authority for creating a type of paid time off, but merely recognized the existence of agency authority to provide brief periods of excused absence under Comptroller General decisions.

Now that OPM has authority to regulate the use of administrative leave under 5 U.S.C. 6329a, it is more appropriate for this particular application of administrative leave to be covered under the new regulations. We would expect administrative leave under 5 U.S.C. 6329a to be used rarely, if at all, for the purpose of excusing a tardy employee. We note that weather and safety leave under 5 U.S.C. 6329c may appropriately be used so that, due to weather or other emergency conditions, an agency may allow employees to have a delayed arrival to avoid unsafe travel conditions.

Subpart N—Administrative Leave

§ 630.1401—Purpose and Applicability

Section 630.1401 addresses the purpose of the proposed regulations on administrative leave—*i.e.*, to implement 5 U.S.C. 6329a. It also notes OPM's authority to prescribe regulations to carry out the new statutory provisions, including the appropriate uses and the proper recording of administrative leave. Additionally, this section provides that subpart N applies to employees, as defined at 5 U.S.C. 2105, who are employed in executive branch agencies, but does not apply to intermittent employees.

§ 630.1402—Definitions

Section 630.1402 provides definitions of terms for purposes of subpart N. Explanations regarding certain definitions are provided below.

We define *administrative leave* to mean paid leave authorized at the

discretion of an agency that is provided without loss or reduction in pay, other leave, or service credit and that is exclusive of leave authorized under any other provision of statute or Presidential directive. Thus, for example, a back pay correction may provide for retroactive pay for a nonduty period when a separation is later found to be erroneous. Such a granting of retroactive pay is not a granting of administrative leave under 5 U.S.C. 6329a, since it is authorized under the back pay law and regulations. Also, the 5 days of excused absence granted by the Presidential memorandum of November 14, 2003, for employees returning from active military duty is not considered administrative leave under this subpart. We also clarify that administrative leave excludes periods when the employee is engaged in activities that qualify as official hours of work, such as attendance at an agency town hall meeting.

We provide that the term *agency* refers to an executive agency of the Federal Government. As required by 5 U.S.C. 6329a(a)(2)(c), the General Accountability Office is excluded from this definition, and thus from coverage by subpart N. When used in the context of an agency making determinations or taking actions, “agency” refers to the agency head or management officials who are authorized (including by delegation) to make a given determination or take a given action.

We define *employee* as an individual who is covered by subpart N as described in § 630.1401(b) and (c). As provided in that section and in 5 U.S.C. 6329a(a)(3)(A), “employee” has the meaning used in 5 U.S.C. 2105. As provided in 5 U.S.C. 6329a(a)(3)(B), intermittent employees who do not have an established regular tour of duty during the administrative workweek are excluded from the definition of “employee,” and therefore are not covered by the provisions of subpart N. While not expressly addressed in the proposed regulations, we note that certain Presidential appointees in the executive branch are exempt from the leave system under 5 U.S.C. 6301(2)(x)-(xii) and are entitled to pay solely because of their status as officers. Such officers are not placed in leave status for any purpose; thus, subparts N, O, and P do not apply to such officers.

We define *head of the agency* to mean the head of an agency or a designated representative of such agency head who is (1) an agency headquarters-level official reporting directly to the agency head or a deputy agency head and (2) the sole such representative for the

entire agency. This term is used in § 630.1403(a)(5)(i) and (b)(4).

We define *Presidential directive* to mean an Executive order, Presidential memorandum, or official written statement by the President in which the President specifically directs agency heads to provide employees with a paid excused absence under a specified set of conditions. This excludes a Presidential action that (1) merely encourages agency heads to use an agency head authority (e.g., section 6329a) to grant a paid excused absence under certain conditions or (2) leaves them with discretion regarding whether to grant excused absence in a particular scenario or discretion regarding the amount of excused absence to be granted in a particular scenario.

§ 630.1403—Principles and Prohibitions

This section sets out the general principles and prohibited uses of the administrative leave authority under 5 U.S.C. 6329a and subpart N. In developing the general principles, OPM took into account past OPM policy and guidance as well as Comptroller General decisions regarding the use of general administrative leave. In paragraph (a)(1), we list three conditions. To justify any use of administrative leave, one of these conditions must be met. The first condition is that an agency may grant administrative leave when the absence directly relates to the mission of the agency. For example, an agency could grant administrative leave to an employee to attend a professional meeting or perform certain volunteer work when these relate to the agency's mission.

The second condition permits an agency to grant administrative leave when the absence is for an activity officially sponsored or sanctioned by the agency. For example, an agency may grant administrative leave to permit employees to participate in an American Red Cross blood donation drive being conducted in an agency facility.

The third condition permits an agency to grant administrative leave when the agency determines that the absence would be in the interest of the agency or the Government as a whole. For instance, an agency may grant administrative leave to allow an employee to participate in employee wellness or health promotion events (e.g., influenza vaccinations, health screenings, or health education forums) or to ensure that an employee has the opportunity to vote. Also, an agency may grant administrative leave to cover brief periods of tardiness or to provide for early dismissal when it is

determined to be in the interest of the agency.

Section 630.1403(a)(5) provides that a determination that an absence satisfies one of the three conditions in § 630.1403(a)(1) must be (1) permitted under policies established by the head of the agency; and (2) reviewed and approved by an official of the agency who is (or is acting) at a higher level than the official making the determination (unless the determination is made by the head or acting head of the agency). The first requirement ensures that agency heads are accountable for adopting policies to ensure appropriate use of administrative leave, consistent with OPM regulations. The second requirement—that administrative leave be approved only after second-level review—should help prevent inappropriate uses and ensure that administrative leave is used sparingly.

Section 630.1403(a)(2) states the principle that administrative leave is not an employee entitlement, but is granted sparingly at the discretion of the agency. Accordingly, employees are not entitled to a certain number of administrative leave hours or days during any specified period, whether biweekly, monthly, or annually.

Section 630.1403(a)(3) states the principle that the appropriate use of administrative leave is for brief periods of time. In most instances, this will be no longer than 1 day; however, exceptions may be approved. For example, an exception is made for times when an employee is subject to an investigation and his or her retention in duty status is inconsistent with the best interests of the Government. In this case, the agency—prior to placing an employee on investigative leave under subpart O of these regulations—must charge administrative leave until expiration of the 10-workday limit described in 5 U.S.C. 6329a(b)(1) and § 630.1404. (See also 5 U.S.C. 6329b(b)(3)(A).)

Section 630.1403(a)(4) states the principle that administrative leave may not be established as an ongoing or recurring entitlement. Accordingly, an agency may not provide a recurring entitlement to administrative leave, for example, on an employee's birthday or on a day following a Thursday holiday. However, an agency may grant administrative leave on an ad hoc basis for an activity or event that may be ongoing or recurring and is in the Government's interest (e.g., influenza vaccinations or blood donation drives).

In addition to the general principles, § 630.1403(b) describes specific prohibited uses of administrative leave.

Section 630.1403(b)(1) provides that agencies are prohibited from using administrative leave to mark the memory of a deceased Federal official, which is consistent with the principle underlying the statutory bar in 5 U.S.C. 6105 prohibiting closure of agencies to mark the memory of a deceased Federal official. We note, however, that section 6105 does not constrain the President from exercising his or her authority in 5 U.S.C. 6103(b) to declare a holiday by Executive order in connection with the death of a President. If the President provides excused absence for Federal employees to commemorate the service of a deceased former President, such excused absence is not a granting of administrative leave under 5 U.S.C. 6329a or subpart N, since it is granted under a Presidential directive and is also authorized as a holiday under 5 U.S.C. 6103(b). (The definition of "administrative leave" under § 630.1402 excludes paid leave authorized under Presidential directives.)

Section 630.1403(b)(2) prohibits agencies from granting administrative leave to permit an employee to participate in an event for his or her personal benefit or the benefit of an outside organization, unless the participation would satisfy one of the conditions in § 630.1403(a)(1). To permit employees to participate in these events, agencies alternatively may approve employees' requests to adjust their work schedules or to use annual leave, leave without pay, compensatory time off, credit hours, or other earned time off.

Section 630.1403(b)(3) prohibits agencies from granting administrative leave as a reward to recognize the performance or contributions of employees. The proper personnel authorities for recognizing the performance or contributions of employees are cash awards and time-off awards. This prohibition does not affect employee attendance at agency awards ceremonies, since such attendance is considered to be on-duty time in direct support of the agency mission.

Section 630.1403(b)(4) prevents agencies from granting administrative leave to allow employees to engage in volunteer work or other civic activity that is not officially sponsored or sanctioned by the head of the agency, based on the agency's mission or Governmentwide interests. This prohibition bars agencies from providing administrative leave for volunteer and other activities that do not benefit the agency or serve a Governmentwide interest. A Governmentwide interest is generally documented through a statement of

support by the President or the OPM Director. For employees who wish to participate in volunteer activities during basic working hours, agencies alternatively may permit work schedule adjustments or approve use of annual leave, compensatory time off, credit hours, or other earned time off, or may allow employees to take leave without pay. For long-term volunteer work, agencies may approve part-time or job sharing schedules.

§ 630.1404—Calendar Year Limitation

Section 630.1404 addresses the 10-workday calendar year limitation on use of administrative leave imposed by 5 U.S.C. 6329a(b)(1). Paragraph (a) states the limitation and notes that the 10-day limitation carries over when an employee transfers to another covered agency or separates and is reemployed by a covered agency within the same calendar year. For example, if an employee has been granted 6 workdays of administrative leave at one agency and then transfers to another agency, the employee may be granted only 4 more workdays of administrative leave by the gaining agency during the remainder of the calendar year.

Section 630.1404(b) provides for the conversion of the 10-workday calendar year limitation to an aggregate limit on hours in order to facilitate application of the limit to employees on different work schedules. For full-time employees who are not on an uncommon tour of duty under § 630.210, the 10-workday limitation is converted to an 80-hour limitation. For full-time employees with an uncommon tour of duty, the converted calendar year limitation equals the number of hours in the biweekly uncommon tour of duty, averaged as necessary. For example, for an employee with an uncommon tour of 144 hours biweekly, the 10-workday limitation equates to 144 hours. (Note that the regular 80-hour calendar limit multiplied by 144/80 equals 144 hours.) For a part-time employee, the calendar year limitation is prorated based on the number of hours in the employee's tour of duty consistent with the proration of annual and sick leave required by 5 U.S.C. 6302(c). For example, the 10-workday limitation for a half-time employee equates to 40 hours, since 80 hours times 40/80 equals 40 hours.

Section 630.1404(c) provides that the calendar year limitation applies only to administrative leave. The limitation does not apply to investigative leave and notice leave provided under subpart O, weather and safety leave provided under subpart P, or leave provided under other statute or a Presidential directive.

Section 630.1404(d) provides that, in accordance with 5 U.S.C. 6329b(b)(3)(A), if an employee under investigation must be placed on leave and that employee has not yet reached the 10-workday calendar year limitation, administrative leave under subpart N must first be used instead of investigative leave. This is because investigative leave under subpart O may not be used until the employee has exhausted the 10-workday limitation.

Section 630.1404(e) prohibits agencies from granting additional administrative leave until the next calendar year when an employee reaches the calendar year limit. If an employee has reached his or her calendar year limit and a situation arises where the employee might have been granted administrative leave but for the limit, the employee must continue to work or use other appropriate leave (e.g., annual leave), time off, or leave without pay. When an employee is not able to work and is not willing or able to use paid leave or time off, the agency must place the employee in an appropriate type of nonpay status.

§ 630.1405—Administration of Administrative Leave

Section 630.1405(a) provides that the minimum charge increment (fraction of an hour) for administrative leave is the same as the agency uses for annual and sick leave.

Section 630.1405(b) states that administrative leave may be granted only for hours within an employee's tour of duty established for the purposes of charging annual and sick leave, which for full-time employees is either the 40-hour basic workweek, the basic work requirement for employees on a flexible or compressed work schedule, or an uncommon tour of duty pursuant to § 630.210.

Section 630.1405(c) states that agencies may authorize or require administrative leave for a single employee or a category of employees. It also notes that employees do not have an entitlement to administrative leave and, in particular, are not entitled to receive the full calendar year limit each year. Employees receive only the amount of administrative leave granted by the agency, which may be less (but can never be more) than the calendar year limit. This paragraph also notes that employees do not have a right to refuse administrative leave when the agency requires its use.

§ 630.1406—Records and Reporting

This section provides the recordkeeping and reporting requirements regarding administrative leave. Paragraph (a) requires agencies to

accurately record use of administrative leave for each employee under two categories—administrative leave used for the purposes of an investigation and administrative leave used for all other purposes. Paragraph (b) requires that agency data systems and data reports submitted to OPM record administrative leave authorized under 5 U.S.C. 6329a and subpart N of these regulations separately from other types of leave and in the two categories noted above. This section also states that agencies must provide information on the granting of administrative leave to the Government Accountability Office as that office requires.

§ 630.1407—Separation or Transfer

Under § 630.1407, agencies must certify, in a manner prescribed by OPM, the number of hours used by an employee in the two administrative leave categories during the current calendar year when the employee transfers to another agency or separates. The employee does not receive a new calendar year limitation upon (1) transfer to another agency or (2) reemployment by a covered agency after a separation within the same calendar year. Thus, the gaining agency must apply the hours reported by the losing agency to the employee's current calendar year limitation.

Subpart O—Investigative Leave and Notice Leave

§ 630.1501—Purpose and Applicability

Section 630.1501(a) states the purpose of subpart O—i.e., to implement 5 U.S.C. 6329b, which allows an agency to provide a separate type of paid leave for employees who are the subject of an investigation or in a notice period. These two new categories are to be known as “investigative leave” and “notice leave.” Section 630.1501(a) notes that OPM has authority to prescribe implementing regulations under 5 U.S.C. 6329b(h)(1).

Section 630.1501(b) states this subpart applies to an employee as defined in 5 U.S.C. 2105 who is employed in an agency, excluding an Inspector General or an intermittent employee who, by definition, does not have an established regular tour of duty during the administrative workweek. This subpart does not apply to employees who are exempt from 5 U.S.C. chapter 63, such as employees of the Federal Aviation Administration (FAA) and Transportation Security Administration (TSA) employees. (Specific laws in title 49 provide that most title 5 provisions, including chapter 63, do not apply to

FAA and TSA employees. See 49 U.S.C. 114(n) and 40122(g)(2).

Section 630.1501(c) explains this subpart applies to certain employees covered by a special personnel authority in title 38, United States Code, even though that authority would normally allow those employees to be exempted from title 5 leave provisions.

§ 630.1502—Definitions

Section 630.1502 provides definitions of various terms. The definitions align with definitions found in the law. Explanations regarding certain definitions are provided below.

We are defining the term *investigation* to mean an inquiry regarding an employee. Examples of an inquiry may include: (1) An employee's alleged misconduct that could result in an adverse action as described in 5 CFR part 752 or similar authority; (2) security concerns, including (but not limited to) whether the employee should retain eligibility for logical access to agency facilities and systems under the standards established by Homeland Security Presidential Directive (HSPD) 12 and guidance issued pursuant to that directive; or (3) other matters that could lead to disciplinary action.

We are defining the term *investigative entity* consistent with the statutory definition in 5 U.S.C. 6329b(a)(6); however, we are adding language to make clear that an internal investigative unit may be composed of one or more persons, such as supervisors, managers, human resources practitioners, personnel security office staff, workplace violence prevention team members, or other agency representatives.

In the definition of the term *notice period*, we have clarified when the notice period ends. For an employee with respect to whom an adverse action is being taken, the notice period ends on the effective date of the adverse action. For an employee for whom an adverse action is not being taken, the notice period ends on the date on which the agency notifies the employee that no adverse action will be taken.

We are providing a definition of *participating in a telework program*, which term is used in § 630.1503(c)(1)(iii). An employee is considered to be participating in a telework program if the employee is eligible to telework and has an established arrangement with his or her agency under which the employee is approved to participate in the agency telework program, including on a routine or situational basis. Thus, an employee who teleworks on a

situational basis is considered to be continuously participating in a telework program even if there are extended periods during which the employee does not perform telework.

We are providing a definition of *telework site*, which is defined as a location where an employee is authorized to perform telework as described in 5 U.S.C. chapter 65, such as an employee's home.

§ 630.1503—Authority and Requirements for Investigative Leave and Notice Leave

Separate from the administrative leave authorized by 5 U.S.C. 6329a and subpart N, new § 630.1503 establishes two new forms of paid leave on which agencies may place employees who are under investigation or who have received a notice of a proposed adverse action. These two new categories are to be known as “investigative leave” under § 630.1503(a)(1) and “notice leave” under § 630.1503(a)(2). Investigative leave and notice leave are not employee entitlements. Instead they are intended to provide the employing agency with the means of removing an employee from the workplace and keeping the employee away from the workplace while the agency investigates the employee or during the notice period of a proposed adverse action against that employee (or both). The default situation should be that an employee who is being investigated or against whom an adverse action has been proposed will remain in a duty status in his or her regular position during the investigation or notice period. Investigative leave or notice leave should be applied only when the agency makes the required determination that the employee must be removed from the workplace during a period of investigation or during a notice period in order to protect agency facilities or systems, the Federal workforce, or the public from harm. In these circumstances, after the required consideration of other options, an agency may place an employee on investigative leave or notice leave. An agency may also consider requiring an employee who is otherwise telework-eligible and who is currently (or recently) participating in the agency telework program to telework from home or another approved location as an alternative to investigative leave. (Any such assessment, however, will need to take into account whether the employee should retain eligibility for logical access to agency systems under the standards established by Homeland Security Presidential Directive (HSPD)

12 and guidance issued pursuant to that directive).

Section 630.1503(a)(1) states one of the conditions that must be met before an employee may be placed on investigative leave—namely, that the employee is “the subject of an investigation.”

Section 630.1503(a)(2)(i) authorizes notice leave when an employee is in a notice period. An employee who has not received an advance notice of proposed adverse action under 5 CFR chapter 752 may not be provided notice leave. Section 630.1503(a)(2)(ii) authorizes notice leave, following a placement of an employee on investigative leave, which may be provided after the last day of the period of investigative leave if the agency proposes an adverse action against the employee under 5 CFR chapter 752 or similar authority. This means investigative leave and notice leave may be used consecutively in some instances. Agencies should be mindful, however, of any internal procedures related to the preparation and approval of a proposed adverse action before it is issued. If the agency determines that the employee continues to meet the criteria of § 630.1503(b)(1) and one or more of the options in § 630.1503(b)(2) is not appropriate, the agency may not transition the employee from investigative leave to notice leave until such time as it has issued the notice of proposed adverse action.

Section 630.1503(b) sets forth the limited circumstances under which an agency may place an employee on investigative leave or notice leave, consistent with the statutory requirements in 5 U.S.C. 6329b(b)(2). First, as provided in paragraph (b)(1), the agency has to make a determination that the continued presence of the employee in the workplace while under investigation or in a notice period may pose a threat to the employee or others, result in the destruction of evidence relevant to an investigation, result in loss or damage to Government property, or otherwise jeopardize legitimate Government interests. (See 5 U.S.C. 6329b(b)(2)(A).) This determination is accomplished through an assessment of baseline factors.

Second, as provided in paragraph (b)(2), the agency must consider required options instead of the use of investigative leave or notice leave.

The baseline factors referenced in § 630.1503(b)(1) are identified in § 630.1503(e), but are described at this point in the section-by-section review of the regulations given their essentiality in making a determination under paragraph (b)(1) regarding whether an employee's continued presence in the

workplace is appropriate. Under 5 U.S.C. 6329b(h)(1)(C), OPM is required to prescribe regulations regarding baseline factors. The baseline factors the agency must consider when making a determination under paragraph (b)(1) are: (1) The nature and severity of the employee's exhibited or alleged behavior, (2) the nature of the agency's or employee's work and the ability of the agency to accomplish its mission, and (3) other impacts of the employee's continued presence in the workplace detrimental to legitimate Government interests, including (but not limited to) whether the employee will pose an unacceptable risk to (i) the life, safety, or health of employees, contractors, vendors or visitors to a Federal facility; (ii) the Government's physical assets or information systems; (iii) personal property; (iv) records, including classified, privileged, proprietary, financial or medical records; or (v) the privacy of the individuals whose data the Government holds in its systems.

The baseline factors are to be used as a starting point when determining whether an employee should be placed on investigative leave or notice leave. Each baseline factor should be considered. Agencies should exercise independent, reasonable judgment in evaluating each particular situation. Agencies should consult with their human resources office or their general counsel, or both, to the extent appropriate, before placing an employee on investigative leave or notice leave.

- *Nature and severity of the employee's exhibited or alleged behavior.*

An agency may determine investigative leave and/or notice leave is necessary because of the nature and severity of the employee's exhibited or alleged behavior. The behavior could be the basis for the investigation and/or be the reason for the proposed adverse action. In some cases, however, the behavior may be exhibited during or following an investigation or proposed adverse action. The nature and severity of the behavior may be in the form of danger to the employee or others, or to Government networks, systems, or property.

Examples of possible threats include direct or veiled threats of harm, belligerence, harassing, bullying, or other inappropriate and aggressive behavior. The employee may have made statements and/or engaged in behaviors that have intimidated other employees or management may have determined that statements or behaviors, because of their disturbing nature, have disrupted the workplace. The behavior may be directed at another individual or may

involve physical damage to or destruction of Government property or the misuse of agency systems or the data they contain; it could also involve a plan to commit, threat to commit, or attempt to commit such conduct. Examples include but are not limited to assaulting a co-worker, supervisor, or agency client; menacing conduct, such as destruction of furniture or other action that puts another individual in reasonable fear of immediate bodily injury. The nature and severity of the employee's exhibited or alleged behavior may involve agency computer systems and other technologies, as well as data handling and access. Examples could include attempting to gain or actually obtaining unauthorized access to systems disbursing money or to classified information. When appropriate, agencies should work closely with their information systems management and/or cyber security advisors to identify patterns of behavior that may indicate the potential for malicious activity on information systems. The agency should identify any relationship between the perceived threat and the technology that may be vulnerable. These considerations relate to the agency's responsibility to determine internal security practices, which includes developing policies and practices designed to safeguard personnel, property or operations, as well as developing a plan to prevent damage to or loss of agency property.

- *Nature of the work and the ability of the agency to accomplish its mission.*

In determining whether to place an employee on investigative leave and/or notice leave, it is important to consider the relationship between the employee's behavior and his or her ability to perform work successfully and without unreasonable risk to the agency during the investigation or notice period and accomplish his or her duties satisfactorily. Among the considerations would be the nature of the employee's duties, the employee's job level, and/or whether the employee has a supervisory or fiduciary role. An employee's contact with the public and the prominence of his or her position are additional considerations that an agency may evaluate in relationship with the alleged misconduct.

- *Other impacts detrimental to legitimate Government interests, including whether the employee will pose an unacceptable risk to (1) the life, safety, or health of employees, contractors, vendors or visitors to a Federal facility; (2) the Government's physical assets or information systems; (3) personal property; (4) records, including classified, privileged,*

proprietary, financial or medical records; or (5) the privacy of the individuals whose data the Government holds in its systems.

This factor represents a broad category that agencies may apply given their individual missions. This could include a range of workplace behaviors and actions that could impede the normal course of work, or have a harmful effect on the safety and order of the workplace. Possible aspects the agency may wish to review in this regard include the extent to which the employee's presence in the workplace or access to agency systems may impair or disrupt agency operations, place systems at risk, harm public confidence in the agency, or otherwise have a detrimental impact on legitimate Government interests. It is advisable for agencies to consult with their legal counsel to determine what situations and circumstances would be detrimental to legitimate Government interests in light of other authorities such as HSPD 12. Differences in agency mission or agency practice, or other internal regulations, may affect this determination.

When considering these baseline factors, agencies should evaluate the duration of the risk; the nature and severity of the potential harm; how likely it is that the potential harm will occur; and how imminent the potential harm is. The agency may not arbitrarily place individuals on investigative leave or notice leave based upon fear of a future risk without engaging in an individualized assessment that establishes that there is a significant risk of substantial harm that cannot be eliminated or reduced by other means.

Section 630.1503(b)(2) requires that the agency consider other options where appropriate to minimize the amount of investigative leave or notice leave provided to an employee, consistent with 5 U.S.C. 6329b(b)(2)(B). Thus, if the agency makes a determination that the continued presence of the employee in the workplace during an investigation of the employee or while the employee is in a notice period meets the criteria of § 630.1503(b)(1), the agency must also consider certain options before placing the employee on investigative leave or notice leave. The options that must be considered are: (1) Assigning the employee to duties in which the employee is no longer a threat, (2) allowing the employee to voluntarily take another type of leave, (3) carrying the employee in absent without leave status if the employee is absent from duty without approval, and (4) curtailing the notice period, consistent with chapter 75 of title 5 of the U.S.

Code and OPM regulations thereunder. The agency may elect to implement one or a combination of these options. Consideration of these options is consistent with adverse action procedures in 5 CFR 752.404(b)(3).

An agency needs to assess whether one or more of the options required to be considered is or are appropriate, and, if so, which is the most appropriate to address concerns about the continued presence of the employee in the workplace and to resolve the safety or security issue(s) presented by the employee. The manager should work closely with the agency's human resources advisors during the process of reviewing the options for consideration. The agency must determine that none of the options is appropriate before placing an employee on investigative leave or notice leave. In addition, agencies may require an employee who is telework-eligible—and has, in fact, been teleworking from home or another approved location—to telework as an alternative to placing the employee on investigative leave if telework will adequately reduce or eliminate the potential for harm.

Section 630.1503(b)(2)(i) sets forth the option of keeping the employee in a duty status by assigning the employee to duties in which the employee does not pose a threat. The duties should be at the same grade level as the employee's current position. The change in duties may also involve a change in the location where the employee works, subject to limitations related to the local commuting area. In considering this alternative in lieu of investigative leave, an agency may consider requiring an employee who participates in a telework program to perform duties from a telework site, as provided in § 630.1503(c). Assigning the employee to other duties (such as a detail assignment) or limiting the employee's access to intranet systems may enable the agency to maintain the safety and security of the workplace while continuing to benefit from the employee's skillset and abilities to further the agency's mission.

Section 630.1503(b)(2)(ii) sets forth the option of allowing the employee to voluntarily take leave (paid or unpaid) or other forms of paid time off, as appropriate under the rules governing each category of leave or paid time off. An employee who is under investigation or in a notice period may elect to take annual leave, sick leave (as appropriate), restored annual leave, or any leave earned under subchapter I of chapter 63, of the United States Code. The employee may also elect to use other paid time off in order to remain in a pay

status, including paid time off that is about to expire, such as compensatory time off earned through overtime work, compensatory time off for travel, and credit hours under a flexible work schedule, as appropriate. An employee may elect to take leave or other paid time off for which the employee is eligible on an intermittent basis, as appropriate, during a period of investigative leave or notice leave.

Agencies may not require employees to take accrued leave or other time off as a substitute for investigative leave or notice leave, and may deny employee requests to use advanced leave.

Section 630.1503(b)(2)(iii) sets forth the option of carrying the employee in an absent without leave (AWOL) status, if the employee is absent from duty without approval. If the employee returns to a duty status, the AWOL would end. The agency could then place the employee on investigative leave or notice leave, as appropriate, only after the agency has analyzed the remaining considerations discussed in this section.

Section 630.1503(b)(2)(iv) sets forth the option of curtailing an employee's notice period if there is reasonable cause to believe the employee has committed a crime for which a sentence of imprisonment may be imposed. Under 5 CFR 752.404(d), this same option of curtailing the notice period is provided as an exception to the requirement for a 30 days' advance written notice period. Thus, this exception would shorten the length of the notice period, but the notice period would still not end until the adverse action is effectuated or until the employee is notified that no adverse action will be taken.

Section 630.1503(c) regulates that an agency may require an employee who is already a participant in the agency telework program, to perform duties similar to the duties that the employee performs at the normal worksite through telework as an alternative to placing an employee on investigative leave. This option to require telework is consistent with 5 U.S.C. 6502(c). (Section 6502(c) expressly links to the investigative leave law in 5 U.S.C. 6329b.

Section 6329b also includes references to section 6502(c) in subsections (d)(1)(E) and (f)(1)(F). Thus, OPM is incorporating provisions that implement the section 6502(c) requirements as part of its regulations of section 6329b.) An agency may require an employee to perform telework if the requirement for the employee to telework would not pose a threat to the employee or others, result in the destruction of evidence relevant to an investigation, result in loss of or damage

to Government property, or otherwise jeopardize legitimate Government interests. Furthermore, the agency must determine that (1) the employee is eligible to telework under the eligibility conditions found in 5 U.S.C. 6502(a) and (b) and (2) and is actually participating in the agency telework program and it would be appropriate for the employee to perform his or her duties through telework.

Under subsection (c) of 5 U.S.C. 6502, an agency may require telework in lieu of investigative leave if the employee is "eligible to telework under subsections (a) and (b)" of that section.

Section 6502(a) is titled "Telework Eligibility" and requires agencies to establish policies related to telework eligibility, subject to certain limitations in section 6502(a)(2). Section 6502(b) is titled "Participation," but includes eligibility conditions in paragraph (b)(4). Paragraph (b)(4) states that, except in emergency conditions, telework shall not apply to any employee whose official duties require on a daily basis (every workday) (1) direct handling of secure materials that are inappropriate for telework or (2) on-site activity that cannot be handled at another location. OPM considers the requirement in section 6502(b)(2) to have a written telework agreement to be a procedural requirement related to participation, not an eligibility requirement.

However, based on our understanding of the intent of Congress, we are regulating that the authority to require telework under section 6502(c) applies only to an employee who has been a participant in the telework program during any portion of the 30-day period immediately preceding the commencement of investigative leave (or the commencement of required telework in lieu of the commencement of such leave). Any existing telework agreement will be superseded as necessary in order to comply with an agency's action to require telework under section 6502(c) and § 630.1503(c).

An agency requiring an employee to perform duties through telework is obligated to provide the employee appropriate work assignments and equipment. An agency may determine it is not appropriate for the employee to telework because it would require the employee to access agency files or to contact agency personnel, directly handle secure materials, or perform official duties that cannot be performed at an alternative worksite.

An employee who is required to telework should be issued a notification indicating that he or she is being directed to telework, and the

notification should clarify that any telework agreement is superseded as necessary. Further, the notification should identify expectations and requirements during the period of required telework.

A telework-eligible employee required by an agency to telework under these conditions may be granted leave or other paid time off, as appropriate. An employee who refuses to telework when required by the agency under these conditions and is absent from telework duty without approval may be placed in AWOL status, consistent with agency policies.

Section 630.1503(d)(1) authorizes an agency to return an employee to duty at any time if the agency reassesses its determination to place the employee on investigative leave or notice leave. It also provides that an employee on investigative leave or notice leave must be prepared to report to work at any time during the employee's regularly scheduled tour of duty or must obtain approval of leave to eliminate the possible obligation to report to work if the employee believes that he or she would be unable to report promptly if called. While investigative leave is approved in increments of up to 30 workdays (see § 550.1504(b), (f), and (g)), an employee may be required to return to duty before an employee has reached the applicable 30-workday limit.

Section 630.1503(d)(2) applies to an employee on investigative leave. An agency may reassess its determination that the employee must be removed from the workplace based on the criteria in § 630.1503(b)(1) and its determination that the options in § 630.1503(b)(2) of this section are not appropriate. An agency may also reassess its previous determination to require or not require telework under paragraph (c) of this section.

Section 630.1503(d)(3) applies to an employee on notice leave. An agency may reassess its determination that the employee must be removed from the workplace based on the criteria in § 630.1503(b)(1) and its determination that the options in § 630.1503(b)(2) of this section are not appropriate.

Section 630.1503(d)(4) provides that, while an employee is on investigative leave or notice leave, the employee has an obligation to report promptly to an approved duty location if directed by his or her supervisor. Any failure to so report may be recorded as absent without leave, which can lead to disciplinary action. An employee who anticipates that he or she may be unavailable to report to duty promptly must request scheduled leave or paid

time off in advance, in lieu of investigative leave. Given these regulatory requirements, an agency may consider adding language regarding these requirements in the notification regarding the employee's placement on investigative leave.

Section 630.1503(e) describes the baseline factors to be used in making a determination under § 630.1503(b)(1). (See the detailed description of those factors under the discussion of § 630.1503(b)(1) above.)

Section 630.1503(f) provides that agencies must use the same minimum charge increments for investigative and notice leave as it does for annual and sick leave under § 630.206.

§ 630.1504—Administration of Investigative Leave

Section 630.1504 explains that an employee under investigation will remain in a duty status, except when the agency determines that the employee's continued presence in the workplace meets the criteria described in § 630.1503(b)(1) and that none of the options under § 630.1503(b)(2) are appropriate.

Section 630.1504(a) explains that investigative leave may not commence until the employee's use of administrative leave under subpart N has reached the 10-workday calendar year limitation described in 5 U.S.C. 6329a(b)(1) and § 630.1404, as converted to hours under § 630.1404(b), and the agency determines that further investigation of the employee is necessary. The agency may conduct its investigation during the period of administrative leave provided under subpart N.

The limitation of 10 workdays of administrative leave under subpart N is a calendar year aggregate limit. If the 10-workday limit is reached in the calendar year in which the employee is placed on investigative leave, the period of investigative leave may continue into the next calendar year without the employee having to exhaust the 10 workdays of administrative leave permitted for use in the next calendar year. In other words, once triggered and commenced, investigative leave would continue as long as permitted without needing to again meet the requirement to exhaust 10-workday limit on administrative leave in a later calendar year. Agencies are expected to expeditiously work to resolve investigations so that the employee can return to duty or the agency can initiate an appropriate personnel action. If an agency determines that continued investigation of the employee is necessary after the 10-workday

limitation of administrative leave has been reached, it must follow the procedures outlined in § 630.1503(b)—*i.e.*, threat determination and consideration of options—before placing the employee on investigative leave for up to 30 workdays.

Section 630.1504(b) provides that an agency may place the employee in an initial period of investigative leave under § 630.1503(a)(1) for a period of not more than 30 workdays. An employee may be placed on investigative leave intermittently. In other words, a period of investigative leave may be interrupted by (1) on-duty service performed under paragraph (b)(2)(i) or (c) of § 630.1503, (2) leave or paid time off in lieu of such service under paragraph (b)(2)(ii) of § 630.1503, or (3) AWOL under paragraph (b)(2)(iii) of § 630.1503.

Section 630.1504(c) requires an agency to provide an employee a written explanation of his or her placement on investigative leave. The written explanation must describe the limitations on the leave placement, including the limitation on the duration of the investigative leave, and include notice that, at the conclusion of the period of investigative leave, the agency must take an action under § 630.1504(d). Furthermore, the agency must include notice that placement on investigative leave for 70 workdays or more is considered a "personnel action" in applying the prohibited personnel practices provisions at 5 U.S.C. 2302(b)(8)–(9).

Section 630.1504(d) provides that, not later than the day after the last day of an initial or extended period of investigative leave, an agency must take action to return the employee to regular duty status, take one or more of the actions under § 630.1503(b)(2), propose an adverse action against the employee as provided under law, or extend the period of investigative leave under § 630.1504(f) and (g). The requirement for agencies to take action at the conclusion of the period of investigative leave holds agencies accountable for the amount of paid leave provided to an employee under investigation for alleged misconduct and prevents situations where employees remain on paid leave for long periods of time without active investigation.

Section 630.1504(e) states that an investigation of an employee may continue after the expiration of the initial 30-workday period of investigative leave. Many factors and variables can require longer than 30 workdays for an agency to conduct an investigation, including but not limited to the nature and complexity of the

issue(s), the number of witnesses, the availability of witnesses, and the coordination with other offices who have relevant evidence. If an agency requires more than 30 workdays to conduct its investigation, an extension may be approved by an authorized official. An employee under investigation is not required to be placed on investigative leave; therefore, the investigation may continue even if the employee is returned to regular duty status and is no longer on investigative leave. An agency may extend the period of investigative leave after the initial 30-workday period of investigative leave ends by following the procedures outlined in § 630.1504(f) and (g).

Section 630.1504(f)(1) allows an agency to extend the period of investigative leave for the employee—using increments of 30 workdays for each extension—when approved by the appropriate agency official upon determination that further time is required to conduct a full and fair investigation. It is conceivable that some investigations will be more involved and complex than others and require more than a 30-workday period of investigation; therefore, agencies must have the ability to extend an employee's period of investigative leave.

Section 630.1504(f)(2) provides that the total period of the extension of investigative leave under § 630.1504(f) may not exceed 90 workdays, which translates into 3 incremental extensions of 30 workdays. This 90-day limit applies to extensions of investigative leave associated with a single initial period of investigative leave. In practice, this means that an employee must first exhaust his or her 10 workdays of administrative leave under 5 U.S.C. 6329a, before the agency may provide an initial period of investigative leave for 30 workdays under § 630.1503(a)(1). If there is a continued need to keep the employee on investigative leave, an authorized official may approve extension of investigative leave in increments of 30 workdays, not to exceed a total 90 workdays for the extensions under § 630.1504(f).

Section 630.1504(f)(3)(i) permits an incremental 30-workday extension under paragraph (f)(1) only if the agency makes a written determination reaffirming that the employee must be removed from the workplace based on the criteria in § 630.1503(b)(1) and that the options in § 630.1503(b)(2) are not appropriate. In other words, the same criteria used for an initial placement on investigative leave must be used in approving any extension.

Section 630.1504(f)(3)(ii) provides that an incremental extension of

investigative leave under paragraph (f)(1) of this section is permitted only if approved by the Chief Human Capital Officer (CHCO) of an agency (*i.e.*, a CHCO designated or appointed under 5 U.S.C. 1401, or an equivalent officer), or the designee of the CHCO, after consulting with the investigator responsible for conducting the investigation of the employee. The CHCO approval provides fairness, transparency, and accountability while allowing agency management to be actively involved in the decision to extend investigative leave. Agencies will be responsible for identifying the factors the CHCO or designee must consider in granting an extension of investigative leave and reflecting those considerations in the agency's internal policies. Requests for extensions of investigative leave should be used sparingly (*e.g.*, to accommodate complex investigative processes), and the CHCO or designee must act in a timely manner on such requests for an extension. Agencies should not submit automatic requests for extensions.

Section 630.1504(f)(3)(iii) provides that, in the case of an employee of an Office of Inspector General, an incremental extension under § 630.1504(f)(1) is permitted only if approved by the Inspector General or designee (rather than the CHCO or designee) after consulting with the investigator responsible for conducting the investigation of the employee. However, as an alternative, the Inspector General may request that the head of the agency designate an official of the agency within which the Office of Inspector General is located to approve an extension of investigative leave for employees in that office.

Section 630.1504(f)(4) requires that in delegating authority to a designated official to approve an incremental extension as described in § 630.1504(f)(3) of this section, an agency must pay heed to the designation guidance issued by the CHCO Council under 5 U.S.C. 6329b(c)(3), except that, in the case of approvals for an employee of an Office of Inspector General (OIG), an agency must pay heed to the designation guidance issued by the Council of the Inspectors General on Integrity and Efficiency under 5 U.S.C. 6329b(c)(4)(B). Adherence to this designation guidance ensures that the designee authorized to approve an extension of investigative leave is at a sufficiently high level within the OIG or the agency, as applicable, to make an impartial and independent determination regarding the extension. Agencies should be aware, however, that this involvement could potentially

disqualify the individual from serving as the deciding official in any subsequent adverse action.

Section 630.1504(g) provides that after reaching the maximum number of extensions of investigative leave under § 630.1504(f), an official authorized to approve an extension under § 630.1504(f)(3) may approve further incremental extensions of investigative leave for periods of 30 workdays for each extension. Those approvals must be based on the same criteria used to approve the initial period of investigative leave and the extensions under § 630.1504(f). While agencies must be allowed to take the time needed to conduct a full and fair investigation of the employee, agencies are not permitted to keep an employee on investigative leave indefinitely. Therefore, not later than 5 business days after granting each further extension of investigative leave, the agency must submit a report documenting the further extension of investigative leave to the Committee on Homeland Security and Governmental Affairs of the Senate and the Committee on Oversight and Government Reform of the House of Representatives, along with any other committees of jurisdiction.

The agency report must contain: (1) The title, position, office or agency subcomponent, job series, pay grade, and salary of the employee; (2) a description of the duties of the employee; (3) the reason the employee was placed on investigative leave; (4) an explanation as to why the employee meets the criteria described in § 630.1503(b)(1) and why the agency is not able to temporarily reassign the employee to different duties within the agency under § 630.1503(b)(2); (5) in the case of an employee required to telework under 5 U.S.C. 6502(c) during the investigation, the reasons that the agency required the employee to telework and the duration of the teleworking requirement; (6) the status of the investigation of the employee; (7) the certification by an investigative entity that additional time is needed to complete the investigation of the employee and an estimate of the amount of time that is necessary to complete the investigation of the employee; and (8) in the case of a completed investigation of the employee, the results of the investigation and the reason the employee remains on investigative leave. While not required to be included in the report, agencies should be prepared to explain their decision not to require a telework-eligible employee to telework during the period of investigation.

Section 630.1504(h) provides an agency may not further extend a period of investigative leave of an employee on or after the date that is 30 calendar days after the completion of the investigation of the employee by an investigative entity. After investigative leave is ended, the agency must take action under § 630.1504(d).

Section 630.1504(i) explains that, pursuant to new 5 U.S.C. 6329b(g), and for purposes of 5 U.S.C. chapter 12, subchapter II, and section 1221, and recourse to the Office of Special Counsel, placement on investigative leave under this subpart for a period of 70 workdays or more shall be considered a personnel action in applying the prohibited personnel practices provisions at 5 U.S.C. 2302(b)(8) or (9). Previously, an employee had no means to contest an agency decision to place him or her on administrative leave for a reason proscribed at 5 U.S.C. 2302(b)(8) or (9), given that the employee continued to receive pay. This provision provides independent review for employees who have been on investigative leave for at least 70 workdays and who allege conduct prohibited under 5 U.S.C. 2302(b)(8) or (9). Consistent with current case law, the placement on investigative leave or notice leave is not an adverse action.

Section 630.1504(j) explains the conversion of workdays to hours applicable in this subpart. The limitations based on workdays (*i.e.*, the 30-workday increments in paragraphs (b), (f), and (g) of this section and the 70-workday limit in paragraph (i) of this section) must be converted to hours, taking into account the different workdays that can apply to employees under different work schedules.

Section 630.1504(j)(1) applies to a full-time employee (including an employee on a regular 40-hour basic workweek or a flexible or compressed work schedule under 5 U.S.C. chapter 61, subchapter II, but excluding an employee on an uncommon tour of duty). Based on an 8-hour workday, the 30-workday increment is converted to 240 hours. The 30-workday increment is the equivalent of 6 calendar weeks of investigative leave. The 70-workday limit is converted to 560 hours.

Section 630.1504(j)(2) applies to a full-time employee with an uncommon tour of duty under § 630.210. The 30-workday increment is converted to three times the number of hours in the biweekly uncommon tour of duty (or the average biweekly hours for uncommon tours for which the biweekly hours vary over an established cycle). The 30-workday increment is the equivalent of

6 calendar weeks of investigative leave. The 70-workday limit is converted to a number of hours derived by multiplying the hours equivalent of 30 workdays (for a given uncommon tour) times the ratio of 70 divided by 30.

Section 630.1504(j)(3) applies to a part-time employee. The calendar year limit is prorated based on the number of hours in the officially scheduled part-time tour of duty established for purposes of charging leave when absent (*e.g.*, for a part-time employee who has an officially scheduled half-time tour of 40 hours in a biweekly pay period, the 30-workday increment is converted to 120 hours, which is half of 240 hours (the 30-workday increment for full-time employees)). The proration is consistent with the proration of annual and sick leave required under 5 U.S.C. 6302(c).

§ 630.1505—Administration of Notice Leave

Section 630.1505(a) provides that notice leave may commence only after an employee has received written notice of a proposed adverse action. There is no requirement that the employee exhaust his or her 10 workdays of administrative leave under 5 U.S.C. 6329a(b) and § 630.1405 before the employee may be placed on notice leave.

Section 630.1505(b) provides that the placement of an employee on notice leave shall be for a period not longer than the duration of the notice period.

Section 630.1505(c) provides that, if an agency places an employee on notice leave, the agency must provide the employee a written explanation regarding the placement of the employee on notice leave. The written explanation must provide information on the employee's notice period and include a statement that the notice leave will be provided only during the notice period.

§ 630.1506—Records and Reporting

Section 630.1506(a) requires an agency to maintain an accurate record of the placement of an employee on investigative leave or notice leave by the agency. The specific information that must be kept in agency records is identified, consistent with the requirements in 5 U.S.C. 6329b(f). OPM may add additional recordkeeping requirements as it deems appropriate.

Section 630.1506(b)(1) requires an agency to make a record kept under § 630.1506(a) available, upon request, to any committee of jurisdiction, to OPM, to the Government Accountability Office, and as otherwise required by law. However, § 630.1506(b)(2) provides that any action to make a record

available is subject to other applicable laws, Executive orders, and regulations governing the dissemination of sensitive information related to national security, foreign relations, or law enforcement matters.

Section 630.1506(c)(1) requires agencies to properly record the granting of investigative leave and notice leave. In agency data systems and in data reports submitted to OPM, an agency must record investigative leave and notice leave under 5 U.S.C. 6329b and this subpart as categories of leave separate from other types of leave. The leave must be recorded as either investigative leave or notice leave, as applicable.

GAO found in its 2014 report that agency policies on paid administrative leave differ across agencies, including the way agencies record paid administrative leave. These proposed regulations provide clear guidance on the use of administrative leave, which, in turn, will promote more consistent recording and documentation of various categories of administrative leave. In order to accurately measure the use of paid administrative leave across Federal agencies, agencies must have a consistent method of documenting the use of administrative leave. Specifically, agencies must properly record administrative leave and distinguish it from leave that is otherwise authorized by other statutory provisions, such as military leave, bone marrow/organ donor leave, and court leave. Without proper recording of leave taken, it is difficult to determine how much administrative leave is actually being used and to hold agencies accountable for its use.

Therefore, for recording purposes, OPM is creating two new categories to record leave granted under 5 U.S.C. 6329b: (1) Investigative leave and (2) notice leave. Investigative leave and notice leave must be recorded on an hourly basis (*i.e.*, hours or fractions of an hour), not to exceed the limitations outlined in § 630.1504.

Section 630.1506(c)(2) requires agencies to provide information to the Government Accountability Office as that office requires in order to submit reports to specified Congressional committees required under section 1138(d)(2) of Public Law 114–328. These reports must be submitted not later than 5 years after December 23, 2016, and every 5 years thereafter.

Subpart P—Weather and Safety Leave

§ 630.1601—Purpose and Applicability

Section 630.1601(a) addresses the purpose of the proposed regulations on

weather and safety leave—*i.e.*, to implement 5 U.S.C. 6329c, which created a new category of paid leave that applies when weather and safety conditions prevent employees from safely traveling to or safely performing work at an approved location due to an act of God, a terrorist attack or other applicable conditions. Unlike the previous administrative leave used for weather-related incidents, OPM now has the authority to prescribe regulations to carry out the new statutory provisions, including the appropriate uses and the proper recording of weather and safety leave. Additionally, § 630.1601(b) provides that subpart P applies to employees, as defined at 5 U.S.C. 2105, who are employed in executive branch agencies, but does not apply to intermittent employees.

§ 630.1602—Definitions

Section 630.1602 provides definitions of various terms used in subpart P. The definitions align with the definitions found in the law.

The statute at 5 U.S.C. 6329c(b)(1) uses the term “act of God.” We define *act of God* for purposes of subpart P as an act of nature such as hurricanes, tornadoes, floods, wildfires, earthquakes, landslides, snowstorms, and avalanches. While this definition covers only natural disasters, weather and safety leave may also be authorized for other conditions that prevent employees from safely traveling to or safely performing work at an approved location (for example, agency-specific emergencies such as a building fire, power outage, or burst water pipes).

The statute at 5 U.S.C. 6329c(a)(1) defines “agency” as an Executive agency of the Federal Government as described in 5 U.S.C. 105, including the Department of Veterans Affairs, but excluding the Government Accountability Office. The definition of *agency* in § 630.1602 follows the statutory definition except that we did not note the inclusion of the Department of Veterans Affairs since that agency is already included by way of 5 U.S.C. 105. We also state that when “agency” is used in the context of an agency making determinations or taking actions, it means the agency head or management officials who are authorized (including by delegation) to make a given determination or take a given action.

We define *employee* as an individual who is covered by subpart P, as provided in § 630.1601(b) and (c).

We define *participating in a telework program* to refer to a telework-eligible employee who has an established

arrangement with his or her agency under which the employee is approved to participate in the agency telework program, including on a routine or situational basis. Thus, an employee who teleworks on a situational basis is considered to be continuously participating in a telework program even if there are extended periods during which the employee does not perform telework. This term is used in § 630.1605(a).

We define *telework site* as a location where an employee is authorized to perform telework as authorized under 5 U.S.C. chapter 65, such as an employee’s home.

We define *weather and safety leave* as paid leave provided under the authority of 5 U.S.C. 6329c and subpart P.

§ 630.1603—Authorization

Section 630.1603 addresses the conditions under which an agency may authorize weather and safety leave—*i.e.*, a severe weather event or other emergency that prevents an employee from safely traveling to or safely performing work at an approved work location.

§ 630.1604—OPM and Agency Responsibilities

Section 630.1604(a) addresses OPM’s responsibility to prescribe regulations and guidance related to the appropriate use of weather and safety leave, including guidance on dismissal/closure policies and procedures related to such leave. Such guidance will deal not only with when it is appropriate to provide weather and safety leave, but also when other workplace flexibility options (including other leave, telework, and flexible work schedules) should be utilized instead of weather and safety leave. In the past, OPM has issued dismissal/closure policies and procedures focused on the Washington, DC, area where OPM, through longstanding practice, has exercised responsibility for issuing operating status announcements in emergency situations. (This responsibility involves taking the lead in coordinating with municipal and regional officials—*e.g.*, National Weather Service, the District of Columbia, suburban governments, Departments of Transportation, public transportation providers, public utilities, and law enforcement. This coordination is designed to avoid dramatic disruptions of the highway and mass transit systems.) After issuing final regulations on weather and safety leave, OPM intends to issue Governmentwide guidance on dismissal/closure policies and procedures to assist agencies in

complying with the weather and safety leave regulations and to promote the use of consistent terminology throughout the Government.

Also, § 630.1604(a) states that when OPM issues any operating status announcement for the Washington, DC, area, the specific policies and procedures communicated with that announcement must be consistent with OPM regulations and Governmentwide guidance on closures and dismissals.

Section 630.1604(b) describes agency responsibilities to (1) establish policies and procedures related to weather and safety leave that are consistent with OPM regulations and guidance and (2) use terminology required by OPM-issued Governmentwide guidance for any operating status announcements issued by an agency (for a specific location).

§ 630.1605—Telework and Emergency Employees

Section 630.1605 provides exclusions to the granting of weather and safety leave when an employee is eligible for and participating in an agency telework program or is designated as an “emergency employee.”

• Telework employees

Section 630.1605(a)(1) states that agencies may not grant weather and safety leave to employees who are participating in a telework program and who are not prevented from safely working at an approved telework site. This implements the statutory provision at 5 U.S.C. 6329c(b) that prescribes that weather and safety leave may be provided when employees are prevented from safely traveling to or safely performing work “at an [*i.e.*, any] approved location.” Employees who are eligible to telework are typically not prevented from performing work at their approved telework site (*e.g.*, home) because they are not required to work at their regular worksites. Accordingly, when employees have the ability to telework, they are not considered to be prevented from performing work at an approved location. This regulatory condition for the granting of weather and safety leave is not contingent on the condition being included in the employee’s telework agreement.

Section 630.1605(a)(2) permits exceptions to the bar on granting weather/safety leave for teleworkers when, in the agency’s judgment, the employee was not able to prepare for teleworking and is otherwise not able to perform productive work at the telework site (*e.g.*, due to lack of portable work or equipment problems). An agency may permit an exception to the bar on granting weather/safety leave for

teleworkers when an employee is prepared to telework but is prevented from safely doing so by conditions applicable to the telework site. However, the agency may decide not to approve weather and safety leave to an employee who can safely travel to or safely perform work at a regular worksite even if it is a scheduled telework day for the employee.

Section 630.1605(a)(3) requires the agency to evaluate whether the weather or safety conditions could be reasonably anticipated and whether the employee took reasonable steps (within the employee's control) to prepare for telework (such as by bringing any needed equipment and work home). If the employee failed to make the necessary preparations, the agency may not grant weather and safety leave. In this case, the employee's only options would be to use other appropriate paid leave or paid time off, or leave without pay.

- *Emergency employees*

Section 630.1605(b) provides that agencies may designate emergency employees as necessary for critical agency operations and for whom the general granting of weather and safety leave generally does not apply. Agencies may designate different emergency employees for the various emergencies that may occur, but should designate these employees well in advance of the possible emergencies, to the extent practicable. Emergency employees are expected to report to the agency-designated worksite unless the agency determines that it is unsafe to do so, in which case the agency may allow the employee to telework or work at another location. An agency may also determine that the circumstances justify granting weather and safety leave to emergency employees.

§ 630.1606—Administration of Weather and Safety Leave

Section 630.1606(a) provides that the minimum charge increment for weather and safety leave is the same as the agency uses for annual and sick leave.

Section 630.1606(b) states that weather and safety leave may be granted only for hours within an employee's tour of duty established for the purposes of charging annual and sick leave, which for full-time employees is either the 40-hour basic workweek, the basic work requirement for employees on a flexible or compressed work schedule, or an uncommon tour of duty under § 630.210.

Section 630.1606(c) states that agencies may not grant weather and safety leave for hours during which employees are on other preapproved

leave (paid or unpaid) or paid time off. It also provides that an agency should not approve an employee's request to cancel preapproved leave or paid time off if the agency determines that the request is primarily for the purpose of obtaining weather and safety leave.

§ 630.1607—Records and Reporting

This section provides the recordkeeping and reporting requirements regarding weather and safety leave. Agencies are required to keep accurate records on the number of weather and safety leave hours granted to employees and to report this data to OPM in the manner directed.

Executive Order 13563 and Executive Order 12866

The Office of Management and Budget has reviewed this rule in accordance with E.O. 13563 and 12866.

Regulatory Flexibility Act

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

List of Subjects in 5 CFR Part 630

Government employees.
Office of Personnel Management.
Kathleen M. McGettigan,
Acting Director.

For the reasons stated in the preamble, OPM proposes to amend part 630 of title 5 of the Code of Federal Regulations as follows:

PART 630—ABSENCE AND LEAVE

■ 1. The authority citation for part 630 is revised to read as follows:

Authority: Subparts A through E issued under 5 U.S.C. 6133(a) (read with 5 U.S.C. 6129), 6303(e) and (f), 6304(d)(2), 6306(b), 6308(a) and 6311; subpart F issued under 5 U.S.C. 6305(a) and 6311 and E.O. 11228, 30 FR 7739, 3 CFR, 1974 Comp., p. 163; subpart G issued under 5 U.S.C. 6305(c) and 6311; subpart H issued under 5 U.S.C. 6133(a) (read with 5 U.S.C. 6129) and 6326(b); subpart I issued under 5 U.S.C. 6332, 6334(c), 6336(a)(1) and (d), and 6340; subpart J issued under 5 U.S.C. 6340, 6363, 6365(d), 6367(e), 6373(a); subpart K issued under 5 U.S.C. 6391(g); subpart L issued under 5 U.S.C. 6383(f) and 6387; subpart M issued under Sec. 2(d), Pub. L. 114–75, 129 Stat. 641 (5 U.S.C. 6329 note); subpart N issued under 5 U.S.C. 6329a(c); subpart O issued under 5 U.S.C. 6329b(h); and subpart P issued under 5 U.S.C. 6329c(d).

Subpart B—Definitions and General Provisions for Annual and Sick Leave

§ 630.206 [Amended]

- 2. In § 630.206, remove the second sentence in paragraph (a).
- 3. Subpart N is added to read as follows:

Subpart N—Administrative Leave

Sec.

630.1401	Purpose and applicability.
630.1402	Definitions.
630.1403	Principles and prohibitions.
630.1404	Calendar year limitation.
630.1405	Administration of administrative leave.
630.1406	Records and reporting.
630.1407	Separation or transfer.

Subpart N—Administrative Leave

§ 630.1401 Purpose and applicability.

(a) This subpart implements 5 U.S.C. 6329a, which allows an agency to provide a separate type of paid leave, on a limited basis, for general purposes not covered by other types of leave authorized by other provisions of law. Section 6329a(c) authorizes OPM to prescribe regulations to carry out the statutory provisions on administrative leave, including regulations on the appropriate uses and the proper recording of this leave.

(b) This subpart applies to an employee as defined in 5 U.S.C. 2105 who is employed in an agency, but does not apply to an intermittent employee who, by definition, does not have an established regular tour of duty during the administrative workweek.

(c) As provided in 5 U.S.C. 6329a(d), this subpart applies to employees described in subsection (b) of 38 U.S.C. 7421, notwithstanding subsection (a) of that section.

§ 630.1402 Definitions.

In this subpart:

Administrative leave means paid leave authorized at the discretion of an agency under 5 U.S.C. 6329a (and not authorized under any other provision of statute or Presidential directive) to cover periods within an employee's tour of duty when the employee is not engaged in activities that qualify as official hours of work, which is provided without loss of or reduction in:

- (1) Pay;
- (2) Leave to which an employee is otherwise entitled under law; or
- (3) Credit for time or service.

Agency means an Executive agency as defined in 5 U.S.C. 105, excluding the Government Accountability Office. When the term "agency" is used in the context of an agency making determinations or taking actions, it means the agency head or management

officials who are authorized (including by delegation) to make the given determination or take the given action.

Employee means an individual who is covered by this subpart, as described in § 630.1401(b) and (c).

Head of the agency means the head of an agency or a designated representative of such agency head who is an agency headquarters-level official reporting directly to the agency head or a deputy agency head and who is the sole such representative for the entire agency.

OPM means the Office of Personnel Management.

Presidential directive means an Executive order, Presidential memorandum, or official written statement by the President in which the President specifically directs agency heads to provide employees with a paid excused absence under a specified set of conditions. This excludes a Presidential action that merely encourages agency heads to use an agency head authority (e.g., section 6329a) to grant a paid excused absence under specified conditions or that leaves the amount of excused absence to be granted in specified conditions subject to agency head discretion.

§ 630.1403 Principles and prohibitions.

(a) *General principles.* In granting administrative leave, an agency must adhere to the following general principles:

(1) Administrative leave may be granted (subject to the requirements of paragraph (a)(5) of this section) only when:

(i) The absence is directly related to the agency's mission;

(ii) The absence is officially sponsored or sanctioned by the agency; or

(iii) The absence is in the interest of the agency or of the Government as a whole.

(2) Administrative leave is not an entitlement, but is an agency discretionary authority that should be used sparingly, consistent with the sense of Congress expressed in section 1138(b)(2) of Public Law 114–328.

(3) Administrative leave is appropriately used for brief or short periods of time—usually for not more than 1 workday. An incidence of administrative leave lasting more than 1 workday may be approved when determined to be appropriate by an agency. For example, a longer period would be appropriate when the employee is subject to an investigation and his or her retention in duty status is inconsistent with the best interests of the Government, and investigative leave under subpart O of this part is not

available because the 10-workday period described in 5 U.S.C. 6329a(b)(1) has not yet expired. (See 5 U.S.C. 6329b(b)(3)(A).)

(4) Administrative leave may not be established (via agency policy or negotiation) as an ongoing or recurring entitlement based on meeting a set of conditions.

(5) A determination that an absence satisfies one of the conditions in paragraph (a)(1) of this section must be:

(i) Permitted under policies established by the head of the agency; and

(ii) Reviewed and approved by an official of the agency who is (or is acting) at a higher level than the official making the determination—unless there is no higher-level official in the agency.

(b) *Specific prohibited uses.* An agency may not grant administrative leave—

(1) To mark the memory of a deceased former Federal official (see also 5 U.S.C. 6105);

(2) To participate in an event for the employee's personal benefit or the benefit of an outside organization unless the participation would satisfy one or more of the conditions in paragraph (a)(1) of this section;

(3) As a reward to recognize the performance or contributions of an employee or group of employees (i.e., in lieu of a cash award or a time-off award); or

(4) To engage in volunteer work or other civic activity that is not officially sponsored or sanctioned by the head of the agency, based on the agency's mission or Governmentwide interests.

§ 630.1404 Calendar year limitation.

(a) *General.* Under 5 U.S.C. 6329a(b), during any calendar year, an agency may place an employee on administrative leave for no more than 10 workdays. In applying this calendar year limitation, administrative leave used in different agencies must be aggregated. The limitation is not separately applied to each agency that employed the employee during the calendar year. (See also § 630.1407.)

(b) *Conversion to a limitation on hours.* This 10-workday calendar year limitation is converted to an aggregate limit on hours, taking into account the different workdays that can apply to employees under different work schedules, as follows:

(1) For a full-time employee (including an employee on a regular 40-hour basic workweek or a flexible or compressed work schedule under 5 U.S.C. chapter 61, subchapter II, but excluding an employee on an

uncommon tour of duty), the calendar year limitation is 80 hours;

(2) For a full-time employee with an uncommon tour of duty under § 630.210, the calendar year limitation is equal to the number of hours in the biweekly uncommon tour of duty (or the average biweekly hours for uncommon tours for which the biweekly hours vary over an established cycle);

(3) For a part-time employee, the calendar year limit is prorated based on the number of hours in the officially scheduled part-time tour of duty established for purposes of charging leave when absent (e.g., for a part-time employee who has an officially scheduled half-time tour of 40 hours in a biweekly pay period, the calendar year limitation is 40 hours, which is half of the 80-hour limitation for full-time employees).

(c) *Applicable hours.* The calendar year limitation described in this section applies only to administrative leave authorized under this subpart.

(d) *Use for investigations.* If an employee is under an investigation that would result in placement on investigative leave under subpart O of this part but for the fact that the employee has not yet reached the calendar year limitation in this section, the agency must first use administrative leave for purposes of the investigation until the employee's calendar year limitation is reached, consistent with 5 U.S.C. 6329b(b)(3) and § 630.1504(a)(1).

(e) *After limit is reached.* When an employee reaches the calendar year limitation, an agency may not grant additional administrative leave during the remainder of that calendar year. If a situation arises where the employee might have been granted administrative leave under the agency's policies but for the limitation, the employee must instead continue to work or use other appropriate paid leave or time off or leave without pay. If an employee is not able to work and is not willing or able to use another type of paid leave or time off, an agency must place the employee in an appropriate type of nonpay status in order to comply with the calendar year limitation.

§ 630.1405 Administration of administrative leave.

(a) An agency must use the same minimum charge increments for administrative leave as it does for annual and sick leave under § 630.206.

(b) Employees may be granted administrative leave only for hours within the tour of duty established for purposes of charging annual and sick leave when absent. For full-time employees, that tour is the 40-hour basic

workweek as defined in 5 CFR 610.102, the basic work requirement established for employees on a flexible or compressed work schedule as defined in 5 U.S.C. 6121(3), or an uncommon tour of duty under § 630.210.

(c) Agencies authorize, and may require, the use of administrative leave by an employee or a category of employees. Employees do not have an entitlement to use administrative leave or to exhaust the permissible 10 workdays per calendar year prescribed under § 630.1404, nor do they have a right to refuse administrative leave when the agency requires its use.

§ 630.1406 Records and reporting.

(a) *Record of placement on leave.* An agency must maintain an accurate record of the placement of an employee on administrative leave by recording leave in one of the following subcategories, as applicable in the case at hand:

(1) Administrative leave used for the purposes of an investigation (as described in § 630.1404(d)); or

(2) Administrative leave used for all other purposes.

(b) *Reporting.* (1) In agency data systems (including timekeeping systems) and in data reports submitted to OPM, an agency must record administrative leave under § 6329a and this subpart as categories of leave separate from other types of leave. Leave under § 6329a and this subpart must be recorded as either administrative leave used for the purposes of an investigation or administrative leave used for all other purposes, as applicable.

(2) Agencies must provide information to the Government Accountability Office as that office requires in order to submit reports to specified Congressional committees required under section 1138(d)(2) of Public Law 114–328, which reports must be submitted not later than 5 years after December 23, 2016, and every 5 years thereafter.

§ 630.1407 Separation or transfer.

When an employee transfers to another agency or separates from Federal service, the losing agency must certify, in a manner prescribed by OPM, the number of administrative leave hours used by an employee during the current calendar year under one of the two subcategories described in § 630.1406(a). Any agency that employs the employee in the same calendar year must apply the hours reported by a losing agency against the employee's current calendar year limitation under § 630.1404.

■ 4. Subpart O is added to read as follows:

Subpart O—Investigative Leave and Notice Leave

Sec.

630.1501 Purpose and applicability.

630.1502 Definitions.

630.1503 Authority and requirements for investigative leave and notice leave.

630.1504 Administration of investigative leave.

630.1505 Administration of notice leave.

630.1506 Records and reporting.

Subpart O—Investigative Leave and Notice Leave

§ 630.1501 Purpose and applicability.

(a) This subpart implements 5 U.S.C. 6329b, which allows an agency to provide separate types of paid leave for employees who are the subject of an investigation or in a notice period. OPM has authority to prescribe implementing regulations under 5 U.S.C. 6329b(h)(1).

(b) This subpart applies to an employee as defined in 5 U.S.C. 2105 who is employed in an agency, excluding:

(1) An Inspector General; or

(2) An intermittent employee who, by definition, does not have an established regular tour of duty during the administrative workweek.

(c) As provided in 5 U.S.C. 6329b(i), this subpart applies to employees described in subsection (b) of 38 U.S.C. 7421, notwithstanding subsection (a) of that section.

§ 630.1502 Definitions.

In this subpart:

Agency means an Executive agency as defined in 5 U.S.C. 105, excluding the Government Accountability Office.

When the term “agency” is used in the context of an agency making determinations or taking actions, it means the agency head or management officials who are authorized (including by delegation) to make the given determination or take the given action.

Chief Human Capital Officer or CHCO means the Chief Human Capital Officer of an agency designated or appointed under 5 U.S.C. 1401, or the equivalent.

Committee of jurisdiction means, with respect to an agency, each committee of the Senate or House of Representatives with jurisdiction over the agency.

Employee means an individual who is covered by this subpart, as described in § 630.1501(b) and (c).

Investigation means inquiry regarding an employee involving such matters as—

(1) An employee's alleged misconduct that could result in an adverse action as described in 5 CFR part 752 or similar authority;

(2) Security concerns, including whether the employee should retain eligibility for logical access to agency facilities and systems under the standards established by Homeland Security Presidential Directive (HSPD) 12 and guidance issued pursuant to that directive; or

(3) Other matters that could lead to disciplinary action.

Investigative entity means:

(1) An internal investigative unit of an agency granting investigative leave under this subpart, which may be composed of one or more persons, such as supervisors, managers, human resources practitioners, personnel security office staff, workplace violence prevention team members, or other agency representatives;

(2) The Office of Inspector General of an agency granting investigative leave under this subpart;

(3) The Attorney General; or

(4) The Office of Special Counsel.

Investigative leave means leave in which an employee who is the subject of an investigation is placed, as authorized under 5 U.S.C. 6329b (and not authorized under any other provision of law), which is provided without loss of or reduction in:

(1) Pay;

(2) Leave to which an employee is otherwise entitled under law; or

(3) Credit for time or service.

Notice leave means leave in which an employee who is in a notice period is placed, as authorized under 5 U.S.C. 6329b (and not authorized under any other provision of law), which is provided without loss of or reduction in:

(1) Pay;

(2) Leave to which an employee is otherwise entitled under law; or

(3) Credit for time or service.

Notice period means a period beginning on the date on which an employee is provided notice, as required under law, of a proposed adverse action against the employee and ending—

(1) On the effective date of the adverse action; or

(2) On the date on which the agency notifies the employee that no adverse action will be taken.

OPM means the Office of Personnel Management.

Participating in a telework program means an employee is eligible to telework and has an established arrangement with his or her agency under which the employee is approved to participate in the agency telework program, including on a routine or situational basis. Such an employee who teleworks on a situational basis is

considered to be continuously participating in a telework program even if there are extended periods during which the employee does not perform telework.

Telework site means a location where an employee is authorized to perform telework, as described in 5 U.S.C. chapter 65, such as an employee's home.

§ 630.1503 Authority and requirements for investigative leave and notice leave.

(a) *Authority.* An agency may, in accordance with paragraph (b) of this section, place an employee on:

(1) Investigative leave, if the employee is the subject of an investigation; or

(2) Notice leave:

(i) If the employee is in a notice period; or

(ii) Following a placement on investigative leave if, not later than the day after the last day of the period of investigative leave:

(A) The agency proposes or initiates an adverse action against the employee; and

(B) The agency determines that the employee continues to meet one or more of the criteria described in paragraph (b)(1) of this section.

(b) *Required determinations.* An agency may place an employee on investigative leave or notice leave only if the agency has:

(1) Determined, after consideration of the baseline factors specified in paragraph (e) of this section, that the continued presence of the employee in the workplace during an investigation of the employee or while the employee is in a notice period, as applicable, may:

(i) Pose a threat to the employee or others;

(ii) Result in the destruction of evidence relevant to an investigation;

(iii) Result in loss of or damage to Government property; or

(iv) Otherwise jeopardize legitimate Government interests; and

(2) Considered the following options (or a combination thereof):

(i) Keeping the employee in a duty status by assigning the employee to duties in which the employee no longer poses a threat, as described in paragraphs (b)(1)(i) through (iv) of this section;

(ii) Allowing the employee to voluntarily take leave (paid or unpaid) or paid time off, as appropriate under the rules governing each category of leave or paid time off;

(iii) Carrying the employee in absent without leave status, if the employee is absent from duty without approval; and

(iv) For an employee subject to a notice period, curtailing the notice

period if there is reasonable cause to believe the employee has committed a crime for which a sentence of imprisonment may be imposed, consistent with 5 CFR 752.404(d)(1); and

(3) Determined that none of the options under paragraph (b)(2) of this section is appropriate.

(c) *Telework alternative for investigative leave.* (1) Consistent with 5 U.S.C. 6502(c), if an agency would otherwise place an employee on investigative leave, the agency may require the employee to perform, at a telework site, duties similar to the duties that the employee normally performs if:

(i) The agency determines that such a requirement would not pose a threat, as described in paragraphs (b)(1)(i) through (iv) of this section;

(ii) The employee is eligible to telework under the eligibility conditions set forth in 5 U.S.C. 6502(a) and (b)(4);

(iii) The employee has been participating in a telework program under the agency telework policy during some portion of the 30-day period immediately preceding the commencement of investigative leave (or the commencement of required telework in lieu of such leave under this paragraph (c), if earlier); and

(iv) The agency determines that teleworking would be appropriate.

(2) For purposes of paragraph (c)(1) of this section, an employee is considered to be eligible to telework if the agency determines the employee is eligible to telework under agency telework policies described in 5 U.S.C. 6502(a) and is not barred from teleworking under the eligibility conditions described in 5 U.S.C. 6502(b)(4). Any telework agreement established under 5 U.S.C. 6502(b)(2) must be superseded as necessary in order to comply with an agency's action to require telework under 5 U.S.C. 6502(c) and paragraph (c)(1) of this section.

(3) If an employee who is required to telework under paragraph (c)(1) of this section is absent from telework duty without approval, an agency may place the employee in absent without leave status, consistent with agency policies.

(d) *Reassessment and return to duty.* (1) An employee may be returned to duty at any time if the agency reassesses its determination to place the employee on investigative leave or notice leave. An employee on investigative leave or notice leave must be prepared to report to work at any time during his or her regularly scheduled tour of duty or, if the employee anticipates a possible inability to report promptly, must obtain approval of leave in advance of the date

or dates that the employee would not be available to report.

(2) For an employee on investigative leave, an agency may reassess its determination that the employee must be removed from the workplace based on the criteria in paragraph (b)(1) of this section and may reassess its determination that the options in paragraph (b)(2) of this section are not appropriate. An agency may reassess its previous determination to require or not require telework under paragraph (c) of this section.

(3) For an employee on notice leave, an agency may reassess its determination that the employee must be removed from the regular worksite based on the criteria in paragraph (b)(1) of this section and may reassess its determination that the options in paragraph (b)(2) of this section are not appropriate.

(4) When an employee is placed on investigative leave or notice leave, the employee must be available to report promptly to an approved duty location if directed by his or her supervisor. Any failure to so report may result in the employee being recorded as absent without leave, which can be the basis for disciplinary action. An employee who anticipates that he or she may be unavailable to report promptly must request scheduled leave or paid time off in advance, as provided under paragraph (b)(2)(ii) of this section, to avoid being recorded as absent without leave.

(e) *Baseline factors.* In making a determination regarding the criteria listed under paragraph (b)(1) of this section, an agency must consider the following baseline factors:

(1) The nature and severity of the employee's exhibited or alleged behavior;

(2) The nature of the agency's or employee's work and the ability of the agency to accomplish its mission; and

(3) Other impacts of the employee's continued presence in the workplace detrimental to legitimate Government interests, including whether the employee will pose an unacceptable risk to:

(i) The life, safety, or health of employees, contractors, vendors or visitors to a Federal facility;

(ii) The Government's physical assets or information systems;

(iii) Personal property;

(iv) Records, including classified, privileged, proprietary, financial or medical records; or

(v) The privacy of the individuals whose data the Government holds in its systems.

(f) *Minimum charge.* An agency must use the same minimum charge increments for investigative and notice leave as it does for annual and sick leave under § 630.206.

(g) *Tour of duty.* Employees may be granted investigative leave or notice leave only for hours within the tour of duty established for purposes of charging annual and sick leave when absent. For full-time employees, that tour is the 40-hour basic workweek as defined in 5 CFR 610.102, the basic work requirement established for employees on a flexible or compressed work schedule as defined in 5 U.S.C. 6121(3), or an uncommon tour of duty under § 630.210.

§ 630.1504 Administration of investigative leave.

(a) *Commencement.* Investigative leave may not be commenced until:

(1) The employee's use of administrative leave under subpart N of this part has reached the 10-workday calendar year limitation described in 5 U.S.C. 6329a(b)(1) and § 630.1404, as converted to hours under § 630.1404(b); and

(2) The agency determines that further investigation of the employee is necessary.

(b) *Duration.* The agency may place the employee on investigative leave for an initial period of not more than 30 workdays per investigation. An employee may be placed on investigative leave intermittently—that is, a period of investigative leave may be interrupted by:

(1) On-duty service performed under § 630.1503(b)(2)(i) or (c);

(2) Leave or paid time off in lieu of such service under § 630.1503(b)(2)(ii); or

(3) Absence without leave under § 630.1503(b)(2)(iii).

(c) *Written explanation of leave.* If an agency places an employee on investigative leave, the agency must provide the employee a written explanation regarding the placement of the employee on investigative leave. The written explanation must:

(1) Describe the limitations of the leave placement, including the duration of leave;

(2) Include notice that, at the conclusion of the period of investigative leave, the agency must take an action under paragraph (d) of this section;

(3) Include notice that placement on investigative leave for 70 workdays or more is considered a “personnel action” for purposes of the Office of Special Counsel's authority to act, in applying the prohibited personnel practices provisions at 5 U.S.C. 2302(b)(8)–(9) (see paragraph (i) of this section).

(d) *Agency action.* Not later than the day after the last day of an initial or extended period of investigative leave, an agency must:

(1) Return the employee to regular duty status;

(2) Take one or more of the actions under § 630.1503(b)(2);

(3) Propose or initiate an adverse action against the employee as provided under law; or

(4) Extend the period of investigative leave if permitted under paragraphs (f) and (g) of this section.

(e) *Continued investigation.*

Investigation of an employee may continue after the expiration of the initial 30 workday period of investigative leave. Investigation of an employee may continue even if the employee is returned to regular duty status and is no longer on investigative leave.

(f) *Extension of investigative leave—*

(1) *Increments.* An agency may extend the period of investigative leave using increments of up to 30 workdays for each extension when approved as described in paragraph (f)(3) of this section. The amount of investigative leave used under the final extension may be less than 30 workdays, as appropriate.

(2) *Maximum number of extensions.* Except as provided in paragraph (g) of this section, the total period of extended investigative leave (*i.e.*, in addition to the initial 30-workday period of investigative leave) may not exceed 90 workdays (*i.e.*, 3 incremental extensions of 30 workdays). This 90-day limit applies to extensions of investigative leave associated with a single initial period of investigative leave.

(3) *Approval of extensions.* (i) An incremental extension under paragraph (f)(1) of this section is permitted only if the agency makes a written determination reaffirming that the employee must be removed from the workplace based on the criteria in § 630.1503(b)(1) and that the options in § 630.1503(b)(2) are not appropriate.

(ii) Except as provided by paragraph (f)(3)(iii) of this section, an incremental extension under paragraph (f)(1) of this section is permitted only if approved by the CHCO of an agency, or the designee of the CHCO, after consulting with the investigator responsible for conducting the investigation of the employee.

(iii) In the case of an employee of an Office of Inspector General, an incremental extension under paragraph (f)(1) of this section is permitted only if approved (after consulting with the investigator responsible for conducting the investigation of the employee) by:

(A) The Inspector General or the designee of the Inspector General, rather than the CHCO or the designee of the CHCO; or

(B) An official of the agency designated by the head of the agency within which the Office of Inspector General is located, if the Inspector General requests the agency head make such a designation.

(4) *Designation guidance.* In delegating authority to a designated official to approve an incremental extension as described in paragraph (f)(3) of this section, a CHCO must pay heed to the designation guidance issued by the CHCO Council under 5 U.S.C. 6329b(c)(3), except that, in the case of approvals for an employee of an Office of Inspector General, an Inspector General must pay heed to the designation guidance issued by the Council of the Inspectors General on Integrity and Efficiency under 5 U.S.C. 6329b(c)(4)(B).

(g) *Further extension of investigative leave.* An official authorized under paragraph (f)(3) of this section to approve an incremental extension under paragraph (f)(1) of this section may approve further incremental extensions of 30 workdays (*i.e.*, each extension is individually approved for up to 30 workdays) under this paragraph after an employee has reached the maximum number of extensions of investigative leave under paragraph (f)(2) of this section. An agency may further extend a period of investigative leave only if the agency makes a written determination reaffirming that the employee must be removed from the workplace based on the criteria in § 630.1503(b)(1) and that the options in § 630.1503(b)(2) are not appropriate. Not later than 5 business days after granting each further extension, the agency must submit (subject to § 630.1506(b)) to the Committee on Homeland Security and Governmental Affairs of the Senate and the Committee on Oversight and Government Reform of the House of Representatives, along with any other committees of jurisdiction, a report containing:

(1) The title, position, office or agency subcomponent, job series, pay grade, and salary of the employee;

(2) A description of the duties of the employee;

(3) The reason the employee was placed on investigative leave;

(4) An explanation as to why the employee meets the criteria described in § 630.1503(b)(1)(i) through (iv) and why the agency is not able to temporarily reassign the duties of the employee or detail the employee to another position within the agency;

(5) In the case of an employee required to telework under 5 U.S.C. 6502(c) during a period of investigation, the reasons that the agency required the employee to telework under that section and the duration of the teleworking requirement;

(6) The status of the investigation of the employee;

(7) A certification to the agency by an investigative entity stating that additional time is needed to complete the investigation of the employee and providing an estimate of the amount of time that is necessary to complete the investigation of the employee; and

(8) In the case of a completed investigation of the employee, the results of the investigation and the reason that the employee remains on investigative leave.

(h) *Completed investigation.* An agency may not further extend a period of investigative leave on or after the date that is 30 calendar days after the completion of the investigation of the employee by an investigative entity.

(i) *Possible prohibited personnel action.* For purposes of 5 U.S.C. chapter 12, subchapter II, and section 1221, placement on investigative leave under this subpart for a period of 70 workdays or more shall be considered a personnel action for purposes of the Office of Special Counsel in applying the prohibited personnel practices provisions at 5 U.S.C. 2302(b)(8) or (9).

(j) *Conversion of workdays to hours.* In applying this section, the limitations based on workdays (*i.e.*, the 30-workday increments in paragraphs (b), (f), and (g) of this section and the 70-workday limit in paragraph (h) of this section) must be converted to hours, taking into account the different workdays that can apply to employees under different work schedules, as follows:

(1) For a full-time employee (including an employee on a regular 40-hour basic workweek or a flexible or compressed work schedule under 5 U.S.C. chapter 61, subchapter II, but excluding an employee on an uncommon tour of duty), the 30-workday increment is converted to 240 hours and the 70-workday limit is converted to 560 hours;

(2) For a full-time employee with an uncommon tour of duty under § 630.210, the 30-workday increment is converted to three times the number of hours in the biweekly uncommon tour of duty (or the average biweekly hours for uncommon tours for which the biweekly hours vary over an established cycle), and the 70-workday limit is converted to a number of hours derived by multiplying the hours equivalent of

30 workdays (for a given uncommon tour) times the ratio of 70 divided by 30;

(3) For a part-time employee, the calendar year limit is prorated based on the number of hours in the officially scheduled part-time tour of duty established for purposes of charging leave when absent (*e.g.*, for a part-time employee who has an officially scheduled half-time tour of 40 hours in a biweekly pay period, the 30-workday increment is converted to 120 hours, which is half of 240 hours (the 30-workday increment for full-time employees)).

§ 630.1505 Administration of notice leave.

(a) *Commencement.* Notice leave may commence only after an employee has received written notice of a proposed adverse action. There is no requirement that the employee exhaust 10 workdays of administrative leave under 5 U.S.C. 6329a(b) and § 630.1404 before the employee may be placed on notice leave.

(b) *Duration.* Placement of an employee on notice leave shall be for a period not longer than the duration of the notice period.

(c) *Written explanation of leave.* If an agency places an employee on notice leave, the agency must provide the employee a written explanation regarding the placement of the employee on notice leave. The written explanation must provide information on the employee's notice period and include a statement that the notice leave will be provided only during the notice period.

§ 630.1506 Records and reporting.

(a) *Record of placement on leave.* An agency must maintain an accurate record of the placement of an employee on investigative leave or notice leave by the agency, including—

(1) The reasons for initial authorization of the investigative leave or notice leave, including the alleged action(s) of the employee that required investigation or issuance of a notice of a proposed adverse action;

(2) The basis for the determination made under § 630.1503(b)(1);

(3) An explanation of why an action under § 630.1503(b)(2) was not appropriate;

(4) The length of the period of investigative leave or notice leave;

(5) The amount of salary paid to the employee during the period of leave;

(6) The reasons for authorizing the leave, and if an extension of investigative leave was granted, the recommendation made by an investigator as part of the consultation required under § 630.1504(f)(3);

(7) Whether the employee was required to telework under § 630.1503(c) during the period of the investigation, including the reasons for requiring or not requiring the employee to telework;

(8) The action taken by the agency at the end of the period of leave, including, if applicable, the granting of any extension of a period of investigative leave under § 630.1504(f) or (g); and

(9) Any additional information OPM may require.

(b) *Availability of records.* (1) An agency must make a record kept under paragraph (a) of this section available upon request:

(i) To any committee of jurisdiction;

(ii) To OPM;

(iii) To the Government

Accountability Office; and

(iv) As otherwise required by law.

(2) Notwithstanding paragraph (b)(1) of this section and § 630.1504(g), the requirement that an agency make records and information on use of investigative leave or notice leave available to various entities is subject to applicable laws, Executive orders, and regulations governing the dissemination of sensitive information related to national security, foreign relations, or law enforcement matters (*e.g.*, 50 U.S.C. 3024(i), (j), and (m) and Executive Orders 12968 and 13526).

(c) *Reporting.* (1) In agency data systems and in data reports submitted to OPM, an agency must record investigative leave and notice leave under § 6329b and this subpart as categories of leave separate from other types of leave. Leave under § 6329b and this subpart must be recorded as either investigative leave or notice leave, as applicable.

(2) Agencies must provide information to the Government Accountability Office as that office requires in order to submit reports to specified Congressional committees required under section 1138(d)(2) of Public Law 114–328, which reports must be submitted not later than 5 years after December 23, 2016, and every 5 years thereafter.

■ 5. Subpart P is added to read as follows:

Subpart P—Weather and Safety Leave

Sec.

630.1601 Purpose and applicability.

630.1602 Definitions.

630.1603 Authorization.

630.1604 OPM and agency responsibilities.

630.1605 Telework and emergency employees.

630.1606 Administration of weather and safety leave.

630.1607 Records and reporting.

Subpart P—Weather and Safety Leave**§ 630.1601 Purpose and applicability.**

(a) This subpart implements 5 U.S.C. 6329c, which allows an agency to provide a separate type of paid leave when weather or other safety-related conditions prevent employees from safely traveling to or safely performing work at an approved location due to an act of God, terrorist attack, or other applicable condition. Section 6329c(d) provides OPM with authority to prescribe regulations to carry out the statutory provisions on weather and safety leave, including regulations on the appropriate uses and the proper recording of this leave.

(b) This subpart applies to an employee as defined in 5 U.S.C. 2105 who is employed in an agency, but does not apply to an intermittent employee who, by definition, does not have an established regular tour of duty during the administrative workweek.

(c) As provided in 5 U.S.C. 6329c(e), this subpart applies to employees described in subsection (b) of 38 U.S.C. 7421, notwithstanding subsection (a) of that section.

§ 630.1602 Definitions.

In this subpart:

Act of God means an act of nature, including hurricanes, tornadoes, floods, wildfires, earthquakes, landslides, snowstorms, and avalanches.

Agency means an Executive agency as defined in 5 U.S.C. 105, excluding the Government Accountability Office. When the term “agency” is used in the context of an agency making determinations or taking actions, it means the agency heads or management officials who are authorized (including by delegation) to make the given determination or take the given action.

Employee means an individual who is covered by this subpart, as described in § 630.1601(b) and (c).

OPM means the Office of Personnel Management.

Participating in a telework program means an employee is eligible to telework and has an established arrangement with his or her agency under which the employee is approved to participate in the agency telework program, including on a routine or situational basis. Such an employee who teleworks on a situational basis is considered to be continuously participating in a telework program even if there are extended periods during which the employee does not perform telework.

Telework site means a location where an employee is authorized to perform telework, as described in 5 U.S.C.

chapter 65, such as an employee’s home.

Weather and safety leave means paid leave provided under the authority of 5 U.S.C. 6329c.

§ 630.1603 Authorization.

Subject to other provisions of this subpart, an agency may grant weather and safety leave to employees if they are prevented from safely traveling to or safely performing work at a location approved by the agency due to:

- (a) An act of God;
- (b) A terrorist attack; or
- (c) Another condition that prevents an employee or group of employees from safely traveling to or safely performing work at an approved location.

§ 630.1604 OPM and agency responsibilities.

(a) OPM is responsible for prescribing regulations and guidance related to the appropriate use of leave under this subpart and the proper recording of such leave, including OPM guidance on Governmentwide dismissal and closure policies and procedures that provides for use of consistent terminology in describing various operating status scenarios. In issuing any operating status announcements for the Washington, DC, area, OPM must ensure that the specific policies and procedures related to those announcements are consistent with the regulations in this subpart and with OPM’s Governmentwide guidance.

(b) Employing agencies are responsible for:

(1) Establishing and applying policies and procedures related to use of leave under this subpart that are consistent with OPM regulations and guidance described in paragraph (a) of this section; and

(2) Ensuring that any agency-specific operating status announcements they issue (for a specific geographic location or area) use terminology required by OPM-issued Governmentwide guidance.

§ 630.1605 Telework and emergency employees.

(a) *Telework employees.* (1) Except as provided under paragraph (a)(2) of this section, employees who are participating in a telework program and are able to safely travel to and work at an approved telework site may not be granted leave under § 630.1603. Employees who are eligible to telework and participating in a telework program under applicable agency policies are typically able to safely perform work at their approved telework site (e.g., home), since they are not required to work at their regular worksite.

(2)(i) If, in the agency’s judgment, the conditions in § 630.1603 could not reasonably be anticipated, an agency may approve leave under this subpart to the extent an employee was not able to prepare for telework as described in paragraph (a)(3) of this section and is otherwise unable to perform productive work at the telework site.

(ii) If an employee is prevented from safely working at the approved telework site due to circumstances, arising from one or more of the conditions in § 630.1603, applicable to the telework site, an agency may, at its discretion, provide leave under this subpart to the employee.

(iii) Notwithstanding paragraphs (a)(2)(i) and (ii) of this section, an agency may decide not to approve leave under this subpart when the conditions in § 630.1603(a) do not prevent the employee from safely traveling to or safely performing work at a regular worksite, even if the affected day is a scheduled telework day.

(3) In making a determination under paragraph (a)(2) of this section, an agency must evaluate whether any of the conditions in § 630.1603(a) of this section could be reasonably anticipated and whether the employee took reasonable steps (within the employee’s control) to prepare to perform telework at the approved telework site. For example, if a significant snowstorm is predicted, the employee may need to prepare by taking home any equipment (e.g., laptop computer) and work needed for teleworking. To the extent that an employee is unable to perform work at a telework site because of failure to make necessary preparations for reasonably anticipated conditions, an agency may not approve weather and safety leave, and the employee would need to use other appropriate paid leave, paid time off, or leave without pay.

(b) *Emergency employees.* An agency may designate emergency employees who are critical to agency operations and for whom weather and safety leave may not be applicable. To the extent practicable, an agency should designate its emergency employees well in advance in anticipation of the possible occurrence of the conditions set forth in § 630.1603. If the agency wishes to provide for the possibility that an emergency employee could work from an approved telework site in lieu of traveling to the regular worksite in appropriate circumstances, an agency should encourage the employee to enter into a telework agreement providing for that contingency. An agency may designate different emergency employees for the different

circumstances expected to arise from these conditions. Emergency employees must report to work at their regular worksite or another approved location as directed by the agency, unless—

(1) The agency determines that travel to or performing work at the worksite is unsafe for emergency employees, in which case the agency may require the employees to work at another location, including a telework site as provided in paragraph (a) of this section, as appropriate; or

(2) The agency determines that circumstances justify granting leave under this subpart to emergency employees.

§ 630.1606 Administration of weather and safety leave.

(a) An agency must use the same minimum charge increments for weather and safety leave as it does for annual and sick leave under § 630.206.

(b) Employees may be granted weather and safety leave only for hours within the tour of duty established for purposes of charging annual and sick leave when absent. For full-time employees, that tour is the 40-hour basic workweek as defined in 5 CFR 610.102, the basic work requirement established for employees on a flexible or compressed work schedule as defined in 5 U.S.C. 6121(3), or an uncommon tour of duty under § 630.210.

(c) Employees may not receive weather and safety leave for hours during which they are on other preapproved leave (paid or unpaid) or paid time off. Agencies should not approve weather and safety leave for an employee who, in the agency's judgment, is cancelling preapproved leave or paid time off, or changing a regular day off in a flexible or compressed work schedule, for the primary purpose of obtaining weather and safety leave.

§ 630.1607 Records and reporting.

(a) *Record of placement on leave.* An agency must maintain an accurate record of the placement of an employee on weather and safety leave.

(b) *Reporting.* In agency data systems (including timekeeping systems) and in data reports submitted to OPM, an agency must record weather and safety leave under § 6329c and this subpart as a category of leave separate from other types of leave.

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DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 1

[REG-139633-08]

RIN 1545-BI18

Transactions Involving the Transfer of No Net Value

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Partial withdrawal of notice of proposed rulemaking.

SUMMARY: This document withdraws the remaining part of a notice of proposed rulemaking containing proposed regulations that would have required an exchange or distribution of net value for certain corporate formations and reorganizations to qualify for nonrecognition treatment under the Internal Revenue Code (Code). Other parts of the notice of proposed rulemaking were previously adopted as final regulations. The proposed regulations being withdrawn also addressed the treatment of certain distributions not qualifying for tax-free treatment under section 332 of the Code. The proposed regulations being withdrawn would have affected corporations and their shareholders.

DATES: As of July 13, 2017, the proposed revisions to § 1.332-2(b) and (e); the proposed addition of *Example 2* to § 1.332-2(e); the proposed additions of § 1.351-1(a)(1)(iii) and (a)(1)(iv); the proposed addition of *Example 4* to § 1.351-1(a)(2); the proposed amendments to § 1.368-1(a) and (b); the proposed addition of § 1.368-1(f); and the proposed revision to § 1.368-2(d)(1) in the notice of proposed rulemaking (REG-163314-03) that was published in the **Federal Register** (70 FR 11903) on March 10, 2005 are withdrawn.

FOR FURTHER INFORMATION CONTACT: Jean Broderick at (202) 317-6848 (not a toll-free number).

SUPPLEMENTARY INFORMATION:

Background

On March 10, 2005, the Department of the Treasury (the Treasury Department) and the IRS published a notice of proposed rulemaking (REG-163314-03) in the **Federal Register** (70 FR 11903) containing proposed regulations under sections 332, 351, and 368 (2005 Proposed Regulations). The 2005 Proposed Regulations generally would have provided that the non-recognition rules in subchapter C of chapter 1 of subtitle 1 of the Code do not apply unless there is an exchange (or, in the

case of section 332, a distribution) of net value (the net value requirement). The 2005 Proposed Regulations also provided that section 332 would apply only if the recipient corporation receives some payment for each class of stock it owns in the liquidating corporation. Finally, the 2005 Proposed Regulations provided guidance on the circumstances in which (and the extent to which) creditors of a corporation are treated as proprietors of the corporation in determining whether continuity of interest is preserved in a potential reorganization (Creditor Continuity of Interest).

On December 12, 2008, the Treasury Department and the IRS adopted the Creditor Continuity of Interest provisions of the 2005 Proposed Regulations as final regulations (TD 9434) published in the **Federal Register** (73 FR 75566). Minor portions of the 2005 Proposed Regulations that reflected statutory changes to sections 332 and 351 were adopted as final regulations as part of a Treasury decision adopting final regulations under sections 334(b)(1)(B) and 362(e)(1) (TD 9759), published in the **Federal Register** (81 FR 17066) on March 28, 2016. The Treasury Department and the IRS have decided to withdraw the remainder of the 2005 Proposed Regulations.

The Treasury Department and the IRS are of the view that current law is sufficient to ensure that the reorganization provisions and section 351 are used to accomplish readjustments of continuing interests in property held in modified corporate form. With respect to section 332, the holdings of *H.K. Porter Co. v. Commissioner*, 87 T.C. 689 (1986), *Spaulding Bakeries Inc. v. Commissioner*, 27 T.C. 684 (1957), *aff'd*, 252 F.2d 293 (2d Cir., 1958), *H.G. Hill Stores, Inc. v. Commissioner*, 44 B.T.A. 1182 (1941), Rev. Rul. 2003-125, 2003-2 C.B. 1243, Rev. Rul. 68-602, 1968-2 C.B. 135, Rev. Rul. 68-359, 1968-2 C.B. 161, and Rev. Rul. 59-296, 1959-2 C.B. 87, continue to reflect the position of the Treasury Department and the IRS.

Drafting Information

The principal author of this withdrawal notice is Jean Broderick of the Office of Associate Chief Counsel (Corporate). However, other personnel from the Treasury Department and the IRS participated in its development.

List of Subjects in 26 CFR Part 1

Income taxes, Reporting and recordkeeping requirements.