On page 2, lines 7 and 8, strike '', with priority given to eligible entities in southern border States,''.

SA 2686. Mr. CORNYN (for Mr. ROBERTS) proposed an amendment to the bill S. 4054, to reauthorize the United States Grain Standards Act, and for other purposes; as follows:

On page 5, strike lines 10 and 11 and insert the following:

(2) in subsection (a) (as so designated)—

(A) by striking ''such sums as are necessary'' and inserting ''$23,000,000''; and

(B) by striking ''1988 through 2020'' and inserting ''2021 through 2025''; and

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SA 2687. Mr. CORNYN (for Mr. SCHUMER) proposed an amendment to the bill H.R. 1830, to require the Secretary of the Treasury to mint coins in commemoration of the National Purple Heart Hall of Honor; as follows:

Strike all after the enacting clause and insert the following:

SECTION 1. SHORT TITLE.

This Act may be cited as the ''National Purple Heart Hall of Honor Commemorative Coin Act''.

SEC. 2. FINDINGS.

The Congress finds the following:

(1) The National Purple Heart Hall of Honor's mission is—

(A) to commemorate the extraordinary sacrifice of America's servicemen and servicewomen who were killed or wounded by enemy action; and

(B) to collect and preserve the stories of Purple Heart recipients from all branches of service and across generations to ensure that all recipients are represented.

(2) The National Purple Heart Hall of Honor first opened its doors on November 10, 2006, in New Windsor, NY.

(3) The National Purple Heart Hall of Honor is co-located with the New Windsor Cantonment State Historic Site.

(4) The National Purple Heart Hall of Honor is the first to recognize the estimated 1.8 million U.S. servicemembers wounded or killed in action representing recipients from the Civil War to the present day, serving as a living memorial to their sacrifice by sharing their stories through interviews, exhibits and the Roll of Honor, an interactive computer database of each recipient enrolled.

SEC. 3. COIN SPECIFICATIONS.

(a) DENOMINATIONS.—The Secretary of the Treasury (hereafter in this Act referred to as the ''Secretary'') shall mint and issue the following coins:

(1) $5 GOLD COINS.—Not more than 50,000 $5 coins, which shall—

(A) weigh 8.359 grams;

(B) have a diameter of 0.850 inches; and

(C) contain 90 percent gold and 10 percent alloy.

(2) $1 SILVER COINS.—Not more than 400,000 $1 coins, which shall—

(A) weigh 26.73 grams;

(B) have a diameter of 1.500 inches; and

(C) contain not less than 90 percent silver.

(3) HALF-DOLLAR CLAD COINS.—Not more than 750,000 half-dollar coins which shall—

(A) weigh 11.34 grams;

(B) have a diameter of 1.205 inches; and

(C) be minted to the specifications for half-dollar coins contained in section 5112(b) of title 31, United States Code.

(b) LEGAL TENDER.—The coins minted under this Act shall be legal tender, as provided in section 5103 of title 31, United States Code.

(c) NUMISMATIC ITEMS.—For purposes of section 5134 of title 31, United States Code, all coins minted under this Act shall be considered to be numismatic items.

SEC. 4. DESIGNS OF COINS.

(a) DESIGNS REQUIREMENTS.—

(1) IN GENERAL.—The designs of the coins minted under this Act shall be emblematic of the National Purple Heart Hall of Honor.

(2) DESIGNATION AND INSCRIPTIONS.—On each coin minted under this Act there shall be—

(A) a designation of the value of the coin;

(B) an inscription of the year ''2022''; and

(C) inscriptions of the words ''Liberty'', ''In God We Trust'', ''United States of America'', and ''E Pluribus Unum''.

(b) SELECTION.—The design for the coins minted under this Act shall be—

(1) selected by the Secretary after consultation with the Commission of Fine Arts and the National Purple Heart Hall of Honor, Inc.; and

(2) reviewed by the Citizens Coinage Advisory Committee.

SEC. 5. ISSUANCE OF COINS.

(a) QUALITY OF COINS.—Coins minted under this Act shall be issued in uncirculated and proof qualities.

(b) MINT FACILITY.—

(1) IN GENERAL.—Only 1 facility of the United States Mint may be used to strike any particular quality of the coins minted under this Act.

(2) USE OF THE UNITED STATES MINT AT WEST POINT, NEW YORK.—It is the sense of Congress that the coins minted under this Act should be struck at the United States Mint at West Point, New York, to the greatest extent possible.

(c) PERIOD FOR ISSUANCE.—The Secretary may issue coins minted under this Act only during the 1-year period beginning on January 1, 2022.

SEC. 6. SALE OF COINS.

(a) SALE PRICE.—The coins issued under this Act shall be sold by the Secretary at a price equal to the sum of—

(1) the face value of the coins;

(2) the surcharge provided in section 7(a) with respect to such coins; and

(3) the cost of designing and issuing the coins (including labor, materials, dies, use of machinery, overhead expenses, marketing, and shipping).

(b) BULK SALES.—The Secretary shall make bulk sales of the coins issued under this Act at a reasonable discount.

(c) PREPAID ORDERS.—

(1) IN GENERAL.—The Secretary shall accept prepaid orders for the coins minted under this Act before the issuance of such coins.

(2) DISCOUNT.—Sale prices with respect to prepaid orders under paragraph (1) shall be at a reasonable discount.

SEC. 7. SURCHARGES.

(a) IN GENERAL.—All sales of coins issued under this Act shall include a surcharge of—

(1) $35 per coin for the $5 coin;

(2) $10 per coin for the $1 coin; and

(3) $5 per coin for the half-dollar coin.

(b) DISTRIBUTION.—Subject to section 5134(f)(1) of title 31, United States Code, all surcharges received by the Secretary from the sale of coins issued under this Act shall be promptly paid by the Secretary to the National Purple Heart Hall of Honor, Inc., to support the mission of the National Purple Heart Hall of Honor, Inc., including capital improvements to the National Purple Heart Hall of Honor facilities.

(c) AUDITS.—The National Purple Heart Hall of Honor, Inc., shall be subject to the audit requirements of section 5134(f)(2) of title 31, United States Code, with regard to the amounts received under subsection (b).

(d) LIMITATION.—Notwithstanding subsection (a), no surcharge may be included with respect to the issuance under this Act of any coin during a calendar year if, as of the time of such issuance, the issuance of such coin would result in the number of commemorative coin programs issued during such year to exceed the annual 2 commemorative coin program issuance limitation under section 5112(m)(1) of title 31, United States Code (as in effect on the date of the enactment of this Act). The Secretary of the Treasury may issue guidance to carry out this subsection.

SEC. 8. FINANCIAL ASSURANCES. The Secretary shall take such actions as may be necessary to ensure that—

(1) minting and issuing coins under this Act result in no net cost to the Federal Government; and

(2) no funds, including applicable surcharges, are disbursed to any recipient designated in section 7(b) until the total cost of designing and issuing all of the coins authorized by this Act, including labor, materials, dies, use of machinery, overhead expenses, marketing, and shipping, is recovered by the United States Treasury, consistent with sections 5112(m) and 5134(f) of title 31, United States Code.

NOTICE OF PROPOSED RULEMAKING

U.S. CONGRESS,
OFFICE OF CONGRESSIONAL WORKPLACE RIGHTS,
Washington, DC, November 16, 2020.

Hon. CHARLES GRASSLEY,
President Pro Tempore, U.S. Senate, Washington, DC.

DEAR MR. PRESIDENT: Section 202(d) of the Congressional Accountability Act (CAA), 2 U.S.C. 1312(d), requires the Board of Directors of the Office of Congressional Workplace Rights (''the Board'') to issue regulations implementing Section 202 of the CAA relating to sections 101 through 105 of the Family and Medical Leave Act of 1993 (''FMLA''), 29 U.S.C. 2611 through 2615, made applicable to the legislative branch by the CAA. 2 U.S.C. 1312(a)(1).

Section 304(b)(1) of the CAA, 2 U.S.C. 1384(b)(1), requires that the Board issue a general notice of proposed rulemaking by transmitting ''such notice to the Speaker of the House of Representatives and the President Pro Tempore of the Senate for publication in the Congressional Record on the first day of which both Houses are in session following such transmittal.''

On behalf of the Board, I am hereby transmitting the attached notice of proposed rulemaking to the President Pro Tempore of the Senate. I request that this notice be published in the Senate section of the Congressional Record on the first day on which both Houses are in session following receipt of this transmittal. In compliance with Section 304(b)(2) of the CAA, a comment period of 30 days after the publication of this notice of proposed rulemaking is being provided before adoption of the rules.

Any inquiries regarding this notice should be addressed to Susan Tsui Grundmann, Executive Director of the Office of Congressional Workplace Rights, Room LA–200, 110 Second Street, S.E., Washington, D.C. 20540–1999; 202–724–9250.

Sincerely,

BARBARA CHILDS WALLACE,
Chair of the Board of Directors, Office of Congressional Workplace Rights.

Attachment.

NOTICE OF PROPOSED RULEMAKING FROM THE BOARD OF DIRECTORS OF THE OFFICE OF CONGRESSIONAL WORKPLACE RIGHTS AND REQUEST FOR COMMENTS FROM INTERESTED PARTIES.

MODIFICATIONS TO THE RIGHTS AND PROTECTIONS UNDER THE FAMILY AND MEDICAL LEAVE ACT OF 1993 (FMLA), NOTICE OF PROPOSED RULEMAKING, AS REQUIRED BY 2 U.S.C. 1312, CONGRESSIONAL ACCOUNTABILITY ACT OF 1995, AS AMENDED (CAA).

Background:

The purpose of this Notice is to propose modifications to the existing legislative branch FMLA substantive regulations under section 202 of the CAA (2 U.S.C. 1302 et seq.), which applies the rights and protections of sections 101 through 105 of the FMLA to covered employees. On December 20, 2019, Congress enacted the Federal Employee Paid Leave Act (subtitle A of title LXXVI of division F of the National Defense Authorization Act for Fiscal Year 2020, Public Law 116–92, December 20, 2019) (FEPLA). FEPLA amended the FMLA to allow most civilian Federal employees, including eligible employees in the legislative branch, to substitute up to 12 weeks of paid parental leave (PPL) for unpaid FMLA leave granted in connection with the birth of an employee's son or daughter or for the placement of a son or daughter with an employee for adoption or foster care. These modifications are necessary in order to bring existing legislative branch FMLA regulations (issued April 19, 1996) in line with these recent statutory changes.

What is the authority under the CAA for these proposed substantive regulations?

Section 202(a) of the CAA provides that the rights and protections established by sections 101 through 105 of the FMLA (29 U.S.C. 2611–2615) shall apply to covered employees in the legislative branch. Section 202(d)(1) and (2) of the CAA require that the Office of Congressional Workplace Rights Board of Directors (the Board), pursuant to section 304 of the CAA, issue regulations implementing the rights and protections of the FMLA and that those regulations shall be ''the same as substantive regulations promulgated by the Secretary of Labor to implement the statutory provisions referred to in the subsection (a) [of section 202 of the CAA] except insofar as the Board may determine, for good cause shown . . . that a modification of such regulations would be more effective for the implementation of the rights and protections under this section.'' The modifications to the regulations proposed by the Board herein are on all matters for which section 202 of the CAA requires regulations to be issued.

Are there currently FMLA regulations in effect?

Yes. On January 22, 1996, the OCWR Board adopted and submitted for publication in the Congressional Record the original FMLA final regulations implementing section 202 of the CAA, which applies certain rights and protections of the FMLA. On April 15, 1996, pursuant to section 304(c) of the CAA, the House and the Senate passed resolutions approving the final regulations. Specifically, the Senate passed S. Res. 242, providing for approval of the final regulations applicable to the Senate and the employees of the Senate; the House passed H. Res. 400 providing for approval of the final regulations applicable to the House and the employees of the House; and the House and the Senate passed S. Con. Res. 51, providing for approval of the final regulations applicable to employing offices and employees other than those offices and employees of the House and the Senate. After the Senate and the House passed these resolutions, the OCWR Board formally issued the FMLA regulations on April 19, 1996.

Note: On June 22, 2016, the Board adopted and submitted for publication in the Congressional Record additional amendments to its substantive regulations regarding the FMLA. 162 Cong. Rec. H4128–H4168, S4475–S4516 (daily ed. June 22, 2016). The 2016 amendments provide needed clarity on certain aspects of the FMLA. First, they add the military leave provisions of the FMLA, enacted under the National Defense Authorization Acts for Fiscal Years 2008 and 2010, Pub. L. 110–181, Div. A, Title V 585(a)(2), (3)(A)–(D) and Pub. L. 111–84, Div. A, Title V 565(a)(1)(B) and (4), which extend the availability of FMLA leave to family members of the Regular Armed Forces for qualifying exigencies arising out of a service member's deployment. They also define those deployments covered under these provisions, extend FMLA military caregiver leave for family members of current service members to include an injury or illness that existed prior to service and was aggravated in the line of duty on active duty, and extend FMLA military caregiver leave to family members of certain veterans with serious injuries or illnesses. Second, the amendments set forth the revised definition of ''spouse'' under the FMLA in light of the Department of Labor's February 25, 2015 Final Rule on the definition of spouse, and the United States Supreme Court's decision in *Obergefell, et al., v. Hodges*, 135 S. Ct. 2584 (2015), which requires a state to license a marriage between two people of the same sex and to recognize a marriage between two people of the same sex when their marriage was lawfully licensed and performed out-of-state. Because Congress has not acted on the Board's request for approval of these amendments, the Board will resubmit them for congressional approval when it submits its request for approval of its FEPLA amendments to its substantive FMLA regulations.

What does the FMLA provide?

In general, the FMLA provides eligible employees the right to take a total of 12 workweeks of unpaid leave during any 12–month period for specified family and medical reasons and for specified circumstances relating to a family member's military service. Employing offices in the legislative branch covered by FMLA provisions of the CAA must provide unpaid leave to eligible employees: (1) for the birth of a son or daughter and to care for the newborn son or daughter; or (2) for placement with the employee of a son or daughter for adoption or foster care; (3) to care for the employee's spouse, son, daughter, or parent with a serious health condition; (4) because of a serious health condition that makes the employee unable to perform the functions of the employee's job; (5) because of any qualifying exigency arising out of the fact that the employee's spouse, son, daughter, or parent is a military member on covered active duty status; and (6) to care for a covered servicemember with a serious injury or illness if the employee is the spouse, son, daughter, parent, or next of kin of the covered servicemember.

How do the FEPLA amendments affect the FMLA as applied to the legislative branch?

The FEPLA amendments to the FMLA include provisions expressly applicable to the legislative branch that both: (1) change the eligibility rules for employees to take protected leave for births or placements under the FMLA; and (2) permit employees to substitute PPL and other paid accrued leave for unpaid FMLA leave for such births or placements. The FEPLA amendments are summarized below.

For purposes of FMLA leave with respect to any birth or placement, all covered employees in the legislative branch are eligible for job-protected leave under the FMLA immediately upon commencement of employment. ''Covered employee'' means any employee of: (1) the House of Representatives; (2) the Senate; (3) the Office of Congressional Accessibility Services; (4) the Capitol Police; (5) the Congressional Budget Office; (6) the Office of the Architect of the Capitol; (7) the Office of the Attending Physician; (8) the Office of Congressional Workplace Rights; (9) the Office of Technology Assessment; (10) the Library of Congress; (11) the Stennis Center for Public Service; (12) the China Review Commission; (13) the Congressional Executive China Commission; or (14) the Helsinki Commission. *See* 2 U.S.C. 1301(a)(3).

Generally, FMLA leave is unpaid leave. However, under certain circumstances, the FEPLA amendments to the FMLA, as made applicable by the CAA, permit an eligible employee to choose to substitute PPL and accrued paid leave (such as paid annual, vacation, personal, family, medical, or sick leave) for unpaid FMLA leave. The term ''substitute'' means that paid leave will run concurrently with the unpaid FMLA leave. Accordingly, the employee receives pay during the period of otherwise unpaid FMLA leave. For leave taken for a birth or placement, an employee may elect to substitute for unpaid FMLA leave—(1) up to 12 workweeks of PPL in connection with the occurrence of a birth or placement; and (2) any additional paid annual, vacation, personal, family, medical, or sick leave provided by the employing office to such employee. Paid parental leave may be used only ''in connection with the birth or placement involved.'' *See* 2 U.S.C. 1312(d)(2)(A).

By law, unpaid FMLA leave is generally limited to a total of 12 weeks in any 12-month period. Accordingly, any use of unpaid FMLA leave for a purpose other than birth or placement may reduce an employee's ability to substitute PPL for a birth or placement. Thus, for example, if an employee has used 3 weeks of unpaid FMLA leave before the birth or placement, that employee's entitlement to 12 weeks of PPL may be reduced to 9 weeks.

Paid parental leave may be used no later than the end of the 12-month period beginning on the date of the birth or placement involved. There are no carryover provisions for unused PPL. An employee may not be paid for unused or expired PPL. Paid parental leave may not be considered annual leave for purposes of making a lump-sum payment for annual leave or for any other purpose.

FEPLA expressly provides that legislative branch employees using parental leave under the FMLA are not subject to the limitations that apply in the executive branch whereby employees may be required to agree in writing to work for the executive branch agency for at least 12 weeks after returning from leave. FEPLA also expressly provides that PPL applies to covered employees in the legislative branch without regard to the limitations that may apply in the executive branch, state and local governments, and private sector, whereby an employer may recover the premiums for maintaining coverage under a group health plan if the employee fails to return from PPL.

When are the Paid Parental Leave provisions of FEPLA effective?

FEPLA provides that the amendments to the CAA concerning PPL are not effective with respect to any birth or placement for adoption or foster care occurring before October 1, 2020. Thus, by law, PPL will be available to covered employees only in connection with a birth or placement that occurs on or after October 1, 2020.

How does FEPLA address active duty service in the National Guard or Reserves?

Effective December 20, 2019, FEPLA amended the general eligibility provisions of

the FMLA (as applied by the CAA) to provide that, for purposes of determining whether a covered employee has been employed by any employing office for at least 12 months and for at least 1,250 hours of service during the 12-month period immediately preceding the commencement of the leave, any service on active duty (as defined in 29 U.S.C. 2611(14)) by a member of the National Guard or Reserves shall be counted as time during which such employee has been employed by an employing office.

Why are these changes to the FMLA regulations necessary?

The CAA requires that the FMLA regulations applicable to the legislative branch and promulgated by the OCWR be the same as substantive regulations promulgated by the Secretary of Labor to implement FMLA title I, except insofar as the Board may determine, for good cause shown and stated together with the regulation, that a modification of such regulations would be more effective for the implementation of the rights and protections under the CAA. 2 U.S.C. 1312(e). FMLA title I covers employees of most private sector employers, state and local governments, and certain quasi-governmental entities, such as the U.S. Postal Service. These employees are governed by Department of Labor regulations at 29 C.F.R. 601 and part 825. The Secretary of Labor will not be promulgating FEPLA regulations because FEPLA does not extend PPL to private sector employees or other employees directly covered by FMLA title I. The Board has determined that these circumstances constitute good cause for modification of its substantive FMLA regulations in order to effectively implement FEPLA's rights and protections to Federal civilian employees in the legislative branch.

Procedural Summary:

How are substantive regulations proposed and approved under the CAA?

Pursuant to section 304 of the CAA, 2 U.S.C. 1384, the procedure for proposing and approving substantive regulations provides that:

(1) the Board of Directors proposes substantive regulations and publishes a general notice of proposed rulemaking in the Congressional Record;

(2) there be a comment period of at least 30 days after the date of publication of the general notice of proposed rulemaking;

(3) after consideration of comments by the Board of Directors, the Board adopts regulations and transmits notice of such action (together with the regulations and a recommendation regarding the method for congressional approval of the regulations) to the Speaker of the House and President Pro Tempore of the Senate for publication in the Congressional Record;

(4) there be committee referral and action on the proposed regulations by resolution in each House, concurrent resolution, or by joint resolution; and

(5) there be final publication of the approved regulations in the Congressional Record, with an effective date prescribed in the final publication. For more detail, please reference the text of 2 U.S.C. 1384.

What is the approach taken by these proposed substantive regulations?

The Board will follow the procedures as enumerated above and as required by statute. This Notice of Proposed Rulemaking is step (1) of the outline set forth above. The Board will review and respond to any comments received under step (2) of the outline above, and make any changes necessary to ensure that the regulations fully implement section 202 of the CAA and reflect the practices and policies particular to the legislative branch.

Are there substantive differences in the proposed regulations for the House of Representatives, the Senate and other employing offices?

No. The Board of Directors has identified no ''good cause'' for varying the text of these regulations. Therefore, if these regulations are approved as proposed, there will be one text applicable to all employing offices and covered employees. *See* 2 U.S.C. 1312(e)(2).

Are these proposed regulations also recommended by the OCWR's Executive Director, the Deputy Executive Director for the Senate, and the Deputy Executive Director for the House of Representatives?

As required by section 304(b)(1) of the CAA, 2 U.S.C. 1384(b)(1), these proposed regulations are also recommended by the Executive Director, the Deputy Executive Director for the Senate and the Deputy Executive Director for the House of Representatives.

Are these proposed substantive regulations available to persons with disabilities in an alternate format?

In addition to being posted on the OCWR's website (www.ocwr.gov), this Notice is also available in alternative formats. Requests for this Notice in an alternative format should be made to the Office of Congressional Workplace Rights, at 202–724–9250 (voice).

How long do I have to submit comments regarding the proposed regulations?

Comments regarding the OCWR's proposed regulations set forth in this Notice are invited for a period of thirty (30) days following the date of the appearance of this Notice in the Congressional Record.

How do I submit comments?

Submission of comments must be made in writing to the Executive Director, Office of Congressional Workplace Rights, 110 Second Street, S.E., Room LA–200, Washington, D.C. 20540–1999. It is requested, but not required, that an electronic version of any comments be provided via e-mail to: Alexander Ruvinsky, Alexander.Ruvinsky@ocwr.gov. Comments may also be submitted by facsimile to the Executive Director at 202–426–1913 (a non toll-free number). Those wishing to receive confirmation of the receipt of their comments are requested to provide a self-addressed, stamped post card with their submission.

Am I allowed to view copies of comments submitted by others?

Yes. Copies of submitted comments will be available for review on the OCWR's public website at www.ocwr.gov.

Summary:

The Congressional Accountability Act of 1995 (CAA), PL 104–1, was enacted into law on January 23, 1995. The CAA, as amended, applies the rights and protections of 13 federal labor and employment statutes to covered employees and employing offices within the legislative branch of the federal government. Section 202 of the CAA applies to employees covered by the CAA, the rights and protections established by sections 101 through 105 of the Family and Medical Leave Act of 1993 (FMLA), 29 U.S.C. 2611–2615. The above provisions of section 202 became effective on January 1, 1997. 2 U.S.C. 1312. The Board of Directors of the Office of Congressional Workplace Rights (OCWR) is now publishing proposed amended regulations to implement section 202 of the CAA, 2 U.S.C. 1301–1438, as applied to covered employees of the House of Representatives, the Senate, and certain congressional instrumentalities listed below.

The purpose of these amended regulations is to implement section 202 of the CAA. In this Notice of Proposed Rulemaking the Board proposes that virtually identical regulations be adopted for the Senate, the House of Representatives, and certain congressional instrumentalities. Accordingly:

(1) *Senate.* It is proposed that the amended regulations as described in this Notice be included in the body of regulations that shall apply to entities within the Senate, and this proposal regarding the Senate entities is recommended by the OCWR's Deputy Executive Director for the Senate.

(2) *House of Representatives.* It is further proposed that the amended regulations as described in this Notice be included in the body of regulations that shall apply to entities within the House of Representatives, and this proposal regarding the House of Representatives entities is recommended by the OCWR's Deputy Executive Director for the House of Representatives.

(3) *Certain congressional instrumentalities.* It is further proposed that the amended regulations as described in this Notice be included in the body of regulations that shall apply to the Office of Congressional Accessibility Services; the Capitol Police; the Congressional Budget Office; the Office of the Architect of the Capitol; the Office of the Attending Physician; the Office of Congressional Workplace Rights; the Office of Technology Assessment; the Library of Congress; the Stennis Center for Public Service; the China Review Commission; the Congressional Executive China Commission; and the Helsinki Commission; and this proposal regarding these congressional instrumentalities is recommended by the OCWR Executive Director.

Dates: Comments are due within 30 days after the date of publication of this Notice in the Congressional Record.

Section-by-Section Discussion of Proposed Changes to the FMLA Regulations

The following is a section-by-section discussion of the proposed revisions to the Board's substantive FMLA regulations that it adopted and submitted for publication in the Congressional Record on June 22, 2016. 162 Cong. Rec. H4128–H4168, S4475–4516 (daily ed. June 22, 2016). As noted above, because Congress has not acted on the Board's request for approval of its 2016 amendments, the Board will resubmit them for congressional approval when it submits its request for approval of its FEPLA amendments to its substantive FMLA regulations. Because the Board's 2016 amendments were adopted pursuant to the procedures for proposing and approving substantive regulations in section 304 of the CAA, 2 U.S.C. 1384, including providing a comment period of 60 days after publication of the proposed amendments in the Congressional Record, the Board is not soliciting additional comments on those adopted amendments, except as indicated below.

The Board's proposed amendments to its substantive FMLA regulations will provide more detail regarding the implementation of the statutory provisions summarized above. In order to implement FEPLA, the Board proposes to amend part 825 of its substantive regulations (Family and Medical Leave) by amending subparts A–C and adding a new subpart E (Paid Parental Leave). The Board is making changes in subparts A–C to establish how the FMLA provisions will now operate, since the appropriate substitution of paid parental leave for unpaid FMLA leave hinges on the standards for granting unpaid FMLA leave. Below we provide a section-by-section explanation of the proposed changes in subparts A–C and the proposed provisions in the new subpart E.

Part 825—Family and Medical Leave

825.1 Purpose and Scope.

The Board proposes to amend 825.1 to insert a new paragraph (c), which describes the

FEPLA amendments to the FMLA provisions of the CAA; states that the Board is amending its substantive FMLA regulations pursuant to the CAA rulemaking procedures set forth at sections 202(d) and 304 of the CAA; and further states that because the Secretary of Labor has not promulgated FEPLA regulations under FMLA title I, the Board has determined that these circumstances constitute good cause for modification of its substantive FMLA regulations in order to effectively implement FEPLA's rights and protections to Federal civilian employees in the legislative branch.

SUBPART A—COVERAGE UNDER THE FAMILY AND MEDICAL LEAVE ACT

825.100 The Family and Medical Leave Act.

The Board proposes to amend paragraph (b) of 825.100 to clarify that the authority of an employing office, disbursing or other financial office to recover the premiums for maintaining coverage under a group health plan is subject to 825.504, which provides that paid parental leave applies to covered employees in the legislative branch without regard to such limitations.

825.102 Definitions.

The Board proposes to amend 825.102 to: (1) add definitions of *birth*, *family and medical leave*, and *placement*; and (2) amend the definitions of *covered employee* and *eligible employee*. The new definition of *placement* clarifies that it refers to a *new* placement. Thus, the term excludes the adoption of a stepchild or a foster child who has already been a member of the employee's household and has an existing parent-child relationship with an adopting parent. This definition of *placement* is consistent with Department of Labor FMLA guidance at https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/2005_08_26_1A_FMLA.pdf. If a foster child is later adopted, the placement has already occurred; there is no new placement with a family that would warrant another use of FMLA leave for the same child. The proposed definitions of *birth* and *placement* clarify that the terms may refer to an anticipated birth or placement. This aligns with 825.120 and 825.121, which provide that unpaid FMLA leave based on birth or placement of a child may be used prior to the actual birth or placement. The revised definition of *family and medical leave* includes new language addressing leave to care for covered servicemembers.

The amended definition of *covered employee* includes any employee of the Library of Congress; the Stennis Center for Public Service; the China Review Commission; the Congressional Executive China Commission; or the Helsinki Commission. The amended definition of *eligible employee* adds a new paragraph (1), which clarifies that for purposes of births or placements, an eligible employee is any covered employee as defined in the CAA, irrespective of whether the employee meets the length of service requirements in paragraph (2). Paragraph (3) of that definition, which concerns eligibility for unpaid FMLA leave for reasons other than births or placements, is amended to clarify that, for purposes of determining whether a covered employee has been employed by any employing office for at least 12 months and for at least 1,250 hours of service during the 12-month period immediately preceding the commencement of the leave, any service on active duty by a member of the National Guard or Reserves shall be counted as time during which such employee has been employed by an employing office.

825.104 Covered employing offices.

The Board proposes to amend 825.104 to: (1) designate paragraphs (1)–(4) as paragraphs (a)–(d); and (2) amend paragraph (d) to include the Library of Congress; the Stennis Center for Public Service; the China Review Commission; the Congressional Executive China Commission; or the Helsinki Commission.

825.110 Eligible employee, general rule.

825.111 Eligible employee, birth or placement.

The Board proposes to: (1) amend 825.110 to create a general rule for eligibility for unpaid FMLA leave for reasons other than births or placements; and (2) add a new 825.111 to create a rule for eligibility for unpaid FMLA leave for births or placements. The amendments to 825.110 clarify that its provisions are subject to the exceptions set forth at 825.111; and they provide that for purposes of determining whether a covered employee has been employed by any employing office for at least 12 months and for at least 1,250 hours of service during the 12-month period immediately preceding the commencement of the leave, any service on active duty by a member of the National Guard or Reserves shall be counted as time during which such employee has been employed by an employing office.

The new 825.111 clarifies that, for purposes of births or placements, an eligible employee is any covered employee as defined in the CAA, irrespective of whether the employee meets the length or hours of service requirements in the general rule at 825.110.

825.112 Qualifying reasons for leave, general rule.

The Board proposes to amend subparagraph (a)(2) of 825.112 to clarify that employing offices are required to grant leave to eligible employees for the placement of a son or daughter with the employee for adoption or foster care, including the care of such son or daughter.

825.120 Leave for pregnancy or birth.

The Board proposes to amend subparagraph (a)(1) of 825.120 to clarify that FMLA leave for pregnancy or the birth of a son or daughter includes leave for the care of the newborn child. The Board proposes to amend subparagraph (a)(2) to add a sentence stating that leave for a birth or placement must be concluded by the expiration of the 12-month period beginning on the date of birth. Finally, the Board proposes to add a new subparagraph (7) stating that leave taken because of a birth includes leave necessary for an employee who is the birth mother to recover from giving birth, or for an employee who is the other parent to care for the birth mother during her recovery period, even if the employee is not involved in caring for the son or daughter during portions of that recovery period.

825.121 Leave for adoption or foster care.

The Board proposes to amend paragraph (a) of 825.121 to clarify that FMLA leave for placement with the employee of a son or daughter for adoption or foster care includes leave to care for the newly placed child.

SUBPART B—EMPLOYEE LEAVE ENTITLEMENTS UNDER THE FAMILY AND MEDICAL LEAVE ACT, AS MADE APPLICABLE BY THE CONGRESSIONAL ACCOUNTABILITY ACT

825.207 Substitution of paid leave, generally.

825.208 Substitution of paid leave—special rule for paid parental leave.

The Board proposes to: (1) amend 825.207 to create a general rule for substitution of paid leave for unpaid FMLA leave for reasons other than births or placements; and (2) add a new 825.208 to create a rule for substitution of paid leave for unpaid FMLA leave for births or placements. The amendments to 825.207 clarify that its provisions are subject to the exceptions set forth at 825.208.

The new paid leave substitution rules, which concern birth events and the placement of a child for adoption or foster care, are now addressed in a new 825.208. 825.208 provides that paid parental leave may be substituted for unpaid FMLA leave based on a birth or placement event as provided in the new subpart E.

Paragraph (b) of 825.208 addresses the possibility of substituting paid annual, vacation, personal, family, medical, or sick leave for unpaid FMLA leave based on a birth or placement. If an employee has not already (before birth or placement) begun a 12-month FMLA period (as established under 825.200), the employee could have no more than 12 weeks of unpaid FMLA leave between the date of birth or placement and the date that is 12 months after the date of birth or placement. Thus, using the 12 weeks of paid parental leave would completely replace any unpaid FMLA leave for birth or placement purposes, and there would be no opportunity to substitute paid annual, vacation, personal, family, medical, or sick leave. However, if an employee has a 12-month FMLA period in progress at the time of birth or placement, that 12-month FMLA period would end after birth or placement but before the date that is 12 months after the birth or placement. When that 12-month FMLA period ends, the employee will be eligible to start a new 12-month FMLA period, and the employee will be able to use up to 12 weeks of unpaid FMLA leave during that period. If that new FMLA period begins during the 12-month period following the birth or placement, it would be possible for the employee to use more than 12 weeks of unpaid FMLA leave for birth or placement purposes before the date that is 12 months after the date of birth or placement. In that case, a maximum of 12 weeks of paid parental leave may be substituted for unpaid FMLA leave taken in either FMLA period, since FEPLA provides for only 12 weeks of paid parental leave in connection with any given birth or placement. However, an employee would be able to substitute available paid annual, vacation, personal, family, medical, or sick leave, as appropriate, for any remaining unpaid FMLA leave.

Paragraph (c) of 825.208 sets forth various general rules related to an employee's entitlement to substitute paid leave. An employee is entitled to elect whether or not to substitute paid leave for unpaid FMLA leave, subject to applicable law and regulation. Thus, an employing office may not deny an employee's election to make a substitution permitted under this section. Nor may an employing office require an employee to substitute paid leave for FMLA leave without pay. Subparagraph (c)(4) adds a statement, not previously included in the FMLA regulations, indicating that an employee may request to use annual leave or sick leave without invoking family and medical leave, and, in that case, the agency exercises its normal authority with respect to approving or disapproving the timing of when the leave may be used. In general, an employing office has the right to deny the scheduling of an employee's leave requested outside of an FMLA request, but if the employee's scheduling of FMLA leave is approved, the employee's request to substitute annual leave for FMLA leave without pay may not be denied.

Paragraph (d) of 825.208 addresses an employee's obligation to generally give advance notice of the employee's election to substitute paid leave for unpaid FMLA leave. The general rule is that retroactive substitution is not allowed. However, subparagraphs (d)(2) through (d)(4) set forth limited exceptions. Paragraph (d)(4) addresses the retroactive substitution of paid parental leave and links to 825.505, which allows retroactive substitution only if an employee is physically or mentally incapacitated.

825.213 Employing office recovery of benefit costs.

The Board proposes to amend paragraph (a) of 825.213 to clarify that the authority of an employing office, disbursing or other financial office to recover the premiums for maintaining coverage under a group health plan is subject to 825.504, which provides that paid parental leave applies to covered employees in the legislative branch without regard to such limitations.

SUBPART C—EMPLOYEE AND EMPLOYING OFFICE RIGHTS AND OBLIGATIONS UNDER THE FMLA, AS MADE APPLICABLE BY THE CAA

825.300 Employing office notice requirements.

The Board proposes to amend subparagraph (c)(iii) of 825.300 to add a requirement that the employing office's rights and responsibilities notice to the employee include, where applicable, notice of the employee's right to substitute paid parental leave for unpaid FMLA leave for a birth or placement.

The Board also proposes to amend subparagraph (d)(6) of 825.300 to clarify that the employing office must notify the employee of the amount of leave counted against the employee's FMLA leave entitlement, and, if applicable, the employee's paid parental leave entitlement.

SUBPART D—ADMINISTRATIVE PROCESS

825.400 Administrative process, general rules.

The Board proposes to amend 825.400 to omit obsolete references to the OCWR's administrative dispute resolution procedures, which were significantly amended by the CAA of 1995 Reform Act of 2018, Pub. L. No. 115–397. The revised 825.400 refers to the Board's revised Procedural Rules, which apply to matters filed with the OCWR on or after June 19, 2019.

SUBPART E—PAID PARENTAL LEAVE

The Board proposes to amend part 825 of its substantive FMLA regulations to add a new subpart E.

825.500 Purpose, applicability, and employing office responsibilities.

Paragraph (a) of 825.500 addresses the purpose of the new subpart E.

Subparagraph (b)(1) of 825.500 provides that subpart E applies to employees to whom subpart B (Employee Leave Entitlements under the Family and Medical Leave Act, as made Applicable By The Congressional Accountability Act) applies. Subparagraph (b)(2) provides that the OCWR will defer to supplemental regulations on PPL issued by the Library of Congress pursuant to the authority in 29 USC 2617, provided those supplemental regulations are consistent with the regulations herein. Subparagraph (b)(3) clarifies that the PPL provisions of the FMLA apply to births or placements occurring on or after October 1, 2020.

Paragraph (c) of 825.500 clarifies that the head of an employing office is responsible for the proper administration of subpart E, including the responsibility of informing employees of their entitlements and obligations.

825.501 Definitions.

Paragraph (a) of 825.501 provides that the definitions in the FMLA regulations in subpart B are applicable in subpart E, except that, to the extent any definitions of terms have been further revised in paragraph (b), the provisions of that paragraph shall apply for purposes of subpart E.

Paragraph (b) provides definitions of additional terms used in subpart E—*employing office*, *child*, *paid parental leave*, and *unpaid FMLA leave*. The definition of *paid parental leave* makes clear that paid parental leave is a type of leave that is used when an employee has a ''parental'' role. A parent who does not maintain a continuing parental role with respect to a newly born or placed child would not be eligible for paid parental leave once the parental role has ended.

825.502 Leave entitlement.

825.502 sets forth various rules related to the entitlement to paid parental leave. Paragraph (a) provides that an employee may elect to substitute available paid parental leave for any unpaid FMLA leave granted based on the occurrence of a birth or placement.

Paragraph (b) of 825.502 states that the paid parental leave that is available for substitution is 12 administrative workweeks in connection with the birth or placement involved. In other words, an employee can receive up to 12 administrative workweeks of paid parental leave for each birth or placement event. Paid parental leave continues to be available only as long as the employee has a continuing parental role with respect to the newly born or placed child. Because paid parental leave is substituting for unpaid FMLA leave, use of paid parental leave is constrained by the use of unpaid FMLA leave, which is limited to 12 weeks in any 12-month FMLA period (as established under 825.200). Paragraph (b) explains that, with respect to FMLA leave under 825.200(a) that is limited to a total of 12 weeks in any 12-month period, any use of unpaid FMLA leave for a purpose other than birth or placement may affect an employee's ability to use the full 12 weeks of paid parental leave during the 12-month period following a birth or placement. In other words, an employee will be able to use the full amount of paid parental leave only to the extent that there are 12 weeks of available unpaid FMLA leave granted based on birth or placement. For example, if an employee uses 6 consecutive weeks of unpaid FMLA leave based on the employee's own serious health condition, the employee could only use 6 weeks of unpaid FMLA leave based on birth or placement (for which paid parental leave could be substituted) during the 12-month period that began when the employee commenced using unpaid FMLA leave based on the employee's serious health condition.

We note that the 12-week entitlement to paid parental leave under FEPLA is applied on a per-employee basis without regard to movements between different employing offices during the 12-month period following a birth or placement. As long as the employee is covered by the FMLA provisions of the CAA while serving in different employing offices, the employee would be limited to a total of 12 weeks of paid parental leave per qualifying birth or placement. However, if an employee has received paid parental leave benefits in connection with a given birth or placement under a different paid parental leave authority applicable to Federal employees (e.g., the paid parental leave benefit for executive branch employees in 5 USC 6382) and moves to a position covered by the title II paid parental leave authority during the 12-month period following birth or placement, there is no basis for limiting or offsetting title II paid parental leave benefits based on receipt of leave benefits under another authority.

Subparagraph (c)(1) of 825.502 provides that an employing office may not require an employee to use annual leave or sick leave for a birth or placement before allowing the employee to use paid parental leave. Subparagraph (c)(1) also clarifies that an employee may request to use annual leave or sick leave without invoking unpaid FMLA leave for a birth or placement under subpart B. As discussed earlier in connection with 825.208, if a request to use paid annual, vacation, personal, family, medical, or sick leave without invoking FMLA leave is granted by the employing office, an employee can preserve entitlement to use unpaid FMLA leave at another time and to substitute paid parental leave for that unpaid FMLA leave. If the request is granted, the employing office exercises its normal authority with respect to approving or disapproving the timing of when the leave may be used. Subparagraph (c)(2) clarifies that an employee with a seasonal work schedule may not use PPL during the off-season period designated by the employing office—the period during which the employee is scheduled to be released from work and placed in nonpay status. In other words, paid parental leave cannot be used as a basis for extending a seasonal employee's work season.

Paragraph (d) of 825.502 provides that, if an employee has any unused balance of paid parental leave remaining at the end of the 12-month period following the birth or placement involved, the entitlement to the unused leave expires at that time. The unused leave may not be rolled over for use in a future period, nor may a payment be made to the employee for unused paid parental leave that has expired. Paid parental leave may not be considered annual leave for purposes of making a lump-sum payment for annual leave or for any other purpose.

825.503 Pay during leave.

Paragraph (a) of 825.503 provides that the pay an employee receives when using paid parental leave shall be the same pay the employee would receive if the employee were using annual leave. In other words, agency payroll systems will apply the same rules they apply in determining what pay continues during annual leave.

Paragraph (b) provides that the pay received during paid parental leave may not include Sunday premium pay. This is consistent with the statutory bar in section 624 of the Treasury and General Government Appropriations Act, 1999 (Public Law 105–277, div. A, §101(h), October 21, 1998).

825.504 Work obligation.

Paragraph (a) of 825.504 clarifies that under FEPLA, legislative branch employees using PPL are not subject to the limitations that apply in the executive branch whereby employees may be required to agree in writing to work for the executive branch agency for at least 12 weeks after returning from leave.

Paragraph (b) clarifies that under FEPLA, PPL applies to covered employees in the legislative branch without regard to the limitations that may apply in the executive branch, state and local governments, and private sector, whereby an employer may recover the premiums for maintaining coverage under a group health plan if the employee fails to return from PPL.

825.505 Cases of employee incapacitation.

825.505 provides that the application of paid parental leave in cases where an employee is incapacitated at the time the use of paid parental leave would be permissible. Paragraph (a) allows the employee to retroactively use paid parental leave. This provision allows for the retroactive election to use paid parental leave under the FMLA if the employing office determines that an otherwise eligible employee who could have made an election during a past period to substitute paid parental leave was physically or mentally incapable of doing so during that past period. Upon this determination, the employing office must allow the employee, when no longer incapacitated, to make an election to substitute paid parental leave for applicable unpaid FMLA leave. The employee must make this election within 5 workdays of returning to work.

Paragraph (b) allows an employee's personal representative to elect, on behalf of the employee, to substitute paid parental leave for applicable unpaid FMLA leave (i.e., approved FMLA leave based on birth or placement of a child). If an employing office determines that an otherwise eligible employee is physically or mentally incapable of making an election to substitute paid parental leave, the employing office must, upon the request of the employee's personal representative, provide conditional approval of substitution of paid parental leave for applicable unpaid FMLA leave on a prospective basis.

825.506 Cases of multiple children born or placed in the same time period.

825.506 addresses the application of paid parental leave in cases in which an employee has multiple children newly born or placed in the same time period. Paragraph (a) provides that if an employee has multiple children born or placed on the same day, that event will be treated as a single event triggering a single entitlement of up to 12 weeks of paid parental leave during the 12-month period following the event.

Paragraph (b) provides that, if an employee has one or more births or placements during the 12-month period following the date of an earlier birth or placement, each subsequent birth or placement event will result in a 12-month period commencing on the date of birth or placement with its own 12-week limit. Any use of paid parental leave during a given 12-month period will count toward that period's 12-week limit. Thus, when such 12-month periods overlap, any use of paid parental leave during the overlap will count toward each affected 12-month period's 12-week limit. For example, if an employee has a child born on June 1 and another child placed for adoption on October 1 of the same year, each event would generate entitlement to substitute up to 12 weeks of paid parental leave during the separate 12-month periods beginning on the date of the birth and on the date of the placement. Those two 12-month periods would be June 1–May 31 and October 1–September 30, respectively. The overlap period for these two 12-month periods would be October 1–May 31. If the employee substitutes paid parental leave during that overlap period, that amount of paid parental leave would count towards both the 12-week limit associated with the birth event and the 12-week limit associated with the placement event.

825.507 Records and reports.

825.507 provides that an employing office must maintain an accurate record of an employee's usage of paid parental leave.

SUBPART G—EFFECT OF OTHER LAWS, EMPLOYING OFFICE PRACTICES, AND COLLECTIVE BARGAINING AGREEMENTS ON EMPLOYEE RIGHTS UNDER THE FMLA, AS MADE APPLICABLE BY THE CAA.

825.702 Interaction with anti-discrimination laws, as applied by section 201 of the CAA.

The Board proposes to amend paragraph (f) of 825.702 to delete the parenthetical phrase ''(and, therefore, not an ''eligible'' employee under FMLA, as made applicable by the CAA).'' It remains the case that under Title VII of the Civil Rights Act of 1964, as amended by the Pregnancy Discrimination Act, and as made applicable by the CAA, an employing office should provide the same benefits for women who are pregnant as the employing office provides to other employees with short-term disabilities, as stated in paragraph (f). However, as a result of FEPLA, an employee employed for less than 12 months is now an ''eligible'' employee for purposes of unpaid FMLA leave for births and placements. *See* 825.111.

REGULATIONS PROPOSED BY THE BOARD OF DIRECTORS OF THE OFFICE OF COMPLIANCE EXTENDING RIGHTS AND PROTECTIONS UNDER THE FAMILY AND MEDICAL ACT OF 1996, AS AMENDED

Part 825—Family and Medical Leave

825.1 Purpose and Scope.

SUBPART A—COVERAGE UNDER THE FAMILY AND MEDICAL LEAVE ACT, AS MADE APPLICABLE BY THE CONGRESSIONAL ACCOUNTABILITY ACT

825.100 The Family and Medical Leave Act.

825.101 Purpose of the FMLA.

825.102 Definitions.

825.103 [Reserved]

825.104 Covered employing offices.

825.105 [Reserved]

825.106 Joint employer coverage.

825.107–825.109 [Reserved]

825.110 Eligible employee, general rule.

825.111 Eligible employee, birth or placement.

825.112 Qualifying reasons for leave, general rule.

825.113 Serious health condition.

825.114 Inpatient care.

825.115 Continuing treatment.

825.116–825.118 [Reserved]

825.119 Leave for treatment of substance abuse.

825.120 Leave for pregnancy or birth.

825.121 Leave for adoption or foster care.

825.122 Definitions of covered servicemember, spouse, parent, son or daughter, next of kin of a covered servicemember, adoption, foster care, son or daughter on covered active duty or call to covered active duty status, son or daughter of a covered servicemember, and parent of a covered servicemember.

825.123 Unable to perform the functions of the position.

825.124 Needed to care for a family member or covered servicemember.

825.125 Definition of health care provider.

825.126 Leave because of a qualifying exigency.

825.127 Leave to care for a covered servicemember with a serious injury or illness (military caregiver leave).

SUBPART B—EMPLOYEE LEAVE ENTITLEMENTS UNDER THE FAMILY AND MEDICAL LEAVE ACT, AS MADE APPLICABLE BY THE CONGRESSIONAL ACCOUNTABILITY ACT

825.200 Amount of leave.

825.201 Leave to care for a parent.

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825.203 Scheduling of intermittent or reduced schedule leave.

825.204 Transfer of an employee to an alternative position during intermittent leave or reduced schedule leave.

825.205 Increments of FMLA leave for intermittent or reduced schedule leave.

825.206 Interaction with the FLSA.

825.207 Substitution of paid leave—leave for reasons other than birth or placement.

825.208 Substitution of paid leave—leave connected to birth or placement.

825.209 Maintenance of employee benefits.

825.210 Employee payment of group health benefit premiums.

825.211 Maintenance of benefits under multiemployer health plans.

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825.213 Employing office recovery of benefit costs.

825.214 Employee right to reinstatement.

825.215 Equivalent position.

825.216 Limitations on an employee's right to reinstatement.

825.217 Key employee, general rule.

825.218 Substantial and grievous economic injury.

825.219 Rights of a key employee.

825.220 Protection for employees who request leave or otherwise assert FMLA rights.

SUBPART C—EMPLOYEE AND EMPLOYING OFFICE RIGHTS AND OBLIGATIONS UNDER THE FMLA, AS MADE APPLICABLE BY THE CAA.

825.300 Employing office notice requirements.
825.301 Designation of FMLA leave.
825.302 Employee notice requirements for foreseeable FMLA leave.
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825.304 Employee failure to provide notice.
825.305 Certification, general rule.
825.306 Content of medical certification for leave taken because of an employee's own serious health condition or the serious health condition of a family member.
825.307 Authentication and clarification of medical certification for leave taken because of an employee's own serious health condition or the serious health condition of a family member; second and third opinions.
825.308 Recertifications for leave taken because of an employee's own serious health condition or the serious health condition of a family member.
825.309 Certification for leave taken because of a qualifying exigency.
825.310 Certification for leave taken to care for a covered servicemember (military caregiver leave).
825.311 Intent to return to work.
825.312 Fitness-for-duty certification.
825.313 Failure to provide certification.

SUBPART D—ADMINISTRATIVE PROCESS

825.400 Administrative process, general rules.
825.401–825.404 [Reserved]

SUBPART E—PAID PARENTAL LEAVE

825.500 Purpose, applicability, and employing office responsibilities.
825.501 Definitions.
825.502 Leave entitlement.
825.503 Pay during leave.
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825.505 Cases of employee incapacitation.
825.506 Cases of multiple children born or placed in the same time period.
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825.508 [Reserved]

SUBPART F—SPECIAL RULES APPLICABLE TO EMPLOYEES OF SCHOOLS

825.600 Special rules for school employees, definitions.
825.601 Special rules for school employees, limitations on intermittent leave.
825.602 Special rules for school employees, limitations on leave near the end of an academic term.
825.603 Special rules for school employees, duration of FMLA leave.
825.604 Special rules for school employees, restoration to an equivalent position.

SUBPART G—EFFECT OF OTHER LAWS, EMPLOYING OFFICE PRACTICES, AND COLLECTIVE BARGAINING AGREEMENTS ON EMPLOYEE RIGHTS UNDER THE FMLA, AS MADE APPLICABLE BY THE CAA

825.700 Interaction with employing office's policies.
825.701 [Reserved]
825.702 Interaction with anti-discrimination laws as applied by section 201 of the CAA.

SUBPART H—[Reserved]

FORMS

Form A: Certification of Health Care Provider for Employee's Serious Health Condition;
Form B: Certification of Health Care Provider for Family Member's Serious Health Condition;
Form C: Notice of Eligibility and Rights & Responsibilities;
Form D: Designation Notice to Employee of FMLA Leave;
Form E: Certification of Qualifying Exigency for Military Family Leave;
Form F: Certification for Serious Injury or Illness of Covered Servicemember for Military Family Leave;
Form G: Certification for Serious Injury or Illness of a Veteran for Military Caregiver Leave.
825.1 Purpose and scope.

(a) Section 202 of the Congressional Accountability Act (CAA) (2 U.S.C. 1312) applies the rights and protections of sections 101 through 105 of the Family and Medical Leave Act of 1993 (FMLA) (29 U.S.C. 2611–2615) to covered employees. (The term ''covered employee'' is defined in section 101(3) of the CAA (2 U.S.C. 1301(3)). *See* 825.102 of these regulations for that definition.) The purpose of this part is to set forth the regulations to carry out the provisions of section 202 of the CAA.

(b) These regulations are issued by the Board of Directors (Board) of the Office of Congressional Workplace Rights, pursuant to sections 202(d) and 304 of the CAA, which direct the Board to promulgate regulations implementing section 202 that are ''the same as substantive regulations promulgated by the Secretary of Labor to implement the statutory provisions referred to in subsection (a) [of section 202 of the CAA] except insofar as the Board may determine, for good cause shown . . . that a modification of such regulations would be more effective for the implementation of the rights and protections under this section.'' The regulations issued by the Board herein are on all matters for which section 202 of the CAA requires regulations to be issued. Specifically, it is the Board's considered judgment, based on the information available to it at the time of the promulgation of these regulations, that, with the exception of regulations adopted and set forth herein, there are no other ''substantive regulations promulgated by the Secretary of Labor to implement the statutory provisions referred to in subsection (a) [of section 202 of the CAA].''

(c) On December 20, 2019, Congress enacted the Federal Employee Paid Leave Act (subtitle A of title LXXVI of division F of the National Defense Authorization Act for Fiscal Year 2020, Public Law 116–92, December 20, 2019) (FEPLA). FEPLA amended the FMLA to allow most civilian Federal employees, including eligible employees in the legislative branch, to substitute up to 12 weeks of paid parental leave (PPL) for unpaid FMLA leave granted in connection with the birth of an employee's son or daughter or for the placement of a son or daughter with an employee for adoption or foster care.

In order to implement FEPLA in the legislative branch, the Board is amending its substantive FMLA regulations pursuant to the CAA rulemaking procedures set forth at sections 202(d) and 304 of the CAA. The Secretary of Labor has not promulgated FEPLA regulations, however, because FEPLA does not extend PPL to private sector employees or other employees directly covered by FMLA title I. The Board has determined that these circumstances constitute good cause for modification of its substantive FMLA regulations in order to effectively implement FEPLA's rights and protections to Federal civilian employees in the legislative branch.

(d) In promulgating these regulations, the Board has made certain technical and nomenclature changes to the regulations as promulgated by the Secretary. Such changes are intended to make the provisions adopted accord more naturally to situations in the legislative branch. However, by making these changes, the Board does not intend a substantive difference between these regulations and those of the Secretary from which they are derived. Moreover, such changes, in and of themselves, are not intended to constitute an interpretation of the regulation or of the statutory provisions of the CAA upon which they are based.

(e) Pursuant to section 304(b)(4) of the CAA, 2 U.S.C. 1384(b)(4), the Board of Directors is required to recommend to Congress a method of approval for these regulations. As the Board has adopted the same regulations for the Senate, the House of Representatives, and the other covered entities and facilities, it therefore recommends that the adopted regulations be approved by concurrent resolution of the Congress.

SUBPART A—COVERAGE UNDER THE FAMILY AND MEDICAL LEAVE ACT, AS MADE APPLICABLE BY THE CONGRESSIONAL ACCOUNTABILITY ACT

825.100 The Family and Medical Leave Act.

(a) The Family and Medical Leave Act of 1993 (FMLA), as made applicable by the Congressional Accountability Act (CAA), allows eligible employees of an employing office to take job-protected, unpaid leave, or to substitute appropriate paid leave if the employee has earned or accrued it, for up to a total of 12 workweeks in any 12 months (*See* 825.200(b)) because of the birth of a child and to care for the newborn child, because of the placement of a child with the employee for adoption or foster care, because the employee is needed to care for a family member (child, spouse, or parent) with a serious health condition, because the employee's own serious health condition makes the employee unable to perform the functions of his or her job, or because of any qualifying exigency arising out of the fact that the employee's spouse, son, daughter, or parent is a military member on active duty or call to covered active duty status (or has been notified of an impending call or order to covered active duty). In addition, eligible employees of a covered employing office may take job-protected, unpaid leave, or substitute appropriate paid leave if the employee has earned or accrued it, for up to a total of 26 workweeks in a single 12-month period to care for a covered servicemember with a serious injury or illness. In certain cases, FMLA leave may be taken on an intermittent basis rather than all at once, or the employee may work a part-time schedule.

(b) An employee on FMLA leave is also entitled to have health benefits maintained while on leave as if the employee had continued to work instead of taking the leave. If an employee was paying all or part of the premium payments prior to leave, the employee would continue to pay his or her share during the leave period. Subject to 825.504, the employing office or a disbursing or other financial office may recover its share only if the employee does not return to work for a reason other than the serious health condition of the employee or the employee's covered family member, the serious injury or illness of a covered servicemember, or another reason beyond the employee's control.

(c) An employee generally has a right to return to the same position or an equivalent position with equivalent pay, benefits, and working conditions at the conclusion of the leave. The taking of FMLA leave cannot result in the loss of any benefit that accrued prior to the start of the leave.

(d) The employing office generally has a right to advance notice from the employee. In addition, the employing office may require an employee to submit certification to substantiate that the leave is due to the serious health condition of the employee or the employee's covered family member, due to the serious injury or illness of a covered servicemember, or because of a qualifying exigency. Failure to comply with these requirements may result in a delay in the start of FMLA leave. Pursuant to a uniformly applied policy, the employing office may also require that an employee present a certification of fitness to return to work when the absence was caused by the employee's serious health condition (*See* 825.312 and 825.313)). The employing office may delay restoring the employee to employment without such certificate relating to the health condition which caused the employee's absence.

825.101 Purpose of the FMLA.

(a) FMLA is intended to allow employees to balance their work and family life by taking reasonable unpaid leave for medical reasons, for the birth or adoption of a child, for the care of a child, spouse, or parent who has a serious health condition, for the care of a covered servicemember with a serious injury or illness, or because of a qualifying exigency arising out of the fact that the employee's spouse, son, daughter, or parent is a military member on covered active duty or call to covered active duty status. The FMLA is intended to balance the demands of

the workplace with the needs of families, to promote the stability and economic security of families, and to promote national interests in preserving family integrity. It was intended that the FMLA accomplish these purposes in a manner that accommodates the legitimate interests of employing offices, and in a manner consistent with the Equal Protection Clause of the Fourteenth Amendment in minimizing the potential for employment discrimination on the basis of sex, while promoting equal employment opportunity for men and women.

(b) The FMLA was predicated on two fundamental concerns—the needs of the American workforce, and the development of high-performance organizations. Increasingly, America's children and elderly are dependent upon family members who must spend long hours at work. When a family emergency arises, requiring workers to attend to seriously-ill children or parents, or to newly-born or adopted infants, or even to their own serious illness, workers need reassurance that they will not be asked to choose between continuing their employment, and meeting their personal and family obligations or tending to vital needs at home.

(c) The FMLA is both intended and expected to benefit employing offices as well as their employees. A direct correlation exists between stability in the family and productivity in the workplace. FMLA will encourage the development of high-performance organizations. When workers can count on durable links to their workplace they are able to make their own full commitments to their jobs. The record of hearings on family and medical leave indicate the powerful productive advantages of stable workplace relationships, and the comparatively small costs of guaranteeing that those relationships will not be dissolved while workers attend to pressing family health obligations or their own serious illness.

825.102 Definitions.

For purposes of this part:

ADA means the Americans with Disabilities Act (42 U.S.C. 12101 et seq., as amended), as made applicable by the Congressional Accountability Act.

Birth means the delivery of a child. When the term ''birth'' under this subpart is used in connection with the use of leave before birth, it refers to an anticipated birth.

CAA means the Congressional Accountability Act of 1995 (Pub. Law 104–1, 109 Stat. 3, 2 U.S.C. 1301 et seq., as amended).

COBRA means the continuation coverage requirements of Title X of the Consolidated Omnibus Budget Reconciliation Act of 1986 (Pub. Law 99–272, title X, section 10002; 100 Stat. 227; 29 U.S.C. 1161–1168).

Contingency operation means a military operation that:

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

(2) Results in the call or order to, or retention on, active duty of members of the uniformed services under section 688, 12301(a), 12302, 12304, 12305, or 12406 of Title 10 of the United States Code, chapter 15 of Title 10 of the United States Code, or any other provision of law during a war or during a national emergency declared by the President or Congress. *See also* 825.126(a)(2).

Continuing treatment by a health care provider means any one of the following:

(1) *Incapacity and treatment.* A period of incapacity of more than three consecutive, full calendar days, and any subsequent treatment or period of incapacity relating to the same condition, that also involves:

(i) Treatment two or more times, within 30 days of the first day of incapacity, unless extenuating circumstances exist, by a health care provider, by a nurse under direct supervision of a health care provider, or by a provider of health care services (e.g., physical therapist) under orders of, or on referral by, a health care provider; or

(ii) Treatment by a health care provider on at least one occasion, which results in a regimen of continuing treatment under the supervision of the health care provider.

(iii) The requirement in paragraphs (i) and (ii) of this definition for treatment by a health care provider means an in-person visit to a health care provider. The first in-person treatment visit must take place within seven days of the first day of incapacity.

(iv) Whether additional treatment visits or a regimen of continuing treatment is necessary within the 30-day period shall be determined by the health care provider.

(v) The term ''extenuating circumstances'' in paragraph (i) means circumstances beyond the employee's control that prevent the follow-up visit from occurring as planned by the health care provider. Whether a given set of circumstances are extenuating depends on the facts. *See also* 825.115(a)(5).

(2) *Pregnancy or prenatal care.* Any period of incapacity due to pregnancy, or for prenatal care. 825.120.

(3) *Chronic conditions.* Any period of incapacity or treatment for such incapacity due to a chronic serious health condition. A chronic serious health condition is one which:

(i) Requires periodic visits (defined as at least twice a year) for treatment by a health care provider, or by a nurse under direct supervision of a health care provider;

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

(iii) May cause episodic rather than a continuing period of incapacity (e.g., asthma, diabetes, epilepsy, etc.).

(4) *Permanent or long-term conditions.* A period of incapacity which is permanent or long-term due to a condition for which treatment may not be effective. The employee or family member must be under the continuing supervision of, but need not be receiving active treatment by, a health care provider. Examples include Alzheimer's, a severe stroke, or the terminal stages of a disease.

(5) *Conditions requiring multiple treatments.* Any period of absence to receive multiple treatments (including any period of recovery therefrom) by a health care provider or by a provider of health care services under orders of, or on referral by, a health care provider, for:

(i) Restorative surgery after an accident or other injury; or

(ii) A condition that would likely result in a period of incapacity of more than three consecutive full calendar days in the absence of medical intervention or treatment, such as cancer (chemotherapy, radiation, etc.), severe arthritis (physical therapy), kidney disease (dialysis).

(6) Absences attributable to incapacity under paragraphs (2) or (3) of this definition qualify for FMLA leave even though the employee or the covered family member does not receive treatment from a health care provider during the absence, and even if the absence does not last more than three consecutive, full calendar days. For example, an employee with asthma may be unable to report for work due to the onset of an asthma attack or because the employee's health care provider has advised the employee to stay home when the pollen count exceeds a certain level. An employee who is pregnant may be unable to report to work because of severe morning sickness.

Covered active duty or call to covered active duty status means:

(1) In the case of a member of the Regular Armed Forces, duty during the deployment of the member with the Armed Forces to a foreign country; and,

(2) In the case of a member of the Reserve components of the Armed Forces, duty during the deployment of the member with the Armed Forces to a foreign country under a Federal call or order to active duty in support of a contingency operation pursuant to: Section 688 of Title 10 of the United States Code, which authorizes ordering to active duty retired members of the Regular Armed Forces and members of the retired Reserve who retired after completing at least 20 years of active service; Section 12301(a) of Title 10 of the United States Code, which authorizes ordering all reserve component members to active duty in the case of war or national emergency; Section 12302 of Title 10 of the United States Code, which authorizes ordering any unit or unassigned member of the Ready Reserve to active duty; Section 12304 of Title 10 of the United States Code, which authorizes ordering any unit or unassigned member of the Selected Reserve and certain members of the Individual Ready Reserve to active duty; Section 12305 of Title 10 of the United States Code, which authorizes the suspension of promotion, retirement or separation rules for certain Reserve components; Section 12406 of Title 10 of the United States Code, which authorizes calling the National Guard into Federal service in certain circumstances; chapter 15 of Title 10 of the United States Code, which authorizes calling the National Guard and state military into Federal service in the case of insurrections and national emergencies; or any other provision of law during a war or during a national emergency declared by the President or Congress so long as it is in support of a contingency operation. *See* 10 U.S.C. 101(a)(13)(B). *See also* 825.126(a).

Covered employee as defined in the CAA, means any employee of—(1) the House of Representatives; (2) the Senate; (3) the Office of Congressional Accessibility Services; (4) the Capitol Police; (5) the Congressional Budget Office; (6) the Office of the Architect of the Capitol; (7) the Office of the Attending Physician; (8) the Office of Congressional Workplace Rights; (9) the Library of Congress; (10) the Stennis Center for Public Service; (11) the Office of Technology Assessment; (12) the China Review Commission; (13) the Congressional Executive China Commission; or (14) the Helsinki Commission.

Covered servicemember means:

(1) A current member of the Armed Forces, including a member of the National Guard or Reserves, who is undergoing medical treatment, recuperation, or therapy, is otherwise in outpatient status, or is otherwise on the temporary disability retired list, for a serious injury or illness, or

(2) A covered veteran who is undergoing medical treatment, recuperation, or therapy for a serious injury or illness.

Covered veteran means an individual who was a member of the Armed Forces (including a member of the National Guard or Reserves), and was discharged or released under conditions other than dishonorable at any time during the five-year period prior to the first date the eligible employee takes FMLA leave to care for the covered veteran. *See* 825.127(b)(2).

Eligible employee as defined in the CAA, means:

(1) For purposes of leave under subparagraphs (a)(1) or (a)(2) of section 85.112 [or subsections (A) or (B) of section 102(a)(1) of the FMLA], a covered employee as defined in the CAA.

(2) For purposes of leave under subparagraphs (a)(3)–(6) of section 825.112 [or subsections (C)–(F) of section 102(a)(1) of the FMLA], a covered employee who has been employed for a total of at least 12 months in

any employing office on the date on which any FMLA leave is to commence, except that an employing office need not consider any period of previous employment that occurred more than seven years before the date of the most recent hiring of the employee, unless:

(i) The break in service is occasioned by the fulfillment of the employee's Uniformed Services Employment and Reemployment Rights Act (USERRA), 38 U.S.C. 4301, et seq., covered service obligation (the period of absence from work due to or necessitated by USERRA-covered service must be also counted in determining whether the employee has been employed for at least 12 months by any employing office, but this section does not provide any greater entitlement to the employee than would be available under the USERRA, as made applicable by the CAA); or

(ii) A written agreement, including a collective bargaining agreement, exists concerning the employing office's intention to rehire the employee after the break in service (e.g., for purposes of the employee furthering his or her education or for childrearing purposes); and

(3) Who, on the date on which any FMLA leave is to commence, has met the hours of service requirement by having been employed for at least 1,250 hours of service with an employing office during the previous 12-month period, *except that*:

(i) An employee returning from fulfilling his or her USERRA-covered service obligation shall be credited with the hours of service that would have been performed but for the period of absence from work due to or necessitated by USERRA-covered service in determining whether the employee met the hours of service requirement (accordingly, a person reemployed following absence from work due to or necessitated by USERRA-covered service has the hours that would have been worked for the employing office added to any hours actually worked during the previous 12-month period to meet the hours of service requirement);

(ii) To determine the hours that would have been worked during the period of absence from work due to or necessitated by USERRA-covered service, the employee's pre-service work schedule can generally be used for calculations; and

(iii) Any service on active duty (as defined in 29 U.S.C. 2611(14)) by a covered employee who is a member of the National Guard or Reserves shall be counted as time during which such employee has been employed in an employing office for purposes of paragraph (3) of this section.

Employ means to suffer or permit to work.

Employee means an employee as defined by the CAA and includes an applicant for employment and a former employee.

Employee employed in an instructional capacity. See the definition of *Teacher* in this section.

Employee of the Capitol Police means any member or officer of the Capitol Police.

Employee of the House of Representatives means an individual occupying a position the pay for which is disbursed by the Clerk of the House of Representatives, or another official designated by the House of Representatives, or any employment position in an entity that is paid with funds derived from the clerk-hire allowance of the House of Representatives but not any such individual employed by any entity listed in subparagraphs (3) through (9) under the definition of covered employee above.

Employee of the Office of the Architect of the Capitol means any employee of the Office of the Architect of the Capitol or the Botanic Garden.

Employee of the Senate means any employee whose pay is disbursed by the Secretary of the Senate, but not any such individual employed by any entity listed in subparagraphs (3) through (9) under the definition of covered employee above.

Employing Office, as defined by the CAA, means:

(1) The personal office of a Member of the House of Representatives or of a Senator;

(2) A committee of the House of Representatives or the Senate or a joint committee;

(3) Any other office headed by a person with the final authority to appoint, hire, discharge, and set the terms, conditions, or privileges of the employment of an employee of the House of Representatives or the Senate; or

(4) The Office of Congressional Accessibility Services, the United States Capitol Police, the Congressional Budget Office, the Office of the Architect of the Capitol, the Office of the Attending Physician, the Office of Congressional Workplace Rights, the Library of Congress, the Stennis Center for Public Service, the Office of Technology Assessment, the China Review Commission, the Congressional Executive China Commission, and the Helsinki Commission.

Employment benefits means all benefits provided or made available to employees by an employing office, including group life insurance, health insurance, disability insurance, sick leave, annual leave, educational benefits, and pensions, regardless of whether such benefits are provided by a practice or written policy of an employing office or through an employee benefit plan. The term does not include non-employment related obligations paid by employees through voluntary deductions such as supplemental insurance coverage. *See also* 825.209(a).

Family and medical leave means an employee's entitlement to 12 workweeks (or 26 workweeks in the case of leave under 825.127) of unpaid leave for certain family and medical needs, as prescribed under the FMLA, as made applicable by the CAA.

FLSA means the Fair Labor Standards Act (29 U.S.C. 201 et seq.), as made applicable by the CAA.

FMLA means the Family and Medical Leave Act of 1993, Public Law 103–3 (February 5, 1993), 107 Stat. 6 (29 U.S.C. 2601 et seq., as amended), as made applicable by the CAA.

Group health plan means the Federal Employees Health Benefits Program and any other plan of, or contributed to by, an employing office (including a self-insured plan) to provide health care (directly or otherwise) to the employing office's employees, former employees, or the families of such employees or former employees. For purposes of FMLA, as made applicable by the CAA, the term group health plan shall not include an insurance program providing health coverage under which employees purchase individual policies from insurers provided that:

(1) No contributions are made by the employing office;

(2) Participation in the program is completely voluntary for employees;

(3) The sole functions of the employing office with respect to the program are, without endorsing the program, to permit the insurer to publicize the program to employees, to collect premiums through payroll deductions and to remit them to the insurer;

(4) The employing office receives no consideration in the form of cash or otherwise in connection with the program, other than reasonable compensation, excluding any profit, for administrative services actually rendered in connection with payroll deduction; and,

(5) The premium charged with respect to such coverage does not increase in the event the employment relationship terminates.

Health care provider means:

(1) The FMLA, as made applicable by the CAA, defines health care provider as:

(i) A doctor of medicine or osteopathy who is authorized to practice medicine or surgery (as appropriate) by the State in which the doctor practices; or

(ii) Any other person determined by the Department of Labor to be capable of providing health care services.

(2) Others ''capable of providing health care services'' include only:

(i) Podiatrists, dentists, clinical psychologists, optometrists, and chiropractors (limited to treatment consisting of manual manipulation of the spine to correct a subluxation as demonstrated by X-ray to exist) authorized to practice in the State and performing within the scope of their practice as defined under State law;

(ii) Nurse practitioners, nurse-midwives and clinical social workers and physician assistants who are authorized to practice under State law and who are performing within the scope of their practice as defined under State law;

(iii) Christian Science practitioners listed with the First Church of Christ, Scientist in Boston, Massachusetts. Where an employee or family member is receiving treatment from a Christian Science practitioner, an employee may not object to any requirement from an employing office that the employee or family member submit to examination (though not treatment) to obtain a second or third certification from a health care provider other than a Christian Science practitioner except as otherwise provided under applicable State or local law or collective bargaining agreement;

(iv) Any health care provider from whom an employing office or a group health plan's benefits manager will accept certification of the existence of a serious health condition to substantiate a claim for benefits; and

(v) A health care provider listed above who practices in a country other than the United States, who is authorized to practice in accordance with the law of that country, and who is performing within the scope of his or her practice as defined under such law.

(3) The phrase ''authorized to practice in the State'' as used in this section means that the provider must be authorized to diagnose and treat physical or mental health conditions.

Incapable of self-care means that the individual requires active assistance or supervision to provide daily self-care in several of the ''activities of daily living'' (ADLs) or ''instrumental activities of daily living'' (IADLs). Activities of daily living include adaptive activities such as caring appropriately for one's grooming and hygiene, bathing, dressing and eating. Instrumental activities of daily living include cooking, cleaning, shopping, taking public transportation, paying bills, maintaining a residence, using telephones and directories, using a post office, etc.

Instructional employee: See the definition of *Teacher* in this section.

Intermittent leave means leave taken in separate periods of time due to a single illness or injury, rather than for one continuous period of time, and may include leave of periods from an hour or more to several weeks. Examples of intermittent leave would include leave taken on an occasional basis for medical appointments, or leave taken several days at a time spread over a period of six months, such as for chemotherapy.

Invitational travel authorization (ITA) or *Invitational travel order* (ITO) mean orders issued by the Armed Forces to a family member to join an injured or ill servicemember at his or her bedside. *See also* 825.310(e).

Key employee means a salaried FMLA-eligible employee who is among the highest paid

10 percent of all the employees employed by the employing office within 75 miles of the employee's worksite. *See also* 825.217.

Mental disability: See the definition of *Physical or mental disability* in this section.

Military caregiver leave means leave taken to care for a covered servicemember with a serious injury or illness under the Family and Medical Leave Act of 1993. *See also* 825.127.

Next of kin of a covered servicemember means the nearest blood relative other than the covered servicemember's spouse, parent, son, or daughter, in the following order of priority: blood relatives who have been granted legal custody of the covered servicemember by court decree or statutory provisions, brothers and sisters, grandparents, aunts and uncles, and first cousins, unless the covered servicemember has specifically designated in writing another blood relative as his or her nearest blood relative for purposes of military caregiver leave under the FMLA. When no such designation is made, and there are multiple family members with the same level of relationship to the covered servicemember, all such family members shall be considered the covered servicemember's next of kin and may take FMLA leave to provide care to the covered servicemember, either consecutively or simultaneously. When such designation has been made, the designated individual shall be deemed to be the covered servicemember's only next of kin. *See also* 825.127(d)(3).

Office of Congressional Workplace Rights means the independent office established in the legislative branch under section 301 of the CAA (2 U.S.C. 1381).

Outpatient status means, with respect to a covered servicemember who is a current member of the Armed Forces, the status of a member of the Armed Forces assigned to either a military medical treatment facility as an outpatient; or a unit established for the purpose of providing command and control of members of the Armed Forces receiving medical care as outpatients. *See also* 825.127(b)(1).

Parent means a biological, adoptive, step or foster father or mother or any other individual who stood in loco parentis to the employee when the employee was a son or daughter as defined below. This term does not include parents ''in law.''

Parent of a covered servicemember means a covered servicemember's biological, adoptive, step or foster father or mother, or any other individual who stood in loco parentis to the covered servicemember. This term does not include parents ''in law.'' *See also* 825.127(d)(2).

Physical or mental disability means a physical or mental impairment that substantially limits one or more of the major life activities of an individual. Regulations at 29 CFR part 1630, issued by the Equal Employment Opportunity Commission under the Americans with Disabilities Act (ADA), 42 U.S.C. 12101 et seq., as amended, provide guidance for these terms.

Placement means a new placement of a son or daughter with an employee for adoption or foster care. For example, this excludes the adoption of a stepchild or a foster child who has already been a member of the employee's household and has an existing parent-child relationship with an adopting parent. When the term ''placement'' is used under this subpart in connection with the use of leave before placement has occurred, it refers to a planned or anticipated placement.

Reduced leave schedule means a leave schedule that reduces the usual number of hours per workweek, or hours per workday, of an employee.

Reserve components of the Armed Forces, for purposes of qualifying exigency leave, include the Army National Guard of the United States, Army Reserve, Navy Reserve, Marine Corps Reserve, Air National Guard of the United States, Air Force Reserve, and Coast Guard Reserve, and retired members of the Regular Armed Forces or Reserves who are called up in support of a contingency operation. *See also* 825.126(a)(2)(i).

Secretary means the Secretary of Labor or authorized representative.

Serious health condition means an illness, injury, impairment, or physical or mental condition that involves inpatient care as defined in 825.114 or continuing treatment by a health care provider as defined in 825.115. Conditions for which cosmetic treatments are administered (such as most treatments for acne or plastic surgery) are not serious health conditions unless inpatient hospital care is required or unless complications develop. Restorative dental or plastic surgery after an injury or removal of cancerous growths are serious health conditions provided all the other conditions of this regulation are met. Mental illness or allergies may be serious health conditions, but only if all the conditions of 825.113 are met.

Serious injury or illness means:

(1) In the case of a current member of the Armed Forces, including a member of the National Guard or Reserves, an injury or illness that was incurred by the covered servicemember in the line of duty on active duty in the Armed Forces or that existed before the beginning of the member's active duty and was aggravated by service in the line of duty on active duty in the Armed Forces and that may render the servicemember medically unfit to perform the duties of the member's office, grade, rank, or rating; and

(2) In the case of a covered veteran, an injury or illness that was incurred by the member in the line of duty on active duty in the Armed Forces (or existed before the beginning of the member's active duty and was aggravated by service in the line of duty on active duty in the Armed Forces) and manifested itself before or after the member became a veteran, and is:

(i) A continuation of a serious injury or illness that was incurred or aggravated when the covered veteran was a member of the Armed Forces and rendered the servicemember unable to perform the duties of the servicemember's office, grade, rank, or rating; or

(ii) A physical or mental condition for which the covered veteran has received a U.S. Department of Veterans Affairs Service-Related Disability Rating (VASRD) of 50 percent or greater, and such VASRD rating is based, in whole or in part, on the condition precipitating the need for military caregiver leave; or

(iii) A physical or mental condition that substantially impairs the covered veteran's ability to secure or follow a substantially gainful occupation by reason of a disability or disabilities related to military service, or would do so absent treatment; or

(iv) An injury, including a psychological injury, on the basis of which the covered veteran has been enrolled in the Department of Veterans Affairs Program of Comprehensive Assistance for Family Caregivers. *See also* 825.127(c).

Son or daughter means a biological, adopted, or foster child, a stepchild, a legal ward, or a child of a person standing in loco parentis, who is either under age 18, or age 18 or older and ''incapable of self-care because of a mental or physical disability'' at the time that FMLA leave is to commence.

Son or daughter of a covered servicemember means a covered servicemember's biological, adopted, or foster child, stepchild, legal ward, or a child for whom the covered servicemember stood in loco parentis, and who is of any age. *See also* 825.127(d)(1).

Son or daughter on covered active duty or call to covered active duty status means the employee's biological, adopted, or foster child, stepchild, legal ward, or a child for whom the employee stood in loco parentis, who is on covered active duty or call to covered active duty status, and who is of any age. *See also* 825.126(a)(5).

Spouse means a husband or wife. For purposes of this definition, husband or wife refers to the other person with whom an individual entered into marriage as defined or recognized under state law for purposes of marriage in the State in which the marriage was entered into or, in the case of a marriage entered into outside of any State, if the marriage is valid in the place where entered into and could have been entered into in at least one State. This definition includes an individual in a same-sex or common law marriage that either:

(1) Was entered into in a State that recognizes such marriages; or

(2) If entered into outside of any State, is valid in the place where entered into and could have been entered into in at least one State.

Teacher (or employee employed in an instructional capacity, or instructional employee) means an employee employed principally in an instructional capacity by an educational agency or school whose principal function is to teach and instruct students in a class, a small group, or an individual setting, and includes athletic coaches, driving instructors, and special education assistants such as signers for the hearing impaired. The term does not include teacher assistants or aides who do not have as their principal function actual teaching or instructing, nor auxiliary personnel such as counselors, psychologists, curriculum specialists, cafeteria workers, maintenance workers, bus drivers, or other primarily noninstructional employees.

TRICARE is the health care program serving active duty servicemembers, National Guard and Reserve members, retirees, their families, survivors, and certain former spouses worldwide.

825.103 [Reserved]

825.104 Covered employing offices.

The FMLA, as made applicable by the CAA, covers all employing offices. As used in the CAA, the term employing office means:

(a) The personal office of a Member of the House of Representatives or of a Senator;

(b) A committee of the House of Representatives or the Senate or a joint committee;

(c) Any other office headed by a person with the final authority to appoint, hire, discharge, and set the terms, conditions, or privileges of the employment of an employee of the House of Representatives or the Senate; or

(d) The Office of Congressional Accessibility Services, the United States Capitol Police, the Congressional Budget Office, the Office of the Architect of the Capitol, the Office of the Attending Physician, the Office of Congressional Workplace Rights, the Library of Congress, the Stennis Center for Public Service, the China Review Commission, the Congressional Executive China Commission, the Helsinki Commission, and the Office of Technology Assessment.

825.105 [Reserved].

825.106 Joint employer coverage.

(a) Where two or more employing offices exercise some control over the work or working conditions of the employee, the employing offices may be joint employers under FMLA, as made applicable by the CAA. Where the employee performs work which simultaneously benefits two or more employing offices, or works for two or more employing offices at different times during the

workweek, a joint employment relationship generally will be considered to exist in situations such as:

(1) Where there is an arrangement between employing offices to share an employee's services or to interchange employees;

(2) Where one employing office acts directly or indirectly in the interest of the other employing office in relation to the employee; or

(3) Where the employing offices are not completely disassociated with respect to the employee's employment and may be deemed to share control of the employee, directly or indirectly, because one employing office controls, is controlled by, or is under common control with the other employing office.

(b) A determination of whether or not a joint employment relationship exists is not determined by the application of any single criterion, but rather the entire relationship is to be viewed in its totality. For example, joint employment will ordinarily be found to exist when:

(1) An employee, who is employed by an employing office other than the personal office of a Member of the House of Representatives or of a Senator, is under the actual direction and control of the Member of the House of Representatives or Senator; or

(2) Two or more employing offices employ an individual to work on common issues or other matters for both or all of them.

(c) When employing offices employ a covered employee jointly, they may designate one of themselves to be the primary employing office, and the other or others to be the secondary employing office(s). Such a designation shall be made by written notice to the covered employee.

(d) If an employing office is designated a primary employing office pursuant to paragraph (c) of this section, only that employing office is responsible for giving required notices to the covered employee, providing FMLA leave, and maintenance of health benefits. Job restoration is the primary responsibility of the primary employing office, and the secondary employing office(s) may, subject to the limitations in 825.216, be responsible for accepting the employee returning from FMLA leave.

(e) If employing offices employ an employee jointly, but fail to designate a primary employing office pursuant to paragraph (c) of this section, then all of these employing offices shall be jointly and severally liable for giving required notices to the employee, for providing FMLA leave, for assuring that health benefits are maintained, and for job restoration. The employee may give notice of need for FMLA leave, as described in 825.302 and 825.303, to whichever of these employing offices the employee chooses. If the employee makes a written request for restoration to one of these employing offices, that employing office shall be primarily responsible for job restoration, and the other employing office(s) may, subject to the limitations in 825.216, be responsible for accepting the employee returning from FMLA leave.

825.107 [Reserved]

825.108 [Reserved]

825.109 [Reserved]

825.110 Eligible employee, general rule.

(a) Subject to the exceptions provided in 825.111, an eligible employee is a covered employee of an employing office who:

(1) Has been employed by any employing office for at least 12 months, and

(2) Has been employed for at least 1,250 hours of service during the 12–month period immediately preceding the commencement of the leave.

(b) Any service on active duty (as defined in 29 U.S.C. 2611(14)) by a covered employee who is a member of the National Guard or Reserves shall be counted as time during which such employee has been employed in an employing office for purposes of paragraph (a)(1) and (2) of this section.

(c) The 12 months an employee must have been employed by any employing office need not be consecutive months, provided:

(1) Subject to the exceptions provided in paragraph (c)(2) of this section, employment periods prior to a break in service of seven years or more need not be counted in determining whether the employee has been employed by any employing office for at least 12 months.

(2) Employment periods preceding a break in service of more than seven years must be counted in determining whether the employee has been employed by any employing office for at least 12 months where:

(i) The employee's break in service is occasioned by the fulfillment of his or her Uniformed Services Employment and Reemployment Rights Act (USERRA), 38 U.S.C. 4301, et seq., covered service obligation. The period of absence from work due to or necessitated by USERRA-covered service must be also counted in determining whether the employee has been employed for at least 12 months by any employing office. However, this section does not provide any greater entitlement to the employee than would be available under the USERRA; or

(ii) A written agreement, including a collective bargaining agreement, exists concerning the employing office's intention to rehire the employee after the break in service (e.g., for purposes of the employee furthering his or her education or for childrearing purposes).

(3) If an employee worked for two or more employing offices sequentially, the time worked will be aggregated to determine whether it equals 12 months.

(4) If an employee is maintained on the payroll for any part of a week, including any periods of paid or unpaid leave (sick, vacation) during which other benefits or compensation are provided by the employing office (e.g., Federal Employees' Compensation, group health plan benefits, etc.), the week counts as a week of employment. For purposes of determining whether intermittent/occasional/casual employment qualifies as at least 12 months, 52 weeks is deemed to be equal to 12 months.

(5) Nothing in this section prevents employing offices from considering employment prior to a continuous break in service of more than seven years when determining whether an employee has met the 12-month employment requirement. However, if an employing office chooses to recognize such prior employment, the employing office must do so uniformly, with respect to all employees with similar breaks in service.

(d)(1) If an employee was employed by two or more employing offices, either sequentially or concurrently, the hours of service will be aggregated to determine whether the minimum of 1,250 hours has been reached.

(2) Except as provided in paragraph (c)(3) of this section, whether an employee has worked the minimum 1,250 hours of service is determined according to the principles established under the Fair Labor Standards Act (FLSA), as applied by section 203 of the CAA (2 U.S.C. 1313), for determining compensable hours of work. The determining factor is the number of hours an employee has worked for one or more employing offices as defined by the CAA. The determination is not limited by methods of recordkeeping, or by compensation agreements that do not accurately reflect all of the hours an employee has worked for or been in service to the employing office. Any accurate accounting of actual hours worked under the FLSA's principles, as made applicable by the CAA (2 U.S.C. 1313), may be used.

(3) An employee returning from USERRA-covered service shall be credited with the hours of service that would have been performed but for the period of absence from work due to or necessitated by USERRA-covered service in determining the employee's eligibility for FMLA-qualifying leave. Accordingly, a person reemployed following USERRA-covered service has the hours that would have been worked for the employing office added to any hours actually worked during the previous 12 month period to meet the hours of service requirement. In order to determine the hours that would have been worked during the period of absence from work due to or necessitated by USERRA-covered service, the employee's pre-service work schedule can generally be used for calculations.

(4) In the event an employing office does not maintain an accurate record of hours worked by an employee, including for employees who are exempt from the overtime requirements of the FLSA, as made applicable by the CAA and its regulations, the employing office has the burden of showing that the employee has not worked the requisite hours. An employing office must be able to clearly demonstrate, for example, that full time teachers (*See* 825.102 for definition) of an elementary or secondary school system, or institution of higher education, or other educational establishment or institution (who often work outside the classroom or at their homes) did not work 1,250 hours during the previous 12 months in order to claim that the teachers are not covered or eligible for FMLA leave.

(e) The determination of whether an employee meets the hours of service requirement for any employing office and has been employed by any employing office for a total of at least 12 months, must be made as of the date the FMLA leave is to start. An employee may be on non-FMLA leave at the time he or she meets the 12-month eligibility requirement, and in that event, any portion of the leave taken for an FMLA-qualifying reason after the employee meets the eligibility requirement would be FMLA leave. See 825.300(b) for rules governing the content of the eligibility notice given to employees.

(f) If, before beginning employment with an employing office, an employee had been employed by another employing office, the subsequent employing office may count against the employee's FMLA leave entitlement FMLA leave taken from the prior employing office, so long as the prior employing office properly designated the leave as FMLA under these regulations or other applicable requirements.

825.111 Eligible employee, birth or placement.

For purposes of leave under subparagraphs (a)(1) or (a)(2) of 825.112 [or subsections (A) or (B) of section 102(a)(1) of the FMLA]:

(a) an eligible employee is a covered employee of an employing office; and

(b) the eligibility requirements of section 825.110 shall not apply. *See also* 825.120–21.

825.112 Qualifying reasons for leave, general rule.

(a) Circumstances qualifying for leave. Employing offices covered by FMLA as made applicable by the CAA are required to grant leave to eligible employees:

(1) For birth of a son or daughter, and to care for the newborn child (*See* 825.120);

(2) For the placement of a son or daughter with the employee for adoption or foster care and the care of such son or daughter (*See* 825.121);

(3) To care for the employee's spouse, son, daughter, or parent with a serious health condition (*See* 825.113 and 825.122);

(4) Because of a serious health condition that makes the employee unable to perform the functions of the employee's job (*See* 825.113 and 825.123);

(5) Because of any qualifying exigency arising out of the fact that the employee's spouse, son, daughter, or parent is a military member on covered active duty (or has been notified of an impending call or order to covered active duty status) (*See* 825.122 and 825.126); and

(6) To care for a covered servicemember with a serious injury or illness if the employee is the spouse, son, daughter, parent, or next of kin of the covered servicemember (*See* 825.122 and 825.127).

(b) *Equal Application.* The right to take leave under FMLA, as made applicable by the CAA, applies equally to male and female employees. A father, as well as a mother, can take family leave for the birth, placement for adoption, or foster care of a child.

(c) *Active employee.* In situations where the employing office/employee relationship has been interrupted, such as an employee who has been on layoff, the employee must be recalled or otherwise be re-employed before being eligible for FMLA leave. Under such circumstances, an eligible employee is immediately entitled to further FMLA leave for a qualifying reason.

825.113 Serious health condition.

(a) For purposes of FMLA, *serious health condition entitling an employee to FMLA leave* means an illness, injury, impairment, or physical or mental condition that involves inpatient care as defined in 825.114 or continuing treatment by a health care provider as defined in 825.115.

(b) The term incapacity means inability to work, attend school or perform other regular daily activities due to the serious health condition, treatment therefore, or recovery therefrom.

(c) The term treatment includes (but is not limited to) examinations to determine if a serious health condition exists and evaluations of the condition. Treatment does not include routine physical examinations, eye examinations, or dental examinations. A regimen of continuing treatment includes, for example, a course of prescription medication (e.g., an antibiotic) or therapy requiring special equipment to resolve or alleviate the health condition (e.g., oxygen). A regimen of continuing treatment that includes the taking of over-the-counter medications such as aspirin, antihistamines, or salves; or bedrest, drinking fluids, exercise, and other similar activities that can be initiated without a visit to a health care provider, is not, by itself, sufficient to constitute a regimen of continuing treatment for purposes of FMLA leave.

(d) Conditions for which cosmetic treatments are administered (such as most treatments for acne or plastic surgery) are not serious health conditions unless inpatient hospital care is required or unless complications develop. Ordinarily, unless complications arise, the common cold, the flu, ear aches, upset stomach, minor ulcers, headaches other than migraine, routine dental or orthodontia problems, periodontal disease, etc., are examples of conditions that do not meet the definition of a serious health condition and do not qualify for FMLA leave. Restorative dental or plastic surgery after an injury or removal of cancerous growths are serious health conditions provided all the other conditions of this regulation are met. Mental illness or allergies may be serious health conditions, but only if all the conditions of this section are met.

825.114 Inpatient care.

Inpatient care means an overnight stay in a hospital, hospice, or residential medical care facility, including any period of incapacity as defined in 825.113(b), or any subsequent treatment in connection with such inpatient care.

825.115 Continuing treatment.

A serious health condition involving continuing treatment by a health care provider includes any one or more of the following:

(a) *Incapacity and treatment.* A period of incapacity of more than three consecutive, full calendar days, and any subsequent treatment or period of incapacity relating to the same condition, that also involves:

(1) Treatment two or more times, within 30 days of the first day of incapacity, unless extenuating circumstances exist, by a health care provider, by a nurse under direct supervision of a health care provider, or by a provider of health care services (e.g., physical therapist) under orders of, or on referral by, a health care provider; or

(2) Treatment by a health care provider on at least one occasion, which results in a regimen of continuing treatment under the supervision of the health care provider.

(3) The requirement in paragraphs (a)(1) and (2) of this section for treatment by a health care provider means an in-person visit to a health care provider. The first (or only) in-person treatment visit must take place within seven days of the first day of incapacity.

(4) Whether additional treatment visits or a regimen of continuing treatment is necessary within the 30-day period shall be determined by the health care provider.

(5) The term *extenuating circumstances* in paragraph (a)(1) of this section means circumstances beyond the employee's control that prevent the follow-up visit from occurring as planned by the health care provider. Whether a given set of circumstances are extenuating depends on the facts. For example, extenuating circumstances exist if a health care provider determines that a second in-person visit is needed within the 30-day period, but the health care provider does not have any available appointments during that time period.

(b) *Pregnancy or prenatal care.* Any period of incapacity due to pregnancy, or for prenatal care. See also 825.120.

(c) *Chronic conditions.* Any period of incapacity or treatment for such incapacity due to a chronic serious health condition. A chronic serious health condition is one which:

(1) Requires periodic visits (defined as at least twice a year) for treatment by a health care provider, or by a nurse under direct supervision of a health care provider;

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

(3) May cause episodic rather than a continuing period of incapacity (e.g., asthma, diabetes, epilepsy, etc.).

(d) *Permanent or long-term conditions.* A period of incapacity which is permanent or long-term due to a condition for which treatment may not be effective. The employee or family member must be under the continuing supervision of, but need not be receiving active treatment by, a health care provider. Examples include Alzheimer's, a severe stroke, or the terminal stages of a disease.

(e) *Conditions requiring multiple treatments.* Any period of absence to receive multiple treatments (including any period of recovery therefrom) by a health care provider or by a provider of health care services under orders of, or on referral by, a health care provider, for:

(1) Restorative surgery after an accident or other injury; or

(2) A condition that would likely result in a period of incapacity of more than three consecutive, full calendar days in the absence of medical intervention or treatment, such as cancer (chemotherapy, radiation, etc.), severe arthritis (physical therapy), or kidney disease (dialysis).

(f) Absences attributable to incapacity under paragraphs (b) or (c) of this section qualify for FMLA leave even though the employee or the covered family member does not receive treatment from a health care provider during the absence, and even if the absence does not last more than three consecutive, full calendar days. For example, an employee with asthma may be unable to report for work due to the onset of an asthma attack or because the employee's health care provider has advised the employee to stay home when the pollen count exceeds a certain level. An employee who is pregnant may be unable to report to work because of severe morning sickness.

825.116 [Reserved]

825.117 [Reserved]

825.118 [Reserved]

825.119 Leave for treatment of substance abuse.

(a) Substance abuse may be a serious health condition if the conditions of 825.113 through 825.115 are met. However, FMLA leave may only be taken for treatment for substance abuse by a health care provider or by a provider of health care services on referral by a health care provider. On the other hand, absence because of the employee's use of the substance, rather than for treatment, does not qualify for FMLA leave.

(b) Treatment for substance abuse does not prevent an employing office from taking employment action against an employee. The employing office may not take action against the employee because the employee has exercised his or her right to take FMLA leave for treatment. However, if the employing office has an established policy, applied in a non-discriminatory manner that has been communicated to all employees, that provides under certain circumstances an employee may be terminated for substance abuse, pursuant to that policy the employee may be terminated whether or not the employee is presently taking FMLA leave. An employee may also take FMLA leave to care for a covered family member who is receiving treatment for substance abuse. The employing office may not take action against an employee who is providing care for a covered family member receiving treatment for substance abuse.

825.120 Leave for pregnancy or birth.

(a) *General rules.* Eligible employees are entitled to FMLA leave for pregnancy or birth of a son or daughter and to care for the newborn child as follows:

(1) Both parents are entitled to FMLA leave for the birth of their child.

(2) Both parents are entitled to FMLA leave to be with the healthy newborn child (i.e., bonding time) during the 12-month period beginning on the date of birth. An employee's entitlement to FMLA leave for a birth expires at the end of the 12-month period beginning on the date of the birth. Leave for a birth must be concluded within this 12-month period. If the employing office permits bonding leave to be taken beyond this period, such leave will not qualify as FMLA leave. Under this section, both parents are entitled to FMLA leave even if the newborn does not have a serious health condition.

(3) Spouses who are eligible for FMLA leave and are employed by the same employing office may be limited to a combined total of 12 weeks of leave during any 12-month period if the leave is taken for birth of the employee's son or daughter or to care for the child after birth, for placement of a son or

daughter with the employee for adoption or foster care or to care for the child after placement, or to care for the employee's parent with a serious health condition. This limitation on the total weeks of leave applies to leave taken for the reasons specified as long as the spouses are employed by the same employing office. It would apply, for example, even though the spouses are employed at two different worksites of an employing office. On the other hand, if one spouse is ineligible for FMLA leave, the other spouse would be entitled to a full 12 weeks of FMLA leave. Where spouses both use a portion of the total 12-week FMLA leave entitlement for either the birth of a child, for placement for adoption or foster care, or to care for a parent, the spouses would each be entitled to the difference between the amount he or she has taken individually and 12 weeks for FMLA leave for other purposes. For example, if each spouse took six weeks of leave to care for a healthy, newborn child, each could use an additional six weeks due to his or her own serious health condition or to care for a child with a serious health condition.

(4) The expectant mother is entitled to FMLA leave for incapacity due to pregnancy, for prenatal care, or for her own serious health condition following the birth of the child. An expectant mother may take FMLA leave before the birth of the child for prenatal care or if her condition makes her unable to work. The expectant mother is entitled to leave for incapacity due to pregnancy even though she does not receive treatment from a health care provider during the absence, and even if the absence does not last for more than three consecutive calendar days.

(5) A spouse is entitled to FMLA leave if needed to care for a pregnant spouse who is incapacitated or if needed to care for her during her prenatal care, or if needed to care for her following the birth of a child if she has a serious health condition. *See* 825.124.

(6) Both parents are entitled to FMLA leave if needed to care for a child with a serious health condition if the requirements of 825.113 through 825.115 and 825.122 (d) are met. Thus, spouses may each take 12 weeks of FMLA leave if needed to care for their newborn child with a serious health condition, even if both are employed by the same employing office, provided they have not exhausted their entitlements during the applicable 12-month FMLA leave period.

(7) Leave taken because of the birth of a son or daughter of the employee includes leave necessary for an employee who is the birth mother to recover from giving birth, or for an employee who is the other parent to care for the birth mother during her recovery period, even if the employee is not involved in caring for the son or daughter during portions of that recovery period.

(b) *Intermittent and reduced schedule leave.* An eligible employee may use intermittent or reduced schedule leave after the birth to be with a healthy newborn child only if the employing office agrees. For example, an employing office and employee may agree to a part-time work schedule after the birth. If the employing office agrees to permit intermittent or reduced schedule leave for the birth of a child, the employing office may require the employee to transfer temporarily, during the period the intermittent or reduced leave schedule is required, to an available alternative position for which the employee is qualified and which better accommodates recurring periods of leave than does the employee's regular position. Transfer to an alternative position may require compliance with any applicable collective bargaining agreement and federal law (such as the Americans with Disabilities Act, as made applicable by the CAA). Transfer to an alternative position may include altering an existing job to better accommodate the employee's need for intermittent or reduced leave. The employing office's agreement is not required for intermittent leave required by the serious health condition of the expectant mother or newborn child. *See* 825.202–825.205 for general rules governing the use of intermittent and reduced schedule leave. *See* 825.121 for rules governing leave for adoption or foster care. *See* 825.601 for special rules applicable to instructional employees of schools.

825.121 Leave for adoption or foster care.

(a) *General rules.* Eligible employees are entitled to FMLA leave for placement with the employee of a son or daughter for adoption or foster care and to care for the newly placed child as follows as follows:

(1) Employees may take FMLA leave before the actual placement or adoption of a child if an absence from work is required for the placement for adoption or foster care to proceed. For example, the employee may be required to attend counseling sessions, appear in court, consult with his or her attorney or the doctor(s) representing the birth parent, submit to a physical examination, or travel to another country to complete an adoption. The source of an adopted child (e.g., whether from a licensed placement agency or otherwise) is not a factor in determining eligibility for leave for this purpose.

(2) An employee's entitlement to leave for adoption or foster care expires at the end of the 12-month period beginning on the date of the placement. If the employing office permits leave for adoption or foster care to be taken beyond this period, such leave will not qualify as FMLA leave. Under this section, the employee is entitled to FMLA leave even if the adopted or foster child does not have a serious health condition.

(3) Spouses who are eligible for FMLA leave and are employed by the same covered employing office may be limited to a combined total of 12 weeks of leave during any 12-month period if the leave is taken for the placement of the employee's son or daughter or to care for the child after placement, for the birth of the employee's son or daughter or to care for the child after birth, or to care for the employee's parent with a serious health condition. This limitation on the total weeks of leave applies to leave taken for the reasons specified as long as the spouses are employed by the same employing office. It would apply, for example, even though the spouses are employed at two different worksites of an employing office. On the other hand, if one spouse is ineligible for FMLA leave, the other spouse would be entitled to a full 12 weeks of FMLA leave. Where spouses both use a portion of the total 12-week FMLA leave entitlement for either the birth of a child, for placement for adoption or foster care, or to care for a parent, the spouses would each be entitled to the difference between the amount he or she has taken individually and 12 weeks for FMLA leave for other purposes. For example, if each spouse took six weeks of leave to care for a healthy, newly placed child, each could use an additional six weeks due to his or her own serious health condition or to care for a child with a serious health condition.

(4) An eligible employee is entitled to FMLA leave in order to care for an adopted or foster child with a serious health condition if the requirements of 825.113 through 825.115 and 825.122(d) are met. Thus, spouses may each take 12 weeks of FMLA leave if needed to care for an adopted or foster child with a serious health condition, even if both are employed by the same employing office, provided they have not exhausted their entitlements during the applicable 12-month FMLA leave period.

(b) *Use of intermittent and reduced schedule leave.* An eligible employee may use intermittent or reduced schedule leave after the placement of a healthy child for adoption or foster care only if the employing office agrees. Thus, for example, the employing office and employee may agree to a part-time work schedule after the placement for bonding purposes. If the employing office agrees to permit intermittent or reduced schedule leave for the placement for adoption or foster care, the employing office may require the employee to transfer temporarily, during the period the intermittent or reduced leave schedule is required, to an available alternative position for which the employee is qualified and which better accommodates recurring periods of leave than does the employee's regular position. Transfer to an alternative position may require compliance with any applicable collective bargaining agreement and federal law (such as the Americans with Disabilities Act, as made applicable by the CAA). Transfer to an alternative position may include altering an existing job to better accommodate the employee's need for intermittent or reduced leave. The employing office's agreement is not required for intermittent leave required by the serious health condition of the adopted or foster child. See 825.202—825.205 for general rules governing the use of intermittent and reduced schedule leave. *See* 825.120 for general rules governing leave for pregnancy and birth of a child. *See* 825.601 for special rules applicable to instructional employees of schools.

825.122 Definitions of covered service member, spouse, parent, son or daughter, next of kin of a covered service member, adoption, foster care, son or daughter on covered active duty or call to covered active duty status, son or daughter of a covered service member, and parent of a covered service member.

(a) *Covered service member* means:

(1) A current member of the Armed Forces, including a member of the National Guard or Reserves, who is undergoing medical treatment, recuperation or therapy, is otherwise in outpatient status, or is otherwise on the temporary disability retired list, for a serious injury or illness; or

(2) A covered veteran who is undergoing medical treatment, recuperation, or therapy for a serious injury or illness. Covered veteran means an individual who was a member of the Armed Forces (including a member of the National Guard or Reserves), and was discharged or released under conditions other than dishonorable at any time during the five-year period prior to the first date the eligible employee takes FMLA leave to care for the covered veteran. *See* 825.127(b)(2).

(b) *Spouse* means a husband or wife. For purposes of this definition, husband or wife refers to the other person with whom an individual entered into marriage as defined or recognized under state law for purposes of marriage in the State in which the marriage was entered into or, in the case of a marriage entered into outside of any State, if the marriage is valid in the place where entered into and could have been entered into in at least one State. This definition includes an individual in a same-sex or common law marriage that either:

(1) Was entered into in a State that recognizes such marriages; or

(2) If entered into outside of any State, is valid in the place where entered into and could have been entered into in at least one State.

(c) *Parent.* Parent means a biological, adoptive, step or foster father or mother, or

any other individual who stood in loco parentis to the employee when the employee was a son or daughter as defined in paragraph (d) of this section. This term does not include parents ''in law.''

(d) *Son or daughter*. For purposes of FMLA leave taken for birth or adoption, or to care for a family member with a serious health condition, son or daughter means a biological, adopted, or foster child, a stepchild, a legal ward, or a child of a person standing in loco parentis, who is either under age 18, or age 18 or older and ''incapable of self-care because of a mental or physical disability'' at the time that FMLA leave is to commence.

(1) *Incapable of self-care* means that the individual requires active assistance or supervision to provide daily self-care in three or more of the activities of daily living (ADLs) or instrumental activities of daily living (IADLs). Activities of daily living include adaptive activities such as caring appropriately for one's grooming and hygiene, bathing, dressing and eating. Instrumental activities of daily living include cooking, cleaning, shopping, taking public transportation, paying bills, maintaining a residence, using telephones and directories, using a post office, etc.

(2) *Physical or mental disability* means a physical or mental impairment that substantially limits one or more of the major life activities of an individual. Regulations at 29 CFR 1630.2(h), (i), and (j), issued by the Equal Employment Opportunity Commission under the Americans with Disabilities Act (ADA), 42 U.S.C. 12101 et seq., provide guidance for these terms.

(3) Persons who are ''in loco parentis'' include those with day-to-day responsibilities to care for and financially support a child, or, in the case of an employee, who had such responsibility for the employee when the employee was a child. A biological or legal relationship is not necessary.

(e) *Next of kin* of a covered servicemember means the nearest blood relative other than the covered servicemember's spouse, parent, son, or daughter, in the following order of priority: blood relatives who have been granted legal custody of the covered servicemember by court decree or statutory provisions, brothers and sisters, grandparents, aunts and uncles, and first cousins, unless the covered servicemember has specifically designated in writing another blood relative as his or her nearest blood relative for purposes of military caregiver leave under the FMLA. When no such designation is made, and there are multiple family members with the same level of relationship to the covered servicemember, all such family members shall be considered the covered servicemember's next of kin and may take FMLA leave to provide care to the covered servicemember, either consecutively or simultaneously. When such designation has been made, the designated individual shall be deemed to be the covered servicemember's only next of kin. *See* 825.127(d)(3).

(f) *Adoption* means legally and permanently assuming the responsibility of raising a child as one's own. The source of an adopted child (e.g., whether from a licensed placement agency or otherwise) is not a factor in determining eligibility for FMLA leave. *See* 825.121 for rules governing leave for adoption.

(g) *Foster care* means 24-hour care for children in substitution for, and away from, their parents or guardian. Such placement is made by or with the agreement of the State as a result of a voluntary agreement between the parent or guardian that the child be removed from the home, or pursuant to a judicial determination of the necessity for foster care, and involves agreement between the State and foster family that the foster family will take care of the child. Although foster care may be with relatives of the child, State action is involved in the removal of the child from parental custody. *See* 825.121 for rules governing leave for foster care.

(h) Son or daughter on covered active duty or call to covered active duty status means the employee's biological, adopted, or foster child, stepchild, legal ward, or a child for whom the employee stood in loco parentis, who is on covered active duty or call to covered active duty status, and who is of any age. *See* 825.126(a)(5).

(i) Son or daughter of a covered servicemember means the covered servicemember's biological, adopted, or foster child, stepchild, legal ward, or a child for whom the covered servicemember stood in loco parentis, and who is of any age. *See* 825.127(d)(1).

(j) *Parent of a covered servicemember* means a covered servicemember's biological, adoptive, step or foster father or mother, or any other individual who stood in loco parentis to the covered servicemember. This term does not include parents ''in law.'' *See* 825.127(d)(2).

(k) *Documenting relationships*. For purposes of confirmation of family relationship, the employing office may require the employee giving notice of the need for leave to provide reasonable documentation or statement of family relationship. This documentation may take the form of a simple statement from the employee, or a child's birth certificate, a court document, etc. The employing office is entitled to examine documentation such as a birth certificate, etc., but the employee is entitled to the return of the official document submitted for this purpose.

825.123 Unable to perform the functions of the position.

(a) *Definition*. An employee is unable to perform the functions of the position where the health care provider finds that the employee is unable to work at all or is unable to perform any one of the essential functions of the employee's position within the meaning of the Americans with Disabilities Act (ADA), as amended and made applicable by Section 201(a) of the CAA (2 U.S.C. 1311(a)(3)). An employee who must be absent from work to receive medical treatment for a serious health condition is considered to be unable to perform the essential functions of the position during the absence for treatment.

(b) *Statement of functions*. An employing office has the option, in requiring certification from a health care provider, to provide a statement of the essential functions of the employee's position for the health care provider to review. A sufficient medical certification must specify what functions of the employee's position the employee is unable to perform so that the employing office can then determine whether the employee is unable to perform one or more essential functions of the employee's position. For purposes of the FMLA, the essential functions of the employee's position are to be determined with reference to the position the employee held at the time notice is given or leave commenced, whichever is earlier. *See* 825.306.

825.124 Needed to care for a family member or covered servicemember.

(a) The medical certification provision that an employee is needed to care for a family member or covered servicemember encompasses both physical and psychological care. It includes situations where, for example, because of a serious health condition, the family member is unable to care for his or her own basic medical, hygienic, or nutritional needs or safety, or is unable to transport himself or herself to the doctor. The term also includes providing psychological comfort and reassurance which would be beneficial to a child, spouse or parent with a serious health condition who is receiving inpatient or home care.

(b) The term also includes situations where the employee may be needed to substitute for others who normally care for the family member or covered servicemember, or to make arrangements for changes in care, such as transfer to a nursing home. The employee need not be the only individual or family member available to care for the family member or covered servicemember.

(c) An employee's intermittent leave or a reduced leave schedule necessary to care for a family member or covered servicemember includes not only a situation where the condition of the family member or covered servicemember itself is intermittent, but also where the employee is only needed intermittently—such as where other care is normally available, or care responsibilities are shared with another member of the family or a third party. *See* 825.202–825.205 for rules governing the use of intermittent or reduced schedule leave.

825.125 Definition of health care provider.

(a) The FMLA, as made applicable by the CAA, defines *health care provider* as:

(1) A doctor of medicine or osteopathy who is authorized to practice medicine or surgery (as appropriate) by the State in which the doctor practices; or

(2) Any other person determined by the Office of Congressional Workplace Rights to be capable of providing health care services.

(3) In making a determination referred to in subparagraph (a)(2), and absent good cause shown to do otherwise, the Office of Congressional Workplace Rights will follow any determination made by the Department of Labor (under section 101(6)(B) of FMLA (29 U.S.C. 2611(6)(B))) that a person is capable of providing health care services, provided the determination by the Department of Labor was not made at the request of a person who was then a covered employee.

(b) Others capable of providing health care services include only:

(1) Podiatrists, dentists, clinical psychologists, optometrists, and chiropractors (limited to treatment consisting of manual manipulation of the spine to correct a subluxation as demonstrated by X-ray to exist) authorized to practice in the State and performing within the scope of their practice as defined under State law;

(2) Nurse practitioners, nurse-midwives, clinical social workers and physician assistants who are authorized to practice under State law and who are performing within the scope of their practice as defined under State law;

(3) Christian Science Practitioners listed with the First Church of Christ, Scientist in Boston, Massachusetts. Where an employee or family member is receiving treatment from a Christian Science practitioner, an employee may not object to any requirement from an employing office that the employee or family member submit to examination (though not treatment) to obtain a second or third certification from a health care provider other than a Christian Science practitioner except as otherwise provided under applicable State or local law or collective bargaining agreement;

(4) Any health care provider from whom an employing office or the employing office's group health plan's benefits manager will accept certification of the existence of a serious health condition to substantiate a claim for benefits; and

(5) A health care provider listed above who practices in a country other than the United States, who is authorized to practice in accordance with the law of that country, and who is performing within the scope of his or her practice as defined under such law.

(c) The phrase authorized to practice in the State as used in this section means that the

provider must be authorized to diagnose and treat physical or mental health conditions.

825.126 Leave because of a qualifying exigency.

(a) Eligible employees may take FMLA leave for a qualifying exigency while the employee's spouse, son, daughter, or parent (the military member or member) is on covered active duty or call to covered active duty status (or has been notified of an impending call or order to covered active duty).

(1) *Covered active duty or call to covered active duty status* in the case of a member of the Regular Armed Forces means duty during the deployment of the member with the Armed Forces to a foreign country. The active duty orders of a member of the Regular components of the Armed Forces will generally specify if the member is deployed to a foreign country.

(2) *Covered active duty or call to covered active duty status* in the case of a member of the Reserve components of the Armed Forces means duty during the deployment of the member with the Armed Forces to a foreign country under a Federal call or order to active duty in support of a contingency operation pursuant to: Section 688 of Title 10 of the United States Code, which authorizes ordering to active duty retired members of the Regular Armed Forces and members of the retired Reserve who retired after completing at least 20 years of active service; Section 12301(a) of Title 10 of the United States Code, which authorizes ordering all reserve component members to active duty in the case of war or national emergency; Section 12302 of Title 10 of the United States Code, which authorizes ordering any unit or unassigned member of the Ready Reserve to active duty; Section 12304 of Title 10 of the United States Code, which authorizes ordering any unit or unassigned member of the Selected Reserve and certain members of the Individual Ready Reserve to active duty; Section 12305 of Title 10 of the United States Code, which authorizes the suspension of promotion, retirement or separation rules for certain Reserve components; Section 12406 of Title 10 of the United States Code, which authorizes calling the National Guard into Federal service in certain circumstances; chapter 15 of Title 10 of the United States Code, which authorizes calling the National Guard and state military into Federal service in the case of insurrections and national emergencies; or any other provision of law during a war or during a national emergency declared by the President or Congress so long as it is in support of a contingency operation. *See* 10 U.S.C. 101(a)(13)(B).

(i) For purposes of covered active duty or call to covered active duty status, the Reserve components of the Armed Forces include the Army National Guard of the United States, Army Reserve, Navy Reserve, Marine Corps Reserve, Air National Guard of the United States, Air Force Reserve and Coast Guard Reserve, and retired members of the Regular Armed Forces or Reserves who are called up in support of a contingency operation pursuant to one of the provisions of law identified in paragraph (a)(2).

(ii) The active duty orders of a member of the Reserve components will generally specify if the military member is serving in support of a contingency operation by citation to the relevant section of Title 10 of the United States Code and/or by reference to the specific name of the contingency operation and will specify that the deployment is to a foreign country.

(3) *Deployment of the member with the Armed Forces to a foreign country* means deployment to areas outside of the United States, the District of Columbia, or any Territory or possession of the United States, including international waters.

(4) A call to covered active duty for purposes of leave taken because of a qualifying exigency refers to a Federal call to active duty. State calls to active duty are not covered unless under order of the President of the United States pursuant to one of the provisions of law identified in paragraph (a)(2) of this section.

(5) *Son or daughter on covered active duty or call to covered active duty status* means the employee's biological, adopted, or foster child, stepchild, legal ward, or a child for whom the employee stood in loco parentis, who is on covered active duty or call to covered active duty status, and who is of any age.

(b) An eligible employee may take FMLA leave for one or more of the following qualifying exigencies:

(1) *Short-notice deployment.* (i) To address any issue that arises from the fact that the military member is notified of an impending call or order to covered active duty seven or less calendar days prior to the date of deployment;

(ii) Leave taken for this purpose can be used for a period of seven calendar days beginning on the date the military member is notified of an impending call or order to covered active duty;

(2) *Military events and related activities.* (i) To attend any official ceremony, program, or event sponsored by the military that is related to the covered active duty or call to covered active duty status of the military member; and

(ii) To attend family support or assistance programs and informational briefings sponsored or promoted by the military, military service organizations, or the American Red Cross that are related to the covered active duty or call to covered active duty status of the military member;

(3) *Childcare and school activities.* For the purposes of leave for childcare and school activities listed in (i) through (iv) of this paragraph, a child of the military member must be the military member's biological, adopted, or foster child, stepchild, legal ward, or child for whom the military member stands in loco parentis, who is either under 18 years of age or 18 years of age or older and incapable of self-care because of a mental or physical disability at the time that FMLA leave is to commence. As with all instances of qualifying exigency leave, the military member must be the spouse, son, daughter, or parent of the employee requesting qualifying exigency leave.

(i) To arrange for alternative childcare for a child of the military member when the covered active duty or call to covered active duty status of the military member necessitates a change in the existing childcare arrangement;

(ii) To provide childcare for a child of the military member on an urgent, immediate need basis (but not on a routine, regular, or everyday basis) when the need to provide such care arises from the covered active duty or call to covered active duty status of the military member;

(iii) To enroll in or transfer to a new school or day care facility a child of the military member when enrollment or transfer is necessitated by the covered active duty or call to covered active duty status of the military member; and

(iv) To attend meetings with staff at a school or a daycare facility, such as meetings with school officials regarding disciplinary measures, parent-teacher conferences, or meetings with school counselors, for a child of the military member, when such meetings are necessary due to circumstances arising from the covered active duty or call to covered active duty status of the military member;

(4) *Financial and legal arrangements.* (i) To make or update financial or legal arrangements to address the military member's absence while on covered active duty or call to covered active duty status, such as preparing and executing financial and healthcare powers of attorney, transferring bank account signature authority, enrolling in the Defense Enrollment Eligibility Reporting System (DEERS), obtaining military identification cards, or preparing or updating a will or living trust; and

(ii) To act as the military member's representative before a federal, state, or local agency for purposes of obtaining, arranging, or appealing military service benefits while the military member is on covered active duty or call to covered active duty status, and for a period of 90 days following the termination of the military member's covered active duty status;

(5) *Counseling.* To attend counseling provided by someone other than a health care provider, for oneself, for the military member, or for the biological, adopted, or foster child, a stepchild, or a legal ward of the military member, or a child for whom the military member stands in loco parentis, who is either under age 18, or age 18 or older and incapable of self-care because of a mental or physical disability at the time that FMLA leave is to commence, provided that the need for counseling arises from the covered active duty or call to covered active duty status of the military member;

(6) *Rest and Recuperation.* (i) To spend time with the military member who is on short-term, temporary, Rest and Recuperation leave during the period of deployment;

(ii) Leave taken for this purpose can be used for a period of 15 calendar days beginning on the date the military member commences each instance of Rest and Recuperation leave;

(7) *Post-deployment activities.* (i) To attend arrival ceremonies, reintegration briefings and events, and any other official ceremony or program sponsored by the military for a period of 90 days following the termination of the military member's covered active duty status; and

(ii) To address issues that arise from the death of the military member while on covered active duty status, such as meeting and recovering the body of the military member, making funeral arrangements, and attending funeral services;

(8) *Parental care.* For purposes of leave for parental care listed in (i) through (iv) of this paragraph, the parent of the military member must be incapable of self-care and must be the military member's biological, adoptive, step, or foster father or mother, or any other individual who stood in loco parentis to the military member when the member was under 18 years of age. A parent who is incapable of self-care means that the parent requires active assistance or supervision to provide daily self-care in three or more of the activities of daily living or instrumental activities of daily living. Activities of daily living include adaptive activities such as caring appropriately for one's grooming and hygiene, bathing, dressing, and eating. Instrumental activities of daily living include cooking, cleaning, shopping, taking public transportation, paying bills, maintaining a residence, using telephones and directories, using a post office, etc. As with all instances of qualifying exigency leave, the military member must be the spouse, son, daughter, or parent of the employee requesting qualifying exigency leave.

(i) To arrange for alternative care for a parent of the military member when the parent is incapable of self-care and the covered active duty or call to covered active duty status of the military member necessitates a

change in the existing care arrangement for the parent;

(ii) To provide care for a parent of the military member on an urgent, immediate need basis (but not on a routine, regular, or everyday basis) when the parent is incapable of self-care and the need to provide such care arises from the covered active duty or call to covered active duty status of the military member;

(iii) To admit to or transfer to a care facility a parent of the military member when admittance or transfer is necessitated by the covered active duty or call to covered active duty status of the military member; and

(iv) To attend meetings with staff at a care facility, such as meetings with hospice or social service providers for a parent of the military member, when such meetings are necessary due to circumstances arising from the covered active duty or call to covered active duty status of the military member but not for routine or regular meetings;

(9) *Additional activities.* To address other events which arise out of the military member's covered active duty or call to covered active duty status provided that the employing office and employee agree that such leave shall qualify as an exigency, and agree to both the timing and duration of such leave.

825.127 Leave to care for a covered servicemember with a serious injury or illness (military caregiver leave).

(a) Eligible employees are entitled to FMLA leave to care for a covered servicemember with a serious illness or injury.

(b) Covered servicemember means:

(1) A current member of the Armed Forces, including a member of the National Guard or Reserves, who is undergoing medical treatment, recuperation, or therapy, is otherwise in outpatient status; or is otherwise on the temporary disability retired list, for a serious injury or illness. Outpatient status means the status of a member of the Armed Forces assigned to either a military medical treatment facility as an outpatient or a unit established for the purpose of providing command and control of members of the Armed Forces receiving medical care as outpatients.

(2) A covered veteran who is undergoing medical treatment, recuperation or therapy for a serious injury or illness. Covered veteran means an individual who was a member of the Armed Forces (including a member of the National Guard or Reserves), and was discharged or released under conditions other than dishonorable at any time during the five-year period prior to the first date the eligible employee takes FMLA leave to care for the covered veteran. An eligible employee must commence leave to care for a covered veteran within five years of the veteran's active duty service, but the single 12-month period described in paragraph (e)(1) of this section may extend beyond the five-year period.

(i) For an individual who was a member of the Armed Forces (including a member of the National Guard or Reserves) and who was discharged or released under conditions other than dishonorable prior to the effective date of this Final Rule, the period between October 28, 2009 and the effective date of this Final Rule shall not count towards the determination of the five-year period for covered veteran status.

(c) A serious injury or illness means:

(1) In the case of a current member of the Armed Forces, including a member of the National Guard or Reserves, means an injury or illness that was incurred by the covered servicemember in the line of duty on active duty in the Armed Forces or that existed before the beginning of the member's active duty and was aggravated by service in the line of duty on active duty in the Armed Forces, and that may render the member medically unfit to perform the duties of the member's office, grade, rank or rating; and,

(2) In the case of a covered veteran, means an injury or illness that was incurred by the member in the line of duty on active duty in the Armed Forces (or existed before the beginning of the member's active duty and was aggravated by service in the line of duty on active duty in the Armed Forces), and manifested itself before or after the member became a veteran, and is:

(i) A continuation of a serious injury or illness that was incurred or aggravated when the covered veteran was a member of the Armed Forces and rendered the servicemember unable to perform the duties of the servicemember's office, grade, rank, or rating; or

(ii) A physical or mental condition for which the covered veteran has received a U.S. Department of Veterans Affairs Service-Related Disability Rating (VASRD) of 50 percent or greater, and such VASRD rating is based, in whole or in part, on the condition precipitating the need for military caregiver leave; or

(iii) A physical or mental condition that substantially impairs the covered veteran's ability to secure or follow a substantially gainful occupation by reason of a disability or disabilities related to military service, or would do so absent treatment; or

(iv) An injury, including a psychological injury, on the basis of which the covered veteran has been enrolled in the Department of Veterans Affairs Program of Comprehensive Assistance for Family Caregivers.

(d) In order to care for a covered servicemember, an eligible employee must be the spouse, son, daughter, or parent, or next of kin of a covered servicemember.

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

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

(3) Next of kin of a covered servicemember means the nearest blood relative, other than the covered servicemember's spouse, parent, son, or daughter, in the following order of priority: blood relatives who have been granted legal custody of the servicemember by court decree or statutory provisions, brothers and sisters, grandparents, aunts and uncles, and first cousins, unless the covered servicemember has specifically designated in writing another blood relative as his or her nearest blood relative for purposes of military caregiver leave under the FMLA. When no such designation is made, and there are multiple family members with the same level of relationship to the covered servicemember, all such family members shall be considered the covered servicemember's next of kin and may take FMLA leave to provide care to the covered servicemember, either consecutively or simultaneously. When such designation has been made, the designated individual shall be deemed to be the covered servicemember's only next of kin. For example, if a covered servicemember has three siblings and has not designated a blood relative to provide care, all three siblings would be considered the covered servicemember's next of kin. Alternatively, where a covered servicemember has a sibling(s) and designates a cousin as his or her next of kin for FMLA purposes, then only the designated cousin is eligible as the covered servicemember's next of kin. An employing office is permitted to require an employee to provide confirmation of covered family relationship to the covered servicemember pursuant to 825.122(k).

(e) An eligible employee is entitled to 26 workweeks of leave to care for a covered servicemember with a serious injury or illness during a single 12-month period.

(1) The single 12-month period described in paragraph (e) of this section begins on the first day the eligible employee takes FMLA leave to care for a covered servicemember and ends 12 months after that date, regardless of the method used by the employing office to determine the employee's 12 workweeks of leave entitlement for other FMLA-qualifying reasons. If an eligible employee does not take all of his or her 26 workweeks of leave entitlement to care for a covered servicemember during this single 12-month period, the remaining part of his or her 26 workweeks of leave entitlement to care for the covered servicemember is forfeited.

(2) The leave entitlement described in paragraph (e) of this section is to be applied on a per-covered-servicemember, per-injury basis such that an eligible employee may be entitled to take more than one period of 26 workweeks of leave if the leave is to care for different covered servicemembers or to care for the same servicemember with a subsequent serious injury or illness, except that no more than 26 workweeks of leave may be taken within any single 12-month period. An eligible employee may take more than one period of 26 workweeks of leave to care for a covered servicemember with more than one serious injury or illness only when the serious injury or illness is a subsequent serious injury or illness. When an eligible employee takes leave to care for more than one covered servicemember or for a subsequent serious injury or illness of the same covered servicemember, and the single 12-month periods corresponding to the different military caregiver leave entitlements overlap, the employee is limited to taking no more than 26 workweeks of leave in each single 12-month period.

(3) An eligible employee is entitled to a combined total of 26 workweeks of leave for any FMLA-qualifying reason during the single 12-month period described in paragraph (e) of this section, provided that the employee is entitled to no more than 12 workweeks of leave for one or more of the following: because of the birth of a son or daughter of the employee and in order to care for such son or daughter; because of the placement of a son or daughter with the employee for adoption or foster care; in order to care for the spouse, son, daughter, or parent with a serious health condition; because of the employee's own serious health condition; or because of a qualifying exigency. Thus, for example, an eligible employee may, during the single 12-month period, take 16 workweeks of FMLA leave to care for a covered servicemember and 10 workweeks of FMLA leave to care for a newborn child. However, the employee may not take more than 12 weeks of FMLA leave to care for the newborn child during the single 12-month period, even if the employee takes fewer than 14 workweeks of FMLA leave to care for a covered servicemember.

(4) In all circumstances, including for leave taken to care for a covered servicemember, the employing office is responsible for designating leave, paid or unpaid, as FMLA-qualifying, and for giving notice of the designation to the employee as provided in 825.300. In the case of leave that qualifies as both leave to care for a covered servicemember and leave to care for a family member with a serious health condition during the single

12-month period described in paragraph (e) of this section, the employing office must designate such leave as leave to care for a covered servicemember in the first instance. Leave that qualifies as both leave to care for a covered servicemember and leave taken to care for a family member with a serious health condition during the single 12-month period described in paragraph (e) of this section must not be designated and counted as both leave to care for a covered servicemember and leave to care for a family member with a serious health condition. As is the case with leave taken for other qualifying reasons, employing offices may retroactively designate leave as leave to care for a covered servicemember pursuant to 825.301(d).

(f) Spouses who are eligible for FMLA leave and are employed by the same covered employing office may be limited to a combined total of 26 workweeks of leave during the single 12-month period described in paragraph (e) of this section if the leave is taken for birth of the employee's son or daughter or to care for the child after birth, for placement of a son or daughter with the employee for adoption or foster care, or to care for the child after placement, to care for the employee's parent with a serious health condition, or to care for a covered servicemember with a serious injury or illness. This limitation on the total weeks of leave applies to leave taken for the reasons specified as long as the spouses are employed by the same employing office. It would apply, for example, even though the spouses are employed at two different worksites. On the other hand, if one spouse is ineligible for FMLA leave, the other spouse would be entitled to a full 26 workweeks of FMLA leave.

SUBPART B—EMPLOYEE LEAVE ENTITLEMENTS UNDER THE FAMILY AND MEDICAL LEAVE ACT, AS MADE APPLICABLE BY THE CONGRESSIONAL ACCOUNTABILITY ACT

825.200 Amount of Leave.

(a) Except in the case of leave to care for a covered servicemember with a serious injury or illness, an eligible employee's FMLA leave entitlement is limited to a total of 12 workweeks of leave during any 12-month period for any one, or more, of the following reasons:

(1) The birth of the employee's son or daughter, and to care for the newborn child;

(2) The placement with the employee of a son or daughter for adoption or foster care, and to care for the newly placed child;

(3) To care for the employee's spouse, son, daughter, or parent with a serious health condition;

(4) Because of a serious health condition that makes the employee unable to perform one or more of the essential functions of his or her job; and

(5) Because of any qualifying exigency arising out of the fact that the employee's spouse, son, daughter, or parent is a military member on covered active duty status (or has been notified of an impending call or order to covered active duty).

(b) An employing office is permitted to choose any one of the following methods for determining the 12–month period in which the 12 weeks of leave entitlement described in paragraph (a) of this section occurs:

(1) The calendar year;

(2) Any fixed 12-month leave year, such as a fiscal year or a year starting on an employee's anniversary date;

(3) The 12-month period measured forward from the date any employee's first FMLA leave under paragraph (a) begins; or

(4) A ''rolling'' 12-month period measured backward from the date an employee uses any FMLA leave as described in paragraph (a).

(c) Under methods in paragraphs (b)(1) and (b)(2) of this section an employee would be entitled to up to 12 weeks of FMLA leave at any time in the fixed 12-month period selected. An employee could, therefore, take 12 weeks of leave at the end of the year and 12 weeks at the beginning of the following year. Under the method in paragraph (b)(3) of this section, an employee would be entitled to 12 weeks of leave during the year beginning on the first date FMLA leave is taken; the next 12-month period would begin the first time FMLA leave is taken after completion of any previous 12-month period. Under the method in paragraph (b)(4) of this section, the ''rolling'' 12-month period, each time an employee takes FMLA leave the remaining leave entitlement would be any balance of the 12 weeks which has not been used during the immediately preceding 12 months. For example, if an employee has taken eight weeks of leave during the past 12 months, an additional four weeks of leave could be taken. If an employee used four weeks beginning February 1, 2008, four weeks beginning June 1, 2008, and four weeks beginning December 1, 2008, the employee would not be entitled to any additional leave until February 1, 2009. However, beginning on February 1, 2009, the employee would again be eligible to take FMLA leave, recouping the right to take the leave in the same manner and amounts in which it was used in the previous year. Thus, the employee would recoup (and be entitled to use) one additional day of FMLA leave each day for four weeks, commencing February 1, 2009. The employee would also begin to recoup additional days beginning on June 1, 2009, and additional days beginning on December 1, 2009. Accordingly, employing offices using the rolling 12-month period may need to calculate whether the employee is entitled to take FMLA leave each time that leave is requested, and employees taking FMLA leave on such a basis may fall in and out of FMLA protection based on their FMLA usage in the prior 12 months. For example, in the example above, if the employee needs six weeks of leave for a serious health condition commencing February 1, 2009, only the first four weeks of the leave would be FMLA-protected.

(d)(1) Employing offices will be allowed to choose any one of the alternatives in paragraph (b) of this section for the leave entitlements described in paragraph (a) of this section provided the alternative chosen is applied consistently and uniformly to all employees. An employing office wishing to change to another alternative is required to give at least 60 days' notice to all employees, and the transition must take place in such a way that the employees retain the full benefit of 12 weeks of leave under whichever method affords the greatest benefit to the employee. Under no circumstances may a new method be implemented in order to avoid the CAA's FMLA leave requirements.

(2) [Reserved]

(e) If an employing office fails to select one of the options in paragraph (b) of this section for measuring the 12-month period for the leave entitlements described in paragraph (a), the option that provides the most beneficial outcome for the employee will be used. The employing office may subsequently select an option only by providing the 60-day notice to all employees of the option the employing office intends to implement. During the running of the 60-day period any other employee who needs FMLA leave may use the option providing the most beneficial outcome to that employee. At the conclusion of the 60-day period the employing office may implement the selected option.

(f) An eligible employee's FMLA leave entitlement is limited to a total of 26 workweeks of leave during a single 12-month period to care for a covered servicemember with a serious injury or illness. An employing office shall determine the single 12-month period in which the 26 weeks of leave entitlement described in this paragraph occurs using the 12-month period measured forward from the date an employee's first FMLA leave to care for the covered servicemember begins. *See* 825.127(e)(1).

(g) During the single 12-month period described in paragraph (f), an eligible employee's FMLA leave entitlement is limited to a combined total of 26 workweeks of FMLA leave for any qualifying reason. *See* 825.127(e)(3).

(h) For purposes of determining the amount of leave used by an employee, the fact that a holiday may occur within the week taken as FMLA leave has no effect; the week is counted as a week of FMLA leave. However, if an employee is using FMLA leave in increments of less than one week, the holiday will not count against the employee's FMLA entitlement unless the employee was otherwise scheduled and expected to work during the holiday. Similarly, if for some reason the employing office's business activity has temporarily ceased and employees generally are not expected to report for work for one or more weeks (e.g., a school closing two weeks for the Christmas/New Year holiday or the summer vacation or an employing office closing the office for repairs), the days the employing office's activities have ceased do not count against the employee's FMLA leave entitlement. Methods for determining an employee's 12-week leave entitlement are also described in 825.205.

(i)(1) If employing offices jointly employ an employee, and if they designate a primary employing office pursuant to 825.106(c), the primary employing office may choose any one of the alternatives in paragraph (b) of this section for measuring the 12-month period, provided that the alternative chosen is applied consistently and uniformly to all employees of the primary employing office including the jointly employed employee.

(2) If employing offices fail to designate a primary employing office pursuant to 825.106(c), an employee jointly employed by the employing offices may, by so notifying one of the employing offices, select that employing office to be the primary employing office of the employee for purposes of the application of paragraphs (d) and (e) of this section.

825.201 Leave to care for a parent.

(a) *General rule.* An eligible employee is entitled to FMLA leave if needed to care for the employee's parent with a serious health condition. Care for parents-in-law is not covered by the FMLA. *See* 825.122(c) for definition of parent.

(b) *Same employing office limitation.* Spouses who are eligible for FMLA leave and are employed by the same covered employing office may be limited to a combined total of 12 weeks of leave during any 12-month period if the leave is taken to care for the employee's parent with a serious health condition, for the birth of the employee's son or daughter or to care for the child after the birth, or for placement of a son or daughter with the employee for adoption or foster care or to care for the child after placement. This limitation on the total weeks of leave applies to leave taken for the reasons specified as long as the spouses are employed by the same employing office. It would apply, for example, even though the spouses are employed at two different worksites of an employing office. On the other hand, if one spouse is ineligible for FMLA leave, the other spouse would be entitled to a full 12 weeks of FMLA leave. Where the spouses both use a portion of the

total 12-week FMLA leave entitlement for either the birth of a child, for placement for adoption or foster care, or to care for a parent, the spouses would each be entitled to the difference between the amount he or she has taken individually and 12 weeks for FMLA leave for other purposes. For example, if each spouse took six weeks of leave to care for a parent, each could use an additional six weeks due to his or her own serious health condition or to care for a child with a serious health condition. *See* also 825.127(d).

825.202 Intermittent leave or reduced leave schedule.

(a) *Definition*. FMLA leave may be taken intermittently or on a reduced leave schedule under certain circumstances. Intermittent leave is FMLA leave taken in separate blocks of time due to a single qualifying reason. A reduced leave schedule is a leave schedule that reduces an employee's usual number of working hours per workweek, or hours per workday. A reduced leave schedule is a change in the employee's schedule for a period of time, normally from full-time to part-time.

(b) *Medical necessity*. For intermittent leave or leave on a reduced leave schedule taken because of one's own serious health condition, to care for a spouse, parent, son, or daughter with a serious health condition, or to care for a covered servicemember with a serious injury or illness, there must be a medical need for leave and it must be that such medical need can be best accommodated through an intermittent or reduced leave schedule. The treatment regimen and other information described in the certification of a serious health condition and in the certification of a serious injury or illness, if required by the employing office, addresses the medical necessity of intermittent leave or leave on a reduced leave schedule. *See* 825.306, 825.310. Leave may be taken intermittently or on a reduced leave schedule when medically necessary for planned and/or unanticipated medical treatment of a serious health condition or of a covered servicemember's serious injury or illness, or for recovery from treatment or recovery from a serious health condition or a covered servicemember's serious injury or illness. It may also be taken to provide care or psychological comfort to a covered family member with a serious health condition or a covered servicemember with a serious injury or illness.

(1) Intermittent leave may be taken for a serious health condition of a spouse, parent, son, or daughter, for the employee's own serious health condition, or a serious injury or illness of a covered servicemember which requires treatment by a health care provider periodically, rather than for one continuous period of time, and may include leave of periods from an hour or more to several weeks. Examples of intermittent leave would include leave taken on an occasional basis for medical appointments, or leave taken several days at a time spread over a period of six months, such as for chemotherapy. A pregnant employee may take leave intermittently for prenatal examinations or for her own condition, such as for periods of severe morning sickness. An example of an employee taking leave on a reduced leave schedule is an employee who is recovering from a serious health condition and is not strong enough to work a full-time schedule.

(2) Intermittent or reduced schedule leave may be taken for absences where the employee or family member is incapacitated or unable to perform the essential functions of the position because of a chronic serious health condition or a serious injury or illness of a covered servicemember, even if he or she does not receive treatment by a health care provider. *See* 825.113 and 825.127.

(c) *Birth or placement*. When leave is taken after the birth of a healthy child or placement of a healthy child for adoption or foster care, an employee may take leave intermittently or on a reduced leave schedule only if the employing office agrees. Such a schedule reduction might occur, for example, where an employee, with the employing office's agreement, works part-time after the birth of a child, or takes leave in several segments. The employing office's agreement is not required, however, for leave during which the expectant mother has a serious health condition in connection with the birth of her child or if the newborn child has a serious health condition. *See* 825.204 for rules governing transfer to an alternative position that better accommodates intermittent leave. *See* also 825.120 (pregnancy) and 825.121 (adoption and foster care).

(d) *Qualifying exigency*. Leave due to a qualifying exigency may be taken on an intermittent or reduced leave schedule basis.

825.203 Scheduling of intermittent or reduced schedule leave.

Eligible employees may take FMLA leave on an intermittent or reduced schedule basis when medically necessary due to the serious health condition of a covered family member or the employee or the serious injury or illness of a covered servicemember. *See* 825.202. Eligible employees may also take FMLA leave on an intermittent or reduced schedule basis when necessary because of a qualifying exigency. If an employee needs leave intermittently or on a reduced leave schedule for planned medical treatment, then the employee must make a reasonable effort to schedule the treatment so as not to disrupt unduly the employing office's operations.

825.204 Transfer of an employee to an alternative position during intermittent leave or reduced schedule leave.

(a) *Transfer or reassignment*. If an employee needs intermittent leave or leave on a reduced leave schedule that is foreseeable based on planned medical treatment for the employee, a family member, or a covered servicemember, including during a period of recovery from one's own serious health condition, a serious health condition of a spouse, parent, son, or daughter, or a serious injury or illness of a covered servicemember, or if the employing office agrees to permit intermittent or reduced schedule leave for the birth of a child or for placement of a child for adoption or foster care, the employing office may require the employee to transfer temporarily, during the period the intermittent or reduced leave schedule is required, to an available alternative position for which the employee is qualified and which better accommodates recurring periods of leave than does the employee's regular position. *See* 825.601 for special rules applicable to instructional employees of schools.

(b) *Compliance*. Transfer to an alternative position may require compliance with any applicable collective bargaining agreement and Federal law (such as the Americans with Disabilities Act, as made applicable by the CAA). Transfer to an alternative position may include altering an existing job to better accommodate the employee's need for intermittent or reduced scheduled leave.

(c) *Equivalent pay and benefits*. The alternative position must have equivalent pay and benefits. An alternative position for these purposes does not have to have equivalent duties. The employing office may increase the pay and benefits of an existing alternative position, so as to make them equivalent to the pay and benefits of the employee's regular job. The employing office may also transfer the employee to a part-time job with the same hourly rate of pay and benefits, provided the employee is not required to take more leave than is medically necessary. For example, an employee desiring to take leave in increments of four hours per day could be transferred to a half-time job, or could remain in the employee's same job on a part-time schedule, paying the same hourly rate as the employee's previous job and enjoying the same benefits. The employing office may not eliminate benefits which otherwise would not be provided to part-time employees; however, an employing office may proportionately reduce benefits such as vacation leave where an employing office's normal practice is to base such benefits on the number of hours worked.

(d) *Employing office limitations*. An employing office may not transfer the employee to an alternative position in order to discourage the employee from taking leave or otherwise work a hardship on the employee. For example, a white collar employee may not be assigned to perform laborer's work; an employee working the day shift may not be reassigned to the graveyard shift; an employee working in the headquarters facility may not be reassigned to a branch a significant distance away from the employee's normal job location. Any such attempt on the part of the employing office to make such a transfer will be held to be contrary to the prohibited acts provisions of the FMLA, as made applicable by the CAA.

(e) *Reinstatement of employee*. When an employee who is taking leave intermittently or on a reduced leave schedule and has been transferred to an alternative position no longer needs to continue on leave and is able to return to full-time work, the employee must be placed in the same or equivalent job as the job he or she left when the leave commenced. An employee may not be required to take more leave than necessary to address the circumstance that precipitated the need for leave.

825.205 Increments of FMLA leave for intermittent or reduced schedule leave.

(a) *Minimum increment*. (1) When an employee takes FMLA leave on an intermittent or reduced leave schedule basis, the employing office must account for the leave using an increment no greater than the shortest period of time that the employing office uses to account for use of other forms of leave provided that it is not greater than one hour and provided further that an employee's FMLA leave entitlement may not be reduced by more than the amount of leave actually taken. An employing office may not require an employee to take more leave than is necessary to address the circumstances that precipitated the need for the leave, provided that the leave is counted using the shortest increment of leave used to account for any other type of leave. *See also* 825.205(a)(2) for the physical impossibility exception, and 825.600 and 825.601 for special rules applicable to employees of schools. If an employing office uses different increments to account for different types of leave, the employing office must account for FMLA leave in the smallest increment used to account for any other type of leave. For example, if an employing office accounts for the use of annual leave in increments of one hour and the use of sick leave in increments of one-half hour, then FMLA leave use must be accounted for using increments no larger than one-half hour. If an employing office accounts for use of leave in varying increments at different times of the day or shift, the employing office may also account for FMLA leave in varying increments, provided that the increment used for FMLA leave is no greater than the smallest increment used for any other type of leave during the period in which the FMLA leave is taken. If an employing office accounts for other forms of leave use in increments greater than one hour, the employing

office must account for FMLA leave use in increments no greater than one hour. An employing office may account for FMLA leave in shorter increments than used for other forms of leave. For example, an employing office that accounts for other forms of leave in one hour increments may account for FMLA leave in a shorter increment when the employee arrives at work several minutes late, and the employing office wants the employee to begin work immediately. Such accounting for FMLA leave will not alter the increment considered to be the shortest period used to account for other forms of leave or the use of FMLA leave in other circumstances. In all cases, employees may not be charged FMLA leave for periods during which they are working.

(2) Where it is physically impossible for an employee using intermittent leave or working a reduced leave schedule to commence or end work mid-way through a shift, such as where a flight attendant or a railroad conductor is scheduled to work aboard an airplane or train, or a laboratory employee is unable to enter or leave a sealed ''clean room'' during a certain period of time and no equivalent position is available, the entire period that the employee is forced to be absent is designated as FMLA leave and counts against the employee's FMLA entitlement. The period of the physical impossibility is limited to the period during which the employing office is unable to permit the employee to work prior to a period of FMLA leave or return the employee to the same or equivalent position due to the physical impossibility after a period of FMLA leave. *See* 825.214.

(b) *Calculation of leave.* (1) When an employee takes leave on an intermittent or reduced leave schedule, only the amount of leave actually taken may be counted toward the employee's leave entitlement. The actual workweek is the basis of leave entitlement. Therefore, if an employee who would otherwise work 40 hours a week takes off eight hours, the employee would use one-fifth (1/5) of a week of FMLA leave. Similarly, if a full-time employee who would otherwise work eight hour days works four-hour days under a reduced leave schedule, the employee would use one half (1/2) week of FMLA leave each week. Where an employee works a part-time schedule or variable hours, the amount of FMLA leave that an employee uses is determined on a pro rata or proportional basis. If an employee who would otherwise work 30 hours per week, but works only 20 hours a week under a reduced leave schedule, the employee's 10 hours of leave would constitute one-third (1/3) of a week of FMLA leave for each week the employee works the reduced leave schedule. An employing office may convert these fractions to their hourly equivalent so long as the conversion equitably reflects the employee's total normally scheduled hours. An employee does not accrue FMLA-protected leave at any particular hourly rate. An eligible employee is entitled to up to a total of 12 workweeks of leave, or 26 workweeks in the case of military caregiver leave, and the total number of hours contained in those workweeks is necessarily dependent on the specific hours the employee would have worked but for the use of leave. *See also* 825.601 and 825.602 on special rules for schools.

(2) If an employing office has made a permanent or long-term change in the employee's schedule (for reasons other than FMLA, and prior to the notice of need for FMLA leave), the hours worked under the new schedule are to be used for making this calculation.

(3) If an employee's schedule varies from week to week to such an extent that an employing office is unable to determine with any certainty how many hours the employee would otherwise have worked (but for the taking of FMLA leave), a weekly average of the hours worked over the 12 months prior to the beginning of the leave period (including any hours for which the employee took leave of any type) would be used for calculating the employee's leave entitlement.

(c) *Overtime.* If an employee would normally be required to work overtime, but is unable to do so because of a FMLA-qualifying reason that limits the employee's ability to work overtime, the hours which the employee would have been required to work may be counted against the employee's FMLA entitlement. In such a case, the employee is using intermittent or reduced schedule leave. For example, if an employee would normally be required to work for 48 hours in a particular week, but due to a serious health condition the employee is unable to work more than 40 hours that week, the employee would utilize eight hours of FMLA-protected leave out of the 48–hour workweek, or one-sixth (1/6) of a week of FMLA leave. Voluntary overtime hours that an employee does not work due to an FMLA-qualifying reason may not be counted against the employee's FMLA leave entitlement.

825.206 Interaction with the FLSA, as made applicable by the Congressional Accountability Act.

(a) Leave taken under FMLA, as made applicable by the CAA, may be unpaid. If an employee is otherwise exempt from minimum wage and overtime requirements of the Fair Labor Standards Act (FLSA), as made applicable by the CAA, and as exempt under regulations issued by the Board, at part 541, providing unpaid FMLA-qualifying leave to such an employee will not cause the employee to lose the FLSA exemption. This means that under regulations currently in effect, where an employee meets the specified duties test, is paid on a salary basis, and is paid a salary of at least the amount specified in the regulations, the employing office may make deductions from the employee's salary for any hours taken as intermittent or reduced FMLA leave within a workweek, without affecting the exempt status of the employee.

(b) For an employee paid in accordance with a fluctuating workweek method of payment for overtime, where permitted by section 203 of the CAA (2 U.S.C. 1313), the employing office, during the period in which intermittent or reduced schedule FMLA leave is scheduled to be taken, may compensate an employee on an hourly basis and pay only for the hours the employee works, including time and one-half the employee's regular rate for overtime hours. The change to payment on an hourly basis would include the entire period during which the employee is taking intermittent leave, including weeks in which no leave is taken. The hourly rate shall be determined by dividing the employee's weekly salary by the employee's normal or average schedule of hours worked during weeks in which FMLA leave is not being taken. If an employing office chooses to follow this exception from the fluctuating workweek method of payment, the employing office must do so uniformly, with respect to all employees paid on a fluctuating workweek basis for whom FMLA leave is taken on an intermittent or reduced leave schedule basis. If an employing office does not elect to convert the employee's compensation to hourly pay, no deduction may be taken for FMLA leave absences. Once the need for intermittent or reduced scheduled leave is over, the employee may be restored to payment on a fluctuating workweek basis.

(c) This special exception to the salary basis requirements of the FLSA exemption or fluctuating workweek payment requirements applies only to employees of covered employing offices who are eligible for FMLA leave, and to leave which qualifies as FMLA leave. Hourly or other deductions which are not in accordance with the Board's FLSA regulations at part 541 or with a permissible fluctuating workweek method of payment for overtime may not be taken, for example, where the employee has not worked long enough to be eligible for FMLA leave without potentially affecting the employee's eligibility for exemption. Nor may deductions which are not permitted by the Board's FLSA regulations at part 541 or by a permissible fluctuating workweek method of payment for overtime be taken from such an employee's salary for any leave which does not qualify as FMLA leave, for example, deductions from an employee's pay for leave required under an employing office's policy or practice for a reason which does not qualify as FMLA leave, e.g., leave to care for a grandparent or for a medical condition which does not qualify as a serious health condition or serious injury or illness; or for leave which is more generous than provided by the FMLA, as made applicable by the CAA. Employing offices may comply with the employing office's own policy/practice under these circumstances and maintain the employee's eligibility for exemption or for the fluctuating workweek method of pay by not taking hourly deductions from the employee's pay, in accordance with FLSA requirements, as made applicable by the CAA, or may take such deductions, treating the employee as an hourly employee and pay overtime premium pay for hours worked over 40 in a workweek.

825.207 Substitution of paid leave, generally.

(a) Generally, FMLA leave is unpaid leave. However, under the circumstances described in this section, the FMLA, as made applicable by the CAA, permits an eligible employee to choose to substitute accrued paid leave for unpaid FMLA leave. Subject to 825.208, if an employee does not choose to substitute accrued paid leave, the employing office may require the employee to substitute accrued paid leave for unpaid FMLA leave. The term substitute means that the paid leave provided by the employing office, and accrued pursuant to established policies of the employing office, will run concurrently with the unpaid FMLA leave. Accordingly, the employee receives pay pursuant to the employing office's applicable paid leave policy during the period of otherwise unpaid FMLA leave. An employee's ability to substitute accrued paid leave is determined by the terms and conditions of the employing office's normal leave policy. When an employee chooses, or an employing office requires, substitution of accrued paid leave, the employing office must inform the employee that the employee must satisfy any procedural requirements of the paid leave policy only in connection with the receipt of such payment. *See* 825.300(c). If an employee does not comply with the additional requirements in an employing office's paid leave policy, the employee is not entitled to substitute accrued paid leave, but the employee remains entitled to take unpaid FMLA leave. Employing offices may not discriminate against employees on FMLA leave in the administration of their paid leave policies.

(b) If neither the employee nor the employing office elects to substitute paid leave for unpaid FMLA leave under the above conditions and circumstances, the employee will remain entitled to all the paid leave which is earned or accrued under the terms of the employing office's plan.

(c) If an employee uses paid leave under circumstances which do not qualify as FMLA leave, the leave will not count against the

employee's FMLA leave entitlement. For example, paid sick leave used for a medical condition which is not a serious health condition or serious injury or illness does not count against the employee's FMLA leave entitlement.

(d) Leave taken pursuant to a disability leave plan would be considered FMLA leave for a serious health condition and counted in the leave entitlement permitted under FMLA if it meets the criteria set forth above in 825.112 through 825.115. In such cases, the employing office may designate the leave as FMLA leave and count the leave against the employee's FMLA leave entitlement. Because leave pursuant to a disability benefit plan is not unpaid, the provision for substitution of the employee's accrued paid leave is inapplicable, and neither the employee nor the employing office may require the substitution of paid leave. However, employing offices and employees may agree to have paid leave supplement the disability plan benefits, such as in the case where a plan only provides replacement income for two-thirds of an employee's salary.

(e) The FMLA, as made applicable by the CAA, provides that a serious health condition may result from injury to the employee on or off the job. If the employing office designates the leave as FMLA leave in accordance with 825.300(d), the leave counts against the employee's FMLA leave entitlement. Because the workers' compensation absence is not unpaid, the provision for substitution of the employee's accrued paid leave is not applicable, and neither the employee nor the employing office may require the substitution of paid leave. However, employing offices and employees may agree, to have paid leave supplement workers' compensation benefits, such as in the case where workers' compensation only provides replacement income for two-thirds of an employee's salary. If the health care provider treating the employee for the workers' compensation injury certifies the employee is able to return to a light duty job but is unable to return to the same or equivalent job, the employee may decline the employing office's offer of a light duty job. As a result, the employee may lose workers' compensation payments, but is entitled to remain on unpaid FMLA leave until the employee's FMLA leave entitlement is exhausted. As of the date workers' compensation benefits cease, the substitution provision becomes applicable and either the employee may elect or the employing office may require the use of accrued paid leave. *See also* 825.210(f), 825.216(d), 825.220(d), 825.307(a) and 825.702 (d)(1) and (2) regarding the relationship between workers' compensation absences and FMLA leave.

(f) Under the FLSA, as made applicable by the CAA, an employing office always has the right to cash out an employee's compensatory time or to require the employee to use the time. Therefore, if an employee requests and is permitted to use accrued compensatory time to receive pay for time taken off for an FMLA reason, or if the employing office requires such use pursuant to the FLSA, the time taken may be counted against the employee's FMLA leave entitlement.

825.208 Substitution of paid leave—special rule for paid parental leave.

(a) This section provides the basis for determining the periods of unpaid leave for which paid parental leave may be substituted under subpart E of this part, which must be read with this subpart to establish eligibility. This section addresses substitution of accrued paid leave for unpaid FMLA leave:

(1) For birth of a son or daughter, and to care for the newborn child (*See* 825.120);

(2) For the placement of a son or daughter with the employee for adoption or foster care and the care of such son or daughter (*See* 825.121);

(b) *Leave connected to birth or placement.* (1) For unpaid family and medical leave taken under 825.120 or 825.121 (which correspond to 29 U.S.C. 2612(A) or (B), respectively) an employee may elect to substitute—

(i) Up to 12 workweeks of paid parental leave in connection with the occurrence of a birth or placement, as provided in subpart E of this part; and

(ii) Any additional paid annual, vacation, personal, family, medical, or sick leave provided by the employing office to such employee.

(c) *Employee entitlement to substitute.* (1) An employee is entitled substitute paid leave for leave without pay under this subpart, as permitted in this section.

(2) An employing office may not require that an employee first use all or any portion of the leave described in paragraph (b)(1)(ii) of this section before being allowed to use the leave described in paragraph (b)(1)(i) of this section.

(3) An employing office may not require an employee to substitute paid leave for leave without pay.

(4) An employee may request to use annual leave or sick leave without invoking family and medical leave, and, in that case, the employing office exercises its normal authority with respect to approving or disapproving the timing of when the leave may be used.

(d) *Notification by employee and retroactive substitution.* (1) An employee must notify the employing office of the employee's election to substitute paid leave for leave without pay under this section prior to the date such paid leave commences (i.e., no retroactive substitution), except as provided in paragraphs (d)(2) through (d)(4) of this section.

(2) An employee may retroactively substitute annual leave or sick leave for leave without pay granted under this subpart covering a past period of time, if the substitution is made in conjunction with the retroactive granting of leave without pay.

(3) An employee may retroactively substitute transferred (donated) annual leave for leave without pay granted under this subpart.

(4) An employee may retroactively substitute paid parental leave for applicable leave without pay granted under this subpart, as provided in 825.505 and subject to the requirements governing paid parental leave in subpart E of this part. If the employee's leave without pay was not granted on a prospective basis under this subpart, the retroactive substitution of paid parental leave may not be made unless the leave without pay period has been retroactively designated as leave under this subpart.

825.209 Maintenance of employee benefits.

(a) During any FMLA leave, an employing office must maintain the employee's coverage under the Federal Employees Health Benefits Program or any group health plan (as defined in the Internal Revenue Code of 1986 at 26 U.S.C. 5000(b)(1)) on the same conditions as coverage would have been provided if the employee had been continuously employed during the entire leave period. All employing offices are subject to the requirements of the FMLA, as made applicable by the CAA, to maintain health coverage. The definition of group health plan is set forth in 825.102. For purposes of FMLA, the term group health plan shall not include an insurance program providing health coverage under which employees purchase individual policies from insurers provided that:

(1) No contributions are made by the employing office;

(2) Participation in the program is completely voluntary for employees;

(3) The sole functions of the employing office with respect to the program are, without endorsing the program, to permit the insurer to publicize the program to employees, to collect premiums through payroll deductions and to remit them to the insurer;

(4) The employing office receives no consideration in the form of cash or otherwise in connection with the program, other than reasonable compensation, excluding any profit, for administrative services actually rendered in connection with payroll deduction; and

(5) The premium charged with respect to such coverage does not increase in the event the employment relationship terminates.

(b) The same group health plan benefits provided to an employee prior to taking FMLA leave must be maintained during the FMLA leave. For example, if family member coverage is provided to an employee, family member coverage must be maintained during the FMLA leave. Similarly, benefit coverage during FMLA leave for medical care, surgical care, hospital care, dental care, eye care, mental health counseling, substance abuse treatment, etc., must be maintained during leave if provided in an employing office's group health plan, including a supplement to a group health plan, whether or not provided through a flexible spending account or other component of a cafeteria plan.

(c) If an employing office provides a new health plan or benefits or changes health benefits or plans while an employee is on FMLA leave, the employee is entitled to the new or changed plan/benefits to the same extent as if the employee were not on leave. For example, if an employing office changes a group health plan so that dental care becomes covered under the plan, an employee on FMLA leave must be given the same opportunity as other employees to receive (or obtain) the dental care coverage. Any other plan changes (e.g., in coverage, premiums, deductibles, etc.) which apply to all employees of the workforce would also apply to an employee on FMLA leave.

(d) Notice of any opportunity to change plans or benefits must also be given to an employee on FMLA leave. If the group health plan permits an employee to change from single to family coverage upon the birth of a child or otherwise add new family members, such a change in benefits must be made available while an employee is on FMLA leave. If the employee requests the changed coverage it must be provided by the employing office.

(e) An employee may choose not to retain group health plan coverage during FMLA leave. However, when an employee returns from leave, the employee is entitled to be reinstated on the same terms as prior to taking the leave, including family or dependent coverages, without any qualifying period, physical examination, exclusion of pre-existing conditions, etc. *See* 825.212(c).

(f) Except as required by the Consolidated Omnibus Budget Reconciliation Act of 1986 (COBRA) or 5 U.S.C. 8905a, whichever is applicable, and for key employees (as discussed below), an employing office's obligation to maintain health benefits during leave (and to restore the employee to the same or equivalent employment) under FMLA ceases if and when the employment relationship would have terminated if the employee had not taken FMLA leave (e.g., if the employee's position is eliminated as part of a nondiscriminatory reduction in force and the employee would not have been transferred to another position); an employee informs the employing office of his or her intent not to return from leave (including before starting

the leave if the employing office is so informed before the leave starts); or the employee fails to return from leave or continues on leave after exhausting his or her FMLA leave entitlement in the 12–month period.

(g) If a key employee (*See* 825.218) does not return from leave when notified by the employing office that substantial or grievous economic injury will result from his or her reinstatement, the employee's entitlement to group health plan benefits continues unless and until the employee advises the employing office that the employee does not desire restoration to employment at the end of the leave period, or the FMLA leave entitlement is exhausted, or reinstatement is actually denied.

(h) An employee's entitlement to benefits other than group health benefits during a period of FMLA leave (e.g., holiday pay) is to be determined by the employing office's established policy for providing such benefits when the employee is on other forms of leave (paid or unpaid, as appropriate).

825.210 Employee payment of group health benefit premiums.

(a) Group health plan benefits must be maintained on the same basis as coverage would have been provided if the employee had been continuously employed during the FMLA leave period. Therefore, any share of group health plan premiums which had been paid by the employee prior to FMLA leave must continue to be paid by the employee during the FMLA leave period. If premiums are raised or lowered, the employee would be required to pay the new premium rates. Maintenance of health insurance policies which are not a part of the employing office's group health plan, as described in 825.209(a), are the sole responsibility of the employee. The employee and the insurer should make necessary arrangements for payment of premiums during periods of unpaid FMLA leave.

(b) If the FMLA leave is substituted paid leave, the employee's share of premiums must be paid by the method normally used during any paid leave, presumably as a payroll deduction.

(c) If FMLA leave is unpaid, the employing office has a number of options for obtaining payment from the employee. The employing office may require that payment be made to the employing office or to the insurance carrier, but no additional charge may be added to the employee's premium payment for administrative expenses. The employing office may require employees to pay their share of premium payments in any of the following ways:

(1) Payment would be due at the same time as it would be made if by payroll deduction;

(2) Payment would be due on the same schedule as payments are made under COBRA or 5 U.S.C. 8905a, whichever is applicable;

(3) Payment would be prepaid pursuant to a cafeteria plan at the employee's option;

(4) The employing office's existing rules for payment by employees on leave without pay would be followed, provided that such rules do not require prepayment (i.e., prior to the commencement of the leave) of the premiums that will become due during a period of unpaid FMLA leave or payment of higher premiums than if the employee had continued to work instead of taking leave; or

(5) Another system voluntarily agreed to between the employing office and the employee, which may include prepayment of premiums (e.g., through increased payroll deductions when the need for the FMLA leave is foreseeable).

(d) The employing office must provide the employee with advance written notice of the terms and conditions under which these payments must be made. *See* 825. 300(c).

(e) An employing office may not require more of an employee using unpaid FMLA leave than the employing office requires of other employees on leave without pay.

(f) An employee who is receiving payments as a result of a workers' compensation injury must make arrangements with the employing office for payment of group health plan benefits when simultaneously taking FMLA leave. *See* 825.207(e).

825.211 Maintenance of benefits under multi-employer health plans.

(a) A multi-employer health plan is a plan to which more than one employing office is required to contribute, and which is maintained pursuant to one or more collective bargaining agreements between employee organization(s) and the employing offices.

(b) An employing office under a multi-employer plan must continue to make contributions on behalf of an employee using FMLA leave as though the employee had been continuously employed, unless the plan contains an explicit FMLA provision for maintaining coverage such as through pooled contributions by all employing offices party to the plan.

(c) During the duration of an employee's FMLA leave, coverage by the group health plan, and benefits provided pursuant to the plan, must be maintained at the level of coverage and benefits which were applicable to the employee at the time FMLA leave commenced.

(d) An employee using FMLA leave cannot be required to use banked hours or pay a greater premium than the employee would have been required to pay if the employee had been continuously employed.

(e) As provided in 825.209(f) of this part, group health plan coverage must be maintained for an employee on FMLA leave until:

(1) The employee's FMLA leave entitlement is exhausted;

(2) The employing office can show that the employee would have been laid off and the employment relationship terminated; or

(3) The employee provides unequivocal notice of intent not to return to work.

825.212 Employee failure to pay health plan premium payments.

(a)(1) In the absence of an established employing office policy providing a longer grace period, an employing office's obligations to maintain health insurance coverage cease under FMLA if an employee's premium payment is more than 30 days late. In order to drop the coverage for an employee whose premium payment is late, the employing office must provide written notice to the employee that the payment has not been received. Such notice must be mailed to the employee at least 15 days before coverage is to cease, advising that coverage will be dropped on a specified date at least 15 days after the date of the letter unless the payment has been received by that date. If the employing office has established policies regarding other forms of unpaid leave that provide for the employing office to cease coverage retroactively to the date the unpaid premium payment was due, the employing office may drop the employee from coverage retroactively in accordance with that policy, provided the 15-day notice was given. In the absence of such a policy, coverage for the employee may be terminated at the end of the 30-day grace period, where the required 15-day notice has been provided.

(2) An employing office has no obligation regarding the maintenance of a health insurance policy which is not a group health plan. *See* 825.209(a).

(3) All other obligations of an employing office under FMLA would continue; for example, the employing office continues to have an obligation to reinstate an employee upon return from leave.

(b) The employing office may recover the employee's share of any premium payments missed by the employee for any FMLA leave period during which the employing office maintains health coverage by paying the employee's share after the premium payment is missed.

(c) If coverage lapses because an employee has not made required premium payments, upon the employee's return from FMLA leave the employing office must still restore the employee to coverage/benefits equivalent to those the employee would have had if leave had not been taken and the premium payment(s) had not been missed, including family or dependent coverage. *See* 825.215(d)(1)(5). In such case, an employee may not be required to meet any qualification requirements imposed by the plan, including any new preexisting condition waiting period, to wait for an open season, or to pass a medical examination to obtain reinstatement of coverage. If an employing office terminates an employee's insurance in accordance with this section and fails to restore the employee's health insurance as required by this section upon the employee's return, the employing office may be liable for benefits lost by reason of the violation, for other actual monetary losses sustained as a direct result of the violation, and for appropriate equitable relief tailored to the harm suffered.

825.213 Employing office recovery of benefit costs.

(a) In addition to the circumstances discussed in 825.212(b), and subject to the exceptions provided in 825.504, an employing office may recover its share of health plan premiums during a period of unpaid FMLA leave from an employee if the employee fails to return to work after the employee's FMLA leave entitlement has been exhausted or expires, unless the reason the employee does not return is due to:

(1) The continuation, recurrence, or onset of either a serious health condition of the employee or the employee's family member, or a serious injury or illness of a covered servicemember, which would otherwise entitle the employee to leave under FMLA; or

(2) Other circumstances beyond the employee's control. Examples of other circumstances beyond the employee's control are necessarily broad. They include such situations as where a parent chooses to stay home with a newborn child who has a serious health condition; an employee's spouse is unexpectedly transferred to a job location more than 75 miles from the employee's worksite; a relative or individual other than a covered family member has a serious health condition and the employee is needed to provide care; the employee is laid off while on leave; or, the employee is a key employee who decides not to return to work upon being notified of the employing office's intention to deny restoration because of substantial and grievous economic injury to the employing office's operations and is not reinstated by the employing office. Other circumstances beyond the employee's control would not include a situation where an employee desires to remain with a parent in a distant city even though the parent no longer requires the employee's care, or a parent chooses not to return to work to stay home with a well, newborn child.

(3) When an employee fails to return to work because of the continuation, recurrence, or onset of either a serious health condition of the employee or employee's family member, or a serious injury or illness of a covered servicemember, thereby precluding

the employing office from recovering its (share of) health benefit premium payments made on the employee's behalf during a period of unpaid FMLA leave, the employing office may require medical certification of the employee's or the family member's serious health condition or the covered servicemember's serious injury or illness. Such certification is not required unless requested by the employing office. The cost of the certification shall be borne by the employee, and the employee is not entitled to be paid for the time or travel costs spent in acquiring the certification. The employee is required to provide medical certification in a timely manner which, for purposes of this section, is within 30 days from the date of the employing office's request. For purposes of medical certification, the employee may use the optional forms developed for this purpose. *See* 825.306(b), 825.310(c)–(d) and Forms A, B, and F. If the employing office requests medical certification and the employee does not provide such certification in a timely manner (within 30 days), or the reason for not returning to work does not meet the test of other circumstances beyond the employee's control, the employing office may recover 100 percent of the health benefit premiums it paid during the period of unpaid FMLA leave.

(b) Under some circumstances an employing office may elect to maintain other benefits, e.g., life insurance, disability insurance, etc., by paying the employee's (share of) premiums during periods of unpaid FMLA leave. For example, to ensure the employing office can meet its responsibilities to provide equivalent benefits to the employee upon return from unpaid FMLA leave, it may be necessary that premiums be paid continuously to avoid a lapse of coverage. If the employing office elects to maintain such benefits during the leave, at the conclusion of leave, the employing office is entitled to recover only the costs incurred for paying the employee's share of any premiums whether or not the employee returns to work.

(c) An employee who returns to work for at least 30 calendar days is considered to have returned to work. An employee who transfers directly from taking FMLA leave to retirement, or who retires during the first 30 days after the employee returns to work, is deemed to have returned to work.

(d) When an employee elects or an employing office requires paid leave to be substituted for FMLA leave, the employing office may not recover its (share of) health insurance or other non-health benefit premiums for any period of FMLA leave covered by paid leave. Because paid leave provided under a plan covering temporary disabilities (including workers' compensation) is not unpaid, recovery of health insurance premiums does not apply to such paid leave.

(e) The amount that self-insured employing offices may recover is limited to only the employing office's share of allowable premiums as would be calculated under COBRA, excluding the two percent fee for administrative costs.

(f) When an employee fails to return to work, any health and non-health benefit premiums which this section of the regulations permits an employing office to recover are a debt owed by the non-returning employee to the employing office. The existence of this debt caused by the employee's failure to return to work does not alter the employing office's responsibilities for health benefit coverage and, under a self-insurance plan, payment of claims incurred during the period of FMLA leave. To the extent recovery is allowed, the employing office may recover the costs through deduction from any sums due to the employee (e.g., unpaid wages, vacation pay, etc.), provided such deductions do not otherwise violate applicable wage payment or other laws. Alternatively, the employing office may initiate legal action against the employee to recover such costs.

825.214 Employee right to reinstatement.

General Rule. On return from FMLA leave, an employee is entitled to be returned to the same position the employee held when leave commenced, or to an equivalent position with equivalent benefits, pay, and other terms and conditions of employment. An employee is entitled to such reinstatement even if the employee has been replaced or his or her position has been restructured to accommodate the employee's absence. *See also* 825.106(e) for the obligations of employing offices that are joint employers.

825.215 Equivalent position.

(a) *Equivalent position.* An equivalent position is one that is virtually identical to the employee's former position in terms of pay, benefits and working conditions, including privileges, prerequisites and status. It must involve the same or substantially similar duties and responsibilities, which must entail substantially equivalent skill, effort, responsibility, and authority.

(b) *Conditions to qualify.* If an employee is no longer qualified for the position because of the employee's inability to attend a necessary course, renew a license, etc., as a result of the leave, the employee shall be given a reasonable opportunity to fulfill those conditions upon return to work.

(c) *Equivalent Pay.* (1) An employee is entitled to any unconditional pay increases which may have occurred during the FMLA leave period, such as cost of living increases. Pay increases conditioned upon seniority, length of service, or work performed must be granted in accordance with the employing office's policy or practice with respect to other employees on an equivalent leave status for a reason that does not qualify as FMLA leave. An employee is entitled to be restored to a position with the same or equivalent pay premiums, such as a shift differential. If an employee departed from a position averaging ten hours of overtime (and corresponding overtime pay) each week, an employee is ordinarily entitled to such a position on return from FMLA leave.

(2) Equivalent pay includes any bonus or payment, whether it is discretionary or nondiscretionary, made to employees consistent with the provisions of paragraph (c)(1) of this section. However, if a bonus or other payment is based on the achievement of a specified goal such as hours worked, products sold or perfect attendance, and the employee has not met the goal due to FMLA leave, then the payment may be denied, unless otherwise paid to employees on an equivalent leave status for a reason that does not qualify as FMLA leave. For example, if an employee who used paid vacation leave for a non-FMLA purpose would receive the payment, then the employee who used paid vacation leave for an FMLA-protected purpose also must receive the payment.

(d) *Equivalent benefits.* Benefits include all benefits provided or made available to employees by an employing office, including group life insurance, health insurance, disability insurance, sick leave, annual leave, educational benefits, and pensions, regardless of whether such benefits are provided by a practice or written policy of an employing office through an employee benefit plan.

(1) At the end of an employee's FMLA leave, benefits must be resumed in the same manner and at the same levels as provided when the leave began, and subject to any changes in benefit levels that may have taken place during the period of FMLA leave affecting the entire work force, unless otherwise elected by the employee. Upon return from FMLA leave, an employee cannot be required to requalify for any benefits the employee enjoyed before FMLA leave began (including family or dependent coverages). For example, if an employee was covered by a life insurance policy before taking leave but is not covered or coverage lapses during the period of unpaid FMLA leave, the employee cannot be required to meet any qualifications, such as taking a physical examination, in order to requalify for life insurance upon return from leave. Accordingly, some employing offices may find it necessary to modify life insurance and other benefits programs in order to restore employees to equivalent benefits upon return from FMLA leave, make arrangements for continued payment of costs to maintain such benefits during unpaid FMLA leave, or pay these costs subject to recovery from the employee on return from leave. *See* 825.213(b).

(2) An employee may, but is not entitled to, accrue any additional benefits or seniority during unpaid FMLA leave. Benefits accrued at the time leave began, however, (e.g., paid vacation, sick or personal leave to the extent not substituted for FMLA leave) must be available to an employee upon return from leave.

(3) If, while on unpaid FMLA leave, an employee desires to continue life insurance, disability insurance, or other types of benefits for which he or she typically pays, the employing office is required to follow established policies or practices for continuing such benefits for other instances of leave without pay. If the employing office has no established policy, the employee and the employing office are encouraged to agree upon arrangements before FMLA leave begins.

(4) With respect to pension and other retirement plans, any period of unpaid FMLA leave shall not be treated as or counted toward a break in service for purposes of vesting and eligibility to participate. Also, if the plan requires an employee to be employed on a specific date in order to be credited with a year of service for vesting, contributions or participation purposes, an employee on unpaid FMLA leave on that date shall be deemed to have been employed on that date. However, unpaid FMLA leave periods need not be treated as credited service for purposes of benefit accrual, vesting and eligibility to participate.

(5) Employees on unpaid FMLA leave are to be treated as if they continued to work for purposes of changes to benefit plans. They are entitled to changes in benefits plans, except those which may be dependent upon seniority or accrual during the leave period, immediately upon return from leave or to the same extent they would have qualified if no leave had been taken. For example if the benefit plan is predicated on a pre-established number of hours worked each year and the employee does not have sufficient hours as a result of taking unpaid FMLA leave, the benefit is lost. (In this regard, 825.209 addresses health benefits.)

(e) *Equivalent terms and conditions of employment.* An equivalent position must have substantially similar duties, conditions, responsibilities, privileges and status as the employee's original position.

(1) The employee must be reinstated to the same or a geographically proximate worksite (i.e., one that does not involve a significant increase in commuting time or distance) from where the employee had previously been employed. If the employee's original worksite has been closed, the employee is entitled to the same rights as if the employee had not been on leave when the worksite closed. For example, if an employing office transfers all employees from a closed worksite to a new worksite in a different city, the employee on leave is also entitled to transfer

under the same conditions as if he or she had continued to be employed.

(2) The employee is ordinarily entitled to return to the same shift or the same or an equivalent work schedule.

(3) The employee must have the same or an equivalent opportunity for bonuses, and other similar discretionary and non-discretionary payments.

(4) FMLA does not prohibit an employing office from accommodating an employee's request to be restored to a different shift, schedule, or position which better suits the employee's personal needs on return from leave, or to offer a promotion to a better position. However, an employee cannot be induced by the employing office to accept a different position against the employee's wishes.

(f) *De minimis exception*. The requirement that an employee be restored to the same or equivalent job with the same or equivalent pay, benefits, and terms and conditions of employment does not extend to de minimis, intangible, or unmeasurable aspects of the job.

825.216 Limitations on an employee's right to reinstatement.

(a) An employee has no greater right to reinstatement or to other benefits and conditions of employment than if the employee had been continuously employed during the FMLA leave period. An employing office must be able to show that an employee would not otherwise have been employed at the time reinstatement is requested in order to deny restoration to employment. For example:

(1) If an employee is laid off during the course of taking FMLA leave and employment is terminated, the employing office's responsibility to continue FMLA leave, maintain group health plan benefits and restore the employee ceases at the time the employee is laid off, provided the employing office has no continuing obligations under a collective bargaining agreement or otherwise. An employing office would have the burden of proving that an employee would have been laid off during the FMLA leave period and, therefore, would not be entitled to restoration. Restoration to a job slated for lay-off when the employee's original position is not would not meet the requirements of an equivalent position.

(2) If a shift has been eliminated, or overtime has been decreased, an employee would not be entitled to return to work that shift or the original overtime hours upon restoration. However, if a position on, for example, a night shift has been filled by another employee, the employee is entitled to return to the same shift on which employed before taking FMLA leave.

(3) If an employee was hired for a specific term or only to perform work on a discrete project, the employing office has no obligation to restore the employee if the employment term or project is over and the employing office would not otherwise have continued to employ the employee. On the other hand, if an employee was hired to perform work for one employing office for a specific time period, and after that time period has ended, the work was assigned to another employing office, the successor employing office may be required to restore the employee if it is a successor employing office.

(b) In addition to the circumstances explained above, an employing office may deny job restoration to salaried eligible employees (key employees, as defined in 825.217(c)), if such denial is necessary to prevent substantial and grievous economic injury to the operations of the employing office; or may delay restoration to an employee who fails to provide a fitness-for-duty certificate to return to work under the conditions described in 825.312.

(c) If the employee is unable to perform an essential function of the position because of a physical or mental condition, including the continuation of a serious health condition or an injury or illness also covered by workers' compensation, the employee has no right to restoration to another position under the FMLA. The employing office's obligations may, however, be governed by the Americans with Disabilities Act (ADA), as amended and as made applicable by the CAA. *See* 825.702.

(d) An employee who fraudulently obtains FMLA leave from an employing office is not protected by the job restoration or maintenance of health benefits provisions of the FMLA, as made applicable by the CAA.

(e) If the employing office has a uniformly-applied policy governing outside or supplemental employment, such a policy may continue to apply to an employee while on FMLA leave. An employing office which does not have such a policy may not deny benefits to which an employee is entitled under FMLA, as made applicable by the CAA, on this basis unless the FMLA leave was fraudulently obtained as in paragraph (d) of this section.

825.217 Key employee, general rule.

(a) A key employee is a salaried FMLA-eligible employee who is among the highest paid 10 percent of all the employees employed by the employing office within 75 miles of the employee's worksite.

(b) The term salaried means paid on a salary basis, within the meaning of the Board's FLSA regulations at part 541, implementing section 203 of the CAA (2 U.S.C. 1313), regarding employees who may qualify as exempt from the minimum wage and overtime requirements of the FLSA, as made applicable by the CAA.

(c) A key employee must be among the highest paid 10 percent of all the employees—both salaried and non-salaried, eligible and ineligible—who are employed by the employing office within 75 miles of the worksite.

(1) In determining which employees are among the highest paid 10 percent, year- to-date earnings are divided by weeks worked by the employee (including weeks in which paid leave was taken). Earnings include wages, premium pay, incentive pay, and non-discretionary and discretionary bonuses. Earnings do not include incentives whose value is determined at some future date, e.g., benefits or prerequisites.

(2) The determination of whether a salaried employee is among the highest paid 10 percent shall be made at the time the employee gives notice of the need for leave. No more than 10 percent of the employing office's employees within 75 miles of the worksite may be key employees.

825.218 Substantial and grievous economic injury.

(a) In order to deny restoration to a key employee, an employing office must determine that the restoration of the employee to employment will cause substantial and grievous economic injury to the operations of the employing office, not whether the absence of the employee will cause such substantial and grievous injury.

(b) An employing office may take into account its ability to replace on a temporary basis (or temporarily do without) the employee on FMLA leave. If permanent replacement is unavoidable, the cost of then reinstating the employee can be considered in evaluating whether substantial and grievous economic injury will occur from restoration; in other words, the effect on the operations of the employing office of reinstating the employee in an equivalent position.

(c) A precise test cannot be set for the level of hardship or injury to the employing office which must be sustained. If the reinstatement of a key employee threatens the economic viability of the employing office, that would constitute substantial and grievous economic injury. A lesser injury which causes substantial, long-term economic injury would also be sufficient. Minor inconveniences and costs that the employing office would experience in the normal course would certainly not constitute substantial and grievous economic injury.

(d) FMLA's substantial and grievous economic injury standard is different from and more stringent than the undue hardship test under the ADA, as made applicable by the CAA. *See* also 825.702.

825.219 Rights of a key employee.

(a) An employing office that believes that reinstatement may be denied to a key employee, must give written notice to the employee at the time the employee gives notice of the need for FMLA leave (or when FMLA leave commences, if earlier) that he or she qualifies as a key employee. At the same time, the employing office must also fully inform the employee of the potential consequences with respect to reinstatement and maintenance of health benefits if the employing office should determine that substantial and grievous economic injury to the employing office's operations will result if the employee is reinstated from FMLA leave. If such notice cannot be given immediately because of the need to determine whether the employee is a key employee, it shall be given as soon as practicable after being notified of a need for leave (or the commencement of leave, if earlier). It is expected that in most circumstances there will be no desire that an employee be denied restoration after FMLA leave and, therefore, there would be no need to provide such notice. However, an employing office who fails to provide such timely notice will lose its right to deny restoration even if substantial and grievous economic injury will result from reinstatement.

(b) As soon as an employing office makes a good faith determination, based on the facts available, that substantial and grievous economic injury to its operations will result if a key employee who has given notice of the need for FMLA leave or is using FMLA leave is reinstated, the employing office shall notify the employee in writing of its determination, that it cannot deny FMLA leave, and that it intends to deny restoration to employment on completion of the FMLA leave. It is anticipated that an employing office will ordinarily be able to give such notice prior to the employee starting leave. The employing office must serve this notice either in person or by certified mail. This notice must explain the basis for the employing office's finding that substantial and grievous economic injury will result, and, if leave has commenced, must provide the employee a reasonable time in which to return to work, taking into account the circumstances, such as the length of the leave and the urgency of the need for the employee to return.

(c) If an employee on leave does not return to work in response to the employing office's notification of intent to deny restoration, the employee continues to be entitled to maintenance of health benefits and the employing office may not recover its cost of health benefit premiums. A key employee's rights under FMLA continue unless and until the employee either gives notice that he or she no longer wishes to return to work, or the employing office actually denies reinstatement at the conclusion of the leave period.

(d) After notice to an employee has been given that substantial and grievous economic injury will result if the employee is

reinstated to employment, an employee is still entitled to request reinstatement at the end of the leave period even if the employee did not return to work in response to the employing office's notice. The employing office must then again determine whether there will be substantial and grievous economic injury from reinstatement, based on the facts at that time. If it is determined that substantial and grievous economic injury will result, the employing office shall notify the employee in writing (in person or by certified mail) of the denial of restoration.

825.220 Protection for employees who request leave or otherwise assert FMLA rights.

(a) The FMLA, as made applicable by the CAA, prohibits interference with an employee's rights under the law, and with legal proceedings or inquiries relating to an employee's rights. More specifically, the law contains the following employee protections:

(1) An employing office is prohibited from interfering with, restraining, or denying the exercise of (or attempts to exercise) any rights provided by the FMLA, as made applicable by the CAA.

(2) An employing office is prohibited from discharging or in any other way discriminating against any covered employee (whether or not an eligible employee) for opposing or complaining about any unlawful practice under the FMLA, as made applicable by the CAA.

(3) All employing offices are prohibited from discharging or in any other way discriminating against any covered employee (whether or not an eligible employee) because that covered employee has—

(i) Filed any charge, or has instituted (or caused to be instituted) any proceeding under or related to the FMLA, as made applicable by the CAA;

(ii) Given, or is about to give, any information in connection with an inquiry or proceeding relating to a right under the FMLA, as made applicable by the CAA;

(iii) Testified, or is about to testify, in any inquiry or proceeding relating to a right under the FMLA, as made applicable by the CAA.

(b) Any violations of the FMLA, as made applicable by the CAA, or of these regulations constitute interfering with, restraining, or denying the exercise of rights provided by the FMLA, as made applicable by the CAA. An employing office may be liable for compensation and benefits lost by reason of the violation, for other actual monetary losses sustained as a direct result of the violation, and for appropriate equitable or other relief, including employment, reinstatement, promotion, or any other relief tailored to the harm suffered. *See* 825.400(c). Interfering with the exercise of an employee's rights would include, for example, not only refusing to authorize FMLA leave, but discouraging an employee from using such leave. It would also include manipulation by a covered employing office to avoid responsibilities under FMLA, for example:

(1) [Reserved]

(2) Changing the essential functions of the job in order to preclude the taking of leave; or

(3) Reducing hours available to work in order to avoid employee eligibility.

(c) The FMLA's prohibition against interference prohibits an employing office from discriminating or retaliating against an employee or prospective employee for having exercised or attempted to exercise FMLA rights. For example, if an employee on leave without pay would otherwise be entitled to full benefits (other than health benefits), the same benefits would be required to be provided to an employee on unpaid FMLA leave. By the same token, employing offices cannot use the taking of FMLA leave as a negative factor in employment actions, such as hiring, promotions or disciplinary actions; nor can FMLA leave be counted under no fault attendance policies. *See* 825.215.

(d) Employees cannot waive, nor may employing offices induce employees to waive, their rights under FMLA. For example, employees (or their collective bargaining representatives) cannot trade off the right to take FMLA leave against some other benefit offered by the employing office. Except for settlement agreements covered by 1414 and/or 1415 of the Congressional Accountability Act, this does not prevent the settlement or release of FMLA claims by employees based on past employing office conduct without the approval of the Office of Congressional Workplace Rights or a court. Nor does it prevent an employee's voluntary and uncoerced acceptance (not as a condition of employment) of a light duty assignment while recovering from a serious health condition. *See* 825.702(d). An employee's acceptance of such light duty assignment does not constitute a waiver of the employee's prospective rights, including the right to be restored to the same position the employee held at the time the employee's FMLA leave commenced or to an equivalent position. The employee's right to restoration, however, ceases at the end of the applicable 12-month FMLA leave year.

(e) Covered employees, and not merely eligible employees, are protected from retaliation for opposing (e.g., filing a complaint about) any practice which is unlawful under the FMLA, as made applicable by the CAA. They are similarly protected if they oppose any practice which they reasonably believe to be a violation of the FMLA, as made applicable by the CAA, or regulations.

SUBPART C—EMPLOYEE AND EMPLOYING OFFICE RIGHTS AND OBLIGATIONS UNDER THE FMLA, AS MADE APPLICABLE BY THE CAA

825.300 Employing office notice requirements.

(a)(1) If an employing office has any eligible employees and has any written guidance to employees concerning employee benefits or leave rights, such as in an employee handbook, information concerning both entitlements and employee obligations under the FMLA, as made applicable by the CAA, must be included in the handbook or other document. For example, if an employing office provides an employee handbook to all employees that describes the employing office's policies regarding leave, wages, attendance, and similar matters, the handbook must incorporate information on FMLA rights and responsibilities and the employing office's policies regarding the FMLA, as made applicable by the CAA. Informational publications describing the provisions of the FMLA, as made applicable by the CAA, are available from the Office of Congressional Workplace Rights and may be incorporated in such employing office handbooks or written policies.

(2) If such an employing office does not have written policies, manuals, or handbooks describing employee benefits and leave provisions, the employing office shall provide written guidance to an employee concerning all the employee's rights and obligations under the FMLA, as made applicable by the CAA. This notice shall be provided to employees each time notice is given pursuant to paragraph (c), and in accordance with the provisions of that paragraph. Employing offices may duplicate and provide the employee a copy of the FMLA Fact Sheet available from the Office of Congressional Workplace Rights to provide such guidance.

(b) *Eligibility notice.* (1) When an employee requests FMLA leave, or when the employing office acquires knowledge that an employee's leave may be for an FMLA-qualifying reason, the employing office must notify the employee of the employee's eligibility to take FMLA leave within five business days, absent extenuating circumstances. See 825.110 for definition of an eligible employee. Employee eligibility is determined (and notice must be provided) at the commencement of the first instance of leave for each FMLA-qualifying reason in the applicable 12-month period. See 825.127(c) and 825.200(b). All FMLA absences for the same qualifying reason are considered a single leave and employee eligibility as to that reason for leave does not change during the applicable 12-month period.

(2) The eligibility notice must state whether the employee is eligible for FMLA leave as defined in 825.110. If the employee is not eligible for FMLA leave, the notice must state at least one reason why the employee is not eligible, including as applicable the number of months the employee has been employed by the employing office and the hours of service with the employing office during the 12-month period. Notification of eligibility may be oral or in writing; employing offices may use Form C to provide such notification to employees.

(3) If, at the time an employee provides notice of a subsequent need for FMLA leave during the applicable 12-month period due to a different FMLA-qualifying reason, and the employee's eligibility status has not changed, no additional eligibility notice is required. If, however, the employee's eligibility status has changed (e.g., if the employee has not met the hours of service requirement in the 12 months preceding the commencement of leave for the subsequent qualifying reason), the employing office must notify the employee of the change in eligibility status within five business days, absent extenuating circumstances.

(c) *Rights and responsibilities notice.* (1) Employing offices shall provide written notice detailing the specific expectations and obligations of the employee and explaining any consequences of a failure to meet these obligations. This notice shall be provided to the employee each time the eligibility notice is provided pursuant to paragraph (b) of this section. If leave has already begun, the notice should be mailed to the employee's address of record. Such specific notice must include, as appropriate:

(i) That the leave may be designated and counted against the employee's annual FMLA leave entitlement if qualifying (*See* 825.300(c) and 825.301) and the applicable 12-month period for FMLA entitlement (*See* 825.127(c), 825.200(b), (f), and (g));

(ii) Any requirements for the employee to furnish certification of a serious health condition, serious injury or illness, or qualifying exigency arising out of covered active duty or call to covered active duty status, and the consequences of failing to do so (*See* 825.305, 825.309, 825.310, 825.313);

(iii) If applicable, the employee's right to substitute paid parental leave for unpaid FMLA leave for a birth or placement (*See* 825.208) and the employee's right to substitute paid leave generally, whether the employing office will require the substitution of paid leave, the conditions related to any substitution, and the employee's entitlement to take unpaid FMLA leave if the employee does not meet the conditions for paid leave (*See* 825.207);

(iv) Any requirement for the employee to make any premium payments to maintain health benefits and the arrangements for making such payments (*See* 825.210), and the possible consequences of failure to make such payments on a timely basis (i.e., the circumstances under which coverage may lapse);

(v) The employee's status as a key employee and the potential consequence that restoration may be denied following FMLA leave, explaining the conditions required for such denial (*See* 825.218);

(vi) The employee's right to maintenance of benefits during the FMLA leave and restoration to the same or an equivalent job upon return from FMLA leave (*See* 825.214 and 825.604); and

(vii) The employee's potential liability for payment of health insurance premiums paid by the employing office during the employee's unpaid FMLA leave if the employee fails to return to work after taking FMLA leave (*See* 825.213, 825.504).

(2) The notice of rights and responsibilities may include other information—e.g., whether the employing office will require periodic reports of the employee's status and intent to return to work—but is not required to do so.

(3) The notice of rights and responsibilities may be accompanied by any required certification form.

(4) If the specific information provided by the notice of rights and responsibilities changes, the employing office shall, within five business days of receipt of the employee's first notice of need for leave subsequent to any change, provide written notice referencing the prior notice and setting forth any of the information in the notice of rights and responsibilities that has changed. For example, if the initial leave period was paid leave and the subsequent leave period would be unpaid leave, the employing office may need to give notice of the arrangements for making premium payments.

(5) Employing offices are also expected to responsively answer questions from employees concerning their rights and responsibilities under the FMLA, as made applicable under the CAA.

(6) A prototype notice of rights and responsibilities may be obtained in Form C, or from the Office of Congressional Workplace Rights. Employing offices may adapt the prototype notice as appropriate to meet these notice requirements. The notice of rights and responsibilities may be distributed electronically so long as it otherwise meets the requirements of this section.

(d) *Designation notice.* (1) The employing office is responsible in all circumstances for designating leave as FMLA-qualifying, and for giving notice of the designation to the employee as provided in this section. When the employing office has enough information to determine whether the leave is being taken for a FMLA-qualifying reason (e.g., after receiving a certification), the employing office must notify the employee whether the leave will be designated and will be counted as FMLA leave within five business days absent extenuating circumstances. Only one notice of designation is required for each FMLA-qualifying reason per applicable 12-month period, regardless of whether the leave taken due to the qualifying reason will be a continuous block of leave or intermittent or reduced schedule leave. If the employing office determines that the leave will not be designated as FMLA-qualifying (e.g., if the leave is not for a reason covered by FMLA or the FMLA leave entitlement has been exhausted), the employing office must notify the employee of that determination. Subject to 825.208, if the employing office requires paid leave to be substituted for unpaid FMLA leave, or that paid leave taken under an existing leave plan be counted as FMLA leave, the employing office must inform the employee of this designation at the time of designating the FMLA leave.

(2) If the employing office has sufficient information to designate the leave as FMLA leave immediately after receiving notice of the employee's need for leave, the employing office may provide the employee with the designation notice at that time.

(3) If the employing office will require the employee to present a fitness-for-duty certification to be restored to employment, the employing office must provide notice of such requirement with the designation notice. If the employing office will require that the fitness-for-duty certification address the employee's ability to perform the essential functions of the employee's position, the employing office must so indicate in the designation notice, and must include a list of the essential functions of the employee's position. *See* 825.312. If the employing office's handbook or other written documents (if any) describing the employing office's leave policies clearly provide that a fitness-for-duty certification will be required in specific circumstances (e.g., by stating that fitness-for-duty certification will be required in all cases of back injuries for employees in a certain occupation), the employing office is not required to provide written notice of the requirement with the designation notice, but must provide oral notice no later than with the designation notice.

(4) The designation notice must be in writing. A prototype designation notice is contained in Form D which may be obtained from the Office of Congressional Workplace Rights. If the leave is not designated as FMLA leave because it does not meet the requirements of the FMLA, as made applicable by the CAA, the notice to the employee that the leave is not designated as FMLA leave may be in the form of a simple written statement. The designation notice may be distributed electronically so long as it otherwise meets the requirements of this section and the employing office can demonstrate that the employee (who may already be on leave and who may not have access to employing office-provided computers) has access to the information electronically.

(5) If the information provided by the employing office to the employee in the designation notice changes (e.g., the employee exhausts the FMLA leave entitlement), the employing office shall provide, within five business days of receipt of the employee's first notice of need for leave subsequent to any change, written notice of the change.

(6) The employing office must notify the employee of the amount of leave counted against the employee's FMLA leave entitlement and, if applicable, the employee's paid parental leave entitlement. If the amount of leave needed is known at the time the employing office designates the leave as FMLA-qualifying, the employing office must notify the employee of the number of hours, days, or weeks that will be counted against the employee's FMLA leave entitlement in the designation notice. If it is not possible to provide the hours, days, or weeks that will be counted against the employee's FMLA leave entitlement (such as in the case of unforeseeable intermittent leave), then the employing office must provide notice of the amount of leave counted against the employee's FMLA leave entitlement and, if applicable, paid parental leave entitlement, upon the request by the employee, but no more often than once in a 30-day period and only if leave was taken in that period. The notice of the amount of leave counted against the employee's FMLA entitlement and, if applicable, paid parental leave entitlement may be oral or in writing. If such notice is oral, it shall be confirmed in writing no later than the following payday (unless the payday is less than one week after the oral notice, in which case the notice must be no later than the subsequent payday). Such written notice may be in any form, including a notation on the employee's pay stub.

(e) *Consequences of failing to provide notice.* Failure to follow the notice requirements set forth in this section may constitute an interference with, restraint, or denial of the exercise of an employee's FMLA rights. An employing office may be liable for compensation and benefits lost by reason of the violation, for other actual monetary losses sustained as a direct result of the violation, and for appropriate equitable or other relief, including employment, reinstatement, promotion, or any other relief tailored to the harm suffered. *See* 825.400(c). 825.301 Designation of FMLA leave.

(a) *Employing office responsibilities.* The employing office's decision to designate leave as FMLA-qualifying must be based only on information received from the employee or the employee's spokesperson (e.g., if the employee is incapacitated, the employee's spouse, adult child, parent, doctor, etc., may provide notice to the employing office of the need to take FMLA leave). In any circumstance where the employing office does not have sufficient information about the reason for an employee's use of leave, the employing office should inquire further of the employee or the spokesperson to ascertain whether leave is potentially FMLA-qualifying. Once the employing office has acquired knowledge that the leave is being taken for a FMLA-qualifying reason, the employing office must notify the employee as provided in 825.300(d).

(b) *Employee responsibilities.* An employee giving notice of the need for FMLA leave does not need to expressly assert rights under the FMLA, as made applicable by the CAA, or even mention the FMLA to meet his or her obligation to provide notice, though the employee would need to state a qualifying reason for the needed leave and otherwise satisfy the notice requirements set forth in 825.302 or 825.303 depending on whether the need for leave is foreseeable or unforeseeable. An employee giving notice of the need for FMLA leave must explain the reasons for the needed leave so as to allow the employing office to determine whether the leave qualifies under the FMLA, as made applicable by the CAA. If the employee fails to explain the reasons, leave may be denied. In many cases, in explaining the reasons for a request to use leave, especially when the need for the leave was unexpected or unforeseen, an employee will provide sufficient information for the employing office to designate the leave as FMLA leave. An employee using accrued paid leave may in some cases not spontaneously explain the reasons or their plans for using their accrued leave. However, if an employee requesting to use paid leave for a FMLA-qualifying reason does not explain the reason for the leave and the employing office denies the employee's request, the employee will need to provide sufficient information to establish a FMLA-qualifying reason for the needed leave so that the employing office is aware that the leave may not be denied and may designate that the paid leave be appropriately counted against (substituted for) the employee's FMLA leave entitlement. Similarly, an employee using accrued paid vacation leave who seeks an extension of unpaid leave for a FMLA-qualifying reason will need to state the reason. If this is due to an event which occurred during the period of paid leave, the employing office may count the leave used after the FMLA-qualifying reason against the employee's FMLA leave entitlement.

(c) *Disputes.* If there is a dispute between an employing office and an employee as to whether leave qualifies as FMLA leave, it should be resolved through discussions between the employee and the employing office. Such discussions and the decision must be documented.

(d) *Retroactive designation*. If an employing office does not designate leave as required by 825.300, the employing office may retroactively designate leave as FMLA leave with appropriate notice to the employee as required by 825.300 provided that the employing office's failure to timely designate leave does not cause harm or injury to the employee. In all cases where leave would qualify for FMLA protections, an employing office and an employee can mutually agree that leave be retroactively designated as FMLA leave.

(e) *Remedies*. If an employing office's failure to timely designate leave in accordance with 825.300 causes the employee to suffer harm, it may constitute an interference with, restraint of, or denial of the exercise of an employee's FMLA rights. An employing office may be liable for compensation and benefits lost by reason of the violation, for other actual monetary losses sustained as a direct result of the violation, and for appropriate equitable or other relief, including employment, reinstatement, promotion, or any other relief tailored to the harm suffered. *See* 825.400(c). For example, if an employing office that was put on notice that an employee needed FMLA leave failed to designate the leave properly, but the employee's own serious health condition prevented him or her from returning to work during that time period regardless of the designation, an employee may not be able to show that the employee suffered harm as a result of the employing office's actions. However, if an employee took leave to provide care for a son or daughter with a serious health condition believing it would not count toward his or her FMLA entitlement, and the employee planned to later use that FMLA leave to provide care for a spouse who would need assistance when recovering from surgery planned for a later date, the employee may be able to show that harm has occurred as a result of the employing office's failure to designate properly. The employee might establish this by showing that he or she would have arranged for an alternative caregiver for the seriously-ill son or daughter if the leave had been designated timely.

825.302 Employee notice requirements for foreseeable FMLA leave.

(a) *Timing of notice*. An employee must provide the employing office at least 30 days advance notice before FMLA leave is to begin if the need for the leave is foreseeable based on an expected birth, placement for adoption or foster care, planned medical treatment for a serious health condition of the employee or of a family member, or the planned medical treatment for a serious injury or illness of a covered servicemember. If 30 days' notice is not practicable, such as because of a lack of knowledge of approximately when leave will be required to begin, a change in circumstances, or a medical emergency, notice must be given as soon as practicable. For example, an employee's health condition may require leave to commence earlier than anticipated before the birth of a child. Similarly, little opportunity for notice may be given before placement for adoption. For foreseeable leave due to a qualifying exigency, notice must be provided as soon as practicable, regardless of how far in advance such leave is foreseeable. Whether FMLA leave is to be continuous or is to be taken intermittently or on a reduced schedule basis, notice need only be given one time, but the employee shall advise the employing office as soon as practicable if dates of scheduled leave change or are extended, or were initially unknown. In those cases where the employee is required to provide at least 30 days' notice of foreseeable leave and does not do so, the employee shall explain the reasons why such notice was not practicable upon a request from the employing office for such information.

(b) As soon as practicable means as soon as both possible and practical, taking into account all of the facts and circumstances in the individual case. When an employee becomes aware of a need for FMLA leave less than 30 days in advance, it should be practicable for the employee to provide notice of the need for leave either the same day or the next business day. In all cases, however, the determination of when an employee could practicably provide notice must take into account the individual facts and circumstances.

(c) *Content of notice*. An employee shall provide at least verbal notice sufficient to make the employing office aware that the employee needs FMLA-qualifying leave, and the anticipated timing and duration of the leave. Depending on the situation, such information may include that a condition renders the employee unable to perform the functions of the job; that the employee is pregnant or has been hospitalized overnight; whether the employee or the employee's family member is under the continuing care of a health care provider; if the leave is due to a qualifying exigency, that a military member is on covered active duty or call to covered active duty status (or has been notified of an impending call or order to covered active duty), and that the requested leave is for one of the reasons listed in 825.126(b); if the leave is for a family member, that the condition renders the family member unable to perform daily activities, or that the family member is a covered servicemember with a serious injury or illness; and the anticipated duration of the absence, if known. When an employee seeks leave for the first time for a FMLA-qualifying reason, the employee need not expressly assert rights under the FMLA, as made applicable by the CAA, or even mention the FMLA. When an employee seeks leave due to a FMLA-qualifying reason, for which the employing office has previously provided FMLA-protected leave, the employee must specifically reference the qualifying reason for leave or the need for FMLA leave. In all cases, the employing office should inquire further of the employee if it is necessary to have more information about whether FMLA leave is being sought by the employee, and obtain the necessary details of the leave to be taken. In the case of medical conditions, the employing office may find it necessary to inquire further to determine if the leave is because of a serious health condition and may request medical certification to support the need for such leave. *See* 825.305. An employing office may also request certification to support the need for leave for a qualifying exigency or for military caregiver leave. See 825.309, 825.310. When an employee has been previously certified for leave due to more than one FMLA-qualifying reason, the employing office may need to inquire further to determine for which qualifying reason the leave is needed. An employee has an obligation to respond to an employing office's questions designed to determine whether an absence is potentially FMLA-qualifying. Failure to respond to reasonable employing office inquiries regarding the leave request may result in denial of FMLA protection if the employing office is unable to determine whether the leave is FMLA-qualifying.

(d) Complying with the employing office policy. An employing office may require an employee to comply with the employing office's usual and customary notice and procedural requirements for requesting leave, absent unusual circumstances. For example, an employing office may require that written notice set forth the reasons for the requested leave, the anticipated duration of the leave, and the anticipated start of the leave. An employee also may be required by an employing office's policy to contact a specific individual. Unusual circumstances would include situations such as when an employee is unable to comply with the employing office's policy that requests for leave should be made by contacting a specific number because on the day the employee needs to provide notice of his or her need for FMLA leave there is no one to answer the call-in number and the voice mail box is full. Where an employee does not comply with the employing office's usual notice and procedural requirements, and no unusual circumstances justify the failure to comply, FMLA-protected leave may be delayed or denied. However, FMLA-protected leave may not be delayed or denied where the employing office's policy requires notice to be given sooner than set forth in paragraph (a) of this section and the employee provides timely notice as set forth in paragraph (a) of this section.

(e) *Scheduling planned medical treatment*. When planning medical treatment, the employee must consult with the employing office and make a reasonable effort to schedule the treatment so as not to disrupt unduly the employing office's operations, subject to the approval of the health care provider. Employees are ordinarily expected to consult with their employing offices prior to the scheduling of treatment in order to work out a treatment schedule which best suits the needs of both the employing office and the employee. For example, if an employee who provides notice of the need to take FMLA leave on an intermittent basis for planned medical treatment neglects to consult with the employing office to make a reasonable effort to arrange the schedule of treatments so as not to unduly disrupt the employing office's operations, the employing office may initiate discussions with the employee and require the employee to attempt to make such arrangements, subject to the approval of the health care provider. *See* 825.203 and 825.205.

(f) Intermittent leave or leave on a reduced leave schedule must be medically necessary due to a serious health condition or a serious injury or illness. An employee shall advise the employing office, upon request, of the reasons why the intermittent/reduced leave schedule is necessary and of the schedule for treatment, if applicable. The employee and employing office shall attempt to work out a schedule for such leave that meets the employee's needs without unduly disrupting the employing office's operations, subject to the approval of the health care provider.

(g) An employing office may waive employees' FMLA notice requirements. *See* 825.304.

825.303 Employee notice requirements for unforeseeable FMLA leave.

(a) *Timing of notice*. When the approximate timing of the need for leave is not foreseeable, an employee must provide notice to the employing office as soon as practicable under the facts and circumstances of the particular case. It generally should be practicable for the employee to provide notice of leave that is unforeseeable within the time prescribed by the employing office's usual and customary notice requirements applicable to such leave. *See* 825.303(c). Notice may be given by the employee's spokesperson (e.g., spouse, adult family member, or other responsible party) if the employee is unable to do so personally. For example, if an employee's child has a severe asthma attack and the employee takes the child to the emergency room, the employee would not be required to leave his or her child in order to report the absence while the child is receiving emergency treatment. However, if the

child's asthma attack required only the use of an inhaler at home followed by a period of rest, the employee would be expected to call the employing office promptly after ensuring the child has used the inhaler.

(b) *Content of notice.* An employee shall provide sufficient information for an employing office to reasonably determine whether the FMLA may apply to the leave request. Depending on the situation, such information may include that a condition renders the employee unable to perform the functions of the job; that the employee is pregnant or has been hospitalized overnight; whether the employee or the employee's family member is under the continuing care of a health care provider; if the leave is due to a qualifying exigency, that a military member is on covered active duty or call to covered active duty status (or has been notified of an impending call or order to covered active duty), that the requested leave is for one of the reasons listed in 825.126(b), and the anticipated duration of the absence; or if the leave is for a family member that the condition renders the family member unable to perform daily activities or that the family member is a covered servicemember with a serious injury or illness; and the anticipated duration of the absence, if known. When an employee seeks leave for the first time for a FMLA-qualifying reason, the employee need not expressly assert rights under the FMLA, as made applicable by the CAA, or even mention the FMLA. When an employee seeks leave due to a qualifying reason, for which the employing office has previously provided the employee FMLA-protected leave, the employee must specifically reference either the qualifying reason for leave or the need for FMLA leave. Calling in ''sick'' without providing more information will not be considered sufficient notice to trigger an employing office's obligations under the FMLA, as made applicable by the CAA. The employing office will be expected to obtain any additional required information through informal means. An employee has an obligation to respond to an employing office's questions designed to determine whether an absence is potentially FMLA-qualifying. Failure to respond to reasonable employing office inquiries office regarding the leave request may result in denial of FMLA protection if the employing office is unable to determine whether the leave is FMLA-qualifying.

(c) *Complying with employing office policy.* When the need for leave is not foreseeable, an employee must comply with the employing office's usual and customary notice and procedural requirements for requesting leave, absent unusual circumstances. For example, an employing office may require employees to call a designated number or a specific individual to request leave. However, if an employee requires emergency medical treatment, he or she would not be required to follow the call-in procedure until his or her condition is stabilized and he or she has access to, and is able to use, a phone. Similarly, in the case of an emergency requiring leave because of a FMLA-qualifying reason, written advance notice pursuant to an employing office's internal rules and procedures may not be required when FMLA leave is involved. If an employee does not comply with the employing office's usual notice and procedural requirements, and no unusual circumstances justify the failure to comply, FMLA-protected leave may be delayed or denied.

825.304 Employee failure to provide notice.

(a) *Proper notice required.* In all cases, in order for the onset of an employee's FMLA leave to be delayed due to lack of required notice, it must be clear that the employee had actual notice of the FMLA notice requirements. This condition would be satisfied by the employing office's proper posting, at the worksite where the employee is employed, of the information regarding the FMLA provided (pursuant to section 301(h)(2) of the CAA, 2 U.S.C. 1381(h)(2)) by the Office of Congressional Workplace Rights to the employing office in a manner suitable for posting.

(b) *Foreseeable leave—30 days.* When the need for FMLA leave is foreseeable at least 30 days in advance and an employee fails to give timely advance notice with no reasonable excuse, the employing office may delay FMLA coverage until 30 days after the date the employee provides notice. The need for leave and the approximate date leave would be taken must have been clearly foreseeable to the employee 30 days in advance of the leave. For example, knowledge that an employee would receive a telephone call about the availability of a child for adoption at some unknown point in the future would not be sufficient to establish the leave was clearly foreseeable 30 days in advance.

(c) *Foreseeable leave—less than 30 days.* When the need for FMLA leave is foreseeable fewer than 30 days in advance and an employee fails to give notice as soon as practicable under the particular facts and circumstances, the extent to which an employing office may delay FMLA coverage for leave depends on the facts of the particular case. For example, if an employee reasonably should have given the employing office two weeks' notice but instead only provided one week's notice, then the employing office may delay FMLA-protected leave for one week (thus, if the employing office elects to delay FMLA coverage and the employee nonetheless takes leave one week after providing the notice (i.e., a week before the two week notice period has been met) the leave will not be FMLA-protected).

(d) *Unforeseeable leave.* When the need for FMLA leave is unforeseeable and an employee fails to give notice in accordance with 825.303, the extent to which an employing office may delay FMLA coverage for leave depends on the facts of the particular case. For example, if it would have been practicable for an employee to have given the employing office notice of the need for leave very soon after the need arises consistent with the employing office's policy, but instead the employee provided notice two days after the leave began, then the employing office may delay FMLA coverage of the leave by two days.

(e) *Waiver of notice.* An employing office may waive employees' FMLA notice obligations or the employing office's own internal rules on leave notice requirements. If an employing office does not waive the employee's obligations under its internal leave rules, the employing office may take appropriate action under its internal rules and procedures for failure to follow its usual and customary notification rules, absent unusual circumstances, as long as the actions are taken in a manner that does not discriminate against employees taking FMLA leave and the rules are not inconsistent with 825.303(a).

825.305 Certification, general rule.

(a) *General.* An employing office may require that an employee's leave to care for the employee's covered family member with a serious health condition, or due to the employee's own serious health condition that makes the employee unable to perform one or more of the essential functions of the employee's position, be supported by a certification issued by the health care provider of the employee or the employee's family member. An employing office may also require that an employee's leave because of a qualifying exigency or to care for a covered servicemember with a serious injury or illness be supported by a certification, as described in 825.309 and 825.310, respectively. An employing office must give notice of a requirement for certification each time a certification is required; such notice must be written notice whenever required by 825.300(c). An employing office's oral request to an employee to furnish any subsequent certification is sufficient.

(b) *Timing.* In most cases, the employing office should request that an employee furnish certification at the time the employee gives notice of the need for leave or within five business days thereafter, or, in the case of unforeseen leave, within five business days after the leave commences. The employing office may request certification at some later date if the employing office later has reason to question the appropriateness of the leave or its duration. The employee must provide the requested certification to the employing office within 15 calendar days after the employing office's request, unless it is not practicable under the particular circumstances to do so despite the employee's diligent, good faith efforts or the employing office provides more than 15 calendar days to return the requested certification.

(c) *Complete and sufficient certification.* The employee must provide a complete and sufficient certification to the employing office if required by the employing office in accordance with 825.306, 825.309, and 825.310. The employing office shall advise an employee whenever the employing office finds a certification incomplete or insufficient, and shall state in writing what additional information is necessary to make the certification complete and sufficient. A certification is considered incomplete if the employing office receives a certification, but one or more of the applicable entries have not been completed. A certification is considered insufficient if the employing office receives a complete certification, but the information provided is vague, ambiguous, or non-responsive. The employing office must provide the employee with seven calendar days (unless not practicable under the particular circumstances despite the employee's diligent good faith efforts) to cure any such deficiency. If the deficiencies specified by the employing office are not cured in the resubmitted certification, the employing office may deny the taking of FMLA leave, in accordance with 825.313. A certification that is not returned to the employing office is not considered incomplete or insufficient, but constitutes a failure to provide certification.

(d) *Consequences.* At the time the employing office requests certification, the employing office must also advise an employee of the anticipated consequences of an employee's failure to provide adequate certification. If the employee fails to provide the employing office with a complete and sufficient certification, despite the opportunity to cure the certification as provided in paragraph (c) of this section, or fails to provide any certification, the employing office may deny the taking of FMLA leave, in accordance with 825.313. It is the employee's responsibility either to furnish a complete and sufficient certification or to furnish the health care provider providing the certification with any necessary authorization from the employee or the employee's family member in order for the health care provider to release a complete and sufficient certification to the employing office to support the employee's FMLA request. This provision will apply in any case where an employing office requests a certification permitted by these regulations, whether it is the initial certification, a recertification, a second or third opinion, or a fitness-for-duty certificate, including

any clarifications necessary to determine if such certifications are authentic and sufficient. *See* 825.306, 825.307, 825.308, and 825.312.

(e) *Annual medical certification.* Where the employee's need for leave due to the employee's own serious health condition, or the serious health condition of the employee's covered family member, lasts beyond a single leave year (as defined in 825.200), the employing office may require the employee to provide a new medical certification in each subsequent leave year. Such new medical certifications are subject to the provisions for authentication and clarification set forth in 825.307, including second and third opinions.

825.306 Content of medical certification for leave taken because of an employee's own serious health condition or the serious health condition of a family member.

(a) *Required information.* When leave is taken because of an employee's own serious health condition, or the serious health condition of a family member, an employing office may require an employee to obtain a medical certification from a health care provider that sets forth the following information:

(1) The name, address, telephone number, and fax number of the health care provider and type of medical practice/specialization;

(2) The approximate date on which the serious health condition commenced, and its probable duration;

(3) A statement or description of appropriate medical facts regarding the patient's health condition for which FMLA leave is requested. The medical facts must be sufficient to support the need for leave. Such medical facts may include information on symptoms, diagnosis, hospitalization, doctor visits, whether medication has been prescribed, any referrals for evaluation or treatment (physical therapy, for example), or any other regimen of continuing treatment;

(4) If the employee is the patient, information sufficient to establish that the employee cannot perform the essential functions of the employee's job as well as the nature of any other work restrictions, and the likely duration of such inability (*See* 825.123(b));

(5) If the patient is a covered family member with a serious health condition, information sufficient to establish that the family member is in need of care, as described in 825.124, and an estimate of the frequency and duration of the leave required to care for the family member;

(6) If an employee requests leave on an intermittent or reduced schedule basis for planned medical treatment of the employee's or a covered family member's serious health condition, information sufficient to establish the medical necessity for such intermittent or reduced schedule leave and an estimate of the dates and duration of such treatments and any periods of recovery;

(7) If an employee requests leave on an intermittent or reduced schedule basis for the employee's serious health condition, including pregnancy, that may result in unforeseeable episodes of incapacity, information sufficient to establish the medical necessity for such intermittent or reduced schedule leave and an estimate of the frequency and duration of the episodes of incapacity; and

(8) If an employee requests leave on an intermittent or reduced schedule basis to care for a covered family member with a serious health condition, a statement that such leave is medically necessary to care for the family member, as described in 825.124 and 825.203(b), which can include assisting in the family member's recovery, and an estimate of the frequency and duration of the required leave.

(b) The Office of Congressional Workplace Rights has developed two optional forms (Form A and Form B) for use in obtaining medical certification, including second and third opinions, from health care providers that meets FMLA's certification requirements, as made applicable by the CAA. (*See* Forms A and B.) Optional Form A is for use when the employee's need for leave is due to the employee's own serious health condition. Optional Form B is for use when the employee needs leave to care for a family member with a serious health condition. These optional forms reflect certification requirements so as to permit the health care provider to furnish appropriate medical information. Forms A and B are modeled closely on Form WH–380E and Form WH–380F, as revised, which were developed by the Department of Labor (*See* 29 C.F.R. Part 825). The employing office may use the Office of Congressional Workplace Rights's forms, or Form WH–380E and Form WH–380F, as revised, or another form containing the same basic information; however, no information may be required beyond that specified in 825.306, 825.307, and 825.308. In all instances the information on the form must relate only to the serious health condition for which the current need for leave exists.

(c) If an employee is on FMLA leave running concurrently with a workers' compensation absence, and the provisions of the workers' compensation statute permit the employing office or the employing office's representative to request additional information from the employee's workers' compensation health care provider, the FMLA does not prevent the employing office from following the applicable workers' compensation provisions and information received under those provisions may be considered in determining the employee's entitlement to FMLA-protected leave. Similarly, an employing office may request additional information in accordance with a paid leave policy or disability plan that requires greater information to qualify for payments or benefits, provided that the employing office informs the employee that the additional information only needs to be provided in connection with receipt of such payments or benefits. Any information received pursuant to such policy or plan may be considered in determining the employee's entitlement to FMLA-protected leave. If the employee fails to provide the information required for receipt of such payments or benefits, such failure will not affect the employee's entitlement to take unpaid FMLA leave. *See* 825.207(a).

(d) If an employee's serious health condition may also be a disability within the meaning of the Americans with Disabilities Act (ADA), as amended and as made applicable by the CAA, the FMLA does not prevent the employing office from following the procedures for requesting medical information under the ADA. Any information received pursuant to these procedures may be considered in determining the employee's entitlement to FMLA-protected leave.

(e) While an employee may choose to comply with the certification requirement by providing the employing office with an authorization, release, or waiver allowing the employing office to communicate directly with the health care provider of the employee or his or her covered family member, the employee may not be required to provide such an authorization, release, or waiver. In all instances in which certification is requested, it is the employee's responsibility to provide the employing office with complete and sufficient certification and failure to do so may result in the denial of FMLA leave. *See* 825.305(d).

825.307 Authentication and clarification of medical certification for leave taken because of an employee's own serious health condition or the serious health condition of a family member; second and third opinions.

(a) *Clarification and authentication.* If an employee submits a complete and sufficient certification signed by the health care provider, the employing office may not request additional information from the health care provider. However, the employing office may contact the health care provider for purposes of clarification and authentication of the medical certification (whether initial certification or recertification) after the employing office has given the employee an opportunity to cure any deficiencies as set forth in 825.305(c). To make such contact, the employing office must use a health care provider, a human resources professional, a leave administrator, or a management official. An employee's direct supervisor may not contact the employee's health care provider, unless the direct supervisor is also the only individual in the employing office designated to process FMLA requests and the direct supervisor receives specific authorization from the employee to contact the employee's health care provider. For purposes of these regulations, authentication means providing the health care provider with a copy of the certification and requesting verification that the information contained on the certification form was completed and/or authorized by the health care provider who signed the document; no additional medical information may be requested.

Clarification means contacting the health care provider to understand the handwriting on the medical certification or to understand the meaning of a response. Employing offices may not ask health care providers for additional information beyond that required by the certification form. The requirements of the Health Insurance Portability and Accountability Act (HIPAA) Privacy Rule, (*See* 45 CFR parts 160 and 164), which governs the privacy of individually-identifiable health information created or held by HIPAA-covered entities, must be satisfied when individually-identifiable health information of an employee is shared with an employing office by a HIPAA-covered health care provider. If an employee chooses not to provide the employing office with authorization allowing the employing office to clarify the certification with the health care provider, and does not otherwise clarify the certification, the employing office may deny the taking of FMLA leave if the certification is unclear. *See* 825.305(d). It is the employee's responsibility to provide the employing office with a complete and sufficient certification and to clarify the certification if necessary.

(b) *Second Opinion.* (1) An employing office that has reason to doubt the validity of a medical certification may require the employee to obtain a second opinion at the employing office's expense. Pending receipt of the second (or third) medical opinion, the employee is provisionally entitled to the benefits of the FMLA, as made applicable by the CAA, including maintenance of group health benefits. If the certifications do not ultimately establish the employee's entitlement to FMLA leave, the leave shall not be designated as FMLA leave and may be treated as paid or unpaid leave under the employing office's established leave policies. In addition, the consequences set forth in 825.305(d) will apply if the employee or the employee's family member fails to authorize his or her health care provider to release all relevant medical information pertaining to the serious health condition at issue if requested by the health care provider designated to provide a second opinion in order

to render a sufficient and complete second opinion.

(2) The employing office is permitted to designate the health care provider to furnish the second opinion, but the selected health care provider may not be employed on a regular basis by the employing office. The employing office may not regularly contract with or otherwise regularly utilize the services of the health care provider furnishing the second opinion unless the employing office is located in an area where access to health care is extremely limited (e.g., a rural area where no more than one or two doctors practice in the relevant specialty in the vicinity).

(c) *Third opinion.* If the opinions of the employee's and the employing office's designated health care providers differ, the employing office may require the employee to obtain certification from a third health care provider, again at the employing office's expense. This third opinion shall be final and binding. The third health care provider must be designated or approved jointly by the employing office and the employee. The employing office and the employee must each act in good faith to attempt to reach agreement on whom to select for the third opinion provider. If the employing office does not attempt in good faith to reach agreement, the employing office will be bound by the first certification. If the employee does not attempt in good faith to reach agreement, the employee will be bound by the second certification. For example, an employee who refuses to agree to see a doctor in the specialty in question may be failing to act in good faith. On the other hand, an employing office that refuses to agree to any doctor on a list of specialists in the appropriate field provided by the employee and whom the employee has not previously consulted may be failing to act in good faith. In addition, the consequences set forth in 825.305(d) will apply if the employee or the employee's family member fails to authorize his or her health care provider to release all relevant medical information pertaining to the serious health condition at issue if requested by the health care provider designated to provide a third opinion in order to render a sufficient and complete third opinion.

(d) *Copies of opinions.* The employing office is required to provide the employee with a copy of the second and third medical opinions, where applicable, upon request by the employee. Requested copies are to be provided within five business days unless extenuating circumstances prevent such action.

(e) *Travel expenses.* If the employing office requires the employee to obtain either a second or third opinion the employing office must reimburse an employee or family member for any reasonable ''out of pocket'' travel expenses incurred to obtain the second and third medical opinions. The employing office may not require the employee or family member to travel outside normal commuting distance for purposes of obtaining the second or third medical opinions except in very unusual circumstances.

(f) *Medical certification abroad.* In circumstances in which the employee or a family member is visiting in another country, or a family member resides in another country, and a serious health condition develops, the employing office shall accept a medical certification as well as second and third opinions from a health care provider who practices in that country. Where a certification by a foreign health care provider is in a language other than English, the employee must provide the employing office with a written translation of the certification upon request.

825.308 Recertifications for leave taken because of an employee's own serious health condition or the serious health condition of a family member.

(a) *30-day rule.* An employing office may request recertification no more often than every 30 days and only in connection with an absence by the employee, unless paragraphs (b) or (c) of this section apply.

(b) *More than 30 days.* If the medical certification indicates that the minimum duration of the condition is more than 30 days, an employing office must wait until that minimum duration expires before requesting a recertification, unless paragraph (c) of this section applies. For example, if the medical certification states that an employee will be unable to work, whether continuously or on an intermittent basis, for 40 days, the employing office must wait 40 days before requesting a recertification. In all cases, an employing office may request a recertification of a medical condition every six months in connection with an absence by the employee. Accordingly, even if the medical certification indicates that the employee will need intermittent or reduced schedule leave for a period in excess of six months (e.g., for a lifetime condition), the employing office would be permitted to request recertification every six months in connection with an absence.

(c) *Less than 30 days.* An employing office may request recertification in less than 30 days if:

(1) The employee requests an extension of leave;

(2) Circumstances described by the previous certification have changed significantly (e.g., the duration or frequency of the absence, the nature or severity of the illness, complications). For example, if a medical certification stated that an employee would need leave for one to two days when the employee suffered a migraine headache and the employee's absences for his or her last two migraines lasted four days each, then the increased duration of absence might constitute a significant change in circumstances allowing the employing office to request a recertification in less than 30 days. Likewise, if an employee had a pattern of using unscheduled FMLA leave for migraines in conjunction with his or her scheduled days off, then the timing of the absences also might constitute a significant change in circumstances sufficient for an employing office to request a recertification more frequently than every 30 days; or

(3) The employing office receives information that casts doubt upon the employee's stated reason for the absence or the continuing validity of the certification. For example, if an employee is on FMLA leave for four weeks due to the employee's knee surgery, including recuperation, and the employee plays in company softball league games during the employee's third week of FMLA leave, such information might be sufficient to cast doubt upon the continuing validity of the certification allowing the employing office to request a recertification in less than 30 days.

(d) *Timing.* The employee must provide the requested recertification to the employing office within the time frame requested by the employing office (which must allow at least 15 calendar days after the employing office's request), unless it is not practicable under the particular circumstances to do so despite the employee's diligent, good faith efforts.

(e) *Content.* The employing office may ask for the same information when obtaining recertification as that permitted for the original certification as set forth in 825.306. The employee has the same obligations to participate and cooperate (including providing a complete and sufficient certification or adequate authorization to the health care provider) in the recertification process as in the initial certification process. *See* 825.305(d). As part of the information allowed to be obtained on recertification for leave taken because of a serious health condition, the employing office may provide the health care provider with a record of the employee's absence pattern and ask the health care provider if the serious health condition and need for leave is consistent with such a pattern.

(f) Any recertification requested by the employing office shall be at the employee's expense unless the employing office provides otherwise. No second or third opinion on recertification may be required.

825.309 Certification for leave taken because of a qualifying exigency.

(a) *Active Duty Orders.* The first time an employee requests leave because of a qualifying exigency arising out of the covered active duty or call to covered active duty status (or notification of an impending call or order to covered active duty) of a military member (See 825.126(a)), an employing office may require the employee to provide a copy of the military member's active duty orders or other documentation issued by the military which indicates that the military member is on covered active duty or call to covered active duty status, and the dates of the military member's covered active duty service. This information need only be provided to the employing office once. A copy of new active duty orders or other documentation issued by the military may be required by the employing office if the need for leave because of a qualifying exigency arises out of a different covered active duty or call to covered active duty status (or notification of an impending call or order to covered active duty) of the same or a different military member;

(b) *Required information.* An employing office may require that leave for any qualifying exigency specified in 825.126 be supported by a certification from the employee that sets forth the following information:

(1) A statement or description, signed by the employee, of appropriate facts regarding the qualifying exigency for which FMLA leave is requested. The facts must be sufficient to support the need for leave. Such facts should include information on the type of qualifying exigency for which leave is requested and any available written documentation which supports the request for leave; such documentation, for example, may include a copy of a meeting announcement for informational briefings sponsored by the military, a document confirming an appointment with a counselor or school official, or a copy of a bill for services for the handling of legal or financial affairs;

(2) The approximate date on which the qualifying exigency commenced or will commence;

(3) If an employee requests leave because of a qualifying exigency for a single, continuous period of time, the beginning and end dates for such absence;

(4) If an employee requests leave because of a qualifying exigency on an intermittent or reduced schedule basis, an estimate of the frequency and duration of the qualifying exigency;

(5) If the qualifying exigency involves meeting with a third party, appropriate contact information for the individual or entity with whom the employee is meeting (such as the name, title, organization, address, telephone number, fax number, and email address) and a brief description of the purpose of the meeting; and

(6) If the qualifying exigency involves Rest and Recuperation leave, a copy of the military member's Rest and Recuperation orders, or other documentation issued by the

military which indicates that the military member has been granted Rest and Recuperation leave, and the dates of the military member's Rest and Recuperation leave.

(c) The Office of Congressional Workplace Rights has developed an optional form (Form E) for employees' use in obtaining a certification that meets FMLA's certification requirements. This optional form reflects certification requirements so as to permit the employee to furnish appropriate information to support his or her request for leave because of a qualifying exigency. Form E, or Form WH–384 (developed by the Department of Labor), or another form containing the same basic information, may be used by the employing office; however, no information may be required beyond that specified in this section. (d) Verification. If an employee submits a complete and sufficient certification to support his or her request for leave because of a qualifying exigency, the employing office may not request additional information from the employee. However, if the qualifying exigency involves meeting with a third party, the employing office may contact the individual or entity with whom the employee is meeting for purposes of verifying a meeting or appointment schedule and the nature of the meeting between the employee and the specified individual or entity. The employee's permission is not required in order to verify meetings or appointments with third parties, but no additional information may be requested by the employing office. An employing office also may contact an appropriate unit of the Department of Defense to request verification that a military member is on covered active duty or call to covered active duty status (or has been notified of an impending call or order to covered active duty); no additional information may be requested and the employee's permission is not required.

825.310 Certification for leave taken to care for a covered servicemember (military caregiver leave).

(a) *Required information from health care provider.* When leave is taken to care for a covered servicemember with a serious injury or illness, an employing office may require an employee to obtain a certification completed by an authorized health care provider of the covered servicemember. For purposes of leave taken to care for a covered servicemember, any one of the following health care providers may complete such a certification:

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

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

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

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

(5) Any health care provider as defined in 825.125.

(b) If the authorized health care provider is unable to make certain military-related determinations outlined below, the authorized health care provider may rely on determinations from an authorized DOD representative (such as a DOD recovery care coordinator) or an authorized VA representative. An employing office may request that the health care provider provide the following information:

(1) The name, address, and appropriate contact information (telephone number, fax number, and/or email address) of the health care provider, the type of medical practice, the medical specialty, and whether the health care provider is one of the following:

(i) A DOD health care provider;

(ii) A VA health care provider;

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

(iv) A DOD non-network TRICARE authorized private health care provider; or

(v) A health care provider as defined in 825.125.

(2) Whether the covered servicemember's injury or illness was incurred in the line of duty on active duty or, if not, whether the covered servicemember's injury or illness existed before the beginning of the servicemember's active duty and was aggravated by service in the line of duty on active duty;

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

(4) A statement or description of appropriate medical facts regarding the covered servicemember's health condition for which FMLA leave is requested. The medical facts must be sufficient to support the need for leave.

(i) In the case of a current member of the Armed Forces, such medical facts must include information on whether the injury or illness may render the covered servicemember medically unfit to perform the duties of the servicemember's office, grade, rank, or rating and whether the member is receiving medical treatment, recuperation, or therapy;

(ii) In the case of a covered veteran, such medical facts must include:

(A) Information on whether the veteran is receiving medical treatment, recuperation, or therapy for an injury or illness that is the continuation of an injury or illness that was incurred or aggravated when the covered veteran was a member of the Armed Forces and rendered the servicemember medically unfit to perform the duties of the servicemember's office, grade, rank, or rating; or

(B) Information on whether the veteran is receiving medical treatment, recuperation, or therapy for an injury or illness that is a physical or mental condition for which the covered veteran has received a U.S. Department of Veterans Affairs Service-Related Disability Rating (VASRD) of 50 percent or greater, and that such VASRD rating is based, in whole or in part, on the condition precipitating the need for military caregiver leave; or

(C) Information on whether the veteran is receiving medical treatment, recuperation, or therapy for an injury or illness that is a physical or mental condition that substantially impairs the covered veteran's ability to secure or follow a substantially gainful occupation by reason of a disability or disabilities related to military service, or would do so absent treatment; or

(D) Documentation of enrollment in the Department of Veterans Affairs Program of Comprehensive Assistance for Family Caregivers.

(5) Information sufficient to establish that the covered servicemember is in need of care, as described in 825.124, and whether the covered servicemember will need care for a single continuous period of time, including any time for treatment and recovery, and an estimate as to the beginning and ending dates for this period of time;

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

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

(c) Required information from employee and/or covered servicemember. In addition to the information that may be requested under 825.310(b), an employing office may also request that such certification set forth the following information provided by an employee and/or covered servicemember:

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

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

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

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

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

(6) Whether the covered servicemember is a veteran, the date of separation from military service, and whether the separation was other than dishonorable. The employing office may require the employee to provide documentation issued by the military which indicates that the covered servicemember is a veteran, the date of separation, and that the separation is other than dishonorable. Where an employing office requires such documentation, an employee may provide a copy of the veteran's Certificate of Release or Discharge from Active Duty issued by the U.S. Department of Defense (DD Form 214) or other proof of veteran status. *See* 825.127(c)(2).

(7) A description of the care to be provided to the covered servicemember and an estimate of the leave needed to provide the care.

(d) The Office of Congressional Workplace Rights has developed an optional form (Form F) for employees' use in obtaining certification that meets FMLA's certification requirements. (*See* Form F). This optional form reflects certification requirements so as to permit the employee to furnish appropriate information to support his or her request for leave to care for a covered servicemember with a serious injury or illness. Form F, or Form WH–385 (developed by the Department of Labor), or another form containing the same basic information, may be used by the employing office; however, no information may be required beyond that specified in this section. In all instances the information on the certification must relate only to the serious injury or illness for which the current need for leave exists. An employing office may seek authentication and/or clarification of the certification under 825.307. Second and third opinions under 825.307 are not permitted for leave to care for a covered servicemember when the certification has been completed by one of the types of healthcare providers identified in section 825.310(a)(1–4). However, second and third opinions under 825.307 are permitted when the certification has been completed by a health care provider as defined in 825.125 that is not one of the types identified in 825.310(a)(1)–(4). Additionally, recertifications under 825.308 are not permitted for leave to care for a covered servicemember. An employing office may require an employee to provide confirmation of covered family relationship to the seriously

injured or ill servicemember pursuant to 825.122(k) of the FMLA.

(e) An employing office requiring an employee to submit a certification for leave to care for a covered servicemember must accept as sufficient certification, in lieu of the Office of Congressional Workplace Rights's optional certification form (Form F) or an employing office's own certification form, invitational travel orders (ITOs) or invitational travel authorizations (ITAs) issued to any family member to join an injured or ill servicemember at his or her bedside. An ITO or ITA is sufficient certification for the duration of time specified in the ITO or ITA. During that time period, an eligible employee may take leave to care for the covered servicemember in a continuous block of time or on an intermittent basis. An eligible employee who provides an ITO or ITA to support his or her request for leave may not be required to provide any additional or separate certification that leave taken on an intermittent basis during the period of time specified in the ITO or ITA is medically necessary. An ITO or ITA is sufficient certification for an employee entitled to take FMLA leave to care for a covered servicemember regardless of whether the employee is named in the order or authorization.

(1) If an employee will need leave to care for a covered servicemember beyond the expiration date specified in an ITO or ITA, an employing office may request that the employee have one of the authorized health care providers listed under 825.310(a) complete the Office of Congressional Workplace Rights optional certification form (Form F) or an employing office's own form, as requisite certification for the remainder of the employee's necessary leave period.

(2) An employing office may seek authentication and clarification of the ITO or ITA under 825.307. An employing office may not utilize the second or third opinion process outlined in 825.307 or the recertification process under 825.308 during the period of time in which leave is supported by an ITO or ITA.

(3) An employing office may require an employee to provide confirmation of covered family relationship to the seriously injured or ill servicemember pursuant to 825.122(k) when an employee supports his or her request for FMLA leave with a copy of an ITO or ITA.

(f) An employing office requiring an employee to submit a certification for leave to care for a covered servicemember must accept as sufficient certification of the servicemember's serious injury or illness documentation indicating the servicemember's enrollment in the Department of Veterans Affairs Program of Comprehensive Assistance for Family Caregivers. Such documentation is sufficient certification of the servicemember's serious injury or illness to support the employee's request for military caregiver leave regardless of whether the employee is the named caregiver in the enrollment documentation.

(1) An employing office may seek authentication and clarification of the documentation indicating the servicemember's enrollment in the Department of Veterans Affairs Program of Comprehensive Assistance for Family Caregivers under 825.307. An employing office may not utilize the second or third opinion process outlined in 825.307 or the recertification process under 825.308 when the servicemember's serious injury or illness is shown by documentation of enrollment in this program.

(2) An employing office may require an employee to provide confirmation of covered family relationship to the seriously injured or ill servicemember pursuant to 825.122(k) when an employee supports his or her request for FMLA leave with a copy of such enrollment documentation. An employing office may also require an employee to provide documentation, such as a veteran's Form DD–214, showing that the discharge was other than dishonorable and the date of the veteran's discharge.

(g) Where medical certification is requested by an employing office, an employee may not be held liable for administrative delays in the issuance of military documents, despite the employee's diligent, good-faith efforts to obtain such documents. *See* 825.305(b). In all instances in which certification is requested, it is the employee's responsibility to provide the employing office with complete and sufficient certification and failure to do so may result in the denial of FMLA leave. *See* 825.305(d).

825.311 Intent to return to work.

(a) An employing office may require an employee on FMLA leave to report periodically on the employee's status and intent to return to work. The employing office's policy regarding such reports may not be discriminatory and must take into account all of the relevant facts and circumstances related to the individual employee's leave situation.

(b) If an employee gives unequivocal notice of intent not to return to work, the employing office's obligations under FMLA, as made applicable by the CAA, to maintain health benefits (subject to COBRA requirements) and to restore the employee cease. However, these obligations continue if an employee indicates he or she may be unable to return to work but expresses a continuing desire to do so.

(c) It may be necessary for an employee to take more leave than originally anticipated. Conversely, an employee may discover after beginning leave that the circumstances have changed and the amount of leave originally anticipated is no longer necessary. An employee may not be required to take more FMLA leave than necessary to resolve the circumstance that precipitated the need for leave. In both of these situations, the employing office may require that the employee provide the employing office reasonable notice (i.e., within two business days) of the changed circumstances where foreseeable. The employing office may also obtain information on such changed circumstances through requested status reports.

825.312 Fitness-for-duty certification.

(a) As a condition of restoring an employee whose FMLA leave was occasioned by the employee's own serious health condition that made the employee unable to perform the employee's job, an employing office may have a uniformly-applied policy or practice that requires all similarly-situated employees (i.e., same occupation, same serious health condition) who take leave for such conditions to obtain and present certification from the employee's health care provider that the employee is able to resume work. The employee has the same obligations to participate and cooperate (including providing a complete and sufficient certification or providing sufficient authorization to the health care provider to provide the information directly to the employing office) in the fitness-for-duty certification process as in the initial certification process. *See* 825.305(d).

(b) An employing office may seek a fitness-for-duty certification only with regard to the particular health condition that caused the employee's need for FMLA leave. The certification from the employee's health care provider must certify that the employee is able to resume work. Additionally, an employing office may require that the certification specifically address the employee's ability to perform the essential functions of the employee's job. In order to require such a certification, an employing office must provide an employee with a list of the essential functions of the employee's job no later than with the designation notice required by 825.300(d), and must indicate in the designation notice that the certification must address the employee's ability to perform those essential functions. If the employing office satisfies these requirements, the employee's health care provider must certify that the employee can perform the identified essential functions of his or her job. Following the procedures set forth in 825.307(a), the employing office may contact the employee's health care provider for purposes of clarifying and authenticating the fitness-for-duty certification. Clarification may be requested only for the serious health condition for which FMLA leave was taken. The employing office may not delay the employee's return to work while contact with the health care provider is being made. No second or third opinions on a fitness-for-duty certification may be required.

(c) The cost of the certification shall be borne by the employee, and the employee is not entitled to be paid for the time or travel costs spent in acquiring the certification.

(d) The designation notice required in 825.300(d) shall advise the employee if the employing office will require a fitness-for-duty certification to return to work and whether that fitness-for-duty certification must address the employee's ability to perform the essential functions of the employee's job.

(e) An employing office may delay restoration to employment until an employee submits a required fitness-for-duty certification unless the employing office has failed to provide the notice required in paragraph (d) of this section. If an employing office provides the notice required, an employee who does not provide a fitness-for-duty certification or request additional FMLA leave is no longer entitled to reinstatement under the FMLA. *See* 825.313(d).

(f) An employing office is not entitled to a certification of fitness to return to duty for each absence taken on an intermittent or reduced leave schedule. However, an employing office is entitled to a certification of fitness to return to duty for such absences up to once every 30 days if reasonable safety concerns exist regarding the employee's ability to perform his or her duties, based on the serious health condition for which the employee took such leave. If an employing office chooses to require a fitness-for-duty certification under such circumstances, the employing office shall inform the employee at the same time it issues the designation notice that for each subsequent instance of intermittent or reduced schedule leave, the employee will be required to submit a fitness-for-duty certification unless one has already been submitted within the past 30 days. Alternatively, an employing office can set a different interval for requiring a fitness-for-duty certification as long as it does not exceed once every 30 days and as long as the employing office advises the employee of the requirement in advance of the employee taking the intermittent or reduced schedule leave. The employing office may not terminate the employment of the employee while awaiting such a certification of fitness to return to duty for an intermittent or reduced schedule leave absence. Reasonable safety concerns means a reasonable belief of significant risk of harm to the individual employee or others. In determining whether reasonable safety concerns exist, an employing office should consider the nature and severity of the potential harm and the likelihood that potential harm will occur.

(g) If the terms of a collective bargaining agreement govern an employee's return to work, those provisions shall be applied.

(h) Requirements under the Americans with Disabilities Act (ADA), as amended and as made applicable by the CAA, apply. After an employee returns from FMLA leave, the ADA requires any medical examination at an employing office's expense by the employing office's health care provider be job-related and consistent with business necessity. For example, an attorney could not be required to submit to a medical examination or inquiry just because her leg had been amputated. The essential functions of an attorney's job do not require use of both legs; therefore such an inquiry would not be job related. An employing office may require a warehouse laborer, whose back impairment affects the ability to lift, to be examined by an orthopedist, but may not require this employee to submit to an HIV test where the test is not related to either the essential functions of his or her job or to his/her impairment. If an employee's serious health condition may also be a disability within the meaning of the ADA, as made applicable by the CAA, the FMLA does not prevent the employing office from following the procedures for requesting medical information under the ADA.

825.313 Failure to provide certification.

(a) *Foreseeable leave*. In the case of foreseeable leave, if an employee fails to provide certification in a timely manner as required by 825.305, then an employing office may deny FMLA coverage until the required certification is provided. For example, if an employee has 15 days to provide a certification and does not provide the certification for 45 days without sufficient reason for the delay, the employing office can deny FMLA protections for the 30-day period following the expiration of the 15-day time period, if the employee takes leave during such period.

(b) *Unforeseeable leave*. In the case of unforeseeable leave, an employing office may deny FMLA coverage for the requested leave if the employee fails to provide a certification within 15 calendar days from receipt of the request for certification unless not practicable due to extenuating circumstances. For example, in the case of a medical emergency, it may not be practicable for an employee to provide the required certification within 15 calendar days. Absent such extenuating circumstances, if the employee fails to timely return the certification, the employing office can deny FMLA protections for the leave following the expiration of the 15-day time period until a sufficient certification is provided. If the employee never produces the certification, the leave is not FMLA leave.

(c) *Recertification*. An employee must provide recertification within the time requested by the employing office (which must allow at least 15 calendar days after the request) or as soon as practicable under the particular facts and circumstances. If an employee fails to provide a recertification within a reasonable time under the particular facts and circumstances, then the employing office may deny continuation of the FMLA leave protections until the employee produces a sufficient recertification. If the employee never produces the recertification, the leave is not FMLA leave. Recertification does not apply to leave taken for a qualifying exigency or to care for a covered servicemember.

(d) *Fitness-for-duty certification*. When requested by the employing office pursuant to a uniformly applied policy for similarly-situated employees, the employee must provide medical certification, at the time the employee seeks reinstatement at the end of FMLA leave taken for the employee's serious health condition, that the employee is fit for duty and able to return to work (*See* 825.312(a)) if the employing office has provided the required notice (*See* 825.300(e)); the employing office may delay restoration until the certification is provided. Unless the employee provides either a fitness-for-duty certification or a new medical certification for a serious health condition at the time FMLA leave is concluded, the employee may be terminated. *See also* 825.213(a)(3).

SUBPART D—ADMINISTRATIVE PROCESS

825.400 Administrative process, general rules.

(a) The Procedural Rules of the Office of Congressional Workplace Rights set forth the procedures for considering and resolving alleged violations of the laws made applicable by the CAA, including the FMLA. The Rules include procedures for filing claims and participating in administrative dispute resolution proceedings at the Office of Congressional Workplace Rights, including procedures for the conduct of hearings and for appeals to the Board of Directors. The Procedural Rules also address other matters of general applicability to the dispute resolution process and to the operations of the Office.

(b) If an employing office has violated one or more provisions of FMLA, and if justified by the facts of a particular case, an employee may receive one or more of the following: wages, employment benefits, or other compensation denied or lost to such employee by reason of the violation; or, where no such tangible loss has occurred, such as when FMLA leave was unlawfully denied, any actual monetary loss sustained by the employee as a direct result of the violation, such as the cost of providing care, up to a sum equal to 26 weeks of wages for the employee in a case involving leave to care for a covered servicemember or 12 weeks of wages for the employee in a case involving leave for any other FMLA qualifying reason. In addition, the employee may be entitled to interest on such sum, calculated at the prevailing rate. An amount equaling the preceding sums may also be awarded as liquidated damages unless such amount is reduced by the court because the violation was in good faith and the employer had reasonable grounds for believing the employer had not violated the Act. When appropriate, the employee may also obtain appropriate equitable relief, such as employment, reinstatement and promotion. When the employer is found in violation, the employee may recover a reasonable attorney's fee, reasonable expert witness fees, and other costs of the action from the employer in addition to any judgment awarded by the court.

(c) The Procedural Rules of the Office of Congressional Workplace Rights are found at 165 Cong. Rec. H4896 (daily ed. June 19, 2019) and 165 Cong. Rec. S4105 (daily ed. June 19, 2019), and may also be found on the Office's website at www.ocwr.gov.

825.401 [Reserved]
825.402 [Reserved]
825.403 [Reserved]
825.404 [Reserved]

SUBPART E—PAID PARENTAL LEAVE

825.500 Purpose, applicability, and employing office responsibilities.

(a) *Purpose.* This subpart provides regulations to govern the granting of paid parental leave to eligible employees. Since paid parental leave may only be substituted for unpaid leave granted following a birth or placement under specific provisions of the Family and Medical Leave Act in title 29, United States Code—specifically, section 2612(a)(1)(A) and (B) in 5 U.S.C. chapter 29—this subpart links to subpart B (Family and Medical Leave) of this part.

(b) *Applicability*. (1) Except as otherwise provided in this paragraph (b), this subpart applies to employees to whom subpart B of this part applies, as provided in 825.111.

(2) The OCWR will defer to supplemental regulations on paid parental leave issued by the Library of Congress pursuant to the authority in 29 USC 2617, provided those supplemental regulations are consistent with the regulations in this subpart.

(3) This subpart applies to a birth or placement occurring on or after October 1, 2020.

(c) *Employing office responsibilities*. The head of an employing office having employees covered by this subpart is responsible for the proper administration of this subpart, including the responsibility of informing employees of their entitlements and obligations.

825.501 Definitions.

(a) *Applicability of subpart B definitions*. The definitions of terms in 825.102 are applicable in this subpart to the extent the terms are used, except that, to the extent any definitions of terms have been further revised in 825.501(b), the provisions of that section shall apply for purposes of this subpart.

(b) Other definitions. In this subpart—

Employing Office means an employing office as defined in 2 U.S.C. 1301(a)(9). When the term ''employing office'' is used in the context of an employing office making determinations or taking actions, it means the employing office head or management officials who are authorized (including by delegation) to make the given determination or take the given action.

Child means a son or daughter as defined in 825.102 whose birth or placement is the basis for entitlement to paid parental leave.

Paid parental leave means paid time off from an employee's scheduled tour of duty that is authorized under 2 U.S.C. 1312(d)(2)(A) and this subpart and that is granted to an employee who has a current parental role in connection with the child whose birth or placement was the basis for granting unpaid FMLA leave under 825.120 or 825.121. This leave is not available to an employee who does not have a current parental role.

Unpaid FMLA leave means leave without pay granted under the Family and Medical Leave Act (FMLA) regulations in subpart B of this part.

825.502 Leave entitlement.

(a) *Election*. An employee may elect to substitute available paid parental leave for any unpaid FMLA leave granted under 825.120 or 825.121 (which correspond to 29 U.S.C. 2612(a)(1)(A) or (B), respectively) in connection with the occurrence of a birth or placement. *See* 825.208.

(b) *Available paid parental leave*. (1) The paid parental leave that is available for purposes of paragraph (a) of this section is 12 workweeks in connection with the birth or placement involved.

(2) Since an employee may use only 12 weeks of unpaid FMLA leave in any 12-month period under 825.200(a), any use of unpaid FMLA leave not associated with paid parental leave may affect an employee's ability to use the full 12 weeks of paid parental leave. Notwithstanding paragraph (b)(1) of this section, an employee will be able to use the full amount of paid parental leave only to the extent that there are 12 weeks of available unpaid FMLA leave granted under the birth or placement provisions in 825.112(a)(1); or (2) during the 12-month period referred to in section 102(a)(1) of the FMLA (29 U.S.C. 2612(a)(1)) to which it relates. The availability of paid parental leave will depend on when the employee uses various types of unpaid FMLA leave relative to any 12-month period established under 825.200(b).

(c) *Leave usage.* (1) An employing office may not require an employee to use accrued paid annual, vacation, personal, family, medical, or sick leave as a condition to be met before the employee uses paid parental leave. An employee may request to use annual leave or sick leave without invoking unpaid FMLA leave under subpart B of this part, and, if the request is granted, the employing office exercises its normal authority with respect to approving or disapproving the timing of when the leave may be used.

(2) An employee with a seasonal work schedule may not use paid parental leave during the off-season period designated by the employing office—the period during which the employee is scheduled to be released from work and placed in nonpay status.

(d) *Treatment of unused leave.* If an employee has any unused balance of paid parental leave that remains at the end of the 12-month period following the birth or placement involved, the entitlement to the unused leave elapses at that time. No payment may be made for unused paid parental leave that has expired. Paid parental leave may not be considered annual leave for purposes of making a lump-sum payment for annual leave or for any other purpose.

825.503 Pay during leave.

(a) The pay an employee receives when using paid parental leave shall be the same pay the employee would receive if the employee were using annual leave.

(b) The pay received during paid parental leave may not include Sunday premium pay. (See section 624 of the Treasury and General Government Appropriations Act, 1999, Public Law 105–277, div. A, 101(h), October 21, 1998.)

825.504 Work obligation.

Paid parental leave under this subpart shall apply without regard to:

(a) the limitations in subparagraphs (E), (F), or (G) of section 6382(d)(2) of title 5, United States Code (requiring employees of executive branch agencies to agree in writing to work for the executive branch agency for at least 12 months after returning from leave); or

(b) the limitations in 825.213 (permitting employing offices to recover an amount equal to the total amount of government contributions for maintaining such employee's health coverage if the employee fails to return from leave).

825.505 Cases of employee incapacitation.

(a) If an employing office determines that an otherwise eligible employee who could have made an election during a past period to substitute paid parental leave (as provided in 825.502) was physically or mentally incapable of doing so during that past period, the employee may, within 5 workdays of the employee's return to duty status, make an election to substitute paid parental leave for applicable unpaid FMLA leave under 825.502(a) on a retroactive basis. Such a retroactive election shall be effective on the date that such an election would have been effective if the employee had not been incapacitated at the time.

(b)(1) If an employing office determines that an otherwise eligible employee is physically or mentally incapable of making an election to substitute paid parental leave (as provided in 825.207), the employing office must, upon the request of a personal representative of the employee, provide conditional approval of substitution of paid parental leave for applicable unpaid FMLA leave on a prospective basis. The conditional approval is based on the presumption that the employee would have elected to substitute paid parental leave for the applicable unpaid FMLA leave.

825.506 Cases of multiple children born or placed in the same time period.

(a) If an employee has multiple children born or placed on the same day, the multiple-child birth/placement event is considered to be a single event that triggers a single entitlement of up to 12 weeks of paid parental leave under 825.502(b).

(b) If an employee has one or more children born or placed during the 12-month period following the date of an earlier birth or placement of a child of the employee, the provisions of this subpart shall be independently administered for each birth or placement event. Any paid parental leave substituted for unpaid FMLA leave during the 12-month period beginning on the date of a child's birth or placement shall count towards the 12-week limit on paid parental leave described in 825.502(b) applicable in connection with the birth or placement involved. The substitution of paid parental leave may count toward multiple 12-week limits to the extent that there are multiple ongoing 12-month periods beginning on the date of an applicable birth or placement, each of which encompasses the day on which the leave is used. Therefore, whenever paid parental leave is substituted during periods of time when separate 12-month periods (each beginning on a date of birth or placement) overlap, the paid parental leave will count toward each affected period's 12-week limit. For example, if an employee has a child born on June 1 and another child placed for adoption on October 1 of the same year, each event would generate entitlement to substitute up to 12 weeks of paid parental leave during the separate 12-month periods beginning on the date of the birth and on the date of the placement, respectively. Those two 12-month periods would be June 1–May 31 and October 1–September 30. The overlap period for these two 12-month periods would be October 1–May 31. If the employee substitutes paid parental leave during that overlap period, that amount of paid parental leave would count towards both the 12-week limit associated with the birth event and the 12-week limit associated with the placement event.

825.507 Records.

Record of usage of paid parental leave. An employing office must maintain an accurate record of an employee's usage of paid parental leave.

825.508 [Reserved]

SUBPART F—SPECIAL RULES APPLICABLE TO EMPLOYEES OF SCHOOLS

825.600 Special rules for school employees, definitions.

(a) Certain special rules apply to employees of local educational agencies, including public school boards and elementary schools under their jurisdiction, and private elementary and secondary schools. The special rules do not apply to other kinds of educational institutions, such as colleges and universities, trade schools, and preschools.

(b) Educational institutions are covered by FMLA, as made applicable by the CAA (and these special rules). The usual requirements for employees to be eligible do apply.

(c) The special rules affect the taking of intermittent leave or leave on a reduced leave schedule, or leave near the end of an academic term (semester), by instructional employees. Instructional employees are those whose principal function is to teach and instruct students in a class, a small group, or an individual setting. This term includes not only teachers, but also athletic coaches, driving instructors, and special education assistants such as signers for the hearing impaired. It does not include, and the special rules do not apply to, teacher assistants or aides who do not have as their principal job actual teaching or instructing, nor does it include auxiliary personnel such as counselors, psychologists, or curriculum specialists. It also does not include cafeteria workers, maintenance workers, or bus drivers.

(d) Special rules which apply to restoration to an equivalent position apply to all employees of local educational agencies.

825.601 Special rules for school employees, limitations on intermittent leave.

(a) Leave taken for a period that ends with the school year and begins the next semester is leave taken consecutively rather than intermittently. The period during the summer vacation when the employee would not have been required to report for duty is not counted against the employee's FMLA leave entitlement. An instructional employee who is on FMLA leave at the end of the school year must be provided with any benefits over the summer vacation that employees would normally receive if they had been working at the end of the school year.

(1) If an eligible instructional employee needs intermittent leave or leave on a reduced leave schedule to care for a family member with a serious health condition, to care for a covered servicemember, or for the employee's own serious health condition, which is foreseeable based on planned medical treatment, and the employee would be on leave for more than 20 percent of the total number of working days over the period the leave would extend, the employing office may require the employee to choose either to:

(i) Take leave for a period or periods of a particular duration, not greater than the duration of the planned treatment; or

(ii) Transfer temporarily to an available alternative position for which the employee is qualified, which has equivalent pay and benefits and which better accommodates recurring periods of leave than does the employee's regular position.

(2) These rules apply only to a leave involving more than 20 percent of the working days during the period over which the leave extends. For example, if an instructional employee who normally works five days each week needs to take two days of FMLA leave per week over a period of several weeks, the special rules would apply. Employees taking leave which constitutes 20 percent or less of the working days during the leave period would not be subject to transfer to an alternative position. Periods of a particular duration means a block, or blocks, of time beginning no earlier than the first day for which leave is needed and ending no later than the last day on which leave is needed, and may include one uninterrupted period of leave.

(b) If an instructional employee does not give required notice of foreseeable FMLA leave (See 825.302) to be taken intermittently or on a reduced leave schedule, the employing office may require the employee to take leave of a particular duration, or to transfer temporarily to an alternative position. Alternatively, the employing office may require the employee to delay the taking of leave until the notice provision is met.

825.602 Special rules for school employees, limitations on leave near the end of an academic term.

(a) There are also different rules for instructional employees who begin leave more than five weeks before the end of a term, less than five weeks before the end of a term, and less than three weeks before the end of a term. Regular rules apply except in circumstances when:

(1) An instructional employee begins leave more than five weeks before the end of a term. The employing office may require the

employee to continue taking leave until the end of the term if—

(i) The leave will last at least three weeks, and

(ii) The employee would return to work during the three-week period before the end of the term.

(2) The employee begins leave during the five-week period before the end of a term because of the birth of a son or daughter; the placement of a son or daughter for adoption or foster care; to care for a spouse, son, daughter, or parent with a serious health condition; or to care for a covered servicemember. The employing office may require the employee to continue taking leave until the end of the term if—

(i) The leave will last more than two weeks, and

(ii) The employee would return to work during the two-week period before the end of the term.

(3) The employee begins leave during the three-week period before the end of a term because of the birth of a son or daughter; the placement of a son or daughter for adoption or foster care; to care for a spouse, son, daughter, or parent with a serious health condition; or to care for a covered servicemember. The employing office may require the employee to continue taking leave until the end of the term if the leave will last more than five working days.

(b) For purposes of these provisions, academic term means the school semester, which typically ends near the end of the calendar year and the end of spring each school year. In no case may a school have more than two academic terms or semesters each year for purposes of FMLA, as made applicable by the CAA. An example of leave falling within these provisions would be where an employee plans two weeks of leave to care for a family member which will begin three weeks before the end of the term. In that situation, the employing office could require the employee to stay out on leave until the end of the term.

825.603 Special rules for school employees, duration of FMLA leave.

(a) If an employee chooses to take leave for periods of a particular duration in the case of intermittent or reduced schedule leave, the entire period of leave taken will count as FMLA leave.

(b) In the case of an employee who is required to take leave until the end of an academic term, only the period of leave until the employee is ready and able to return to work shall be charged against the employee's FMLA leave entitlement. The employing office has the option not to require the employee to stay on leave until the end of the school term. Therefore, any additional leave required by the employing office to the end of the school term is not counted as FMLA leave; however, the employing office shall be required to maintain the employee's group health insurance and restore the employee to the same or equivalent job including other benefits at the conclusion of the leave.

825.604 Special rules for school employees, restoration to an equivalent position.

The determination of how an employee is to be restored to an equivalent position upon return from FMLA leave will be made on the basis of ''established school board policies and practices, private school policies and practices, and collective bargaining agreements.'' The ''established policies'' and collective bargaining agreements used as a basis for restoration must be in writing, must be made known to the employee prior to the taking of FMLA leave, and must clearly explain the employee's restoration rights upon return from leave. Any established policy which is used as the basis for restoration of an employee to an equivalent position must provide substantially the same protections as provided in the FMLA, as made applicable by the CAA, for reinstated employees. See 825.215. In other words, the policy or collective bargaining agreement must provide for restoration to an equivalent position with equivalent employment benefits, pay, and other terms and conditions of employment. For example, an employee may not be restored to a position requiring additional licensure or certification.

SUBPART G—EFFECT OF OTHER LAWS, EMPLOYING OFFICE PRACTICES, AND COLLECTIVE BARGAINING AGREEMENTS ON EMPLOYEE RIGHTS UNDER THE FMLA, AS MADE APPLICABLE BY THE CAA.

825.700 Interaction with employing office's policies.

(a) An employing office must observe any employment benefit program or plan that provides greater family or medical leave rights to employees than the rights established by the FMLA. Conversely, the rights established by the FMLA, as made applicable by the CAA, may not be diminished by any employment benefit program or plan. For example, a provision of a collective bargaining agreement (CBA) which provides for reinstatement to a position that is not equivalent because of seniority (e.g., provides lesser pay) is superseded by FMLA. If an employing office provides greater unpaid family leave rights than are afforded by FMLA, the employing office is not required to extend additional rights afforded by FMLA, such as maintenance of health benefits (other than through COBRA or 5 U.S.C. 8905a, whichever is applicable), to the additional leave period not covered by FMLA.

(b) Nothing in the FMLA, as made applicable by the CAA, prevents an employing office from amending existing leave and employee benefit programs, provided they comply with FMLA, as made applicable by the CAA. However, nothing in the FMLA, as made applicable by the CAA, is intended to discourage employing offices from adopting or retaining more generous leave policies.

825.701 [Reserved]

825.702 Interaction with anti-discrimination laws, as applied by section 201 of the CAA.

(a) Nothing in the FMLA modifies or affects any applicable law prohibiting discrimination on the basis of race, religion, color, national origin, sex, age, or disability (e.g., Title VII of the Civil Rights Act of 1964, as amended by the Pregnancy Discrimination Act and as made applicable by the CAA). FMLA's legislative history explains that FMLA is ''not intended to modify or affect the Rehabilitation Act of 1973, as amended, the regulations concerning employment which have been promulgated pursuant to that statute, or the Americans with Disabilities Act of 1990 [as amended] or the regulations issued under that act. Thus, the leave provisions of the [FMLA] are wholly distinct from the reasonable accommodation obligations of employers covered under the [ADA] . . . or the Federal government itself. The purpose of the FMLA, as applied by the CAA, is to make leave available to eligible employees and [employing offices] within its coverage, and not to limit already existing rights and protection.'' S. Rep. No. 3, 103d Cong., 1st Sess. 38 (1993). An employing office must therefore provide leave under whichever statutory provision provides the greater rights to employees. When an employer violates both FMLA and a discrimination law, an employee may be able to recover under either or both statutes (double relief may not be awarded for the same loss; when remedies coincide a claimant may be allowed to utilize whichever avenue of relief is desired. *Laffey v. Northwest Airlines, Inc.*, 567 F.2d 429, 445 (D.C. Cir. 1976), *cert. denied*, 434 U.S. 1086 (1978).

(b) If an employee is a qualified individual with a disability within the meaning of the Americans with Disabilities Act (ADA), as made applicable by the CAA, the employing office must make reasonable accommodations, etc., barring undue hardship, in accordance with the ADA. At the same time, the employing office must afford an employee his or her FMLA rights, as made applicable by the CAA. ADA's ''disability'' and FMLA's ''serious health condition'' are different concepts, and must be analyzed separately. FMLA entitles eligible employees to 12 weeks of leave in any 12-month period due to their own serious health condition, whereas the ADA allows an indeterminate amount of leave, barring undue hardship, as a reasonable accommodation. FMLA requires employing offices to maintain employees' group health plan coverage during FMLA leave on the same conditions as coverage would have been provided if the employee had been continuously employed during the leave period, whereas ADA does not require maintenance of health insurance unless other employees receive health insurance during leave under the same circumstances.

(c)(1) A reasonable accommodation under the ADA might be accomplished by providing an individual with a disability with a part-time job with no health benefits, assuming the employing office did not ordinarily provide health insurance for part-time employees. However, FMLA would permit an employee to work a reduced leave schedule until the equivalent of 12 workweeks of leave were used, with group health benefits maintained during this period. FMLA permits an employing office to temporarily transfer an employee who is taking leave intermittently or on a reduced leave schedule to an alternative position, whereas the ADA allows an accommodation of reassignment to an equivalent, vacant position only if the employee cannot perform the essential functions of the employee's present position and an accommodation is not possible in the employee's present position, or an accommodation in the employee's present position would cause an undue hardship. The examples in the following paragraphs of this section demonstrate how the two laws would interact with respect to a qualified individual with a disability.

(2) A qualified individual with a disability who is also an eligible employee entitled to FMLA leave requests 10 weeks of medical leave as a reasonable accommodation, which the employing office grants because it is not an undue hardship. The employing office advises the employee that the 10 weeks of leave is also being designated as FMLA leave and will count towards the employee's FMLA leave entitlement. This designation does not prevent the parties from also treating the leave as a reasonable accommodation and reinstating the employee into the same job, as required by the ADA, rather than an equivalent position under FMLA, if that is the greater right available to the employee. At the same time, the employee would be entitled under FMLA to have the employing office maintain group health plan coverage during the leave, as that requirement provides the greater right to the employee.

(3) If the same employee needed to work part-time (a reduced leave schedule) after returning to his or her same job, the employee would still be entitled under FMLA to have group health plan coverage maintained for the remainder of the two-week equivalent of FMLA leave entitlement, notwithstanding

an employing office policy that part-time employees do not receive health insurance. This employee would be entitled under the ADA to reasonable accommodations to enable the employee to perform the essential functions of the part-time position. In addition, because the employee is working a part-time schedule as a reasonable accommodation, the FMLA's provision for temporary assignment to a different alternative position would not apply. Once the employee has exhausted his or her remaining FMLA leave entitlement while working the reduced (part-time) schedule, if the employee is a qualified individual with a disability, and if the employee is unable to return to the same full-time position at that time, the employee might continue to work part-time as a reasonable accommodation, barring undue hardship; the employee would then be entitled to only those employment benefits ordinarily provided by the employing office to part-time employees.

(4) At the end of the FMLA leave entitlement, an employing office is required under FMLA to reinstate the employee in the same or an equivalent position, with equivalent pay and benefits, to that which the employee held when leave commenced. The employing office's FMLA obligations would be satisfied if the employing office offered the employee an equivalent full-time position. If the employee were unable to perform the essential functions of that equivalent position even with reasonable accommodation, because of a disability, the ADA may require the employing office to make a reasonable accommodation at that time by allowing the employee to work part-time or by reassigning the employee to a vacant position, barring undue hardship.

(d)(1) If FMLA entitles an employee to leave, an employing office may not, in lieu of FMLA leave entitlement, require an employee to take a job with a reasonable accommodation. However, ADA may require that an employing office offer an employee the opportunity to take such a position. An employing office may not change the essential functions of the job in order to deny FMLA leave. *See* 825.220(b).

(2) An employee may be on a workers' compensation absence due to an on-the-job injury or illness which also qualifies as a serious health condition under FMLA. The workers' compensation absence and FMLA leave may run concurrently (subject to proper notice and designation by the employing office). At some point the health care provider providing medical care pursuant to the workers' compensation injury may certify the employee is able to return to work in a light duty position. If the employing office offers such a position, the employee is permitted but not required to accept the position. *See* 825.220(d). As a result, the employee may no longer qualify for payments from the workers' compensation benefit plan, but the employee is entitled to continue on unpaid FMLA leave either until the employee is able to return to the same or equivalent job the employee left or until the 12-week FMLA leave entitlement is exhausted. *See* 825.207(e). If the employee returning from the workers' compensation injury is a qualified individual with a disability, he or she will have rights under the ADA, as made applicable by the CAA.

(e) If an employing office requires certifications of an employee's fitness for duty to return to work, as permitted by FMLA under a uniform policy, it must comply with the ADA requirement that a fitness for duty physical be job-related and consistent with business necessity.

(f) Under Title VII of the Civil Rights Act of 1964, as amended by the Pregnancy Discrimination Act, and as made applicable by the CAA, an employing office should provide the same benefits for women who are pregnant as the employing office provides to other employees with short-term disabilities. Because Title VII does not require employees to be employed for a certain period of time to be protected, an employee employed for less than 12 months by the employing office may not be denied maternity leave if the employing office normally provides short-term disability benefits to employees with the same tenure who are experiencing other short-term disabilities.

(g) Under the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA), 38 U.S.C. 4301, *et seq.*, veterans are entitled to receive all rights and benefits of employment that they would have obtained if they had been continuously employed. Therefore, under USERRA, a returning servicemember would be eligible for FMLA leave if the months and hours that he or she would have worked for the civilian employing office during the period of absence due to or necessitated by USERRA-covered service, combined with the months employed and the hours actually worked, meet the FMLA eligibility threshold of 12 months of employment and the hours of service requirement. *See* 825.110(b)(2)(i) and (c)(2) and 825.802(c).

(h) For further information on Federal antidiscrimination laws applied by section 201 of the CAA (2 U.S.C. 1311), including Title VII, the Rehabilitation Act, and the ADA, individuals are encouraged to contact the Office of Congressional Workplace Rights.

ORDERS FOR TUESDAY, NOVEMBER 17, 2020

Mr. MCCONNELL. Mr. President, I ask unanimous consent that when the Senate completes its business today, it adjourn until 10 a.m., Tuesday, November 17; further, that following the prayer and pledge, the morning hour be deemed expired, the Journal of proceedings be approved to date, the time for the two leaders be reserved for their use later in the day, and morning business be closed; further, following leader remarks, the Senate proceed to executive session and resume consideration of the Johnson nomination under the previous order. Finally, I ask that the Senate recess following the cloture vote on the Beaton nomination until 2:15 p.m. to allow for the weekly conference meetings.

The PRESIDING OFFICER. Without objection, it is so ordered.

ORDER FOR ADJOURNMENT

Mr. MCCONNELL. Mr. President, if there is no further business to come before the Senate, I ask unanimous consent that it stand adjourned under the previous order following the remarks of Senator BROWN.

The PRESIDING OFFICER. Without objection, it is so ordered.

The Senator from Ohio.

NOMINATION OF JUDY SHELTON

Mr. BROWN. Mr. President, I start by asking the Presiding Officer to wear a mask as he speaks and the people are below him.

I can't tell you what to do.

The PRESIDING OFFICER. I don't wear a mask when I am speaking like most Senators. I will put it back on, but I don't need your instruction.

Mr. BROWN. I know you don't need my instruction.

There clearly isn't much interest in this body in public health. We have a President who hasn't shown up at the Coronavirus Task Force in months. We have a majority leader who calls us back here to vote on an unqualified nominee and, at the same time, to vote for judge after judge, exposing all the people who can't say anything. I understand. There are people in front of the Presiding Officer and we expose all the staff here and the majority leader doesn't seem to care.

The American people sent a clear message in this election. They voted for stability. They rejected an administration that has failed them in the middle of a public health crisis and economic crisis. People want a government that works for them and is on their side. My colleagues in both parties know this.

I know some of you feel like you have to humor the outgoing President, continue to make excuses for him, continue to run from the media when they might ask a question about your opinion on the President. But you know that Joe Biden won, and you won. Most of you won your elections—including the Presiding Officer—fair and square on the same ballot. You don't have to play along with the tweets and the chaos.

He threatened the Republican Governor of Ohio today, for instance, because the Governor of Ohio—I think he said the term ''President-Elect Biden,'' and that offended the President. You don't have to play along with the tweets and the chaos and the crazy anymore.

We need to move on. We need to actually deliver for the people who voted for us and put their faith in us. The last thing we should be doing is granting Trump one last wish—one more opportunity to salt the earth on his way out.

The Federal Reserve is supposed to be a steady, guiding hand, making sure our economy actually delivers for the people who make it work. They are supposed to worry about the big picture of the economy so hard-working families don't have to.

But Judy Shelton—most of my colleagues know this. I have talked to many of them. She believes the opposite. That is why Trump wants one last pick for the Federal Reserve, and Senator MCCONNELL and all the spineless people in this body continue to give him that last wish.

Eighty million Americans voted for stability. Shelton promises more Trump chaos. I know we have disagreements. We have progressive economic ideas and conservative economic ideas. I am fine with disagreements. That is what government is about. That is what self-government is about.