DEPARTMENT OF LABOR

Wage and Hour Division

29 CFR Part 825

RIN 1215–AB76, RIN 1235–AA03

The Family and Medical Leave Act

AGENCY: Wage and Hour Division, Department of Labor.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Department of Labor's Wage and Hour Division proposes to revise certain regulations of the Family and Medical Leave Act of 1993 (FMLA or the Act), primarily to implement recent statutory amendments to the Act. This Notice of Proposed Rulemaking (NPRM) proposes regulations to implement amendments to the military leave provisions of the FMLA made by the National Defense Authorization Act for Fiscal Year 2010, which extends the availability of FMLA leave to family members of members of the Regular Armed Forces for qualifying exigencies arising out of the servicemember's deployment; defines those deployments covered under these provisions; and extends FMLA military caregiver leave to family members of certain veterans with serious injuries or illnesses. This NPRM also proposes to amend the regulations to implement the Airline Flight Crew Technical Corrections Act, which established new FMLA leave eligibility requirements for airline flight crewmembers and flight attendants. In addition, the proposal includes changes concerning the calculation of leave; reorganization of certain sections to enhance clarity; the removal of the forms from the regulations; and technical corrections of inadvertent drafting errors in the current regulations.

DATES: Comments must be received on or before April 16, 2012.

ADDRESSES: You may submit comments, identified by Regulatory Information Number (RIN) 1235–AA03, by electronic submission through the Federal eRulemaking Portal *http://www.regulations.gov*. Follow instructions for submitting comments. You may also submit comments by mail. Address written submissions to Mary Ziegler, Director of the Division of Regulations, Legislation, and Interpretation, Wage and Hour Division, U.S. Department of Labor, Room S–3510, 200 Constitution Avenue NW., Washington, DC 20210.

Instructions: Please submit only one copy of your comments by only one method. All submissions must include the agency name and RIN, identified above, for this rulemaking. Please be advised that comments received will be posted without change to *http://www.regulations.gov*, including any personal information provided, and should not include any individual's personal medical information. For questions concerning the application of the FMLA provisions, individuals may contact the Wage and Hour Division (WHD) local district offices (see contact information below). Mailed written submissions commenting on these provisions must be received by the date indicated for consideration in this rulemaking. For additional information on submitting comments and the rulemaking process, see the ''Public Participation'' heading of the **SUPPLEMENTARY INFORMATION** section of this document.

Docket: For access to the docket to read background documents or comments, go to the Federal eRulemaking Portal at *http://www.regulations.gov*.

FOR FURTHER INFORMATION CONTACT: Mary Ziegler, Director of the Division of Regulations, Legislation, and Interpretation, Wage and Hour Division, U.S. Department of Labor, Room S–3510, 200 Constitution Avenue NW., Washington, DC 20210; telephone: (202) 693–0406 (this is not a toll-free number). Copies of this rule may be obtained in alternative formats (large print, Braille, audio tape or disc), upon request, by calling (202) 693–0675 (this is not a toll-free number). TTY/TDD callers may dial toll-free 1–877–889–5627 to obtain information or request materials in alternative formats.

Questions of interpretation and/or enforcement of the agency's regulations may be directed to the nearest WHD district office. Locate the nearest office by calling the WHD's toll-free help line at (866) 4US–WAGE ((866) 487–9243) between 8 a.m. and 5 p.m. in your local time zone, or log onto the WHD's Web site for a nationwide listing of WHD district and area offices at *http://www.dol.gov/whd/america2.htm*.

SUPPLEMENTARY INFORMATION:

I. Electronic Access and Filing Comments

Public Participation: This NPRM is available through the **Federal Register** and the *http://www.regulations.gov* Web site. You may also access this document via the WHD's Web site at *http://www.dol.gov/whd/*. To comment electronically on Federal rulemakings, go to the Federal e-Rulemaking Portal at *http://www.regulations.gov*, which will allow you to find, review, and submit comments on Federal documents that are open for comment and published in the **Federal Register**. You must identify all comments submitted by including the RIN 1235–AA03 in your submission. The RIN identified for this rulemaking changed with the publication of the 2010 Spring Regulatory Agenda due to an organizational restructuring. The previously identified RIN was assigned to the Employment Standards Administration, which no longer exists. A new RIN has been assigned to the WHD. Commenters should transmit comments early to ensure timely receipt prior to the close of the comment period (date identified above); comments submitted after the comment period closes will not be considered. Submit only one copy of your comments by only one method. Please be advised that all comments received will be posted without change to *http://www.regulations.gov*, including any personal information provided, and should not include any individual's personal medical information.

II. Background

Subsequent to this rulemaking first appearing on the Department's Fall 2009 Regulatory Agenda, the FMLA was amended by the National Defense Authorization Act for Fiscal Year 2010 (FY 2010 NDAA), Public Law 111–84, and the Airline Flight Crew Technical Corrections Act (AFCTCA), Public Law 111–119. This rulemaking, therefore, proposes regulatory changes to implement these statutory amendments. The Department continues to review the impact of regulatory revisions published in the Family and Medical Leave Act of 1993, Final Rule on November 17, 2008 (2008 final rule). 73 FR 67934.

A. What the FMLA Provides

The Family and Medical Leave Act of 1993, 29 U.S.C. 2601 *et seq.,* was enacted on February 5, 1993, and became effective for most covered employers on August 5, 1993. As originally enacted, the FMLA entitles eligible employees of covered employers to take job-protected, unpaid leave, or to substitute appropriate accrued paid leave, for up to a total of 12 workweeks in a 12-month period for the birth of the employee's son or daughter and to care for the newborn child; for the placement of a son or daughter with the employee for adoption or foster care; to care for the employee's spouse, parent, son, or daughter with a serious health condition; or when the employee is unable to work due to the employee's own serious health condition.

The FMLA was amended in January 2008 by enactment of the National

Defense Authorization Act for FY 2008 (FY 2008 NDAA). Public Law 110–181. Section 585(a) of FY 2008 NDAA expanded the FMLA to allow eligible employees of covered employers to take FMLA leave because of any qualifying exigency (as determined by the Secretary of Labor) when that employee's spouse, son, daughter, or parent is a member of the National Guard or Reserves who is on, or has been notified of an impending call or order to, active duty in the Armed Forces in support of a contingency operation (referred to as ''qualifying exigency leave''). Additionally, the FY 2008 NDAA amendments provided up to 26 workweeks of leave in a ''single 12-month period'' for an eligible employee 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 (referred to as ''military caregiver leave''). These two leave entitlements are collectively referred to as ''military family leave''.

The FMLA was again amended in 2009 with the enactment of the FY 2010 NDAA on October 28, 2009, and the AFCTCA on December 21, 2009. Section 565(a) of the FY 2010 NDAA amended the military family leave provisions of the FMLA by extending qualifying exigency leave to eligible family members of the Regular Armed Forces, and military caregiver leave to include care provided to certain veterans. The AFCTCA amended the FMLA to include special eligibility requirements for airline flight crewmembers and flight attendants (referred to collectively as ''airline flight crew employees''). A new definition of hours of service as it applies to airline flight crew employees was included in the eligibility provisions. Each of these provisions is discussed in detail in the section-by-section analysis that follows.

FMLA leave may be taken in a block, or under certain circumstances, intermittently or on a reduced leave schedule. In addition to providing job protected family and medical leave, employers must also maintain any preexisting group health plan coverage for an employee on FMLA protected leave under the same conditions that would apply if the employee had not taken leave. 29 U.S.C. 2614. Once the leave period is concluded, the employer is required to restore the employee to the same or an equivalent position with equivalent employment benefits, pay, and other terms and conditions of employment. *Id.* If an employee believes that his or her FMLA rights have been violated, the employee may file a complaint with the Department of Labor or file a private lawsuit in Federal or State court. If the employer has violated the employee's FMLA rights, the employee is entitled to reimbursement for any monetary loss incurred, equitable relief as appropriate, interest, attorneys' fees, expert witness fees, and court costs. Liquidated damages also may be awarded. 29 U.S.C. 2617.

Title I of the FMLA is administered by the U.S. Department of Labor and applies to private sector employers of 50 or more employees, public agencies, and certain Federal employers and entities, such as the U.S. Postal Service and Postal Rate Commission. Title II is administered by the U.S. Office of Personnel Management and applies to civil service employees covered by the annual and sick leave system established under 5 U.S.C. Chapter 63 and certain employees covered by other Federal leave systems. Title III established a temporary Commission on Leave to conduct a study and report on existing and proposed policies on leave and the costs, benefits, and impact on productivity of such policies. Title IV contains provisions governing the effect of the FMLA on more generous leave policies, other laws, and existing employment benefits. Finally, Title V originally extended the leave provisions to certain employees of the U.S. Senate and House of Representatives; however, such coverage was repealed and replaced by the Congressional Accountability Act of 1995. 2 U.S.C. 1301.

B. Who the Law Covers

The FMLA generally covers employers with 50 or more employees. To be eligible to take FMLA leave, an employee must meet specified criteria, including employment with a covered employer for at least 12 months, performance of a specified number of hours of service in the 12 months prior to the start of leave, and work at a location where there are at least 50 employees within 75 miles.

C. Regulatory History

The FMLA required the Department to issue initial regulations to implement Title I and Title IV of the FMLA within 120 days (by June 5, 1993) with an effective date of August 5, 1993. The Department published an NPRM in the **Federal Register** on March 10, 1993. 58 FR 13394. The Department received comments from a wide variety of stakeholders, and after considering these comments the Department issued an interim final rule on June 4, 1993, effective August 5, 1993. 58 FR 31794.

After publication, the Department invited further public comment on the interim regulations. 58 FR 45433. During this comment period, the Department received a significant number of substantive and editorial comments on the interim regulations from a wide variety of stakeholders. Based on this second round of public comments, the Department published final regulations to implement the FMLA on January 6, 1995. 60 FR 2180. The regulations were amended February 3, 1995 (60 FR 6658) and March 30, 1995 (60 FR 16382) to make minor technical corrections. The final regulations went into effect on April 6, 1995.

On December 1, 2006, the Department published a Request for Information (RFI) in the **Federal Register** requesting public comment on its experiences with and observations of the Department's administration of the FMLA and the effectiveness of the regulations. 71 FR 69504. The Department received comments from workers, family members, employers, academics, and other interested parties, ranging from personal accounts, surveys, and legal reviews, to academic studies and recommendations for regulatory and statutory changes to the FMLA. The Department published its Report on the comments in the **Federal Register** on June 28, 2007. 72 FR 35550.

The Department published an NPRM in the **Federal Register** on February 11, 2008 proposing changes to the FMLA's regulations based on the Department's experience administering the law, two Department of Labor studies and reports on the FMLA issued in 1996 and 2001, several U.S. Supreme Court and lower court rulings on the FMLA, and a review of the comments received in response to the RFI. 73 FR 7876. The Department also sought comments on the recently enacted military family leave statutory provisions. In response to the NPRM, the Department received thousands of comments from a wide variety of stakeholders. The Department issued a final rule on November 17, 2008, which became effective on January 16, 2009. 73 FR 67934.

D. Updates to the Military Family Leave Provisions

Section 565(a) of the FY 2010 NDAA, enacted on October 28, 2009, amends the military family leave provisions of the FMLA. Public Law 111–84. The FY 2010 NDAA expands the availability of qualifying exigency leave and military caregiver leave. Qualifying exigency leave, which was made available to family members of the National Guard and Reserve components under the FY 2008 NDAA, is expanded to include family members of the Regular Armed

Forces. The entitlement to qualifying exigency leave is expanded by substituting the term ''covered active duty'' for ''active duty'' and defining covered active duty for a member of the Regular Armed Forces as ''duty during the deployment of the member with the Armed Forces to a foreign country'', and for a member of the Reserve components of the Armed Forces as ''duty during the deployment of the member with the Armed Forces to a foreign country under a call or order to active duty under a provision of law referred to in section 101(a)(13)(B) of title 10, United States Code.'' 29 U.S.C. 2611(14).[1] Prior to the FY 2010 NDAA amendments, there was no requirement that members of the National Guard and Reserves be deployed to a foreign country.

The FY 2010 NDAA amendments expand the definition of a serious injury or illness for military caregiver leave for current members of the Armed Forces to include an injury or illness that existed prior to service and was aggravated in the line of duty on active duty. 29 U.S.C. 2611(18)(A). These amendments also expand the military caregiver leave provisions of the FMLA to allow family members to take military caregiver leave to care for certain veterans. The definition of a covered servicemember, which is the term the Act uses to indicate the group of military members for whom military caregiver leave may be taken, is broadened to include a veteran with a serious injury or illness who is receiving medical treatment, recuperation, or therapy, if the veteran was a member of the Armed Forces at any time during the period of five years preceding the date of the medical treatment, recuperation, or therapy. 29 U.S.C. 2611(15)(B). The amendments define a serious injury or illness for a veteran as a ''qualifying (as defined by the Secretary of Labor) injury or illness that was incurred by the member in 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 line of duty on active duty in the Armed Forces) and that manifested itself before or after the member became a veteran.'' 29 U.S.C. 2611(18)(B).

As was the case with the FY 2008 NDAA, the FY 2010 NDAA is silent as to the effective date of the FMLA amendments. Because the FY 2008 NDAA required the Secretary of Labor to define the term ''qualifying exigency'', the Department took the position that employers were not obligated to provide qualifying exigency leave to employees until the Department defined the term through regulation. 73 FR 7925. In contrast, the Department viewed the military caregiver leave provisions of the FY 2008 NDAA as being effective as of January 28, 2008, the signing date of the amendment. *Id.* Like the FY 2008 NDAA, the FY 2010 NDAA also requires the Secretary of Labor to define a key term in the amendment—''serious injury or illness of a veteran''. Public Law 111–84, sec. 565(a)(3); 29 U.S.C. 2611(18)(B). It is the Department's position that employers are not required to provide employees with military caregiver leave to care for a veteran until the Department defines a qualifying serious injury or illness of a veteran through regulation. However, employers are not prohibited from providing leave to employees to care for an injured or ill veteran if they choose to do so before the Department issues a final rule defining those terms, although any such leave would not be FMLA-protected and would not count against the employees' FMLA entitlement. It is also the Department's position that the provisions of the FY 2010 NDAA expanding qualifying exigency leave to cover qualifying exigencies arising from the foreign deployment of a family member in the Regular Armed Forces became effective on the date of enactment, October 29, 2009.

E. Amendments to Eligibility Criteria for Airline Flight Crewmembers and Flight Attendants

On December 21, 2009, the AFCTCA was enacted, establishing a special minimum hours of service eligibility requirement for airline flight crew employees. The AFCTCA provides that an airline flight crew employee will meet the hours of service eligibility requirement if he or she has worked or been paid for not less than 60 percent of the applicable total monthly guarantee (or its equivalent) and has worked or been paid for not less than 504 hours (not including personal commute time or time spent on vacation, medical, or sick leave) during the previous 12 months. Airline flight crew employees continue to be subject to the FMLA's other eligibility requirements.

The AFCTCA is silent as to its effective date. Because the AFCTCA is explicit about how to calculate the hours of service requirement for airline flight crew employees, it is the Department's position that the amendment became effective on the date of enactment. While the AFCTCA authorizes the Department to promulgate regulations on how to calculate the FMLA leave entitlement for airline flight crew employees, the authorization is permissive and does not require the Department to engage in rulemaking (unlike the FY 2010 NDAA provision requiring the Department to define serious injury or illness of a veteran).

Because the Department is not statutorily required to issue regulations to effectuate the AFCTCA, and employers can provide leave to airline flight crew employees under the current FMLA regulations, it is the Department's position that employees became entitled to take leave under the AFCTCA as of December 21, 2009. Until the Department issues a final rule specifically addressing calculating FMLA leave usage for flight crew employees, the Department will exercise its discretion in assessing employer compliance, in light of the individual facts and circumstances, with current § 825.205.

F. Regulatory Look Back Review

In complying with Executive Order 13563, ''Improving Regulation and Regulatory Review,'' the Department sought public comment in March 2011 to inform its design of a framework to review its significant rules. The review would determine whether these rules are obsolete, unnecessary, unjustified, excessively burdensome, counterproductive, or duplicative of other Federal regulations. Specifically, the Department sought comment on which regulations should be considered for review, expansion, or modification. The Department utilized an interactive Web site (*www.dol.gov/regulations/regreview.htm*) and published a Request for Information in the **Federal Register** (76 FR 15224) for the public to provide comments.

The Department received three comments concerning the FMLA. The first commenter requested clarification on § 825.218, regarding substantial and grievous economic injury. Upon review of the comment, the Department determined that there was no need to clarify this section through regulatory change.

The second comment the Department received concerned § 825.204, ''Transfer of an Employee to an Alternative Position During Intermittent Leave or Reduced Schedule Leave.'' The commenter suggested extending the employer's ability to transfer an employee to an alternative positive for

[1] As with the FY 2008 NDAA, the FY 2010 NDAA references 10 U.S.C. 101(a)(13)(B), which covers call ups of the National Guard and Reserves and certain retired members of the Regular Armed Forces and Reserves in support of contingency operations. 73 FR 67954–55. For simplicity, the terms ''National Guard and Reserve'' and ''Reserve components'' are used interchangeably throughout this document and refer to these categories of military members.

intermittent leave that is foreseen but unscheduled. The Department responded to similar comments in the 2008 final rule. As the Department noted at that time, by expressly permitting transfers in cases of intermittent or reduced schedule leave ''that is foreseeable based on planned medical treatment,'' 29 U.S.C. 2612(b)(2), the statutory language strongly suggests that this is the only situation where such transfers are allowed. 73 FR 67975. The Department continues to find no statutory basis to permit transfers to an alternative position for employees taking unscheduled or unforeseeable intermittent leave, and declines to expand the situations in which an employer may temporarily transfer an employee to an alternative position. *Id.*

The last comment that the Department received suggested excluding from the Act's protections medical conditions that the commenter believes are subjectively determined. The regulations provide an objective definition of ''serious health condition'' as well as a process for employers to request a certification of a serious health condition from the employee's (or family member's) health care practitioner. Additionally, where the employer has reason to doubt the validity of the initial certification, the employer may require a second and, if necessary, third opinion from a health care practitioner. Given the procedures available for ensuring certification of a serious health condition by a health care practitioner, the Department does not believe that issuing further regulatory changes at this time is warranted.

III. Section-by-Section Analysis of Proposed Changes to the FMLA Regulations

The following is a section-by-section analysis of the proposed revisions to the FMLA regulations. The primary sections of the regulations with proposed revisions to implement the FY 2010 NDAA amendments are: § 825.126 (Leave because of a qualifying exigency); § 825.127 (Leave to care for a covered servicemember with a serious injury or illness); § 825.309 (Certification for leave taken because of a qualifying exigency); and § 825.310 (Certification for leave taken to care for a covered servicemember (military caregiver leave)). Less substantive changes are proposed to § 825.122 (Definitions of spouse, parent, son or daughter, next of kin of a covered servicemember, adoption, foster care, son or daughter on active duty or call to active duty status, son or daughter of a covered servicemember, and parent of a covered servicemember) and § 825.800 (Definitions) to reflect new definitions related to military family leave. The primary sections of the regulations with proposed revisions to implement the AFCTCA are: § 825.110 (Eligible employee); § 825.205 (Increments of FMLA leave for intermittent or reduced schedule leave); § 825.500 (Record-keeping requirements); and § 825.800 (Definitions) to include definitions specific to airline flight crew employees.

The Department further proposes to move the definitions section of the regulations from § 825.800 to § 825.102, which is currently reserved. The Department believes that placing the definitions section at the beginning of the regulations is more helpful to the reader, and consistent with other regulations implementing statutes administered by the WHD. Unless specifically discussed, no further substantive changes are proposed to this section.

The Department intends to make corresponding minor changes to the FMLA poster (WHD publication 1420), the Notice of Eligibility and Rights and Responsibilities (Form WHD–381), the Certification for Qualifying Exigency Leave for Military Family Leave (Form WHD–384), and the Certification for Serious Injury or Illness of a Covered Servicemember for Military Family Leave (Form WHD–385) to reflect the FY 2010 NDAA amendments and the AFCTCA. The Department also intends to develop a new form for the certification for the serious injury or illness of a covered veteran. The Department also proposes to remove the optional-use forms and notices from the regulations' Appendices. The removed forms and notices are medical certification forms WH–380–E (Certification of Health Care Provider—Employee), WH–380–F (Certification of Health Care Provider—Family Member), WH–384 (Certification of Qualifying Exigency for Military Family Leave), and WH–385 (Certification for Serious Injury or Illness of Covered Servicemember for Military Family Leave); notification forms WH–381 (Notice of Eligibility and Rights & Responsibilities) and WH–382 (Designation Notice to Employee of FMLA Leave); and the Notice to Employees of Rights under FMLA (WH Publication 1420).

The Department's prototype forms are intended to facilitate the information collection requirements of the FMLA. These information collections are subject to the requirements of the Paperwork Reduction Act of 1995 (PRA). The Department, as part of its continuing effort to reduce paperwork and respondent burden, conducts a pre-clearance consultation program to provide the general public and Federal agencies with an opportunity to comment on proposed and/or continuing collections of information every three years in accordance with the requirements of the PRA. Substantive changes to the forms as they appear in the Appendices require additional and separate rulemaking activities.

The PRA clearance process has sometimes resulted in updates to the forms that differed from the version of the forms that appeared in the Appendices to the regulations. The Department believes that multiple versions of the forms have created needless confusion for the public, and in an effort to lessen this confusion the Department proposes to remove the forms from the regulations. The forms will continue to be available on the WHD Web site. The Department believes that removing the forms from the regulations, and thereby streamlining the clearance process, will permit the forms to be more expeditiously amended in response to statutory and other changes, as well as suggestions from the public. This will ensure that the most accurate and up-to-date forms are available to the public. Although the Department is proposing to remove the forms from the regulations, this proposed change does not alter the Department's belief that the forms facilitate employer and employee compliance with their respective obligations under the FMLA. Employers are permitted to use forms other than those issued by the Department so long as they do not require information beyond that specified in the regulations. *See* 29 CFR §§ 825.306, 825.309, 825.310. However, if an employee provides sufficient certification regardless of format, no additional information may be requested.

Minor changes to more accurately reflect the new military family leave and airline flightcrew employee eligibility provisions or to delete references to Appendices for prototype forms or notices, are proposed at: §§ 825.100, 825.101, 825.107, 825.112, 825.200, 825.213, 825.300, 825.302, 825.303 and 825.306. The Department also proposes to correct inadvertent drafting errors that were made in the 2008 final rule, including correcting the cross-references in current § 825.200(g) and (f), and inserting the word ''spouse'' in the first lines of § 825.202(b) and (b)(1). The Department also proposes to include the word ''the'' in the statutory phrase ''in line of duty'' where used in the regulations. The URL for the WHD Web site has also been updated to link

viewers directly to the WHD site. This proposed change appears in: §§ 825.300, 825.306, and 825.309. These proposed changes are not addressed in the section-by-section analysis. The addition of definitions to current § 825.800 and its relocation to reserved § 825.102 is also not addressed in the section-by-section analysis.

A. Revisions To Implement the FY 2010 NDAA amendments

1. Section 825.122—Definitions of Spouse, Parent, Son or Daughter, Next of Kin of a Covered Servicemember, Adoption, Foster Care, Son or Daughter on Active Duty or Call or Order to Active Duty Status, Son or Daughter of a Covered Servicemember, and Parent of a Covered Servicemember

The Department proposes to add a definition of ''covered servicemember'' as new paragraph (a) of this section to reflect the addition of covered veterans as covered servicemembers under the FY 2010 NDAA. As a result, the Department proposes to renumber the paragraphs that follow. The Department also proposes to change the term ''active duty'' to ''covered active duty'' in each place it appears in both the title of this section and in paragraph (g), and to update the reference in this paragraph to proposed § 825.126(a)(5).

2. Section 825.126—Leave Because of a Qualifying Exigency

Section 585 of the FY 2008 NDAA provided that eligible employees of covered employers may take FMLA leave for any qualifying exigency arising out of the fact that the employee's spouse, son, daughter, or parent is on active duty or has been notified of an impending call or order to active duty in support of a contingency operation. Public Law 110–181; § 585(a). The FY 2008 NDAA defined ''active duty'' as a call or order to active duty under a provision of law referred to in 10 U.S.C. 101(a)(13)(B). *Id.* The provisions referred to in 10 U.S.C. 101(a)(13)(B) are: sections 688, 12301(a), 12302, 12304, 12305, and 12406 of Title 10 of the United States Code; Chapter 15 of Title 10 of the United States Code; and any other provision of law during a war or during a national emergency declared by the President or Congress. These provisions are limited to duty by members of the Reserve components, the National Guard, and certain retired members of the Regular Armed Forces and retired Reserve under a call or order to active duty. The FY 2008 NDAA amendment thus limited the availability of qualifying exigency leave to family members of members of the Reserve components. The entitlement to qualifying exigency leave did not extend to family members of the Regular Armed Forces on active duty status because members of the Regular Armed Forces either do not serve ''under a call or order to active duty'' or are not identified in the provisions of law referred to in 10 U.S.C. 101(a)(13)(B). 73 FR 67954–55.

The FY 2010 NDAA further amends the FMLA to permit an eligible employee to take FMLA leave for any qualifying exigency arising out of the fact that the employee's spouse, son, daughter, or parent is on covered active duty, or has been notified of an impending call or order to covered active duty in the Armed Forces. Public Law 111–84, § 565(a)(1)(B); *see* 29 U.S.C. 2612(a)(1)(E). The FY 2010 NDAA provisions define ''covered active duty'' to include duty by members of the Regular Armed Forces during deployment to a foreign country, and duty by members of the Reserve components during deployment to a foreign country under a call or order to active duty under a provision of law referred to in section 101(13)(B) of title 10, United States Code. 29 U.S.C. 2611(14). Thus, these new provisions entitle qualifying family members to FMLA leave for qualifying exigencies arising from foreign deployments of Regular Armed Forces members, and add a foreign deployment requirement to the type of call or order to active duty required for the Reserve components of the Armed Forces.

Section 825.126 is currently organized into two parts: (a) The specific circumstances under which qualifying exigency leave may be taken; and (b) an employee's entitlement to qualifying exigency leave. The Department proposes to keep these two provisions, but reverse the order in which they appear. The Department has learned from employers and employees that there is confusion about the military family provisions. The Department believes that it is more logical to outline an employee's entitlement to qualifying exigency leave first, and then to specify the circumstances under which the employee may take qualifying exigency leave. The Department expects that this reordering will be less confusing to the public. Thus, proposed § 825.126(a) covers an employee's entitlement to qualifying exigency leave (currently addressed in § 825.126(b)) and proposed § 825.126(b) identifies the specific circumstances under which qualifying exigency leave may be taken (currently addressed in § 825.126(a)). As discussed below, the Department further proposes to revise § 825.126 to incorporate the FY 2010 NDAA amendments.

The Department proposes to substitute in this section (as well as throughout the regulations wherever the term appears) ''covered active duty'' for ''active duty'' to incorporate the FY 2010 NDAA statutory language. The Department also proposes to delete references in this section (as well as throughout the regulations wherever the term appears) to ''covered military member'' and instead use the generic term ''military member'' or ''member'' to refer to members of the Armed Forces on covered active duty as defined by the statute. As discussed above, the FY 2008 NDAA restricted entitlement to qualifying exigency leave to an employee whose parent, spouse, son, or daughter is a member of the National Guard and Reserves under an impending call or order to active duty in support of a contingency operation. In the 2008 final rule, the Department introduced the term ''covered military member'' to reflect that the military member must be the parent, spouse, son or daughter of the employee. This term has also come to reflect the restrictive nature of qualifying exigency leave under the FY 2008 NDAA, *i.e.,* that such leave was limited to qualifying family members of Reserve component members. The FY 2010 NDAA amendment extends the entitlement for qualifying exigency leave to family members of Regular Armed Forces members, and therefore, the limiting term ''covered military member'' is no longer relevant and may be unnecessarily confusing. Similarly, the use of the term ''covered active duty'' rather than ''active duty'' will more accurately reflect the fact that there are limitations on the types of active duty that can give rise to qualifying exigency leave. The Department intends to make the provisions of qualifying exigency leave more understandable to the public by using the statutory term ''covered active duty'' and referring generically to the military member throughout the regulation, and seeks comment on this proposed change.

Current § 825.126(a) states the statutory entitlement that eligible employees may take FMLA leave while the employee's spouse, son, daughter, or parent is on active duty or call to active duty status (this paragraph continues by listing the specific qualifying exigencies for which leave may be taken). Similarly, proposed § 825.126(a) sets out the statutory entitlement that an eligible employee may take leave for any qualifying exigency arising out of the covered active duty or call to covered active duty status of the employee's

spouse, son, daughter, or parent. The list of specific qualifying exigencies in current paragraph (a) is moved to proposed paragraph (b).

Proposed § 825.126(a)(1) defines ''covered active duty or call to covered active duty'' status for a member of the Regular Armed Forces as ''duty under a call or order to active duty (or notification of an impending call or order to covered active duty) during the deployment of the member with the Armed Forces to a foreign country,'' and states that the active duty orders will generally specify if the member's deployment is to a foreign country. In accordance with the FY 2010 NDAA, the Department deleted the statement in current § 825.126(b)(2)(i) that family members of members of the Regular Armed Forces are not entitled to qualifying exigency leave.

Proposed § 825.126(a)(2) defines ''covered active duty or call to covered active duty'' status for a member of the Reserve components as duty under a call or order to active duty (or notification of an impending call or order to active duty) during the deployment of the member to a foreign country under a Federal call or order to active duty in support of a contingency operation pursuant to the provisions of law referred to in 10 U.S.C. 101(a)(13)(B). The provisions referred to in 10 U.S.C. 101(a)(13)(B) are 10 U.S.C. 688, 12301(a), 12302, 12304, 12305, 12406; 10 U.S.C. chapter 15; and any other provision of law during a war or during a national emergency declared by the President or Congress. While FY 2010 NDAA struck the definition of ''contingency operation'' from the FMLA and deleted the reference to ''contingency operation'' in 29 U.S.C. 2612(a)(1)(E), the Department believes that the reference to 10 U.S.C. 101(a)(13)(B) in the definition of covered active duty for members of the Reserve components continues to require that members of the Reserve components be called to duty in support of a contingency operation in order for their family members to be entitled to qualifying exigency leave. Therefore, proposed § 825.126(a)(2) maintains the language in current § 825.126(b)(2) regarding duty in support of a contingency operation. The Department also proposes to use the word ''Federal'' in proposed paragraph § 825.126(a)(2) in describing the covered calls or orders to active duty in order to make clear that only Federal calls to duty will meet the definition of covered active duty.

Proposed paragraph § 825.126(a)(2)(i) lists the specific Reserve components currently found in § 825.126(b)(2)(i). Proposed paragraph § 825.126(a)(2)(ii) follows current § 825.126(b)(3) in that it provides that the active duty orders of a member of the Reserve components will generally specify if the covered active duty military member is serving in support of a contingency operation by citing the relevant section of Title 10 of the United States Code and/or by reference to the specific name of the contingency operation as is stated in current § 825.126(b)(3). Proposed § 825.126(a)(2)(ii) also states that the active duty orders will specify that the deployment is to a foreign country.

The Department proposes in paragraph § 825.126(a)(3) to define deployment of the member with the Armed Forces to a foreign country as deployment to areas outside of the United States, the District of Columbia, or any Territory or possession of the United States, including deployment in international waters. This definition is consistent with the Department's understanding of the term ''deployment'' based on consultations with the Department of Defense (DOD). The Department understands that servicemembers are assigned to a home station [2] and deployment is the relocation of forces and materials from that home station to an operational area. The term does not include reassignments to a new duty station or deployment for training exercises.

In addition, the definition of ''deployment'' in proposed paragraph § 825.126(a)(3) includes deployment of the military member to active duty in international waters. The Department understands Congress to have intended to extend the entitlement of qualifying exigency leave to family members of all branches of the military equally. The Department seeks to ensure that family members of the Navy, Coast Guard, and other military members deployed to duty in international waters have access to qualifying exigency leave. The Department seeks comment on the types of duty assignments for members of the Navy and Coast Guard that will satisfy the definition of deployment.

The Department proposes in § 825.126(a)(4) to specify, as current § 825.126(b)(2)(ii) does, that covered deployments are limited to Federal calls to active duty. Finally, the Department proposes to move the definition of ''son or daughter on active duty or call to active duty status'' currently located at § 825.126(b)(1) to paragraph § 825.126(a)(5).

Current § 825.126(a) lists the reasons, divided into eight categories, for which an eligible employee may take qualifying exigency leave. The qualifying exigency leave categories are: (1) *Short-notice deployment,* (2) *Military events and related activities,* (3) *Childcare and school activities,* (4) *Financial and legal arrangements,* (5) *Counseling,* (6) *Rest and recuperation,* (7) *Post-deployment activities,* and (8) *Additional activities.* The Department proposes to move this list to § 825.126(b); the paragraph numbers that correspond to the eight categories will remain the same. As noted above, the Department proposes to replace the term ''active duty'' with ''covered active duty'' and ''covered military member'' with ''military member'' or ''member'' throughout this section. Where no additional changes are made within a category of qualifying exigency, and the Department is not specifically requesting additional information, that category is not discussed further in this proposal.

Current § 825.126(a)(1) sets forth the requirements for *Short-notice deployment* qualifying exigency leave. Leave taken for this purpose may be used for a period of seven calendar days beginning with the date the military member is notified of an impending call or order to covered active duty. The Department seeks public comment on whether the seven calendar day period remains appropriate for this type of qualifying exigency.

Current § 825.126(a)(3), *Childcare and school activities,* allows eligible employees to take qualifying exigency leave to arrange childcare or attend certain school activities for a military member's son or daughter. The Department proposes to delete repetitive text throughout this paragraph identifying the relationship between the child and the military member. Instead, proposed paragraph § 825.126(b)(3) states that for purposes of the childcare and school activities leave listed in § 825.126(b)(3)(i) through (iv), the child 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 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.'' Proposed § 825.126(b)(3) also adds language to clarify that, as with all instances of qualifying exigency leave, the military member must be the spouse, son, daughter, or parent of the employee

[2] According to The Joint Publication 1–02, Department of Defense Dictionary of Military and Associated Terms, 8 November 2010 (as amended through 15 August 2011), ''home station'' is defined as the permanent location of active duty units and Reserve Component units (*e.g.,* location of armory or reserve center).

requesting leave. The Department believes this clarifying language is necessary because of this section's unique relationship requirements. While the military member must be the spouse, parent, or son or daughter of the eligible employee, the child for whom childcare leave is sought need *not* be a child of the employee requesting leave. For example, the employee may be the mother of the military member and may need qualifying exigency childcare and school activities leave for the military member's child.

Current § 825.126(a)(6), *Rest and recuperation,* allows an eligible employee to take up to five days of leave to spend time with a military member on rest and recuperation leave during a period of deployment. The Department proposes in § 825.126(b)(6) to capitalize *Rest and Recuperation* to reflect that this type of leave corresponds directly to the DOD Rest and Recuperation leave programs (*e.g.,* USCENTCOM R & R leave). The Department also proposes to expand the maximum duration of Rest and Recuperation qualifying exigency leave from five to 15 days. The DOD has advised the Department that the actual number of days of Rest and Recuperation leave provided by the military varies, with some military members receiving as many as 15 days, depending upon the length of their deployment. The Department proposes to allow the amount of leave an employee may take for Rest and Recuperation qualifying exigency leave to equal that provided to the military member, up to a maximum of 15 days. The Department has received information from employees indicating that the amount of time granted to a military member for Rest and Recuperation leave is generally longer than the five days permitted by the regulations, and due to the nature of the deployments, five days, as permitted by the current regulations, is an insufficient amount of time for leave. As noted in the 2008 final rule, there are limited opportunities available for military members to spend time with their families while on active duty and it is important to foster strong relationships among military families. 73 FR 67961. The Department believes it is appropriate to make the availability of this type of FMLA-qualifying exigency leave consistent with the leave actually provided by the military to the member on covered active duty. The Department seeks comment on the expansion of *Rest and Recuperation* qualifying exigency leave and whether the proposed 15 day period is sufficient in all instances.

The Department is also proposing to add language to § 825.126(7), *Post-deployment activities.* Current § 825.126(b)(7)(ii) permits an employee to take qualifying exigency leave to address issues that arise from the death of a military member while on covered active duty status. The Department proposes to add attending funeral services as an additional example to the activities that are covered by such leave.

The Department proposes no additional qualifying exigencies for which FMLA leave may be taken, but invites comment on whether additional qualifying exigencies should be added in light of the extension of this leave entitlement to family members of members of the Regular Armed Forces. The Department notes that the categories of leave in the current and proposed regulations include activities that may take place in advance of deployment (pre-deployment activities), during deployment, and limited activities that occur after deployment has ended (post-deployment activities). While the FY 2010 NDAA defines ''covered active duty'' as ''duty during the deployment of the member,'' the Department continues to believe that it is appropriate to include certain pre-deployment activities to reflect Congressional intent to include exigencies arising from notification of ''an *impending* call or order to covered active duty''. 29 U.S.C. 2612(a)(1)(E) (emphasis added). Similarly, the Department continues to believe that it is appropriate to include as qualifying exigencies limited post-deployment activities the need for which immediately and foreseeably arise from the military member's covered active duty. This interpretation and reasoning is consistent with that outlined in the 2008 final rule. 73 FR 67961.

No other changes are proposed to § 825.126.

3. Section 825.127 Leave To Care for a Covered Servicemember With a Serious Injury or Illness

Section 585(a) of the FY 2008 NDAA amended the FMLA to allow an eligible employee who is a covered servicemember's spouse, son, daughter, parent, or next of kin to take up to 26 workweeks of leave during a ''single 12-month period'' to care for a servicemember receiving treatment for a serious injury or illness (''military caregiver leave''). Such leave can be taken to provide care to a current member of the Armed Forces, including the National Guard and Reserves. These provisions were incorporated in current § 825.127, which explains an employee's entitlement to military caregiver leave and the specific circumstances under which military caregiver leave may be taken.

Section 565(a) of the FY 2010 NDAA further amends the FMLA to revise the definition of ''covered servicemember'' to include certain veterans and to expand coverage for military caregiver leave to eligible employees caring for such veterans with a qualifying (as defined by the Secretary of Labor) injury or illness. 29 U.S.C. 2611(15)(B). It also amends the FMLA to revise the definition of serious injury or illness for current members of the Armed Forces to include conditions that existed before the covered servicemembers' active duty but were aggravated by service in the line of duty on active duty. 29 U.S.C. 2611(18)(A). A serious injury or illness for a veteran similarly includes conditions that existed before the veteran's active duty but were aggravated by service in the line of duty on active duty and that manifested before or after the servicemember became a veteran. 29 U.S.C. 2611(18)(B).

The Department proposes to reorganize § 825.127 to reflect the substantive changes to the military caregiver leave provisions pursuant to the FY 2010 NDAA amendments. In addition, the proposal adds the term ''military caregiver leave'' to the title of this section for clarity. Current paragraph § 825.127(b), which defines the family members qualified to take caregiver leave, is moved to proposed paragraph § 825.127(d). Current paragraph § 825.127(d), which addresses circumstances when a husband and wife who are both eligible for FMLA leave work for the same employer, is moved to proposed § 825.127(f). Because no substantive changes are proposed to these sections they are not discussed further.

Current § 825.127(a) provides that an eligible employee may take FMLA leave to care for a current member of the Armed Forces, including National Guard and Reserves members, with a serious injury or illness incurred in the line of duty on active duty for which the servicemember is undergoing medical treatment, recuperation, or therapy, is otherwise in outpatient status, or is otherwise on the temporary disability retired list. This section of the current regulations incorporates the statutory definition of a covered servicemember pursuant to the FY 2008 NDAA, and states that the definition of a covered servicemember does not include former members of the Regular Armed Forces, former members of the National Guard and Reserves, and members on the permanent disability retired list. Consistent with the FY 2010 NDAA

expansion of military caregiver leave to care for certain veterans, the current statement that military caregiver leave does not apply to former members of the military is deleted from proposed paragraph (a). The definitions set forth in current paragraphs (a)(1) and (2) are incorporated in proposed paragraphs (b) and (c), discussed below. Proposed paragraph § 825.127(a) simply states that eligible employees are entitled to FMLA leave to care for a covered servicemember with a serious injury or illness.

Proposed § 825.127(b) provides the definition of covered servicemember for current members of the Armed Forces and for covered veterans. Proposed § 825.127(b)(1) defines covered servicemember as it applies to current members of the Armed Forces, including members of the National Guard or Reserves. This definition mirrors the statutory definition. 29 U.S.C. 2611(15)(A). This paragraph also incorporates the definition of ''outpatient status'' from current § 825.127(a)(2), which is applicable only to current members of the Armed Forces.

Proposed § 825.127(b)(2) defines covered servicemember, as it applies to veterans, to mean a covered veteran who is undergoing medical treatment, recuperation, or therapy for a serious injury or illness. It further defines a covered veteran as an individual who 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. This definition combines the FY 2010 NDAA statutory definition of a ''veteran'' (which incorporates the definition of veteran in 38 U.S.C. 101) and the statutory limitations on the inclusion of veterans as covered servicemembers. 29 U.S.C. 2611(15)(B) (a veteran will be a covered servicemember if he or she is ''undergoing medical treatment, recuperation, or therapy for a serious injury or illness [and the veteran] was a member of the Armed Forces (including a member of the National Guard or Reserves) at any time during the period of 5 years preceding the date on which the veteran undergoes that medical treatment, recuperation, or therapy.''); 29 U.S.C. 2611(19) (adopting 38 U.S.C. 101 definition of veteran, which defines the term as ''a person who served in the active military, naval, or air service, and who was discharged or released therefrom under conditions other than dishonorable''). The Department proposes to measure the five-year period from the date the employee first takes leave to care for the veteran, and to permit an employee to continue leave begun within the five-year period until the end of the applicable ''single 12-month period''. A veteran will be considered a covered veteran if he or she was a member of the Armed Forces within the five-year period immediately preceding the date the requested leave is to begin. If the leave commences within the five-year period, the employee may continue leave for the applicable ''single 12-month period'', even if it extends beyond the five-year period. The Department believes this interpretation is consistent with the intent of Congress in limiting FMLA leave to care for certain veterans to a specified time period. This interpretation may exclude veterans of previous conflicts (*e.g.,* Gulf War veterans), and may exclude certain veterans of the War in Afghanistan and Operation Iraqi Freedom, depending on the veteran's discharge date and the date the eligible employee's leave is to begin. The Department invites comment on this interpretation.

Proposed § 825.127(c) provides the definition of serious injury or illness for current members of the Armed Forces and for covered veterans. Proposed § 825.127(c)(1) incorporates the definition of serious injury or illness of a current servicemember from current § 825.127(a)(1), and expands it to include an injury or illness that existed prior to the beginning of the member's active duty but was aggravated by service in the line of duty on active duty in the Armed Forces, consistent with the statutory definition of this term as amended by the FY 2010 NDAA. 29 U.S.C. 2611(18)(A).

For both current members of the Armed Forces and covered veterans, a serious injury or illness that existed before the beginning of the servicemember's active duty and was aggravated by service in the line of duty on active duty includes both conditions that were noted at the time of entrance into active service and conditions that the military was unaware of at the time of entrance into active service but that are later determined to have existed at that time. A preexisting injury or illness will generally be considered to have been aggravated by service in the line of duty on active duty where there is an increase in the severity of such injury or illness during service, unless there is a specific finding that the increase in severity is due to the natural progression of the injury or illness. It is the Department's understanding that individuals will not be accepted for military service in the Regular or Reserve components unless they are: (1) Free of contagious diseases that probably will endanger the health of other personnel; (2) free of medical conditions or physical defects that may require excessive time lost from duty for necessary treatment or hospitalization, or probably will result in separation for medical unfitness; (3) medically capable of satisfactorily completing required training; (4) medically adaptable to the military environment without the necessity of geographical area limitations; and (5) medically capable of performing duties without aggravation of existing physical defects or medical conditions. DOD Instruction Number 6130.03 on Medical Standards for Appointment, Enlistment or Induction in the Military Service. In light of these standards, the Department seeks comments, particularly from military members and their families, concerning types of injuries or illnesses that may exist prior to service and be aggravated in the line of duty on active duty to such an extent as to render the servicemember unable to perform the duties of the member's office, grade, rank, or rating.

The FY 2010 NDAA requires the Department to define a qualifying serious injury or illness for a veteran. Proposed § 825.127(c)(2) defines serious injury or illness for a covered veteran with three alternative definitions set out in paragraphs (c)(2)(i), (c)(2)(ii), and (c)(2)(iii). Proposed § 825.127(c)(2)(i) defines a serious injury or illness of a covered veteran as a serious injury or illness of a current servicemember, as defined in § 825.127(c)(1), that continues after the servicemember becomes a veteran. Thus, if a veteran suffered a serious injury or illness when he or she was a current member of the Armed Forces and that same injury or illness continues after the member leaves the Armed Forces and becomes a veteran, the injury or illness will continue to qualify as a serious injury or illness warranting military caregiver leave. The Department believes that allowing qualifying family members to take leave to care for covered veterans who continue to suffer from these serious injuries or illnesses is consistent with Congressional intent, as evidenced by the extension of military caregiver leave provisions for veterans for a defined five-year period. As explained below, the Department believes that an eligible employee may take military caregiver leave for the same family member based on the same serious injury or illness when the family member is a current member of the Armed Forces and when the family member becomes a covered veteran.

Proposed § 825.127(c)(2)(ii) defines a serious injury or illness for a covered veteran as a physical or mental condition for which the covered veteran has received a Department of Veterans Affairs (VA) Service Related Disability Rating (VASRD) of 50 percent or higher and such VASRD rating is based, in whole or part, on the condition precipitating the need for caregiver leave. The Department's review indicates that a VASRD disability rating of 50 percent or greater encompasses disabilities or conditions such as amputations, severe burns, post traumatic stress syndrome, and severe traumatic brain injuries. The Department believes that there should be parity between a serious injury or illness of a covered veteran and a serious injury or illness for a current member of the Armed Forces, but also recognizes that veterans are in different circumstances than active duty military members. The standard for a serious injury or illness for current members of the Armed Forces cannot be directly applied to veterans because a veteran no longer has a military office, grade, rank, or rating against which to measure a condition that does not manifest until after the servicemember becomes a veteran. Further, veterans, unlike current military members, may participate in the civilian workforce.

The Department believes that a serious injury or illness that substantially impairs a veteran's ability to secure or follow a substantially gainful occupation by reason of service-connected disability should be a qualifying injury or illness for a covered veteran. The Department considered proposing the VASRD rating equal to the level at which, under VA regulations, the veteran is considered to be totally disabled, *i.e.,* that the veteran is unable to secure or follow a substantially gainful occupation by reason of service-connected disability. *See* 38 CFR 4.16. Section 4.16(a) of the VA regulations clarifies that for a veteran with one disability, a disability rating of 60 percent or higher constitutes a total disability, and for a veteran with two or more disabilities, at least one disability must be rated at 40 percent or more with sufficient additional disabilities to bring the combined rating to 70 percent or higher. However, the Department is concerned that veterans may suffer from injuries and illnesses that do not result in a ''total disability'' under the VASRD rating system, but which the Department believes should qualify as a serious injury or illness for military caregiver leave. For example, burns resulting in distortion or disfigurement (*see* 38 CFR 4.118), or psychological disorders resulting from stressful events (*see* 38 CFR 4.129) occurring in the line of duty on active duty may not result in a VASRD rating of 60 percent or higher, but nonetheless may be severe enough to substantially impair a veteran's ability to work and therefore should be considered qualifying injuries or illnesses. The Department is particularly concerned that military caregiver leave be available to family members of veterans suffering from, or receiving treatment for such injuries or illnesses, which may include continuing or follow-up treatment for burns, including skin grafts or other surgeries, and amputations, including prosthetic fittings, occupational therapy and similar care.

The Department also considered proposing the VASRD disability rating at a percentage below 50 percent. However, the Department determined that a lower threshold may capture injuries and illnesses that Congress did not intend to qualify as serious injuries or illnesses for which employees would be entitled to 26 workweeks of FMLA leave. For example, after a review of the VASRD rating schedules, the Department understands that a 30 percent VASRD rating may encompass conditions such as the loss of one ear (*see* 38 CFR 4.87), chronic laryngitis (*see* 38 CFR 4.97), moderate migraine (episodes once per month over several months) (*see* 38 CFR 4.124(a)), or severe acne (*see* 38 CFR 4.118). In attempting to achieve parity with the standard of a serious injury or illness for a current member of the Armed Forces, the Department concluded that a VASRD rating of 50 percent will more closely approximate a condition that substantially impairs a veteran's ability to work.

The Department is also concerned that establishment of a two-tier test, as used by the VA to reflect single and multiple disabilities, may be unnecessarily complicated for the purpose of defining a qualifying serious injury or illness for military caregiver leave. Therefore, after a careful review of VA regulations, the Department proposes a single threshold of an overall VASRD rating of 50 percent or higher (whether based on a single or multiple disabilities) as a qualifying serious injury or illness.

The Department seeks comments on several aspects of this proposed definition. First, the Department invites comment on whether the VASRD rating of 50 percent is the appropriate level of injury or illness to support a request for military caregiver leave. The Department specifically seeks comment on whether the VASRD rating of 50 percent is the proper percentage of disability to capture all injuries and illnesses that would warrant an employee taking military caregiver leave to care for a covered veteran. Second, while the standard reflects the VA's determination of a disability with respect to benefits, the Department seeks comment on whether a VASRD rating appropriately correlates to the veteran's need for care and ability to work, attend school or perform other daily activities. The Department also seeks comment on whether this standard should expressly reference limitations in a veteran's ability to attend school or perform other regular daily activities. The Department invites comment on whether there are circumstances in which a veteran would be able to work but would nonetheless need care because of an inability to perform other daily activities.

Proposed § 825.127(c)(2)(iii) is the third alternative definition of a serious injury or illness for a covered veteran; it covers injuries and illnesses that are not technically within the definition proposed in (c)(2)(i) or (ii), but are of similar severity. The Department recognizes that covered veterans may have injuries or illnesses that are similar in severity to the injuries or illnesses qualifying under proposed (c)(2)(i) but for which the veterans did not obtain certification as a serious injury or illness when they were current members of the military. Similarly, the Department recognizes that covered veterans may have injuries or illnesses that are similar in severity to the injuries or illnesses qualifying under proposed (c)(2)(ii) but for which the veterans have not received a VASRD rating. The Department also recognizes that covered veterans may need a family member to provide care for injuries or illnesses that, absent treatment, would be similar in severity to those qualifying under (c)(2)(i) and (ii). This third alternative definition of serious injury or illness for a covered veteran is intended to capture these types of injuries and illnesses.

The Department proposes to define a serious injury or illness for a covered veteran in the third alternative as a physical or mental condition that substantially impairs the veteran's ability to secure or follow a substantially gainful occupation by reason of a service-connected disability, or would do so absent treatment. This proposed definition is intended to replicate the VASRD 50 percent disability rating standard under (c)(2)(ii) for situations in which the veteran does not have a service-related disability rating from the VA. The Department

expects that, when making determinations of serious injury or illness under this proposed definition, private health care providers will do so in the same way they make similar determinations for Social Security Disability claims and Workers' Compensation claims. Particularly with respect to Social Security Disability, health care providers must determine that an injury or illness ''substantially impairs'' the individual and determine whether the individual is able to gain or keep a ''substantially gainful occupation.''

As noted above, the standard in (c)(2)(ii) is based on VA regulations and disability determinations. For example, a covered veteran with post traumatic stress disorder who is usually able to work may need care from an employee-family member when an event triggers a reoccurrence of the associated depression and anxiety to a level that the veteran would be unable to work absent treatment. Although paragraph (c)(2)(iii) is intended to have the same degree of incapacity as that set forth in paragraph (c)(2)(ii), a certification of serious injury or illness under this section serves only to establish that the veteran has a condition that entitles his or her family member to military caregiver leave under the FMLA. Such a determination provides no basis for a determination of status, rights, or benefits for the VA or other agencies. The VA is the sole agency qualified to make any rating determination for purposes of VA-related rights or benefits.

The Department seeks comments from employees, employers, health care providers, and veterans as well as current military members on this proposed alternative definition. Specifically, the Department seeks comments on whether this proposal will be effective at capturing the serious injuries and illnesses that covered veterans suffer for which caregiving is needed by qualifying employee-family members and which will not be covered under proposed paragraphs (c)(2)(i) and (ii). In addition, the Department seeks comments on the ability of health care providers to certify a serious injury or illness for a covered veteran and the ability of employers to administer leave associated with a serious injury or illness for a covered veteran under this proposed definition. The Department is particularly concerned that this provision comprehensively encompasses traumatic brain injuries, post traumatic stress disorder, and other such conditions that may not manifest until some time after the member has become a veteran. Therefore, the Department also seeks comment on the types of injuries and illnesses that typically manifest after the member becomes a veteran, whether a family member is needed to care for the veteran for such injuries or illness and, if so, whether this proposed definition would cover such situations.

The Department notes another means through which the severity of an injured veteran's disability may be assessed. VA's Program of Comprehensive Assistance for Family Caregivers (*see Caregivers and Veterans Omnibus Health Services Act of 2010,* Public Law 111–163 and 38 CFR part 71) is designed to provide health care, travel, training, and financial benefits to certain eligible caregivers of veterans who are eligible for the program. In general, a veteran or servicemember undergoing medical discharge from the Armed Forces, is eligible for VA's Program of Comprehensive Assistance for Family Caregivers if the individual has incurred or aggravated a serious injury (including traumatic brain injuries, psychological trauma, or other mental disorders) in the line of duty on or after September 11, 2001; the serious injury renders the individual in need of a minimum of six continuous months of personal care services based on a variety of clinical criteria listed under 38 CFR 71.20 (c)(1)–(4); and it is in the best interest of the individual to participate in the program. *See* 38 CFR 71.20. According to VA, approximately 86 percent of veterans currently enrolled in the program have received a VASRD rating of 50 percent or greater, with approximately 50 percent having received a VASARD rating of 100 percent.

In an effort to minimize the burden placed on military families, the Department has worked with VA to understand the requirements that must be met to enroll in VA's Program of Comprehensive Assistance for Family Caregivers and utilize FMLA leave. Based on the eligibility requirements for VA's Program of Comprehensive Assistance for Family Caregivers, the Department believes that most veterans who qualify for the program meet the requirement of having a serious injury or illness as defined in this proposal for the purpose of FMLA caregiver leave. Accordingly, the Department is considering adding a fourth alternative to the definition of serious injury or illness of a veteran, enrollment in VA's Program of Comprehensive Assistance for Family Caregivers, and invites comment on whether this would appropriately help reduce the burden placed on military and veterans' families in being able to take FMLA leave.

As with the three definitions proposed in paragraphs (c)(2)(i)–(iii), enrollment in VA's Program of Comprehensive Assistance for Family Caregivers would establish only that the veteran has a serious injury or illness, and would not mean that the caregiver is automatically entitled to take FMLA leave. The person seeking to take FMLA military caregiver leave must qualify as a family member under the FMLA and meet the other eligibility criteria, and the veteran must meet the definition of a ''covered veteran'' in proposed § 825.127(b)(2).

The Department seeks comment, especially from caregivers and veterans who are currently enrolled in VA's Program of Comprehensive Assistance for Family Caregivers, on whether including enrollment in this program as another possible definition for establishing a qualifying serious injury or illness required to take FMLA leave would be helpful to veterans and caregivers in seeking FMLA leave for a covered veteran. Finally, the Department welcomes comments proposing other definitions not included above that would achieve the goals that the proposed definitions seek to achieve—namely, coverage of injuries or illnesses that covered veterans experience that approximate the severity of a serious injury or illness for current members of the military as defined in the statute and regulations.

Current § 825.127(c) explains how the ''single 12-month period'' in which eligible employees are entitled to take up to 26 workweeks of military caregiver leave is applied. This provision is moved to proposed paragraph § 825.127(e) (the numbering of the subparagraphs within this provision remain the same). Proposed paragraph § 825.127(e)(2) (current § 825.127(c)(2)) provides that the 26-workweek entitlement is to be applied as a per-covered servicemember, per-injury entitlement. Because the FY 2010 NDAA establishes two distinct categories of covered servicemembers (*i.e.,* a current member of the Armed Forces and a covered veteran) and because military caregiver leave is applied on a per-covered servicemember basis, an eligible employee could potentially take military caregiver leave to care for a covered servicemember who is a current member of the Armed Forces and then, at a later point when the same servicemember becomes a covered veteran, could take a subsequent period of military caregiver leave. The Department notes that all of the normal eligibility requirements,

such as the hours of service requirement, would apply in such a situation. Additionally, an employee may not take more than a combined total of 26 workweeks of FMLA leave during a ''single 12-month period.'' The Department seeks comment on this interpretation of the ''single 12-month period'' limitation.

The Department notes that under this provision, an eligible employee may take up to 26 workweeks of leave to care for the same covered servicemember with a subsequent serious injury or illness. As the Department explained in the 2008 final rule, a subsequent serious injury or illness of the same covered servicemember could arise either from an injury or illness incurred by a current member in a subsequent deployment, or from the subsequent manifestation of a second serious injury or illness to either a current member or a covered veteran that relates back to the initial incident. 73 FR 67969. For example, if a servicemember is injured in the line of duty on active duty and suffers severe burns, an eligible employee is entitled to 26-workweeks of caregiver leave. If the servicemember later manifests a traumatic brain injury that was incurred in the same incident as the burns, the eligible employee would be entitled to an additional 26-workweeks of leave to care for the same servicemember. The Department requests comment on whether the current regulatory language is sufficiently clear as to the situations in which an employee would be permitted to take a second period of military caregiver leave due to the subsequent serious injury or illness of the same covered servicemember.

Lastly, the Department proposes to make minor edits to internal references throughout this paragraph to reflect the reorganized structure of this section, to delete references to ''as described in paragraph (c) of this section'' as unnecessary, and to make two minor changes to paragraph (e)(3) (current § 825.127(c)(3)): adding internal numbering to facilitate readability, and changing ''week'' to ''workweek'' consistently throughout the paragraph.

4. Section 825.309 Certification Requirements for Leave Taken Because of a Qualifying Exigency

The FY 2010 NDAA amends 29 U.S.C. 2613(f), which addresses certification for qualifying exigency leave. Accordingly, as it did in § 825.126, the Department proposes to substitute ''covered active duty'' for ''active duty'' wherever it appears in this section. Consistent with the proposed change in § 825.126, the Department also proposes to substitute ''military member'' or ''member'' for ''covered military member'' wherever it appears.

Proposed § 825.309(a) follows current § 825.309(a) and states that the first time an employee requests leave because of a qualifying exigency, an employer may require the employee to provide a copy of the military member's covered 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 once to the employer, unless a need for qualifying exigency leave arises out of a different call to covered active duty status of the same military member or the call to covered active duty status of a different military member. The Department proposes to delete the phrase ''in support of a contingency operation'' from current § 825.309(a) to reflect the expansion of qualifying exigency leave to family of the Regular Armed Forces. As discussed in § 825.126, the contingency operation requirement does not apply to members of the Regular Armed Forces.

As previously discussed, the FY 2010 NDAA amended the qualifying exigency provisions to require that both members of the Reserve components and members of the Regular Armed Forces be deployed to a foreign country in order for their service to be considered covered active duty entitling their family members to qualifying exigency leave. It is the Department's understanding that the military member's active duty orders will specify the location of the deployment and will provide sufficient information to establish that the duty is, in fact, covered active duty. Both current and proposed § 825.309(a) permit an employee to use either a copy of the military member's active duty orders or ''other documentation issued by the military'' to establish that the military member is on covered active duty or call to covered active duty status. The Department has received information from employees and employers indicating that family members have experienced difficulty obtaining copies of active duty orders or that the available documentation is insufficient to comply with current certification requirements. The Department specifically seeks feedback from the public on whether active duty orders of members of the Regular and Reserve components of the Armed Forces contain sufficient information to determine that the call to covered active duty involves deployment to a foreign country (and, in the case of the Reserve components that the member is being called up in support of a contingency operation), and, if not, what other documentation would meet the certification requirements. The Department also seeks comment on whether employees have experienced difficulty in obtaining copies of active duty orders or other military documents establishing their family member's covered service, and whether employers have experienced difficulty in confirming covered service.

As with other FMLA certifications, the certification process for qualifying exigency leave is optional for the employer. Accordingly, the proposal revises the regulatory language at § 825.309(a) to make it clear that new active duty orders or documentation do not automatically need to be provided; rather new active duty orders or documentation need only be provided upon request by the employer. The proposed change is consistent with the general certification process, which provides that an employer may require certification upon an employee request for qualifying exigency leave.

Current § 825.309(b) addresses information that may be required to support a request for qualifying exigency leave. Consistent with the proposed expansion of Rest and Recuperation qualifying exigency leave to be equivalent to the period of time the military member has for such leave, up to 15 days, the Department believes that it is appropriate for the employee to provide a copy of the military member's Rest and Recuperation orders in order to determine the specific leave period available. The Department therefore proposes a new § 825.309(b)(6) to require that certification of qualifying exigency leave for Rest and Recuperation include a copy of the members Rest and Recuperation leave orders, or other documentation issued by the military, and the dates of the leave. No other change is proposed to § 825.309(b).

Current § 825.126(c) identifies an optional-use Form WH–384 which may be used in requesting qualifying exigency leave and states that another form containing the same basic information may be used by an employer as long as no information beyond that specified in this section is required. As discussed above, the Department proposes to delete the optional-use forms from the Appendices to part 825. Accordingly, the Department proposes to delete the reference in current § 825.309(c) to Appendix H and proposes to add language explaining that Form WH–384 may be obtained from local Wage and

Hour offices or the Wage and Hour Web site. No other changes are proposed for § 825.309(c).

Current § 825.309(d) indicates that where a complete and sufficient certification is submitted in support of a request for leave, an employer may not request additional information from an employee. Where the qualifying exigency involves a third party, employers may contact the individual or entity for purposes of verifying the meeting or appointment and the nature of the meeting. The employee's permission is not required to conduct such verification, but the employer may not request additional information. Employers may also contact the appropriate unit of the DOD to verify that the military member is on active duty or call to active duty status; no additional information may be requested and the employee's permission is not required for such verification. The Department solicits information on how this provision has been working for employers and employees. The Department would like to know whether any privacy issues have arisen for employees, or whether any employees have been denied qualifying exigency leave because their employers have been unable to verify their leave requests. The Department also seeks information on whether employers have encountered any difficulties in making third party verifications, and if so, why and whether they have denied an employee leave as a result.

5. Section 825.310 Certification for Leave Taken To Care for a Covered Servicemember (Military Caregiver Leave)

Section 825.310 sets forth the certification process and the elements of a complete certification for military caregiver leave. Current § 825.310(a) permits an employer to require that a request for leave to care for a covered servicemember with a serious injury or illness be supported by a certification issued by an authorized health care provider, defined as: (1) A DOD health care provider; (2) a VA health care provider; (3) a DOD TRICARE network authorized private health care provider; or (4) a DOD non-network TRICARE authorized private health care provider. Thus, current paragraph (a) limits the type of health care providers who may complete a medical certification for military caregiver leave for current members of the military.

Proposed paragraph § 825.310(a)(5) adds health care providers, as defined by regulation in § 825.125, as a fifth component to the definition of an authorized health care provider from whom medical certification can be obtained for a serious injury or illness. The Department understands that in some circumstances, for example when seeking treatment for a mental health condition, some current servicemembers may wish to seek care from a health care provider unaffiliated with DOD. The Department believes that a family member of a current servicemember who is seeking treatment outside of the military's network for an injury or illness that was incurred or aggravated in the line duty on active duty should be eligible for FMLA leave under this provision. As such, the Department no longer believes that it is appropriate to limit a current servicemember's selection of health care provider more than it is limited for an individual seeking FMLA leave for a serious health condition. The expansion of authorized health care providers will apply equally to covered servicemembers who are covered veterans. The Department understands that veterans may use private health care providers rather than DOD, VA, TRICARE network health care providers, and some veterans may no longer be entitled to seek care through DOD or VA affiliated health care providers. Veterans may also be covered by the private health care plans of a spouse or parent and may utilize the services of private health care providers through these plans. Whether it is because there is no VA center in the area or due to other circumstances, the Department believes that families of veterans should be able to rely upon the determination of the veteran's own private health care provider, who otherwise meets the definition of an FMLA health care provider at § 825.125, in determining if the treated condition is a qualifying serious injury or illness. The Department also believes that expanding the pool of health care providers will avoid increasing the administrative burdens on the VA and DOD. The Department invites comment on the proposal to allow any FMLA health care provider as defined in § 825.125 to certify a serious injury or illness for military caregiver leave.

While the Department believes that it is appropriate to include as authorized health care providers under this section health care providers as defined in § 825.125, the Department is nonetheless concerned that private health care providers will not have the specialized information available to DOD, VA, and TRICARE network health care providers that is necessary to make several of the military-related determinations, and may need to obtain that information from DOD or VA in order to make a determination of whether the condition is related to the covered servicemember's service and/or whether the condition meets the definition of serious injury or illness. The Department seeks comments related to the available processes for a private health care provider to obtain information related to whether an injury or illness was incurred in the line of duty while on active duty or whether the covered servicemember's injury or illness existed before beginning service and was aggravated by service in the line of duty while on active duty. The Department also seeks comments on whether a covered servicemember will have a copy of medical records from his or her military service, or would the covered servicemember, or family member, be able to access medical records or other documentation that would support the determination that an injury or illness was incurred in the line of duty while on active duty, and the types of documentation that may be available to the covered servicemember or family member. Specific to veterans, the Department seeks comment on whether a veteran or family member has access to documentation of a VASRD disability rating.

Current § 825.310(b) sets forth the information an employer may request from the health care provider in order to support the employee's request for leave. The Department proposes to modify paragraphs (b)(1)–(4), as discussed below. The Department proposes no other changes to § 825.310(b). Current § 825.310(b) permits an authorized health care provider who is unable to make certain military determinations to rely on determinations from an authorized DOD representative. In light of the extension of military caregiver leave to covered veterans, proposed § 825.310(b) indicates that an authorized health care provider may rely on military-related determinations from an authorized DOD representative or an authorized VA representative. Current § 825.310(b)(1) allows an employer to request certain information from the health care provider. Consistent with the Department's proposal to allow covered servicemembers to utilize any health care provider as defined in § 825.125, the Department proposes to add a new provision (b)(1)(v) clarifying that the medical certification may be provided by a health care provider as defined by § 825.125.

Current paragraph (b)(2) allows an employer to request information that specifies whether the covered servicemember's injury or illness was

incurred in the line of duty while on active duty. The Department proposes to add language to this paragraph to allow an employer to obtain information that specifies whether the covered servicemember's injury or illness existed before beginning service and was aggravated by service in the line of duty while on active duty. The proposed language incorporates the FY 2010 NDAA statutory amendment to the definition of serious injury or illness which provides that a serious injury or illness for both current members of the military and covered veterans includes an injury or illness 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. The Department seeks comment on what processes are or may be used to determine that an injury or illness existed prior to active duty service and was aggravated by service in the line of duty on active duty. Comment is also sought on the basis a non-DOD or non-VA health care provider would determine that an injury or illness is a condition that existed before the military member's service and was aggravated in the line of duty on active duty.

Current § 825.310(b)(3) allows an employer to request the approximate date on which the serious injury or illness commenced and its probable duration. In light of the statutory amendments to the definition of serious injury or illness, proposed § 825.310(b)(3) allows an employer to request the approximate date on which the serious injury or illness commenced or was aggravated and its probable duration.

Current § 825.310(b)(4) allows an employer to request a statement of appropriate medical facts regarding the covered servicemember's health condition for which leave is requested and specifies what medical facts must be included in a certification in order to support the need for leave. The Department proposes to move the description of what medical facts must be included in the certification for a serious injury or illness of a current member of the military from current § 825.310(b)(4) to proposed § 825.310(b)(4)(i). Proposed § 825.310(b)(4)(i) retains the same requirements as in current paragraph (b)(4) that a sufficient certification for a serious injury or illness of a current member of the military must include information on whether the injury or illness may render the current servicemember unfit to perform the duties of the servicemember's office, grade, rank, or rating and whether the servicemember is receiving medical treatment, recuperation, or therapy. The Department further proposes to describe in § 825.310(b)(4)(ii) what medical facts must be included in the certification for an injury or illness of a covered veteran. Proposed § 825.310(b)(4)(ii) states that a sufficient certification for a serious injury or illness of a covered veteran must include information on whether the veteran is receiving medical treatment, recuperation, or therapy for an injury or illness that is a continuation of a serious injury or illness that was incurred or aggravated when the veteran was a member of the Armed Forces; involves a physical or mental condition for which the veteran has received a VASRD rating of 50 percent or higher, and that such VASRD rating is based, in whole or in part, on the condition precipitating the need for caregiver leave; or, a physical or mental condition that substantially impairs the veteran's ability to secure or follow a substantially gainful occupation by reason of a service-connected disability or disabilities, or would do so absent treatment.

As noted earlier, the Department is considering adding enrollment into VA's Program of Comprehensive Assistance for Family Caregivers as another possible definition for establishing a qualifying serious injury or illness for a covered veteran. The Department seeks comments on whether the medical documentation required for enrollment in the VA's Program for Comprehensive Assistance for Family Caregivers provides sufficient medical facts to support the need for FMLA leave. The Department notes that under the current proposed definition of serious injury or illness of a veteran, medical documentation prepared in connection with the VA's Program of Comprehensive Assistance for Family Caregivers may be submitted as part of the FMLA certification process under proposed § 825.127(c)(2)(ii) and (c)(2)(iii). To the extent that additional information is necessary to establish a complete and sufficient FMLA certification (*i.e.,* information showing the relationship of the employee to the covered servicemember for whom the employee is requesting leave to care), the employee seeking leave would be responsible for providing the employer with the additional information.

Current § 825.310(c) outlines the information that employers may require from employees as part of the certification. No change is proposed to current § 825.310(c)(1)–(5). The Department proposes to add a new paragraph (c)(6) and renumber current paragraph (c)(6) as (c)(7). Proposed paragraph (c)(6) permits an employer to require that the employee or covered servicemember indicate whether the member is a veteran, the date of separation, and whether the separation was other than dishonorable. It also permits the employer to request documentation confirming this information, and permits the employee to provide a copy of the veteran's DD Form 214 or other proof of veteran status to satisfy such documentation requirement.

Current § 825.310(d) identifies an optional-use form that may be used to provide certification for military caregiver leave. As discussed above, the Department proposes to delete the forms from the Appendices and therefore proposes in paragraph (d) to delete the reference to Appendix H and instead to insert language stating that the applicable form may be obtained either from a local WHD office or the WHD Web site. The Department intends to amend current form WH–385 to reflect that a health care provider as defined in § 825.125 may certify a serious injury or illness for a current servicemember. The Department is also considering the development of a new form to capture the above identified information for military caregiver leave for a covered veteran. The Department seeks comments on whether it will be less confusing to develop two forms to use for military caregiver certification or whether adapting the current WH–385 would be preferable.

Current § 825.310(d) also provides that an employer may seek authentication and/or clarification of the certification for military caregiver leave; however, second and third opinions are not permitted. In the 2008 final rule, the Department reasoned that the statutory standard for determining whether a military member has a serious injury or illness is dependent on several determinations which can only be made by the military. Therefore, it would be inappropriate to permit second and third opinions regarding those determinations. 73 FR 68029. With the proposed change to allow families of covered servicemembers to rely upon the determination of health care providers unaffiliated with DOD, VA, or TRICARE, the certification process, when done by a private health care provider that is not one of the types identified in § 825.310(a)(1)–(4), is more akin to the certification process for the serious health condition of civilian family members. Therefore, the Department believes that in such situations there is no basis to prohibit employers from obtaining second and third opinions. Consequently, the

Department proposes in § 825.310(d) to state that second and third opinions are not permitted when the certification has been completed by one of the types of health care providers identified in § 825.310(a)(1)–(4), but second and third opinions are permitted when the certification has been completed by a health care provider that is not one of the types identified in § 825.310(a)(1)–(4). The Department seeks comment on the proposal to permit second and third opinions on military caregiver leave certifications that are completed by health care practitioners who are not affiliated with the military or VA.

No changes are proposed for § 825.310(e), which addresses the use of ''invitational travel orders'' (ITO) or ''invitational travel authorizations'' (ITA) issued for medical purposes, in lieu of a certification form, other than to update internal references. However, the Department seeks comment on the effectiveness of the substitution of ITOs and ITAs in support of a need for military caregiver leave.

Current § 825.310(f) states that it is the employee's responsibility to provide the employer with a complete and sufficient certification and describes the consequences of failing to do so. The Department proposes to add text that clarifies this requirement, providing that ''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.'' While current § 825.305(b) already provides that employees who are unable to provide requested FMLA certification (including certification for military caregiver leave) within 15 days despite their diligent, good faith efforts must be provided with additional time, the Department believes that it is important to reiterate this principle in § 825.310(f). As discussed in the preamble to the 2008 final rule, the Department acknowledges concerns regarding timely receipt of military documentation and hopes to clarify that employees may not be held responsible for administrative delays in the issuance of military documents where a good faith attempt is made by the employee to obtain such documents. 73 FR 68011.

B. Revisions To Implement the AFCTCA Amendments

1. Section 825.110 Eligible Employee

Current § 825.110 sets forth the eligibility standards an employee must meet in order to take FMLA leave. To be eligible, an employee must have been employed by the employer for at least 12 months, must have been employed for at least 1,250 hours of service in the 12-month period immediately preceding the commencement of the leave, and must be employed at a worksite where 50 or more employees are employed by the employer within 75 miles. Whether an employee has worked the required 1,250 hours of service is based on FLSA hours-worked principles contained in 29 CFR 785. The Department proposes revisions to § 825.110(a), (c), and (d) to reflect the AFCTCA's expanded definition of the ''hours of service'' requirement for airline flight crew employees. No changes are proposed to § 825.110(b) and (e).

Section 825.110(a) sets forth the general employee eligibility requirements. In § 825.110(a)(2) the Department proposes to add a reference to proposed paragraph § 825.110(c)(2), which sets forth the hours of service requirement for airline flight crew employees. No other changes are proposed in § 825.110(a).

Current § 825.110(b)(2)(i) concerns determining an employee's eligibility when there is a break in service occasioned by the fulfillment of the employee's National Guard or Reserve military service. The Department proposes to modify the language in the first sentence to reference the Uniformed Services Employment and Reemployment Rights Act (USERRA) and to clarify that the protections afforded by USERRA extend to all military members (active duty and reserve) returning from USERRA-qualifying military service. Current § 825.110(c)(2) provides rules pursuant to USERRA for crediting an employee returning from a National Guard or Reserve obligation with the hours of service that would have been performed but for the military service when evaluating whether the ''hours of service'' eligibility requirement has been met. The Department proposes to renumber current paragraph (c)(2) as paragraph (c)(3) and to spell out the title of USERRA, which is currently referred to in this section by the acronym only. In addition, the Department proposes to modify the language in the first sentence of this paragraph in recognition that USERRA rights may extend to certain employees returning to civilian employment from service in the Regular Armed Forces. The Department also proposes to modify this paragraph to refer more generally to the hours of service requirement.

The AFCTCA requires employers to calculate hours of service for eligibility in a different manner for airline flight crew employees. The Department proposes to separately define the hours of service eligibility requirement for these employees in proposed § 825.110(c)(2) and (c)(3). The Department notes that the hours of service requirement will continue to be determined based on ''hours worked'' as defined under the FLSA for all employees other than airline flight crew employees. Proposed paragraph § 825.110(c)(2) states the AFCTCA requirement that the hours of service criteria will be met if during the previous 12-month period the airline flight crew employee has worked or been paid for not less than 60 percent of the applicable monthly guarantee and has worked or been paid for not less than 504 hours (not including personal commute time or time spent on vacation leave or sick or medical leave).

Proposed paragraph § 825.110(c)(2)(i) states the statutory definition of applicable monthly guarantee for airline flight crew employees on reserve and non-reserve status. The Department proposes to refer to airline flight crew employees who are not on reserve status as ''line holders'', which the Department understands to reflect industry terminology. The applicable monthly guarantee is determined by the employer's policies or collective bargaining agreement and differs depending on whether the airline flight crew employee is a line holder or on reserve status and on the employee's job classification (*i.e.,* pilot, co-pilot, flight attendant, or flight engineer). For airline employees who are on reserve status, the applicable monthly guarantee means the number of hours for which an employer has agreed to pay the employee for any given month. For line holders, the applicable monthly guarantee is the minimum number of hours for which an employer has agreed to schedule such employee for any given month. It is the Department's understanding that the schedule for line holders is based on duty hours, and that duty hours include the *flight* or *block* hours as determined by the Federal Aviation Administration (FAA) as well as additional time before and after the flight as determined by employer policy or applicable collective bargaining agreement. The Department seeks comments on whether this is an accurate interpretation of what comprises the line holders' scheduled hours, or whether some other basis such as flight or block hours would be more appropriate for this calculation.

In § 825.110(c)(2)(ii) the Department proposes to base the number of hours that an airline flight crew employee has worked on the employee's duty hours during the previous 12-month period. While duty hours may not always reflect all hours that would be considered

hours worked under the FLSA, it is the Department's understanding that duty hours are closely tracked in a similar manner by all employers in the industry. Therefore, the Department believes that duty hours provide the most accurate and uniform basis for making eligibility determinations for hours of service for airline flight crew employees. Regarding the calculation of the number of hours that an airline flight crew employee has been paid, it is the Department's understanding that all airline flight crew employees are generally paid on an hourly basis, and that these hours are routinely tracked by each airline. The hours an airline flight crew employee has been paid is the number of hours for which an employee received wages during the previous 12-month period. As required by the AFCTCA, personal commute time, vacation, and medical or sick leave do not count towards the hours worked or paid calculation. The Department notes that airline flight crew employees are eligible if they have either the required number of ''hours worked'' or ''hours paid''. The Department invites comments on whether these calculation methods for hours worked and hours paid are the most appropriate bases for determining whether an airline flight crew employee has worked or been paid for 504 hours during the previous 12-month period.

The Department proposes to renumber current paragraph § 825.110(c)(3), which explains an employer's burden when it does not maintain accurate records of hours worked for an employee, as new § 825.110(c)(4), and to add language clarifying the application of this rule to airline flight crew employees.

Finally, the Department proposes to replace the phrase ''worked for the employer for at least 1,250 hours'' in the first sentence of current § 825.110(d) with the more general ''met the hours of service requirement'', to provide uniformity with the rest of the section in reflecting the AFCTCA requirements. The Department also proposes to replace the general reference to ''eligibility requirements'' in the second sentence of this paragraph with a specific reference to the ''12-month eligibility requirement'' to clarify the application of this principle.

The Department seeks comments on all aspects of the application of the AFCTCA eligibility provisions, particularly on the proposal to interpret the requirement of 504 hours worked to be 504 hours of duty time, as well as the Department's understanding that scheduled hours for line holders encompasses duty hours. The Department recognizes that the airline industry has unique timekeeping practices and it is the Department's intent to utilize existing industry records to make FMLA eligibility determinations.

2. Section 825.205 Increments of FMLA Leave for Intermittent or Reduced Schedule Leave

Section 825.205 of the current regulations explains how to count increments of leave in cases of intermittent or reduced schedule leave. The Department proposes several changes to this section. The changes implement the AFCTCA provisions and address how FMLA leave usage is counted for all employees.

Current § 825.205(a) defines the minimum increment of FMLA leave to be used when taken intermittently or on a reduced schedule as an increment no greater than the shortest period of time that the employer uses to account for other forms of leave, provided that it is not greater than one hour. The Department proposes to add language to paragraph (a)(1) stating that an employer may not require an employee to take more leave than is necessary to address the circumstances that precipitated the need for leave. This concept was included in § 825.203(d) of the 1995 final rule. The Department believes it is appropriate to reinsert it into the regulations to emphasize the statutory requirement that an employee's FMLA leave entitlement not be reduced beyond the amount of leave actually taken in accounting for leave taken on an intermittent or reduced schedule basis. 29 U.S.C. 2612(b)(1). The proposed regulatory text makes clear that this principle is subject to the increment of leave rule set forth in this paragraph as well as to the physical impossibility rule in paragraph (a)(2) and the special rules for intermittent leave for school employees in §§ 825.601 and 825.602. As explained in the 2008 final rule, the other situation in which an employee may use more FMLA leave than necessary to address the circumstances requiring leave is when the employee elects to substitute paid leave and must use a larger amount of leave in order to satisfy the employer's paid leave policy. In such instances, the entire period of leave taken is FMLA-protected and counts against the FMLA entitlement. 73 FR 67981. While an employer can require an employee to utilize a larger amount of FMLA leave than necessitated by the FMLA condition if the employee wishes to substitute paid leave, the employee always has the option to take unpaid FMLA leave in the smallest increment of leave used by the employer.

The Department also proposes to add to paragraph (a)(1) language from the preamble to the 2008 final rule that further clarifies two important aspects of the calculation of FMLA leave. First, the Department proposes to add an example to illustrate the principal that where an employer uses different increments to account for different types of leave (*e.g.,* sick leave in one-half hour increments and annual leave in increments of one hour), the employer must use the smallest of the increments to account for FMLA leave usage. 73 FR 67976. Additionally, the Department proposes to clarify in the regulatory text that FMLA leave may only be counted against an employee's FMLA entitlement for leave taken and not for time that is worked for the employer. *Id.* Accordingly, where an employer chooses to waive its increment of leave policy in order to return an employee to work—for example where an employee arrives a half hour late to work due to an FMLA-qualifying condition and the employer waives its normal one hour increment of leave and puts the employee to work immediately—only the amount of leave actually taken by the employee may be counted against the FMLA entitlement. The Department believes these clarifications in the regulatory text will aid employers and employees in understanding the application and counting of FMLA leave usage.

Current § 825.205(a)(1) also permits employers to utilize different increments of FMLA leave at different times of the day or shift under certain circumstances. Under this provision, for example, if an employer utilizes a larger increment of leave at the beginning or the end of a shift an employee needing FMLA leave during those periods may be required to take the leave in the size of the smallest increment of leave permitted at that particular time. The Department's enforcement experience indicates some confusion regarding this provision including some employers who have interpreted this language to permit the use of a larger increment of FMLA leave at certain points in a shift than the increment used for other forms of leave in the same time period. Consequently, the Department proposes to remove the language allowing for varying increments at different times of the day or shift in favor of the more general principle of using the employer's shortest increment of any type of leave at any time. The Department requests comment on the proposal to remove this language from the regulations.

Current § 825.205(a)(2) sets forth the physical impossibility provision which provides that where it is physically impossible for an employee to commence or end work mid-way through a shift, the entire period that the employee is forced to be absent is counted against the employee's FMLA leave entitlement. The Department has reviewed this position in connection with the AFCTCA because of the impact of the physical impossibility provision on the airline industry. As discussed in the preamble to the 2008 final rule, the physical impossibility provision is intended to apply only in very narrow circumstances. 73 FR 67977. The Department is concerned, however, that the provision may be being applied more broadly than intended. Accordingly, the Department proposes adding language at paragraph (a)(2) emphasizing that it is an employer's responsibility to restore an employee to his or her same or equivalent position at the end of any FMLA leave as soon as possible. The proposed language further emphasizes the Department's intent that the physical impossibility provision be applied in only the most limited circumstances and only where it is, in fact, physically impossible to allow the employee to leave his or her shift early or to restore the employee to his or her same position or to an equivalent position at the time the employee no longer needs FMLA leave. Thus, for example, if after three hours of FMLA leave use it was physically possible to restore a flight crew employee to another flight, the employer would be required to do so. If, however, no other flight is available to which the employee could be assigned, or no other equivalent work is available, restoration could be delayed and the employee's FMLA entitlement reduced for the entire period the employee is forced to be absent. The Department reiterates that employers have an obligation not to discriminate between employees taking FMLA leave and employees taking other forms of leave in restoring employees or offering alternative work. 73 FR 679678. Alternatively, the Department is considering deleting the physical impossibility provision in its entirety. The 2008 final rule explained that the Department intended the provision to protect employees from discipline when a short FMLA-protected absence resulted in a much longer absence because of the unique nature of the worksite. 73 FR 67977. However, the Department is concerned that this exception may be misused, delaying restoration in instances where restoration to an equivalent position is possible or where restoration to the same position may be possible but inconvenient to the employer. The Department seeks comments on whether the physical impossibility provision has indeed protected employees from inappropriate discipline, or if it has been misused to unduly extend employees' FMLA leave and diminish their FMLA entitlement, and whether it should be retained in the regulations.

Current § 825.205(b) addresses the rules concerning the calculation of leave usage when leave is taken on an intermittent or reduced leave schedule (calculation of leave for airline flight crew employees is separately addressed in § 825.205(d)). The Department proposes only clarifying changes to this paragraph. The Department proposes to include in the regulatory text language from the 2008 final rule preamble to reinforce the requirement that the employee's total available entitlement is 12 workweeks (or 26 workweeks in the case of military caregiver leave), that FMLA leave does not accrue at any particular hourly rate, and that the specific number of hours contained in the workweek is dependent upon the hours the employee would have worked but for the taking of the FMLA leave. 73 FR 67978. The Department also proposes minor edits making uniform the references to fractions contained in this paragraph.

Current § 825.205(c) addresses when overtime hours that are not worked may be counted as FMLA leave. The Department proposes to change the term ''serious health condition'' in the last sentence in paragraph (c) to ''FMLA qualifying reason.'' This editorial change is consistent with the language used in the first sentence of the paragraph and more accurately reflects that overtime hours missed by an employee may be due to any FMLA-qualifying reason and are not limited to a serious health condition.

Proposed § 825.205 (d)(1) provides the method for calculating leave usage for airline flight crew employees who are line holders and is based on principles established for the calculation of leave for all employees found in paragraph (b)(1) of this section. For line holders, the number of duty hours scheduled will be used in determining the employee's workweek for purposes of calculating FMLA leave usage. Duty hours scheduled means the hours that the individual employee is scheduled to work in the workweek in which FMLA leave is needed. It is the Department's understanding that the line or block awarded to the employee would readily yield the duty hours scheduled for any given week. Further, it is the Department's understanding that duty hours include the flight or block hours as determined by the FAA, as well as the additional time before and after the flight encompassing pre- and post-flight duties, as determined by employer policy or applicable collective bargaining agreement. The Department believes the employee's duty time best represents the time spent on the job and provides an accurate characterization of the time needing job protection in the event FMLA leave is needed by the employee.

Proposed paragraph (d)(2) of this section provides the method for calculating leave usage for airline flight crew employees on reserve status. The Department proposes to base the leave entitlement and calculation of the employee's workweek on an average of the greater of the applicable monthly guarantee or actual duty hours worked over the prior 12 months. Under this proposal, the employee's average workweek would be calculated by adding the greater of the applicable monthly guarantee (the number of hours for which an employer has agreed to pay the employee for any given month) or actual duty hours worked in each of the previous 12 months and dividing by 52 weeks per year. This average workweek would be the basis for FMLA leave usage for the 12-month FMLA leave year. For example, if a reserve flight attendant has worked or been paid an average of 20 hours per week over the prior 12 months, the employee would be entitled to 12 workweeks of 20-hours for FMLA leave (or 26 workweeks in the case of leave to care for a covered servicemember). If the flight attendant needs four hours of FMLA leave in one workweek, the employee would use one-fifth (⅕) of a workweek (4 hours ÷ 20 hours/workweek). The principles established for the calculation of leave for all employees found in paragraph (b)(1) of this section continues to apply to these airline flight crew employees. Due to the Department's understanding of the variation in scheduling and actual hours worked by reserve airline flight crew employees and variation during different times of the year, the Department proposes this averaging method for calculating FMLA leave usage. The Department acknowledges that, as with any averaging method, actual workweeks will vary in any given situation.

In developing a proposed method to calculate FMLA-leave usage for airline flight crew employees on reserve status, the Department considered a methodology based on FLSA principles of ''hours worked,'' as is used for

employees other than airline flight crew employees. However, airline flight crew employees are not paid strictly on a FLSA ''hours worked'' basis but rather based in part on the applicable monthly guarantee. Airline flight crew employees on reserve status may work all, few, or none of the hours for which they are paid in a given month. Thus, after considering applying the FLSA ''hours worked'' method of leave calculation to airline flight crew employees, the Department concluded that the unique way in which airline flight crew employees are scheduled and paid made this methodology impracticable. Through consultations with airline employers and employee representatives, the Department understands that airlines are already tracking and recording airline flight crew employees' hours in a number of ways pursuant to FAA regulations, including flight hours, duty hours, and mandatory rest periods. *See* 14 CFR pt. 91. The Department believes that imposing a FLSA ''hours worked'' methodology on the airline industry and thus mandating yet another recordkeeping system would be unduly burdensome and costly for employers, as well as unnecessarily confusing for employees.

Rather, the Department believes the method of averaging in proposed paragraph (d)(2) is better suited to the variable scheduling of reserve airline flight crew members. Additionally, the method proposed is consistent with current § 825.205(b)(3), which provides that, where an employee's schedule varies from week to week to such an extent the employer is unable to determine the hours the employee would have worked but for the taking of FMLA leave, the employer has the option to establish a leave entitlement by using the weekly average of the hours scheduled over the 12 months prior to the beginning of the leave period. The Department believes proposed paragraph (d)(2) is consistent with current FMLA calculation methods, best reflects Congressional intent, and will provide access to FMLA leave for the largest number of flight crew employees without requiring dramatic changes to existing industry systems.

The Department also understands that some line holders may also request additional work in reserve status. Where an employee is both a line holder and on reserve status, the Department proposes that the leave calculation should be made using the method set forth for reserve airline flight crew employees, as this method is flexible enough to encompass both the applicable monthly guarantee and duty hours. The Department requests comment on industry practice in this area and application of the FMLA regulations to such a scenario. The Department also seeks comment on the proposed calculation of leave methods for both line holders and airline flight crew employees on reserve status and welcomes suggestions for alternative methods that equitably reflect the employee's total normally scheduled hours and actual FMLA leave taken.

3. Section 825.500 Recordkeeping Requirements

Current § 825.500 details the recordkeeping requirements under the FMLA. The Department proposes to add a new sentence at the end of paragraph (g) setting forth the employer's obligation to comply with the confidentiality requirements of the Genetic Information Nondiscrimination Act of 2008 (GINA). To the extent that records and documents created for FMLA purposes contain ''family medical history'' or ''genetic information'' as defined in the GINA, employers must maintain such records in accordance with the confidentiality requirements of Title II of GINA. GINA permits genetic information, including family medical history, obtained by the employer in FMLA records and documents to be disclosed consistent with the requirements of the FMLA.

The Department proposes to define in a new paragraph (h) the statutory requirement that employers of airline flight crew employees maintain on file with the Secretary certain records. Consistent with other recordkeeping requirements, proposed paragraph (h) makes clear that records are to be maintained by the employer by making, keeping, and preserving records in accordance with the requirements already delineated in § 825.500, with no actual submission to the Secretary unless requested.

Additionally, proposed paragraph (h)(1) outlines additional records that are required to be kept specific to employers of airline flight crew employees. These additional records include any records or documents that specify the applicable monthly guarantee for each type of employee to whom the guarantee applies, including any relevant collective bargaining agreements or employer policy documents that establish the applicable monthly guarantee; as well as records of hours scheduled, in order to be able to apply the leave calculation principles contained in proposed § 825.205(d).

C. Proposed Revisions to Forms, Appendices, and Definitions

1. Section 825.300 Employee and Employer Rights and Obligations Under the Act

As previously discussed, the Department is proposing to delete the Appendices to part 825 and to provide copies of the optional use forms and the poster through local Wage and Hour Offices and the Wage and Hour Web site. References to the Appendices have been deleted from the following sections: § 825.300 (Employer notice requirements), § 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), § 825.309 (Certification for leave taken because of a qualifying exigency), § 825.310 (Certification for leave taken to care for a covered servicemember (military caregiver leave)), and § 825.800 (Definitions). The Department also proposes minor edits to § 825.300 to reflect provisions of the FY 2010 NDAA and AFCTCA.

2. Section 825.800 Definitions

The current § 825.800 contains the definitions of significant terms, phrases, and acronyms used in the regulations. The Department proposes to move this section of the regulations to § 825.102. This reorganization is intended to enhance the utility of the regulations by defining terms before they are used and in advance of the substantive provisions. Moving the definitions section to the beginning of the regulations is consistent with other regulations implementing statutes administered by the WHD.

The Department proposes to make changes to definitions and regulatory references in this section to maintain consistency with the Department's proposed changes to the regulatory text. Specifically, the terms modified are *covered servicemember, eligible employee, serious injury or illness,* and *son or daughter on covered active duty or an impending call or order to covered active duty.* Only the references were updated to *contingency operation, next of kin of a covered servicemember, outpatient status, parent of a covered servicemember,* and *son or daughter of a covered servicemember.* In addition, the Department proposes terms be added or removed to reflect the regulatory changes made to incorporate the FY 2010 NDAA and AFCTCA amendments to the regulations. The terms added are *airline flight crew employee, covered active duty or call to covered active duty status, applicable*

monthly guarantee, line holder, and *covered veteran.* The terms removed are *active duty or call to active duty status* and *covered military member.*

The Department also proposes to add terms previously not listed in this section but used in the current regulations and unchanged by this NPRM as an aid and service to the reader. These terms are *ITO or ITA, key employee, military caregiver leave, reserve components of the Armed Forces,* and *TRICARE.*

IV. Paperwork Reduction Act

In accordance with the requirements of the Paperwork Reduction Act of 1995 (PRA), 44 U.S.C. 3501 et seq., and its attendant regulations, 5 CFR part 1320, the Department seeks to minimize the paperwork burden for individuals, small businesses, educational and non-profit institutions, Federal contractors, State, local, and tribal governments, and other persons resulting from the collection of information by or for the agency. The PRA typically requires an agency to provide notice and seek public comments on any proposed collection of information contained in a proposed rule. *See* 44 U.S.C. 3506(c)(2)(B); 5 CFR 1320.8. Persons are not required to respond to the information collection requirements as contained in this proposal unless and until they are approved by the Office of Management and Budget (OMB) under the PRA at the final rule stage.

This paperwork burden analysis estimates the burdens for the proposed regulations as drafted. The proposed regulations, as they relate to the PRA, implement amendments to the military leave provisions made by the FY 2010 NDAA, which extends the availability of FMLA leave for qualifying exigencies to employee-family members of members of the Regular Armed Forces and defines the deployments covered by such leave, and extends FMLA military caregiver leave to employee-family members of certain veterans with a serious injury or illness and expands the provision of such leave to cover serious injuries or illnesses that existed prior to a covered servicemember's active duty and were aggravated in the line of duty while on active duty. The proposed regulations also implement the AFCTCA, which establishes new eligibility requirements for airline flight crew members and flight attendants.

As will be more fully explained later, many of the estimates in the analysis of the paperwork requirements derive from data developed for the Preliminary Regulatory Impact Analysis (PRIA) under Executive Orders 13563 and 12866. However, the specific needs that the PRA analysis and PRIA are intended to meet often require that the data undergo a different analysis to estimate burdens imposed by the paperwork requirements from the analysis used in estimating the effect the regulations will have on the economy. In addition for certain sections, a range of values is provided in the PRIA; the PRA uses the midpoint of those ranges. Consequently, the differing treatment that must be undertaken in the PRA analysis and the PRIA of the proposed regulatory changes may result in different results. For example, the PRA analysis measures the additional burden of the information collection on those who are providing information due to the proposed regulatory changes; however, the PRIA measures the incremental changes expected to result in the broader economy due to the proposed regulatory changes. Thus, this PRA analysis will calculate the additional paperwork burden in relation to the existing FMLA information collection burden arising from this rule. Conversely, the regulatory definition for collection of information for PRA purposes specifically excludes the public disclosure of information originally supplied by the Federal government to the recipient for the purpose of disclosure to the public. 5 CFR 1320.3(c)(2). The PRIA, however, may need to consider the impact of any regulatory changes in such notifications provided by the government. Finally, the PRA definition of ''burden'' can exclude the time, effort, and financial resources necessary to comply with a collection of information that would be incurred by persons in the normal course of their activities (*e.g.,* in compiling and maintaining business records) if the agency demonstrates that the reporting, recordkeeping, or disclosure activities needed to comply are usual and customary. 5 CFR 1320.3(b)(2). The PRIA, however, must consider the economic impact of any changes in the proposed regulation.

Circumstances Necessitating Collection: The FMLA requires private sector employers of 50 or more employees and public agencies to provide up to 12 weeks of unpaid, job-protected leave during any 12-month period to eligible employees for certain family and medical reasons (*i.e.,* for the birth of a son or daughter and to care for the newborn child; for placement with the employee of a son or daughter for adoption or foster case; to care for the employee's spouse, son, daughter, or parent with a serious health condition; to care for the employee's own serious health condition that makes the employee unable to perform the functions of his or her job; and to address qualifying exigencies related to the military call up of a spouse, son, daughter, or parent), and to provide up to 26 weeks of unpaid, job-protected leave during a single 12-month period to eligible employees to provide military caregiver leave to a covered servicemember. FMLA section 404 requires the Secretary of Labor to prescribe such regulations as necessary to enforce this Act. 29 U.S.C. 2654. The proposed regulations, which primarily pertain to the expansion of the military family leave entitlements and the expansion of FMLA protections to airline flight crews, will create additional burdens on the following information collections.

A. *Notice to Employee of FMLA Eligibility and Rights and Responsibilities* [29 CFR 825.300(b) and (c)]. When an employee requests FMLA leave or when the employer acquires knowledge that an employee's leave may be for an FMLA-qualifying condition, the employer must notify the employee within five business days of the employee's eligibility to take FMLA leave, or, alternatively, at least one reason why the employee is not eligible for FMLA leave (*e.g.,* applicable number of months the employee has been employed by the employer, the number of hours of service in the 12-month period, whether the employee is employed at a worksite where 50 employees are employed at or within 75 miles of that worksite.) At the same time that the employer provides eligibility notice, the employer must provide information detailing the specific responsibilities of the employee, including any additional requirements for qualifying for FMLA leave, and explain any consequences of a failure to meet these responsibilities. If the specific information provided by the notice changes, the employer must inform the employee of the change within five business days of receipt of the employee's first notice of the need for FMLA leave subsequent to such change.

B. *Designation Notice* [29 CFR 825.300(d)]. The employer is responsible in all circumstances for designating leave as FMLA-qualifying, and for giving notice of the designation to the employee. When the employer has enough information to determine whether the leave is being taken for an FMLA-qualifying reason, the employer must notify the employee whether the leave will be designated and will be counted as FMLA leave. 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.

C. *Medical Certification and Recertification* [29 CFR 825.100(d) and 825.305 through 825.308]. An employer may require that an employee's leave to care for the employee's seriously ill spouse, son, daughter, or parent, or due to the employee's own serious health condition that makes the employee unable to perform one or more essential functions of the employee's position, be supported by a certification issued by the health care provider of the eligible employee or of the ill family member. The employer must provide notice of this requirement in writing. The employer may contact the employee's health care provider for purpose of authentication and clarification of the medical certification (whether initial certification or recertification) after the employer has given the employee an opportunity to cure any deficiencies. In addition, an employer must advise an employee whenever it finds a certification incomplete or insufficient and state in writing what additional information is necessary to make the certification complete and sufficient. An employer, at his or her own expense and subject to certain limitations, also may require an employee to obtain a second and third medical opinion. In addition, an employer may also request recertification under certain conditions. The employer must provide the employee at least 15 calendar days to provide the initial certification and any subsequent recertification. The employer must provide seven calendar days (unless not practicable under the particular circumstances despite the employee's good faith efforts) to cure any deficiency identified by the employer.

D. *Fitness-for-duty Medical Certification* [29 CFR 825.100(d) and 825.312]. 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 employer 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 in providing a complete and sufficient certification to the employer in the fitness-for-duty certification process as in the initial certification process. An employer is permitted to require an employee to furnish a fitness-for-duty certificate every 30 days if an employee has used intermittent leave during that period and reasonable safety concerns exist concerning the employee's ability to perform his job.

E. *Qualifying Exigency Leave* [29 CFR 825.309]. Under the FY 2010 NDAA, qualifying exigency leave was expanded to include the members of the Regular Armed Forces along with members of the National Guard and Reserves, and to require that the deployment of both types of military members be to a foreign country. Section 825.309 establishes that an employer may require an employee to provide certification of the servicemember's covered active duty or call to covered active duty status. Pursuant to current § 825.309(a), the employee may provide a copy of the servicemember's active duty orders or other documentation issued by the military which indicates that the servicemember is on active duty or has been notified of an impending call or order to active duty and the dates of the servicemember's active duty service. Current section 825.309(b) establishes that when leave is taken for one of the qualified exigencies specified in § 825.126, an employer may require the eligible employee to provide certification that sets forth certain information. Current section 825.309(c) describes the optional use form developed by the Department for employees' use in obtaining certification that meets the FMLA's certification requirements. Current section 825.309(d) establishes the verification process for the certifications.

F. *Leave to Care for a Covered Servicemember* [29 CFR 825.310]. The FY 2010 NDAA expanded the definition of covered servicemember to include veterans, and permitted eligible employees to take leave to care for certain veterans with a qualifying serious injury or illness. It also permits leave to be taken for a covered servicemember whose previously existing condition was aggravated by service in the line of duty on active duty, and in the case of veterans, when the serious illness or injury manifested before or after the servicemember became a veteran. When an eligible employee requests FMLA leave to care for a covered servicemember with a serious injury or illness, the employer may require the employee to provide sufficient certification of the serious injury or illness issued by an authorized health care provider. Current section 825.310(a) permits an employer to require that certain necessary information support the request for leave and defines the health care providers who are authorized to provide such certification. Current section 825.310(b) and (c) set forth the information an employer may require from the authorized health care provider and the employee, respectively, in order to support the request for leave. Current section 825.310(d) describes the optional form developed by WHD for employees' use in obtaining certification that meets the FMLA's certification requirements. Current section 825.310(e) describes alternatives to the optional form that employers must accept from employees obtaining certifications in certain circumstances.

G. *Notice to Employees of Change of 12-Month Period for Determining FMLA Entitlement* [29 CFR 825.200(d)(1)]. An employer generally must choose a single uniform method from four options available under the regulations for determining the 12-month period in which the 12-week entitlement occurs for the purposes of FMLA leave. An employer wishing to change to another alternative is required to give at least 60 days notice to all employees.

H. *Key Employee Notification* [29 CFR 825.216(b), 825.217 through 825.219 and 825.300(c)(1)(v)]. An employer that believes that it may deny reinstatement 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 employer must also fully inform the employee of the potential consequences with respect to reinstatement and maintenance of health benefits if the employer should determine that substantial and grievous economic injury to the employer's operations would result if the employer were to reinstate the employee from FMLA leave. If the employer cannot immediately give such notice, because of the need to determine whether the employee is a key employee, the employer must give the notice as soon as practicable after receiving the employee's notice of a need for leave (or the commencement of leave, if earlier). If an employer fails to provide such timely notice, it loses its right to deny restoration, even if substantial and grievous economic injury will result from reinstatement.

As soon as an employer 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 employer must notify the employee in writing of its determination; that the employer cannot deny FMLA leave; and that the employer intends to deny restoration to employment on completion of the FMLA leave. The employer must serve this notice either in person or by certified mail. This notice must explain the basis for the employer'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.

An employee may still request reinstatement at the end of the leave period, even if the employee did not return to work in response to the employer's notice. The employer must then determine whether there will be substantial and grievous economic injury from reinstatement, based on the facts at the time. If the employer determines that substantial and grievous economic injury will result from reinstating the employee, the employer must notify the employee in writing (in person or by certified mail) of the denial of restoration.

I. *Periodic Employee Status Reports* [825.300(c)(2) and 825.311]. An employer may require an employee to provide periodic reports regarding the employee's status and intent to return to work.

J. *Notice to Employee of Pending Cancellation of Health Benefits* [29 CFR 825.212(a)]. Unless an employer establishes a policy providing a longer grace period, an employer's obligation to maintain health insurance coverage ceases 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 employer 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 and advise the employee 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.

K. *Documenting Family Relationship* [29 CFR 825.122(j)]. Current section 825.122(j) permits an employer to require an 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 child's birth certificate, a court document, or a simple statement of the employee regarding family relationship. The employee is entitled to the return of any official document submitted for this purpose.

L. *Recordkeeping* [29 CFR 825.500]. The FMLA provides that covered employers shall make, keep, and preserve records pertaining to the FMLA in accordance with the recordkeeping requirements of Fair Labor Standards Act section 11(c), 29 U.S.C. 211(c), and regulations issued by the Secretary of Labor. 29 U.S.C. 2616. The FMLA provides that no employer or plan, fund, or program shall be required to submit books or records more than once during any 12-month period unless the Department has reasonable cause to believe a violation of the FMLA exists or is investigating a complaint. 29 U.S.C. 2616(c).

Current section 825.500(c) requires employers to maintain basic payroll and identifying employee data, including name, address, and occupation; rate or basis of pay and terms of compensation; daily and weekly hours worked per pay period; additions to or deductions from wages; and total compensation paid; dates FMLA leave is taken by FMLA eligible employees (available from time records, requests for leave, etc., if so designated). Leave must be designated in records as FMLA leave; leave so designated may not include leave required under State law or an employer plan which is not also covered by FMLA; if FMLA leave is taken by eligible employees in increments or less than one full day, the hours of leave; copies of employee notices of leave furnished to the employer under FMLA, if in writing, and copies of all written notices given to employees as required under FMLA and these regulations; any documents (including written and electronic records) describing employee benefits or employer policies and practices regarding the taking of paid and unpaid leave; premium payments of employee benefits; records of any dispute between the employer and an eligible employee regarding designation of leave as FMLA leave, including any written statement from the employer or employee of the reasons for the designation and for the disagreement. Under the AFCTCA amendment, employers in the airline industry must also maintain records that specify the applicable monthly guarantee for each type of employee to whom the guarantee applies and must make these records available to the Secretary of Labor upon request.

Current section 825.500(d) requires covered employers with no eligible employees to maintain certain basic payroll and identifying employee data. Current section 825.500(e) requires covered employers that jointly employ workers with other employers to keep all the records required by the regulations with respect to any primary employees, and to keep certain basic payroll and identifying employee data with respect to any secondary employees.

Current section 825.500(f) provides that if FMLA-eligible employees are not subject to FLSA recordkeeping regulations for purposes of minimum wage or overtime compliance (*i.e.,* not covered by, or exempt from, FLSA), an employer need not keep a record of actual hours worked (as otherwise required under FLSA, 29 CFR 516.2(a)(7)), provided that: Eligibility for FMLA leave is presumed for any employee who has been employed for at least 12 months; and with respect to employees who take FMLA leave intermittently or on a reduced leave schedule, the employer and employee agree on the employee's normal schedule or average hours worked each week and reduce their agreement to a written record.

Current section 825.500(g) requires employers to maintain records and documents relating to any medical certification, recertification, or medical history of an employee or employee's family member, created for FMLA purposes as confidential medical records in separate files/records from the usual personnel files. Employers must also maintain such records in conformance with any applicable Americans with Disability Act (ADA) confidentiality requirements; except that: Supervisors and managers may be informed regarding necessary restrictions on the work or duties of an employee and necessary accommodations; first aid and safety personnel may be informed, when appropriate, if the employee's physical or medical condition might require emergency treatment; and government officials investigating compliance with the FMLA, or other pertinent law, shall be provided relevant information upon request. To the extent that records and documents created for FMLA purposes contain ''family medical history'' or ''genetic information'' as defined in the Genetic Information Nondiscrimination Act of 2008 (GINA), employers must maintain such records in accordance with the confidentiality requirements of Title II of GINA. GINA permits genetic information, including family medical history, obtained by the employer in FMLA records and documents to be disclosed consistent with the requirements of the FMLA.

The FLSA record keeping requirements, contained in 29 CFR part 516, are currently approved under Office of Management and Budget (OMB) control number 1235–0018; consequently this information does not duplicate their burden, despite the fact that for the administrative ease of the regulated community this information collection restates them.

Purpose and Use: The Department created optional use forms: WHD Publication 1420, WH–380–E, WH–380–F, WH–381, WH–382, WH–384, and WH–385, and is considering the creation of a new optional use form for the certification of leave to care for a covered veteran, to assist employers and employees in meeting their FMLA third party notification obligations. WHD Publication 1420 allows employers to satisfy the general notice requirement. *See* § 825.300(a). Form WH–380–E allows an employee requesting FMLA-leave for his or her own serious health condition to satisfy the statutory requirement to furnish, upon the employer's request, appropriate certification to support the need for leave for the employee's own serious health condition. *See* § 825.305(a). Form WH–380–F allows an employee requesting FMLA-leave for a family member's serious health condition to satisfy the statutory requirement to furnish, upon the employer's request, appropriate certification to support the need for leave for the family member's serious health condition. *See* § 825.305(a). Form WH–381 allows an employer to satisfy the regulatory requirement to provide employees taking FMLA leave with written notice concerning eligibility status and detailing specific expectations and obligations of the employee and explaining any consequences of a failure to meet these obligations. *See* § 825.300(b) and (c). Form WH–382 allows employers to satisfy the regulatory requirement of designating leave as FMLA-qualifying. *See* § 825.301(a). Form WH–384 allows an employee requesting FMLA leave based on a qualifying exigency to satisfy the statutory requirement to furnish, upon the employer's request, appropriate certification to support leave for a qualifying exigency. *See* § 825.309. Form WH–385 currently allows an employee requesting FMLA leave based on an active duty covered servicemember's serious injury or illness to satisfy the statutory requirement to furnish, upon the employer's request, a medical certification from an authorized health care provider. *See* § 825.310. The Department is considering the development of a separate optional form for the certification for a serious injury or illness of a covered veteran, or alternatively amending form WH–385 to cover certification of the serious injury or illness of both an active duty servicemember and a covered veteran.

While use of the Department's forms is optional, the regulations require employers and employees to make the third-party disclosures that the forms cover. The FMLA third-party disclosures ensure that both employers and employees are aware of and can exercise their respective rights and meet their respective obligations under the FMLA. The recordkeeping requirements are necessary in order for the Department to carry out its statutory obligation under FMLA § 106, 29 U.S.C. 2616, to investigate and ensure employer compliance. The WHD uses these records to determine employer compliance.

Information Technology: The proposed regulations continue to prescribe no particular order or form of records. *See* § 825.500(b). The preservation of records in such forms as microfilm or automated word or data processing memory is acceptable, provided the employer maintains the information and provides adequate facilities to the Department for inspection, copying, and transcription of the records. In addition, photocopies of records are also acceptable under the regulations. *Id.*

Aside from the basic requirement that third-party notifications be in writing, with the possible exception for the employee's FMLA request (which depends on the requirements of the employer's leave policies), there are no restrictions on the method of transmission. Employers and employees may meet many of their notification obligations by using DOL-prepared forms and publications available on the WHD Web site, *www.dol.gov/whd.* These forms are in a PDF, fillable format for downloading and printing. Employers may keep records that comply with the recordkeeping requirements covered by this information collection in any form, including electronic.

Minimizing Duplication: The FMLA information collections do not duplicate other existing information collections. In order to provide all relevant FMLA information in one set of requirements, the recordkeeping requirements restate a portion of the records employers must maintain under the FLSA. Employers do not need to duplicate the records when basic records maintained to meet FLSA requirements also document FMLA compliance. With the exception of records specifically tracking FMLA leave, the additional records required by the FMLA regulations, including records that must be maintained by covered employers in the airline industry as outlined in proposed § 825.500(h), are records that employers ordinarily maintain in the usual and ordinary course of business. The regulations do impose, however, a three-year minimum time limit that employers must maintain the records. The Department minimizes the FMLA information collection by accepting records maintained by employers as a matter of usual or customary business practices to the extent those records meet FMLA requirements. The Department also accepts records kept due to other governmental requirements (*e.g.,* records maintained for tax and payroll purposes). The Department has reviewed the needs of both employers and employees to determine the frequency of the third-party notifications covered by this collection to establish frequencies that provide timely information with the least burden. The Department has further minimized any burden by developing prototype notices for the third-party disclosures covered by this information collection.

Agency Need: The Department is assigned a statutory responsibility to ensure employer compliance with the FMLA. The Department uses records covered by the FMLA information collection to determine compliance, as required of the agency by FMLA § 107(b)(1). 29 U.S.C. 2617(b)(1). Without the third-party notifications required by the law and/or regulations, employers and employees would have difficulty knowing their FMLA rights and obligations.

Special Circumstances: Because of the unforeseeable and often urgent nature of the need for FMLA leave, notice and response times must be of short duration to ensure that employers and employees are sufficiently informed and can exercise their FMLA rights and obligations. The discussion above outlines the circumstances necessitating the information collection and provides the details of when employees and employers must provide certain notices.

Public Comments: The Department seeks public comments regarding the burdens imposed by the information collection contained in this proposed rule. In particular, the Department seeks comments that evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have

practical utility; evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; enhance the quality, utility, and clarity of the information to be collected; and minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submissions of responses. Commenters may send their views about these information collections to the Department in the same way as all other comments (*e.g.,* through the regulations.gov Web site). All comments received will be made a matter of public record, and posted without change to *http://www.regulations.gov,* including any personal information provided.

An agency may not conduct an information collection unless it has a currently valid OMB approval, and the Department has submitted the identified information collection contained in the proposed rule to OMB for review under the PRA under Control Number 1235–0003. *See* 44 U.S.C. 3507(d); 5 CFR 1320.11. While much of the information provided to the OMB in support of the information collection request appears in this preamble, interested parties may obtain a copy of the full supporting statement by sending a written request to the mail address shown in the **ADDRESSES** section at the beginning of this preamble or by visiting the *http://www.reginfo.gov/public/do/PRAMain* Web site.

In addition to having an opportunity to file comments with the Department, comments about the FMLA information collection requirements may be addressed to the OMB. OMB encourages commenters to submit comments by emailing them to *OIRA_submissions@omb.eop.gov* or faxing them to (202) 395–7285. While commenters are encouraged to email or fax their comments to OMB to ensure timely receipt of comments, commenters may mail OMB their comments by using the following mailing address: Office of Information and Regulatory Affairs, Attention: OMB Desk Officer for the Wage and Hour Division, Office of Management and Budget, 725 17th Street NW., Room 10235, Washington, DC 20503.

Confidentiality: Much of the information covered by this information collection consists of third-party disclosures. Employers generally must maintain records and documents relating to any medical certification, recertification, or medical history of an employee or employee's family members as confidential medical records in separate files/records from usual personnel files. Employers must also generally maintain such records in conformance with any applicable ADA and/or GINA confidentiality requirements. As a practical matter, the Department would only disclose agency investigation records of materials subject to this collection in accordance with the provisions of the Freedom of Information Act, 5 U.S.C. 552, and the attendant regulations, 29 CFR part 70, and the Privacy Act, 5 U.S.C. 552a, and its attendant regulations, 29 CFR part 71.

Hours Burden Estimates: The Department bases the following burden estimates on the estimates the PRIA presented elsewhere in this document, except as otherwise noted. The Department estimates that there are 381,000 covered employers with 1.2 million establishments. There are 72.9 million employees working for covered employers who are eligible for leave. In 2005, 7 million employees took leave. 73 FR 7938.

A. *Employee Notice of Need for FMLA Leave.* While employees normally will provide general information regarding their absences, the regulations may impose requirements for workers to provide their employers with more detailed information than might otherwise be the case. The Department estimates that providing this additional information will take approximately two minutes per employee notice of the need to take FMLA leave.

The Department estimates that there are 193,000 employees who are newly eligible to take leave for a qualifying exigency under the FY 2010 NDAA. Based on leave usage patterns, 30,900 of these employees will take leave for a qualifying exigency (16 percent of 193,000 employees). Based on the leave patterns estimated by the Department discussed in the PRIA, the Department estimates that there will be 679,800 employee requests for qualifying exigency leave.

The Department also estimates that there are 59,700 employees who are newly eligible to take leave to care for a covered veteran under the FY 2010 NDAA. Based on leave usage patterns, 15,500 of these employees will take leave to care for a covered veteran (26 percent of 117,790 employees). Based on the leave patterns estimated by the Department in the PRIA analysis, the Department estimates that there will be 790,500 employee requests for leave to care for a covered veteran.

The Department also estimates that there are 129,760 flight crew members eligible to take FMLA leave. However, some of these employees may already be entitled to leave similar to FMLA leave under collective bargaining agreements. Consequently, the Department anticipates that there are 90,560 airline flight crew employees who may be newly entitled to FMLA leave pursuant to AFCTCA. The Department estimates that 5,951 of these employees will take FMLA leave (5 percent of eligible pilots and 7.9 percent of eligible flight attendants). The PRIA analysis provides an explanation for how these numbers were determined. The Department also anticipates that each of these employees will provide his or her employer with 1.5 notices of need for FMLA leave, totaling 8,930 employee requests for FMLA leave.

New burden: 1,479,230 responses (employee notices of leave) × 2 minutes/60 minutes per hour = 49,308 hours.

Existing employee notification requirements unaffected by this NPRM already impose an estimated burden of 13,419,050 responses and 447,302 hours.

Total burden for this requirement is estimated to be 14,898,280 responses and 496,610 hours.

B. *Notice to Employee of FMLA Eligibility and Rights and Responsibilities.* The Department estimates that each written notice to an employee of FMLA eligibility and notice of rights and responsibilities takes approximately ten minutes. The number of eligibility and rights and responsibilities notices that employers must provide is equal to the number of leave takers.[3] The Department estimates

[3] Based on the leave patterns for qualifying exigency and military caregiver leave, the Department is assuming that all subsequent leave requests will be for the same servicemember for whom the leave was originally requested. The employee is required to notify the employer in each instance of the need for leave. But the employer is not required to provide the employee with a notice of eligibility or rights and responsibilities notice each time the employee requests the leave unless the employee's eligibility status changes. For qualifying exigency leave, 30,900 leave takers will provide 679,800 employer notices of their need for leave. For military caregiver leave, 15,500 leave takers will provide 790,500 employer notices of their need for leave. However, employers will only have to issue 46,400 eligibility notices and rights and responsibilities notices.

However, for the eligible employees who are airline flight crew members, the Department is assuming that each of the employees' 1.5 employer notices of the need for leave are for different FMLA-qualifying reasons, and therefore employers will need to provide a notice of eligibility and a notice of rights and responsibilities for each request for leave. 5,951 leave takers will issue 8,930 employer notices for leave (5,951 × 1.5 leaves = 8,930 notices). Employers will issue 8,930 notices of eligibility and notices or rights and responsibilities.

that employers will provide 55,330 FMLA eligibility and rights and responsibilities notices to employees under the new military and airline amendments to the FMLA. Employers may use optional Form WH–381 to satisfy this requirement.

New burden: 55,330 total responses (notices of eligibility and rights and responsibilities) × 10 minutes/60 minutes per hour = 9,222 hours.

Existing employee eligibility and rights and responses notification requirements unaffected by this NPRM already impose an estimated burden of 21,764,900 responses and 9,491,476 hours.

Total burden for this requirement is estimated to be 21,820,230 responses and 9,500,698 hours.

C. Employee Certifications

1. Medical Certification and Recertification. The Department estimates that 90 percent of airline flight crew employees who take FMLA leave will do so for a serious health condition of their own or that of a family member. The Department also assumes, due to the safety concerns of the airline industry, that employers will require that all of these employees provide medical certification to their employer. As it did in the 2008 paperwork analysis, and with no present reason to change its estimate, the Department further estimates that second or third opinions and/or recertifications add 15 percent to the total number of certifications, and that employees spend 20 minutes in obtaining the certifications.[4] Employers may have employees use optional Forms WH–380–E and WH–380–F to satisfy this statutory requirement.

5,951 airline flight crew employees taking leave × 90% rate for a serious health condition × 90% of employees asked to provide initial medical documentation = 4,820 employees providing initial medical certification.

New burden: 4,820 × 1.15 subsequent medical certifications = 5,543 total employee medical certifications.

5,543 × 20 minutes/60 minutes per hour = 1,848 hours.

The Department does not associate a paperwork burden with the portion of this information collection that employers complete since—even absent the FMLA—similar information would customarily appear in their internal instructions requesting a medical certification or recertification. The Department accounts for health care provider burdens to complete these certifications as a ''maintenance and operation'' cost burden, which is discussed later.

2. *Fitness-for-Duty Medical Certification.* The Department assumes that the Federal Aviation Authority (FAA) requires airline flight crew employees, specifically pilots and flight attendants, to receive regular medical evaluations as a condition of their continued employment. Therefore the Department estimates that 50 percent of airline pilots and 10 percent of flight attendants will be required to submit fitness-for-duty medical certifications pursuant to the FMLA regulations. The Department estimates that completing a fitness-for-duty certification will take an employee ten minutes.

New burden: 25,135 responses (employee certifications) × 10 minutes/60 minutes per hour = 4,189 hours.

3. *Certification of Qualifying Exigency for Military Family Leave.* The Department estimates that 30,900 employee-family members will be eligible to take FMLA leave to address qualifying exigencies due to the expansion of qualifying exigency leave under the FY 2010 NDAA to certain family members of members of the Regular Armed Forces. The Department estimates that employers will request certification from 30,900 employees for qualifying exigency leave. Employers may use optional Form WH–384 to satisfy this requirement. The Department further estimates that it will take approximately 20 minutes for a Human Resources staff member to request, review, and verify the employee's certification papers.

New burden: 30,900 total responses (employee qualifying exigency leave certifications) × 20 minutes/60 minutes per hour = 10,300 hours.

4. *Certification for Leave Taken to Care for a Covered Servicemember—Current Servicemember.* Pursuant to the FY 2010 NDAA, an eligible employee-family member may take FMLA leave to care for a current servicemember who has a serious injury or illness that existed before the member's active duty and was aggravated by service in the line of duty while on active duty. At this time the Department does not have sufficient information to develop an estimate of employees who will qualify for military caregiver leave for a covered servicemember with a serious injury or illness that existed prior to the servicemember's active duty and was aggravated in the line of duty on active duty. Accordingly, the Department will not revise the current burden analysis for certification of leave to care for a current servicemember at this time. The Department will review the comments that it receives in response to the NPRM and based on the received comments may revise the burden analysis at the final rule stage.

5. *Certification for Leave Taken to Care for a Covered Servicemember—Covered Veteran.* The FY 2010 NDAA provided FMLA leave for eligible employees to care for a covered veteran with a serious injury or illness that was incurred in the line of duty on active duty (or existed before the member's active duty and was aggravated in the line of duty on active duty) and manifested itself before or after the member became a veteran. The Department estimates that 15,500 employees will be eligible to take leave to care for a covered veteran. The Department expects that employers will request certification forms for this leave. The Department estimates that it will take a Human Resources specialist 30 minutes to request, review, and verify the employee's certification papers.

New burden: 15,500 responses (certification papers) × 30 minutes/60 minutes per hour = 7,750 hours.

All new certification and recertification requirements as a result of this NPRM impose a burden of 77,078 responses and 24,087 hours.

All existing certification and recertification requirements unaffected by this NPRM already impose an estimated burden of 12,080,153 responses and 4,009,851 hours.

Total burden for this requirement is estimated to be 12,157,231 responses and 4,033,938 hours.

D. *Notice to Employees of FMLA Designation.* The Department estimates that each written FMLA designation notice takes approximately 10 minutes to complete.

New burden: 55,330 total responses (designation notices) × 10 minutes/60 minutes per hour = 9,222 hours.

Existing designation notification requirements unaffected by this NPRM already impose an estimated burden of 17,383,325 responses and 4,693,574 hours.

Total burden for this requirement is estimated to be 147,438,655 responses and 4,702,796 hours.

E. *Notice to Employees of Change of 12-month period of determining FMLA eligibility.* The Department assumes that 10 percent of covered airline employers will choose to change their 12-month period for determining eligibility since the AFCTCA. The Department also assumes these employers will employ 10 percent of newly added eligible

[4] The estimated time of 20 minutes reflects the Department's expectation that it will take 20 minutes to complete optional form WH–380. The Department assumes that while visiting the health care provider for a previously scheduled appointment, the individual will have the certification completed by the doctor's office.

employees in the airline industry. The Department continues to estimate from the 2008 analysis that it will take an employer 10 minutes to make this employee notification, and this time was amortized to 1.79336117 seconds per individual response.

90,560 newly added employees in the airline industry × 10% for employers who change the period = 9,056 responses.

9,056 responses × 1.79336117 = 5 hours.

Existing similar notification requirements unaffected by this NPRM already impose a burden of 9,580,000 responses and 4,772 hours.

Total burden for this requirement is estimated to be 9,589,056 responses and 4,777 hours.

F. *Key Employee Notification.* The Department assumes that a very small percentage of airline flight crew employees will be determined key employees. As such, the Department does associate a burden hour estimate with this provision.

Existing notification requirements unaffected by this NPRM already impose a burden of 42,787 responses and 3,566 hours.

Total burden for this requirement is estimated to be 42,787 responses and 3,566 hours.

G. *Periodic employee status reports.* The Department estimated in the 2008 paperwork analysis that employers require periodic status reports from 25 percent of FMLA-leave users, and since it has not received any evidence to believe otherwise, it continues to estimate 25 percent today. The Department also estimates that a typical employee would normally respond to an employer's request for a status report; however to account for any burden the regulations may impose, the Department estimates that 10 percent of employees will respond to the request only because of the regulatory requirement, imposing a burden of two minutes per response. The Department also estimates that each such employee provides two periodic status reports.

New burden: 52,351 leave takers × 25% rate of employer requests × 10% of employees who comply due to the regulations = 1,309 employee responses.

1,309 employee responses × 2 responses = 2,618 total responses.

2,618 responses × 2 minutes/60 minutes = 87 hours.

Existing status report notification requirements unaffected by this NPRM already impose an estimated burden of 369,704 responses and 12,323 hours.

Total burden for this requirement is estimated to be 372,322 responses and 12,410 hours.

H. *Documenting Family Relationships.* As it did in the 2008 analysis, the Department estimates that 50 percent of traditional FMLA leave takers do so for ''family'' related reasons, such as caring for a newborn or recently adopted child or a qualifying family member with a serious health condition. 73 FR 7939. As such, the Department assumes that 50 percent of airline flight crewmembers who take leave will take it for family reasons. (2,976 of 5,951 leave takers). Under the military amendments all employees who take leave will be doing so for a family-related reason. (46,400 leave takers).

As it did in the 2008 analysis, the Department estimates that employers may require additional documentation to support a family relationship in five percent of these cases, and the additional documentation will require 5 minutes.

New burden: 49,376 (employees taking leave for family-related reasons) × 5% (additional documentation) = 2,469 employees required to document family relationships.

2,469 employees × 5 minutes/60 minutes per hour = 206 hours.

Existing family documentation requirements unaffected by this NPRM already impose an estimated burden of 183,987 responses and 15,332 hours.

Total burden for this requirement is estimated to be 186,456 responses and 15,538 hours.

M. *Notice to employee of pending cancellation of health benefits.* Pursuant to the AFCTCA, airline flight crew employees are newly eligible to take FMLA-qualifying leave. However, the Department believes employer policies and agreements that airline flight crew employees may be a party to preclude employers from canceling employees' health benefits. Therefore, at this time the Department will not revise the current burden analysis for employee notice of pending cancellation of health benefits. The Department will review the comments that it receives in response to the NPRM, and based on the received comments may revise the burden analysis at the final rule stage.

Existing notification requirements unaffected by this NPRM already impose a burden of 142,619 responses and 11,885 hours.

N. *General Recordkeeping.* The Department believes that the FMLA does not impose any additional burden on employers in the airline industry, as the records required to be maintained by the FMLA should already be maintained by the employers as part of their usual and customary business practices. Therefore, the Department is not proposing a new burden hour estimate for this provision.

The existing estimated burden for these elements is 13,419,050 responses and 279,564 hours.

Total burden for this requirement is estimated to be 13,419,050 responses and 279,564 hours.

Other respondent cost burdens (maintenance and operation): Airline flight crew employees seeking FMLA-leave for their own serious health condition or the serious health condition of a family member, must obtain, upon their employers' request, a certification of their own or family member's serious health condition. Similarly, employees seeking FMLA leave for military caregiver leave must obtain, upon their employer's request, a certification of the covered servicemember's serious injury or illness. Often the health care provider's office staff completes the form for the provider's signature. In other cases, the health care provider personally completes it. In the 2008 analysis, the Department assumed that while most health care providers do not charge for completing these certifications, some do. The Department has no reason to believe that this assumption has changed since its last analysis.

The Department estimates that it will take approximately 20 minutes to complete a certification for a serious health condition, and 10 minutes to complete a fitness for duty certification. The time would equal the employee's time in obtaining the certification. The Department used the median hourly wage for a physician's assistant of $41.54 plus 40 percent in fringe benefits to compute cost of $19.39 for the certification of a serious health condition ($58.17 × 20 minutes/60 minutes per hour), and $9.69 for the fitness-for-duty certification. *See* BLS Occupational Employment Statistics, Occupational Employment and Wages, May 2010, *http://www.bls.gov/oes/current/oes291071.htm.*

The Department estimates that it will take approximately 20 minutes to complete the certification for a covered veteran. Thus, the time would equal the employee's time in obtaining the certification. The Department used the median hourly wage for a physician's assistant of $41.54 plus 40 percent in fringe benefits to compute cost of $19.39 for the certification to care for covered veteran ($58.17 × 20 minutes/60 minutes per hour). *See* BLS Occupational Employment Statistics, Occupational Employment and Wages, May 2010, *http://www.bls.gov/oes/current/oes291071.htm.*

New burden: 15,500 medical certifications for covered veterans × $19.39 cost per certification = $300,545.

The maintenance and operations cost estimate for the existing FMLA information collections is $162,821,810.

Grand total of maintenance and operations cost burden for respondents = $163,122,355.

The burden imposed by this information collection, as proposed to be revised, is summarized as follows:

Agency: Wage and Hour Division.

Title of Collection: Family and Medical Leave Act, as Amended.

OMB Control Number: 1235–0003.

Affected Public: Individuals or Households; Private Sector—Businesses or other for profits.

Not-for-profit institutions, Farms: State, Local or Tribal Governments.

Total Estimated Number of Respondents: 7,301,451 (52,351 added by this NPRM).

Total Estimated Number of Responses: 91,066,686 (1,681,111 added by this NPRM).

Total Estimated Annual Burden Hours: 19,061,782 (92,137 added by this NPRM).

Total Estimated Annual Other Costs Burdens: $163,122,355 ($300,545 added by this NPRM).

V. Executive Order 12866; Executive Order 13563

Executive Orders 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This rule has been designated a ''significant regulatory action'' although not economically significant, under section 3(f) of Executive Order 12866. However, in keeping with the spirit of Executive Order 12866, the Department had the rule reviewed by OMB. The Family and Medical Leave Act (FMLA or Act) is administered by the U.S. Department of Labor, Wage and Hour Division (WHD). The FMLA provides a means for employees to balance their work and family responsibilities by taking unpaid leave for certain reasons. The Act is intended to promote the stability and economic security of families as well as the nation's interest in preserving the integrity of families.

The FMLA applies to any employer in the private sector engaged in commerce or in an industry or activity affecting commerce who employed 50 or more employees each working day during at least 20 weeks in the current or preceding calendar year; all public agencies and local education agencies; and most Federal employees.[5]

To be eligible for leave, an individual must:

- Be employed by a covered employer at a worksite that employs at least 50 employees within 75 miles;
- Have worked at least 12 months for the employer (not necessarily consecutively); and
- Have at least 1,250 hours of service during 12 months preceding the beginning of the FMLA leave (as discussed herein, special hours of service rules apply to airline flight crew employees).

The FMLA provides for job-protected, unpaid leave, which may be continuous or intermittent, and allows for the substitution of paid leave. Employees are entitled to:

- A combined total of 12 workweeks of leave in a 12-month period for:
  - Birth and care of the employee's child (within one year);
  - Placement with employee of a child for adoption or foster care (within one year);
  - Care of a spouse, child, or parent with serious health condition;
  - The employee's own serious health condition; and
  - Qualifying exigency arising out of the fact that the employee's spouse, son, daughter, or parent is a military member and is on covered active duty or has been notified of an impending call or order to covered active duty.

Employees are also entitled to 26 workweeks of leave in a single 12-month period to care for a covered servicemember with a serious injury or illness if the employee is the spouse, son, daughter, parent, or next of kin of the servicemember.

A. Need for Regulation

The proposed changes to the FMLA regulations are primarily to implement statutory amendments to the FMLA's military family leave provisions and separate statutory changes affecting the eligibility requirements for airline flight crewmembers and flight attendants (collectively referred to as airline flight crew employees). Additionally, the military statutory amendments are designed to make it easier for workers with family in military service to balance their work and family lives during particularly demanding times without the fear of losing their jobs. 73 FR 68070. The amendments relating to the airline flight crew employees established a special hours of service eligibility requirement in order to address this industry's unique scheduling practices and expand access to FMLA-protected leave for flight crew employees.

1. National Defense Authorization Act for Fiscal Year 2010 Amendments

On October 28, 2009, the President signed into law the 2010 National Defense Authorization Act (FY 2010 NDAA), Public Law 111–84. Section 565(a) of the FY 2010 NDAA amends the FMLA. These amendments expand the military family leave provisions added to the FMLA in 2008, which provide qualifying exigency and military caregiver leave for employees with family members who are covered military members.

The FY 2010 NDAA amendments to the FMLA provide that an eligible employee may take FMLA leave for any qualifying exigency arising out of the fact that the employee's spouse, son, daughter, or parent is on (or has been notified of an impending call to) ''covered active duty'' in the Armed Forces. ''Covered Active Duty'' for members of a regular component of the Armed Forces means duty during deployment of the member with the Armed Forces to a foreign country. For members of the U.S. National Guard and Reserves it means duty during deployment of the member with the Armed Forces to a foreign country under a call or order to active duty in a contingency operation as defined in section 101(a)(13)(B) of title 10, United States Code. Prior to the FY 2010 NDAA amendments, (1) qualifying exigency leave did not apply to employees with family members serving in a regular component of the Armed Forces and (2) qualifying exigency leave for family members of members of the National Guard and Reserves was not limited to deployment to a foreign country in support a contingency operation.

The FY 2010 NDAA also expands the military caregiver leave provisions of the FMLA. Military caregiver leave entitles an eligible employee who is the spouse, son, daughter, parent, or next of kin of a ''covered servicemember'' to take up to 26 workweeks of FMLA leave in a ''single 12- month period'' to care

[5] Most Federal employees are covered under Title II of the FMLA (incorporated in Title V, Chapter 63, Subchapter 5 of the U.S. Code), which is administered by the Office of Personnel Management under regulations set forth at 5 CFR Part 630, Subpart L.

for a covered servicemember with a serious injury or illness. Under the FY 2010 NDAA amendments, the definition of ''covered servicemember'' is expanded to include a veteran ''who is undergoing medical treatment, recuperation, or therapy for a serious injury or illness'' if the veteran was a member of the Armed Forces ''at any time during the period of 5 years preceding the date on which the veteran undergoes that medical treatment, recuperation, or therapy.'' Prior to the FY 2010 NDAA amendments, military caregiver leave was limited to care for current members of the U.S. Armed Forces, including members of the Regular Armed Forces and members of the National Guard and Reserves.

In addition, the FY 2010 NDAA amends the FMLA's definition of a ''serious injury or illness'' for a current member of the U.S. Armed Forces, including National Guard or Reserves, to include not only a serious injury or illness that was incurred by the member in the line of duty on active duty but also one that ''existed before the beginning of the member's active duty and was aggravated by service in line of duty on active duty in the Armed Forces'' that may render the member medically unfit to perform the duties of the member's office, grade, rank, or rating. For covered veterans, the term is defined as ''a qualifying (as defined by the Secretary of Labor) injury or illness that was incurred by the member in 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 line of duty on active duty in the Armed Forces) and that manifested itself before or after the member became a veteran.''

2. Airline Flight Crew Technical Amendments

On December 21, 2009, the President signed into law the Airline Flight Crew Technical Corrections Act, Public Law 111–119. This amendment to the FMLA establishes a special hours of service eligibility requirement for airline flight crew employees. This amendment also permits the Secretary of Labor to provide by regulation a method of calculating FMLA leave for airline flight crew employees. Airline flight crew employees continue to be subject to the FMLA's other eligibility requirements.

The amendment provides that an airline flight attendant or flight crew member meets the hours of service requirement if, during the previous 12-month period, he or she has worked or been paid for:

■ Not less than 60 percent of the applicable total monthly guarantee (or its equivalent), and

■ Not less than 504 hours, not including personal commute time, or time spent on vacation, medical, or sick leave.

Prior to this amendment, many flight crew employees were not eligible for FMLA leave because the nature of the airline industry, including regulatory limits on the flying time, prevented them from meeting the required 1,250 hours of service requirement. Airline employees other than flight crew employees continue to be subject to the 1,250 hours of service eligibility requirement with hours of service determined according to principles established under the FLSA for compensable work time (*i.e.,* ''hours worked'').

Summary of Impacts [6]

The Department projects that the average annualized cost of the rule will be somewhat more than $61 million per year over 10 years. The rule is expected to cost $72.3 million in the first year, and $59.8 million per year in subsequent years. The amendment to extend FMLA provisions to flight crew employees accounts for 0.5 percent of first year costs and 0.7 percent in subsequent years, while military exigency and caregiver leave account for 81.4 percent of first year costs and 99.4 percent of costs in subsequent years. Regulatory familiarization costs account for 17.4 percent of first year costs. By provision, the costs related to the provision of health benefits account for the largest share of costs, about 44.5 percent of costs in the first year of the rule, and 53.9 percent of costs each in each of the following years.

TABLE 1–1—SUMMARY OF IMPACT OF PROPOSED CHANGES TO FMLA

Component	Year 1 ($1000)	Year 2 ($1000)	Annualized ($1000)	
			Real discount rate 3%	Real discount rate 7%
Total	$72,398	$59,791	$61,226	$61,469
By Amendment * * *				
Any FMLA revision	12,607	0	1,435	1,678
Flight Crew Technical Amendment	372	372	372	372
NDAA 2010	59,419	59,419	59,419	59,419
Qualifying Exigency	*23,052*	*23,052*	*23,052*	*23,052*
Expanded R&R Leave	*2,781*	*2,781*	*2,781*	*2,781*
Military Caregiver	*33,587*	*33,587*	*33,587*	*33,587*
By Requirement * * *				
Regulatory Familiarization	12,607	0	1,435	1,678
Employer Notices	26,851	26,851	26,851	26,851
Certifications	722	722	722	722
Health Benefits	32,218	32,218	32,218	32,218

B. Proposed Impacts

1. Industry Profile

The first step in the analysis is to estimate the number of firms, establishments and employees in the public and private sectors that will be impacted by the proposed changes. The Department estimates that there are a total of 7.9 million firms and government agencies with 10.6 million establishments in the U.S.[7] These entities employ 133 million workers with an annual payroll of $5.9 trillion.[8]

[6] On certain provisions, the Department provides a range of estimates. Where the ranges provide a summary of information, the midpoint of the range is represented.

[7] Number of firms and establishments includes private industry, farms, and governments.

[8] The Department's analysis is based on: USDA 2007 Census of Agriculture, available at: *http://www.agcensus.usda.gov/Publications/2007/index.asp;* 2007 Annual Survey of State and Local Government Employment and Payroll, available at: *http://www.census.gov/govs/estimate/;* and

Continued

Estimated annual revenues equal $33.2 trillion and estimated net income is $1.1 trillion.[9]

After identifying and excluding from the analysis those businesses that are not covered by the FMLA, the Department estimates that there are 381,000 covered firms and government agencies with 1.2 million establishments. These firms employ 91.1 million workers that will potentially be impacted by the proposed rule changes. These employers have an annual payroll of $5.0 trillion, estimated annual revenues of $23.7 trillion, and estimated net income of $1.03 trillion.

Table 2–1 presents the estimated number of establishments, firms, employment, annual wages, revenue, and net income for all employers. The following subsection describes in detail the methods and data sources used to develop the industry profile.

2. Methods and Data Sources

In order to determine the impact of this proposed rule, it is important to understand the analysis underlying the 2008 final rule. Therefore, this section describes the data sources and methods used to calculate the 2008 industry profile and identify employers that will be impacted by the proposed rule. The foundation for the profile is a special tabulation of data produced by the Bureau of Labor Statistics (BLS) Quarterly Census of Employment and Wages (QCEW) Program. The tabulation describes the distribution of establishments and employment by major industry division (2-digit NAICS level) across nine employment size categories. As explained more fully below, the analysis is based on establishment-level data because employer coverage and employee eligibility for the proposed rule is determined, in part, by establishment size.

The number of establishments and employment for each 2-digit industry, as defined by the North American Industry Classification System (NAICS), by employment size class, were obtained directly from BLS Quarterly Census of Employment and Wages Business Employment Dynamics (QCEW).[10] The number of farms was obtained from the U.S. Department of Agriculture 2007 Census of Agriculture. The number of governments and number of government workers was obtained from the Census of Governments.

The number of firms was determined by distributing the BLS QCEW total number of firms at the 2-digit industry level to each size class using the proportion of firms in each size class calculated from the Statistics of U.S. Businesses 2006. The Department used a similar approach to determine the annual payroll within each industry. The total annual payroll at the 2-digit industry level was distributed to each of the employment size classes using the proportion of payroll in each size class calculated from the Statistics of U.S. Businesses 2006.[11] Annual wages for government entities were obtained from the U.S. Census of Governments.[12]

In order to determine estimated 2008 revenues for each industry and employment size class, the Department calculated the receipts per employee in each size class from the 2007 Statistics of U.S. Business by aggregating the 2007 size classes to match BLS size classes, then dividing total receipts by the number of employees in each size class. Then, the Department estimated the BLS worker output index and producer price index for each two-digit sector as a weighted average of industries composing that sector. For sectors where no indices were available, the Department used the median value from those sectors with indices. Finally, to obtain an estimate of 2008 revenues, the Department multiplied receipts per employee in each size class by the 2008 number of employees in each size class, the worker output index and the producer price index. Government revenues were directly obtained from the 2007 Census of Government Finance.[13]

To determine estimated 2008 net income for each industry and employment class size, the Department calculated the average revenues per firm in each size class and calculated the ratio of net income to total receipts using the 2007 IRS Statistics of Income.[14] The estimated average revenue per firm in each size class was used to select an appropriate ''size of business receipts'' category from Statistics of Income for a size class in a particular industry and to generate the ratio of net income to total receipts for that category. The 2007 ratio of net income to total receipts was multiplied by the estimated 2008 revenues in each size class to calculate the estimated 2008 net income. Government net income was estimated by subtracting expenditures from revenues.[15]

3. Covered Employers

The FMLA applies to any employer in the private sector engaged in commerce or in an industry affecting commerce who employed 50 or more employees each working day during at least 20 weeks in the current or preceding calendar year; all public agencies and local education agencies; and most Federal employees.

First, the Department dropped from the profile all establishments in employment size classes of less than 50 employees (*i.e.,* 0–49 employees) except for those in elementary and secondary education. For the purpose of this analysis, all Federal government employers are assumed to be covered by FMLA regulations as administered by the Office of Personnel Management and, therefore, not subject to these revisions; State and local government employees, as well as U.S. Postal Service employees, are covered by this proposed rulemaking and are included in the profile of covered workers. Additionally, based on estimates from the 2007 Census of Agriculture, it is likely that very few farms employ more than 50 employees, and among those that do, very few of their employees are eligible for FMLA due to the seasonality of the work. As a result, this analysis assumes that no farm employers are covered by FMLA.[16] *See* Table 2–2 for a summary of covered employers.

Additionally, the Department used Statistics of U.S. Business, 2006 at the 6-digit NAICS level to identify the proportion of employers in NAICS 61 ''Education Services'' who are

Unpublished Special Tabulations produced by the Bureau of Labor Statistics, Quarterly Census of Employment and Wages (QCEW) Program. For more information on the QCEW program, please see the Web site: *http://www.bls.gov/cew/.*

[9] Estimated net income does not include net income for farms. The Department's analysis is based on: U.S. Census Bureau, Statistics of U.S. Businesses, ''Number of Firms, Number of Establishments, Employment, Annual Payroll, and Receipts by Employment Size of the Enterprise for the United States, All Industries—2002''; Unpublished Special Tabulations, BLS; and, IRS, 2007 Statistics of Income, Returns of Active Corporations, Table5—Selected Balance Sheet, Income Statement, and Tax Items, by sector, by Size of Business Receipts.

[10] Unpublished Special Tabulations, BLS.

[11] Statistics of U.S. Businesses, 2006 features a range of size classes; in some cases these size classes were aggregated to match the size classes available in the BLS Quarterly Census of Employment and Wages Business Employment Dynamics data set.

[12] 2007 Annual Survey of State and Local Government Employment and Payroll, available at: *http://www.census.gov/govs/estimate/.*

[13] U.S. Census Bureau 2007 Census of Government Finance, available at: *http://www.census.gov/govs/estimate/index.html#state_local.*

[14] Internal Revenue Service, 2007 Statistics of Income, Returns of Active Corporations, Table 5—Selected Balance Sheet, Income Statement, and Tax Items, by Sector, by Size of Business Receipts.

[15] 2007 Census of Government Finance.

[16] Based on the 2007 Census of Agriculture, about 2% of all farms have more than 10 hired employees, suggesting that the number of covered farms is likely very close to zero. Due to the seasonal nature of farm employment, it is similarly likely that few employees would be eligible for FMLA leave even if the farm were covered.

categorized as ''Elementary and Secondary Education.'' This proportion was used to calculate the number of employers in each size class in NAICS 61 that are considered local education agencies, and, therefore, covered by FMLA regardless of size. These employers were subtracted from the broader category of education services, and treated separately by the analysis; the remaining employers in education services with fewer than 50 employees were dropped from the profile.

Next, the Department calculated an appropriate adjustment factor to account for establishments with fewer than 50 employees at a worksite owned by a firm with more than 50 employees within 75 miles. It is necessary to add an estimated number of these employees back in to the industry profile to avoid underestimating the number of covered employers and eligible employees affected by the proposed rule.

The Department calculated this adjustment following the approach described in the 2007 ''Preliminary Analysis of the Impacts of Prospective Revision to the Regulation Implementing the FMLA of 1993 at 29 CFR 825'' (hereafter, ''the 2007 PRIA'').[17] In summary, the Department estimated an upper and lower bound on the number of employees who may be employed at worksites with less than 50 employees owned by firms with greater than 50 employees within 75 miles, and calculated the difference between these two estimates. In the absence of reliable data on the geographic proximity of establishments owned by the same firm, and employment at those establishments, we assumed 50 percent of workers at these establishments are employed at covered worksites.

The lower bound is estimated at the 2-digit industry level as the employment in establishments with more than 50 employees according to the U.S. County Business Patterns of 2007.[18] The upper bound is estimated as employment in firms with greater than 50 employees according to the Statistics of U.S. Businesses 2007 Small employment size classes.[19] Next, the Department calculated fifty percent of the difference between the upper and lower bound to estimate the number of workers at covered worksites of less than 50 employees in 2007. This estimate was then calculated as a percent of total employment in each industry, and that percent multiplied by the total employment in each industry in 2008 to estimate the number of workers at covered worksites of less than 50 employees in 2008. The Department did not attempt to distribute these workers to size classes. This approach was repeated to estimate the number of establishments and annual payroll for this category.

TABLE 2–1—2008 INDUSTRY PROFILE: ALL PRIVATE AND PUBLIC SECTOR EMPLOYERS

NAICS	Industry	Number of establishments	Employment	Number of firms	Annual payroll ($1000)	Estimated revenues ($1000)	Estimated net income ($1000)
11	Agriculture, Forestry, Fishing & Hunting.	93,063	1,083,602	86,256	30,293,755	191,671,485	2,407,103
11f	Farms	2,204,792	843,000	2,204,792	18,349	283,520,000	*
21	Mining	29,816	728,810	21,206	61,569,636	265,308,320	23,777,149
22	Utilities	16,000	560,628	7,296	46,832,814	588,750,468	28,522,162
23	Construction	788,982	6,691,659	686,282	348,060,594	1,764,016,511	13,137,722
31–33	Manufacturing	346,637	12,991,886	284,894	727,472,090	5,042,240,515	220,025,292
42	Wholesale Trade	587,802	5,900,701	341,387	366,499,181	5,217,289,386	34,862,575
44–45	Retail Trade	587,802	5,900,701	341,387	366,499,181	5,217,289,386	34,862,575
48–49	Transportation and Warehousing *.	207,554	4,981,034	154,026	182,514,664	920,250,059	14,548,904
51	Information	136,001	2,970,258	72,676	210,177,173	829,642,598	46,672,698
52	Finance and Insurance.	458,828	5,823,542	233,643	492,482,993	2,590,473,795	114,918,333
53	Real Estate and Rental and Leasing.	342,250	2,085,053	243,368	90,735,012	439,247,207	14,606,997
54	Professional, Scientific & Technical Serv.	933,257	7,875,748	695,416	578,284,495	1,476,151,016	18,463,759
55	Management of Companies & Enterprises.	48,434	1,895,781	35,257	178,611,324	466,204,666	56,954,063
56	Admin, Support, Waste Mgmt & Remed Serv.	432,089	7,705,263	315,462	254,989,288	649,497,228	4,026,201
61	Education Services—Total.	84,911	2,501,830	67,800	96,989,952	268,567,412	4,714,997
61a	*Education Services—all others.*	64,952	1,623,889	51,100	72,612,918	185,424,684	3,752,850
61e	*Education Services—Elementary and Secondary.*	19,959	877,941	18,639	24,377,033	83,142,727	958,024
62	Health Care and Social Assistance.	748,151	15,910,960	594,285	655,441,919	1,749,782,977	14,443,129
71	Arts, Entertainment, and Recreation.	116,178	1,816,000	98,613	62,461,364	193,817,674	2,970,331

[17] CONSAD Research Corporation, December 7, 2007. Pages 6–8.

[18] U.S. County Business Patterns of 2007, available at URL: *http://www.census.gov/econ/cbp/download/07_data/index.htm.*

[19] Statistics of U.S. Businesses, available at URL: *http://www.census.gov/econ/susb/.*

TABLE 2–1—2008 INDUSTRY PROFILE: ALL PRIVATE AND PUBLIC SECTOR EMPLOYERS—Continued

NAICS	Industry	Number of establishments	Employment	Number of firms	Annual payroll ($1000)	Estimated revenues ($1000)	Estimated net income ($1000)
72	Accommodation and Food Services.	591,605	11,218,253	447,113	189,461,657	559,882,364	4,192,717
81 & 95 ...	Other Services & Auxiliaries.	1,112,327	4,466,292	455,279	128,156,787	543,507,574	3,291,846
99	Unclassified	140,476	190,374	100,969	6,592,088	29,688,367	763,157
.....	*All industries*	*10,437,770*	*113,977,648*	*7,786,426*	*5,107,828,608*	*29,672,157,281*	*717,263,252*
	Government	*179,952*	*19,385,969*	*89,526*	*769,877,876*	*3,536,511,409*	*401,304,167*
Public and Private Sector Total		10,617,722	133,363,617	7,875,952	5,877,706,485	33,208,668,690	1,118,567,419

*Sources: BLS Unpublished special tabulations; 2007 Annual Survey of State and Local Government Employment and Payroll; 2007 Census of Government Finance; Census of Agriculture; IRS 2001 Statistics of Income.

* Net income for farms is not available.

* NAICS code 48–49 includes the Postal Service (Source: www.usps.com, and USPS Annual Report 2008); postal service employees are covered by the proposed rulemaking while most other Federal employees are covered under FMLA regulations administered by the Office of Personnel Management.

TABLE 2–2—2008 INDUSTRY PROFILE: COVERED EMPLOYERS

NAICS	Industry	Number of establishments	Employment	Number of firms	Annual payroll ($1000)	Estimated revenues ($1000)	Estimated net income ($1000)
11	Agriculture, Forestry, Fishing & Hunting.	4,867	537,602	2,043	9,150,199	90,343,170	1,295,858
11f	Farms	*	*	*	*	*	*
21	Mining	5,370	534,418	1,614	53,624,288	214,181,588	22,080,354
22	Utilities	6,428	472,599	915	48,585,145	503,859,306	26,102,570
23	Construction	25,880	2,651,363	19,032	181,278,503	787,171,326	6,956,491
31–33	Manufacturing	63,903	10,272,292	34,929	637,870,080	4,435,460,496	211,718,345
42	Wholesale Trade	78,026	3,056,807	21,258	291,441,021	2,862,989,339	21,066,806
44–45	Retail Trade	215,675	10,146,178	22,267	338,457,243	3,998,484,468	84,801,022
48–49	Transportation and Warehousing*.	32,748	3,907,594	8,755	216,154,621	715,836,368	12,813,522
51	Information	38,790	2,323,185	5,025	205,020,423	693,282,719	42,915,077
52	Finance and Insurance.	115,439	4,007,678	9,251	477,979,216	2,195,244,677	104,279,817
53	Real Estate and Rental and Leasing.	37,505	842,136	5,183	62,400,405	162,795,517	8,385,978
54	Professional, Scientific & Technical Serv.	59,834	4,020,484	17,396	407,974,385	789,102,823	13,716,076
55	Management of Companies & Enterprises.	22,249	1,650,176	24,332	187,531,345	334,394,917	40,851,477
56	Admin, Support, Waste Mgmt & Remed Serv.	52,724	5,415,739	20,048	218,388,045	389,310,585	2,811,964
61	Education Services—Total.	—	—	—	—	—	—
61a	*Education Services—all others.*	7,557	1,328,922	3,297	67,069,643	158,106,124	3,524,541
61e	*Education Services—Elementary and Secondary.*	19,959	877,941	18,639	24,377,033	83,142,727	958,024
62	Health Care and Social Assistance.	114,670	11,364,063	34,298	523,657,606	1,201,616,565	12,720,148
71	Arts, Entertainment, and Recreation.	10,311	1,134,984	5,779	38,736,030	115,713,478	2,110,154
72	Accommodation and Food Services.	105,210	5,955,522	27,601	150,133,805	285,088,709	2,949,814
81 & 95 ...	Other Services & Auxiliaries.	50,994	1,260,055	9,486	59,437,649	170,730,790	1,664,491
99	Unclassified	13	1,185	11	0	0	0
.....	*All industries*	*1,068,152*	*71,760,923*	*291,159*	*4,199,266,686*	*20,186,855,692*	*623,722,527*
	Government	*179,952*	*19,385,969*	*89,526*	*769,877,876*	*3,536,511,409*	*401,304,167*

TABLE 2–2—2008 INDUSTRY PROFILE: COVERED EMPLOYERS—Continued

NAICS	Industry	Number of establishments	Employment	Number of firms	Annual payroll ($1000)	Estimated revenues ($1000)	Estimated net income ($1000)
Total	.....	1,248,104	91,146,892	380,685	4,969,144,562	23,723,367,101	1,025,026,694

Sources: BLS Unpublished special tabulations; 2007 Annual Survey of State and Local Government Employment and Payroll; 2007 Census of Government Finance; Census of Agriculture; IRS 2001 Statistics of Income.

* Based on the 2007 Census of Agriculture, about 2% of all farms have more than 10 hired employees, suggesting that the number of covered farms is likely very close to zero. Due to the seasonal nature of farm employment, it is similarly likely that few employees would be eligible for FMLA leave even if the farm were covered.

* NAICS code 48–49 includes the Postal Service (Source: www.usps.com, and USPS Annual Report 2008); postal service employees are covered by the proposed rulemaking while most other Federal employees are covered under FMLA regulations administered by the Office of Personnel Management.

C. FMLA Leave Profile

This section describes how, in light of the recent amendments, the Department estimated the number of covered, eligible workers who may be in a position to take qualifying exigency or military caregiver leave and the number of leaves they may take, and the number of covered eligible flight crew members and flight attendants who may take FMLA leave and the number of leaves they may take.

1. Military Family Leave Under FMLA

The proposed changes to the military family leave provisions of FMLA impact a variety of employees and employers across the economy. While these proposed changes do not alter the conditions for employer coverage or employee eligibility under the FMLA, they do change the circumstances under which eligible employees who are family members of covered servicemembers qualify for FMLA leave and, as a result, will affect the number and frequency of FMLA leaves taken for those reasons.

In order to estimate the number of individuals who may take leave under the qualifying exigency or military caregiver provisions as a result of the proposed changes, the Department estimated the number of servicemembers or veterans covered by the amendments, completed an age profile of those individuals and estimated the number of eligible family members or potential caregivers likely to be associated with each age range. This method is described in full detail in Appendix A.

a. Qualifying Exigency

The FY 2010 NDAA amendments to the FMLA provide that an eligible employee may take FMLA leave for any qualifying exigency arising out of the fact that the employee's spouse, son, daughter, or parent is on (or has been notified of an impending call to) covered active duty in the Armed Forces. For members of a regular component of the Armed Forces, this means duty during deployment to a foreign country. For members of the U.S. National Guard and Reserves, it means duty during deployment to a foreign country under a call or order to active duty under a provision of law referred to in section 101(a)(13)(B) of title 10, United States Code.

To determine the number of eligible employees who may take FMLA leave as a result of this amendment, the Department first estimated the number of servicemembers on covered active duty and the number of family members who may be eligible and employed at a covered employer and then subtracted those servicemembers and family members already entitled to take qualifying exigency leave prior to the FY 2010 NDAA amendments. Clear, consistent data on the number of military personnel deployed in any given year are difficult to find; many sources, for example, do not adequately distinguish military personnel deployed overseas from those stationed overseas. In addition, estimates might vary significantly depending on sources utilized.[20] Furthermore, when deployments do occur, a Congressional Research Service report showed that estimates of personnel involved might vary significantly depending on definition and source. Thus, estimates of ''boots on the ground'' in Iraq between 2003 and 2008 are only 30 percent to 60 percent of the total involved when personnel outside Iraq are included.[21] Therefore, the Department drew on several data sources to determine the number of servicemembers likely to be called to covered active duty in the Armed Forces annually.

Table 3–1 provides a summary of deployments of the U.S. Armed Forces from 1960 through 2007. Although composed of the best data found to date, some estimates of personnel deployed appear to use more restrictive definitions than would be covered by the Department's definition of covered active duty. For example, the table shows deployment of 1,200 personnel for operations in Lebanon from 1982 through 1984. However, this appears to include only those Marine Corps troops that were on the ground in Lebanon, but excludes sailors on the Navy support ships that were also deployed in this operation.[22]

TABLE 3–1—U.S. DEPLOYMENTS AND TOTAL ACTIVE MILITARY PERSONNEL, 1960–2007

Year	Total active military personnel [b]	Deployed Personnel		Total deployed as percent of total active	Deployment
		Total [a]	Active		
1960	2,490,000	900	900	0.04	Vietnam [c]
1961	2,550,000	3,000	3,000	0.12	

[20] See, for example, the promisingly, but misleadingly, titled: Kane, T. 2004. Global U.S. Troop Deployment, 1950–2003. The Heritage Foundation. October 27. Accessed at *http://www.heritage.org/research/reports/2004/10/global-us-troop-deployment-1950-2003* on October 7, 2010.

[21] Belasco, A. 2009. Troop Levels in the Afghan and Iraq Wars, FY2001–FY2010: Cost and Other Potential Issues. Congressional Research Service. July 2. Accessed at *http://www.fas.org/sgp/crs/natsec/R40682.pdf* on October 7, 2010.

[22] For example, the U.S.S. New Jersey provided offshore fire support during this operation; this ship alone has a crew of about 1,900. Thus, this source may use a ''boots on the ground'' definition.

TABLE 3–1—U.S. DEPLOYMENTS AND TOTAL ACTIVE MILITARY PERSONNEL, 1960–2007—Continued

Year	Total active military personnel [b]	Deployed Personnel		Total deployed as percent of total active	Deployment
		Total [a]	Active		
1962	2,690,000	11,000	11,000	0.41	
1963	2,700,000	16,000	16,000	0.59	
1964	2,690,000	23,000	23,000	0.86	
1965	2,720,000	184,000	184,000	6.76	
1966	3,230,000	385,000	385,000	11.92	
1967	3,410,000	486,000	486,000	14.25	
1968	3,490,000	536,000	536,000	15.36	
1969	3,450,000	475,000	475,000	13.77	
1970	2,980,000	335,000	335,000	11.24	
1971	2,630,000	157,000	157,000	5.97	
1972	2,360,000	24,000	24,000	1.02	
1973	2,230,000	50	50	0.00	
1974	2,160,000				
1975	2,100,000				
1976	2,080,000				
1977	2,070,000				
1978	2,060,000				
1979	2,030,000				
1980	2,050,000				
1981	2,080,000				
1982	2,110,000	10,000	10,000	0.47	Lebanon [e], Grenada [e]
1983	2,120,000	1,200	1,200	0.06	Lebanon [e]
1984	2,140,000	1,200	1,200	0.06	
1985	2,150,000				
1986	2,170,000				
1987	2,170,000				
1988	2,140,000				
1989	2,130,000	27,000	27,000	1.27	Panama [e]
1990	2,050,000				
1991	1,990,000	560,000	476,000	28.14	Iraq (1) [f]
1992	1,810,000	25,800	25,800	1.43	Iraq OSW [f], Somalia [e]
1993	1,710,000	25,800	25,800	1.51	
1994	1,610,000	26,500	26,500	1.65	Somalia [e], Rwanda [e], Haiti [e]
1995	1,520,000	12,200	12,200	0.80	Somalia [e], Haiti [e], Bosnia [e]
1996	1,470,000	9,300	9,300	0.63	Haiti [e], Bosnia [e]
1997	1,440,000	1,400	1,400	0.10	Iraq ONW [f]
1998	1,410,000				
1999	1,390,000	37,100	37,100	2.67	Kosovo [f]
2000	1,380,000				
2001	1,390,000	83,400	83,400	6.00	Afghanistan [d]
2002	1,410,000	21,100	21,100	1.50	
2003	1,430,000	237,600	178,200	16.62	Afghanistan [d], Iraq (2) [g]
2004	1,410,000	236,100	177,100	16.74	
2005	1,380,000	258,900	194,200	18.76	
2006	1,380,000	265,400	199,100	19.23	
2007	1,380,000	285,700	214,300	20.70	
Average	2,102,000	99,200	90,800	4.7	Overall, 1960–2007
	2,140,000	144,000	132,000	6.7	Deployment Years Only

[a] Total deployed personnel is equal to the active personnel plus Reserve and/or National Guard personnel.

[b] Kane, T. 2004. Global U.S. Troop Deployment, 1950–2003. The Heritage Foundation. October 27. Accessed at *http://www.heritage.org/research/reports/2004/10/global-us-troop-deployment-1950-2003* on October 7, 2010.

[c] American War Library. Vietnam War Allied Troop Levels 1960–73. Accessed at: *http://www.americanwarlibrary.com/vietnam/vwatl.htm* on October 7, 2010.

[d] Belasco, A. 2009. Troop Levels in the Afghan and Iraq Wars, FY2001–FY2010: Cost and Other Potential Issues. Congressional Research Service. July 2. Accessed at *http://www.fas.org/sgp/crs/natsec/R40682.pdf* on October 7, 2010.

[e] Sarafino, N.M. 1999. Military Interventions by U.S. Forces from Vietnam to Bosnia: Background, Outcomes, and ''Lessons learned'' for Kosovo. Congressional Research Service. May 20.

[f] U.S. Department of Defense, Deployment Health Clinical Center (DHCC): Deployments by Operation. Accessed at *http://www.pdhealth.mil/dcs/deploy_op.asp* on October 7, 2010.

[g] ''Contingency Tracking System deployment file for Operation Enduring Freedom and Iraqi Freedom, as of: October 31, 2007.'' Accessed at: *http://veterans.house.gov/Media/File/110/2-7-08/DoDOct2007-DeploymentReport.htm.*

OSW (Operation Southern Watch) and ONW(Operation Northern Watch) refer to operations in support of the Iraqi no-fly zones.

Supplementing the deployment data with annual active military personnel counts, the Department estimated the annual number and percent of military personnel deployed on average over the 1960 to 2007 period. Over the entire 48-year period, each year the U.S. deployed on average about 99,200 of its 2.1 million personnel active military force

(4.7 percent) on operations that meet the definition of covered active duty. The overall average covers a wide variation in the timing, duration, and size of those operations; of the 48 years included in Table 3–1, in:

■ 16 years, essentially no personnel were deployed (with the exception of 50 servicemembers in Vietnam in 1973);

■ 18 years, 900 to 37,100 personnel were deployed, an average of 15,400 per year (0.8 percent of active servicemembers);

■ 14 years (Vietnam and the two Iraq conflicts), deployments ranged from 83,400 to 560,000 personnel, an average of 320,400 per year (13.9 percent of active servicemembers).

Finally, with the exception of the Vietnam and second Iraq conflicts, most of the conflicts listed in Table 3–1 were for two years or less.

Based on the information provided in Table 3–1, and acknowledging the limitations of those data, the Department judged that the simple average of 99,200 deployed personnel does not adequately represent the typical number of service personnel on covered active duty in any given year for projecting the costs associated with this rule. The Department also calculated that, on average, 144,000 personnel per year were deployed in the 33 years in which a deployment occurred. Using this figure instead to represent average annual deployments on covered active duty provides a 45 percent cushion to account for data inconsistencies and omissions. Therefore, for the purposes of this PRIA, we assume an average of 144,000 military personnel are deployed per year on covered active duty.

Two additional adjustments to this estimate must be made:

■ Qualifying exigency leave for eligible family members of National Guard and Reserve personnel was promulgated in 2008.

■ Military personnel may deploy more than once in any given year; if their eligible family members use less than the entire allotment of leave on the first deployment (12 weeks), they may use some or all of the remaining leave on subsequent deployments that year.

Data on U.S. military deployments showed that 17 percent of personnel deployed to Iraq in 1991 were Reserve units, while 28 percent of personnel deployed to Iraq between 2003 and 2007 were Reserve or National Guard units.[23] Therefore, the Department adjusted the estimated number of personnel downward by 15 percent for 1991, and 25 percent for 2003 through 2007. Thus, we estimate that on average 132,000 active military personnel per year are deployed on covered active duty.

The Department used a Department of Defense news release on typical deployment lengths in the Iraq conflict by service (Army, 1 year; Navy and Marines, six months; Air Force, 3 months) [24] to estimate the average number of deployments per person. This average was weighted by the relative percent of active personnel by service deployed to Iraq (Army, 61 percent; Navy and Marines, 28 percent; Air Force, 11 percent) [25] to determine that the military would use 1.49 deployments to maintain one person in Iraq for one year. Thus, deployment of 132,000 personnel might require 197,000 actual deployments per year.

In the 2008 final rule, the Department estimated the joint probability that a servicemember will have one or more family members (parent, spouse, or adult child), that those family members will be employed at an FMLA-covered establishment, and that they would be eligible to take FMLA leave under the qualifying exigency provision (see 2007 PRIA and Appendix A). Applying these joint probabilities to the 197,000 annual deployments, the Department estimates approximately 193,000 family members will be eligible to take FMLA leave to address qualifying exigencies. Military deployments represent a nonroutine departure from normal family life to potentially long-term exposure to a high stress, high risk environment, often at relatively short notice. Therefore, the Department assumes the rate at which eligible employees take FMLA leave for this purpose will be twice the rate (about 16 percent) of those taking regular FMLA leave (7.9 percent). The Department does not assert that only 16 percent of family members will take leave for reasons related to the servicemember's deployment, but that 16 percent will use leave designated as FMLA leave for qualifying exigencies. Based on these assumptions, the Department estimates 30,900 family members will take FMLA leave annually to address qualifying exigencies.

In the 2008 final rule, the Department developed a profile of the ''typical'' usage of qualifying exigency leave over the course of a 12-month period for an eligible employee. Under this leave profile, the typical employee will take a one week block of leave upon notification of the deployment of the servicemember, ten days of unforeseeable leave during deployment, one week of foreseeable leave to join the servicemember while on Rest and Recuperation, and one week of foreseeable leave post deployment to address qualifying exigencies. 73 FR 68051. The proposed revisions to the rule increase foreseeable leave to join a servicemember while the servicemember is on Rest and Recuperation leave. Table 3–2 summarizes the revised leave pattern.

TABLE 3–2—PROFILE OF QUALIFYING EXIGENCY LEAVE

Reason	Description	Days	Hours
Notice of Deployment	1 week unforeseeable	5	40
During Deployment	10 days unforeseeable	10	80
During Deployment, ''Rest and Recuperation''	10 days foreseeable	10	80
Post Deployment	1 week foreseeable	5	40
Total		30	240

[23] Belasco, A. 2009. Troop Levels in the Afghan and Iraq Wars, FY2001–FY2010: Cost and Other Potential Issues. Congressional Research Service. July 2. Accessed at *http://www.fas.org/sgp/crs/natsec/R40682.pdf* on October 7, 2010.

''Contingency Tracking System deployment file for Operation Enduring Freedom and Iraqi Freedom, as of: October 31, 2007.'' Accessed at: *http://veterans.house.gov/Media/File/110/2-7-08/DoDOct2007-DeploymentReport.htm.*

[24] DOD News Briefing with Secretary Gates and Gen Pace from the Pentagon. April 11, 2007. Available at URL: *http://www.defense.gov/Transcripts/Transcript.aspx?TranscriptID=3928.* See also: Powers, R. 2007. ''Joint Chiefs Continue to Examine Deployment Lengths.'' April 14. Accessed at *http://usmilitary.about.com/od/terrorism/a/deploylength.htm.*

[25] ''Contingency Tracking System deployment file for Operation Enduring Freedom and Iraqi Freedom, as of: October 31, 2007.'' Accessed at: *http://veterans.house.gov/Media/File/110/2-7-08/DoDOct2007-DeploymentReport.htm.*

For the purpose of this analysis, the Department is assuming that the average employee will take 10 days of leave to be with their servicemember during rest and recuperation leave. While the Department proposes increasing the number of days of qualifying exigency leave an employee may take for the servicemember's Rest and Recuperation leave to coincide with the number of days provided the servicemember, up to 15 days, the Department does not have a basis at this time to estimate the percentage of servicemembers who would be granted 15 days of Rest and Recuperation or the probability that their family member(s) would join them for Rest and Recuperation leave. Therefore, the Department assumes for the purpose of this analysis that a covered and eligible employee will take 10 days of qualifying exigency leave for the servicemember's Rest and Recuperation leave. The Department invites comment on the amount of Rest and Recuperation leave provided to service personnel and the extent to which employees would take an equal number of days of FMLA-qualifying exigency leave to be with their servicemember-family member.

Based on this profile, the Department estimates that 30,900 eligible employees will take 927,000 days (7.4 million hours) of FMLA leave annually to address qualifying exigencies under the FY 2010 NDAA amendments. These estimates may vary from 772,000 days (6.2 million hours) if eligible employees average five days of leave to 1.1 million days (8.7 million hours) if they average 15 days of leave when a servicemember is on Rest and Recuperation leave.

The Department acknowledges that estimated qualifying exigency leave also represents an average of periods with high levels of deployment and active conflict and periods with low or minimal deployments. Therefore, the Department supplements its analysis by considering a ''heavy conflict'' scenario and a ''low conflict'' scenario to capture the range of leave usage that may be expected in any given year in the future.

Drawing on the data in Table 3–1, for the purposes of these cost estimates, the Department defines the low conflict scenario as a year containing no deployment exceeding 40,000 servicemembers, while the heavy conflict scenario is one in which deployments exceed 40,000 servicemembers. Applying this standard to the data in Table 3–1, the average size of a deployment during the low conflict scenario is 15,400 troops, compared to 320,400 during a period of heavy conflict.

The Department applied the same probabilities of having eligible family members and patterns of leave usage as were used for the average analysis. Using this method, the Department estimates that 2,400 employees will take 72,060 days (576,500 hours) of leave for qualifying exigencies under the low conflict scenario, while 50,244 employees will take 1.5 million days (12 million hours) of leave during periods of heavy conflict.

b. Military Caregiver Leave

Military caregiver leave entitles an eligible employee who is the spouse, son, daughter, parent, or next of kin of a ''covered servicemember'' to take up to 26 workweeks of FMLA leave in a ''single 12-month period'' to care for a covered servicemember with a serious injury or illness. Under the FY 2010 NDAA amendments, the definition of ''covered servicemember'' is expanded to include a veteran ''who is undergoing medical treatment, recuperation, or therapy for a serious injury or illness'' if the veteran was a member of the Armed Forces ''at any time during the period of 5 years preceding the date on which the veteran undergoes that medical treatment, recuperation, or therapy.'' The FY 2010 NDAA amendments define a serious injury or illness for a covered veteran as ''a qualifying (as defined by the Secretary of Labor) injury or illness that was incurred by the member in 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 line of duty on active duty in the Armed Forces) and that manifested itself before or after the member became a veteran.''

The amendments also expand the definition of ''serious illness or injury'' to include an injury or illness of a current member of the military that ''existed before the beginning of the member's active duty and was aggravated by service in line of duty'' and that may cause the servicemember to be unable to perform the duties of his or her office, grade, rank, or rating. The Department does not attempt in this analysis to estimate the number of additional current servicemembers who may be covered under this expansion of the definition due to the lack of data to support reasonable assumptions on the potential size of this group. However, for the reasons discussed earlier in this preamble, the Department believes it is reasonable to conclude that the number of servicemembers entering the military with an injury or illness with the potential to be aggravated by service to the point of rendering the servicemember unable to perform the duties of his or her office, grade, rank, or rating is quite small due to the selection process used by the U.S. Armed Forces.

To determine the number of eligible employees that may take FMLA leave as a result of the expansion of caregiver leave to family members of covered veterans, the Department first estimated the number of veterans likely to undergo medical treatment for a serious injury or illness, and the number of family members who are employed by a covered employer and who may be eligible to take FMLA leave to care for them. The Department reviewed several summaries of injuries and illnesses among military servicemembers to estimate the rate at which injuries that are sufficiently severe as to require medical care after separation from the military might occur.[26] A number of data limitations make the estimation of serious injury and illness rates problematic:

■ The Department of Defense generally publishes data on the number of servicemembers killed or wounded in action, but little about non-combat injuries and illnesses.

■ Except for the most severe injuries (*e.g.,* amputations, severe burns, blindness), little is published about the nature or severity of illnesses and injuries.

After completing its review, described below, the Department estimates that an average of about 46,900 servicemembers will incur injuries or illnesses that may require treatment after separation from the military, for which family members will be eligible for military caregiver leave.[27] This number includes the 14,000 servicemembers whose family

[26] The most useful of these sources were:

Dole, R. and D. Shalala. Serve, Support, and Simplify. Report of the President's Commission on Care for America's Returning Wounded Warriors. July, 2007.

Fischer, H. United States Military Casualty Statistics: Operation Iraqi Freedom and Operation Enduring Freedom. CRS Report for Congress. Congressional Research Service, March 25, 2009.

Tanielian, T. and L.H. Jaycox (eds.). Invisible Wounds: Mental Health and Cognitive Care Needs of America's Returning Veterans. Research Highlights. RAND Center for Military Health Policy Research. 2008.

U.S. Department of Defense. DoD Military Injury Metrics Working Group White Paper. December 2002.

[27] For the purposes of describing the calculations in this section, we assume each injury or illness occurs to one veteran (*i.e.,* 46,900 veterans experience 46,900 injuries and illnesses). However, veterans might experience more than one injury or illness, and the family members of fewer than 46,900 veterans might take multiple leaves to care for the 46,900 injuries and illnesses. The total estimated leaves and costs will be identical in both cases.

members are expected to take military caregiver leave while the servicemember is still in the military. The Department reached this estimate based on the information and analysis presented in the following paragraphs.

The Department first estimated the percent of servicemembers that might receive an injury or illness requiring care while in the service or after separation. In 2001, the Department of Veterans Affairs undertook a survey that showed 24 percent of veterans that served during the Gulf War era reported having a service-related disability rating.[28] Service-related disability ratings do not require that the servicemember is disabled; the rating might be less than 30 percent (or even zero in the case of a service-related injury that healed prior to separation;) however, the mere fact that a servicemember has a rating indicates that a service-related injury occurred.[29]

The Department then examined deployment rates across different time periods. Table 3–1 indicates that servicemembers deployed during the Gulf War of 1991 account for about 28 percent of the total active military at that time. The same tables show that servicemembers deployed in Operations Enduring Freedom and Iraqi Freedom (Iraq (2)) comprise a smaller percentage of the active military (roughly 20 percent). However, the Department believes this is an underestimate; because the second Iraq conflict lasted several years, it is likely that many in the active military not deployed at the time of the snapshot were deployed sometime during its duration; conversely, the first Iraq war was relatively brief, and personnel had a smaller likelihood of rotating into the war zone during its duration. Therefore, the Department believes that the percent of active military personnel that were deployed to Afghanistan or Iraq is higher than the calculations in Table 3–1 show, and that the true percent is similar to the first Iraq conflict: approximately 30 percent of active military personnel were deployed. The Department also concludes that the percent of veterans that received a service-connected disability rating from the first Gulf War era is a reasonable proxy for veterans of the period 2003 through 2007, about 25 percent (rounded up from 24 percent). Thus, the Department expects that at least 25 percent of active military personnel in the post-9/11 era will separate from the military with a disability rating.

Data provided by the Department of Veterans' Affairs indicates that among the population of current veterans with a disability rating, 39.3 percent have a rating of 50 percent or greater (Table 3–3). Assuming the distribution of disability ratings among servicemembers who will separate from the military in years to come is the same as the distribution of disability ratings of current veterans, the Department estimates that 10 percent (rounding up, 25 percent × 40 percent = 10 percent) of separating servicemembers will have a disability rating of 50 percent or greater.

TABLE 3–3—2010 DISTRIBUTION OF CURRENT VETERANS BY DISABILITY RATING

Degree of disability (%)	Number of current veterans with DR	Percent of current veterans with DR	Cumulative percent of current veterans with DR
0	12,145	0.4	0.4
10	779,997	24.7	25.1
20	445,472	14.1	39.2
30	365,254	11.6	50.8
40	312,301	9.9	60.7
50	205,419	6.5	67.2
60	246,132	7.8	75.0
70	227,528	7.2	82.2
80	172,491	5.5	87.7
90	97,591	3.1	90.8
100	290,396	9.2	100.0

Source: Department of Veterans Affairs.

However, it is possible that a servicemember may not manifest the symptoms of a serious injury or illness at the time of his or her separation, and therefore, not go through the VA disability rating process prior to leaving the service. In 2008, the RAND organization published a report entitled *Invisible Wounds: Mental Health and Cognitive Care Needs of America's Returning Veterans* (Tanielian and Jaycox, 2008). The RAND report summarized the results from a survey of servicemembers, which found that among servicemembers who returned from Operation Enduring Freedom and Operation Iraqi Freedom:

- 11.2 percent met the criteria for post-traumatic stress disorder (PTSD) or depression,
- 12.2 percent had likely experienced a traumatic brain injury (TBI),
- 7.3 percent had experienced both a TBI and either PTSD or a TBI and depression, and
- Roughly 50 percent of these servicemembers sought treatment for their symptoms within one year of returning from overseas.

Furthermore, symptoms of such injuries may not appear until several years after the injury was experienced, have traditionally been badly underreported, and are not well understood. Due to the high visibility research performed in this area, and recent initiatives undertaken by the Department of Veterans Affairs,[30] it is reasonable to assume a much higher percentage of these types of injuries will be diagnosed and reported than in previous cohorts of veterans.

Consequently, the Department must also account for veterans who may

[28] U.S. Department of Veterans Affairs. 2001 National Survey of Veterans. Accessed at *http://www1.va.gov/VETDATA/docs/SurveysAndStudies/NSV_Final_Report.pdf.*

[29] Veterans Administration Service Related Disability Rating (VASRD). Accessed at *http://myarmybenefits.us.army.mil/Home/Benefit_Library/Federal_Benefits_Page/Veterans_Administration_Schedule_for_Rating_Disabilities_(VASRD).html?serv=150.*

[30] See, for example:

DeKosky, S.T., M.D. Ikonomovic, and S. Gandy. 2010. Traumatic Brain Injury—Football, Warfare, and Long-Term Effects. The New England Journal of Medicine. 363:14. September 30.

U.S. Department of Veterans Affairs. 38 CFR Part 3. Post Traumatic Stress Syndrome. Interim Final Rule. Federal Register, Vol. 73, No. 210, p. 64208.

suffer a serious injury or illness that manifested after his or her separation from the military. Evidence shows that approximately 30 percent of servicemembers that were deployed to Afghanistan and Iraq experienced a TBI, PTSD, or depression, and roughly 30 percent of active military personnel were deployed to Afghanistan or Iraq. Assuming that such injuries would result in the equivalent of a VASRD rating of at least 50 percent, and did not manifest until after separation from the military, it is reasonable to estimate that 10 percent ($0.3 \times 0.3 = 0.09$, then rounding up) of these veterans incurred such an injury or illness that manifested after separation from the military. The Department added this 10 percent of veterans who suffer a post-separation serious injury or illness to the 10 percent of military members who separate from the military with a VASRD rating. Therefore, the estimated percent of veterans likely to have a service-related injury or illness that might require treatment after separation is 20 percent.

In summary, for the purposes of this PRIA, the Department assumes that 20 percent of servicemembers may separate from the military with an injury or illness requiring treatment. This may be an overestimate. We assume that of the additional 10 percent of servicemembers that experience a serious injury or illness that might not manifest until well after the event occurs (*e.g.,* PTSD, TBI, or depression), none go through the VA disability rating process. We also assume that all eventually seek treatment within five years. Both of these assumptions are very conservative.

This estimate suffers from a number of qualifications and limitations:

- This injury rate was based on data for military personnel that had a high likelihood of experiencing active combat while in the military; to the extent that future cohorts experience less combat, the injury rate may well be significantly smaller.
- It is not clear that all injuries included in this figure will be severe enough to require treatment.
- Even if the injury is severe, it is unclear that the servicemember will seek treatment; it has long been known that the treatment rate for mental health conditions such as depression amongst the general population is less than 100 percent.
- This estimate does not account for other injuries that might require treatment; however, the Department could find little data on which to base an estimate of such injuries.
- This estimate abstracts from the requirement that treatment must occur within five years of separation for the injury to be eligible for FMLA caregiver leave. Thus, we implicitly assume 100 percent will seek treatment within five years.

The Department used projections of military personnel separations for fiscal years 2010 through 2036 from the Department of Veterans Affairs as the basis for the average number of personnel who might newly seek medical care in a given year, *see* Table 3–4.[31] We did not model a medical care usage pattern for these servicemembers. Because we project this to be an average annual ''stream'' of cohorts of separating servicemembers, as long as we assume each year's cohort follows the same usage pattern, the primary factor governing the number of servicemembers requiring treatment is the total number in each cohort that will seek treatment within five years.[32]

TABLE 3–4—MILITARY SEPARATIONS 2010–2036 BY BRANCH AND PERIOD

Fiscal year	Separations by Branch [a]						
	Army	Navy	Air Force	Marines	Reserve Forces [b]	Coast Guard [c]	Grand total
FY2010	77,761	46,927	37,053	28,892	48,342	4,391	243,367
FY2011	78,401	46,803	36,979	28,784	28,148	4,523	223,638
FY2012	78,843	46,643	36,876	28,655	18,075	4,649	213,742
FY2013	79,584	46,741	36,976	28,685	8,019	4,798	204,803
FY2014	79,956	46,956	37,160	28,799	8,054	4,820	205,745
FY2015	79,479	46,672	36,948	28,607	8,004	4,790	204,500
FY2016	79,203	46,506	36,830	28,488	7,974	4,773	203,773
FY2017	79,607	46,740	37,028	28,614	8,012	4,796	204,798
FY2018	80,052	46,998	37,245	28,755	8,055	4,822	205,927
FY2019	80,196	47,079	37,322	28,788	8,067	4,830	206,281
FY2020	80,187	47,071	37,327	28,767	8,064	4,829	206,246
FY2021	80,338	47,156	37,407	28,803	8,077	4,837	206,618
FY2022	81,015	47,550	37,731	29,028	8,143	4,877	208,346
FY2023	80,995	47,535	37,730	29,004	8,140	4,875	208,279
FY2024	80,409	47,188	37,466	28,777	8,079	4,839	206,758
FY2025	79,502	46,653	37,052	28,437	7,986	4,784	204,414
FY2026	79,632	46,726	37,121	28,467	7,997	4,791	204,734
FY2027	79,953	46,912	37,278	28,566	8,027	4,810	205,547
FY2028	79,878	46,865	37,251	28,524	8,018	4,805	205,341
FY2029	79,477	46,627	37,072	28,366	7,976	4,780	204,299
FY2030	79,930	46,890	37,291	28,513	8,020	4,807	205,451
FY2031	80,148	47,015	37,401	28,576	8,040	4,819	206,000
FY2032	79,965	46,906	37,323	28,497	8,020	4,808	205,518
FY2033	79,857	46,839	37,279	28,444	8,008	4,800	205,228
FY2034	79,925	46,877	37,318	28,455	8,013	4,804	205,392
FY2035	79,867	46,840	37,298	28,421	8,006	4,800	205,233

[31] U.S. Department of Veterans Affairs. 2008. Demographics: Veteran Population Model 2007. Table 8S. January. Accessed at *http://www1.va.gov/VETDATA/Demographics/Demographics.asp.*

[32] For example, compared to a single cohort separating from the military over 5 years, modeling the separation of that same cohort over 10 years will result in fewer servicemembers from that cohort seeking treatment in any given year. However, modeling separation over 10 years will result in servicemembers from more cohorts seeking treatment in a given year. Thus, in a steady state, the one effect will cancel out the other. Different models of separation patterns will, however, result in different numbers of treatments prior to reaching the steady state, and the net present value of the stream of treatments.

TABLE 3–4—MILITARY SEPARATIONS 2010–2036 BY BRANCH AND PERIOD—Continued

Fiscal year	Separations by Branch [a]						
	Army	Navy	Air Force	Marines	Reserve Forces [b]	Coast Guard [c]	Grand total
FY2036	79,857	46,832	37,301	28,404	8,003	4,799	205,196
Average	.....	.....	.....	.....	.....	.....	207,969

[a] Includes only separations from the five armed services; excludes separations from the Public Health Service (PHS) and National Oceanic and Atmospheric Administration (NOAA).

[b] Reserve Forces include only those who have had active Federal military service (other than for training) as a result of their membership in the reserves or National Guard. Reserve forces with prior active military service in the regular military, are classified according to the branch (Army, Navy, Air Force, Marines) in which they served while in the regular military, notwithstanding their subsequent service in the Reserve Forces.

[c] Coast Guard separations estimated from VETDATA ''Non-Defense'' separations by determining the current proportion of non-defense personnel in the Coast Guard (84.8%) versus NOAA and PHS.

Source: *http://www.va.gov/VETDATA/Demographics/Demographics.asp.*

The Department proposes to define a serious injury or illness of a veteran as an injury or illness incurred in the line of duty on active duty (or a pre-existing injury or illness exacerbated by service) that manifests itself before or after the member became a veteran and is either: 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; 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 higher and such VASRD rating is based, in whole or in part, on the condition precipitating the need for military caregiver leave; or is a condition which significantly impairs the veteran's ability to secure or follow a substantially gainful occupation. Assuming an annual cohort of 203,000 personnel separate from the military each year, and that 20 percent of those personnel incurred an injury or illness in service that manifests before or after the servicemember became a veteran, the Department estimates that approximately 40,600 military personnel (20 percent of 203,000) per year might have family members who may take FMLA caregiver leave, if the regulatory requirements are met. This estimate may be over-inclusive due to data limitations on the severity of service-related injuries and illnesses.

For the 2008 final rule, the Department estimated 1,500 to 14,000 servicemembers will suffer serious injuries or illnesses that require treatment while in the military, and for which family members will take military caregiver leave. 73 FR 68043. Because military caregiver leave may be used for the same injury when the servicemember is in active duty and again when the servicemember becomes a veteran, the family members of these servicemembers in most instances will be eligible for additional caregiver leave after separation from the military by the servicemember. The economic impact attributable to the first instance of leave was accounted for in the 2008 revisions to FMLA, and this economic analysis will need to account for the possibility that these family members may take additional military caregiver leave when their servicemember becomes a veteran.

To determine the number of servicemembers whose family members may take military caregiver leave when the servicemember is on active duty and again when the servicemember becomes a veteran the Department assumes that 100 percent of the servicemembers will receive treatment while in the military and that about 50 percent will seek treatment as a veteran (*e.g.,* not all the injuries will be severe enough to require treatment beyond active service in the military). In other words, the number of injured servicemembers per year with family that may be eligible for caregiver leave is equal to 1.5 times 26,600 (40,600 less 14,000 already accounted for under the 2008 revisions) new servicemembers per year. In addition, we assume that one-half of 14,000 servicemembers that already received treatment while in the military, under the 2008 revisions, will receive treatment after separation. Therefore, under this revision to the FMLA, servicemembers and veterans may have approximately 46,900 injuries or illnesses per year that result in eligible family members taking military caregiver leave. Using the previously described calculations of the joint probabilities that a servicemember will have one or more family members eligible for FMLA (*see* Appendix A), the Department estimates that those 46,900 veterans and servicemembers will have 59,700 eligible family members who may qualify for FMLA and act as caregivers (*see* Appendix A).[33] The Department assumes that at least 26 percent of eligible employees, or an average of 15,500 per year, will take FMLA leave to care for a veteran undergoing medical treatment for a serious injury or illness. This assumption is based on a survey of injured servicemembers concerning the impact of their needs on their caregivers. The survey found that about 16 percent of working caregivers used ''unpaid leave from their job'' and 10 percent ''cut back their hours'' to care for the servicemember.[34] However, the Department is aware that it is not drawing from a more comprehensive data source and acknowledges the limitations of its estimate. The Department seeks comments on whether there are more complete data sources, or if there are ways to develop a more accurate estimate in the absence of more reliable data, that it could utilize in conducting this part of the analysis.

In the 2008 final rule, the Department developed a profile of the ''typical'' usage of military caregiver leave over the course of a 12-month period for an eligible employee. Under this profile of leave, the typical employee will take a block of four weeks of unforeseeable leave upon notification of the serious injury or illness, a second block of two weeks of unforeseeable leave following

[33] The Department made one modification to the joint probabilities used for caregiver leave. In addition to family members such as parents, spouses, and adult children, designated ''next-of-kin'' are also eligible to take military caregiver leave under FMLA. The Department accounted for this difference by assuming all servicemembers have at least one potential caregiver eligible for FMLA leave.

[34] Christensen et al. Economic Impact on Caregivers of the Seriously Wounded, Ill, and Injured. CNA, April 2009. Available at URL: *http://www.cna.org/documents/D0019966.A2.pdf.*

transfer of the covered servicemember to a rehabilitation facility, two one-week blocks of unforeseeable leave for unanticipated complications, and 40 individual days of foreseeable leave to care for the covered servicemember. 73 FR 68051.

This profile is based on a typical leave pattern of an eligible employee caring for an injured or ill servicemember on active duty; for the purpose of this analysis, the profile was adjusted to capture a likely leave pattern for employees taking leave to care for a covered veteran. In this case, the nature of the serious injury or illness is expected to be different from those encountered during active duty. We assume an injury to an active duty servicemember that results in FMLA caregiver leave is likely to be a sudden, severe injury, which necessitates a large block of leave for the employee to travel to be at the bedside of the injured servicemember. Conversely, ongoing treatment for an existing injury or diagnosis and then treatment of an emerging injury or illness (*e.g.,* post-traumatic stress disorder, traumatic brain injury) might call for frequent but short periods of leave for the employee to take the servicemember to appointments and provide other ongoing support. Adjusting the leave profile to account for these differences generates a leave pattern such as that summarized in Table 3–5.

TABLE 3–5—PROFILE OF MILITARY CAREGIVER LEAVE—VETERANS

Reason	Description	Days	Hours
Diagnosis, therapy, or recuperation	1 week unforeseeable	5	40
Travel to appointments and other errands	50 days foreseeable	50	400
Total		*55*	*440*

Based on this profile, the Department estimates that 15,500 eligible employees will take 854,000 days (6.8 million hours) of FMLA leave annually to act as a caregiver for a veteran who is undergoing treatment for a serious illness or injury.

2. Air Transportation Industry FMLA Leave

The proposed changes to the FMLA eligibility requirements for airline flight crew employees do not alter the number of covered employers in the airline industry but increase the number of pilots, co-pilots, flight attendants and flight engineers who are eligible to take FMLA leave, and as a result, will likely increase the total number of FMLA leaves taken by these employees in the airline industry.[35] The amendment changes flight crew eligibility such that an airline flight crew employee meets the hours of service requirement if, during the previous 12-month period, he or she has worked or been paid for not less than 60 percent of the applicable total monthly guarantee (or its equivalent), and not less than 504 hours, not including personal commute time, or time spent on vacation, medical, or sick leave.

The Department estimated the profile of covered employers in the ''Air Transportation'' industry, the number of flight crew employees who would be eligible for FMLA leave, and the number of leaves they may take. The profile of covered employers, see Table 3–6 below, was developed by estimating the proportion of NAICS code 48 classified as ''Air Transportation'' (NAICS 481) in each size class from the 2006 Statistics of U.S. Businesses at the 6-digit NAICS level. This proportion was multiplied by the total number of establishments, firms, employment and payroll in NAICS 48 according to the 2008 BLS special tabulations. Next, employers with fewer than 50 employees were dropped from the profile; as described below, the Department did not attempt to make an adjustment for establishments with fewer than 50 employees that are owned by firms with more than 50 employees in a 75 mile area for this sub-industry.

TABLE 3–6—2008 COVERED EMPLOYERS IN AIR TRANSPORTATION

Size class (employees)	Number of establish-ments	Employment	Firms	Annual payroll ($1000)	Estimated revenues ($1000)	Estimated net income ($1000)
50 to 99	184	5,098	118	$265,903	$741,840	$4,194
100 to 499	544	16,577	113	919,239	2,369,610	23,342
500+	2,204	439,315	135	24,905,181	70,921,603	2,295,261
Total	2,932	460,990	366	26,090,323	74,033,052	2,322,797

Source: BLS Special Tabulations, 2008; and Statistics of U.S. Businesses, 2006.

Based on conversations with experts in the airline industry, the Department assumes that all potentially eligible airline flight crew employees are employed at a covered worksite. In general, flight crew members are scheduled for flights from a home base, or ''domicile.'' A domicile would not only include the airline flight crew employees, but the non-flight crew employees as well; therefore, the interviewees observed that for most carriers it was very unlikely that airline flight crew employees would be employed at a domicile with fewer than 50 total employees.[36] Next, the Department determined the total number of flight crew members employed in air transportation from the BLS Occupational Employment Statistics for 2008; in 2008 there were

[35] The FAA defines a flightcrew member as ''A pilot, flight engineer, or flight navigator assigned to duty in an aircraft during flight time.'' See URL: *http://www.faa-aircraft-certification.com/faa-definitions.html.*

[36] Rob DeLucia. 2010. Interview with Rob DeLucia of AIR Conference, Calvin Franz and Lauren Jankovic, both of ERG. Janet Zweber. 2010. Interview with Janet Zweber of U.S. Airways Pilots Association, Calvin Franz and Lauren Jankovic, both of ERG.

about 162,200 airline flight crew employees. This includes pilots, co-pilots, flight engineers, and flight attendants.

The next step was to determine the proportion of those flight crew members who will be eligible for FMLA leave. Crew members who are paid for 50 to 60 hours per month will, over the course of a 12-month period, be paid for 600 to 720 hours and they will easily meet the hours of service required for eligibility under the AFCTCA. According to sample data provided by the industry, about 80 percent of American Airlines flight attendants are paid for 50 or more hours per month, and this is considered reasonably representative of industry patterns.[37] While a similar distribution of paid hours for pilots is not available, the FAA indicates that most pilots are paid for an average of 75 hours per month; based on this observation, the Department assumes that a similar proportion of pilots, 80 percent, would reach the proposed hours of service required for eligibility. Based on these estimates, about 129,760 airline flight crew employees may be eligible to take FMLA leave.

Many airlines have already incorporated FMLA-type provisions in collective bargaining agreements with pilots and flight attendants. In terms of the costs associated with the number of leaves resulting from the proposed changes, it is important to consider the proportion of airline flight crew employees already taking FMLA-type leave under collective bargaining agreements. Based on a review of the current FMLA-type leave policies in the labor contracts for 19 air carriers, the Department finds that about 20 percent of pilots, and 35 to 40 percent of flight attendants are covered and eligible for FMLA-type leave policies.[38] Assuming that 80 percent of pilots and 63 percent of flight attendants are not currently covered by FMLA-type policies, the Department estimates, as outlined in Table 3–7, that, of the 129,760 flight crew members that will be eligible, 90,560 are not already covered by an FMLA-type leave policy under a collective bargaining agreement.

Because there is little information available on the FMLA-type leave usage patterns of flight crew employees, the Department assumes that flight attendants will use FMLA leave at a similar rate to the rest of the population. Based on interviews with experts in the airline industry, pilots (also co-pilots and flight engineers) tend to use less FMLA-type leave due to different demographic needs and the availability of other types of paid leave.[39] The 2008 PRIA extrapolated leave usage rates from surveys of FMLA leave usage to estimate expected leave use among the general population for 2007; the Department further extrapolated this number to estimate an expected leave usage rate of 7.9 percent of eligible employees and applied this rate to the number of eligible flight attendants not covered by a collective bargaining agreement.[40] Given that pilots use less FMLA-type leave, the Department assumed a rate of about 5 percent for eligible pilots and applied that to the estimated number of eligible pilots not covered by a collective bargaining agreement. Based on these estimates and assumptions, just under 6,000 flight attendants, pilots, co-pilots, and flight engineers will take new FMLA leaves under the proposed changes. Assuming that flight crew members will take approximately the same number of leaves per 12-month period as the general population, the Department estimates that each individual will take 1.5 leaves, for a total of 8,930 leaves.[41] Table 3–7 summarizes the estimates developed in this section.

TABLE 3–7—ESTIMATED FMLA USAGE BY FLIGHT CREWS

Flight crew	Number of crew [a]	Number of eligible crew [b]	Eligible crew not covered by CBA FMLA-type policy [c]	Eligible crew, not covered by CBA that will take leave [d]	Number of new FMLA leaves [e]
Pilots	64,800	51,840	41,470	2,070	3,110
Flight Attendants	97,400	77,920	49,090	3,880	5,820
Total	162,200	129,760	90,560	5,950	8,930

Sources: BLS Occupational Employment Statistics, May 2008, Scheduled Air Transportation; CONSAD Research Corporation, December 7, 2007.

[a] Number of pilots includes: pilots, copilots and flight engineers (532011); and commercial pilots (532012).

[b] Eligibility based on estimated proportion of crew members (80%) meeting proposed hours of service requirement.

[c] Based on a sample of CBA for Flight attendants about 35% to 40% are currently covered by an FMLA-type provision such that most are eligible to take leave (we assumed a point estimate of 37% for the calculation); for Pilots about 20% are currently covered by an FMLA-type provision such that they are eligible to take leave.

[d] Flight attendants take leave at same rate as other industries (7.9%); Pilots and other crew use slightly less FMLA leave (5%).

[e] Individuals taking FMLA leave average 1.5 leaves per year.

In developing a proposed method to calculate FMLA-leave usage for airline flight crew employees on reserve status, the Department considered a methodology based solely on the FLSA principles of hours worked, as is typically used for employees other than airline flight crew employees. However, since the airline industry is already tracking and recording airline flight crew employees' hours pursuant to FAA regulations, such as the flight, duty, and rest rules, the Department rejected this option. *See* 14 CFR pt. 91. The Department believes that imposing an FLSA ''hours worked'' methodology on the airline industry would require employers to create another

[37] Table ''AA Flight Attendant Block Hours and Paid Hours'' provided by Interviewee. Rob DeLucia. 2010. Interview with Rob DeLucia of AIR Conference, Calvin Franz and Lauren Jankovic, both of ERG. Table available at URL: *http://www.aanegotiations.com/documents/AAFACharts_7.8.10.pdf;* Last accessed on March 21, 2011.

[38] Based on a review of excerpts from the collective bargaining agreements of 19 airlines transmitted to the Department by Steve Schembs, Association of Flight Attendants—CWA, on January 19, 2010.

[39] Rob DeLucia. 2010. Interview with Rob DeLucia of AIR Conference, Calvin Franz and Lauren Jankovic, both of ERG. Janet Zweber. 2010. Interview with Janet Zweber of U.S. Airways Pilots Association, Calvin Franz and Lauren Jankovic, both of ERG.

[40] The extrapolation is used because the survey was performed relatively soon after FMLA was enacted; over time, as employee knowledge of FMLA provisions has grown, presumably so has FMLA usage.

[41] CONSAD Research Corporation, December 7, 2007.

recordkeeping system, which would be unduly burdensome and costly for employers. As such, the Department did not quantify the cost of this alternative.

D. Costs

This section describes the costs associated with the proposed changes to FMLA, including: regulatory familiarization, employer and employee notices, certifications, and other costs.

1. Regulatory Familiarization

In response to the proposed changes to the FMLA, each employer will need to review the changes and determine what revisions are necessary to their policies, obtain copies of the revised FMLA poster and templates for required notices and certifications, and update their handbooks or other leave-related materials to incorporate the changes (*see* ''General Notice'' below). This is a one-time cost to each employer, calculated as two hours at the loaded hourly wage of a Human Resources (HR) staff member in the airline industry and one hour in all other industries to complete the tasks described above. Industries other than the airline industry will need less time for this task because there is no need for them to review the components of the rule pertaining to flight crews and they are already familiar with the requirements of FMLA. The Department seeks comment on whether two hours for the airline industry and one hour for all other industries are reasonable estimates for employers to review this rule and determine what revisions may need to be made to their employment guides and practices, such as updating company policies and/or timekeeping systems.

2. Employer Notices

Under the FMLA, as described in § 825.300, employers are required to provide certain types of notices to employees regarding FMLA eligibility, employee rights and responsibilities, and employee usage of leave. The estimated time to complete each notice is based on the PRA contained in the final rule. 73 FR 68040.

General Notice. Every covered employer must provide general notice of FMLA coverage to all employees; this notice may be provided in employee handbooks or other benefits and leave materials or as a one-time notice to new employees. For the purpose of this analysis, the cost associated with the proposed changes will be a one-time cost to each employer to update the notice provided and is included under regulatory familiarization costs above.

Eligibility Notice and Rights and Responsibilities Notice. An employer is required to notify an employee of their eligibility to take FMLA leave when an employee requests FMLA leave or the employer becomes aware that an employee's leave may be for an FMLA-qualifying reason. The notice must state whether or not the employee is eligible and, if not, the reason the employee is not eligible. Along with the eligibility notice, the employer must include a discussion of employee rights and obligations, amount of leave designated as FMLA, the applicable 12-month period for leave, certification requirements, and other key details. The cost of these combined notices is calculated as 10 minutes at the loaded hourly wage of an HR staff member to process each notice.

Designation Notice. The employer is required to determine if leave taken by the employee for an FMLA-qualifying reason will be designated and counted as FMLA leave and provide written notice to the employee of this determination. Notice must be provided even if the employer determines that the leave will not be designated as FMLA, and only one notice is required per FMLA reason per 12-month period. The cost of this type of notice is calculated as 10 minutes at the loaded hourly wage of an HR staff member to process each notice.

Certifications

Under the FMLA, as described in § 825.305, employers are allowed to request certification to support an employee's need for FMLA leave due to their own or a family member's serious health condition, the serious injury or illness of a covered servicemember, a qualifying exigency, or to verify an employee's fitness for duty after an absence due to their own health condition.[42] The costs associated with these certifications include: Employer cost to request, review, and verify the certification and employee cost to obtain the certification from the designated authority.

Medical Certification. This type of certification may be requested of employees who take FMLA leave for their own serious health condition or that of a family member and is obtained from the health care provider. This is a recurring cost to both the employee and the employer for each FMLA leave event that is required to have medical certification. The cost to the employee is calculated as the cost of the visit to the health care provider completing the certification, assumed to be approximately $50 per visit.[43] The cost to the employer is 30 minutes at the loaded hourly wage of an HR staff person to review and verify each certification. The proposed changes will only impact the usage of FMLA leave for the employee's own or the employee's family member's serious health condition for flight crew members; for the purposes of this analysis, the additional costs of the proposed changes will only accrue to flight crew members and airline industry employers. (The cost for medical certification for military caregiver leave is discussed below.)

Qualifying Exigency. Employees taking FMLA leave for a qualifying exigency may be asked to provide a copy of the relevant military orders or other documentation, and a copy of Form WH–384 ''Certification of Qualifying Exigency'' to their employers to substantiate their need for leave. This is a recurring cost to the employer for each FMLA qualifying exigency leave for which the employer requires the employee to provide certification. The cost is calculated as 20 minutes at the loaded hourly wage of an HR staff person to review and verify each certification.

Military Caregiver. Employees taking FMLA military caregiver to care for a covered servicemember with a qualifying illness or injury may be asked to provide medical certification of the condition from an authorized health care provider. This is a recurring cost to both the employee and the employer for each FMLA military caregiver leave event that is required to have medical certification. The cost to the employee is calculated as the cost of the visit to the health care provider completing the certification, assumed to be approximately $50 per visit.[44] The cost to the employer is 30 minutes at the loaded hourly wage of an HR staff person to review and verify each certification. For the purposes of this analysis, these costs accrue to employees taking FMLA military caregiver to care for a covered veteran with a qualifying illness or injury and their employers.

Fitness for Duty. For certain occupations, employers may desire certification from a medical professional that an employee is well enough to

[42] An unknown percent of employers require employees to periodically recertify their need for FML. We have no data on the percent of employers that require certification, and believe the percent of employers that require recertification is a small percent of those that require certification. Therefore we have not attempted to estimate the number of employers that require recertification or the costs associated with it; we expect that these costs are small.

[43] CONSAD, December 2007.

[44] CONSAD, December 2007.

fulfill their duties following an FMLA leave for the employee's own serious health condition. Under prescribed circumstances, an employer may request a fitness-for-duty certification. The cost to the employee is calculated as the cost of the visit to the health care provider completing the certification, assumed to be approximately $50 per visit.[45] The cost to the employer is 30 minutes at the loaded hourly wage of an HR staff person to review and verify each certification. For the purposes of this analysis, the additional costs of the proposed changes will only accrue to flight crew members and airline industry employers.

3. Other Employer Costs

The FMLA includes employer recordkeeping requirements but those costs are not addressed here because the proposed changes do not affect the type of records the employer is required to keep nor the amount of time they must keep them. Employers must continue to keep and maintain records under the proposed changes as they are required to do so under the current regulations. Additionally, while the proposed rule does newly cover airline flight crew employees, the Department expects that employers in the airline industry have already been tracking non-flight crew employees' hours to comply with the FMLA. Covered airlines must currently comply with FMLA with respect to employees, such as ticketing agents, baggage handlers, and administrative personnel. As such, the Department does not expect the proposed rule to create any additional recordkeeping burdens on airline employers.

a. *Employee Health Benefits.* Employers are required by FMLA to maintain employee benefits during their absence on FMLA leave. This is a recurring cost to each employer that is calculated as the cost per hour to cover employee health benefits multiplied by the total number of hours of FMLA leave taken. This cost results from additional reasons an employee may take FMLA leave (qualifying exigency, military caregiver), and additional employees entitled to leave (airline flight crew employees). The Department estimated this cost as part of the 2008 final rule and is using the same methodology here, noting that ''the marginal costs related to workers taking * * * military family leave * * * result from the cost of providing health insurance during the period the worker is on leave * * *. The Department believes these * * * costs are reasonable proxies for the opportunity cost of the NDAA provisions, since health insurance coverage represents the marginal compensation an employer is still required to cover under the FMLA when a worker is absent.'' 73 FR 68051. According to the BLS ''Employer Costs for Employee Compensation Survey'' of June 2008, employers spend an average of $2.25 per employee per hour worked on health insurance coverage.[46]

b. *Replacement Workers.* In some businesses, employers are able to redistribute work among other employees while an employee is absent on FMLA leave but in other cases the employer may need to hire temporary replacement workers. This process involves costs resulting from recruitment of temporary workers with needed skill sets, training the temporary workers, and lost or reduced productivity of these workers. The cost to compensate the temporary workers is in most cases offset by the amount of wages not paid to the employee absent on FMLA leave.

In the initial FMLA rulemaking, the Department drew upon available research to suggest that the cost per employer to adjust for workers who are on FMLA leave is fairly small. 58 FR 31810. As in previous rulemakings, the Department is requesting information from businesses on the impact of different strategies for compensating for workers on leave, particularly the extent to which work is redistributed among other workers, and the costs of recruiting and training temporary workers.

For the purpose of this analysis, we will continue to assume that these costs are fairly small; furthermore, most employers subject to this rule change have been implementing FMLA for some time and have already developed internal systems for work redistribution and recruitment and training of temporary workers. The air transportation industry, however, is an exception to this reasoning and employers in this industry may face additional challenges with respect to scheduling.

Due to the nature of the industry, airlines have varied and complex approaches to scheduling airline flight crew employees for flights.[47] Based on seniority, these employees may bid on their desired domicile (*i.e.,* primary airport), equipment (*i.e.,* type of airplane), and flying schedule (*e.g.,* international, shuttle). Generally, the employees can bid a ''line of flying'' or a ''block'' of flights or may bid on a number of days on reserve. According to our interviewees, approximately 15–20 percent of employees may be on reserve at any point in time and this amount fluctuates by airline and demand.[48] There are different types of reserve that are loosely based on the proximity of the employee to the airport; an employee on ''short call'' may be required to arrive at the domicile within 90 minutes, while an employee on ''long call'' may be given 9 hours notice to arrive at the domicile for a flight.

Overall, the scheduling is fairly flexible in order to manage schedule changes; for example, ''block holders'' can be rescheduled to cover additional flights, flight attendants can engage in ''trip trading'' or volunteer for open flying time, and airlines can use ''dead heading'' to fly in a crew from another airport.

There are several key limitations to the flexibility of the system; the primary one being regulatory limits on flying time and equipment. This limitation is the most stringent for pilots who have more restrictive limitations on flying time than other flight crew members and who may only fly specific types of aircraft. Additionally, schedule changes due to events such as severe weather can impact scheduling; reserve flight crew members are utilized to make up for cancelled and rescheduled flights.

At this point, it is not clear if the AFCTCA will impose a significant cost on air transportation employers, nor the potential magnitude of the cost. The Department believes that the rule will increase the number of flight crew leaves classified as FMLA, but may not necessarily increase the absolute number of leaves taken by these workers.

4. Regulatory Impacts

This section draws on the estimates of potentially affected employees, and the unit costs discussed above to determine the anticipated impact of the proposed regulations in terms of total cost across all industries as well as estimated cost per firm and per employee.

a. Projected Regulatory Cost

The total estimated impact of the proposed changes is $72.4 million in the first year with $59.8 million in recurring costs in subsequent years. Table 5–1 summarizes the total estimated costs of the proposed changes to FMLA by cost

[45] CONSAD, December 2007.

[46] BLS Employment Cost Trends, URL: *http://www.bls.gov/ncs/ect/.* Accessed on 09–29–2010.

[47] This discussion is highly generalized and may not represent the practices of a specific airline. The purpose of the discussion is to provide context for understanding the impact of FMLA leave on overall scheduling practices.

[48] Rob DeLucia. 2010. Interview with Rob DeLucia of AIR Conference, Calvin Franz and Lauren Jankovic, both of ERG.

type (first year, recurring), amendment (flight crew, military caregiver), and regulatory requirement (familiarization, notices, certifications, benefits).

TABLE 5–1—SUMMARY OF IMPACT OF PROPOSED CHANGES TO FMLA

Component	Year 1 ($1000)	Year 2 ($1000)
Total	$72,398	$59,791
By Amendment . . .		
Any FMLA revision	12,607	0
Flight Crew Technical Amendment	372	372
NDAA 2010	59,419	59,419
Qualifying Exigency	*25,832*	*25,832*
Military Caregiver	*33,587*	*33,587*
By Requirement . . .		
Regulatory Familiarization	12,607	0
Employer Notices	26,851	26,851
Certifications	722	722
Health Benefits	32,218	32,218

[a] Columns may not sum due to rounding.

All covered employers will incur costs of $12.6 million during the first year for regulatory familiarization associated with any new FMLA revision. Other than the initial regulatory familiarization costs that occur in the first year, all other costs are annual costs; they occur in the first year, and in each subsequent year. Covered employers in the air transportation industry who are not already providing family and medical leave to flight crew employees will incur costs of about $372 thousand per year to implement the changes. Covered employers of workers eligible for military family leave will incur costs of about $59.4 million per year as a result of the proposed changes. Looking at the key requirements of FMLA, most of the costs of the proposed changes will stem from generation of employer notices and maintenance of health benefits in recurring years.

To facilitate the public's understanding of the impact of this proposed rule, the Department provides some alternative assumptions on the utilization of leave and corresponding costs. However, due to the lack of reliable data on which to base alternative assumptions, we do not include these ranges in the summary analysis.

The Department estimates the cost of the NDAA as $59.4 million, with qualifying exigency leave costing $25.8 million and military caregiver leave costing $33.6 million. However, under different scenarios, the cost of the NDAA may increase or decrease. The cost of qualifying exigency leave will vary between $2.6 million and $54.6 million in times of low conflict and high conflict.[49] As a result, the cost of the NDAA will vary from $36.2 million in low conflict times and $88.2 million in high conflict times. The cost of qualifying exigency leave may also change if leave taken for Rest and Recuperation is closer to 5 days or 15 days. Under this scenario, the cost of qualifying exigency leave might range from $23.1 million to $28.6 million, and, thus, the total cost of the NDAA will range from $56.6 million to $62.1 million.

Similarly, if the definition of serious injury or illness was set only to include disability ratings of 60% or greater (*i.e.,* was more stringent), or alternatively to include more ratings of 30% or greater (*i.e.,* was more inclusive), then the cost of military caregiver leave would range from $29.8 million to $44.9 million. As a result, the total cost of the NDAA would vary between $55.7 million and $70.7 million.

Table 5–2 provides the total, net present value and average annualized projected compliance costs over 10 years. Average annualized costs take the entire stream of costs over 10 years, including both first-year costs that are only incurred once, and recurring costs that are incurred every year, and converts them into a stream of equal annual payments with a net present value equal to the original stream of time-varying costs at the specified real discount rate. Calculating annualized costs allows the examination of an appropriate measure of average costs (by accounting for the time-value of money) over time without overestimating impacts by focusing on initial costs, or underestimating impacts by focusing solely on recurring costs. The OMB directs that the streams of costs and benefits should be discounted using a 7 percent real discount rate; we also include the three percent real discount rate for reference.

TABLE 5–2—AVERAGE ANNUALIZED COSTS BY AMENDMENT AND REQUIREMENT

Component	Total ($1000)	Annualized ($1000) [a]	
		Real discount rate 3% ($1000)	Real discount rate 7% ($1000)
Total	$610,517	$61,226	$61,469

[49] In addition, no deployments take place in 16 of the 48 years of data examined (33.3 percent), and costs associated with qualifying exigency leave for deployment would be zero in those years. Low levels of conflict occurred in 18 of 48 years (37.5 percent) and high levels of conflict took place in 14 of 48 years (29.2 percent).

TABLE 5–2—AVERAGE ANNUALIZED COSTS BY AMENDMENT AND REQUIREMENT—Continued

Component	Total ($1000)	Annualized ($1000) [a]	
		Real discount rate 3% ($1000)	Real discount rate 7% ($1000)
By Amendment . . .			
Any FMLA revision	12,607	1,435	1,678
Flight Crew Technical Amendment	3,720	372	372
NDAA 2010	594,190	59,419	59,419
Qualifying Exigency	258,323	25,832	25,832
Military Caregiver	335,868	33,587	33,587
By Requirement . . .			
Regulatory Familiarization	12,607	1,435	1,678
Employer Notices	268,509	26,851	26,851
Certifications	7,221	722	722
Health Benefits	322,181	32,218	32,218

[a] Columns may not sum due to rounding.

The results presented in the table show that the proposed changes are projected to cost an average of $61.4 million per year over 10 years using a 7 percent real discount rate.

With respect to the proposed amendments to the rule, the military family leave provisions (FY 2010 NDAA) account for about 96.7 percent of the total annualized cost. In terms of requirements of the rule, employer notices and maintenance of health benefits each account for about 44 and 52 percent of the total cost, respectively.

b. Impacts of Projected Cost

In this section we review the impact of projected regulatory costs on business income. To avoid misrepresenting impacts, they are presented in four different ways: First year costs are the largest, thus the ratio of first-year costs to income (business and worker) represent the most severe impacts that might be incurred in any one year; the ratio of recurring costs to income are more typical impacts—those that can be expected in any year except the first year; finally, average annualized costs, as described above reflect the overall average over 10 years.

Table 5–3 presents the impact of the projected costs on firm income and payroll with respect to first year and recurring costs; the impacts are disaggregated by proposed amendment and regulatory requirement. The projected first year costs of the proposed rule are about $190 per firm, which is less than one-hundredth of a percent of average annual revenues and payroll. For most firms, the military family leave provisions account for the largest part of this impact, at $156 per firm. With the exception of regulatory familiarization, first year costs for employer notices, certifications, and the maintenance of health benefits are identical to the amounts incurred in each subsequent year. The cost of the flight crew technical amendments may be a small portion of overall first year costs, but the impact will be concentrated on the air transportation industry. As a result, the cost per firm is $1,016, which is less than one-hundredth of a percent of average annual revenues and payroll.

The impact of the recurring costs will be about $157 per firm; the military family leave provisions continue to be the driver of the size of the impact due to the cost of employer notices and maintenance of employee health benefits associated with the requirement.

TABLE 5–3—IMPACT OF COMPLIANCE COSTS ON FIRM INCOME

Component	Costs		Projected impacts	
	Total cost	Cost per firm [a]	Cost per firm as percent of revenues	Cost per firm as a percent of annual payroll
First Year Cost	$72,398	$190	0.0003	0.0015
By Amendment . . .				
Any FMLA revision	12,607	33	0.0001	0.0003
Flight Crew Technical Amendment	372	1,016	0.0004	0.0014
NDAA 2010	59,419	156	0.0003	0.0012
By Requirement . . .				
Regulatory Familiarization	12,607	33	0.0001	0.0003
Employer Notices	26,851	71	0.0001	0.0005
Certifications	722	2	0.0000	0.0000
Health Benefits	32,218	85	0.0001	0.0006
Recurring Cost	59,791	157	0.0003	0.0012
By Amendment . . .				
Any FMLA revision	0	0	0.0000	0.0000
Flight Crew Technical Amendment	372	1,016	0.0004	0.0014
NDAA 2010	59,419	156	0.0003	0.0012
By Requirement . . .				
Regulatory Familiarization	0	0	0.0000	0.0000
Employer Notices	26,851	71	0.0001	0.0005
Certifications	722	2	0.0000	0.0000
Health Benefits	32,218	85	0.0001	0.0006

TABLE 5–3—IMPACT OF COMPLIANCE COSTS ON FIRM INCOME—Continued

Component	Costs		Projected impacts	
	Total cost	Cost per firm [a]	Cost per firm as percent of revenues	Cost per firm as a percent of annual payroll
7% Real Discount Rate	61,469	161	0.0003	0.0013
By Amendment . . .				
Any FMLA revision	1,677	4	0.0000	0.0000
Flight Crew Technical Amendment	372	1,016	0.0004	0.0014
NDAA 2010	59,419	156	0.0003	0.0012
By Requirement . . .				
Regulatory Familiarization	1,677	4	0.0000	0.0000
Employer Notices	26,851	71	0.0001	0.0005
Certifications	722	2	0.0000	0.0000
Health Benefits	32,218	85	0.0001	0.0007

[a] Calculated as total cost divided by the number of affected firms. For example, first year NDAA cost per firm is $59 million divided by 381 thousand firms and first year cost per firm for the flight crew technical amendment is $372 thousand divided by 366 firms.

Table 5–3 also presents the impact of projected costs on firm and worker income for average annualized costs with a 7 percent real discount rate. The results demonstrate that the overall average annualized cost of the rule is $61.5 million, or about $161 per firm ($1,016 per firm in the air transportation industry).

Finally, the impacts presented in Tables 5–3 also show the costs per firm as a percent of firm resources. The Department estimated impacts as the national costs of the rule divided by the number of affected firms (including government entities). The total cost per firm of $161 based on the total annualized cost at a 7 percent discount rate composes approximately 3 ten-thousandths of 1 percent of average annual firm revenue. However, it is likely that some of these costs will be borne by the firm and some by the workers; the exact incidence of these impacts will depend on the relative bargaining strength of firms and workers which will vary by industry.

C. Benefits

The Department anticipates significant benefits resulting from the proposed revisions. Employers that have adopted flexible workplace practices cite many economic benefits such as reduced worker absenteeism and turnover, improvements in their ability to attract and retain workers, and other positive changes that translate into increased worker productivity. ''Work-Life Balance and the Economics of Workplace Flexibility'' at 16, Executive Office of the President, Council of Economic Advisors (March 2010). However, quantifying the benefits is challenging. *Id.* The Department does not attempt to quantify these benefits in this analysis, but does, however, describe the expected benefits of each major revision in the proceeding section.

1. Military Family Leave

The benefits stemming from improving access to military leave for military family members were described in the 2008 final rule as follows:

> [T]he families of servicemembers will no longer have to worry about losing their jobs or health insurance due to absences to care for a covered seriously injured or ill servicemember or due to a qualifying exigency resulting from active duty or call to active duty in support of a contingency operation.

73 FR 68069. Based on the preceding analysis, and the availability of recent research examining the impacts of service-connected injuries and illnesses, the Department also anticipates additional benefits to accrue to servicemembers and their families from the FY 2010 NDAA amendments.

Providing job-protected leave for caregivers of covered veterans under the military caregiver provision is expected to have several benefits, including increased family involvement in recovery, improved self-reliance and access to resources for caregivers, and a reduction in negative outcomes for covered veterans and their families.

Recent research suggests that as many as 30 percent of returning servicemembers may suffer from symptoms of PTSD, major depression, and/or traumatic brain injury. These individuals often suffer from:

- Co-morbitities such as anxiety and mood disorders, and substance abuse,
- Increased risk of suicidal ideation and attempts;
- Higher rates of unhealthy behaviors such as smoking, poor diet, and unsafe sex;
- Higher rates of other health problems and mortality; and
- Decreased work productivity in the form of missed work days and decreased performance at work.[50]

While this study focused on active servicemembers, these disorders involve long timeframes for recovery and management of the symptoms so it is reasonable to conclude that these same issues would impact the servicemember following separation from service. Furthermore, the impact of these disorders, and other serious injuries or illnesses incurred by covered servicemembers and veterans, extends to family members as well. Common issues include marital discord and increased likelihood of divorce, intimate partner violence, poor parenting skills and poor child outcomes, and caregiver burden. In ''Economic Impact on Caregivers of the Seriously Wounded, Ill, and Injured,'' the authors describe the impact on caregivers as follows:

> Family support is critical to patients' successful rehabilitation. Especially in a prolonged recovery, it is family members who make therapy appointments and ensure they are kept, drive the servicemember to these appointments, pick up medications and make sure they are taken, provide a wide range of personal care, become the impassioned advocates, take care of the kids, pay the bills and negotiate with the benefits offices, find suitable housing for a family that includes a person with a disability, provide emotional support, and, in short, find they have a full-time job—or more—for which they never prepared. When family members give up jobs to become caregivers, income can drop precipitously.[51]

[50] Tanielian, Terri and Lisa Jaycox. 2008. Invisible wounds of war: psychological and cognitive injuries, their consequences, and services to assist recovery. RAND. Available for download at URL: *www.rand.org*

[51] Christensen, et. al., April 2009, Economic Impact on Caregivers of the Seriously Wounded, Ill, and Injured, CNA, p. 8.

The support provided by caregivers plays a pivotal role in the course of the servicemember's recovery, as noted in ''Invisible Wounds of War'':

> The likelihood that the condition will trigger a negative cascade of consequences over time is greater if the initial symptoms of the condition are more severe and the afflicted individual has other sources of vulnerability * * * Early interventions are likely to pay long-term dividends in improved outcomes for years to come; so, it is critical to help servicemembers and veterans seek and receive treatment.[52]

Providing caregivers with job-protected FMLA leave to care for their family member who is a covered veteran creates a window of opportunity to interrupt the negative cascade of consequences experienced by sufferers of PTSD, TBI and depression. Furthermore, maintaining the flow of resources and self-sufficiency provided by a secure employment situation ensures that the caregivers are able to maintain their own mental and physical health during the veteran's recovery process.[53]

At this point, there is not sufficient data to accurately estimate the number of servicemembers suffering from these disorders or the range of severity of symptoms; as a result, we are unable to quantify the benefits of reduced rates of negative outcomes for affected veterans and their families. However, in ''Invisible Wounds of War,'' RAND developed estimates of costs associated with PTSD, major depression, and TBI stemming from the conflicts in Afghanistan and Iraq. For example:

- Servicemembers diagnosed with PTSD incur costs of $5,000–10,000 per servicemember during the first two years after returning home.[54]
- Servicemembers diagnosed with major depression incur costs of $15,000—25,000 per servicemember during the first two years after returning home.[55]
- Servicemembers diagnosed with TBI incur costs of $27,000 to 32,000 for a mild case up to $268,000 to 408,000 for severe cases.[56]

The proposed regulatory change will likely reduce these costs, and the costs associated with other negative outcomes associated with these diagnoses; but, at this point in time we do not have sufficient data to estimate the reduction in costs.

2. Airline Industry FMLA Leave

As a result of the proposed changes airline flight crew employees will enjoy all the benefits of FMLA coverage that have been afforded to employees in other industries. Additionally, as discussed in the 2008 final rule, employers may see reduced ''presenteeism''—the loss of productivity due to employees working while injured or ill—and a resultant increase in overall productivity, workplace safety, and wellness among employees. 73 FR 68071.

VI. Small Business Regulatory Enforcement Fairness Act; Regulatory Flexibility

This section describes the analysis of impacts on small entities of the proposed rule. The Regulatory Flexibility Act of 1980 (RFA) requires agencies to prepare regulatory flexibility analyses and make them available for public comment when proposing regulations that will have a significant economic impact on a substantial number of small entities. *See* 5 U.S.C. 603. If the rule is not expected to have a significant economic impact on a substantial number of small entities, the RFA allows an agency to certify such, in lieu of preparing an analysis. *See* 5 U.S.C. 605.

The Department has determined that an Initial Regulatory Flexibility Analysis under the RFA is not required for this rulemaking. The FMLA covers private employers of 50 or more employees; employers with fewer than 50 employees are exempt. Moreover, Congress defined, for the purpose of the FMLA, a small business to be one with fewer than 50 employees. Therefore, changes to the FMLA regulations by definition will not impact small businesses.[57] However, in the interest of transparency and to provide an opportunity for public comment, the Department has prepared the following analysis to assess the impact of this regulation on small entities (as defined by the applicable SBA size standards). The Chief Counsel for Advocacy of the Small Business Administration was notified of a draft of this rule upon submission of the rule to the Office of Management and Budget under E.O. 12866.

The Small Business Administration size standard is 500 employees, therefore employers with 50 to 500 employees will be affected by this regulation. Coverage under the FMLA is limited to an estimated 314,752 small employers with 50 to 500 employees. This rule is estimated to cost an average of $190 per firm in the first year, and an average of $157 per firm each year thereafter. *See* Table 5–3. Therefore, this regulation will not have a significant economic impact on any of these small entities. The Department certifies this NPRM is not likely to have a significant economic impact on a substantial number of small entities, and, accordingly, a regulatory flexibility analysis is not required by the RFA.

1. Number of Small Entities

The RFA defines a ''small entity'' as a: (1) Small not-for-profit organization, (2) small governmental jurisdiction, or (3) small business. The Department relied upon standards defined by the Small Business Administration (SBA) to identify firms and governments classified as small. For the purposes of this rulemaking effort, we did not attempt to analyze not-for-profit organizations other than as they appear in the BLS QCEW data used as the basis for the analysis (*e.g.,* not-for-profit hospitals); the estimation of such not-for-profits is therefore included in the estimation of other small firms as described below.

This analysis focuses solely on the costs and impacts of the proposed regulations on small entities and draws on the industry profile described in the E.O. 12866 analysis of this preamble. The Department assumed all firms with fewer than 500 employees are small.

A small governmental jurisdiction is defined as the government of a city, county, town, township, village, school district, or special district with a population of less than 50,000. The Department used the field specifying the population of the governmental jurisdiction in the Census of Governments to determine the number of government entities considered small for RFA purposes. All State governments were assumed to be large for RFA purposes.

Applying these size assumptions to the universe of potentially affected firms (Tables 6–1A) we estimate that 83 percent of entities, about 315,000 impacted by the proposed rule meet SBA's criteria for a small entity. Of those, 251,000 are private sector businesses employing about 57 percent of all workers and earning about 57 percent of estimated revenues. The remaining 63,600 are small government entities employing about 11 percent of workers and accruing about 5 percent of all estimated revenues. About 17

[52] Tanielian and Jaycox, 2008.

[53] Christensen, et. al., 2009, p.9.

[54] RAND, 2008, p. xxiii. Variation due to severity and inclusion, or not, of cost of lives lost to suicide. Costs do not include costs due to substance abuse, domestic violence, homelessness, or family strain.

[55] RAND, 2008, p. xxiii. Costs associated with co-morbid PTSD and depression are approximately $12,000 to 16,000.

[56] RAND, 2008, p. xxiii. Costs presented in 2007 dollars.

[57] SBA Office of Advocacy: A Guide for Governmental Agencies—How to Comply with the Regulatory Flexibility Act. June 2010. *http://www.sba.gov/sites/default/files/rfaguide.pdf.*

percent of private businesses and government agencies are non-small for RFA purposes. These entities employ more than 32 percent of workers, pay 64 percent of wages, and earn 39 percent of annual revenues.

TABLE 6–1A—COVERED FIRMS AND WORKERS BY SBA SIZE STANDARDS

Industry	Number and percent of establishments		Number and percent of employment		Number and percent of firms	
Small						
Private	1,051,716	*84*	52,113,983	*57*	251,134	*66*
Government	127,235	*10*	10,085,977	*11*	63,617	*17*
Subtotal	1,178,951	*94*	62,199,960	*68*	314,751	*83*
Non Small						
Private	16,436	*1*	19,646,940	*22*	40,025	*11*
Government	52,717	*4*	9,299,992	*10*	25,909	*7*
Subtotal	69,153	*6*	28,946,932	*32*	65,934	*18*
Total						
Private	1,068,152	*86*	71,760,923	*79*	291,159	*76*
Government	179,952	*14*	19,385,969	*21*	89,526	*24*
Total	1,248,104	*100*	91,146,892	*100*	380,685	*100*

Industry	Annual Payroll ($mil.) and percent of total		Estimated 2008 revenues ($mil.) and percent of total		Estimated 2008 net income ($mil.) and percent of total	
Small						
Private	$1,375,524	*28*	$13,423,633	*57*	$304,497	*30*
Government	395,610	*8*	1,092,309	*5*	26,180	*3*
Subtotal	1,771,134	*36*	14,515,943	*61*	330,677	*32*
Non Small						
Private	2,823,743	*57*	6,763,222	*29*	319,226	*31*
Government	374,268	*8*	2,444,202	*10*	375,124	*37*
Subtotal	3,198,011	*64*	9,207,424	*39*	694,349	*68*
Total						
Private	4,199,267	*85*	20,186,856	*85*	623,723	*61*
Government	769,878	*15*	3,536,511	*15*	401,304	*39*
Total	4,969,145	*100*	23,723,367	*100*	1,025,0267	*100*

Table 6–1B presents the number of affected entities for the air transportation industry. While 63 percent of firms are small by SBA standards, the 37 percent of firms that are not small account for 75 percent of establishments, 95 percent of employees and payroll, 96 percent of revenues and 99 percent of net income.

TABLE 6–1B—AIR TRANSPORTATION INDUSTRY (NAICS 481) COVERED FIRMS AND WORKERS BY SBA STANDARDS

Industry	Number and percent of establishments		Number and percent employment		Number and percent of firms	
Small	728	25	25,004	5	231	63
Non Small	2,204	75	506,796	95	135	37
Total	2,932	100	531,800	100	366	100

TABLE 6–1B-CONTINUED—PAYROLL, REVENUE, AND INCOME OF AIR TRANSPORTATION INDUSTRY COVERED FIRMS BY SBA SIZE STANDARDS

Industry	Annual payroll ($mil.) and percent of total		Estimated revenues ($mil.) and percent of total		Estimated net income ($mil.) and percent of total	
Small	$1,185	5	$4,321	4	$38	1
Non Small	24,905	95	98,496	96	3,188	99
Total	26,090	100	102,817	100	3,226	100

2. Cost to Small Entities

Table 6–2A summarizes estimated first-year, recurring, and annualized compliance costs attributable to the proposed rule for both small and non-small businesses. Among all entities (both business and government) potentially affected by the proposed rule 83 percent are small for the purposes of the RFA. *See* Table 6–1A. They are projected to incur about 71 percent of first-year costs, 68 percent of recurring costs, and 68 percent of average annualized costs. *See* Table 6–2A. In the air transportation industry, small entities account for 8 percent of first-year costs, 5 percent of recurring costs, and 5 percent of average annualized costs although they compose 63 percent of firms. *See* Table 6–2B.

TABLE 6–2A—COMPLIANCE COSTS BY BUSINESS SIZE [a]

Industry	First year ($1000) and percent of total		Recurring ($1000) and percent of total		Annualized ($1000) and percent of total	
Small						
Private	$40,716	*56*	$33,981	*57*	$34,877	*57*
Government	9,994	*14*	6,585	*11*	7,039	*11*
Subtotal	50,709	*70*	40,566	*68*	41,916	*68*
Non Small						
Private	14,048	*19*	12,972	*22*	13,116	*21*
Government	7,652	*11*	6,264	*10*	6,449	*11*
Subtotal	21,689	*30*	19,225	*32*	19,553	*32*
Total						
Private	54,764	*76*	46,954	*79*	47,993	*78*
Government	17,646	*24*	12,849	*22*	13,487	*22*
Total	72,398	*100*	59,791	*100*	61,469	*100*

[a] Column totals may not sum due to rounding.

TABLE 6–2B—AIR TRANSPORTATION INDUSTRY (NAICS 481) COMPLIANCE COSTS BY BUSINESS SIZE

Industry	First year and percent of total ($1000)		Recurring and percent of total ($1000)		Annualized and percent of total ($1000)	
Small	$30	*8*	$17	*5*	$19	*5*
Non Small	362	*92*	355	*95*	355	*95*
Total	392	*100*	372	*100*	375	*100*

Small entities constitute the substantial majority of affected entities and are projected to incur the majority of compliance costs; however, they do not bear a disproportionate share of projected costs, nor will those costs result in a significant economic impact on those small entities. First-year costs of the rule are the largest costs incurred by all entities, but these average less than $200 for small firms in the private sector and for small government entities. *See* Table 6–3A. Estimated compliance costs per firm for small firms do not compose a higher percentage of firm revenues than for large firms, and in no case does that cost exceed 0.01 percent of firm revenues. For small air transportation firms, the cost per firm is smaller than the overall average (*see* Table 6–3B); for non-small firms, cost per firm is larger than the overall average, but still composes one ten-thousandth of a percent of annual revenues.

TABLE 6–3A—COMPLIANCE COSTS PRESENTED AS COST PER FIRM AND COST AS A PERCENT OF FIRM INCOME, BY SBA SIZE STANDARDS

Industry	First year		Recurring		Annualized	
	Cost per firm	Cost as percent of income	Cost per firm	Cost as percent of income	Cost per firm	Cost as percent of income
Small						
Private	$162	*0.00000*	$135	*0.00000*	$139	*0.00000*
Government	157	*0.00001*	104	*0.00000*	111	*0.00000*
Subtotal	161	*0.00000*	129	*0.00000*	133	*0.00000*
Non Small						
Private	351	*0.00000*	324	*0.00000*	328	*0.00000*
Government	295	*0.00000*	242	*0.00000*	249	*0.00000*
Subtotal	329	*0.00000*	292	*0.00000*	297	*0.00000*
Total						
Private	188	*0.00000*	161	*0.00000*	165	*0.00000*
Government	197	*0.00000*	144	*0.00000*	151	*0.00000*

TABLE 6–3A—COMPLIANCE COSTS PRESENTED AS COST PER FIRM AND COST AS A PERCENT OF FIRM INCOME, BY SBA SIZE STANDARDS—Continued

Industry	First year		Recurring		Annualized	
	Cost per firm	Cost as percent of income	Cost per firm	Cost as percent of income	Cost per firm	Cost as percent of income
Total	190	*0.00000*	157	*0.00000*	161	*0.00000*

TABLE 6–3B—COMPLIANCE COSTS TO AIR TRANSPORTATION PRESENTED AS COST PER FIRM AND COST AS A PERCENT OF FIRM INCOME, BY SBA SIZE STANDARDS

Industry	First year		Recurring		Annualized	
	Cost per firm	Cost as percent of income	Cost per firm	Cost as percent of income	Cost per firm	Cost as percent of income
Small	$129	0.0003	$76	0.0002	$83	0.0002
Non Small	2,674	0.0001	2,621	0.0001	2,628	0.0001
Total	1,070	0.0000	1,016	0.0000	1,023	0.0000

In summary, although the potential impacts of the proposed rule are larger for small firms when measured as the absolute cost per firm or employee, or as a percent of firm revenues or employee wages, small firms do not bear a disproportionate burden under this rule. Therefore, the Department believes that the proposed rule will not have a significant economic impact on a substantial number of small entities. Furthermore, as noted above, Congress defined ''small business'' for the purpose of the FMLA as one employing fewer than 50 employees and the proposed regulation therefore, by definition, does not impact small entities. However, using SBA's size standard of 500 employees to define ''small business'', an estimated 314,752 employers with 50 to 500 employees are covered by the FMLA, this rule is only estimated to cost an average of $161 per small firm in the first year, and an average of $129 per small firm each year thereafter. This regulation will not have a significant economic impact on any of these small entities. Therefore, the Department has determined and certified that this rule will not have a significant economic impact on a substantial number of small entities.

Appendix A: Military Family Leave Profile

In order to estimate the number of individuals who may take leave under the qualifying exigency or military caregiver provisions as a result of the proposed changes, the Department estimated (1) the number of active duty servicemembers whose family members are entitled to qualifying exigency leave and the number of veterans whose family members will be entitled to caregiver leave, (2) the age profile of those servicemembers and veterans, and (3) the number of eligible family members or caregivers associated with that age profile. The first estimate is described earlier in this preamble. This appendix provides an explanation of the method used to develop the age profiles and eligible family members.

Overview of Approach

The Department attempted to replicate the method used in the CONSAD 2007 report to ensure consistency with previous estimates.[58] In that report, CONSAD used data from the Defense Manpower Database, the Current Population Survey, and the decennial Census of Population to estimate the age distribution of servicemembers; the proportion of servicemembers in each age category with living parents, a spouse, and children (over 18 years of age);[59] and the proportion of those individuals who may be employed by a covered employer. The Department used these estimates to determine the likely number of family members eligible to take leave for a qualifying exigency or to act as a caregiver for a covered veteran.

The first step is to apply the age profile of servicemembers to the estimated number of servicemembers to distribute the number of servicemembers to the age groups. Table A–1 presents the estimated proportion of servicemembers by age range estimated by CONSAD. The Department aggregated the age groups for this calculation. For example, if the proposed rule was expected to affect 100 servicemembers then this age profile would estimate that 47 of them would be between the ages of 22 and 30 years old.

TABLE A–1—AGE PROFILE OF SERVICEMEMBERS

General military servicemember age range	Average estimated proportion of military members (percent)
18–21	19.9
22–30	47.0
31–40	24.8
41–50	8.0
51–59	0.6

The next step is to estimate the number of servicemembers in each age group with 0, 1, 2, 3, 4, or 5 eligible family members. Table A–2 presents the estimated number of eligible family members by age range of the servicemember.

[58] CONSAD 2007. Appendix A.

[59] Under military caregiver leave a designated ''next of kin'' may also take leave to care for a covered veteran. We accounted for these individuals by assuming that every covered veteran has at least one caregiver.

TABLE A–2—PROPORTION OF SERVICEMEMBERS WITH "N" ELIGIBLE FAMILY MEMBERS

General military servicemember age range	Proportion of servicemembers with n eligible family members, where n =					
	0 (%)	1 (%)	2 (%)	3 (%)	4 (%)	5 (%)
18–21	29.32	49.5	21.0	0.2	0.0	0.0
22–30	27.38	46.5	23.3	2.8	0.0	0.0
31–40	31.08	44.1	21.1	3.6	0.2	0.2
41–50	37.78	40.4	16.9	4.2	0.7	0.1
51–59	45.25	35.4	14.6	3.9	0.7	0.1

Finally, the number of estimated eligible family members for each age group of servicemembers is summed up by multiplying the number of servicemembers in each column by the number of eligible family members. For example, for each age group the calculation is (# × 0) + (# × 1) + (# × 2) + (# × 3) + (# × 4) + (# × 5). Next, the total number of eligible family members is summed across the age groups to estimate the total number of eligible family members.

The following sections illustrate this method for the calculation of the number of eligible family members who may take qualifying exigency leave, and the number of eligible family members who may take leave to act as a military caregiver for a covered veteran.

Qualifying Exigency Leaves

Table A–3 presents the calculation of the projected number of servicemembers in each age category based on the estimated average number of covered military members and age profile of military members.

TABLE A–3—ESTIMATED AGE PROFILE OF SERVICEMEMBERS ON COVERED ACTIVE DUTY

General military servicemember age range	Total average number of military members	Average estimated proportion of military members by age range (percent)	Projected number of servicemembers on covered active duty per year
18–21	197,000	19.9	39,203
22–30	197,000	47.0	92,590
31–40	197,000	24.8	48,856
41–50	197,000	8.0	15,760
51–59	197,000	0.6	1,182

Table A–4 presents the calculation of the number of eligible family members of servicemembers in each age group; this combines the projected number of servicemembers from Table A–3 with the distribution of family members presented in Table A–2.

TABLE A–4—ESTIMATED NUMBER OF ELIGIBLE FAMILY MEMBERS OF SERVICEMEMBERS BY AGE RANGE

Age range	Projected number of servicemembers	Number of eligible family members						Total number of eligible family members
		0	1	2	3	4	5	
18–21	39,203	11,492	19,386	8,233	92.1	0	0	36,128
22–30	92,590	25,353	43,086	21,533	2,615	0	0	93,996
31–40	48,856	15,184	21,545	10,331	1,750	85.5	9.8	47,848
41–50	15,760	5,954	6,362	2,656	657	116	16.5	14,190
51–59	1,182	535	419	172	46.5	8.39	1.18	942
Total	197,591	58,519	90,798	42,924	5,161	210	28	193,104

Military Caregiver Leaves

Table A–5 presents the calculation of the projected number of servicemembers in each age category based on the estimated average number and age profile of servicemembers and covered veterans.

TABLE A–5—ESTIMATED AGE PROFILE OF SERVICEMEMBERS AND COVERED VETERANS WITH SERIOUS INJURY OR ILLNESS

General military servicemember age range	Total average number of military members	Average estimated proportion of military members by age range percent)	Projected number of servicemembers with serious injury or illness per year
18–21	92,500	19.8	18,352
22–30	92,500	46.9	43,345
31–40	92,500	24.7	22,871
41–50	92,500	8.0	7,378
51–59	92,500	0.6	553

Table A–6 presents the calculation of the number of eligible caregivers of servicemembers in each age group; this combines the projected number of servicemembers from Table A–5 with the distribution of family members presented in Table A–2 with one difference. Under military caregiver leave we assume that each covered servicemember has at least one caregiver; so, the servicemembers in the category ''0'' caregivers are assumed to have at least 1 caregiver.

TABLE A–6—ESTIMATED NUMBER OF ELIGIBLE CAREGIVERS OF SERVICEMEMBERS BY AGE RANGE

Age range	Projected number of service members	Number of eligible family members						Total number of eligible family members
		0	1	2	3	4	5	
18–21	18,352	5,380	9,075	3,854	43.1	0	0	22,293
22–30	43,345	11,869	20,170	10,080	1,224	0	0	55,872
31–40	22,871	7,108	10,086	4,836	819	40.0	4.6	29,508
41–50	7,378	2,787	2,978	1,243	308	54	7.7	9,430
51–59	553	250	196	81	21.7	3.93	0.55	691
Total	92,500	27,395	42,506	20,094	2,416	98	13	117,794

VII. Unfunded Mandates Reform Act

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), Public Law 104–4, establishes requirements for Federal agencies to assess the effects of their regulatory actions on State, local, and tribal governments as well as on the private sector. Under Section 202(a) of UMRA, the Department must generally prepare a written statement, including a cost-benefit analysis, for proposed and final regulations that ''includes any Federal mandate that may result in the expenditure by State, local, and tribal governments, in the aggregate or by the private sector'' in excess of $100 million in any one year (equivalent to $143 million in 2010 dollars after adjusting for inflation).

State, local, and tribal government entities are within the scope of the regulated community for this proposed regulation. The Department has determined that this rule contains a Federal mandate that is unlikely to result in expenditures of $143 million or more for State, local, and tribal governments, in the aggregate, or the private sector in any one year. Total costs to government entities do not exceed $25 million in any single year of the rule (*see* Table 7–2A). Total costs to the private sector do not exceed $53 million in the first, most costly year of the rule. *See* Table 7–2A. The total first year cost of this rule is estimated at $72.4 million to the private and public sectors combined. Thus, the proposed rule is not expected to result in any expenditures of $100 million or more for State, local, and tribal governments, in the aggregate, or the private sector in any one year.

VIII. Executive Order 13132, Federalism

The proposed rule does not have federalism implications as outlined in E.O. 13132 regarding federalism. Although States are covered employers under the FMLA, the proposed rule does not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.

IX. Executive Order 13175, Indian Tribal Governments

This proposed rule was reviewed under the terms of E.O. 13175 and determined not to have ''tribal implications.'' The proposed rule does not have ''substantial direct effects on one or more Indian tribes, on the relationship between the Federal government and Indian tribes, or on the distribution of power and responsibilities between the Federal government and Indian tribes.'' As a result, no tribal summary impact statement has been prepared.

X. Effects on Families

The undersigned hereby certifies that this proposed rule will not adversely affect the well-being of families, as discussed under section 654 of the Treasury and General Government Appropriations Act, 1999.

XI. Executive Order 13045, Protection of Children

E.O. 13045 applies to any rule that (1) is determined to be ''economically significant'' as defined in E.O. 12866, and (2) concerns an environmental health or safety risk that the promulgating agency has reason to believe may have a disproportionate effect on children. This proposal is not subject to E.O. 13045 because although the rule addresses family and medical leave provisions of the FMLA including the rights of employees to take leave for the birth or adoption of a child and to care for a healthy newborn or adopted

child, and to take leave to care for a son or daughter with a serious health condition, it does not concern environmental health or safety risks that may disproportionately affect children.

XII. Environmental Impact Assessment

A review of this proposal in accordance with the requirements of the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. 4321 *et seq.;* the regulations of the Council on Environmental Quality, 40 CFR part 1500 *et seq.;* and the Departmental NEPA procedures, 29 CFR part 11, indicates that the proposed rule will not have a significant impact on the quality of the human environment. There is, thus, no corresponding environmental assessment or an environmental impact statement.

XIII. Executive Order 13211, Energy Supply

This proposed rule is not subject to E.O. 13211. It will not have a significant adverse effect on the supply, distribution or use of energy.

XIV. Executive Order 12630, Constitutionally Protected Property Rights

This proposal is not subject to E.O. 12630, because it does not involve implementation of a policy ''that has takings implications'' or that could impose limitations on private property use.

XV. Executive Order 12988, Civil Justice Reform Analysis

This proposed rule was drafted and reviewed in accordance with E.O. 12988 and will not unduly burden the Federal court system. The proposed rule was: (1) Reviewed to eliminate drafting errors and ambiguities; (2) written to minimize litigation; and (3) written to provide a clear legal standard for affected conduct and to promote burden reduction.

List of Subjects in 29 CFR Part 825

Employee benefit plans, Health, Health insurance, Labor management relations, Maternal and child health, Teachers.

Signed at Washington, DC, this 30th day of January, 2012.

Nancy J. Leppink,

Deputy Administrator, Wage and Hour Division.

For the reasons set out in the preamble, the Department of Labor proposes to amend Title 29 part 825 of the Code of Federal Regulations as follows:

1. The authority citation for part 825 continues to read as follows:

Authority: 29 U.S.C. 2654

Subpart A—Coverage Under the Family and Medical Leave Act

2. Amend § 825.100 by revising the first and second sentences of paragraph (a) to read as follows:

§ 825.100 The Family and Medical Leave Act.

(a) The Family and Medical Leave Act of 1993, as amended, (FMLA or Act) allows ''eligible'' employees of a covered employer 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 covered active duty or call to covered active duty status. In addition, ''eligible'' employees of a covered employer 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. * * *

* * * * *

3. Amend § 825.101 by revising the first sentence of paragraph (a) to read as follows:

§ 825.101 Purpose of the Act.

(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. * * *

* * * * *

4. Amend § 825.107 by revising the last sentence of paragraph (c) to read as follows:

§ 825.107 Successor in interest coverage.

* * * * *

(c) * * * A successor which meets FMLA's coverage criteria must count periods of employment and hours of service with the predecessor for purposes of determining employee eligibility for FMLA leave.

5. Amend § 825.110 by:

a. revising paragraph (a)(2);

b. revising the first and third sentences of paragraph (b)(2)(i);

c. revising the first sentence of paragraph (c)(1);

d. adding new paragraph (c)(2);

e. re-designating current paragraph (c)(2) as (c)(3);

f. revising the first sentence of newly designated paragraph (c)(3);

g. re-designating current paragraph (c)(3) as (c)(4);

h. revising newly designated (c)(4); and

i. revising paragraph (d)

to read as follows:

§ 825.110 Eligible employee.

(a) * * *

(2) Has been employed for at least 1,250 hours of service during the 12-month period immediately preceding the commencement of the leave (*see* § 825.110(c)(2) for special hours of service requirements for airline flight crew employees), and

* * * * *

(b) * * *

(2) * * *

(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.,* qualifying military service obligation. * * * However, this section does not provide any greater entitlement to the employee than would be available under USERRA; or * * *

* * * * *

(c)(1) Except as provided in paragraph (c)(2) and (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) for determining compensable hours of work. * * *

(2) Whether an airline flight crew employee meets the hours of service requirement is determined by assessing the number of hours the employee has worked or been paid over the previous 12 months. An airline flight crew employee will meet the hours of service requirement during the previous 12-month period if he or she has worked or been paid for not less than 60 percent of the employee's applicable monthly guarantee and has worked or been paid for not less than 504 hours.

(i) The applicable monthly guarantee for an airline flight crew employee who is not on reserve status is the minimum number of hours for which an employer has agreed to schedule such employee for any given month. The applicable monthly guarantee for an airline flight crew employee who is on reserve status is the number of hours for which an employer has agreed to pay the employee for any given month

(ii) The hours an airline flight crew employee has worked for purposes of the hours of service requirement is the employee's duty hours during the previous 12-month period. The hours an airline flight crew employee has been paid is the number of hours for which an employee received wages during the previous 12-month period. The 504 hours do not include personal commute time or time spent on vacation, medical, or sick leave.

(3) An employee returning from his or her USERRA qualifying military service shall be credited with the hours of service that would have been performed *but for* the period of military service in determining the employee's eligibility for FMLA-qualifying leave. * * *

(4) In the event an employer does not maintain an accurate record of hours worked by an employee (or hours paid, in the case of an airline flight crew employee), including for employees who are exempt from FLSA's requirement that a record be kept of their hours worked (*e.g.,* bona fide executive, administrative, and professional employees as defined in FLSA regulations, 29 CFR part 541), the employer has the burden of showing that the employee has not worked the requisite hours. An employer 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 eligible for FMLA leave. Similarly, an employer must be able to clearly demonstrate that airline flight crew employees have not ''worked or been paid'' for 60 percent of their applicable monthly guarantee or for 504 hours during the previous 12 months in order to claim that the airline flight crew employees are not eligible for FMLA leave.

(d) The determination of whether an employee meets the hours of service requirement and has been employed by the employer 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.)

* * * * *

6. Amend § 825.112 by revising paragraph (a)(5) and (a)(6) to read as follows:

§ 825.112 Qualifying reasons for leave, general rule.

(a) * * *

(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 call 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).

* * * * *

7. Amend § 825.122 by:

a. revising the section heading;

b. replacing ''active duty'' with ''covered active duty'' in each instance that it appears in the heading and this section;

c. re-designating current paragraphs (a) through (j) as (b) through (k)

d. adding new paragraph (a); and

e. revising the last sentence in paragraph (h)

The additions and revisions read as follows:

§ 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.

(a) Covered servicemember. *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 discharged or released under conditions other than dishonorable at any time during the five-year period prior to the first date of the employee's military caregiver leave.

* * * * *

(h) * * * *See* § 825.126(a)(5).

* * * * *

7. Revise § 825.126 to read as follows:

§ 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.

(1) ''Covered active duty or call to covered active duty status'' in the case of a member of the Regular Armed Forces means duty under a call or order to active duty (or notification of an impending call or order to covered active 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 under a call or order to active duty (or notification of an impending call or order to active 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) A ''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 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 purposes of leave for the childcare and school activities listed in paragraphs (b)(3)(i) through (iv) of this section, 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) Eligible employees may take leave for the duration of the Rest and Recuperation leave provided to the military member, up to a maximum of 15 days for 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) *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 employer and employee agree that such leave shall qualify as an exigency, and agree to both the timing and duration of such leave.

9. Amend § 825.127 by:

a. revising the section heading;

b. re-designating current paragraphs (b) through (d) as (d) through (f) respectively;

c. adding new paragraph (b)

d. adding new paragraph (c);

e. revising the last sentence of newly designated paragraph (d)(3);

f. removing ''weeks'' and adding in its place ''workweeks'' every time it appears in paragraph (e)(3);

g. revising newly designated paragraph (f)

h. removing the phrase ''paragraph (c)'' everywhere it appears in newly designated paragraph (e) and adding in its place ''paragraph (e)'' to read as follows:

§ 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 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.

(c) A ''serious injury or illness'':

(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, an injury or illness will be a qualifying serious injury or illness if it 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% or higher, 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 service-connected disability or disabilities, or would do so absent treatment.

(d) * * *

(3) * * * An employer is permitted to require an employee to provide confirmation of covered family relationship to the covered servicemember pursuant to § 825.122(k).

* * *

(f) A husband and wife who are eligible for FMLA leave and are employed by the same covered employer 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.

Subpart B—Employee Leave Entitlements Under the Family and Medical Leave Act

10. Amend § 825.200 as follows:

a. revising paragraph (a)(5);

b. revising the citation following the last sentence in paragraph (f); and

c. revising the citation following the last sentence in paragraph (g), to read as follows:

§ 825.200 Amount of leave.

(a) * * *

(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 call to covered active duty status.

* * * * *

(f) * * * *See* § 825.127(e)(1).

(g) * * * *See* § 825.127(e)(2).

* * * * *

11. Amend § 825.202 by revising the second sentence in paragraph (b) and revising the first sentence in paragraph (b)(1), to read as follows:

§ 825.202 Intermittent leave or reduced leave schedule.

* * * * *

(b) * * * 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. * * *

(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. * * *

* * * * *

12. Amend § 825.205 by:

a. revising paragraph (a);

b. revising paragraph (b)(1);

c. revising paragraph (c), and

d. adding paragraph (d), to read as follows:

§ 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 employer must account for the leave using an increment no greater than the shortest period of time that the employer 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 employer 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 employer uses different increments to account for different types of leave, the employer must account for FMLA leave in the smallest increment used to account for any other type of leave. For example, if an employer 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 employer accounts for other forms of leave use only in increments greater than one hour, the employer must account for FMLA leave use in increments no greater than one hour. An employer may account for FMLA leave in shorter increments than used for other forms of leave. For example, an employer 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 employer 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 employer is unable to permit the employee to work at the same or an equivalent position 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 8 hours, the employee would use one-fifth (⅕) of a week of FMLA leave. Similarly, if a full-time employee who would otherwise work 8-hour days works 4-hour days under a reduced leave schedule, the employee would use one-half (½) week of FMLA leave. When 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 works only 20 hours a week under a reduced leave schedule, the employee's ten hours of leave would constitute one-third (⅓) of a week of FMLA leave for each week the employee works the reduced leave schedule. An employer 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 FMLA leave.

* * * * *

(c) *Overtime.* If an employee would normally be required to work overtime, but is unable to do so because of an 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 (⅙) 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.

(d) *Calculation of leave for airline flight crew employees.* (1) For flight crew employees who are ''line holders,'' the employee's scheduled workweek, which is the total scheduled duty hours for that workweek, is the basis for calculating the employee's FMLA leave. The amount of FMLA leave is determined on a pro rata or proportional basis according to principles established in paragraph (b) of this section. For example, if a line holder needed to take four hours of leave during a workweek in which the employee was scheduled to work 20 hours, the FMLA leave used would be one-fifth (⅕) of a workweek.

(2) For an airline flight crew employee on reserve status, an average of the greater of the applicable monthly guarantee or actual duty hours worked in each of the prior 12 months would be used for calculating the employee's average workweek. The workweek determination must be completed at the employee's first instance of leave and is valid for the remainder of the FMLA leave year. The amount of FMLA leave is determined on a pro rata or proportional basis according to principles established in paragraph (b) of this section. For example, if it was determined that a reserve status employee had a workweek of 20 hours after averaging the greater of the employee's monthly guarantee or actual duty hours over the past 12 months, the employee would be entitled to 12 20-hour workweeks for FMLA leave. If the employee needed four hours of FMLA leave in one workweek, the employee would have used one-fifth (⅕) of a workweek.

13. Amend § 825.213(a) by revising the fifth sentence in paragraph (a)(3) to read as follows:

§ 825.213 Employer recovery of benefit costs.

(a) * * *

(3) * * * For purposes of medical certification, the employee may use the optional DOL forms developed for these

purposes (*see* §§ 825.306(b), 825.310(c)–(d)). * * *

* * * * *

Subpart C—Employee and Employer Rights and Obligations Under the Act

14. Amend § 825.300 by:

a. Removing ''*www.wagehour.dol.gov*'' and adding in its place ''*www.dol.gov/whd*'' whenever it appears in this section.

b. revising the first sentence of paragraph (a)(4);

c. revising paragraph (b)(2);

d. revising paragraph (c)(1)(ii);

e. revising the first sentence of paragraph (c)(6); and

f. revising the second sentence of paragraph (d)(4) to read as follows:

§ 825.300 Employer notice requirements.

(a) * * *

(4) To meet the requirements of paragraph (a)(3) of this section, employers may duplicate the text of the Department's prototype notice (WHD Publication 1420) or may use another format so long as the information provided includes, at a minimum, all of the information contained in that notice.

* * *

(b) * * *

(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 employer, the number of hours of service with the employer during the 12-month period, and whether the employee is employed at a worksite where 50 or more employees are employed by the employer within 75 miles of that worksite. Notification of eligibility may be oral or in writing; employers may use optional Form WH–381 (Notice of Eligibility and Rights and Responsibility) to provide such notification to employees. Prototypes are available from the nearest office of the Wage and Hour Division or on the Internet at *www.dol.gov/whd.* The employer is obligated to translate this notice in any situation in which it is obligated to do so in § 825.300(a)(4).

* * * * *

(c) * * *

(1) * * *

(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);

* * *

(6) A prototype notice of rights and responsibilities may be obtained from local offices of the Wage and Hour Division or from the Internet at *www.dol.gov/whd.* * * *

* * * * *

(d) * * *

(4) * * * A prototype designation notice may be obtained from local offices of the Wage and Hour Division or from the Internet at *www.dol.gov/whd.* * * *

* * * * *

15. Amend § 825.302 by:

a. removing ''active duty'' and adding in its place ''covered active duty'' whenever it appears in paragraph (c); and

b. revising the citation in the second sentence of paragraph (c), to read as follows:

§ 825.302 Employee notice requirements for foreseeable FMLA leave.

(a) * * *

(c) * * * 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, 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.

* * *

* * * * *

16. Amend § 825.303 by:

a. removing ''active duty'' and adding in its place ''covered active duty'' every time it appears in paragraph (b);

b. revising the citation in the second sentence from 825.126(a) to 825.126(b) in paragraph (b) to read as follows:

§ 825.303 Employee notice requirements for unforeseeable FMLA leave.

* * * * *

(b) * * * 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, 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.

* * *

* * * * *

17. Amend § 825.306 by revising paragraph (b) to read as follows:

§ 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.

* * * * *

(b) DOL has developed two optional forms (Form WH–380E and Form WH–380F, as revised) for use in obtaining medical certification, including second and third opinions, from health care providers that meets FMLA's certification requirements. Optional form WH–380E is for use when the employee's need for leave is due to the employee's own serious health condition. Optional form WH–380F 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. Form WH–380E and WH–380F, as revised, or another form containing the same basic information, may be used by the employer; 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. Prototype forms WH–380E and WH–380F may be obtained from local offices of the Wage and Hour Division or from the Internet at *www.dol.gov/whd.*

* * * * *

18. Amend § 825.309 by:

a. removing ''active duty'' and adding in its place ''covered active duty'' every time it appears in this section;

b. revising paragraph (a);

c. revising paragraphs (b)(4) and (b)(5);

d. adding paragraph (b)(6);

e. removing the parenthetical at the end of the first sentence in paragraph (c); and

f. revising the first and second sentences in paragraph (c).

The additions and revisions read as follows:

§ 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 of a military member (as defined in § 825.126(a)(1)–(2)), an employer 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 employer once. A copy of new active duty orders or other documentation issued by the military may be required by the employer 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 of the same or a different military member.

(b) * * *

(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) DOL has developed an optional form (Form WH–384) for employees' use in obtaining a certification that meets FMLA's certification requirements. Form WH–384 may be obtained from local offices of the Wage and Hour Division or from the Internet at *www.dol.gov/whd.* * * *

* * * * *

19. Amend § 825.310 by:

a. adding paragraph (a)(5);

b. revising the first sentence of paragraph (b);

c. adding paragraph (b)(1)(v);

d. revising paragraph (b)(2);

e revising paragraph (b)(4);

f. re-designating current paragraph (c)(6) as (c)(7);

g. adding new paragraph (c)(6);

h. revising paragraph (d);

i. revising the citation in paragraph (e)(3) from § 825.122(j) to § 825.122(k);

j. revising paragraph (f) to read as follows:

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

(a) * * *

(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. * * *

(1) * * *

(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;

* * * * *

(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 information on whether the veteran is receiving medical treatment, recuperation, or therapy for an injury or illness that is:

(A) 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) 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% or higher, and that such VASRD rating is based, in whole or in part, on the condition precipitating the need for military caregiver leave;

(C) 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 service-connected disability or disabilities, or would do so absent treatment.

* * * * *

(c) * * *

(6) Whether the covered servicemember is a veteran, the date of separation from military service, and whether the separation was other than dishonorable. The employer 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 employer 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.

* * * * *

(d) DOL has developed an optional form (WH–385) for employees' use in obtaining certification that meets FMLA's certification requirements, which may be obtained from local offices of the Wage and Hour Division or on the Internet at *www.dol.gov/whd.* 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. WH–385, or another form containing the same basic information, may be used by the employer; 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 employer 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 health care providers identified in § 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 employer 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) * * *

(3) An employer 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) Where medical certification is requested by an employer, 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 employer with complete and sufficient certification and failure to do so may result in the denial of FMLA leave. *See* § 825.305(d).

Subpart E—Record-keeping Requirements

20. Amend § 825.500 by:

a. revising paragraph (g) introductory text; and

b. adding new paragraph (h), to read as follows:

§ 825.500 Record-keeping requirements.

* * * * *

(g) Records and documents relating to certifications, recertifications or medical histories of employees or employees' family members, created for purposes of FMLA, shall be maintained as confidential medical records in separate files/records from the usual personnel files. If the Genetic Information Nondiscrimination Act of 2008 (GINA) is applicable, records and documents created for purposes of FMLA containing ''family medical history'' or ''genetic information'' as defined in GINA shall be maintained in accordance with the confidentiality requirements of Title II of GINA (*see* 29 CFR 1635.9), which permit such information to be disclosed consistent with the requirements of FMLA. If the ADA, as amended, is also applicable, such records shall be maintained in conformance with ADA confidentiality requirements (*see* 29 CFR 1630.14(c)(1)), except that:

* * * * *

(h) Covered employers who employ eligible airline flight crew employees are required to maintain certain records ''on file with the Secretary.'' To comply with this requirement, such employers shall make, keep, and preserve records in accordance with the requirements of this section, and additional records as follows:

(1) Records and documents containing information specifying the applicable monthly guarantee with respect to each category of employee to whom such guarantee applies, including copies of any relevant collective bargaining agreements or employer policy documents; and

(2) A record of hours scheduled for airline flight crew employees on non-reserve status.

21. Redesignate § 825.800 as § 825.102, and revise newly designated § 825.102 to read as follows:

§ 825.102 Definitions.

For purposes of this part:

Act or *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*).

ADA means the Americans with Disabilities Act (42 U.S.C. 12101 *et seq.,* as amended).

Administrator means the Administrator of the Wage and Hour Division, U.S. Department of Labor, and includes any official of the Wage and Hour Division authorized to perform any of the functions of the Administrator under this part.

Airline flight crew employee means an airline flight crewmember or flight attendant as those terms are defined in regulations of the Federal Aviation Administration. *See also* § 825.110(c)(2).

Applicable monthly guarantee, means:

(1) For the individual airline flight crew employee who is not on reserve status (line holder), the minimum number of hours for which an employer has agreed to *schedule* such employee for any given month; and

(2) For an airline flight crew employee who is on reserve status, the number of hours for which an employer has agreed to *pay the employee for any given month. See also § 825.110(c)(2).*

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

Commerce and *industry or activity affecting commerce* mean any activity, business, or industry in commerce or in which a labor dispute would hinder or obstruct commerce or the free flow of commerce, and include ''commerce'' and any ''industry affecting commerce'' as defined in sections 501(1) and 501(3) of the Labor Management Relations Act of 1947, 29 U.S.C. 142(1) and (3).

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 (1)(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 (1)(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. *See also* § 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 under a call or order to active duty (or notification of an impending call or order to covered active 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 under a call or order to active duty (or notification of an impending call or order to active duty) during the deployment of the member with the Armed Forces to a foreign country under a Federal call or order to active duty under a provision of law referred to in section 101(a)(13)(B) of Title 10, United States Code. *See also* § 825.126(a).

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 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.

Eligible employee means:

(1) An employee who has been employed for a total of at least 12 months by the employer on the date on which any FMLA leave is to commence, except that an employer 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 National Guard or Reserve military service obligation (the time served performing the military service must be also counted in determining whether the employee has been employed for at least 12 months by the employer, but this section does not provide any greater entitlement to the employee than would be available under the Uniformed Services Employment and Reemployment Rights Act (USERRA)); or

(ii) A written agreement, including a collective bargaining agreement, exists concerning the employer'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

(2) Who, on the date on which any FMLA leave is to commence, has been employed for at least 1,250 hours of service with such employer during the previous 12-month period, *except that:*

(i) An employee returning from fulfilling his or her National Guard or Reserve military obligation shall be credited with the hours-of-service that would have been performed *but for* the period of military service in determining whether the employee worked the 1,250 hours of service (accordingly, a person reemployed following military service has the hours that would have been worked for the employer added to any hours actually worked during the previous 12-month period to meet the 1,250 hour requirement);

(ii) To determine the hours that would have been worked during the period of military service, the employee's pre-service work schedule can generally be used for calculations;

(iii) An airline flight crew employee will be considered to meet the hours of service requirement if in the previous 12 months the employee has worked or been paid for not less than 60 percent of the applicable total monthly guarantee and has worked or been paid for not less than 504 hours (not counting personal commute time, or vacation, medical or sick leave). *See* 825.110(c)(2)–(3).

(3) Who is employed in any State of the United States, the District of Columbia or any Territories or possession of the United States.

(4) Excludes any Federal officer or employee covered under subchapter V of chapter 63 of title 5, United States Code.

(5) Excludes any employee of the United States House of Representatives or the United States Senate covered by the Congressional Accountability Act of 1995, 2 U.S.C. 1301.

(6) Excludes any employee who is employed at a worksite at which the employer employs fewer than 50 employees if the total number of employees employed by that employer within 75 miles of that worksite is also fewer than 50.

(7) Excludes any employee employed in any country other than the United States or any Territory or possession of the United States.

Employ means to suffer or permit to work.

Employee has the meaning given the same term as defined in section 3(e) of the Fair Labor Standards Act, 29 U.S.C. 203(e), as follows:

(1) The term ''employee'' means any individual employed by an employer;

(2) In the case of an individual employed by a public agency, ''employee'' means—

(i) Any individual employed by the Government of the United States—

(A) As a civilian in the military departments (as defined in section 102 of Title 5, United States Code),

(B) In any executive agency (as defined in section 105 of Title 5, United States Code), excluding any Federal officer or employee covered under subchapter V of chapter 63 of Title 5, United States Code,

(C) In any unit of the legislative or judicial branch of the Government which has positions in the competitive service, excluding any employee of the United States House of Representatives or the United States Senate who is covered by the Congressional Accountability Act of 1995,

(D) In a nonappropriated fund instrumentality under the jurisdiction of the Armed Forces, or

(ii) Any individual employed by the United States Postal Service or the Postal Regulatory Commission; and

(iii) Any individual employed by a State, political subdivision of a State, or an interstate governmental agency, other than such an individual—

(A) Who is not subject to the civil service laws of the State, political subdivision, or agency which employs the employee; and

(B) Who—

(*1*) Holds a public elective office of that State, political subdivision, or agency,

(*2*) Is selected by the holder of such an office to be a member of his personal staff,

(*3*) Is appointed by such an officeholder to serve on a policymaking level,

(*4*) Is an immediate adviser to such an officeholder with respect to the constitutional or legal powers of the office of such officeholder, or

(*5*) Is an employee in the legislative branch or legislative body of that State, political subdivision, or agency and is not employed by the legislative library of such State, political subdivision, or agency.

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

Employer means any person engaged in commerce or in an industry or activity affecting commerce who employs 50 or more employees for each working day during each of 20 or more calendar workweeks in the current or preceding calendar year, and includes—

(1) Any person who acts, directly or indirectly, in the interest of an employer to any of the employees of such employer;

(2) Any successor in interest of an employer; and

(3) Any public agency.

Employment benefits means all benefits provided or made available to employees by an employer, 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 employer or through an ''employee benefit plan'' as defined in section 3(3) of the Employee Retirement Income Security Act of 1974, 29 U.S.C. 1002(3). The term does not include non-employment related obligations paid by employees through voluntary deductions such as supplemental insurance coverage. (*See* § 825.209(a).)

FLSA means the Fair Labor Standards Act (29 U.S.C. 201 *et seq.*).

Group health plan means any plan of, or contributed to by, an employer (including a self-insured plan) to provide health care (directly or otherwise) to the employer's employees, former employees, or the families of such employees or former employees. 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 employer;

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

(3) The sole functions of the employer 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 employer 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 Act 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 Secretary 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, 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 employer 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 employer or the employer'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

(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.

ITO or *ITA,* invitational travel order (ITO) or invitational travel authorization (ITA), are 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 employer 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 § 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(g)(3).

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(e).

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(g)(2).

Person means an individual, partnership, association, corporation, business trust, legal representative, or any organized group of persons, and includes a public agency for purposes of this part.

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, define these terms.

Public agency means the government of the United States; the government of a State or political subdivision thereof; any agency of the United States (including the United States Postal Service and Postal Regulatory Commission), a State, or a political subdivision of a State, or any interstate governmental agency. Under section 101(5)(B) of the Act, a public agency is considered to be a ''person'' engaged in commerce or in an industry or activity affecting commerce within the meaning of the Act.

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)(ii).

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

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,

(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% or higher, 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 service-connected disability or disabilities, or would do so absent treatment. *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(g)(1).

Son or daughter on covered active duty or an impending call or order to covered active duty 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 or has received notice of a call or order to covered active duty, and who is of any age. *See also* § 825.126(b)(1).

Spouse means a husband or wife as defined or recognized under State law for purposes of marriage in the State where the employee resides, including common law marriage in States where it is recognized.

State means any State of the United States or the District of Columbia or any Territory or possession of the United States.

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.

22. Remove and Reserve Appendices B through E, and G and H to part 825.

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