

FAMILIES -

SICK LEAVE REG.

MEMORANDUM FOR THE CHIEF OF STAFF

Through: Jacob Lew

From: Dan Mendelson

Subject: Definition of "Family" in OPM's notice of proposed rulemaking on expanded sick leave

Family -
Sick leave
REG.

On May 24, 1999, the President issued a memorandum directing OPM to propose government-wide regulations allowing Federal employees to use up to 12 weeks of sick (paid) leave each year for family care purposes. (Attached is a copy of the memorandum for your information; the relevant paragraphs are highlighted.) In response, OPM is now preparing a notice of proposed rulemaking (NPRM) for publication in the Federal Register to solicit public comments. After analyzing the public comments, OPM will issue a final regulation along with their responses to public comments.

Currently at issue is the definition of "family" used in the regulation. In the area of employee leave policy, two different definitions of family are used. Under current sick leave policy, employees are entitled to use a total of up to 13 days of sick (paid) leave each year to care for a sick family member.

"Family member" in the OPM regulation is broadly defined as any of the following relatives of the employee: spouse, and parents thereof; children, including adopted children and spouses thereof; parents; brothers and sisters, and spouses thereof; and any individual related by blood or *affinity* whose close association with the employee is the equivalent of a family relationship. Under this broad regulatory boundary, agency managers are given discretion for determining who is a "family member."

By contrast, the Family and Medical Leave Act (FMLA) uses a more restricted definition of family. Under FMLA, employees are entitled to use a total of up to 12 workweeks of unpaid leave per year for (i) birth of a child, (ii) adoption/foster care, or (iii) a serious health condition of the employee or his or her spouse, son or daughter, or parent. In implementing FMLA, OPM must use the definition of spouse specified in the Defense of Marriage Act (DOMA). According to the DOMA, "spouse" is an individual in a marriage that is a legal union between one man and one woman.

OPM, OMB, and staff at OVP, DPC, and OCS believe that the new sick leave policy extending the number of available days an employee can take off for family care should use the same broad definition of family as in the current sick leave policy. The broad definition of family would benefit all types of families and various family members. It is also more consistent with the President's broader sexual orientation non-discrimination policies. Moreover, sticking with the broad definition would send a strong signal that the Administration remains committed to helping all types of families and family members.

There is some potential risk to using the broad definition. It might invite Congress to attempt to pass legislation that will deny or limit any new or existing leave to care for any family member (e.g., prohibiting the now-common practice of using donated leave for any family member). Second, using the broad definition might open a public controversy over the definition of family. Third, the broad definition is less consistent with the President's May 24th statements, which implied specific family members – spouse, son or daughter, or parent -- as beneficiaries.

While recognizing potential risks, we recommend that the Administration use the broad definition of family in the upcoming NPRM to recognize and include all types of families and family members and to be consistent with other non-discrimination policies.

Please let us know whether you concur with us.

_____ Agree

_____ Disagree. Use the narrow definition of family.

_____ Let's discuss

THE WHITE HOUSE

Office of the Press Secretary

For Immediate Release

May 24, 1999

May 24, 1999

MEMORANDUM FOR THE HEADS OF EXECUTIVE DEPARTMENTS AND AGENCIES

SUBJECT: New Tools to Help Parents Balance Work and Family

Since I became President, my Administration has worked hard to make sure that parents have the tools they need to meet their obligations at home and at work. I am proud that the very first bill I signed into law was the Family and Medical Leave Act (FMLA). Since 1993, the FMLA has allowed millions of Americans to take up to 12 weeks of unpaid leave -- without fear of losing their jobs -- to care for a newborn or adopted child, to attend to their own serious health needs, or to care for a seriously ill parent, son, daughter, or spouse. Too many American workers, however, have been unable to take the leave they need because they simply cannot afford to go without a paycheck.

Therefore, I am taking new steps toward enabling workers to take the leave they need.

First, I hereby direct the Secretary of Labor to propose regulations that enable States to develop innovative ways of using the Unemployment Insurance (UI) system to support parents on leave following the birth or adoption of a child. In addition, I direct the Secretary to develop model State legislation that States could use in following these regulations. In this effort, the Department of Labor is to evaluate the effectiveness of using the UI system for these or related purposes. In a 1996 study conducted by the Commission on Family and Medical Leave, lost pay was the most significant barrier to parents taking advantage of unpaid leave after the birth or adoption of a child. This new step will help to give States the ability to eliminate a significant barrier that parents face in taking leave.

Second, I direct the Director of the Office of Personnel Management to propose government-wide regulations to allow Federal employees to use up to 12 weeks of accrued sick leave each year to care for a spouse, son, daughter, or parent with a "serious health condition," as that term is defined for the purpose of applying the FMLA. Currently, the amount of sick leave that can be used to care for a family member who is ill is limited to 13 days each year for most Federal employees. By enabling Federal workers to use the sick leave they have earned, we will eliminate a significant barrier to caring for a family member with a serious health condition. The use of paid sick leave under this policy will be subject to the same conditions as the use of unpaid leave for these purposes under the FMLA. In particular, the same notification and certification requirements that govern the use of unpaid leave to care

for a spouse, son, daughter, or parent under the FMLA will apply to Federal employees who use paid sick leave for this purpose. I believe the Federal Government has an important role to play in setting an example for the Nation.

Finally, I direct the Director of the Office of Personnel Management to establish an Interagency Family Friendly Workplace Working Group within 90 days to promote, evaluate, and exchange information on Federal family-friendly workplace initiatives. I also direct the head of each executive department and agency to appoint a family-friendly work/life coordinator to serve as a member of this Working Group. Working Group representatives will be responsible for making sure that Federal employees are aware of the full range of options available to them to meet their personal and family responsibilities (such as alternative work schedules, telecommuting, part-time employment, and job sharing). The coordinators also will provide employees with information about child and elder care resources currently available in their communities, and establish and promote parent support groups, elder care support groups, and on-site nursing mothers' programs.

WILLIAM J. CLINTON

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EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

Eric -

FYI - it's not
a "decision" memo
Niece

November 10, 1999

MEMORANDUM FOR THE CHIEF OF STAFF

THROUGH: Jacob Lew

FROM: Dan Mendelson

Don Arbuckle

SUBJECT: Definition of "Family" in OPM's notice of proposed rulemaking on expanded sick leave

On May 24, 1999, the President issued a memorandum directing OPM to propose government-wide regulations allowing Federal employees to use up to 12 weeks of paid sick leave each year for family care purposes. (Presidential memorandum attached.) OPM is now finalizing a notice of proposed rulemaking (NPRM) for publication in the Federal Register to solicit public comments. This memo, reflecting consensus of OPM, OMB, DPC, OPL, and WHC, recommends that we adopt a permissive definition of "family" in the upcoming NPRM. However, you need to be aware that this may generate criticism and might be seen as contradicting the executive memorandum.

Currently at issue is the definition of "family" used in the regulation. In the area of Federal employee leave policy, two different definitions of family are used. Under current sick leave policy, Federal employees are entitled to use a total of up to 13 days of paid sick leave each year to care for an ill family member. In this instance, "family member" is defined by OPM as any of the following relatives of the employee: spouse, and parents thereof; children, including adopted children and spouses thereof; parents; brothers and sisters, and spouses thereof; and any individual related by blood or *affinity* whose close association with the employee is the equivalent of a family relationship. Under this broad regulatory boundary, agency managers are given discretion for determining who is a "family member" - e.g., domestic partner.

By contrast, the Family and Medical Leave Act (FMLA) uses a more restricted definition of family. Under FMLA, Federal employees are entitled to a total of up to 12 workweeks of unpaid leave per year for (i) birth of a child, (ii) adoption/foster care, or (iii) a serious health condition of the employee or his or her spouse, son or daughter, or parent. In implementing FMLA, OPM must use the definition of spouse specified in the Defense of Marriage Act (DOMA). According to the DOMA, "spouse" is an individual in a marriage that is a legal union between one man and one woman.

OPM, OMB, DPC and WH staff believe that the new sick leave policy extending the number of available days an employee can take off for family care should use the same broad definition of family as in current sick leave policy. The broad definition of family would benefit

all types of families and various family members. It is also more consistent with the President's broader sexual orientation non-discrimination policies. Moreover, sticking with the broad definition would send a strong signal that the Administration remains committed to helping all types of families and family members.

There is some potential risk to using the broad definition. It might invite Congress to attempt to pass legislation that will deny or limit any new or existing leave (e.g., prohibiting the now-common practice of using donated leave for any family member). Second, using the broad definition might open a public controversy over the definition of family. Third, the broad definition might be criticized as less consistent with the executive memorandum, which implied specific family members -- spouse, son or daughter, or parent -- as beneficiaries.

While recognizing potential risks, the EOP offices and OPM involved in this discussion agree that the Administration should use the broad definition of family in the upcoming NPRM. We believe that it is a defensible interpretation of the executive memorandum, which builds on current sick leave policy. It is also consistent with the President's broader goal of eliminating "a significant barrier to caring for a family member with a serious health condition," as stated in the executive memorandum. Further, we believe that this approach is consistent with the Administration's non-discrimination policies. Finally, we believe that it is preferable to be proactive in supporting this policy, rather than being in a position where we need to respond to critical comments on a rule containing the more restrictive definition.

Please let us know if you disagree with this assessment.

Attachment

THE WHITE HOUSE

Office of the Press Secretary

For Immediate Release

May 24, 1999

May 24, 1999

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Second, I direct the Director of the Office of Personnel Management to propose government-wide regulations to allow Federal employees to use up to 12 weeks of accrued sick leave each year to care for a spouse, son, daughter, or parent with a "serious health condition," as that term is defined for the purpose of applying the FMLA. Currently, the amount of sick leave that can be used to care for a family member who is ill is limited to 13 days each year for most Federal employees. By enabling Federal workers to use the sick leave they have earned, we will eliminate a significant barrier to caring for a family member with a serious health condition. The use of paid sick leave under this policy will be subject to the same conditions as the use of unpaid leave for these purposes under the FMLA. In particular, the same notification and certification requirements that govern the use of unpaid leave to care for a spouse, son, daughter, or parent under the FMLA will apply to Federal employees who use paid sick leave for this purpose. I believe the Federal Government has an important role to play in setting an example for the Nation.

Finally, I direct the Director of the Office of Personnel Management to establish an Interagency Family Friendly Workplace Working Group within 90 days to promote, evaluate, and exchange information on Federal family-friendly workplace initiatives. I also direct the head of each executive department and agency to appoint a family-friendly work/life coordinator to serve as a member of this Working Group. Working Group representatives will be responsible for making sure that Federal employees are aware of the full range of options available to them to meet their personal and family responsibilities (such as alternative work schedules, telecommuting, part-time employment, and job sharing). The coordinators also will provide employees with information about child and elder care resources currently available in their communities, and establish and promote parent support groups, elder care support groups, and on-site nursing mothers' programs.

WILLIAM J. CLINTON

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HUMAN
RIGHTS
CAMPAIGN

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Washington, DC 20006
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fax 202 347 5323

MEMORANDUM

DATE: September 17, 1999

TO: Dan Mendelson
Nicole Rabner

FROM: Winnie Stachelberg
Political Director

RE: Proposed OPM Regulations on Expansion of Sick Leave for Federal Employees

CC: Karen Tramontano
Richard Socarides
Eric Liu

On behalf of the Human Rights Campaign's more than 300,000 members, we applaud the President's efforts to set an example for the private sector by creating new family-friendly workplace policies for Federal government employees. As we expressed to you last month, however, we are concerned that if these policies are specifically linked to a particular definition of family, many Federal employees will be unnecessarily denied those benefits.

As you know, we have been closely tracking the implementation of the President's proposal to expand Federal employees' use of sick leave for family care. While this policy will allow many Federal employees to better balance their family and work responsibilities, if not carefully drafted, it will not cover the family members of many Federal employees currently covered by OPM's sick leave for family care policies.

It is our understanding that OPM has forwarded draft regulations in this area to OMB and DPC. We have reviewed these proposed regulations and would like to reiterate our concern that they are not inclusive of the families of many Federal employees. While OPM's current sick-leave policy includes a broad definition of "family member," 5CFR630.201 (see attached), the new regulations unnecessarily limit the availability of expanded sick leave to care for a "spouse, son, daughter or parent." This wording completely eliminates the ability of gay and lesbian employees to avail themselves of this expanded leave to care for a seriously ill domestic partner. In addition, it prevents Federal employees from using this leave to care for siblings, parents-in-law, grandchildren, adult children or grandparents, as they are able to do under current regulations governing sick leave for family care.

We agree that this expansion of sick leave must be tied to some of the terms and conditions included in the Family and Medical Leave Act, (e.g. certification of "serious health condition"). The expanded sick leave, however, should be available to care for all persons listed in the current regulations governing sick leave for family care, and not limited to only those available under FMLA. As such, we request that the Administration make the following modifications to these regulations to be more inclusive before they are sent out for public comment or to Congress:

First, the regulations should provide up to 12 weeks of unpaid family and medical leave for all federal employees to care for a family member (as defined by 5 CFR 630.201.) Second, the regulations should provide for substitution of accrued sick leave for this unpaid leave in a uniform policy applying equally to all federal employees. Such regulations would be consistent with Executive Order 13087, which established a uniform policy for the Federal Government to prohibit discrimination based on sexual orientation. Further, while the Defense of Marriage Act (1 U.S.C. §7) prevents the use of the terms "marriage" or "spouse" in reference to same-sex couples, it *does not* prevent the Administration from promulgating the more expansive regulations that we propose.

Above, we have broadly outlined our suggested changes to these regulations. We have also drafted preliminary language for these modified regulations, which we have attached following the OPM proposal.

Again, we strongly support the President's efforts to create a more family-friendly workplace, and look forward to working with you to ensure that this and other policies are inclusive of the families of all Federal employees.

[Code of Federal Regulations]
[Title 5, Volume 1, Parts 1 to 699]
[Revised as of January 1, 1999]
From the U.S. Government Printing Office via GPO Access
[CITE: 5CFR630.201]

[Page 673-674]

TITLE 5--ADMINISTRATIVE
PERSONNEL

CHAPTER I--OFFICE OF PERSONNEL MANAGEMENT

PART 630--ABSENCE AND LEAVE--Table of Contents

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

Sec. 630.201 Definitions.

(a) In section 6301(2)(iii) of title 5, United States Code, the term temporary employee engaged in construction work at an hourly rate means an employee hired on a temporary basis solely for the purpose of work on a specific construction project and paid on an hourly rate.

(b) In subparts B through G of this part:

Accrued leave means the leave earned by an employee during the current leave year that is unused at any given time in that year.

Accumulated leave means the unused leave remaining to the credit of an employee at the beginning of the leave year.

Employee means an employee to whom subchapter I of chapter 63 of title 5, United States Code, applies.

Family member means the following relatives of the employee:

- (1) Spouse, and parents thereof;
- (2) Children, including adopted children and spouses thereof;
- (3) Parents;
- (4) Brothers and sisters, and spouses thereof; and
- (5) Any individual related by blood or affinity whose close association with the employee is the equivalent of a family relationship.

Health care provider has the meaning given that term in Sec. 630.1202.

Leave year means the period beginning with the first day of the first complete pay period in a calendar year and

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ending with the day immediately before the first day of the first complete pay period in the following calendar year.

Medical certificate means a written statement signed by a registered practicing physician or other practitioner certifying to the incapacitation, examination, or treatment, or to the period of disability while the patient was receiving professional treatment.

Uncommon tour of duty means an established tour of duty that exceeds 80 hours of work in a biweekly pay period, provided the tour--

(1) Includes hours for which the employee is compensated by standby duty pay under 5 U.S.C. 5545(c)(1) and Sec. 550.141 of this chapter;

(2) Is a regular tour of duty (as defined in Sec. 550.1302 of this chapter) established for firefighters compensated under 5 U.S.C. 5545b and part 550, subpart M, of this chapter; or

(3) Is authorized for a category of employees by the Office of Personnel Management.

United States means the several States and the District of Columbia.

[61 FR 64450, Dec. 5, 1996, as amended at 63 FR 64595, Nov. 23, 1998]

PROPOSAL

TITLE 5 -- ADMINISTRATIVE PERSONNEL CHAPTER I -- OFFICE OF PERSONNEL MANAGEMENT SUBCHAPTER B -- CIVIL SERVICE REGULATIONS PART 630 -- ABSENCE AND LEAVE SUBPART B -- DEFINITIONS AND GENERAL PROVISIONS FOR ANNUAL AND SICK LEAVE

5 CFR 630.201

§ 630.201 Definitions.

(a) In section 6301(2)(iii) of title 5, United States Code, the term temporary employee engaged in construction work at an hourly rate means an employee hired on a temporary basis solely for the purpose of work on a specific construction project and paid on an hourly rate.

(b) In subparts B through G of this part:

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Family member means the following relatives of the employee:

- (1) Spouse, and parents thereof;
- (2) Children, including adopted children and spouses thereof;
- (3) Parents;
- (4) Brothers and sisters, and spouses thereof; and
- (5) Any individual related by blood or affinity whose close association with the employee is the equivalent of a family relationship.

Health care provider has the meaning given that term in § 630.1202.

Leave year means the period beginning with the first day of the first complete pay period in a calendar year and ending with the day immediately before the first day of the first complete pay period in the following calendar year.

Medical certificate means a written statement signed by a registered practicing physician or other practitioner certifying to the incapacitation, examination, or treatment, or to the period of disability while the patient was receiving professional treatment.

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

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

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

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

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

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

(B) Any period of incapacity due to pregnancy, or for prenatal care, even if the affected individual does not receive active treatment from a health care provider during the period of incapacity or the period of incapacity does not last more than 3 consecutive calendar days.

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

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

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

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

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

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

(2) (Serious health condition does not include routine physical, eye, or dental examinations; a regimen of continuing treatment that includes the taking of over-the-counter medications, bed-rest, exercise, and other similar activities that can be initiated without a visit to the health care provider; a condition for which cosmetic treatments are administered, unless inpatient hospital care is required or unless complications develop; or an absence because of an employee's use of an illegal substance, unless the employee is receiving treatment for substance abuse by a health care provider or by a provider of health care services on referral by a health care provider. Ordinarily, unless complications arise, the common cold, the flu, earaches, upset stomach, minor ulcers, headaches (other than migraines), routine dental or orthodontia problems, and periodontal disease are not serious health conditions. Allergies, restorative dental or plastic surgery after an injury, removal of cancerous growth, or mental illness resulting from stress may be serious health conditions only if such conditions require inpatient care or continuing treatment by a health care provider.)

Uncommon tour of duty means an established tour of duty that exceeds 80 hours of work in a biweekly pay period, provided the tour --

(1) Includes hours for which the employee is compensated by standby duty pay under 5 U.S.C. 5545(c)(1) and § 550.141 of this chapter;

(2) Is a regular tour of duty (as defined in § 550.1302 of this chapter) established for firefighters compensated under 5 U.S.C. 5545b and part 550, subpart M, of this chapter; or

(3) Is authorized for a category of employees by the Office of Personnel Management.

United States means the several States and the District of Columbia.

PROPOSED REGULATIONS

TITLE 5 -- ADMINISTRATIVE PERSONNEL CHAPTER I -- OFFICE OF PERSONNEL MANAGEMENT SUBCHAPTER B -- CIVIL SERVICE REGULATIONS PART 630 -- ABSENCE AND LEAVE SUBPART D -- SICK LEAVE

5 CFR 630.401

§ 630.401 Grant of sick leave.

(a) Subject to paragraphs (b) through (e) (f) of this section, an agency ~~shall~~ must grant sick leave to an employee when the employee --

(1) Receives medical, dental, or optical examination or treatment;

(2) Is incapacitated for the performance of duties by physical or mental illness, injury, pregnancy, or childbirth;

(3) (i) Provides care for a family member who is incapacitated as the result of physical or mental illness, injury, pregnancy, or childbirth or who receives medical, dental or optical examination or treatment; or

(ii) Requests the substitution of sick leave for leave without pay under paragraph (c)(1) of this section to provide care for a spouse, son or daughter, or parent with a serious health condition;

(4) Makes arrangements necessitated by the death of a family member or attends the funeral of a family member;

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

(6) Must be absent from duty for purposes relating to the adoption of a child, including appointments with adoption agencies, social workers, and attorneys; court proceedings; required travel; and any other activities necessary to allow the adoption to proceed.

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

(c)(1) An employee who has invoked his or her entitlement to use family and medical leave under subpart L of this part *OR § 630.401A* may substitute a total of up to 480 hours of sick leave (or, in the case of a part-time employee or an employee with an uncommon tour of duty, an amount of sick leave equal to 12 times the average number of hours in his or her scheduled tour of duty each week) for leave without pay during the 12-month period established under § 630.1203(c) *OR § 630.401A(c)* to care for a spouse, son or daughter, parent *OR FAMILY MEMBER* with a serious health condition.

(2) If, at the time an employee requests the substitution of sick leave for leave without pay under paragraph (c)(1) of this section, he or she has used any portion of the sick leave authorized under paragraph (b) of this section during that leave year, that amount must be subtracted from the maximum number of hours authorized under paragraph (c)(1) of this section to determine the total amount of sick leave that may be substituted for leave without pay during the 12-month period established under § 630.1203(c) *OR § 630.401A(c)*. If the 12-month period extends into the next leave year, the employee may use additional sick leave under § 630.401(a)(3)(i) or (4) as soon as that leave becomes available for use at the beginning of the new leave year. Further, if an employee has not used the full entitlement to 12 weeks of family and medical leave under subpart L of this part *OR § 630.401A*, he or she may substitute the additional sick leave that becomes available for use at the beginning of the new leave year for leave without pay at any time during the remainder of the 12-months period established under § 630.1203(c) *OR § 630.401A(c)*.

(3) An employee who substitutes the maximum amount of sick leave authorized under paragraph (c)(1) to care for a spouse, son or daughter, parent *OR FAMILY MEMBER* with a serious health condition may not use any additional family and medical leave for any other purpose listed in § 630.1203(a) *OR § 630.401A(a)* during the 12-month period established under § 630.1203(c) *OR § 630.401A(c)*.

(4) The approval of an employee's request to substitute sick leave for leave without pay to care for a spouse, son or daughter, parent *OR FAMILY MEMBER* with a serious health condition is subject to all the terms and conditions applicable to the approval of leave without pay for these same purposes under 5 CFR part 630, subpart L, Family and Medical Leave, *OR § 630.401A*, *AND* the notice and medical certification requirements set forth in §§ 60.1206 and 630.1207, respectively.

(d) To be granted any sick leave for the purposes described in paragraphs (a) (3) or (4) of this section during any leave year in an amount exceeding a total of 40 hours (or, in the case of a part-time employee or an employee with an uncommon tour of duty, the average number of hours in the employee's scheduled tour of duty each week), the employee concerned shall retain in his or her sick leave account a balance of at least 80 hours (or, in the case of a part-time employee or an employee with an uncommon tour of duty, an amount equal to twice the average number of hours in the employee's scheduled tour of duty each week). No sick leave may be advanced under 5 U.S.C. 6307(d) for the purpose of meeting the requirement to retain a minimum sick leave balance or for using additional sick leave for the purposes described in paragraphs (a) (3) and (4) of this section when such use would otherwise cause the employee's sick leave balance to fall below the minimum required.

(e) When sick leave is granted to an employee under the condition specified in paragraph (d) of this section, the amount of sick leave retained in the employee's sick leave account shall, in each instance, be at least equal to the minimum prescribed by paragraph (c) of this section after deducting the amount to be used for the purposes described in paragraphs (a)(3) and (4) of this section.

(f) If the number of hours in the employee's tour of duty is changed during the leave year, the employee's entitlement to use sick leave for the purposes described in paragraphs (a)(3) and (4) of this section shall be recalculated based on the employee's new tour of duty.

PROPOSAL

5 CFR 630.401A

§ 630.401A. Leave entitlement.

(a) An employee shall be entitled to a total of 12 administrative workweeks of unpaid leave during any 12-month period for one or more of the following reasons:

- (1) The birth of a son or daughter of the employee and the care of such son or daughter;
- (2) The placement of a son or daughter with the employee for adoption or foster care;
- (3) The care of a family member, if such family member has a serious health condition; or
- (4) A serious health condition of the employee that makes the employee unable to perform any one or more of the essential functions of his or her position.

(b) An employee shall invoke his or her entitlement to leave under paragraph (a) of this section, subject to the notification and medical certification requirements in §§ 630.1206 and 630.1207. An employee may take only the amount of leave that is necessary to manage the circumstances that prompted the need for leave under paragraph (a) of this section.

(c) The 12-month period referred to in paragraph (a) of this section begins on the date an employee first takes leave for a family or medical need specified in paragraph (a) of this section and continues for 12 months. An employee is not entitled to 12 additional workweeks of leave until the previous 12-month period ends and an event or situation occurs that entitles the employee to another period of family or medical leave. (This may include a continuation of a previous situation or circumstance.)

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

(e) Leave under paragraph (a) of this section is available to full-time and part-time employees. A total of 12 administrative workweeks will be made available equally for a full-time or part-time employee in direct proportion to the number of hours in the employee's regularly scheduled administrative workweek. The 12 administrative workweeks of leave will be calculated on an hourly basis and will equal 12 times the average number of hours in the employee's regularly scheduled administrative workweek. If the number of hours in an employee's workweek varies from week to week, a weekly average of the hours scheduled over the 12 weeks prior to the date leave commences shall be used as the basis for this calculation.

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

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

(h) An agency may not subtract leave from an employee's entitlement to leave under paragraph (a) of this section unless the agency has obtained confirmation from the employee of his or her intent to invoke entitlement to leave under paragraph (b) of this section. An employee's notice of his or her intent to take leave under § 630.1206 may suffice as the employee's confirmation.

(i) "Family member" has the meaning given that term in §630.201.



**Executive Office of the President of the United States
Office of Management and Budget**

*Office of Information and Regulatory Affairs
Human Resources and Housing Branch
New Executive Office Building
Room 10235
Washington, DC 20503*

FAX TRANSMITTAL

FAX: 202-395-6974
DATE: 9-13-99
TO: Nicole Rabner
FROM: JOE Lackey

Total number of pages (Including Transmittal Sheet):

17

Recipient's Fax Number:

Recipient's Telephone Number:

62878

Comments:

Here is a copy of the draft OPM regulation
currently under review at OMB that would permit
Federal employees to use up to 12 workweeks of
sick leave to care for a family member.
I can be reached at 54741.

Publication date _____

6325-01

OFFICE OF PERSONNEL MANAGEMENT

5 CFR PART 630

RIN: 3206-AI76

Absence and Leave; Sick Leave

AGENCY: Office of Personnel Management.

ACTION: Proposed rule with request for comments.

SUMMARY: The Office of Personnel Management is issuing proposed regulations to expand the use of sick leave for family care purposes. Under the proposed regulations, an employee would be able to use a total of up to 12 weeks of sick leave to care for a spouse, son or daughter, or parent with a serious health condition, subject to the conditions that govern the use of unpaid leave for these same purposes under title II of the Family and Medical Leave Act of 1993. This benefit would broaden the options available for employees to meet their family responsibilities.

DATES: Comments must be received on or before [Insert date 30 days after date of publication in the Federal Register].

ADDRESSES: Comments may be sent or delivered to Donald J. Winstead, Assistant Director for Compensation Administration, Office of Personnel Management, Room 7H31, 1900 E Street NW., Washington, DC 20415-8200, FAX (202) 606-0824, or email to payleave@opm.gov.

FOR FURTHER INFORMATION CONTACT: Sharon Herzberg, (202) 606-2858, FAX (202) 606-0824, or email to payleave@opm.gov.

SUPPLEMENTARY INFORMATION:

On May 24, 1999, President Clinton issued a memorandum directing the Office of Personnel Management (OPM) to propose Governmentwide regulations to allow Federal employees to use a total of up to 12 weeks of sick leave each year to care for a spouse, son or daughter, or parent with a serious health condition. The sick leave would be used under the same conditions that govern the use of unpaid leave for these same purposes under title II of the Family and Medical Leave Act of 1993 (FMLA).

Most Federal employees are currently entitled to use a total of up to 12 weeks (480 hours) of unpaid leave (leave without pay) during any 12-month period under title II of the FMLA to care for a spouse, son or daughter, or parent with a serious health condition. Under OPM's regulations at 5 CFR 630.1205(b)(1), annual or sick leave may be substituted for FMLA leave without pay "consistent with current law and regulations governing the granting and use of annual or sick leave." OPM's regulations at § 630.401(b) limit the amount of sick leave that may be used each leave year for family care purposes to a maximum of 13 days (104 hours). An employee therefore may substitute no more than 13 days (104) hours of sick leave for leave without pay under the FMLA to care for a spouse, son or daughter, or parent with a serious health condition. Consequently, many employees face extended periods of leave without pay when caring for a family member once they have exhausted their entitlement to use annual and sick leave.

Mothers, fathers, and grandparents (who are raising their grandchildren), and employees caring for their spouses and parents would all greatly benefit from the more generous leave

entitlement described in the President's directive to OPM. This benefit also would address the dilemmas faced by parents of special needs children when trying to balance their work and family responsibilities. Allowing an employee to substitute up to 12 weeks of his or her sick leave for unpaid leave under the FMLA would reduce the need for extended periods of leave without pay, which has a negative effect on an employee's pay and benefits, such as within-grade increases and health benefits. In addition, employees would be better able to deal with the financial and personal strain caused by a family member's medical needs.

In response to the President's memorandum, therefore, OPM is proposing to revise § 630.401(a) of the Governmentwide sick leave regulations to allow employees to use a total of up to 12 weeks (480 hours) of sick leave to care for a spouse, son or daughter, or parent with a serious health condition. The use of paid sick leave under this policy would be subject to the same conditions as the use of leave without pay under the FMLA to care for a spouse, son or daughter, or parent with a serious health condition. In particular, the same notification and certification requirements that govern the use of unpaid leave to care for a spouse, son or daughter, or parent under the FMLA would apply to Federal employees who wish to use paid sick leave under this new policy.

Part-time and Uncommon Tours

Under the proposed regulations, the entitlement to use sick leave to care for a spouse, son or daughter, or parent with a serious health condition would be prorated for part-time employees or employees on an uncommon tour of duty, consistent with the current regulations in § 630.1203(e) for using leave without pay under the FMLA. For those employees, the amount of sick leave available to care for a spouse, son or daughter, or parent with a serious health condition

would be equal to 12 times the average number of hours in the employee's regularly scheduled administrative workweek.

Relationship to Other Family Friendly Leave Programs

Employees will continue to be entitled to use a total of up to 13 days of sick leave each leave year to (1) provide care for a family member as a result of physical or mental illness; injury; pregnancy; childbirth; or medical, dental, or optical examination or treatment; or (2) make arrangements necessitated by the death of a family member or attend the funeral of a family member, subject to the requirements and limitations in § 630.401. There will be no change in this entitlement. Under the proposed regulations, however, any portion of the 13 days of sick leave previously used in a leave year for these purposes would be subtracted from the new entitlement to substitute a total of up to 12 weeks of sick leave for unpaid leave under the FMLA to care for a spouse, son or daughter, or parent with a serious health condition. If the 12-month period extends into the next leave year, the employee may use additional sick leave for family care or bereavement purposes under § 630.401(a)(3)(i) or (4) as soon as that leave becomes available for use at the beginning of the new leave year. Further, if an employee has not used the full entitlement to 12 weeks of family and medical leave under the FMLA to care for a spouse, son or daughter, or parent with a serious health condition, he or she may substitute the additional sick leave that becomes available for use at the beginning of the new leave year for leave without pay at any time during the remainder of the 12-month FMLA period.

Example 1: An employee uses 13 days (104 hours) of sick leave for family care purposes early in the leave year (leave year 1). On April 1, the employee invokes her entitlement to 12 weeks (480 hours) of unpaid leave under the FMLA to care for a son

with a serious health condition and requests to substitute sick leave to cover the 12-week period from April 1 to June 30. Since the employee has already used the 13-day (104-hour) entitlement to sick leave to care for a family member under § 630.401(a)(3)(i), she may substitute only 9 weeks and 2 days (376 hours) of sick leave for unpaid leave under the FMLA in leave year 1. The employee remains entitled to an additional 13 days of unpaid leave under the FMLA. As of the beginning of the next leave year (leave year 2), the employee may use up to 13 additional days of sick leave for family care or bereavement purposes. The employee cannot invoke a new entitlement to FMLA leave until after the 12-month period has expired at the end of March.

Example 2: An employee uses 13 days (104 hours) of sick leave for family care purposes early in the leave year (leave year 1). On December 6, the employee invokes his entitlement to 12 weeks (480 hours) of unpaid leave under the FMLA to care for a spouse with a serious health condition. The 12-month FMLA period begins on December 6 and ends on December 5 of the following year. Since the employee has already used 13 days (104 hours) of sick leave for family-care purposes in leave year 1, this amount must be subtracted from the 12-week (480-hour) entitlement to use sick leave to care for a spouse, son or daughter, or parent with a serious health condition. Therefore, the employee may substitute up to 376 hours of sick leave for unpaid leave during the original 12-month period established under the FMLA. The employee remains entitled to an additional 13 days of unpaid leave under the FMLA. As of the beginning of the next leave year (leave year 2), the employee may use up to 13 additional days of sick leave for family care or bereavement purposes or may substitute up to 13 days of sick leave for unpaid leave

under the FMLA (until the expiration of the original 12-month period). The employee cannot invoke a new entitlement to FMLA leave until after the 12-month period has expired at the beginning of December. If the employee invokes another entitlement to FMLA leave in December and has already used 13 days (104 hours) of sick leave for family-care purposes in leave year 2, this amount must be subtracted from the new 12-week (480-hour) entitlement to use sick leave to care for a spouse, son or daughter, or parent with a serious health condition. Therefore, the employee may substitute up to 376 hours of sick leave for unpaid leave during the second 12-month period established under the FMLA.

An employee would continue to be responsible for notifying the employing agency as to whether he or she is requesting sick leave for family care or bereavement purposes or substituting sick leave for unpaid leave under the FMLA to care for a spouse, son or daughter, or parent with a serious health condition. The employing agency would continue to be responsible for maintaining a record of each employee's use of sick leave for all family care or bereavement purposes, as required by §§ 630.408 and 630.1211.

Employees who exhaust their available sick and annual leave as a result of caring for a family member may request donated annual leave under the voluntary leave transfer or leave bank programs. However, an employee's expanded entitlement to use sick leave under the proposed regulations would have to be considered in determining his or her eligibility to become a leave recipient under these programs. Under the proposed regulations, if an employee wishes to become a leave recipient, and the medical emergency involves a family member, the employee would have to use all sick leave available to him or her under § 630.401 for family care purposes before qualifying for donated annual leave.

Minimum Sick Leave Balance

A full-time employee is entitled to use up to 5 days (40 hours) of his or her accrued or accumulated sick leave (or in the case of a part-time employee or an employee on an uncommon tour of duty, the number of days in his or her regularly scheduled workweek) for family care or bereavement purposes without regard to his or her sick leave balance. To use more than 5 days (40 hours) of sick leave to care for a family member, up to a maximum of 13 days (104 hours), an employee must maintain a sick leave balance of at least 10 days (80 hours) at all times. Under the proposed regulations, if an employee chooses to substitute sick leave for unpaid leave under the FMLA to care for a spouse, son or daughter, or parent with a serious health condition, these same limitations would apply. In summary, an employee may not use more than 5 days (40 hours) of sick leave for *any* family-care purpose, unless he or she maintains a sick leave balance of at least 10 days (80 hours) (or, in the case of a part-time employee or an employee on an uncommon tour of duty, two times the number of days in his or her regularly scheduled workweek). Although an agency may advance up to 40 hours of sick leave for family care or bereavement purposes, an agency may not advance sick leave to fulfill the 80-hour requirement. In addition, an agency may not advance sick leave to allow an employee who has a minimum of 80 hours of sick leave in his or her account to use additional sick leave for family care purposes.

No Retroactive Substitution of Paid Leave for Unpaid Leave

OPM's regulations on family and medical leave in 5 CFR part 630, subpart L, state that an employee must notify the agency of his or her intent to substitute paid leave for unpaid leave under the FMLA prior to the date the paid leave begins. Under the proposed regulations, therefore, an employee must notify the agency of his or her intent to substitute sick leave for unpaid leave under the FMLA to care for a spouse, son or daughter, or parent with a serious

health condition. An employee cannot retroactively substitute sick leave for unpaid leave previously taken under the FMLA.

Regulatory Flexibility Act

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

E.O. 12866, Regulatory Review

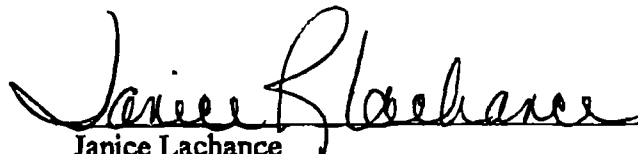
This rule has been reviewed by the Office of Management and Budget in accordance with Executive Order 12866.

List of Subjects

5 CFR Part 630

Government employees.

U.S. Office of Personnel Management


Janice Lachance
Director

Accordingly, OPM is proposing to amend part 630 of title 5 of the Code of Federal Regulations as follows:

PART 630--ABSENCE AND LEAVE

1. The authority citation for part 630 continues to read as follows:

AUTHORITY: 5 U.S.C. 6311; § 630.301 also issued under Pub. L. 103-356, 108 Stat. 3410; § 630.303 also issued under 5 U.S.C. 6133(a); §§ 630.306 and 630.308 also issued under 5 U.S.C. 6304(d)(3), Pub. L. 102-484, 106 Stat. 2722, and Pub. L. 103-337, 108

Stat. 2663; subpart D also issued under Pub. L. 103-329, 108 Stat. 2423; § 630.501 and subpart F also issued under E.O. 11228, 30 FR 7739, 3 CFR, 1974 Comp., p. 163; subpart G also issued under 5 U.S.C. 6305; subpart H also issued under 5 U.S.C. 6326; subpart I also issued under 5 U.S.C. 6332, Pub. L. 100-566, 102 Stat. 2834, and Pub. L. 103-103, 107 Stat. 1022; subpart J also issued under 5 U.S.C. 6362, Pub. L. 100-566, and Pub. L. 103-103; subpart K also issued under Pub. L. 102-25, 105 Stat. 92; and subpart L also issued under 5 U.S.C. 6387 and Pub. L. 103-3, 107 Stat. 23.

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

2. In § 630.201(b), new definitions of parent, serious health condition, son or daughter, and spouse are added in alphabetical order to read as follows:

Sec. 630.201 Definitions.

* * * * *

Parent has the meaning given that term in § 630.1202.

Serious health condition has the meaning given that term in § 630.1202.

Son or daughter has the meaning given that term in § 630.1202.

Spouse has the meaning given that term in § 630.1202.

Subpart D—Sick Leave

3. In § 630.401, the introduction to paragraph (a) and paragraphs (a)(3) and (b) are revised; paragraphs (c) through (e) are redesignated as paragraphs (d) through (f), respectively; in newly designated paragraph (e), “(c)” is removed and “(d)” is added in its place wherever it appears; and a new paragraph (c) is added to read as follows:

Sec. 630.401 Grant of sick leave.

(a) Subject to paragraphs (b) through (f) of this section, an agency must grant sick leave to an employee when the employee--

* * * * *

(3)(i) Provides care for a family member who is incapacitated as the result of physical or mental illness, injury, pregnancy, or childbirth or who receives medical, dental, or optical examination or treatment; or

(ii) Requests the substitution of sick leave for leave without pay under paragraph (c)(1) of this section to provide care for a spouse, son or daughter, or parent with a serious health condition;

* * * * *

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

(c)(1) An employee who has invoked his or her entitlement to use family and medical leave under subpart L of this part may substitute a total of up to 480 hours of sick leave (or, in the case of a part-time employee or an employee with an uncommon tour of duty, an amount of sick leave equal to 12 times the average number of hours in his or her scheduled tour of duty each week) for leave without pay during the 12-month period established under § 630.1203(c) to care for a spouse, son or daughter, or parent with a serious health condition.

(2) If, at the time an employee requests the substitution of sick leave for leave without pay under paragraph (c)(1) of this section, he or she has used any portion of the sick leave authorized under paragraph (b) of this section during that leave year, that amount must be subtracted from the

maximum number of hours authorized under paragraph (c)(1) of this section to determine the total amount of sick leave that may be substituted for leave without pay during the 12-month period established under § 630.1203(c). If the 12-month period extends into the next leave year, the employee may use additional sick leave under § 630.401(a)(3)(i) or (4) as soon as that leave becomes available for use at the beginning of the new leave year. Further, if an employee has not used the full entitlement to 12 weeks of family and medical leave under subpart L of this part, he or she may substitute the additional sick leave that becomes available for use at the beginning of the new leave year for leave without pay at any time during the remainder of the 12-month period established under § 630.1203(c).

(3) An employee who substitutes the maximum amount of sick leave authorized under paragraph (c)(1) to care for a spouse, son or daughter, or parent with a serious health condition may not use any additional family and medical leave for any other purpose listed in § 630.1203(a) during the 12-month period established under § 630.1203(c).

(4) The approval of an employee's request to substitute sick leave for leave without pay to care for a spouse, son or daughter, or parent with a serious health condition is subject to all of the terms and conditions applicable to the approval of leave without pay for these same purposes under 5 CFR part 630, subpart L, Family and Medical Leave, including the notice and medical certification requirements set forth in §§ 630.1206 and 630.1207, respectively.

* * * * *

§ 630.405 [amended]

4. In § 630.405 paragraph (a) remove "(e)" and add in its place "(f)."

Billing Code: 6325-01