

Sunshine Act Meetings

Federal Register

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Friday, June 4, 1993

This section of the **FEDERAL REGISTER** contains notices of meetings published under the "Government in the Sunshine Act" (Pub. L. 94-409) 5 U.S.C. 552b(e)(3).

FEDERAL DEPOSIT INSURANCE CORPORATION

Notice of Agency Meeting

Pursuant to the provisions of the "Government in the Sunshine Act" (5 U.S.C. 552b), notice is hereby given that at 9:30 a.m. on Wednesday, June 9, 1993, the Federal Deposit Insurance Corporation's Board of Directors will meet in closed session, by vote of the Board of Directors, pursuant to sections 552b(c)(2), (c)(4), (c)(6), (c)(8), (c)(9)(A)(ii), (c)(9)(B), and (c)(10) of Title 5, United States Code, to consider the following matters:

Summary Agenda

No substantive discussion of the following items is anticipated. These matters will be resolved with a single vote unless a member of the Board of Directors requests that an item be moved to the discussion agenda.

Reports of the Office of Inspector General.
Matters relating to the Corporation's supervisory and corporate activities.

Recommendations with respect to the initiation, termination, or conduct of administrative enforcement proceedings (cease-and-desist proceedings, termination-of-insurance proceedings, suspension or removal proceedings, or assessment of civil money penalties) against certain insured depository institutions or officers, directors, employees, agents or other persons participating in the conduct of the affairs thereof.

Names of persons and names and locations of depository institutions authorized to be exempt from disclosure pursuant to the provisions of subsections (c)(6), (c)(8), and (c)(9)(A)(ii) of the "Government in the Sunshine Act" (5 U.S.C. 552b(c)(6), (c)(8), and (c)(9)(A)(ii)).

Note: Some matters falling within this category may be placed on the discussion agenda without further public notice if it becomes likely that substantive discussion of those matters will occur at the meeting.

Discussion Agenda

Matters relating to the possible closing of certain insured depository institutions:

Names and locations of depository institutions authorized to be exempt from disclosure pursuant to the provisions of subsections (c)(8), (c)(9)(A)(ii), and (c)(9)(B)

of the "Government in the Sunshine Act" (5 U.S.C. 552b(c)(8), (c)(9)(A)(ii), and (c)(9)(B)).

The meeting will be held in the Board Room on the sixth floor of the FDIC Building located at 550-17th Street NW., Washington, DC.

Requests for further information concerning the meeting may be directed to Mr. Hoyle L. Robinson, Executive Secretary of the Corporation, at (202) 898-6757.

Dated: June 2, 1993.
Federal Deposit Insurance Corporation.
Hoyle L. Robinson,
Executive Secretary.
[FR Doc. 93-13360 Filed 6-2-93; 2:39 pm]
BILLING CODE 6714-01-M

FEDERAL DEPOSIT INSURANCE CORPORATION

Notice of Agency Meeting

Pursuant to the provisions of the "Government in the Sunshine Act" (5 U.S.C. 552b), notice is hereby given that the Federal Deposit Insurance Corporation's Board of Directors will meet in open session at 9:00 a.m. on Wednesday, June 9, 1993, to consider the following matters:

Summary Agenda

No substantive discussion of the following items is anticipated. These matters will be resolved with a single vote unless a member of the Board of Directors requests that an item be moved to the discussion agenda.

Reports of actions approved by the standing committees of the Corporation and by officers of the Corporation pursuant to authority delegated by the Board of Directors.

Memorandum and resolution re: Delegation of Authority to Defer Appointing Receiver for Critically Undercapitalized Institutions.

Memorandum and resolution re: Proposed amendments to Part 303 of the Corporation's rules and regulations, entitled "Applications, Requests, Submittals, Delegations of Authority, and Notices Required to be Filed by Statute or Regulation," which would (1) amend the Corporation's requirements for publishing notice of the filing of applications for proposed merger transactions under the Bank Merger Act; and (2) clarify that the public comment period begins when the first notice is published and is 30 days for non-emergency merger transactions and 10 days for emergency merger transactions.

Discussion Agenda

Memorandum and resolution re: Proposed amendments to Parts 303 and 308 of the

Corporation's rules and regulations, entitled "Applications, Requests, Submittals, Delegations of Authority, and Notices Required to be Filed by Statute or Regulation," and "Rules of Practice and Procedure," respectively, and proposed amendments to the Corporation's rules and regulations in the form of a new Part 364 entitled, "Standards for Safety and Soundness," all of which would prescribe safety and soundness standards in the areas of operation and management, asset quality and earnings, and compensation as required by section 39 of the Federal Deposit Insurance Act, as added by section 132 of the Federal Deposit Insurance Corporation Improvement Act of 1991.

Memorandum and resolution re: Proposed amendments to Part 325 of the Corporation's rules and regulations, entitled "Capital Maintenance," which would (1) ensure that depository institutions effectively measure and monitor their interest rate risk ("IRR") and maintain adequate capital for that risk, and (2) provide for considerations to IRR in the overall determination of an institution's minimum capital ratio.

The meeting will be held in the Board Room on the sixth floor of the FDIC Building located at 550-17th Street, N.W., Washington, D.C.

The FDIC will provide attendees with auxiliary aids (e.g., sign language interpretation) required for this meeting. Those attendees needing such assistance should call (202) 898-6745 (Voice); (202) 898-3509 (TTY), to make necessary arrangements.

Requests for further information concerning the meeting may be directed to Mr. Hoyle L. Robinson, Executive Secretary of the Corporation, at (202) 898-6757.

Dated: June 2, 1993.
Federal Deposit Insurance Corporation.
Hoyle L. Robinson,
Executive Secretary.
[FR Doc. 93-13361 Filed 6-2-93; 2:39 pm]
BILLING CODE 6714-01-M

FEDERAL HOUSING FINANCE BOARD
"FEDERAL REGISTER" CITATION OF
PREVIOUS ANNOUNCEMENT: 58 FR 29693,
May 21, 1993.
PREVIOUSLY ANNOUNCED TIME AND DATE OF
THE MEETING: 9:00 a.m. Wednesday, May
26, 1993.
CHANGES IN THE MEETING: The following
topic was deleted from the agenda
during the closed portion of the
meeting.

• Discussion of the merits of the System's moving to 20:1 in conjunction with changes

to the Financial Management Policy guidelines, particularly those that effect the limits on Mortgage Backed Securities investment.

The following topic was added to the agenda during the closed portion of the meeting.

- Review of 1992 Incentive Award for the President of the FHLBank of San Francisco.

The Board determined that agency business required its consideration of this matter on less than seven days' notice to the public; that no earlier notice of these changes in the subject matter of the meeting was practicable; that the public interest did not require consideration of the matter in a meeting open to public observation; and that the matter could be considered in the closed portion of the meeting pursuant to

section 552b(c)(6) of title 5 of the United States Code.

CONTACT PERSON FOR MORE INFORMATION:
Elaine L. Baker, Executive Secretary to the Board, (202) 408-2837.

Philip L. Conover,
Managing Director.

[FR Doc. 93-13279 Filed 6-1-93; 4:44 pm]

BILLING CODE 6725-01-M

BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM

TIME AND DATE: 10:00 a.m., Wednesday, June 9, 1993.

PLACE: Marriner S. Eccles Federal Reserve Board Building, C Street entrance between 20th and 21st Streets, N.W., Washington, D.C. 20551.

STATUS: Closed.

MATTERS TO BE CONSIDERED:

1. Personnel actions (appointments, promotions, assignments, reassignments, and salary actions) involving individual Federal Reserve System employees.

2. Any items carried forward from a previously announced meeting.

CONTACT PERSON FOR MORE INFORMATION:

Mr. Joseph R. Coyne, Assistant to the Board; (202) 452-3204. You may call (202) 452-3207, beginning at approximately 5 p.m. two business days before this meeting, for a recorded announcement of bank and bank holding company applications scheduled for the meeting.

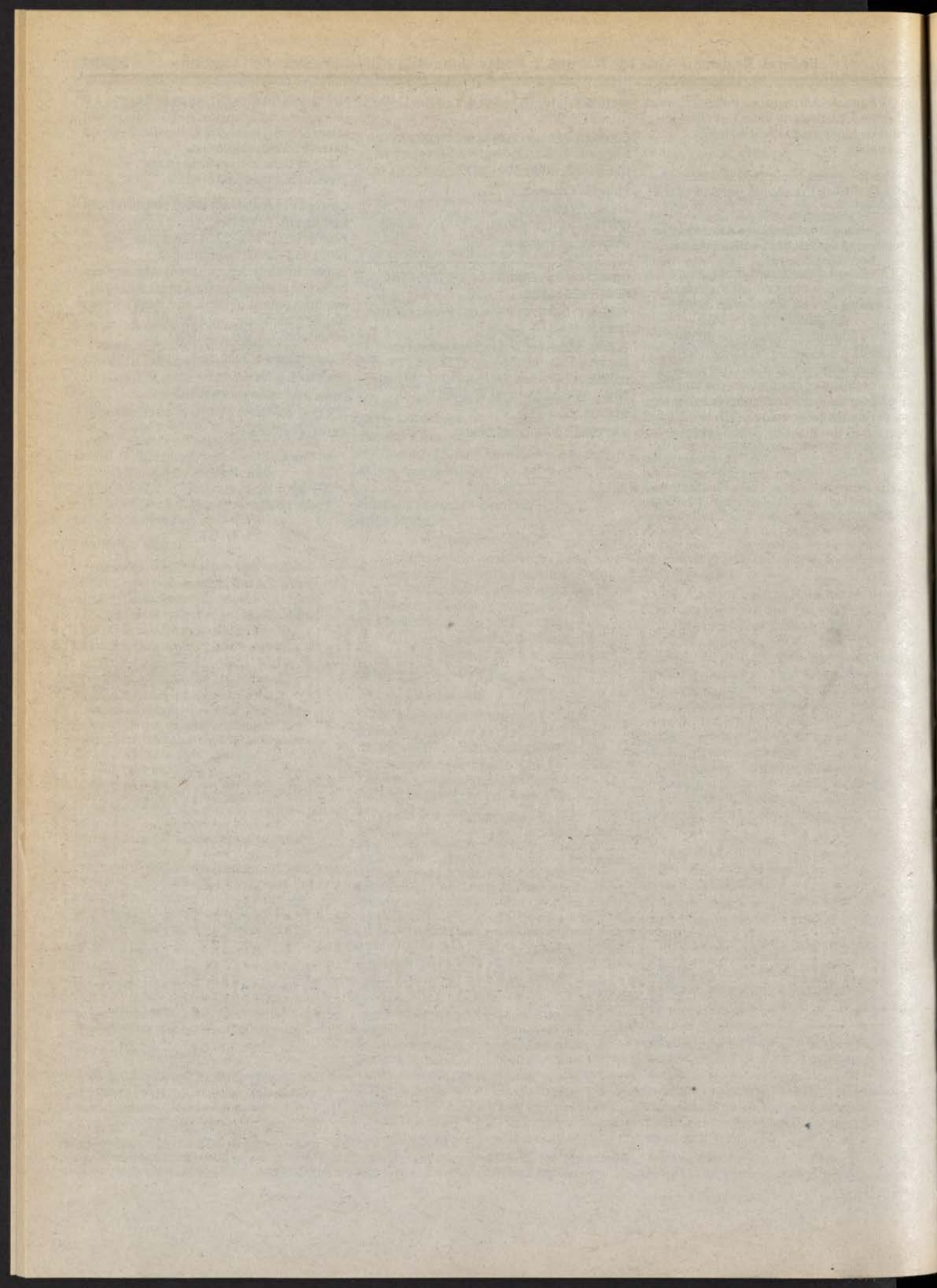
Dated: June 1, 1993.

Jennifer J. Johnson,

Associate Secretary of the Board.

[FR Doc. 93-13335 Filed 6-2-93; 12:48 pm]

BILLING CODE 6210-01-P



5010-108-01

Friday
June 4, 1993

Part II

Department of Labor

Wage and Hour Division

29 CFR Part 825

**Family and Medical Leave Act; Interim
Final Rule**

DEPARTMENT OF LABOR

Wage and Hour Division

29 CFR Part 825

RIN 1215-AA85

The Family and Medical Leave Act of 1993

AGENCY: Wage and Hour Division, Labor.

ACTION: Interim final rule; request for comments.

SUMMARY: This document contains interim regulations implementing the Family and Medical Leave Act of 1993 called ("FMLA" or "the Act").

The Act is effective on August 5, 1993, six months from the date of its enactment. Where a collective bargaining agreement is in effect on August 5, 1993, the Act is effective when the collective bargaining agreement terminates or February 5, 1994, whichever is earlier.

The purpose of these regulations is to set forth the requirements of Title I and Title IV of the Act. Title I applies to covered private employers and public agencies (except for most of the Federal Government, which is governed by Title II). Title IV of the Act primarily concerns the relationship between FMLA and other laws, as well as collective bargaining agreements and other employer plans and programs.

DATES: *Effective Date:* This interim final rule is effective on August 5, 1993.

Comments: Comments are due on or before September 2, 1993.

ADDRESSES: Submit written comments to the Administrator, Wage and Hour Division, U.S. Department of Labor, room S-3502, 200 Constitution Avenue, NW., Washington, DC 20210.

Commenters who wish to receive notification of receipt of comments are requested to include a self-addressed, stamped post card. As a convenience to commenters, comments may be transmitted by facsimile ("FAX") machine to (202) 219-5122. This is not a toll-free number.

FOR FURTHER INFORMATION CONTACT: J. Dean Speer, Division of Policy and Analysis, Wage and Hour Division, Employment Standards Administration, U.S. Department of Labor, room S-3506, 200 Constitution Avenue, NW., Washington, DC 20210; telephone (202) 219-8412. This is not a toll-free number.

SUPPLEMENTARY INFORMATION:

I. Paperwork Reduction Act

Recordkeeping requirements contained in the regulation (§ 825.500)

have been submitted to the Office of Management and Budget under the provisions of the Paperwork Reduction Act of 1980 (Pub. L. 96-511) for review.

The public reporting burden for collection of information requirements contained in these regulations is estimated to average as follows:

3 minutes per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information.

This estimate is based on the assumption that most of the information required by these regulations is already maintained by those employers subject to the minimum wage and overtime provisions of the Fair Labor Standards Act (FLSA) under Regulations, 29 CFR part 516. Additional FMLA-specific recordkeeping requirements, not otherwise required under the FLSA, are the minimum necessary for determining compliance with FMLA. These regulations establish no new reporting requirements. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, to the Office of Information Management, U.S. Department of Labor, room N-1301, 200 Constitution Avenue NW., Washington, DC 20210; and the Office of Information and Regulatory Affairs, Office of Management and Budget, Washington, DC 20503.

II. Background

The Family and Medical Leave Act (FMLA) was enacted into law on February 5, 1993. In general, FMLA entitles qualified employees to up to 12 weeks of unpaid leave per year for the birth or adoption of a child, to care for a spouse or an immediate family member with a serious health condition, or when unable to work because of a serious health condition. Employers covered by the law are required to maintain any pre-existing health coverage during the leave period and, once the leave period is concluded, to reinstate the employee to the same or an equivalent job.

A. Purpose of FMLA.

Enactment of FMLA was predicated on two overarching concerns—the needs of the American workforce, and the development of high-performance work organizations. Increasingly, America's children and elderly are dependent upon family members who spend many hours at work. When a family emergency arises, requiring workers to attend to a seriously-ill child or parent, or to a newly-born infant, or even to their own serious illness, workers need

reassurance that they will not be asked to choose between continuing their employment and meeting their personal and family obligations, or tending to vital needs at home.

The FMLA is both intended and expected to benefit employers as well as their employees. The Department believes that a direct correlation exists between stability in the family and productivity in the workplace. FMLA will encourage the development of high performance work organizations. When workers can count on durable links to their workplace they are able to make a full commitment to their job. The record of hearings on family and medical leave is full of testimonials from some of America's most respected business leaders on the powerful productive advantages of stable workplace relationships, and on the comparatively small costs of guaranteeing that those relationships will not be dissolved while workers attend to pressing family health obligations or their own serious illness.

This "family friendly" law reflects policies and practices already adopted by many employers across the United States and in most other industrialized countries. In fact, such policies have been found to be good for both workers and businesses.

FMLA benefits working people by allowing a healthier balance between their family and work lives. In enacting the law, Congress found that especially with the very significant increase in single-parent households and homes where both parents are working, it is important for the development of children and the family unit that parents be able to have time to participate in early child-rearing and to attend to serious illness affecting their immediate family, including the elder care needs affecting more and more families in our country. When a newborn or newly adopted child arrives or a serious family medical problem occurs, employees should not have to choose between taking the time needed to attend to such important events and the loss of their job and health insurance coverage. The FMLA—like similar State laws and employer policies—is intended to promote a healthier balance between work and family responsibilities, ensuring that family development and cohesiveness are encouraged by this nation's public policy.

FMLA will benefit employers too. Many employers—in all areas and kinds of industries, and throughout the public sector—have long-established policies and practices that accommodate their employees' family and medical leave

needs. Many private employers with such policies have come to regard them as providing a competitive advantage in today's labor markets. Such family and medical leave policies are seen as an important attraction in recruiting and retaining employees, and in promoting employee loyalty, involvement and commitment to their employer's business goals and operations. These businesses have also found that the costs associated with accommodating their employees' family and medical leave needs are almost always minimal. In fact, several studies show that family and medical leave policies are actually cost-beneficial in that any costs incurred are more than offset by savings realized from lower turnover, higher productivity, and reducing or avoiding the costs of training new employees.

In addition, employers with family and medical leave policies report that abuse of their policy is extremely uncommon. When employees' paid leave is exhausted or cannot be used, continuing leave in an unpaid status is a powerful incentive for employees to return to work as soon as they are able. Employers have told us that their policies are intentionally structured to minimize requirements for employee notice and justification for family and medical leave for two reasons. First, because their experience is that their workers cannot afford and do not ask for such leave unless it is absolutely necessary. Second, when confronting a serious family or medical situation, the employee's stress is only compounded by unnecessary demands by the employer.

Employees needing family or medical leave, even when not risking the possible loss of their job or health insurance, experience other kinds of stress unrelated to the event occurring in their personal lives. Employers report that many employees fear that leaving their job for some period of time will affect their employer's business, that their work will not get done or be done correctly, or that they will return to an accumulated backlog of work. Employers have found that it is extremely important to involve the employees in planning for how their work will get done during their absence. This effort helps relieve both the employer's and the employee's anxieties in this regard, and fosters cooperation among co-workers who may be called on to help cover the unit's work during the absence.

These principles provide valuable guidance in implementing family and medical leave policies as required by the FMLA. Meeting employees' leave needs—regulated primarily by the fact

that few workers can afford to take unnecessary unpaid leave—will work best, afford the greatest business advantages, and produce the greatest payback in the long term when done in a spirit of cooperation, openness and in recognition of the fact that both the employer and employee will benefit. Employees treated fairly and equitably, with sympathy and understanding of the situation they face, and with a minimum of unnecessary requirements will be more loyal, dedicated and productive, and a greater asset to their organization.

B. Applicability of Different Titles Under FMLA

Title I of the Act applies to private 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. Similar provisions in Title II of the Act apply to most other Federal employees. Separate regulations implementing that title will be issued and administered by the U.S. Office of Personnel Management (OPM). Title III concerns the establishment of a "Commission on Leave." Title IV contains various provisions pertaining to effective dates, regulations, and the effect of the Act on more generous leave policies, other laws, and existing employment benefits. Title V extends similar leave provisions to certain employees of the Senate and House of Representatives.¹

C. Significant Dates Under FMLA

The Act requires the Department of Labor to issue regulations implementing Title I and Title IV by no later than June 5, 1993. The provisions of Title I are effective on August 5, 1993 (six months after the date of enactment) except where a collective bargaining agreement (CBA) is in effect on that date. Where a CBA is in effect, these provisions take effect on the date of termination of the CBA or on February 5, 1994, whichever is earlier.

D. March 1993 NPRM Under FMLA

To obtain public input to assist in the development of these regulations, the Department published a notice of proposed rulemaking in the *Federal Register* on March 10, 1993 (58 FR 13394). Public comment was invited on a variety of questions and issues. The notice provided for a comment period until March 31, 1993. A total of 393

comments were received in response to the notice—from employers, trade and professional associations, advocacy organizations, labor unions, State and local governments, law firms and employee benefit firms, academic institutions, financial institutions, medical institutions, governments, Members of Congress, and others. About 16 percent of the comments were concerned solely with the definition of the term "health care provider," urging that Christian Scientist practitioners be included in the definition. A number of comments were received after the comment period closed on March 31. These comments have also been included in the rulemaking record and will be considered in the preparation of the final rule.

In addition, the Department met with Congressional staff and outside parties who provided background information and raised questions to be considered in preparation of the notice of proposed rulemaking. Notes of these meetings are included in the rulemaking record. Participating in one such meeting were representatives of the Society for Human Resource Management, National Association of Manufacturers, National Restaurant Association, National Association of Wholesale Distributors, Labor Policy Association, Federated Department Stores, Houston Lighting and Power Company, Alexander & Alexander, Towers Perrin, General Motors, ARCO, Oneida Ltd., and Southwest Air. Another meeting included representatives of the AFL-CIO, Service Employees International Union, National Education Association, American Association of Retired Persons, American Federation of State, County and Municipal Employees, Association of Professional Flight Attendants, and the Independent Federation of Flight Attendants. Meetings were also held with representatives of the National Retail Federation, the States of Connecticut, Oregon, and Wisconsin, and The First Church of Christ, Scientist. Teleconferences were held with representatives of Businesses for Social Responsibility and the State of California's Fair Employment Practices Department. A meeting was also held with majority and minority staff of the interested Congressional Committees in which these staff were afforded the opportunity to review and discuss draft regulations. Notes of this meeting have been made part of the rulemaking record. The discussion during this meeting resulted in a number of clarifications of regulatory language and a revision of the definition of "serious

¹ Title VI contains a sense of the Congress provision requiring a review and report from the Secretary of Defense on departmental policy with respect to the service of homosexuals in the Armed Forces.

health condition" contained in these regulations.

The Department also has been working with the U.S. Office of Personnel Management (OPM) to coordinate our respective rulemaking efforts under the Act. We have also conferred with the U.S. Equal Employment Opportunity Commission (EEOC), the U.S. Internal Revenue Service (IRS), and the Resolution Trust Corporation.

E. Structure of Interim Final Rule

One of the Department's primary goals in this rulemaking process is to produce "user-friendly" regulations—in other words, regulations which are accessible, understandable, and usable by a person who is not familiar with the Act. The rulemaking process has also made clear to us that the public wants its questions answered in a way that permits the Act to be implemented as it was intended and without unnecessary litigation.

To assist the public, these regulations have been structured in a question and answer format, with both major and minor questions grouped as we believe they would most logically be asked. An index is also provided as an appendix at the end of the regulations to facilitate their use.

Our objective is to establish clear principles and guidelines that can be applied in varying factual circumstances. We cannot, however, address all of the questions that might arise under the multitude of industry- or company-specific situations that can occur under the Act. We will endeavor to address such additional matters as they are raised in this rulemaking process, or suggest the appropriate source for obtaining further information and answers to questions on issues which extend beyond the scope of FMLA or which cannot be resolved directly through FMLA's implementing regulations. For example, employers and employees have expressed a desire to learn how particular fringe benefit plans or practices with respect to "cafeteria plans," "flexible spending accounts," and the "continuation of health benefits provisions" of Title X of the Consolidated Omnibus Budget Reconciliation Act of 1986 ("COBRA") interact with FMLA, particularly in regard to the tax implications of such programs. The Department urges that employers and employees with an interest in these areas consult directly with the IRS to obtain guidance.

III. Summary and Discussion of Regulatory Provisions

Subpart A—What Is the Family and Medical Leave Act, and to Whom Does It Apply?

Subpart A briefly summarizes the provisions of the Act and its purposes, including how the effective date provisions of the Act apply to leave taken or underway on its effective date, which employers are covered by the Act, which employees are "eligible" for FMLA benefits, and in what kinds of situations the Act requires employers to allow FMLA leave. Section 825.100 describes the Act's basic provisions and requirements. Section 825.101 briefly explains the Congressional findings and purposes, and the rationale for why the Act was passed.

When Is the Act Effective? (§ 825.102)

The Act takes effect on August 5, 1993, unless a collective bargaining agreement (CBA) is in effect on that date. If a CBA is in effect on August 5, 1993, FMLA takes effect upon termination of the CBA, but no later than February 5, 1994 (i.e., 12 months after the date of enactment).

The Act's legislative history explains that employment with a covered employer before the Act takes effect is to be counted in determining whether an employee is "eligible" for FMLA leave. Accordingly, an employer must consider periods of employment before the Act's effective date when determining if the law applies to it and if its employees are eligible for leave. For example, an employer must count the number of employees employed in both calendar years 1992 and 1993 to determine if it employed at least 50 employees during 20 or more weeks in either year. If the employer employed 50 or more employees during 20 or more calendar weeks in either calendar year as of the Act's effective date, the employer is subject to the law on August 5, 1993, the date the law takes effect.

How Does the Act Affect Leave in Progress on, or Taken Before, the Effective Date of the Act? (§ 825.103)

Because both the leave entitlements and notice provisions of the Act are not effective until August 5, 1993, only leave starting on and after that date is considered FMLA leave which can be counted against an employee's 12-week entitlement. Alternatives suggested by comments, but not adopted, include: (1) Only leave requested on or after the Act's effective date should count; (2) leave beginning before the Act takes effect and continuing on the effective

date should all be counted against the 12-week entitlement; and, (3) any leave taken for FMLA-eligible purposes over the prior 12-month period before the Act's effective date should be counted towards the 12-week entitlement. It is recognized that the regulation may allow some opportunity for leave-stacking, e.g., where an employee has already taken leave to which the employee is entitled under State law or the employer's plan. However, this circumstance will exist only in the initial implementation and transition period.

What Employers Are Covered by the Act? (§ 825.104)

FMLA covers employers who employ 50 or more employees (see the next section) and who are engaged in commerce or in any industry or activity affecting commerce. The Act uses the "affecting commerce" test under the Labor Management Relations Act (LMRA), rather than the narrower standard of the Fair Labor Standards Act (FLSA). When determining if activities affect "commerce," courts interpret this test very broadly, in effect finding that coverage coincides with the full scope of Congressional power to regulate commerce under the Constitution. See *National Labor Relations Board v. Reliance Fuel Corp.*, 371 U.S. 224, 226 (1963) (per curiam). Under Title VII of the Civil Rights Act of 1964 (Title VII), the U.S. Court of Appeals for the Ninth Circuit stated that it is difficult to imagine any activities, businesses or industries employing 15 or more employees (the Title VII threshold) that do not affect commerce among the States in some degree. Because FMLA has an even higher coverage threshold than Title VII, any employer with 50 or more employees will be deemed to be an employer " * * * engaged in commerce or in any industry or activity affecting commerce * * *" within the meaning of FMLA.

The notice of proposed rulemaking raised questions concerning who is the employer under arrangements involving leased employees, employees of franchises, and other loosely related business operations, e.g., related but separate corporate entities. Principles established under Title VII and the LMRA are applied in the regulation to make this determination. Ordinarily the legal entity will be the employer. However, there are circumstances where the relationship between two entities is so close that they will be considered an integrated employer and, therefore, treated as a single employer in counting employees and for other purposes. Although the standards are somewhat

different, it is believed that an employer who meets the "enterprise" test under the FLSA would ordinarily meet the integrated employer test.

In Determining Whether an Employer Is Covered by FMLA, What Does it Mean to Employ 50 or More Employees for Each Working Day During Each of 20 or More Calendar Workweeks in The Current or Preceding Calendar Year? (§ 825.105)

This language parallels language in Title VII of the Civil Rights Act of 1964, and is intended to receive the same interpretation. As most courts and the EEOC have interpreted the language, it is intended to mean "employ" in the sense of maintain on the payroll. It is not necessary that every employee actually perform work on each working day to be counted for this purpose. For example, a bank that is open for business five days per week will be considered to have all employees who are regularly maintained on its payroll as employed for each working day, even though only a few of its employees, such as security guards or maintenance personnel, may work on weekend days. Similarly, part-time employees and employees on leaves of absence would be counted as employed for each working day so long as they are on the employer's payroll for each day of the workweek. On the other hand, an employee who is added to the employer's payroll after the beginning of a workweek, or who terminates employment prior to the end of the workweek, will not count as being employed on each working day in that week. (See S. Rep. 103-3 (1993), pp. 21-22; see also, H.R. Rep. 103-8, Part 1 (1993), pp. 33-34.) Employees on long-term or indefinite lay-off will also not be counted.

Although there is contrary case law, the interpretation of this statutory provision contained in the legislative history is the predominant view and, we believe, is the better construction of the provision. Therefore, a "maintained on the payroll" test is used in the regulations.

How Is "Joint Employment" Treated Under FMLA? (§ 825.106)

Title VII, the LMRA, and the FLSA all utilize the concept of joint employment. These principles are spelled out in the regulations, utilizing the principles of the FLSA interpretative bulletin, 29 CFR part 791, and the regulations under the Migrant and Seasonal Agricultural Worker Protection Act, 29 CFR 500.20(i). Under the FMLA, however, the application of these principles is somewhat more difficult because, for

example, ordinarily only one employer furnishes an employee's benefits.

These regulations provide that where there is a joint employment relationship, all individuals working for an entity (including those shared with the joint employer) are counted in determining coverage. A primary employer is responsible for satisfying the basic FMLA responsibilities to an employee taking FMLA leave, while a secondary employer is prohibited from discriminating or retaliating against that employee. With respect to its regular work force, on the other hand, a covered secondary employer must comply with all of its responsibilities under FMLA.

What Is Meant by "Successor in Interest"? (§ 825.107)

The FMLA defines the term "employer" to include "any successor in interest of an employer." Thus, a "successor in interest" employer must take into account the Act's coverage, eligibility, and other FMLA responsibilities of the predecessor employer when determining and satisfying its FMLA obligations. This means that an employee's FMLA leave eligibility is determined by treating the employment by the predecessor and successor employers as continuous employment by a single employer. Further, an eligible employee who commences FMLA leave while employed by the predecessor employer must be restored to employment by the "successor in interest" upon concluding the leave (assuming the exemption for "key employees" does not apply, discussed below in § 825.217).

The factors to be considered in determining whether an employer is a "successor in interest" are those utilized under Title VII and a number of cases under the Vietnam Era Veterans' Readjustment Act of 1974 (VEVRA), which relate essentially to whether there is continuity of the same business operations with the same plant, work force, jobs and working conditions, supervisory personnel, machinery and equipment, and products or services, and the ability of the predecessor to provide relief. One of these factors, notice to the employer, is not included because—as suggested in *Horton v. Georgia-Pacific Corp.*, 114 Lab. Cas. (CCH) ¶ 12,060 (E.D. Mich. 1990), arising under VEVRA—that factor is not considered pertinent to an employee returning from leave.

What Is a "Public Agency"? (§ 825.108)

"Public agency" is defined in accordance with section 3(x) of the FLSA, which includes the government of the United States; the government of

a State or political subdivision of a State; any agency of the United States (including the United States Postal Service and Postal Rate Commission), a State, or a political subdivision of a State, or any interstate governmental agency. Under the FLSA, States and political subdivisions of States are considered to be single public agency employers, the same test used in these regulations.

While the 50-employee coverage test does not apply to public agencies, the public agency employer must employ 50 employees within a 75-mile area around the worksite in order for an employee to be "eligible" and entitled to FMLA leave (see § 825.110 below). Thus, a State is considered a single public agency employer under FMLA for purposes of counting the number of employees to determine if they are "eligible" for FMLA leave. Likewise, any political subdivision of a State, such as a county or a city, is a single public agency employer for this purpose.

Where there is a question about whether an agency is a single public agency employer (separate from other governmental jurisdictions), the listing in the U.S. Bureau of Census' "Census of Governments" will be conclusive.

Are Federal Agencies Covered by These Regulations? (§ 825.109)

Most Federal executive branch employees are covered by Title II of FMLA, administered by the Office of Personnel Management (OPM). The Department has worked with OPM to determine which executive branch employees are excluded from Title II and, therefore, covered by these regulations. The Federal employees covered by these regulations include: (1) Employees of the U.S. Postal Service, Postal Rate Commission, and Library of Congress; (2) employees of a corporation supervised by the Farm Credit Administration, if private interests elect or appoint a member of the board of directors; (3) part-time employees who do not have an established regular tour of duty during the administrative workweek; (4) employees serving under temporary appointments with a time limitation of one year or less; (5) employees of legislative and judicial branch agencies employed in a unit which has employees in the competitive service (e.g., the Government Printing Office and the U.S. Tax Court); and (6) other Federal executive agencies if they are not covered by Title II of FMLA and OPM jurisdiction. The 50-employees-within-75-miles eligibility test applies to Federal employees covered by these regulations. For employees covered by

these regulations, the U.S. Government constitutes a single employer.

Which Employees Are "Eligible" To Take Leave Under the FMLA?
(§ 825.110)

To be "eligible," an employee must have worked for the employer: (1) For at least 12 months and (2) for at least 1,250 hours during the year preceding the start of the leave, and (3) be employed at a worksite where the employer employs at least 50 employees within a 75-mile radius.

In determining whether an employee has 1,250 hours of service, the Act requires that FLSA hours-worked principles be applied. Therefore, all hours which an employer suffers or permits an employee to work are counted towards hours of service (see 29 CFR part 785). For example, on-call time would be hours of service where it meets the FLSA hours-worked requirements (29 CFR part 785.17), as would ground time for flight crews.

The regulations describe how to determine hours of service for this purpose for employees not subject to the minimum wage and overtime requirements of the FLSA, and for whom no record of hours-worked are kept. For purposes of this regulation, FLSA-exempt employees for whom no hours-worked records have been kept and who have worked for the employer for at least 12 months are presumed to have met the 1,250 hours of service requirement for eligibility. For example, in consideration of the time spent at home reviewing homework and tests, full-time teachers in an elementary or secondary school system, or institution of higher education, or other educational establishment or institution, are deemed to meet the 1,250 hour test. An employer must be able to clearly demonstrate that such an employee did not work 1,250 hours during the preceding 12-month period if FMLA leave is to be denied on the basis that the employee is not an "eligible" employee.

In Determining if an employee Is "Eligible" Under FMLA, How Is the Determination Made Whether the Employer Employs 50 Employees Within 75 Miles of the Worksite Where the Employee Requesting Leave Is Employed? (§ 825.111)

The term "single site of employment" from the Worker Adjustment and Retraining Notification Act (WARN) regulations, 20 CFR Part 639, applies in determining what constitutes a "worksite" for purposes of FMLA. Because the purpose of the 75-mile radius limit is to afford employers the

opportunity to utilize employees among proximate worksites when an employee goes on leave, and because of practical difficulties in determining 75 miles "as the crow flies," the regulations provide that 75 miles from the worksite is measured based on surface miles on public roads.

It is important to recognize the distinction made under FMLA between the 50-employees test for determining if a private employer is covered by the Act, and the separate 50-employees-employed-within-75-miles-of-the-worksite test for determining if an employee is "eligible" to take FMLA leave. It is conceivable that a covered employer, employing more than 50 employees at multiple, geographically dispersed worksites, might have no eligible employees if fewer than 50 employees are working within 75 miles of each worksite. For example, an employer that operates a chain of convenience stores with none of the locations within 75 miles of each other could employ hundreds of employees, and be covered by the Act, but still not have any employees who are eligible for FMLA leave if fewer than 50 employees work at each location.

A number of different options were considered for when the count should be made to determine how many employees are employed within 75 miles for eligibility purposes. Commenters variously suggested the point at which an employee requests leave, the point at which an employee begins leave, a fixed year (such as the calendar year or leave year), or at the same time as when employer coverage is determined.

Under FMLA, the purpose of an employee providing notice to an employer of the need for leave is primarily to give the employer an opportunity to plan for handling the work during the employee's absence, such as by reassigning the work among staff in the unit where the employee taking leave is assigned, assigning an employee on temporary duty from another office or worksite, or hiring a temporary replacement. At the same time, the employee needs the opportunity to make plans regarding the leave—for example, to coordinate leave with a spouse so at least one parent can be with a child who is in the hospital, obtain reservations to travel to a distant city to care for a parent, and the like.

Employees should be encouraged to give the employer as much notice as possible so both can make necessary arrangements. Both the employee and the employer benefit from knowing whether or not the employee is going to be entitled to leave so that each can

make appropriate plans. It is in their mutual interest to make this determination when the employee requests leave.

If there are not 50 employees employed within 75 miles at that time, the employee may renew his or her request at a later date.

Both the use of a fixed date and the use of the same method used in determining employer coverage were considered inconsistent with the Act's use of the present tense in defining "eligible" employees. In addition, the use of a fixed date could be manipulated to reduce eligibility.

In this regard, the Department also gave serious consideration to an option not suggested by commenters. This option is that where notice is given 30 or more days prior to the commencement of leave, the count would be made on the 30th day preceding the start of leave, or, at the employer's option, as of the date leave is requested; where 30 days notice is not given, the count would be made at the time notice is given or the date leave begins, whichever is earlier. This option might alleviate the inconvenience potentially presented to a seasonal employer who receives a notice for leave during the height of the season, for leave to be taken at a time when the employer's staff is reduced. However, this should not be a significant concern because many seasonal employers may not be covered because of the coverage requirement that an employer employ 50 or more employees in at least 20 workweeks. Comments are specifically invited on whether the problems envisioned for seasonal employers are significant, and whether this or another approach should be considered to address those problems.

Under What Kinds of Circumstances Are Employers Required To Grant Family or Medical Leave? (§ 825.112)

An eligible employee is entitled to FMLA leave for the birth of a child, and to care for such child; for the placement of a child for adoption or foster care; to care for the employee's seriously-ill spouse, child, or parent; and because of a serious health condition that makes the employee unable to perform his or her job functions. Circumstances may require that leave for the birth of a child, or for placement for adoption or foster care, be taken prior to the actual birth or placement. With respect to placement for adoption, the regulations do not require use of licensed adoption agencies. Foster care is defined to require State action, rather than just an informal arrangement to take care of another person's child.

What Do "Spouse," "Parent," and "Son or Daughter" Mean for Purposes of an Employee Qualifying To Take FMLA Leave? (§ 825.113)

An eligible employee may take FMLA leave to care for the employee's spouse, son, daughter, or parent, if the spouse, son, daughter, or parent has a serious health condition.

"Spouse" is defined in accordance with applicable State law, including common law marriages where recognized by the State. It is clear from the legislative history that unmarried domestic partners are not intended to qualify for family leave to care for their partner.

FMLA defines "son or daughter" to include a child 18 years or over who is "incapable of self-care because of a mental or physical disability." To define mental or physical disability, regulations under the Social Security Act and Medicare were examined, in addition to regulations under the Americans with Disabilities Act (ADA). The applicable portion of the ADA definition of mental or physical disability is adopted in these regulations. The additional requirement that the son or daughter be incapable of self care means that he or she is incapable of performing several of the activities of daily living without assistance.

What is a "serious health condition"? (§ 825.114) An eligible employee may take FMLA leave to care for a spouse, son, daughter, or parent with a serious health condition, or because of the employee's own serious health condition. FMLA defines a "serious health condition" as one which requires either inpatient care, or "continuing treatment by a health care provider." Although the meaning of inpatient care is evident, the alternative definition raises difficult questions.

The term "serious health condition" is intended to cover conditions or illnesses affecting one's health to the extent that inpatient care is required, or absences are necessary on a recurring basis or for more than a few days for treatment or recovery. Furthermore, the Congressional reports indicate that this term is not intended to cover short-term conditions for which treatment and recovery are very brief, since such conditions would generally be covered by employers' sick leave policies. Examples of a serious health condition cited in the legislative history include heart attacks, heart conditions requiring heart bypass or valve operations, most cancers, back conditions requiring extensive therapy or surgical procedures, strokes, severe respiratory

conditions, spinal injuries, appendicitis, pneumonia, emphysema, severe arthritis, severe nervous disorders, injuries caused by serious accidents on or off the job, ongoing pregnancy, severe morning sickness, the need for prenatal care, childbirth and recovery from childbirth.

Because of this legislative history, the notice of proposed rulemaking asked whether there should be a minimum number of days of absence in order for an illness to be "serious." A variety of suggestions were received, ranging from no minimum requirement to a requirement of disability within the meaning of the ADA. Where inpatient care is not involved, the regulations require that the absence from work, or from school or incapacity in performing other daily activities in the case of a family member, be for a period of more than three days in addition to requiring the continuing treatment of a health care provider. This provision is similar to a statutory provision under many State workers' compensation laws and the Federal Employees' Compensation Act (FECA), also administered by the Department of Labor, which generally provide for a three-day waiting period before compensation is paid to an employee for a temporary disability (see 5 U.S.C. 8117), sometimes after a "continuation of pay" period.

Because the statute permits intermittent leave or leave on a "reduced leave schedule" in cases of medical necessity, it is also clear that the Act contemplates that employees would be entitled to FMLA leave in some cases because of doctor's visits or therapy—i.e., that the absence requiring leave need not be due to a condition that is incapacitating at that point in time. Thus, the legislative history explains that absences to receive treatment for early stage cancer, to receive physical therapy after a hospital stay or because of severe arthritis, or for prenatal care are covered by the Act. Therefore, the regulations provide that a serious health condition includes treatment for a serious, chronic health condition which, if left untreated, would likely result in an absence from work of more than three days, and for prenatal care.

Consistent with these definitions, voluntary or cosmetic treatments (such as most treatments for orthodontia or acne) which are not medically necessary are not included in the definition of "serious health condition," unless inpatient hospital care is required. Restorative dental surgery after an accident or removal of cancerous growths would be included if the other conditions of the regulation are met.

Treatments for allergies or stress may be included if the conditions of the regulation are met. Prenatal care is explicitly included; routine physical examinations are explicitly excluded.

Treatment of substance abuse may also be included, such as where a stay in an inpatient treatment facility is required. On the other hand, absence because of the employee's use of the substance, without treatment, does not qualify for leave. It should be pointed out that the inclusion of substance abuse as a "serious health condition" does not prevent an employer from taking employment action against an employee who is unable to perform the essential functions of the job—provided the employer complies with the ADA and does not take action against the employee because the employee has exercised his or her right to take FMLA leave for treatment of that condition.

For any condition other than one that requires inpatient care, the employee or family member must be receiving continuing treatment by a health care provider. "Continuing treatment" includes (i) Two or more visits to a health care provider; (ii) two or more treatments by a health care practitioner on referral from, or under the direction of, a health care provider; or (iii) a single visit to a health care provider that results in a regimen of continuing treatment under the supervision of the health care provider—for example, a course of medication or therapy to resolve the health condition. In addition, there was concern about persons who have serious, chronic conditions such as Alzheimer's or late-stage cancer, or who have suffered a severe stroke, who obviously are severely ill but may not be receiving continuing active care from a doctor. Therefore, the rule encompasses such serious conditions which are under continuing supervision by a health care provider.

Some may argue that this approach may encompass health conditions that are not really serious, while others may view the approach as excluding certain situations that were intended to require the granting of FMLA leave. However, the Department believes the regulation's definition is most consistent with the statute and legislative history.

What Does It Mean That "the Employee Is Unable To Perform the Functions of the Position of the Employee"? (§ 825.115)

An eligible employee may take FMLA leave because of a serious health condition that makes the employee unable to perform the functions of the employee's position. FMLA's legislative

history states that this provision does not mean that the employee must be so incapacitated that the employee is unable to work at all, but that it may include necessary absence from work to receive treatment, during which time the employee would be temporarily "unable to perform the functions of the position." Limitations are provided by the additional requirement that any intermittent or reduced leave be medically necessary.

Employers suggested that the "unable to perform the functions of the [employee's] position . . ." requirement should be limited to the essential functions of the employee's position. The Department believes this is a reasonable suggestion. As part of the certification of a serious health condition (to be discussed below), a health care provider will, when required, include a statement that the employee is unable to perform the essential functions of the employee's job. However, a seriously-ill employee will often be unable to perform work of any kind; requiring employers to provide a list of the employee's essential job functions to a health care provider in such cases would be unnecessary and burdensome. Therefore, employers who wish the health care provider to review an employee's ability to perform his or her essential job functions will have the option of designating the essential job functions in a position description provided to the health care provider for this purpose (similar to what occurs in workers' compensation determinations).

What Does it Mean That an Employee Is "Needed To Care for" a Family Member? (§ 825.116)

An eligible employee may take FMLA leave in order to care for the employee's spouse, child, or parent with a serious health condition. An employer may request that an employee support a leave request for this purpose with a certification from the health care provider that includes a statement that the employee is "needed to care for" the family member. It is clear from the legislative history that this provision is intended to accommodate needs for leave to provide psychological comfort, such as to a seriously ill child or parent, and to arrange "third-party" care for a family member (e.g., by a visiting nurse, in a nursing home, etc.). Generally, an employee must decide that he or she will provide needed care rather than through another person, or through inpatient care in a hospital, hospice, or nursing home. Because health care providers may not be in a position to know that the employee is needed to care for the family member, the health

care provider must either certify that third-party care is required or that the employee's presence would be beneficial to the patient. Such certification, after review of an employee's statement of the care the employee will provide, will be sufficient to satisfy this requirement and entitle the employee to FMLA leave.

For an Employee Seeking Intermittent Leave or Leave on a Reduced Leave Schedule, What Is Meant by "the Medical Necessity for" Intermittent Leave or Leave on a Reduced Leave Schedule? (§ 825.117)

An employer may request that an eligible employee seeking intermittent leave or leave on a reduced leave schedule due to a serious health condition of the employee or immediate family member support requested leave for this purpose with a certification from the health care provider that such leave is medically necessary and the expected duration and schedule of such leave. This provision of the certification section was added as a technical amendment just prior to FMLA's passage in the Senate. There is, therefore, little explanation of the provision in the legislative history. The regulations require that there be a medical need for the leave, and that the medical need can best be accommodated through an intermittent or reduced leave schedule. The requirement for certification of the medical necessity of intermittent leave or leave on a reduced leave schedule would normally be satisfied by the specified description of the treatment regimen provided.

What Is a "Health Care Provider"? (§ 825.118)

A "serious health condition" requires either inpatient care or continuing treatment by a "health care provider." Further, an employer may require that an employee's request for leave to care for a seriously-ill family member, or because of the employee's own serious health condition that makes the employee unable to perform his or her job, be supported by a certification issued by the "health care provider" of the employee or of the son, daughter, spouse, or parent of the employee, as appropriate.

FMLA defines a "health care provider" as a doctor of medicine or osteopathy who is authorized to practice medicine or surgery (as appropriate) by the State in which the doctor practices; or (2) any other person determined by the Secretary to be capable of providing health care services. Many employer commenters asked that the definition be

limited to doctors of medicine or osteopathy; others wanted providers of a broad range of medical services to be included. Because health care providers will need to indicate their diagnosis in health care certificates, such a broad definition was considered inappropriate.

After review of definitions under various programs, including OPM rules and Medicare, the definition of "physician" under the Federal Employees' Compensation Act, 5 U.S.C. 8101(2); was used in these regulations as a starting point, which also includes 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. In addition, nurse practitioners and nurse-midwives who provide diagnosis and treatment of certain conditions, especially at health maintenance organizations and in rural areas where other health care providers may not be available, are included in the definition, provided they are performing within the scope of their practice as allowed by State law.

A very significant number of comments were received from Christian Scientists urging inclusion of Christian Science practitioners in the definition of a "health care provider." Colloquies on the floor of both the House and Senate make clear Congressional intent that such practitioners be covered by the definition. However, employers may require that second or third opinions be obtained by health care providers other than Christian Science practitioners.

Subpart B—What Leave Is an Employee Entitled To Take Under the Family and Medical Leave Act?

Subpart B explains the leave to which an employee is entitled, the requirements for maintenance of health benefits during periods of leave, employee rights to job and benefit restoration upon returning to work, and provisions to protect employees from adverse action.

How Much Leave May an Employee Take? (§ 825.200)

An eligible employee is entitled to take up to 12 weeks of FMLA leave in "any 12-month period." After review of the alternatives suggested, the Department concluded that maximum employer flexibility should be accommodated for ease of

administration, in view of some employers' established practice of using a "leave year," and because of varying State law requirements. Employers will, therefore, be allowed to choose a uniform method to compute the 12-month period from various alternatives, including a fixed 12-month period for all employees, 12 months measured forward from the first date leave is used, and a rolling 12-month period measured backward from the date leave is used. Employee advocacy groups generally opposed the rolling 12-month period measured backward from the date leave is used. However, this method is the only one which clearly would not allow "stacking" of back-to-back leave entitlements, and seems clearly to be permissible under the plain meaning of the statutory language. While employers may change the uniform method used to define the 12-month period, the regulations afford protections to employees in such event.

If Leave Is Taken for the Birth of a Child, or for Placement of a Child for Adoption or Foster Care, When Must the Leave Be Concluded? (§ 825.201)

An employee's entitlement to FMLA leave for birth or placement of a child expires 12 months after the birth or placement.

How Much Leave May a Husband and Wife Take if They Are Employed by the Same Employer? (§ 825.202)

FMLA limits the leave that may be taken by spouses who work for the same employer to a combined total of 12 workweeks during any 12-month period if leave is taken for birth or placement for adoption or foster care. This limitation applies even if the spouses work at different worksites or in different divisions of the same company, as long as they are employed by the same employer. The legislative history states that this limitation is intended to eliminate any incentive for employers to refuse to hire married couples. The limitation does not apply, however, to leave taken by either spouse to care for the other who is seriously ill and unable to work, to care for a child with a serious health condition, or for his or her own serious illness. This limitation also applies in the law to FMLA leave to care for a parent with a serious health condition. However, because FMLA leave is not available to care for a parent-in-law with a serious health condition (though such leave may be allowed under State law or an employer's policy or practice), the circumstances in which such limitation might actually apply are extremely unlikely.

Does FMLA Leave Have To Be Taken All at Once, or Can It Be Taken in Parts? (§ 825.203)

FMLA permits an employee taking leave for birth or because of placement for adoption or foster care to take leave intermittently or by working a reduced workweek only with the employer's approval. However, leave to care for a seriously ill family member or because of the employee's own serious health condition may be taken whenever "medically necessary." Although some employers favored a minimum four-hour leave duration, the Department concluded that no minimum limitation should be made. There are other protections for employers in the statute; for example, if leave is foreseeable, an employee is required to try to schedule the leave so as not to unduly disrupt the employer's operations, and the employer may place the employee in an alternative position which better accommodates intermittent leave. Furthermore, it is considered unlikely that an employee would have several short instances of intermittent leave on an emergency basis which qualify as serious health conditions. Similarly, there is no basis in the statute for limiting the period of time for intermittent leave.

May an Employer Transfer an Employee to an "Alternative Position" in Order To Accommodate Intermittent Leave or a Reduced Leave Schedule? (§ 825.204)

If an employee requests intermittent leave or a reduced work schedule to care for a seriously-ill family member or for the employee's own serious health condition, and the need for leave is foreseeable based on planned medical treatment, the employer may temporarily transfer the employee to an available alternative position with equivalent pay and benefits if the employee is qualified for the position and it better accommodates recurring periods of leave than the employee's regular job. This provision gives employers greater staffing flexibility by enabling them to transfer employees on a temporary basis who need intermittent leave or a reduced leave schedule to positions that are more suitable to recurring periods of leave. At the same time, however, it ensures that employees will not be adversely affected by their need for such leave.

The Act places no limitations on the nature of the alternative position to which an employee may be transferred. There is no requirement that an employee agree, although such a requirement may be imposed by a collective bargaining agreement, for

example. Furthermore, an employer may be required by the ADA to accommodate the employee's health condition. Even in the absence of ADA protections, it would be desirable for any placement by the employer to accommodate the employee's health condition. In any event, an employer would be permitted to alter the employee's existing position to better accommodate the intermittent or reduced leave, or to transfer the employee to a part-time position. However, the employee must receive equivalent pay and benefits in the new position, even if the position would not otherwise provide benefits, for example.

How Does One Determine the Amount of Leave Used Where an Employee Takes Leave Intermittently or on a Reduced Leave Schedule? (§ 825.205)

Only the time actually taken as FMLA leave may be charged against the employee's entitlement when leave is taken intermittently or on a reduced leave schedule. This section explains, through various examples, how changes in an employee's work schedule due to intermittent leave affect the calculation of the amount of FMLA leave taken. If an employee who normally works five-day workweeks takes one day off on FMLA leave, only one-fifth of one week of FMLA leave has been used. If a full-time employee switches to half-days under a reduced leave schedule, one-half week of FMLA leave is used each week.

For part-time employees and those who work variable hours, the FMLA leave entitlement is calculated on a pro rata or proportional basis. If an employee who normally worked a schedule of 30 hours per week needed to change to 20 hours a week on a reduced leave schedule, the ten hours of FMLA leave equals one-third of a week of FMLA leave each week. If an employee's work schedule varies from week to week, the average weekly hours worked during the 12 weeks prior to the start of the FMLA leave will be used to calculate the employee's "normal" work schedule for this purpose.

May an Employer Deduct Hourly Amounts From an Employee's Salary, When Providing Unpaid Leave Under FMLA, Without Affecting the Employee's Qualifications for Exemption as an Executive, Administrative, or Professional Employee Under the Fair Labor Standards Act? (§ 825.206)

Yes. Employers will be able to "dock" the pay of otherwise salaried and exempt employees for family and medical leave-related absences of less

than one full day without affecting their exempt status under the Fair Labor Standards Act's (FLSA) minimum wage and overtime requirements, but only in situations where an employer is required to provide leave under FMLA. Thus, for example, hourly deductions may not be taken where leave is required by State law or pursuant to the employer's more generous leave program, but not by FMLA, without affecting the employee's FLSA exempt status. Thus, an employer not covered by the FMLA may not take deductions for partial-day absences for reasons which would have been required by FMLA without disqualifying the employee for the FLSA exemption. Similarly, a covered employer may not make such deductions from the pay of employees not "eligible" under FMLA without disqualifying the employee for FLSA exemption. Of course, in such cases, employers can provide paid leave for such absences, consistent with the employee being paid "on a salary basis," or may treat the employee as non-exempt and take such deductions but pay overtime premium pay for hours worked over 40 each workweek.

This position comports with the explicit requirements of FMLA; there is no reason to believe that more was contemplated by Congress. Any further change in the FLSA exemption provisions would have to be promulgated under the FLSA regulations, after full notice and comment.

While it is considered inappropriate for the Department to address the effects of pay "docking" in other, analogous leave situations in these regulations, the Department is concerned about the tension between the effects of partial-day "docking" under FLSA and FMLA's encouragement of more generous employment policies and adherence with more generous State laws.

Is FMLA Leave Paid or Unpaid? (§ 825.207)

Although FMLA leave is generally unpaid, the Act permits an employee to substitute accrued paid leave under certain circumstances. Similarly, an employer is permitted to require an employee to substitute paid leave. Accrued paid vacation or personal leave may be substituted for any FMLA-qualifying purpose. In addition, accrued paid family leave may be substituted for birth or adoption, or to care for a seriously-ill immediate family member; and, accrued paid medical or sick leave may be substituted to care for a seriously-ill immediate family member or for the employee's own serious health condition. Thus, if an employee takes

leave for birth, adoption, or to care for a seriously-ill family member, accrued paid vacation leave, personal leave, or family leave may be substituted for all or part of the period of leave. Accrued paid vacation leave, personal leave, or medical or sick leave may be used to care for a seriously-ill family member or because of the employee's own serious medical condition for all or part of the period of leave—"except that nothing in [the Act] shall require an employer to provide paid sick leave or paid medical leave in any situation in which such employer would not normally provide any such paid leave" (emphasis added).

The meaning of the quoted limiting phrase is in dispute. Several of the sponsors of the legislation and the Women's Legal Defense Fund (WLDF) contend in their comments that the limitation was intended to apply only to use of paid sick leave for types of illnesses (i.e., medical conditions) that would otherwise be covered by the employer's plan (for example, if substance abuse treatment were excluded, paid leave could not be used for that purpose), but not to limit an employee's ability to use paid sick leave to care for an ill family member if the employer's plan does not permit such use of paid sick leave. However, the history of this provision lacks an explanation that it is so intended and cannot, therefore, overcome the clearer reading of the statutory language.

A number of more minor issues concerning substitution of paid leave are also addressed in the regulation. For example, the legislative history requires a similar limitation to be placed on use of paid family leave, explaining that the term "family leave" refers to "paid leave provided by the employer covering the particular circumstances for which the employee is seeking leave" for birth, adoption, or to care for a seriously ill family member. In other words, if the employer's family leave plan provides leave only for birth, it cannot be used for another purpose; or if the plan provides leave to care for a child, but not for a spouse, it cannot be used to care for a spouse.

On the other hand, the Act contains no similar limitation for use of paid vacation or personal leave. Therefore, an employee can use paid vacation leave for any FMLA purpose, without limitation. Thus, an employee would be able to use paid vacation leave for any FMLA-qualifying purpose despite an employer's requirement that it be used in periods of at least a day or a week at a time, or despite the fact that by reason of an employee's seniority or the staffing needs of the employer, a vacation would not normally be allowed at that time.

The employer is provided protection, however, by the requirement that the employee attempt to schedule foreseeable leave so as not to unduly disrupt the employer's operations.

Employers expressed considerable concern that an employee not be allowed to take an additional 12 weeks of FMLA leave for birth of a child after conclusion of a disability leave period provided under the employer's plan. It appears clear this was not intended. Any period before and after birth where a mother is not able to work for medical reasons may be considered leave for a serious health condition, despite the fact that the period after birth is also leave to care for the newborn child.

On the other hand, some employers wished to prohibit an employee from later using paid sick or personal leave if the employee takes only unpaid FMLA leave. There is nothing in the Act which prohibits such use of paid leave, but employers may, subject to the limitation just discussed, require use of paid leave during the FMLA leave period. Employers are not permitted to count paid leave which was not for an FMLA purpose against an employee's FMLA leave entitlement.

Furthermore, if an employee uses paid leave, whether or not under circumstances that qualify as FMLA leave, an employee is only required to comply with the employer's requirements for use of paid leave. If FMLA provides more stringent notice or certification requirements, an employer may not impose them upon the employee's use of paid leave. On the other hand, if the employee wishes to extend a paid leave period with unpaid FMLA leave, the FMLA notice and certification requirements will apply as of the first day of the leave period (if the leave was for an FMLA purpose from the beginning or some earlier date).

May an Employer Require an Employee To Designate Paid Leave as FMLA Leave and, as a Result, Count It Against the Employee's Total FMLA Leave Entitlement? (§ 825.208)

Under FMLA an employee may elect or an employer may require an employee to substitute certain paid leave for unpaid FMLA leave. An employee requesting unpaid FMLA leave must explain the reasons for the needed leave to allow the employer to determine that the leave qualifies under the Act. In many cases, in explaining the reasons for a request to use paid leave, especially when the need for the leave was unexpected or unforeseen, an employee will (even though, under the employer's policy, may not be required to) provide sufficient information for the

employer to designate the paid leave as substituting for all or some portion of the employee's FMLA leave entitlement. An employee using accrued paid leave, especially vacation or personal leave, may in some cases not spontaneously explain the reasons or the plans for using accrued leave. As noted in the regulations (see § 825.302(c)), an employee giving notice of the need for unpaid FMLA leave does not need to expressly assert rights under the Act or even mention the FMLA to meet his or her obligation to provide notice, though the employee would need to state a qualifying reason for the needed leave. An employee requesting or notifying the employer of an intent to use accrued paid leave, even if for a purpose covered by FMLA, would not need to assert such right either. However, if an employee requesting to use paid leave for an FMLA-qualifying purpose does not explain the reason for the leave and—consistent with the employer's established policy or practice—the employer denies the employee's request, the employee will need to state an FMLA-qualifying reason for the needed leave so that the employer is aware of the employee's entitlement (i.e., that the leave may not be denied) and, then, may designate that the paid leave be appropriately counted against (substituted for) the employee's 12-week FMLA leave entitlement. Similarly, an employee using accrued paid vacation leave who seeks an extension of unpaid leave for an FMLA-qualifying purpose will need to state the reason. If this is due to an event which occurred during the period of paid leave, the employer may count the leave used after the FMLA-qualifying event against the employee's 12-week entitlement. In all circumstances, it is the employer's responsibility to designate leave, paid or unpaid, as FMLA-qualifying, based on information provided by the employee.

If the employer decides that paid leave should be substituted for unpaid leave, or that paid leave taken under an employer's existing leave plan should be counted as FMLA leave, the decision must be made in response to the request (notice) by the employee. If circumstances are such that this decision is not made before leave has begun, e.g., because the need for the leave was unexpected, or because an employee was on personal, vacation or sick leave for an FMLA purpose and did not advise the employer of the purpose and the employee requests an extension of the leave, the employer or the employee may retroactively redesignate the entire leave period (or the appropriate part) as FMLA leave. In no

event may such designation be made after leave is concluded, or based on information other than that provided by the employee.

Is an Employee Entitled to Benefits While Using FMLA Leave? (§ 825.209)

FMLA requires an employer to maintain coverage under any "group health plan . . . for the duration of such leave and under the conditions coverage would have been provided if the employee had continued in employment continuously for the duration of such leave." An employer is not required to provide health benefits unless the employer already does so. However, if a plan is established or changed by the employer during an employee's leave period, entitlement to benefits starts at the same point as if the employee were still on the job.

The legislative history explains that a "qualifying event" triggering requirements that an employer allow an employee to continue health benefits coverage (but paying the full cost) for purposes of Title X of the Consolidated Omnibus Budget Reconciliation Act of 1986 (COBRA), "may occur when it becomes known that an employee is not returning to employment and therefore ceases to be entitled to leave under this act." Thus, the employer's obligation to provide health benefits, except as provided under COBRA, would cease at that point. On the other hand, if an employer has given a "key employee" notice that substantial and grievous economic injury would occur if the employee were to be reinstated, and the employee declines to return to work in response to the notice, the employer's obligation to maintain health benefits continues.

Some commenters asked whether government entities are subject to the requirement to maintain health benefits of eligible employees during periods of FMLA leave, because government entities are excluded from the IRS definition of "employer" under the Internal Revenue Code for purposes of imposing an excise tax on employers or employee organizations which contribute to "nonconforming" group health plans. The Internal Revenue Code subsection which excludes Federal and other government entities from the definition of "group health plan" for this purpose (the Internal Revenue Code of 1986 at 26 U.S.C. 5000(d)) is a separate provision from that incorporated into FMLA (section 5000(b)(1)). FMLA includes public agencies within its definition of covered employers. There is no indication in either the Act or its legislative history supporting a view that public agencies

are not required to maintain employee's health benefits during periods of FMLA leave, and they must do so.

How May Employees on FMLA Leave Pay Their Share of Health Benefit Premiums? (§ 825.210)

In the case of paid FMLA leave, the employer's and employee's share, if any, of health plan premiums are to be paid in the manner customarily used. In the case of unpaid FMLA leave, employers and employees are encouraged to work out arrangements which accommodate both administrative convenience for the employer and the financial situation of the employee who would not be receiving a paycheck during the leave period. Therefore, the regulations provide options for payment of the employee's share of premiums if the leave is unpaid; any such arrangement must be clearly specified in advance.

What Special Health Benefits Continuation Rules Apply to Multi-Employer Health Plans? (§ 825.211)

Multi-employer health plans are comprised of several employers contributing to the same plan, pursuant to one or more collective bargaining agreements—an arrangement used widely in the construction industry. Questions arise as to an employer's responsibility to continue contributions to such a plan when an employee takes unpaid FMLA leave.

Except where the plan provides another method for maintaining coverage, such as a pool to which all employers contribute, the employer must continue to make contributions during the employee's FMLA leave. Coverage by the health plan must be maintained at the level coverage would have been provided if the employee had continued to be employed. The employee may not be required to use "banked" hours or pay a greater premium than the employee would have paid if leave had not been taken. Plans are encouraged to develop rules which accommodate this FMLA requirement in the context of the situations in the particular industry.

What Are the Consequences of an Employee's Failure To Make Timely Health Plan Premium Payments? (§ 825.212)

These regulations encourage the employee and employer to make arrangements for payment of the employee's share of premiums to maintain health care coverage that are mutually acceptable to both parties. The regulations provide for a 30-day grace period after the agreed upon date for payment within which the employee

may make payment of the premium without affecting health benefit coverage. If the employee does not make the payment within the 30-day grace period, the employer may cease to maintain health coverage on the date the grace period ends, or the employer may continue health coverage by making both the employer's and employee's premium payments. If the employer chooses to continue coverage in this manner, the employer is entitled to recover the additional payments made on behalf of the employee while on leave after the employee returns to work.

If the employer chooses to discontinue health coverage as a result of non-payment of premiums by the employee after the grace period, upon the employee's return to work, the employee's group health (and other) benefits must be restored to at least the same level and terms as were provided when leave commenced. Therefore, the restored employee shall not be required to meet any qualification requirements such as a waiting period including any new preexisting condition waiting period, waiting for an open season, or passing a medical examination.

May an Employer Recover Premiums It Paid for Maintaining Group Health Plan Coverage During FMLA Leave?
(§ 825.213)

An employer may recover premiums it paid for maintaining group health plan coverage during any period of unpaid FMLA leave if the employee fails to return to work after the employee's FMLA leave entitlement has expired, unless the reason the employee does not return to work is due to: (1) The continuation, recurrence, or onset of a serious health condition that would entitle the employee to FMLA leave (either affecting the employee or an immediate family member), or (2) "other circumstances beyond the control of the employee." These exceptions are intended to prevent an employer from recapturing health insurance premiums from employees who are unable to return to work from their FMLA leave because they are themselves disabled by a serious health condition, or because they are needed to care for a seriously ill family member, or because the employee's circumstances suddenly and unexpectedly change during leave. For example, an expectant mother who took FMLA leave for the birth of her child and after 10 weeks of leave discovers that her baby has serious birth defects requiring immediate surgery, might find it impossible to return to work at the end of 12 weeks of leave. Recognizing that workers should not be adversely

affected in such cases for failure to return to work due to circumstances beyond their control, FMLA exempts workers in these situations from liability for repayment of health insurance premiums paid by their employers during the leave period.

The regulations clarify that "other circumstances beyond the control of the employee" would include, for example, circumstances where someone other than an immediate family member with a serious health condition needs the employee to provide care; the employee is laid off while on FMLA leave; the employee is a "key employee" who elects not to return to work after being notified that the employer intends to deny reinstatement because of the threat of substantial and grievous economic injury to the employer's operations and is not reinstated by the employer; or the employee's spouse is unexpectedly transferred more than 75 miles away from the employee's worksite.

"Circumstances beyond the control of the employee" do not include such situations as where an employee desires to remain with a parent in a distant city even though the parent no longer needs the employee's care, or a mother decides not to return to work, choosing instead to remain at home with her newborn child.

If an employee fails to return to work at the end of the leave period because of a serious health condition, the employer may request that the employee furnish a medical certification from the health care provider of the employee or the employee's family member to support the employee's claim. If the employee fails to furnish the requested certification within 30 days of the employer's request, the employer may recover the health insurance premiums it paid during the period of unpaid leave.

If an employee fails to pay his or her share of health benefit premiums and the employer elects to continue health coverage for the employee (in order to be able to restore the employee on return to work) by paying the employee's share, and the employee fails to return to work at the end of the FMLA leave period in circumstances where recovery is allowed, the employer may recover all of the health benefit premiums it paid (both the employer's and the employee's share) during the period of unpaid FMLA leave.

An employee who does not return to work for at least 30 calendar days is considered to have failed to "return" to work for this purpose.

The employer's recovery is limited to the premiums it paid during any period of unpaid FMLA leave in the

circumstances where recovery is allowed. If paid leave is substituted for all or any part of the FMLA leave period, the employer may not recapture health insurance premiums paid during any period of paid leave.

When circumstances allow for an employer to recover health insurance premium payments it made from a non-returning employee, the employer may deduct the amount due from any sums owed to the employee (e.g., vacation pay, profit-sharing, final paycheck, etc.), provided the deductions do not otherwise violate any wage payment or other laws that may apply (including State law). A self-insured employer may only recover its share of allowable "premiums" as would be calculated under COBRA, excluding the two percent administrative costs fee.

What Are an Employee's Rights on Returning to Work From FMLA Leave?
(§ 825.214)

An eligible employee who takes FMLA leave is entitled to be restored to the same position that the employee held when the leave started, or to an equivalent position with equivalent benefits, pay, and other terms and conditions of employment. The legislative history characterizes this as an appropriately stringent standard for assigning employees who return from leave to jobs other than the position which they previously held. FMLA does not entitle a restored employee to any more rights, benefits, or employment beyond that to which the employee would have been entitled had the employee not taken FMLA leave.

What Is an Equivalent Position?
(§ 825.215)

At the conclusion of FMLA leave, an employer must restore the employee to the same job the employee held before going on leave, or an equivalent position. The legislative history makes it clear that the standard for an equivalent position is not "comparability" or "similarity," and that a "correspondence" to the duties, terms and conditions, and privileges of the previous position is required. An equivalent position must have the same pay, benefits and working conditions. It must involve the same or substantially similar duties and responsibilities, and must entail substantially equivalent skill, effort, responsibility and authority. If special qualifications are required for the position that have lapsed during the employee's leave (e.g., continuing education requirement for emergency medical technicians, flying a minimum number of hours, completing a required training course, etc.), the employee must

be given a reasonable opportunity to fulfill the requirements after returning to work.

Benefits must be resumed upon the employee's return to work at the same level as were provided when leave began, without any new qualification period, physical exam, etc. An employee is not entitled to accrue additional benefits during a period of unpaid leave; any new or additional coverage or changes in health benefits, however, must be made available to an employee while on leave. Any increases in pay or changes in benefits which are not dependent upon seniority or accrual during the leave period must be made effective upon the employee's return to work.

Because benefits—health insurance coverage and other benefits—must be resumed at the end of an employee's FMLA leave in the same manner and at the same levels as provided when the leave began, some employers may find it necessary to modify life insurance or other benefits programs in order to be able to restore employees to equivalent benefits upon return from FMLA leave, make arrangements for continued payment of costs to maintain such other benefits during unpaid FMLA leave, or pay these costs subject to recovery from the employee following return from leave.

The employee must be restored to the same worksite from which the employee commenced leave, or to a geographically proximate worksite. If the employee's original worksite has been closed or moved, and other employees were transferred to another worksite, the employee must have the same rights for transfer as would have been available had the employee not taken leave. The employee is entitled to be returned to the same shift or equivalent schedule, and have the same opportunity for bonuses, profit-sharing and other non-discretionary payments. The requirement that a restored employee receive the same or equivalent pay and benefits does not extend to intangible or unmeasurable aspects of the job, such as perceived loss of or potentially diminished opportunities for promotion.

Are There Any Limitations on an Employer's Obligation To Reinstatement an Employee? (§ 825.216)

An employee has no greater right to restoration or to other benefits than if the employee had been continuously employed during the leave period. If the employee is denied restoration or other benefits, the employer must be able to show that the employee would not have continued to be employed, or to have

received the benefits, if the employee had continued to work until the time restoration was requested. For example, the employer may have had a reduction-in-force, eliminated a shift, or eliminated overtime work. Under such circumstances, the employee would not be entitled to reinstatement, or to work overtime hours not available to other employees, if the employee would have been affected by these changes if not on FMLA leave. If, however, the employee has been replaced on the night shift by another employee, the employer may not deny the employee the opportunity to return to the same shift.

What Is a "key" Employee? (§ 825.217)

Under very limited circumstances, explained below, an employee who qualifies as a "key" employee may be denied restoration to employment. A key employee is an employee who is salaried, and is "among the highest paid 10 percent" of the employees employed within 75 miles of his or her worksite. The regulations use the Department's definition of payment "on a salary basis" set forth in the FLSA regulations at 29 CFR 541.118. A key employee must be among the highest paid 10 percent of all salaried and non-salaried, eligible and ineligible, employees. To determine who are the highest paid 10 percent, year-to-date earnings as of the date leave is requested are considered.

Upon requesting FMLA leave, an employee must be notified by the employer of his/her status as a key employee if there is any possibility that the employer may deny reinstatement after the leave. (See section 825.219, below.)

What Does "Substantial and Grievous Economic Injury" Mean? (§ 825.218)

An employer may deny restoration to a "key employee" only if necessary to prevent substantial and grievous economic injury to the operations of the employer. In addressing this provision, the Department considered two alternative interpretations: (1) That the employee's taking leave must cause substantial and grievous economic injury to the operations of the employer; and (2) that the employee's restoration to employment after taking leave must cause the substantial and grievous economic injury. The plain meaning of the statutory language is that it must be the restoration to employment, rather than the taking of the leave, which would cause the injury. The legislative history on this point, however, is somewhat confused. The following statement appears in the House and Senate reports:

In measuring grievous economic harm, a factor to be considered is the cost of losing a key employee if the employee chooses to take the leave, notwithstanding the determination that restoration will be denied.

Other characterizations of the statutory language are straightforward. The House and Senate reports both state that the Act contains a limited exemption from the restoration requirement for certain highly compensated employees, and restoration may be denied to such employees if the employer shows that such denial is necessary to prevent substantial and grievous economic injury. The minority, in the committee report and on the floor, unambiguously characterize the test as injury caused by restoration. The provision is described as only exempting such employees from the right to reinstatement if denial of such reinstatement would be necessary to prevent grievous injury. This requirement is stressed in floor statements by Representative Goodling:

Note that the focus, strangely, is not on the impact of the employee's absence, but on the reinstatement. Let us read the text of the bill and then the Members will understand what it is all about. Maybe if he or she was making \$500,000 a year, reinstatement might lead to grievous harm but when else?

I realize this is strange language that is in this bill, and it may have been structured this way in order to require the employer to continue to pay health insurance benefits for the employee, but that fact does not change the bill's focus on the effect of reinstatement.

In their comments in response to the Notice of Proposed Rulemaking, minority Members and Congresswoman Roukema, a sponsor of the bill, urge that the test should involve the injury caused by the employee's taking of the leave. Quoting Congresswoman Roukema's floor statements when the bill was passed in 1991:

An employer may deny reinstatement * * * to avoid serious economic harm from an employee's being out on leave * * * In addition, the substitute retains the key employee exemption, where the top * * * employees may be denied reinstatement if their absence would cause substantial and grievous harm to an employer's operations. This provision is designed to ensure that employers do not experience financial difficulties when highly specialized or compensated essential workers request family or medical leave.

Based on the language of the Act itself and the overall sense of the legislative history, the rule requires an employer to show that the restoration to employment would cause the injury in order to deny restoration to a "key employee". For example, if circumstances necessitated that an employer permanently replace an employee taking FMLA leave, the

disruption to the company caused by restoration to that position or to another equivalent position filled by a valuable employee could cause substantial and grievous economic injury to the company. While this interpretation is the more supportable, the Department recognizes that such a test will be extremely difficult to meet.

The regulation does not explicitly define the test for determining the hardship or injury to the employer which must be sustained. Although minor inconveniences and costs clearly would not constitute substantial and grievous injury, it is not necessary that reinstatement threaten the economic viability of the firm. A lesser injury which causes substantial, long-term economic injury would be sufficient. Comment is invited on whether further regulatory guidance should be given on the factors which may be taken into account and the degree of hardship which would be necessary to constitute "substantial and grievous economic injury" to the employer's operations.

What Are the Rights of a Key Employee? (§ 825.219)

An employer is required to notify employees of their status as key employees if the employer believes there is a possibility that the employee will not be restored at the end of the leave period. However, it is believed that employers will normally want to continue to reinstate a key employee after a leave period, and that, in any event, the "substantial and grievous economic injury" test can only rarely be met. An employer that will not deny restoration is not required to determine which employees are key employees, or to notify them of that status when leave is requested.

If a key employee elects not to return to work after receiving the employer's notification that restoration will cause substantial and grievous economic injury, the employer must continue to maintain health benefits and cannot recover its share of the premiums paid during the period of leave.

The key employee may still request reinstatement at the end of the leave period even though the employee did not return to work after receiving the employer's notification. The employer must then determine if substantial and grievous economic injury would result from reinstatement at that time, and so notify the employee (in writing either in person or by certified mail) if reinstatement is denied.

How Are Employees Who Exercise Their Rights Protected? (§ 825.220)

It is unlawful for an employer to: (1) interfere with, restrain, or deny the exercise of (or attempt to exercise) any right provided by the Act; or (2) discharge or in any other manner discriminate against any individual for opposing or complaining about any unlawful practice under the Act. It is also unlawful for any person to discharge or in any other manner discriminate against individuals for having: (1) filed charges, instituted (or caused to be instituted) any proceeding under or related to the Act; (2) given (or be about to give) any information in connection with an inquiry or proceeding relating to a right under the Act; or (3) testified (or be about to testify) in any inquiry or proceeding relating to a right under the Act.

This "opposition" clause is derived from Title VII of the Civil Rights Act of 1964 and is intended to be construed similarly. Thus, an employee is protected against employer retaliation for opposing any practice which the employee reasonably believes to be a violation. Any violation of FMLA or its implementing regulations constitutes interfering with, restraining, or denying the exercise of rights provided by FMLA. An employer cannot treat employees who use FMLA leave in a manner that discriminates against them for taking FMLA leave. Thus, for example, an employer cannot use an employee's taking of FMLA leave as a negative factor in employment actions, as promotions or discipline, nor can FMLA leave be counted under "no fault" attendance policies.

Subpart C—How Do Employees Learn of Their FMLA Rights and Obligations, and What Can an Employer Require of an Employee?

Subpart C explains employers' obligations to notify employees of their rights and responsibilities under FMLA, and describes employees' obligations to provide notice and medical certifications.

What Posting Requirements Does the Act Place on Employers? (§ 825.300)

Covered employers must post a notice describing the Act's provisions. The regulations specify the text and format for this notice. Employers are encouraged to produce their own notices for display; copies of the notice may also be obtained from the Wage and Hour Division.

What Other Notices to Employees Are Required of Employers Under FMLA? (§ 825.301)

Employers must furnish additional notice and information to employees on entitlements and obligations for FMLA leave, through employee handbooks if the employer ordinarily distributes such handbooks to employees, or by furnishing written guidance when employees request FMLA leave. These and other specific notice requirements are intended to ensure that employees are aware of FMLA obligations which may apply particularly to their situation, including, for example, any requirement to furnish medical certification substantiating a serious health condition, arrangements for paying the employee's portion of insurance premiums during leave periods, their status as a "key employee" potentially subject to being denied restoration to employment, and any requirement for medical certification of fitness to return to work.

What Notice Does an Employee Have To Give an Employer When the Need for FMLA Leave is Foreseeable (§ 825.302) and Not Foreseeable (§ 825.303)?

Employees must give 30 days advance notice to employers of the need to take unpaid FMLA leave when it is foreseeable for the birth or placement of a child for adoption or foster care, or for planned medical treatment. When it is not practicable under the circumstances to provide such advance notice, e.g., premature birth, such notice must be given "as soon as practicable," ordinarily within one or two business days of when the employee learns of the need for the leave. Verbal notice sufficient to inform the employer that the employee will be needing FMLA leave satisfies the FMLA notice requirement. An employer may also require an employee to comply with the employer's usual rules for requesting leave, but may not disallow FMLA leave on this basis.

When planning medical treatments, employees should consult with employers when giving notice and make reasonable efforts to schedule the leave so as not to unduly disrupt the employer's operations, subject to the approval of the health care provider.

When unforeseen events occur that require FMLA leave, employees must give notice as soon as practicable, ordinarily within one or two working days. Notice should be given either in person or by phone when medical emergencies are involved, and may be given by the employee's spouse or other family member if the employee is

unable to do so due to a serious health condition. Written notice pursuant to the employer's established policy or practice cannot be required in the case of a medical emergency.

What Recourse Do Employers Have if Employees Fail To Comply With the Act's Notice Requirements? (§ 825.304)

An employer can always waive FMLA notice or its own notice requirements. If an employer does choose to take action against an employee for failing to provide adequate notice, its policies and procedures must be uniformly applied, although variation because of differing circumstances would be permitted. In all cases, before action can be taken against an employee, it must be clear that the employee had actual notice of the FMLA notice requirements. In most cases this would be satisfied by the display of the required notice at the worksite where the employee is employed. Furthermore, the need for leave and approximate date leave would be taken must have been clearly foreseeable. For example, knowledge that an employee would receive a call about the availability of a child for adoption at some unknown point in the future would not be sufficient.

If all of these requirements are satisfied, questions arise as to the permissible consequences of an employee's failure to satisfy the notice requirement. The structure and intent of the Act require that the employer be permitted to deny leave until 30 days after notice is provided. The Department considered but for various reasons rejected other options, including an equitable formulation which would make denial of leave dependent upon circumstances such as whether there was any reasonable excuse by the employee; prejudice to the employer caused by delay in providing notice; undue hardship to the employee; whether the failure was material, willful or due to the employee's lack of knowledge of the circumstances; and duration of leave.

When Must an Employee Provide Medical Certifications To Support a FMLA Leave Request? (§ 825.305)

Employers may require a medical certification from a health care provider to support FMLA leave requests either to care for an employee's seriously-ill family member, or for leave due to a serious health condition that makes the employee unable to perform the functions of the employee's job. Employees must provide such certification "in a timely manner." The regulations define "timely manner" as within 15 calendar days, unless it is not

practicable to do so under the circumstances. Employers must advise the employee if medical certification will be required when the employee requests leave so the employee can obtain it during visits to the health care provider.

How Much Information May Be Required in Medical Certifications of a Serious Health Condition? (§ 825.306)

The regulations provide an optional form for required medical certifications. The form, which is to be completed by the health care provider, makes maximum use of easy checklist entries. The form may be reproduced by employers.

A certification for medical leave must include a statement that the employee "is needed to care for" a seriously-ill family member or, in the case of an employee's serious health condition, a statement that the employee is "unable to perform the functions of the position of the employee." Some of this information may not be readily known to the health care provider. For example, the health care provider may know that the seriously-ill family member needs care, but may not know whether the employee is needed to provide such care. Similarly, the health care provider may know that an employee is so seriously ill as to be unable to perform any work, but may not know in less serious circumstances without further information whether the employee is able to perform some of the "functions of the position of the employee." The regulations implement the statutory requirements affecting such leave in the first case by having the employee certify as to the care the employee will provide to the family member. In the case of an employee's serious health condition, the health care provider may review a description of the employee's essential job functions provided by the employer or, if none is provided, may ascertain such functions from the employee when determining (and certifying) that either the employee is unable to perform work of any kind, or is unable to perform the essential functions of the employee's position. The requirement for certification of the "medical necessity" of intermittent leave or leave on a reduced leave schedule should be satisfied by the specified description of the treatment regimen provided.

Comment is invited regarding the appropriate timing of the certification when there is a need for an employee to care for an immediate family member with a chronic, degenerative serious health condition, and where the family member may not be under the

continuing treatment of a health care provider, e.g., a father who has been diagnosed with a deteriorating health condition due to age, and is unable to care for himself but has not visited a health care provider for several months due to poor financial condition or living in a remote location where access to a health care provider is limited. Should the employee be able to use a certification obtained during the past six months or a year to support a current request for FMLA leave?

What Can an Employer Do if It Questions the Adequacy of a Medical Certification? (§ 825.307; § 825.308)

An employer may require the employee to obtain a second medical opinion, at the employer's expense. The second health care provider may not be employed on a regular basis by the employer. If the opinions of the first and second health care provider differ, the employer may require a third opinion, again at the employer's expense, from a health care provider mutually agreed upon by the employer and employee. The third opinion shall be final and binding.

In this regard, the Department requested comments on methods for selecting a third health care provider if the employer and employee cannot reach agreement. This issue has not been resolved in these regulations. The suggestions made in response to the notice included requiring the employer and employee each to furnish lists from which the other would be required to select; having the employee designate the provider unless there is a lack of good faith; creating a dispute resolution procedure; following established resolution mechanisms such as those of the American Arbitration Association; and having a health care provider selected by the local medical society. The interim final regulations obligate both the employer and the employee to act in good faith in attempting to reach agreement on the third opinion provider in cases of differing first and second opinions. If the employer fails to act in good faith, the employer will be bound by the first certification. If the employee fails to act in good faith, the second certification will be binding. Comments are invited on this rule, and on appropriate alternatives, if any, that may be more workable.

An employer can require an employee to obtain subsequent recertifications to support continuing FMLA medical leave "on a reasonable basis." The regulations, at § 825.308, permit the employer to request such recertification not more often than every 30 days unless: (1) The employee requests an

extension of leave; (2) changed circumstances occur regarding the illness or injury; or, (3) the employer receives information that casts doubt upon the continuing validity of the most recent certification.

What Notice May an Employer Require Regarding an Employee's Intent To Return to Work? (§ 825.309)

An employer may require periodic reports from an employee on FMLA leave regarding the employee's status and intent to return to work. If the employee provides a statement of intent to return to work, even if the statement is qualified, entitlement to leave and maintenance of health benefits continues. However, if the employee gives an unequivocal notice of intent not to return to work, the employer's obligations to provide health benefits (except pursuant to COBRA requirements) and to restore the employee end.

Under What Circumstances May an Employer Require That an Employee Submit a Medical Certification That the Employee Is Able (or Unable) To Return to Work (e.g., a "Fitness-for-Duty" Report)? (§ 825.310)

As a condition of restoration of an employee who has taken leave due to the employee's serious health condition, the employer may have a uniformly applied policy or practice that requires presentation of certification from the employee's health care provider that the employee is able to resume work, i.e., is fit for duty. The employer's policy must apply uniformly to similarly-situated employees, and comply with ADA requirements as well as those of State or local law or any applicable collective bargaining agreement. Subject to certain limitations, the regulations allow an employer to deny restoration to employment until a fitness-for-duty certificate is presented, provided the employee has been provided with specific notice that such certification will be required at the time leave was requested.

Because of concern that obtaining certification in a timely manner may not be in the employee's control, the Department considered other approaches, such as requiring an employer to temporarily restore the employee until such certification is received; or, allowing an employer to deny restoration only if the employer has medical evidence that the employee is not able to return to work and, in the absence of such evidence, requiring temporary restoration of the employee while awaiting certification. The statute expressly allows employers to require

fitness-for-duty certification as a condition of restoration. Thus, there appears to be little flexibility to require restoration under the circumstances described above. Comment is invited on whether there is a more workable alternative consistent with the statutory scheme.

What Happens if an Employee Fails To Satisfy the Medical Certification Requirements? (§ 825.311)

If an employee fails to provide timely certification within 15 days (where practicable) of being asked to do so by the employer, and the need for leave was foreseeable, the employer may deny the employee leave until the required certification is provided. If the need for leave is not foreseeable, the employee must still attempt to provide the certification within 15 days of the employer's request, or as soon thereafter as practicable under the circumstances.

Under What Circumstances Can a Covered Employer Refuse To Provide FMLA Leave or Reinstatement to Eligible Employees? (§ 825.312)

This section describes the circumstances under which an employer may refuse to grant FMLA leave or job reinstatement at the conclusion of FMLA leave. Generally, an eligible employee who has complied with FMLA's notice and certification requirements may not be denied the taking of FMLA leave. An employer may, however, deny restoration to an eligible employee under the terms of the "key employee" exemption, as discussed in § 825.218, if necessary to prevent substantial and grievous economic injury to the employer's operations and if the employer has so notified the employee and given the employee an opportunity to elect not to return to work.

Subpart D—What Enforcement Mechanisms Does FMLA Provide?

Subpart D describes what employees can do if they believe their FMLA rights have been violated. Eligible employees who are denied the taking of FMLA leave or who are denied reinstatement at the end of the leave in violation of the Act may file a complaint with the Department of Labor or file a private lawsuit against the employer to obtain damages and other relief. Complaint resolution and enforcement procedures similar to those established under the Fair Labor Standards Act (FLSA) will be utilized by the Department in handling complaints under the FMLA.

Subpart D also provides procedures for the assessment of penalties against

employers that willfully violate the Act's posting requirement.

Subpart E—What Records Must Be Kept To Comply With the FMLA?

Subpart E contains the employer recordkeeping requirements relating to the FMLA. These are based on similar records already required under the Fair Labor Standards Act (FLSA) regulations, 29 CFR part 516. Some FMLA-specific requirements not otherwise required under FLSA are included where necessary for determining FMLA compliance. A special provision similar to that under the ADA requires confidentiality of medical information.

Subpart F—What Special Rules Apply to Employees of Schools?

Subpart F contains special rules applicable to employees of "local educational agencies," which include public school boards and elementary and secondary schools under their jurisdiction, and private elementary and secondary schools. These include limitations on the taking of intermittent leave or leave on a reduced leave schedule, taking leave near the conclusion of an academic term, and restoration to an equivalent position.

To Whom Do the Special Rules Apply? (§ 825.600)

The special rules applicable to educational agencies apply only to primary and secondary schools; they do not apply to colleges and universities, preschools, or other types of educational institutions. The 50-employee test is not applicable in determining employer coverage, but the 50-employees-within-75-miles test does apply in determining employee eligibility. The special rules discussed below for using FMLA leave on an intermittent or reduced leave schedule basis, or close to the end of the term apply only to "instructional employees." This term is narrowly defined to include only those employees whose principal function is to teach and instruct students, thereby excluding auxiliary personnel such as teacher aides and counselors.

What Limitations Apply to the Taking of Intermittent Leave or Leave on a Reduced Leave Schedule? (§ 825.601, § 825.603(a))

When an instructional employee requests intermittent or reduced leave for planned medical treatment for more than 20 percent of the total number of working days in the period during which the leave would be used, the employer may require the employee to elect either to (1) take leave for a

"particular duration" of time which is not greater than the duration of the planned treatment, or (2) be transferred to an alternative position.

Several commenters characterized leave taken for a particular duration as "forced leave," and suggested that any leave taken beyond what was requested by the employee should not be counted as FMLA leave. However, the election to take leave of a particular duration is made by the employee, and there is no suggestion in the statute that this time period would not be counted as FMLA leave.

If an instructional employee requesting intermittent leave or leave on a reduced leave schedule does not give proper notice as required under § 825.302 of the regulations, an employer may deny the taking of leave until 30 days after notice was provided, or may require the employee to take leave for either a "particular duration" or accept an alternative position.

What Limitations Apply to the Taking of Leave Near the End of an Academic Term? (§§ 825.602, 825.603(b))

FMLA addresses several different scenarios applicable to leave taken near the end of the academic term.

First, if an instructional employee begins leave more than five weeks before the end of a term, and if the leave will last at least three weeks and the employee would otherwise return to work during the three weeks before the end of the term, the employer may require the employee to continue taking leave until the end of the term.

Second, if an instructional employee takes leave for a reason other than the employee's serious health condition which commences during the five weeks before the end of the term, and if the leave will last more than two weeks and the employee would otherwise return to work during the last two weeks of the term, the employer may require the employee to continue taking leave until the end of the term.

Finally, if the employee takes leave for a reason other than the employee's own serious health condition which begins during the last three weeks of the term, and if the leave will last more than five working days, the employer may require the employee to take leave until the end of the term.

Although commenters suggest that "academic term" be defined as the entire school year, the legislative history also utilizes the term "semester." Therefore, the regulations provide that the academic term is the school semester, but that in no case may a school have more than two academic terms or semesters each year for

purposes for FMLA. The entire period of leave taken, including any involuntary leave through the end of the school term, counts against an employee's 12-week entitlement; however, the employer has the obligation to maintain health benefits and to reinstate the employee if the leave entitlement ends before the involuntary period is completed.

What Special Rules Apply to Restoration to "an Equivalent Position"? (§ 825.604)

Restoration of an employee to an equivalent position must be based on "established school board policies and practices, private school policies and practices, and collective bargaining agreements." The regulations define established policies, whether for school boards, private schools, or collective bargaining agreements, as written policies which are made known to employees, and deal with the restoration rights of an employee upon return from leave. Such policies are required to provide substantially the same protections as provided in the Act for returning employees. Of course, State law or collective bargaining agreements may provide greater rights than FMLA.

Subpart G—How Do Other Laws, Employer Practices, and Collective Bargaining Agreements Affect Employee Rights under FMLA?

Subpart G discusses the provisions of Title IV of FMLA, which concern the relationship of FMLA to other laws, existing employer benefit policies, and collective bargaining agreements.

What if an Employer Provides More Benefits Than Required by FMLA? (§ 825.700)

An employer must comply with any employee benefit program or collective bargaining agreement that provides greater family or medical leave rights than are established by FMLA. On the other hand, employee rights under FMLA cannot be diminished—for example, through a provision in a collective bargaining agreement providing for restoration to a position which is not equivalent. An employer is not prohibited from amending its employee benefit programs, although nothing in FMLA should be construed to discourage employers from adopting or retaining more generous leave policies.

FMLA provides a different effective date for employees covered by a collective bargaining agreement which is in effect on August 5, 1993.

Specifically, the Act is effective on the date the agreement terminates (*i.e.*, expires) or February 5, 1994, whichever is earlier. This special provision applies to collective bargaining agreements whether or not the agreement contains family or medical leave rights.

Do State Laws Providing Family and Medical Leave Still Apply? (§ 825.701)

FMLA does not supersede "any provision of any State or local law that provides greater family or medical leave rights than the rights established under [FMLA]." Although some commenters suggested that this provision should not apply to procedural requirements, such as notice and certification, a colloquy on the House floor concerning certification indicates an intent that any more generous procedural provision would apply as well.

An employer must comply with any provisions of State or local law that provide greater family or medical leave rights than the rights established by the Federal FMLA. The Department will not enforce State family and medical leave laws, and States may not enforce FMLA. The rule places no obligation on employees to designate whether the leave they are taking is FMLA leave as opposed to leave under State law. Thus, employers covered by both Federal FMLA and applicable State law must comply with the provisions of both.

For example, an employer covered by a State law and not the Federal FMLA would have to comply with the State law, even if it otherwise affords less benefits. Similarly, an employee "eligible" under only one law would receive the benefits of that law.

If State law provides 16 weeks of family and medical leave in two years, an employee may be entitled to take 16 weeks one year under the State law and 12 weeks in the next year under the FMLA. If the employee took qualifying leave for 12 weeks in the first year, the employee would be entitled to up to 12 weeks of leave in the second year under the FMLA, not four or 16. State- and FMLA-mandated leave entitlements run concurrently; an employee would not be entitled to 28 weeks of family and medical leave in a single year in the example given.

If State law provides half-pay for employees temporarily disabled because of pregnancy for six weeks, the employee would be entitled to an additional six weeks of leave under FMLA. A shorter notice period under State law would apply unless an employer has already provided, or an employee is requesting, more leave than required under State law. If State law allows only one certification, no

additional certifications may be required by the employer unless the employer has already provided, or an employee is requesting, more leave than required under State law.

If State law provides six weeks of leave, which includes leave to care for a seriously ill grandparent or a "spouse equivalent," and leave is used for that purpose, the employee is still entitled to 12 weeks of FMLA leave. If FMLA leave is used for a purpose for which leave is also allowed under State law, the employer would not be required to provide additional leave beyond that required by State law to care for the grandparent or "spouse equivalent."

If State law prohibits mandatory leave beyond the actual period of pregnancy disability, an instructional employee employed by an educational agency may not be required to remain on leave until the end of the academic term, as is permitted by FMLA under certain circumstances.

Some 34 States, the District of Columbia and Puerto Rico provide some type of leave guarantee through law. Of these, the laws of 23 jurisdictions apply to both private and public employees. The remaining 13 jurisdictions have laws that apply to public employees only. While the type of benefits provided in these 36 jurisdictions vary considerably, 12 of them have FMLA-type leave for employees in both the private and public sectors: California, Connecticut, the District of Columbia, Hawaii, Maine, Minnesota, New Jersey, Oregon, Rhode Island, Vermont, Washington, and Wisconsin. The Department of Labor recognizes that compliance with the provisions of both the Federal FMLA and the laws of the States may be complex for some employers. To assist employees and employers in this regard, the Department is preparing informational materials which compare the provisions of each State law side-by-side with FMLA and, to the extent possible, designate which provision the Department considers "more generous."

How Does FMLA Affect Federal and State Anti-discrimination Laws? (§ 825.702)

It is important that employers be aware that nothing in FMLA modifies or affects their obligation to comply with Federal and State anti-discrimination laws. Issues will particularly arise concerning an employer's obligations to comply with the Americans with Disabilities Act. As stated above, the employer must comply with both laws. A few examples of situations where ADA may require more than FMLA are set forth in the regulations. The

Department intends to work closely with the Equal Employment Opportunity Commission to assure the smooth implementation of these laws.

Subpart H—Definitions

Subpart H contains definitions of the terms used under FMLA, which are contained in the sections of the regulations where discussed and repeated in here.

Index to Part 825

In addition to the definitions contained in Subpart H, a subject matter index is contained as Appendix A to the regulations.

Commenters are invited to comment on any issues or concerns which should be considered in developing the final rule.

IV. Statutory and Executive Order Requirements

Executive Order 12291

Because of the importance and likely impact of FMLA, the Department will treat this as a major rule under Executive Order 12291. Furthermore, the statute may have an annual impact on the economy of \$100 million or more. This conclusion is based on cost impact information provided to the Congress by the U.S. General Accounting Office (GAO) regarding various family and medical leave proposals under consideration since 1985. The data used by GAO and their methodologies in arriving at their estimates are detailed in their report entitled *Parental Leave: Estimated Costs of H.R. 925, the Family and Medical Leave Act of 1987* (GAO/HRD-88-34, Nov. 10, 1987).

GAO's most recent report, dated February 1, 1993 (*Family and Medical Leave Cost Estimate* (GAO/HRD-93-14R)), estimated the cost to employers of maintaining health insurance coverage for workers on unpaid family and medical leave under H.R. 1—the bill substantially enacted as the FMLA—at about \$674 million annually. Based on adjustments to reflect 1992 health insurance costs and employment levels, GAO estimated that, of all covered employees, about 2.5 million were likely to take leave under H.R. 1 due to the birth or adoption of a child, to care for a seriously ill child, parent or spouse, or an employee's own health condition. The number of employees eligible to take leave (potential beneficiaries) for the reasons permitted under the legislation, and the costs to employers of continuing health insurance during such leave, are summarized by GAO as follows:

Reason for leave	Potential beneficiaries	Cost in millions
Birth or adoption of a child	908,000	\$244
Seriously ill child	64,000	19
Seriously ill parent	177,000	80
Seriously ill spouse	731,000	241
Employees own health (temporary medical leave)	659,000	90
Total	2,539,000	674

Source: GAO/HRD-93-14R, Family and Medical Leave Cost Estimate.

The GAO arrived at these estimates based on various assumptions including:

(1) unpaid leave for newly born or adopted children would be used exclusively by women, and all eligible women would take the full 12 weeks, but existing paid vacation, sick, and disability leave would be used for 6 of these weeks;

(2) unpaid leave to care for a seriously ill child (serious illness being defined as 31 or more days of bed rest) would be used by one parent for an average of 7.8 weeks, but existing paid vacation leave would be used for 1.6 of these weeks;

(3) unpaid leave to care for a seriously ill parent or spouse (serious illness being defined as above) would be used by one related worker for the full 12 weeks, but existing paid vacation leave would be used for 1.6 of these weeks; and,

(4) unpaid leave for an employee's own serious illness (serious illness being defined as above) would be used by 60 percent of the eligible employees (40 percent having short-term disability coverage that would provide paid leave for the duration of the illness) for an average of about 8.9 weeks, but existing paid sick and vacation leave would be used for 3.3 of these weeks.

Underpinning GAO's estimates is an assumption that employers will experience no measurable costs under the law beyond those of maintaining health insurance during periods of permitted absences. This conclusion is based on the results of a survey of 80 firms conducted in Detroit, MI, and Charleston, SC, designed to obtain data on the usage of parental leave, and how employers manage extended absences. GAO found that there is no measurable net cost to business associated with replacing workers (less than one-third of the workers were replaced) or maintaining current levels of productivity while workers not replaced were on unpaid leave. (Absences, for the most part, were handled by reallocating work among the remaining workforce.)

It is also GAO's view that its estimates are likely to overstate the actual cost to

employers for maintaining health insurance during leave permitted by the new law because GAO could not adjust to account for the mitigating influence of existing leave practices either voluntarily provided by employers or required under State law. Likewise, GAO indicated that certain of its leave usage assumptions may tend to overstate actual experience in the workplace.

The Department is also aware of the Minority Views contained in the House Report (H.R. Rept. 103-8, 103d Cong., 1st Sess., p. 60) which characterize the GAO's cost estimates as being significantly understated either because assumptions are inconsistent with the legislative provisions or are in conflict with conclusions reached by other studies. For example, the Minority Report takes issue with GAO's assumption, based on a limited study of two marketplaces, that no costs would be incurred other than for maintaining health insurance coverage and questions the conclusions that no losses in productivity would occur, that temporary replacement workers could be hired at costs comparable to that of the employee, and, where no replacement was hired, that the employee's work could be assumed by other employees. By way of contrast, the Minority Report points to a study by the American Society for Personnel Administrators (ASPA)—now the Society for Human Resource Management (SHRM)—which indicates that there are also costs associated with recruiting new temporary replacement workers, the training of replacement workers, and the lower level of productivity of temporary replacement workers. For example, the ASPA study estimates the cost of recruiting a new employee amounts to about one-third of the new employee's annual salary, the training of a new employee at about 10 percent of the new employee's annual salary, the cost of productivity downtime—the time lost while the new employee learns the job—at 50 percent of the first year's salary. Based on these guidelines, the Minority Report concludes that the approximate cost of replacing an employee earning an annual salary of \$12,000 would amount to \$4,000 in recruitment costs, \$1,200 in training costs, and \$6,000 in lost productivity, or a total of \$11,200. The Report also concludes—based on GAO's estimate that some 30 percent of the employees who would likely take advantage of the FMLA leave provisions would be replaced with temporary workers—that the ASPA guidelines would result in a cost of some \$56

million just for temporary replacement workers. The Minority Report also referred to the somewhat higher estimates of a 1990 study conducted by the Small Business Administration (SBA) entitled *Leave Policies in Small Business*. The SBA study estimated the cost of six weeks of unpaid maternity and infant care leave alone at \$612 million a year and nearly double that amount if such leave was for 12 weeks as provided in FMLA.

Among other things, the Minority Report also questioned GAO's assumptions: relating the term "serious health condition" to an illness requiring 31 or more days of bed rest or, in the case of an ill parent, to long-term care requiring daily assistance with personal hygiene, mobility, or taking medication; excluding from coverage "key employees," i.e., the highest paid 10 percent of employees in the employer's workforce; and, substituting available paid vacation, sick, and disability leave from the full amount of leave allowed. With respect to GAO's definition of "serious health condition," the Minority Report noted GAO's observation in its Report of November 10, 1987, that the cost of the family leave legislation then under consideration would increase by nearly \$120 million if serious illness was defined as 21 days or more of bed rest rather than 31 days.

Quantifying the costs of the FMLA legislation is currently highly dependent on assumptions, many of which are abstract at best, and the limitations of available data. For example, with respect to the higher estimated costs if serious illness were defined to be something less than the 31 days GAO used, these regulations define the term "serious health condition" as follows:

(1) Any period of incapacity or treatment in connection with or consequent to inpatient care (i.e., an overnight stay) in a hospital, hospice, or residential medical care facility;

(2) Any period of incapacity requiring absence from work, school, or other regular daily activities of more than three calendar days, that also involves continuing treatment by (or under the supervision of) a health care provider; and,

(3) Continuing treatment by (or under the supervision of) a health care provider for a chronic or long-term health condition that is incurable or so serious that, if not treated, would result in a period of incapacity of more than three calendar days; and for prenatal care.

This definition is considerably less stringent than GAO's; thus, estimates based on the regulatory definition

would likely increase costs. On the other hand, there are some factors not taken into account by GAO that would mitigate costs, such as the influence of existing State laws. Some 34 States, the District of Columbia and Puerto Rico already provide some type of leave guarantee through law. While the coverage and types of benefits provided vary considerably, FMLA does not supersede such laws. It also can be presumed that absences shorter than those estimated by GAO would often be covered by employers' existing leave policies.

The Department is examining the methodology, various assumptions and data used by GAO in an effort to determine whether provisions of the bill finally enacted, or these implementing regulations, are likely to have any significant effect on the GAO's estimates. If the Department determines from its review that a more definitive or significantly different estimate can be prepared, the Department will publish a further Regulatory Impact Analysis at a later date.

In this regard, the Department notes further that of the nearly 400 comments received in response to its notice, several commenters expressed concern about the law's impact on their operations. They indicated, for example, that FMLA would impact profitability because of the burden of recruiting, selecting, placing, and training temporary workers to fill clerical and labor vacancies at a much lower rate of efficiency; because managerial employees cannot be replaced by temporary workers; because the employer becomes liable for the unemployment costs of temporary workers; because temporary workers are not typically eligible for hospitalization coverage until after 30 days of employment, which increases hospitalization costs; and, because temporary workers have more accidents, adding to workers' compensation costs. None of the commenters, however, provided any data or cost specific information in response to the Department's request for data relating to the economic impact of the Act.

The Department again requests comments on the foregoing estimates of the impact of the FMLA and these implementing regulations.

Regulatory Flexibility Analysis

The Regulatory Flexibility Act of 1980 requires agencies to prepare regulatory flexibility analyses, and to develop alternatives, whenever possible, in drafting regulations that will have a "significant economic impact on a substantial number of small entities."

The Department has determined that such an analyses is not required for this rulemaking. This conclusion is based on the fact that FMLA only covers private employers of 50 or more employees, and public agencies. Small entities, i.e., employers with fewer than 50 employees, are exempt. Thus, coverage under the FMLA is limited to an estimated 300,000 employers, or about five percent of all employers. Accordingly, this regulation will not have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act. The Secretary has certified to the Chief Counsel for Advocacy of the Small Business Administration to this effect. Therefore, no regulatory flexibility analysis is required.

This document was prepared under the direction and control of Charles E. Pugh, Acting Administrator, Wage and Hour Division, Employment Standards Administration, U.S. Department of Labor.

List of Subjects in 29 CFR Part 825

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

Signed in Washington, DC, this 28th day of May, 1993.

Robert B. Reich,
Secretary of Labor.

John R. Fraser,
Acting Assistant Secretary for Employment Standards.

Title 29, chapter V, subchapter C, "Other Laws", is amended by adding a new part 825 to read as follows:

PART 825—THE FAMILY AND MEDICAL LEAVE ACT OF 1993

Subpart A—What is the Family and Medical Leave Act, and to Whom Does It Apply?

- Sec.
- 825.100 What is the Family and Medical Leave Act?
- 825.101 What is the purpose of the Act?
- 825.102 When is the Act effective?
- 825.103 How does the Act affect leave in progress on, or taken before, the effective date of the Act?
- 825.104 What employers are covered by the Act?
- 825.105 In determining whether an employer is covered by FMLA, what does it mean to employ 50 or more employees for each working day during each of 20 or more calendar workweeks in the current or preceding calendar year?
- 825.106 How is "joint employment" treated under FMLA?
- 825.107 What is meant by "successor in interest"?

- Sec.
- 825.108 What is a "public agency"?
- 825.109 Are Federal agencies covered by these regulations?
- 825.110 Which employees are "eligible" to take leave under FMLA?
- 825.111 In determining if an employee is "eligible" under FMLA, how is the determination made whether the employer employs 50 employees within 75 miles of the worksite where the employee requesting leave is employed?
- 825.112 Under what kinds of circumstances are employers required to grant family or medical leave?
- 825.113 What do "spouse," "parent," and "son or daughter" mean for purposes of an employee qualifying to take FMLA leave?
- 825.114 What is a "serious health condition"?
- 825.115 What does it mean that "the employee is unable to perform the functions of the position of the employee"?
- 825.116 What does it mean that an employee is "needed to care for" a family member?
- 825.117 For an employee seeking intermittent FMLA leave or leave on a reduced leave schedule, what is meant by "the medical necessity for" such leave?
- 825.118 What is a "health care provider"?

Subpart B—What Leave Is an Employee Entitled to Take Under the Family and Medical Leave Act?

- 825.200 How much leave may an employee take?
- 825.201 If leave is taken for the birth of a child, or for placement of a child for adoption or foster care, when must the leave be concluded?
- 825.202 How much leave may a husband and wife take if they are employed by the same employer?
- 825.203 Does FMLA leave have to be taken all at once, or can it be taken in parts?
- 825.204 May an employer transfer an employee to an "alternative position" in order to accommodate intermittent leave or a reduced leave schedule?
- 825.205 How does one determine the amount of leave used where an employee takes leave intermittently or on a reduced leave schedule?
- 825.206 May an employer deduct hourly amounts from an employee's salary, when providing unpaid leave under FMLA, without affecting the employee's qualifications for exemption as an executive, administrative, or professional employee under the Fair Labor Standards Act?
- 825.207 Is FMLA leave paid or unpaid?
- 825.208 May an employer require an employee to designate paid leave as FMLA leave and, as a result, count it against the employee's total FMLA leave entitlement?
- 825.209 Is an employee entitled to benefits while using FMLA leave?
- 825.210 How may employees on FMLA leave pay their share of health benefit premiums?

- 825.211 What special health benefits maintenance rules apply to multi-employer health plans?
- 825.212 What are the consequences of an employee's failure to make timely health plan premium payments?
- 825.213 May an employer recover premiums it paid for maintaining "group health plan" coverage during FMLA leave?
- 825.214 What are an employee's rights on returning to work from FMLA leave?
- 825.215 What is an equivalent position?
- 825.216 Are there any limitations on an employer's obligation to reinstate an employee?
- 825.217 What is a "key employee"?
- 825.218 What does "substantial and grievous economic injury" mean?
- 825.219 What are the rights of a key employee?
- 825.220 How are employees who exercise their rights protected?

Subpart C—How Do Employees Learn of Their FMLA Rights and Obligations, and What Can an Employer Require of an Employee?

- 825.300 What posting requirements does the Act place on employers?
- 825.301 What other notices to employees are required of employers under the FMLA?
- 825.302 What notice does an employee have to give an employer when the need for FMLA leave is foreseeable?
- 825.303 What are the requirements for an employee to furnish notice to an employer where the need for FMLA leave is not foreseeable?
- 825.304 What recourse do employers have if employees fail to provide the required notice?
- 825.305 When must an employee provide medical certification to support a FMLA leave request?
- 825.306 How much information may be required in medical certifications of a serious health condition?
- 825.307 What can an employer do if it questions the adequacy of a medical certification?
- 825.308 Under what circumstances can an employer request subsequent recertifications of medical conditions to support leave requests?
- 825.309 What notice may an employer require regarding an employee's intent to return to work?
- 825.310 Under what circumstances may an employer require that an employee submit a medical certification that the employee is able (or unable) to return to work (e.g., a "fitness-for-duty" report)?
- 825.311 What happens if an employee fails to satisfy the medical certification requirements?
- 825.312 Under what circumstances can a covered employer refuse to provide FMLA leave or reinstatement to eligible employees?

Subpart D—What Enforcement Mechanisms Does FMLA Provide?

- 825.400 What can employees do who believe that their rights under FMLA have been violated?
- 825.401 Where can an employee file a complaint of FMLA violations with the Federal government?
- 825.402 How is an employer notified of a violation of the posting requirement?
- 825.403 How may an employer appeal the assessment of a penalty for willful violation of the posting requirement?
- 825.404 What are the consequences of an employer not paying the penalty assessment after a final order is issued?

Subpart E—What Records Must Be Kept To Comply With the FMLA?

- 825.500 What records must an employer keep to comply with the FMLA?

Subpart F—What Special Rules Apply to Employees of Schools?

- 825.600 To whom do the special rules apply?
- 825.601 What limitations apply to the taking of intermittent leave or leave on a reduced leave schedule?
- 825.602 What limitations apply to the taking of leave near the end of an academic term?
- 825.603 Is all leave taken during "periods of a particular duration" counted against the FMLA leave entitlement?
- 825.604 What special rules apply to restoration to "an equivalent position?"

Subpart G—How Do Other Laws, Employer Practices, and Collective Bargaining Agreements Affect Employee Rights Under FMLA?

- 825.700 What if an employer provides more generous benefits than required by FMLA?
- 825.701 Do State laws providing family and medical leave still apply?
- 825.702 How does FMLA affect Federal and State anti-discrimination laws?

Subpart H—Definitions

- 825.800 Definitions.
- Appendix A to Part 825—Index
- Appendix B to Part 825—Certification of Physician or Practitioner
- Appendix C to Part 825—Notice to Employees of Rights under FMLA
- Authority: 29 U.S.C. 2654; Secretary's Order 1-93 (58 FR 21190).

Subpart A—What Is the Family and Medical Leave Act, and to Whom Does It Apply?**§ 825.100 What is the Family and Medical Leave Act?**

(a) The Family and Medical Leave Act of 1993 (FMLA or Act) gives "eligible" employees of a covered employer the right to take unpaid leave, or paid leave if it has been earned, for a period of up to 12 workweeks in any 12 months because of the birth of a child or the placement of a child 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, or because the employee's own serious health condition makes the employee unable to do his or her job. Under certain circumstances, this leave may be taken on an intermittent basis rather than all at once, or the employee may work a part-time schedule.

(b) An employee on FMLA leave is also entitled to have health benefits maintained while on leave. If an employee was paying all or part of the premium payments prior to leave, the employee would continue to pay their share during the leave period. The employer can recover its share only if the employee does not return to work for a reason other than the serious health condition of the employee or the employee's immediate family member, or another reason beyond the employee's control.

(c) An employee generally has a right to return to the same position or an equivalent position with equivalent pay, benefits and working conditions at the conclusion of the leave.

(d) The employer has a right to 30 days advance notice from the employee where practicable. In addition, the employer may require an employee to submit certification from a health care provider to substantiate that the leave is due to the serious health condition of the employee or the employee's immediate family member. Failure to comply with these requirements may result in the denial of FMLA leave. Pursuant to a uniformly applied policy, the employer may also require that an employee present a certification of fitness to return to work when the absence was caused by the employee's serious health condition. The employer may deny restoration to employment without such certificate relating to the health condition which caused the employee's absence.

§ 825.101 What is the 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, and for the care of a child, spouse, or parent who has a serious health condition. The Act is intended to balance the demands of the workplace with the needs of families, to promote the stability and economic security of families, and to promote national interests in preserving family integrity. It was intended that the Act accomplish these purposes in a manner that accommodates the legitimate interests of employers, and in a manner consistent with the Equal Protection

Clause of the Fourteenth Amendment in minimizing the potential for employment discrimination on the basis of sex, while promoting equal employment opportunity for men and women.

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

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

§ 825.102 When is the Act effective?

(a) The Act is effective on August 5, 1993. If a collective bargaining agreement is in effect on that date, the Act is effective on February 5, 1994, or the date the agreement expires, whichever is sooner. Application to collective bargaining agreements is discussed further in § 825.700(c).

(b) The period prior to the Act's effective date must be considered in determining employer coverage and employee eligibility. For example, as discussed further below, as of August 5, 1993, an employer must count employees/workweeks for calendar year 1992 and calendar year 1993 (to date). If 50 or more employees were employed during 20 or more workweeks in either 1992 or 1993 (year to date), the employer is covered under FMLA on August 5, 1993. If not, the employer is not covered on August 5, 1993, but must continue to monitor employment levels each workweek remaining in 1993 to

determine if and when it might become covered.

§ 825.103 How does the Act affect leave in progress on, or taken before, the effective date of the Act?

(a) The right to take FMLA leave begins on the Act's effective date. Any leave taken prior to the Act's effective date may not be counted for purposes of FMLA. If leave qualifying as FMLA leave was underway prior to the effective date of the Act and continues after the Act's effective date, only that portion of leave taken on or after August 5, 1993, may be counted against the employee's leave entitlement under the FMLA.

(b) If an employer-approved leave is underway when the Act takes effect, no further notice may be required of the employee unless the employee requests an extension of the leave. For leave which commences on the effective date or shortly thereafter, such notice must be given which is practicable considering the foreseeability of the need for leave and the effective date of the statute.

(c) Starting on the Act's effective date, an employee is entitled to FMLA leave if the reason for the leave is qualifying under the Act, even if the event occasioning the need for leave (e.g., the birth of a child) occurred before the effective date (so long as any other requirements are satisfied).

§ 825.104 What employers are covered by the Act?

(a) An employer covered by FMLA is any person engaged in commerce or in any 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. Employers covered by FMLA also include any person acting, directly or indirectly, in the interest of a covered employer to any of the employees of the employer, any successor in interest of a covered employer, and any public agency. Public agencies are covered employers without regard to the number of employees employed. Private elementary and secondary schools are also covered employers without regard to the number of employees employed. (See § 825.600.)

(b) The terms "commerce" and "industry affecting commerce" are defined in accordance with section 501 (1) and (3) of the Labor Management Relations Act of 1947 (LMRA) (29 U.S.C. 142 (1) and (3)), as set forth in the definitions at § 825.800 of this part. For purposes of the FMLA, employers who meet the 50-employee coverage test are

deemed to be engaged in commerce or in an industry or activity affecting commerce.

(c) Normally the legal entity which employs the employee is the employer under FMLA. Applying this principle, a corporation is a single employer rather than its separate establishments or divisions.

(1) Where one corporation has an ownership interest in another corporation, it is a separate employer unless it meets the "joint employment" test discussed in § 825.106, or the "integrated employer" test contained in paragraph (c)(2) of this section.

(2) Separate entities will be deemed to be parts of a single employer for purposes of FMLA if they meet the "integrated employer" test. Where this test is met, the employees of all entities making up the integrated employer will be counted in determining employer coverage and employee eligibility. Factors considered in determining whether two or more entities are an integrated employer include:

- (i) Common management;
- (ii) Interrelation between operations;
- (iii) Centralized control of labor relations; and
- (iv) Degree of common ownership/financial control. A determination of whether or not separate entities are an integrated employer is not determined by the application of any single criterion, but rather the entire relationship is to be reviewed in its totality.

(d) An "employer" includes any person who acts directly or indirectly in the interest of an employer to any of the employer's employees. The definition of "employer" in section 3(d) of the Fair Labor Standards Act (FLSA), 29 U.S.C. 203(d), similarly includes any person acting directly or indirectly in the interest of an employer in relation to an employee. As under the FLSA, individuals such as corporate officers "acting in the interest of an employer" are individually liable for any violations of the requirements of FMLA.

§ 825.105 In determining whether an employer is covered by FMLA, what does it mean to employ 50 or more employees for each working day during each of 20 or more calendar workweeks in the current or preceding calendar year?

(a) Any employee whose name appears on the employer's payroll will be considered employed each working day of the calendar week, and must be counted whether or not any compensation is received for the week.

(b) Employees on paid or unpaid leave, including FMLA leave, leaves of absence, disciplinary suspension, etc.,

are counted as long as the employer has a reasonable expectation that the employee will later return to active employment. Employees on layoff, whether temporary, indefinite or long-term, are not counted. Part-time employees, like full-time employees, are considered to be employed each working day of the calendar week, as long as they are maintained on the payroll.

(c) An employee who does not begin to work for an employer until after the first working day of a calendar week, or who terminates employment before the last working day of a calendar week, is not considered employed on each working day of that calendar week.

(d) A private employer is covered if it maintained 50 or more employees on the payroll during 20 or more calendar workweeks (not consecutive workweeks) in either the current or the preceding calendar year.

(e) Once a private employer meets the 50 employees/20 workweeks threshold, the employer remains covered until it reaches a future point where it no longer has employed 50 employees for 20 (nonconsecutive) workweeks in the current and preceding calendar year. For example, if an employer who meets the 50 employees/20 workweeks test in the current calendar year as of August 5, 1993, subsequently drops below 50 employees before the end of 1993 and continues to employ fewer than 50 employees in all workweeks throughout calendar year 1994, the employer continues to be covered throughout calendar year 1994 because it met the coverage criteria for 20 workweeks of the preceding (i.e., 1993) calendar year.

§ 825.106 How is "joint employment" treated under FMLA?

(a) Where two or more businesses exercise some control over the work or working conditions of the employee, the businesses may be joint employers under FMLA. Joint employers may be separate and distinct entities with separate owners, managers and facilities. Factors which are considered in determining whether an employer-employee relationship exists include, but are not limited to:

- (1) The nature and degree of control of the workers;
- (2) The degree of supervision, direct or indirect, of the work;
- (3) The power to determine the pay rates or the methods of payment of the workers;
- (4) The right, directly or indirectly, to hire, fire, or modify the employment conditions of the workers; and
- (5) Preparation of the payroll and payment of wages.

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

(c) A joint employment relationship often exists in situations:

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

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

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

(d) Employees jointly employed by two employers must be counted by both employers, whether or not maintained on one of the employer's payroll, in determining employer coverage and employee eligibility. For example, an employer who jointly employs 15 workers from a leasing or temporary help agency and 40 permanent workers is covered by FMLA.

(e) In joint employment relationships, only the primary employer is responsible for giving required notices to its employees, providing leave, maintenance of health benefits, and job restoration. Factors considered in determining which is the "primary" employer include authority/responsibility to hire and fire, assign/place the employee, make the payroll, and provide employment benefits. For employees of temporary help or leasing agencies, for example, the placement agency most commonly would be the primary employer.

(f) A secondary employer with 50 or more employees—including jointly employed employees of e.g., a temporary help agency—is responsible for compliance with the prohibited acts provisions (§ 825.220) with respect to its temporary/leased employees. These include prohibitions against interfering with an employee's attempt to exercise rights under the Act, or discharging or discriminating against an employee for opposing a practice which is unlawful under FMLA. The secondary employer will be responsible for compliance with all the provisions of the FMLA with respect to its regular, permanent workforce.

§ 825.107 What is meant by "successor in interest"?

(a) For purposes of FMLA, in determining whether an employer is covered because it is a "successor in interest" to a covered employer, the following factors will be considered:

- (1) Substantial continuity of the same business operations;
- (2) Use of the same plant;
- (3) Continuity of the work force;
- (4) Similarity of jobs and working conditions;
- (5) Similarity of supervisory personnel;
- (6) Similarity in machinery, equipment, and production methods;
- (7) Similarity of products or services; and
- (8) The ability of the predecessor to provide relief.

(b) A determination of whether or not a "successor in interest" exists is not determined by the application of any single criterion, but rather the entire circumstances are to be viewed in their totality.

(c) When an employer is a "successor in interest," employees' entitlements are the same as if the employment by the predecessor and successor were continuous employment by a single employer.

§ 825.108 What is a "public agency"?

(a) An "employer" under FMLA includes any "public agency," as defined in section 3(x) of the Fair Labor Standards Act, 29 U.S.C. 203(x). Section 3(x) of the FLSA defines "public agency" as the government of the United States; the government of a State or political subdivision of a State; or an agency of the United States, a State, or a political subdivision of a State, or any interstate governmental agency. "State" is further defined in Section 3(c) of the FLSA to include any State of the United States, the District of Columbia, or any Territory or possession of the United States.

(b) The determination of whether an entity is a "public" agency, as distinguished from a private employer, is determined by whether the agency has taxing authority, or whether the chief administrative officer or board, etc., is elected by the voters-at-large or their appointment is subject to approval by an elected official.

(c) A State or a political subdivision of a State constitutes a single public agency and, therefore, a single employer for purposes of determining employee eligibility. For example, a State is a single employer; a county is a single employer; a city or town is a single employer. Where there is any question about whether a public entity is a public

agency, as distinguished from a part of another public agency, the U.S. Bureau of the Census' "Census of Governments" will be determinative, except for new entities formed since the most recent publication of the "Census." For new entities, the criteria used by the Bureau of Census will be used to determine whether an entity is a public agency or a part of another agency, including existence as an organized entity, governmental character, and substantial autonomy of the entity.

(d) All public agencies are covered by FMLA regardless of the number of employees; they are not subject to the coverage threshold of 50 employees carried on the payroll each day for 20 or more weeks in a year. However, employees of public agencies must meet all of the requirements of eligibility, including the requirement that the agency (e.g., State) employ 50 employees at the worksite or within a 75-mile radius.

§ 825.109 Are Federal agencies covered by these regulations?

(a) Most employees of the government of the United States, if they are covered by the FMLA, are covered under Title II of the FMLA (incorporated in Title V, Chapter 63, Subchapter 5 of the United States Code) which is administered by the U.S. Office of Personnel Management (OPM). OPM has separate regulations at 5 CFR part 630, subpart L. In addition, employees of the Senate and House of Representatives are covered by Title V of the FMLA.

(b) The Federal Executive Branch employees within the jurisdiction of these regulations include:

- (1) Employees of the Postal Service;
- (2) Employees of the Postal Rate Commission;
- (3) Employees of the Library of Congress;
- (4) Employees of a corporation supervised by the Farm Credit Administration if private interests elect or appoint a member of the board of directors;
- (5) A part-time employee who does not have an established regular tour of duty during the administrative workweek; and

(6) An employee serving under an intermittent appointment or temporary appointment with a time limitation of one year or less.

(c) Employees of other Federal executive agencies are also covered by these regulations if they are not covered by Title II of FMLA.

(d) Employees of the legislative or judicial branch of the United States are covered by these regulations only if they are employed in a unit which has

employees in the competitive service. Examples include employees of the Government Printing Office and the U.S. Tax Court.

(e) For employees covered by these regulations, the U.S. Government constitutes a single employer for purposes of determining employee eligibility. These employees must meet all of the requirements for eligibility, including the requirement that the Federal Government employ 50 employees at the worksite or within a 75-mile radius.

§ 825.110 Which employees are "eligible" to take leave under FMLA?

(a) An "eligible employee" is an employee of a covered employer who:

- (1) Has been employed by the employer for at least 12 months, and
- (2) Has been employed for at least 1,250 hours of service during the 12-month period immediately preceding the commencement of the leave, and
- (3) Is employed at a worksite where 50 or more employees are employed by the employer within 75 miles of that worksite.

(b) The 12 months an employee must have been employed by the employer need not be consecutive months. If an employee is maintained on the payroll for any part of a week, the week counts as a week of employment. For purposes of determining whether intermittent/occasional/casual employment qualifies as "at least 12 months," 52 weeks is deemed to be equal to 12 months.

(c) 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 (see 29 CFR part 785). The determining factor is the number of hours an employee has worked for the employer within the meaning of the FLSA. The determination is not limited by methods of recordkeeping, or by compensation agreements that do not accurately reflect all of the hours an employee has worked for or been in service to the employer. Any accurate accounting of actual hours worked under FLSA's principles may be used; in the absence of actual records of hours worked, 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) and who have worked for the employer for at least 12 months will be presumed to have worked at least 1,250 hours during the previous 12 months. See § 825.500(d). For this purpose, full-time

teachers (see § 825.800 for definition) of an elementary or secondary school system, or institution of higher education, or other educational establishment or institution are deemed to meet the 1,250 hour test. An employer must be able to clearly demonstrate that such an employee did not work 1,250 hours during the previous 12 months in order to claim that the employee is not "eligible" for FMLA leave.

(d) The determinations of whether an employee has worked for the employer for at least 1,250 hours in the past 12 months and has been employed by the employer for a total of at least 12 months must be made as of the date leave commences. If an employee notifies the employer of need for FMLA leave before the employee meets these eligibility criteria, the employer may confirm the employee's eligibility based upon a projection that the employee will be eligible on the date leave would commence or may advise the employee when the eligibility requirement is met. In the former case, the employer may not subsequently challenge the employee's eligibility and, provided the other requirements of these regulations are met, the employee will have satisfied the notice requirements even if not yet eligible for FMLA benefits.

(e) The period prior to the FMLA's effective date must be considered in determining an employee's eligibility.

§ 825.111 In determining if an employee is "eligible" under FMLA, how is the determination made whether the employer employs 50 employees within 75 miles of the worksite where the employee requesting leave is employed?

(a) Generally, a worksite can refer to either a single location or a group of contiguous locations. Structures which form a campus or industrial park, or separate facilities in proximity with one another, may be considered a single site of employment. On the other hand, there may be several single sites of employment within a single building, such as an office building, if separate employers conduct activities within the building. For example, an office building with 50 different businesses as tenants will contain 50 sites of employment. The offices of each employer will be considered separate sites of employment for purposes of FMLA. An employee's worksite under FMLA will ordinarily be the site the employee reports to or, if none, from which the employee's work is assigned.

(1) Separate buildings or areas which are not directly connected or in immediate proximity are a single worksite if they are in reasonable

geographic proximity, are used for the same purpose, and share the same staff and equipment. For example, if an employer manages a number of warehouses in a metropolitan area but regularly shifts or rotates the same employees from one building to another, the multiple warehouses would be a single worksite.

(2) For employees with no fixed worksite, e.g., construction workers, transportation workers, salespersons, etc., the "worksite" is the site to which they are assigned as their home base, from which their work is assigned, or to which they report. For example, if a construction company headquartered in New Jersey opened a construction site in Ohio, and set up a mobile trailer on the construction site as the company's offices, the construction site in Ohio would be the worksite for any employees hired locally who report to the mobile trailer/company office daily for work assignments, etc. If that construction company also sent personnel such as job superintendents, foremen, engineers, an office manager, etc., from New Jersey to the job site in Ohio, those workers sent from New Jersey continue to have the headquarters in New Jersey as their "worksite."

(b) The 75-mile radius is measured by road miles, using surface transportation over public streets, roads, highways and waterways, by the shortest route from the facility where the eligible employee requesting leave is employed.

(c) The determination of how many employees are employed within 75 miles of the worksite of an employee is based on the number of employees maintained on the payroll. Employees of educational institutions who are employed permanently or who are under contract are "maintained on the payroll" during any portion of the year when school is not in session.

(d) Whether 50 employees are employed within 75 miles to ascertain an employee's eligibility for FMLA benefits is determined when the employee requests the leave. Whether the leave is to be taken at one time or on an intermittent or reduced leave schedule basis, once an employee is determined eligible after requesting leave, the employee's eligibility is not affected by any subsequent change in the number of employees employed at or within 75 miles of the employee's worksite. Similarly, an employer may not terminate employee leave that has already started if the employee-count drops below 50. For example, if an employer employs 60 employees in August, but expects that the number of employees will drop to 40 in December, the employer must grant FMLA benefits

to an employee who requests leave in August for a period of leave to begin in December.

§ 825.112 Under what kinds of circumstances are employers required to grant family or medical leave?

(a) Employers covered by FMLA are required to grant leave to eligible employees:

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

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

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

(4) Because of a serious health condition that makes the employee unable to perform the functions of the employee's job.

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

(c) Circumstances may require that FMLA leave begin before the actual date of birth of a child. An expectant mother may take FMLA leave before the birth of the child for prenatal care or if her condition makes her unable to work.

(d) FMLA leave can begin before the actual placement or adoption of a child if an absence from work is required for the placement for adoption or foster care to proceed. For example, the employee may be required to attend counselling sessions, appear in court, consult with his or her attorney or the doctor(s) representing the birth parent, or submit to a physical examination. The source of an adopted child (e.g., whether from a licensed placement agency or otherwise) is not a factor in determining eligibility for leave for this purpose. There is no maximum age limit on a child being adopted or placed for foster care for purposes of determining eligibility for leave.

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

§ 825.113 What do "spouse," "parent," and "son or daughter" mean for purposes of an employee qualifying to take FMLA leave?

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

(b) Parent means a biological parent or an individual who stands or stood *in loco parentis* to an employee when the employee was a child. This term does not include parents "in law."

(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."

(1) "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" or "ADLs." Activities of daily living include adaptive activities such as caring appropriately for one's grooming and hygiene, bathing, dressing, eating, cooking, cleaning, shopping, taking public transportation, paying bills, maintaining a residence, using telephones and directories, using a post office, etc.

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

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

§ 825.114 What is a "serious health condition"?

(a) For purposes of FMLA, "serious health condition" means an illness, injury, impairment, or physical or mental condition that involves:

(1) Any period of incapacity or treatment in connection with or consequent to inpatient care (i.e., an overnight stay) in a hospital, hospice, or residential medical care facility;

(2) Any period of incapacity requiring absence from work, school, or other regular daily activities, of more than three calendar days, that also involves continuing treatment by (or under the supervision of) a health care provider; or

(3) Continuing treatment by (or under the supervision of) a health care provider for a chronic or long-term health condition that is incurable or so serious that, if not treated, would likely result in a period of incapacity of more than three calendar days; or for prenatal care.

(b) "Continuing treatment by a health care provider" means one or more of the following:

(1) The employee or family member in question is treated two or more times for the injury or illness by a health care provider. Normally this would require visits to the health care provider or to a nurse or physician's assistant under direct supervision of the health care provider.

(2) The employee or family member is treated for the injury or illness two or more times by a provider of health care services (e.g., physical therapist) under orders of, or on referral by, a health care provider, or is treated for the injury or illness 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—for example, a course of medication or therapy—to resolve the health condition.

(3) The employee or family member is under the continuing supervision of, but not necessarily being actively treated by, a health care provider due to a serious long-term or chronic condition or disability which cannot be cured. Examples include persons with Alzheimer's, persons who have suffered a severe stroke, or persons in the terminal stages of a disease who may not be receiving active medical treatment.

(c) Voluntary or cosmetic treatments (such as most treatments for orthodontia or acne) which are not medically necessary are not "serious health conditions," unless inpatient hospital care is required. Restorative dental surgery after an accident, or removal of cancerous growths are serious health conditions provided all the other conditions of this regulation are met. Treatments for allergies or stress, or for substance abuse, are serious health conditions if all the conditions of the regulation are met. Prenatal care is included as a serious health condition. Routine preventive physical examinations are excluded.

(d) The scope of "serious health condition" is further clarified by the requirements of the Act that the health care provider may be required to certify: in the case of family medical leave, that the "employee is needed to care for" the family member; in the case of medical leave, that "the employee is unable to

perform the functions of the position of the employee"; and, in addition, in the case of leave taken "intermittently or on a reduced leave schedule," the medical necessity for such leave. (See §§ 825.115, 825.116, 825.117, 825.306, 825.310, and 825.311.)

§ 825.115 What does it mean that "the employee is unable to perform the functions of the position of the employee"?

An employee is "unable to perform the functions of the position" where the health care provider finds that the employee is unable to work at all or is unable to perform any of the essential functions of the employee's position within the meaning of the Americans with Disabilities Act (ADA), 42 U.S.C. 12101 *et seq.*, and the regulations at 29 CFR part 1630. An employer has the option, in requiring certification from a health care provider, to provide a statement of the essential functions of the employee's position for the provider to review.

§ 825.116 What does it mean that an employee is "needed to care for" a family member?

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

(b) The term also includes situations where the employee may be needed to fill in for others who are caring for the family member, or to make arrangements for changes in care, such as transfer to a nursing home.

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

§ 825.117 For an employee seeking intermittent FMLA leave or leave on a reduced leave schedule, what is meant by "the medical necessity for" such leave?

For intermittent leave or leave on a reduced leave schedule, there must be a medical need for leave (as distinguished

from voluntary treatments and procedures) and it must be that such medical need can be best accommodated through an intermittent or reduced leave schedule. The treatment regimen and other information described in the certification of a serious health condition (see § 825.306) meets the requirement for certification of the medical necessity of intermittent leave or leave on a reduced leave schedule. Employees needing intermittent FMLA leave or leave on a reduced leave schedule must attempt to schedule their leave so as not to disrupt the employer's operations. In addition, an employer may assign an employee to an alternative position with equivalent pay and benefits that better accommodates the employee's intermittent or reduced leave schedule.

§ 825.118 What is a "health care provider"?

(a) The Act defines "health care provider" as:

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

(2) Any other person determined by the Secretary to be capable of providing health care services.

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

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

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

(3) Christian Science practitioners listed with the First Church of Christ, Scientist in Boston, Massachusetts. Where an employee or family member is receiving treatment from a Christian Science practitioner, an employee may not object to any requirement from an 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.

Subpart B—What Leave Is an Employee Entitled To Take Under the Family and Medical Leave Act?

§ 825.200 How much leave may an employee take?

(a) An eligible employee is entitled to a total of 12 workweeks of leave during any 12-month period for any one, or more, of the following reasons:

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

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

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

(4) Because of a serious health condition that makes the employee unable to perform the functions of his or her job.

(b) An employer is permitted to choose any one of the following methods for determining the "12-month period" in which the 12 weeks of leave entitlement occurs:

(1) The calendar year;

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

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

(4) A "rolling" 12-month period measured backward from the date an employee uses any FMLA leave (except that such measure may not extend back before August 5, 1993).

(c) Under methods in paragraphs (b)(1) and (b)(2) of this section an employee would be entitled to up to 12 weeks of FMLA leave at any time in the fixed 12-month period selected. An employee could, therefore, take 12 weeks of leave at the end of the year and 12 weeks at the beginning of the following year. Under the method in paragraph (b)(3) of this section, an employee would be entitled to 12 weeks of leave during the year beginning on the first date FMLA leave is taken; the next 12-month period would begin the first time FMLA leave is taken after completion of any previous 12-month period. Under the method in paragraph (b)(4) of this section, the "rolling" 12-month period, each time an employee takes FMLA leave the remaining leave entitlement would be any balance of the 12 weeks which has not been used during the immediately preceding 12 months. For example, if an employee has taken eight weeks of leave during the past 12 months, an additional four weeks of leave could be taken. If an employee used four weeks beginning February 1, 1994, four weeks beginning

June 1, 1994, and four weeks beginning December 1, 1994, the employee would not be entitled to any additional leave until February 1, 1995. However, on February 1, 1995, the employee would be entitled to four weeks of leave, on June 1 the employee would be entitled to an additional four weeks, etc.

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

(e) Methods for determining an employee's 12-week leave entitlement are described in § 825.205.

§ 825.201 If leave is taken for the birth of a child, or for placement of a child for adoption or foster care, when must the leave be concluded?

An employee's entitlement to leave for a birth or placement for adoption or foster care expires at the end of the 12-month period beginning on the date of the birth or placement, unless State law allows, or the employer permits leave to be taken for a longer period. Any such FMLA leave must be concluded within this one-year period.

§ 825.202 How much leave may a husband and wife take if they are employed by the same employer?

(a) A husband and wife who are eligible for FMLA leave and are employed by the same covered employer are permitted to take only a combined total of 12 weeks of leave during any 12-month period if the leave is taken:

- (1) For birth of a son or daughter or to care for the child after birth;
- (2) For placement of a son or daughter for adoption or foster care, or to care for the child after placement; or
- (3) To care for a parent (but not a parent "in-law") with a serious health condition.

(b) This limitation on the total weeks of leave applies as long as a husband and wife are employed by the "same employer." It would apply, for example, even though the spouses are employed at two different worksites of an employer located more than 75 miles from each other, or by two different operating divisions of the same company. On the other hand, if one

spouse is ineligible for FMLA leave, the other spouse would be entitled to a full 12 weeks of FMLA leave.

(c) Where the husband and wife both use a portion of the total 12-week FMLA leave entitlement for one of the purposes in paragraph (a) of this section, the husband and wife would each be entitled to the difference between the amount he or she has taken individually and 12 weeks for FMLA leave for a purpose other than those contained in paragraph (a) of this section. For example, if each spouse took 6 weeks of leave for the birth of a child, each could later use an additional 6 weeks due to a personal illness or to care for a sick child.

§ 825.203 Does FMLA leave have to be taken all at once, or can it be taken in parts?

(a) FMLA leave may be taken "intermittently or on a reduced leave schedule" under certain circumstances. Where leave is taken because of a birth or placement of a child for adoption or foster care, an employee may take leave intermittently or on a reduced leave schedule only if the employer agrees. Where FMLA leave is taken to care for a sick family member or for an employee's own serious health condition, leave may be taken intermittently or on a reduced leave schedule when medically necessary.

(b) "Intermittent leave" is leave taken in separate blocks 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.

(c) A "reduced leave schedule" is a leave schedule that reduces an employee's usual number of working hours per workweek, or hours per workday. In other words, a reduced leave schedule is a change in the employee's schedule for a period of time, normally from full-time to part-time. Such a schedule reduction might occur, for example, where an employee, with the employer's agreement, works part-time after the birth of a child; or because an employee who is recovering from a serious health condition is not strong enough to work a full-time schedule.

(d) There is no limit on the size of an increment of leave when an employee takes intermittent leave or leave on a reduced leave schedule. However, an employer may limit leave increments to the shortest period of time (one hour or

less) that the employer's payroll system uses to account for absences or use of leave. For example, an employee might take two hours off for a medical appointment, or might work a reduced day of four hours over a period of several weeks while recuperating from an illness.

§ 825.204 May an employer transfer an employee to an "alternative position" in order to accommodate intermittent leave or a reduced leave schedule?

(a) If an employee requests intermittent leave or leave on a reduced leave schedule that is foreseeable based on planned medical treatment, including during a period of recovery from a serious health condition, the employer may require the employee to transfer temporarily to an available alternative position for which the employee is qualified and which better accommodates recurring periods of leave than does the employee's regular position.

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

(c) The alternative position must have equivalent pay and benefits. An alternative position for these purposes does not have to have equivalent duties. The employer may increase the pay and benefits of an existing alternative position, so as to make them equivalent to the employee's regular job. The employer may also transfer the employee to a part-time job with the same hourly rate of pay and benefits, provided the employee is not required to take more leave than is medically necessary. For example, an employee desiring to take leave in increments of 4 hours per day could be transferred to a half-time job paying the same hourly rate as the employee's previous job and enjoying the same benefits. The employer may not eliminate benefits which otherwise would not be provided to part-time employees; however, an employer may proportionately reduce earned benefits, such as vacation leave, where such a reduction is normally made by an employer for its part-time employees.

§ 825.205 How does one determine the amount of leave used where an employee takes leave intermittently or on a reduced leave schedule?

(a) If an employee takes leave on an intermittent or reduced leave schedule,

only the amount of leave actually taken may be counted toward the 12 weeks of leave to which an employee is entitled. For example, if an employee who normally works five days a week takes off one day, the employee would use $\frac{1}{5}$ of a week of FMLA leave. Similarly, if a full-time employee who normally works 8-hour days works 4-hour days under a reduced leave schedule, the employee would use $\frac{1}{2}$ week of FMLA leave each week.

(b) Where an employee normally works a part-time schedule or variable hours, the amount of leave to which an employee is entitled is determined on a pro rata or proportional basis by comparing the new schedule with the employee's normal schedule. For example, if an employee who normally works 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 of a week of FMLA leave for each week the employee works the reduced leave schedule.

(c) If an employer has made a permanent or long-term change in the employee's schedule (for reasons other than FMLA), the hours worked under the new schedule are to be used for making this calculation.

(d) If an employee's schedule varies from week to week, a weekly average of the hours worked over the 12 weeks prior to the beginning of the leave period would be used for calculating the employee's normal workweek.

§ 825.206 May an employer deduct hourly amounts from an employee's salary, when providing unpaid leave under FMLA, without affecting the employee's qualification for exemption as an executive, administrative, or professional employee under the Fair Labor Standards Act?

(a) Leave taken under FMLA may be unpaid. If an employee is otherwise exempt from minimum wage and overtime requirements of the Fair Labor Standards Act (FLSA) as a salaried executive, administrative, or professional employee (under regulations issued by the Secretary), 29 CFR part 541, providing unpaid FMLA-required leave to such an employee will not cause the employee to lose the FLSA exemption. This means that under regulations currently in effect, where an employee meets the specified duties test, and is paid, on a salary basis, a salary of at least the amount specified in the regulations, the employer may make deductions from the employee's salary for any hours taken as intermittent or reduced FMLA leave within a workweek, without affecting the exempt status of the employee. The fact that an

employer provides FMLA leave, whether paid or unpaid, and maintains records required by this part regarding FMLA leave, will not be relevant to the determination whether an employee is exempt within the meaning of 29 CFR part 541.

(b) This special exception to the "salary basis" requirements of the FLSA exemption applies only to employees of covered employers who are eligible for FMLA leave, and to leave which qualifies as (one of the four types of) FMLA leave. Hourly or other deductions which are not in accordance with 29 CFR part 541 may not be taken, for example, from the salary of an otherwise exempt employee who works for an employer with fewer than 50 employees, or where the employee has not worked long enough to be eligible for FMLA leave without potentially affecting the employee's eligibility for exemption. Nor may deductions which are not permitted by part 541 be taken from such an employee's salary for any leave which does not qualify as FMLA leave, for example, deductions from an employee's pay for leave required under State law or under an employer's policy or practice for a reason which does not qualify as FMLA leave, e.g., leave to care for a grandparent or for a medical condition which does not qualify as a serious health condition; or for leave which is more generous than provided by FMLA, such as leave in excess of 12 weeks in a year. Employers may comply with State law or the employer's own policy/practice under these circumstances and maintain the employee's eligibility for exemption by not taking hourly deductions from the employee's pay, in accordance with FLSA requirements, or may take such deductions, treating the employee as an "hourly" employee and pay overtime premium pay for hours worked over 40 in a workweek.

§ 825.207 Is FMLA leave paid or unpaid?

(a) Generally, FMLA leave is unpaid. However, under the circumstances described in this section, FMLA permits an eligible employee to choose to substitute paid leave for FMLA leave, and an employer to require an employee to substitute paid leave for FMLA leave.

(b) Where an employee has earned or accrued paid vacation, personal or family leave, that leave may be substituted for all or part of any (otherwise) unpaid FMLA leave relating to birth, placement of a child for adoption or foster care, or care for a family member. An employee is entitled to substitute paid family leave only under circumstances permitted by the employer's family leave plan. For

example, if the employer's leave plan allows use of family leave to care for a child but not for a parent, the employer may but is not required to allow accrued family leave to be substituted for FMLA leave used to care for a parent.

(c) Substitution of paid accrued vacation, personal, or medical/sick leave may be made for all or part of any (otherwise) unpaid FMLA leave needed to care for a family member or the employee's own serious health condition. However, an employer may but is not required to, allow substitution of paid sick or medical leave for unpaid FMLA leave "in any situation" where the employer would not normally allow such paid leave.

(1) An employee has a right to substitute paid medical/sick leave to care for a seriously ill family member only if the employer's leave plan allows paid leave to be used for that purpose. Similarly, an employee does not have a right to substitute paid medical/sick leave for a serious health condition which is not covered by the employer's leave plan.

(2) Paid leave provided under a plan covering temporary disabilities is considered sick/medical leave for purposes of FMLA substitution. For example, disability leave for the birth of a child would be considered FMLA leave for a serious health condition and counted in the 12 weeks of leave permitted under FMLA.

(d) Paid vacation or personal leave, including leave earned or accrued under plans allowing "paid time off," may be substituted, at either the employee's or the employer's option, for any qualified FMLA leave. No limitations may be placed by the employer on substitution of paid vacation or personal leave for these purposes.

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

(f) If an employee uses paid leave under circumstances which do not qualify as FMLA leave, the leave will not count against the 12 weeks of FMLA leave to which the employee is entitled. For example, paid sick leave used for a medical condition which is not a serious health condition does not count against the 12 weeks of FMLA leave entitlement.

(g) Whenever an employee uses paid leave, the employee can only be required to comply with the requirements of the employer's leave plan, and not any more stringent requirements of FMLA (e.g., notice or

certification requirements) unless the paid leave period is followed by a period of unpaid FMLA leave. For example, an employee having only four weeks of sick leave available under the employer's plan, may need to take an additional four weeks of unpaid FMLA leave. If the employee requests a total of eight weeks of leave, FMLA notice and certification may be required by the employer (unless such notice and certification would not otherwise be required by the employer of employees using unpaid leave for such a period of time).

§ 825.208 May an employer require an employee to designate paid leave as FMLA leave and, as a result, count it against the employee's total FMLA leave entitlement?

(a) An employee requesting unpaid FMLA leave must explain the reasons for the needed leave so as to allow the employer to determine that the leave qualifies under the Act. In many cases, in explaining the reasons for a request to use paid leave, especially when the need for the leave was unexpected or unforeseen, an employee will (even though, under the employer's policy, they may not be required to) provide sufficient information for the employer to designate the paid leave as substituting for all or some portion of the employee's FMLA leave entitlement. An employee using accrued paid leave, especially vacation or personal leave, may in some cases not spontaneously explain the reasons or their plans for using their accrued leave.

(1) As noted in § 825.302(c), an employee giving notice of the need for unpaid FMLA leave does not need to expressly assert rights under the Act or even mention the FMLA to meet their obligation to provide notice, though they would need to state a qualifying reason for the needed leave. An employee requesting or notifying the employer of an intent to use accrued paid leave, even if for a purpose covered by FMLA, would not need to assert such right either. However, if an employee requesting to use paid leave for an FMLA-qualifying purpose does not explain the reason for the leave—consistent with the employer's established policy or practice—and the employer denies the employee's request, the employee will need to provide sufficient information to establish an FMLA-qualifying reason for the needed leave so that the employer is aware of the employee's entitlement (i.e., that the leave may not be denied) and, then, may designate that the paid leave be appropriately counted against (substituted for) the employee's 12-week entitlement. Similarly, an employee

using accrued paid vacation leave who seeks an extension of unpaid leave for an FMLA-qualifying purpose will need to state the reason. If this is due to an event which occurred during the period of paid leave, the employer may count the leave used after the FMLA-qualifying event against the employee's 12-week entitlement.

(2) In all circumstances, it is the employer's responsibility to designate leave, paid or unpaid, as FMLA-qualifying, based on information provided by the employee.

In any circumstance where the employer does not have sufficient information about the reason for an employee's use of paid leave, the employer should inquire further to ascertain whether the paid leave is potentially FMLA-qualifying.

(b) The employer may designate paid leave as FMLA leave only on the basis of information provided by the employee to the employer (as opposed to information sought or obtained from another party). The employer must immediately notify the employee that the paid leave is designated (see § 825.301(c)), and will be counted as FMLA leave. If there is a dispute between an employer and an employee as to whether paid leave qualifies as FMLA leave, it should be resolved through discussions between the employee and the employer.

(c) If the employer requires paid leave to be substituted for unpaid leave, or that paid leave taken under an existing leave plan be counted as FMLA leave, this decision must be made by the employer at the time the employee requests or gives notice of the leave, or when the employer determines that the leave qualifies as FMLA leave if this happens later. The employer's designation must be made before the leave starts, or before an extension of the leave is granted, unless the employer does not have sufficient information as to the employee's reason for taking the leave until after the leave commenced. In no event may an employer designate leave as FMLA leave after the leave has ended.

(d) If either the employer or the employee designates leave as FMLA leave after leave has begun, such as when an employee requests an extension of the paid leave with unpaid FMLA leave, the entire or some portion of the paid leave period may be retroactively counted as FMLA leave, to the extent that the leave period qualified as FMLA leave.

§ 825.209 Is an employee entitled to benefits while using FMLA leave?

(a) During any FMLA leave, an employer must maintain the employee's coverage under any group health plan (as defined in the Internal Revenue Code of 1986 at 26 U.S.C. 5000(b)(1)) on the same conditions as coverage would have been provided if the employee had been continuously employed during the entire leave period. All employers covered by FMLA, including public agencies, are subject to the Act's requirements to maintain health coverage. The definition of "group health plan" is set forth in § 825.800.

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

(c) If an employer provides a new health plan or benefits or changes health benefits or plans while an employee is on FMLA leave, the employee is entitled to the new or changed plan/benefits to the same extent as if the employee were not on leave. For example, if an employer changes a group health plan so that dental care becomes covered under the plan, an employee on FMLA leave must be given the same opportunity as other employees to receive (or obtain) the dental care coverage.

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

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

(f) Except as required by the Consolidated Omnibus Budget Reconciliation Act of 1986 (COBRA) and for "key" employees (as discussed below), an employer's obligation to maintain health benefits under FMLA ceases if and when an employee informs the employer of his or her intent not to return from leave (including at the start of leave if the employer is so informed before the leave starts), or the employee fails to return from leave, and thereby terminates employment, or the employee exhausts his or her FMLA leave entitlement.

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

§ 825.210 How may employees on FMLA leave pay their share of health benefit premiums?

(a) Group health plan benefits must be continued on the same basis as coverage would have been provided if the employee had been continuously employed during the FMLA leave period. Therefore, any share of health plan premiums which had been paid by the employee prior to FMLA leave must continue to be paid by the employee during the FMLA leave period. If premiums are raised or lowered, the employee would be required to pay the new premium rates.

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

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

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

(2) Payment would be due on the same schedule as payments are made under COBRA;

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

(4) The employer's existing rules for payment by employees on "leave without pay" would be followed, provided that such rules do not require prepayment (i.e., prior to the commencement of the leave) of the premiums that will become due during a period of unpaid FMLA leave; or,

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

(d) The employer must provide the employee with advance written notice of the terms and conditions under which these payments must be made. (See § 825.301.)

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

§ 825.211 What special health benefits maintenance rules apply to multi-employer health plans?

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

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

(c) During the duration of an employee's FMLA leave, coverage by the health plan, and benefits provided pursuant to the plan, must continue at the level coverage would have been continued if the employee had continued to be employed.

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

§ 825.212 What are the consequences of an employee's failure to make timely health plan premium payments?

(a) While an employer may continue to maintain health benefits, an employer's obligations to maintain health insurance coverage ceases if an employee's premium payment is more

than 30 days late. All other obligations of an employer under FMLA would continue; for example, the employer continues to have an obligation to reinstate an employee upon return from leave.

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

(c) If coverage lapses because an employee has not made required premium payments, upon the employee's return from FMLA leave the employer must still restore the employee to coverage/benefits equivalent to those the employee would have had if leave had not been taken and the premium payment(s) had not been missed. See § 825.215(d)(1)-(5). In such case, an employee may not be required to meet any qualification requirements imposed by the plan, including any new preexisting condition waiting period, to wait for an open season, or to pass a medical examination to obtain reinstatement of coverage.

§ 825.213 May an employer recover premiums it paid for maintaining "group health plan" coverage during FMLA leave?

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

(1) The continuation, recurrence, or onset of a serious health condition which would entitle the employee to leave under FMLA; or

(2) Other circumstances beyond the employee's control. Examples of other circumstances beyond the employee's control include such situations as where an employee's spouse is unexpectedly transferred to a job location more than 75 miles from the employee's worksite; a relative or individual other than an immediate family member has a serious health condition and the employee is needed to provide care; the employee is laid off while on leave; or, the employee is a "key employee" who decides not to return to work upon being notified of the employer's intention to deny restoration because of substantial and grievous economic injury to the employer's operations and is not reinstated by the employer. Other circumstances beyond the employee's

control would not include a situation where an employee desires to remain with a parent in a distant city even though the parent no longer requires the employee's care, or a mother's decision not to return to work to stay home with a newborn child.

(3) When an employee fails to return to work because of the continuation, recurrence, or onset of a serious health condition, thereby precluding the employer from recovering its (share of) health benefit premium payments made on the employee's behalf during a period of unpaid FMLA leave, the employer may require medical certification of the employee's or the family member's serious health condition. Such certification is not required unless requested by the employer. The employee is required to provide medical certification in a timely manner which, for purposes of this section, is within 30 days from the date of the employer's request. For purposes of medical certification, the employee may use the optional DOL form developed for this purpose (see § 825.306(a) and Appendix B of this part). If the employer requests medical certification and the employee does not provide such certification in a timely manner (within 30 days), the employer may recover the health benefit premiums it paid during the period of unpaid FMLA leave.

(4) When circumstances permit, the employer's right to recover its share of health premiums paid during periods of unpaid FMLA leave extends to the entire period of unpaid FMLA leave taken by the employee.

(b) An employee who returns to work for at least 30 calendar days is considered to have "returned" to work.

(c) When an employee elects or an employer requires paid leave to be substituted for FMLA leave, the employer may not recover its (share of) health insurance premiums for any period of FMLA leave covered by paid leave.

(d) The amount that self-insured employers may recover is limited to only the employer's share of allowable "premiums" as would be calculated under COBRA, excluding the 2 percent fee for administrative costs.

(e) When an employee fails to return to work, except for the reasons stated in paragraphs (a)(1) and (a)(2) of this section, health premiums paid by the employer during a period of FMLA leave are a debt owed by the non-returning employee to the employer. The existence of this debt caused by the employee's failure to return to work does not alter the employer's responsibilities for coverage and, under

a self-insurance plan, payment of claims incurred during the period of FMLA leave. In the circumstances where recovery is allowed, the employer may recover its share of health insurance premiums through deduction from any sums due to the employee (e.g., unpaid wages, vacation pay, profit sharing, etc.), provided such deductions do not otherwise violate applicable Federal or State wage payment or other laws. Alternatively, the employer may initiate legal action against the employee to recover its share of health insurance premiums.

(f) Under some circumstances an employer may elect to maintain other benefits, e.g., life insurance, disability insurance, etc., by paying the employee's (share of) premiums during periods of unpaid FMLA leave. For example, to ensure the employer can meet its responsibilities to provide equivalent benefits to the employee upon return from unpaid FMLA leave, it may be necessary that premiums be paid continuously to avoid a lapse of coverage. In such circumstances the employer is entitled to recover any premium payments made on the employee's behalf to maintain coverage of benefits during unpaid FMLA leave pursuant to the guidance set out in paragraphs (a) through (e) of this section, whether or not the employee returns from FMLA leave.

§ 825.214 What are an employee's rights on returning to work from FMLA leave?

(a) On return from FMLA leave, an employee is entitled to be returned to the same position the employee held when leave commenced, or to an equivalent position with equivalent benefits, pay, and other terms and conditions of employment.

(b) Ordinarily an employee will be restored to the same position the employee held prior to FMLA leave, with the same pay and benefits, if the position remains available. However, an employee has no right to return to the same position.

§ 825.215 What is an equivalent position?

(a) An equivalent position must have the same pay, benefits and working conditions, including privileges, perquisites and status. It must involve the same or substantially similar duties and responsibilities, which must entail substantially equivalent skill, effort, responsibility, and authority.

(b) If an employee is no longer qualified for the position because of the employee's inability to attend a necessary course, renew a license, fly a minimum number of hours, etc., as a result of the leave, the employee shall

be given a reasonable opportunity to fulfill those conditions upon return to work. If the employee is unable to perform the position because of a physical or mental condition, including the continuation of a serious health condition, the employer's obligations may be governed by the Americans with Disabilities Act (ADA).

(c) *Equivalent Pay.* An employee is entitled to any unconditional pay increases which may have occurred during the FMLA leave period, such as cost of living increases. Pay increases conditioned upon seniority, length of service, or work performed would not have to be granted unless it is the employer's policy or practice to do so with respect to other employees on "leave without pay." In such case, any pay increase would be granted based on the employee's seniority, length of service, work performed, etc., excluding the period of unpaid FMLA leave. An employee is entitled to be restored to a position with the same or equivalent pay premiums, such as a shift differential. If an employee departed from a position averaging ten hours of overtime (and corresponding overtime pay) each week, an employee is ordinarily entitled to such a position on return from FMLA leave.

(d) *Equivalent Benefits.* "Benefits" include 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 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).

(1) At the end of an employee's FMLA leave, benefits must be resumed in the same manner and at the same levels as provided when the leave began, and subject to any changes in benefit levels that may have taken place during the period of FMLA leave affecting the entire workforce, unless otherwise elected by the employee. Upon return from FMLA leave, an employee cannot be required to requalify for any benefits the employee enjoyed before FMLA leave began. For example, if an employee was covered by a life insurance policy before taking leave but is not covered or coverage lapses during the period of unpaid FMLA leave, the employee cannot be required to meet any qualifications, such as taking a physical examination, in order to requalify for life insurance upon return from leave. Accordingly, some employers may find it necessary to

modify life insurance and other benefits programs in order to restore employees to equivalent benefits upon return from FMLA leave, make arrangements for continued payment of costs to maintain such benefits during unpaid FMLA leave, or pay these costs subject to recovery from the employee on return from leave.

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

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

(4) With respect to pension and other retirement plans, any period of FMLA leave will be treated as continued service (i.e., no break in service) for purposes of vesting and eligibility to participate. If, for example, the plan requires an employee to be working on a specific date in order to be credited with a year of service for vesting or participation purposes, an employee on FMLA leave who subsequently returns to work shall be deemed to have been working on that date.

(5) Employees on unpaid FMLA leave are to be treated as if they continued to work for purposes of changes to benefit plans. They are entitled to changes in benefits plans, except those which may be dependent upon seniority or accrual during the leave period, immediately upon return from leave or to the same extent they would have qualified if no leave had been taken. (In this regard, § 825.209 addresses health benefits.)

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

(1) The employee must be reinstated to the same or a geographically proximate worksite where the employee had previously been employed. If the employee's original worksite has been closed, the employee is entitled to the same rights as if the employee had not been on leave when the worksite closed. For example, if an employer transfers all

employees from a closed worksite to a new worksite in a different city, the employee on leave is also entitled to transfer under the same conditions as if he or she had continued to be employed.

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

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

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

(f) The requirement that an employee be restored to the same or equivalent job with the same or equivalent pay, benefits, and terms and conditions of employment does not extend to intangible, unmeasurable aspects of the job. For example, the perceived loss of potential for future promotional opportunities is not encompassed in equivalent pay, benefits and working conditions; nor would any increased possibility of being subject to a future layoff. However, restoration to a job slated for layoff when the employee's original position is not would not meet the requirements of an equivalent position.

§ 825.216 Are there any limitations on an employer's obligation to reinstate an employee?

(a) An employee has no greater right to reinstatement or to other benefits and conditions of employment than if the employee had been continuously employed during the FMLA leave period. An employer must be able to show that an employee would not otherwise have been employed at the time reinstatement is requested in order to deny restoration to employment. For example, an employer would have the burden of proving that an employee would have been laid off during the FMLA leave period and, therefore, would not be entitled to reinstatement. If a shift has been eliminated, or overtime has been decreased, an employee would not be entitled to return to work that shift or the original overtime hours upon reinstatement. However, if a position on, for example, a night shift has been filled by another employee, the employee is entitled to

return to the same shift on which employed before taking FMLA leave.

(b) If an employee was hired for a specific term or only to perform work on a discrete project, the employer has no obligation to restore the employee if the employment term or project is over and the employer would not otherwise have continued to employ the employee. On the other hand, if an employee was hired to perform work on a contract, and after that contract period the contract was awarded to another contractor, the successor contractor may be required to restore the employee if it is a successor employer. See § 825.107.

(c) In addition to the circumstances explained above, an employer may deny job restoration: to salaried eligible employees ("key employees," as defined in paragraph (c) of § 825.218) if such denial is necessary to prevent substantial and grievous economic injury to the operations of the employer; or, to an employee who fails to provide a fitness for duty certificate to return to work under the conditions described in § 825.309.

§ 825.217 What is a "key employee"?

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

(b) The term "salaried" means "paid on a salary basis," as defined in 29 CFR 541.118. This is the Department of Labor regulation defining employees who may qualify as exempt from the minimum wage and overtime requirements of the FLSA as executive, administrative, and professional employees.

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

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

(2) The determination of whether a salaried employee is among the highest paid 10 percent shall be made at the time of the request for leave. No more than 10 percent of the employer's

employees within 75 miles of the worksite may be "key employees."

§ 825.218 What does "substantial and grievous economic injury" mean?

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

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

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

§ 825.219 What are the rights of a key employee?

(a) An employer who believes that reinstatement may be denied to a key employee, must give written notice to the employee at the time FMLA leave is requested (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 will result if the employee is reinstated from FMLA leave. If such notice cannot be given immediately because of the need to determine whether the employee is a key employee, it shall be given as soon as practicable after receipt of a request for leave (or the commencement of leave, if earlier). It is expected that in most circumstances there will be no desire

that an employee be denied restoration after FMLA leave and, therefore, there would be no need to provide such notice. However, an employer who fails to provide such timely notice will lose its right to deny restoration even if substantial and grievous economic injury will result from reinstatement.

(b) As soon as an 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 requested or is using FMLA leave is reinstated, the employer shall notify the employee in writing of its determination, that it cannot deny FMLA leave, and that it intends to deny restoration to employment on completion of the FMLA leave. It is anticipated that an employer will ordinarily be able to give such notice prior to the employee starting 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 must provide the employee a reasonable time in which to return to work, taking into account the circumstances, such as the length of the leave and the urgency of the need for the employee to return.

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

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

§ 825.220 How are employees who exercise their rights protected?

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

(1) An employer is prohibited from interfering with, restraining, or denying the exercise of (or attempts to exercise) any rights provided by the Act.

(2) An employer is prohibited from discharging or in any other way discriminating against any person (whether or not an employee) for opposing or complaining about any unlawful practice under the Act.

(3) All persons (whether or not employers) are prohibited from discharging or in any other way discriminating against any person (whether or not an employee) because that person has—

(i) Filed any charge, or has instituted (or caused to be instituted) any proceeding under or related to this Act;

(ii) Given, or is about to give, any information in connection with an inquiry or proceeding relating to a right under this Act;

(iii) Testified, or is about to testify, in any inquiry or proceeding relating to a right under this Act.

(b) Any violations of the Act or of these regulations constitute interfering with, restraining, or denying the exercise of rights provided by the Act. "Interfering with" the exercise of an employee's rights would include, for example, not only refusing to authorize FMLA leave, but discouraging an employee from using such leave. It would also include manipulation by an employer to avoid responsibilities under FMLA, such as unnecessarily transferring employees from one worksite to another in order to keep worksites below the 50-employee threshold for employee eligibility under the Act.

(c) An employer is prohibited from discriminating against employees who use FMLA leave. For example, if an employee substitutes paid leave for unpaid FMLA leave and the employer does not normally require written notice or certification for use of paid leave, an employer cannot require written notice or certification for the paid FMLA leave. Similarly, if an employee on leave without pay would otherwise be entitled to full benefits (other than health benefits), the same benefits would be required to be provided to an employee on unpaid FMLA leave. By the same token, employers cannot use the taking of FMLA leave as a negative

factor in employment actions, such as promotions or disciplinary actions; nor can FMLA leave be counted under "no fault" attendance policies.

(d) Employees cannot waive their rights under FMLA. For example, employees (or their collective bargaining representatives) cannot "trade off" the right to take FMLA leave against some other benefit offered by the employer. Employers are prohibited from inducing an employee to waive rights under the Act.

(e) Individuals, and not merely employees, are protected from retaliation for opposing (e.g., file a complaint about) any practice which is unlawful under the Act. They are similarly protected if they oppose any practice which they reasonably believe to be a violation of the Act or regulations.

Subpart C—How Do Employees Learn of Their FMLA Rights and Obligations, and What Can an Employer Require of an Employee?

§ 825.300 What posting requirements does the Act place on employers?

(a) Every employer subject to the FMLA is required to post and keep posted on its premises, in conspicuous places where employees are employed, a notice explaining the Act's provisions and providing information concerning the procedures for filing complaints of violations of the Act with the Wage and Hour Division. The notice must be posted prominently where it can be readily seen by employees and applicants for employment. Employers may duplicate the text of the notice contained in Appendix C of this part, or copies of the required notice may be obtained from local offices of the Wage and Hour Division. When duplicating the text of the notice, no reproduction of the notice smaller than 8½ inches by 11 inches will satisfy the posting requirements of this regulation, and the reproduction must contain fully legible text.

(b) An employer that willfully violates the posting requirement may be assessed a civil money penalty by the Wage and Hour Division not to exceed \$100 for each separate offense. Furthermore, an employer that fails to post the required notice cannot take any adverse action against an employee, including denying FMLA leave, for failing to furnish the employer with advance notice of a need to take FMLA leave.

(c) Where an employer's workforce is comprised of a significant portion of workers who are not literate in English, the employer shall be responsible for

providing the information required by the notice provisions of this regulation in a language in which the employees are literate.

§ 825.301 What other notices to employees are required of employers under the FMLA?

(a) If an employer has any written guidance to employees concerning employee benefits or leave rights, such as in an employee handbook, information concerning FMLA entitlements and employee obligations under the FMLA must be included in the handbook or other document. For example, if an employer provides an employee handbook to all employees that describes the employer's policies regarding leave, wages, attendance, and similar matters, the handbook must incorporate information on FMLA rights and responsibilities and the employer's policies regarding the FMLA. Informational publications describing the Act's provisions are available from local offices of the Wage and Hour Division and may be incorporated in such employer handbooks or written policies.

(b) If an employer does not have written policies, manuals, or handbooks describing employee benefits and leave provisions, the employer shall provide written guidance to an employee concerning all the employee's rights and obligations under the FMLA whenever an employee requests leave under the FMLA. Employers may duplicate and provide the employee a copy of the FMLA Fact Sheet available from the nearest office of the Wage and Hour Division to provide such guidance.

(c) In addition, when an employee provides notice of the need for FMLA leave, the employer shall provide the employee with notice detailing the specific expectations and obligations of the employee and explaining any consequences of a failure to meet these obligations. Such specific notice should include, as appropriate:

(1) That the leave will be counted against their annual FMLA leave entitlement;

(2) Any requirements for the employee to furnish medical certification of a serious health condition and the consequences of failing to do so (see § 825.305);

(3) The employee's right to substitute paid leave and whether the employer will require the substitution of paid leave, and the conditions related to any substitution;

(4) Any requirement for the employee to make any premium payments to maintain health benefits and the arrangements for making such payments (see § 825.210);

(5) Any requirement for the employee to present a fitness-for-duty certificate to be restored to employment (see § 825.309);

(6) Their status as a "key employee" and the potential consequence that restoration may be denied following FMLA leave, explaining the conditions required for such denial (see § 825.218);

(7) The employee's right to restoration to the same or an equivalent job upon return from leave (see §§ 825.214 and 825.604); and,

(8) The employee's potential liability for payment of health insurance premiums paid by the employer during the employee's unpaid FMLA leave if the employee fails to return to work after taking FMLA leave (see § 825.213). This specific notice may include other information—e.g., whether the employer will require periodic reports of the employee's status and intent to return to work, or will require any recertification relating to a serious health condition—but is not required to do so. A prototype notice is available from local offices of the Department of Labor's Wage and Hour Division, which employers may adapt for their optional use to meet these specific notice requirements.

(d) Employers are also expected to responsively answer questions from employees concerning their rights and responsibilities under the FMLA.

§ 825.302 What notice does an employee have to give an employer when the need for FMLA leave is foreseeable?

(a) An employee must provide the employer at least 30 days advance notice before FMLA leave is to begin if the need for the leave is foreseeable based on an expected birth, placement for adoption or foster care, or planned medical treatment for a serious health condition of the employee or of a family member. If 30 days notice is not practicable, such as because of a lack of knowledge of approximately when leave will be required to begin, a change in circumstances, or a medical emergency, notice must be given as soon as practicable. For example, an employee's health condition may require leave to commence earlier than anticipated before the birth of a child. Similarly, little opportunity for notice may be given before placement for adoption.

(b) "As soon as practicable" means as soon as both possible and practical, taking into account all of the facts and circumstances in the individual case. For foreseeable leave where it is not possible to give as much as 30 days notice, "as soon as practicable" ordinarily would mean at least verbal notification to the employer within one or two business days of when the need

for leave becomes known to the employee.

(c) An employee shall provide at least verbal notice sufficient to make the employer aware that the employee needs FMLA-qualifying leave, and the anticipated timing and duration of the leave. The employee need not expressly assert rights under the FMLA or even mention the FMLA, but may only state that leave is needed for an expected birth or adoption, for example. The employer should inquire further of the employee if it is necessary to have more information about whether FMLA leave is being sought by the employee, and obtain the necessary details of the leave to be taken. In the case of medical conditions, the employer may find it necessary to inquire further to determine if the leave is because of a serious health condition and may request medical certification to support the need for such leave (see § 825.305).

(d) An employer may also require an employee to comply with the employer's usual and customary notice and procedural requirements for requesting leave without pay. For example, an employer may require that written notice set forth the reasons for the requested leave, the anticipated duration of the leave, and the anticipated start of the leave. However, failure to follow such internal employer procedures will not permit an employer to disallow an employee's taking FMLA leave if the employee gives timely verbal or other notice.

(e) When planning medical treatment, the employee should consult with the employer and make a reasonable effort to schedule the leave so as not to disrupt unduly the employer's operations, subject to the approval of the health care provider. Employees are ordinarily expected to consult with their employers prior to the scheduling of treatment in order to work out a treatment schedule which best suits the needs of both the employer and the employee. In any event, when notice is given of the need for leave, an employer may, for justifiable cause, require an employee to attempt to reschedule treatment, subject to the ability of the health care provider to reschedule the treatment and the approval of the health care provider as to any modification of the treatment schedule.

(f) In the case of a request for intermittent leave or leave on a reduced leave schedule which is medically necessary, an employee shall advise the employer, upon request, of the reasons why the intermittent/reduced leave schedule is necessary and of the schedule for treatment, if applicable. The employee and employer shall

attempt to work out a schedule which meets the employee's needs without unduly disrupting the employer's operations, subject to the approval of the health care provider.

(g) An employer may waive employees' FMLA notice requirements. In addition, an employer may not require compliance with stricter FMLA notice requirements where the provisions of a collective bargaining agreement, State law, or applicable leave plan allow less advance notice to the employer.

§ 825.303 What are the requirements for an employee to furnish notice to an employer where the need for FMLA leave is not foreseeable?

(a) When the need for leave, or its approximate timing, is not foreseeable, an employee should give notice to the employer of the need for FMLA leave as soon as practicable under the facts and circumstances of the particular case. It is expected that an employee will give notice to the employer within no more than one or two working days of learning of the need for leave, except in extraordinary circumstances. In the case of a medical emergency requiring leave because of an employee's own serious health condition or to care for a family member with a serious health condition, written advance notice pursuant to an employer's internal rules and procedures cannot be required when FMLA leave is involved.

(b) The employee should provide notice to the employer either in person or by telephone, telegraph, facsimile ("fax") machine or other electronic means. Notice may be given by the employee's representative (e.g., a spouse, family member or other responsible party) if the employee is unable to do so personally. The employer will be expected to obtain any additional required information through informal means. The employee or representative will be expected to provide more information when it can readily be accomplished as a practical matter, taking into consideration the exigencies of the situation.

§ 825.304 What recourse do employers have if employees fail to provide the required notice?

(a) An employer may waive employees' FMLA notice obligations or the employer's own internal rules on leave notice requirements.

(b) If an employee fails to give 30 days notice for foreseeable leave with no reasonable excuse for the delay, the employer may deny the taking of FMLA leave until at least 30 days after the date the employee provides notice to the employer of the need for FMLA leave.

(c) In all cases, in order for the onset of an employee's FMLA leave to be delayed due to lack of required notice, it must be clear that the employee had actual notice of the FMLA notice requirements. This condition would be satisfied by the employer's proper posting of the required notice at the worksite where the employee is employed. Furthermore, the need for leave and the approximate date leave would be taken must have been clearly foreseeable to the employee 30 days in advance of the leave. For example, knowledge that an employee would receive a telephone call about the availability of a child for adoption at some unknown point in the future would not be sufficient.

(d) Where the employee elects or the employer requires use of paid leave, or where the employer has a less stringent policy regarding requests for "leave without pay," such as for leave of short duration, the employer's usual policy for notification for such leave shall apply.

(e) If an employer does not waive employees' notice requirements and chooses to take action against an employee for violating these notice requirements, the employer's policies and procedures must be uniformly applied in similar circumstances.

§ 825.305 When must an employee provide medical certification to support a FMLA leave request?

(a) An employer may require that an employee's request for 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 the functions of the employee's position, be supported by a certification issued by the health care provider of the employee or the employee's ill family member. An employer must give written notice of a requirement for medical certification (see § 825.301) in a particular case, but an employer's verbal request to an employee to furnish any subsequent medical certification is sufficient. The employee must provide the requested certification to the employer within the time frame requested by the employer (which must allow at least 15 calendar days after the employer's request), unless it is not practicable under the particular circumstances to do so despite the employee's diligent, good faith efforts.

(b) In most cases, the employer should request that an employee furnish certification from a health care provider at the time the employee requests leave or soon after the leave is requested, or,

in the case of unforeseen leave, soon after the leave commences. The employer may request certification at some later date if the employer later has reason to question the appropriateness of the leave or its duration.

(c) At the time the employer requests certification, the employer must also advise an employee of the anticipated consequences of an employee's failure to provide adequate certification. The employer shall advise an employee whenever the employer finds a certification incomplete, and provide the employee a reasonable opportunity to cure any such deficiency.

§ 825.306 How much information may be required in medical certifications of a serious health condition?

(a) DOL has developed an optional form for employees' use in obtaining medical certification from health care providers that meets FMLA's certification requirements. (See Appendix B to these regulations.) This optional form reflects certification requirements so as to permit the health care provider to furnish appropriate medical information within his or her knowledge. This form, or another form containing the same basic information, may be used by the employer; however, no additional information may be required. The form identifies the practitioner and type of medical practice (including pertinent specialization, if any), makes maximum use of checklist entries for ease in completing the form, and contains required entries for:

- (1) The date the serious health condition commenced and the health care provider's best medical judgment concerning the probable duration of the condition;
- (2) Diagnosis of the serious health condition;
- (3) A brief statement of the regimen of treatment prescribed for the condition by the health care provider (including estimated number of visits, nature, frequency and duration of treatment, including treatment by another provider of health services on referral by or order of the health care provider); and
- (4) Indication of whether inpatient hospitalization is required.

(b) For medical leave because of the employee's own serious health condition, the health care provider's certification must also include either a statement that the employee is unable to perform work of any kind, or a statement that the employee is unable to perform the essential functions of the employee's position, based on either information provided via a statement from the employer of the essential

functions of the employee's position, or, if not provided, discussion with the employee about the employee's job functions. (See § 825.115.)

(c) For family leave to care for a seriously-ill family member, the health care provider's certification must also include a statement that the patient requires assistance for basic medical, hygiene, nutritional needs, safety or transportation, or that the employee's presence would be beneficial or desirable for the care of the family member, which may include psychological comfort. The employee is required to indicate on the form the care he/she will provide and an estimate of the time period. (See § 825.116.)

(d) The treatment regimen and other information in the certification should satisfy the requirement that—if leave must be taken intermittently or on a reduced leave schedule because of the employee's own serious health condition or a seriously-ill family member—the certification include:

- (1) A statement of the medical necessity for such leave (see § 825.117); or,
- (2) That the leave is necessary to care for the child, parent, or spouse who has a serious health condition, or will assist in the family member's recovery, and (3) The expected duration and schedule of the intermittent or reduced leave schedule. (See § 825.116.)

§ 825.307 What can an employer do if it questions the adequacy of a medical certification?

(a) If an employee submits a complete certification signed by the health care provider, the employer may not request additional information from the employee's health care provider. Rather, an employer who has reason to doubt the validity of a medical certification may require the employee to obtain a second opinion at the employer's expense. The employer is permitted to designate the health care provider to furnish the second opinion, but the selected health care provider cannot be employed on a regular basis by the employer.

(b) The employer may not regularly contract with or otherwise regularly utilize the services of the health care provider furnishing the second opinion unless the employer is located in an area where access to health care is extremely limited (e.g., a rural area where no more than one or two doctors practice in the relevant specialty in the vicinity).

(c) If the opinions of the employee's and the employer's designated health care providers differ, the employer may require the employee to obtain

certification from a third health care provider, again at the employer's expense. This third opinion shall be final and binding. The third health care provider be must designated or approved jointly by the employer and the employee. The employer and the employee must each act in good faith to attempt to reach agreement on whom to select for the third opinion provider. If the employer does not attempt in good faith to reach agreement, the employer will be bound by the first certification. If the employee does not attempt in good faith to reach agreement, the employee will be bound by the second certification. For example, an employee who refuses to agree to see a doctor in the specialty in question may be failing to act in good faith. On the other hand, an employer that refuses to agree to any doctor on a list of specialists in the appropriate field provided by the employee and whom the employee has not previously consulted may be failing to act in good faith.

§ 825.308 Under what circumstances can an employer request subsequent recertifications of medical conditions to support leave requests?

An employer may request recertification at any reasonable interval, but not more often than every 30 days, unless:

- (a) The employee requests an extension of leave;
 - (b) Circumstances described by the original certification have changed significantly (e.g., the duration of the illness, the nature of the illness, complications); or
 - (c) The employer receives information that casts doubt upon the continuing validity of the certification.
- (d) When an employee is unable to return to work after FMLA leave because of the continuation, recurrence, or onset of a serious health condition, thereby preventing the employer from recovering its share of health benefit premium payments made on the employee's behalf during a period of unpaid FMLA leave, the employer may require medical certification of the employee's or the family member's serious health condition. (See § 825.213(a)(3).)

§ 825.309 What notice may an employer require regarding an employee's intent to return to work?

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

to the individual employee's leave situation.

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

§ 825.310 Under what circumstances may an employer require that an employee submit a medical certification that the employee is able (or unable) to return to work (e.g., a "fitness-for-duty" report)?

(a) As a condition of restoring an employee whose FMLA leave was occasioned by the employee's own serious health condition that made the employee unable to perform the employee's job, an employer may have a uniformly-applied policy or practice that requires all employees who take leave for such conditions to obtain and present certification from the health care provider that the employee is able to resume work. This does not mean that the employer's policy or practice must require fitness-for-duty certification from all employees who are absent due to a serious health condition, but an employer requiring any fitness for duty certifications must have a uniformly-applied policy that is based on, for example, the nature of the illness or the duration of the absence.

(b) An employer may seek fitness-for-duty certification only with regard to the particular health condition that caused the employee's need for FMLA leave. The certification itself need only be a simple statement of an employee's ability to return to work. If State or local law or the terms of a collective bargaining agreement govern an employee's return to work, those provisions shall be applied. Similarly, requirements under the Americans with Disabilities Act (ADA) that any return-to-work physical be job-related must be complied with.

(c) The notice that employers are required to give to each employee requesting FMLA leave regarding their FMLA rights and obligations (see § 825.301) shall advise the employee if the employer will require fitness-for-duty certification to return to work. If the employer has a handbook explaining employment policies and benefits, the handbook should explain the employer's general policy regarding any requirement for fitness-for-duty certification to return to work. Specific notice shall also be given to any employee from whom fitness-for-duty

certification will be required either at the time leave is requested or immediately after leave commences and the employer is advised of the medical circumstances requiring the leave, unless the employee's condition changes from one that did not previously require certification pursuant to the employer's practice or policy. No second or third fitness-for-duty certification may be required.

(d) An employer may deny restoration to employment until an employee submits a required fitness-for-duty certification unless the employer has failed to provide the notices required in paragraph (c) of this section.

§ 825.311 What happens if an employee fails to satisfy the medical certification requirements?

(a) In the case of foreseeable leave, an employee who fails to provide timely certification after being requested by the employer to furnish such certification (e.g., within 15 calendar days, if practicable), may be denied the taking of leave until the required certification is provided.

(b) When the need for leave is *not* foreseeable, an employee must provide certification within the time frame requested by the employer (which must allow at least 15 days after the employer's request) or as soon as reasonably possible under the particular facts and circumstances. In the case of a medical emergency, it may not be practicable for an employee to provide the required certification within 15 calendar days. If an employee fails to provide a medical certification within a reasonable time under the pertinent circumstances, the employer may deny the employee's continuation of leave.

(c) When requested by the employer pursuant to a uniformly applied policy, the employee must provide medical certification at the time the employee seeks reinstatement at the end of FMLA leave taken for the employee's serious health condition, that the employee is fit for duty and able to return to work. The employer may deny restoration until the certification is provided. (See § 825.309.)

§ 825.312 Under what circumstances can a covered employer refuse to provide FMLA leave or reinstatement to eligible employees?

(a) If an employee fails to give timely advance notice when the need for FMLA leave is foreseeable, the employer may deny the taking of FMLA leave until 30 days after the date the employee provides notice to the employer of the need for FMLA leave. (See § 825.302.)

(b) If an employee fails to provide in a timely manner a requested medical certification to substantiate the need for FMLA leave due to a serious health condition, an employer may deny FMLA leave until an employee submits the certificate. (See § 825.305 and 825.310.)

(c) If an employee fails to provide a requested fitness-for-duty certification to return to work, an employer may deny restoration until the employee submits the certificate. (See §§ 825.309 and 825.310.)

(d) An employee has no greater right to reinstatement or to other benefits and conditions of employment than if the employee had been continuously employed during the FMLA leave period. An employer must be able to show, when an employee requests reinstatement, that the employee would not otherwise have been employed if leave had not been taken in order to deny restoration to employment. (See § 825.216.)

(e) If an employee unequivocally advises the employer that the employee does not intend to return to work, the employment relationship is deemed terminated, and the employee's entitlement to reinstatement, continued leave, and health benefits ceases. An employer may require an employee on FMLA leave to report periodically on the employee's status and intention to return to work. (See § 825.309.)

(f) An employer may deny restoration to employment, but not the taking of FMLA leave and the maintenance of health benefits, to an eligible employee only under the terms of the "key employee" exemption. Denial of reinstatement must be necessary to prevent "substantial and grievous economic injury" to the employer's operations. The employer must notify the employee of the employee's status as a "key employee" and of the employer's intent to deny reinstatement on that basis when the employer makes these determinations. If leave has started, the employee must be given a reasonable opportunity to return to work after being so notified. (See § 825.220.)

(g) An employee who fraudulently obtains FMLA leave from an employer is not protected by FMLA's job restoration or maintenance of health benefits provisions.

(h) If the employer has a uniformly-applied policy governing outside or supplemental employment, such a policy may continue to apply to an employee while on FMLA leave. An employer which does not have such a policy may not deny benefits to which an employee is entitled under FMLA on this basis unless the FMLA leave was

fraudulently obtained as in paragraph (g) of this section.

Subpart D—What Enforcement Mechanisms Does FMLA Provide?

§ 825.400 What can employees do who believe that their rights under FMLA have been violated?

(a) The employee has the choice of:

(1) Filing, or having another person file on his or her behalf, a complaint with the Secretary of Labor, or

(2) Filing a private lawsuit pursuant to section 107 of FMLA.

(b) If the employee files a private lawsuit, it must be filed within two years after the last action which the employee contends was in violation of the Act, or three years if the violation was willful.

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

§ 825.401 Where can an employee file a complaint of FMLA violations with the Federal government?

(a) A complaint may be filed in person, by mail or by telephone, with the Wage and Hour Division, Employment Standards Administration, U.S. Department of Labor. A complaint may be filed at any local office of the Wage and Hour Division; the address and telephone number of local offices may be found in telephone directories.

(b) A complaint filed with the Secretary of Labor should be filed within a reasonable time of when the employee discovers that his or her FMLA rights have been violated. In no event may a complaint be filed more

than two years after the action which is alleged to be a violation of FMLA occurred, or three years in the case of a willful violation.

(c) No particular form of complaint is required, except that a complaint must be reduced to writing and should include a full statement of the acts and/or omissions, with pertinent dates, which are believed to constitute the violation.

§ 825.402 How is an employer notified of a violation of the posting requirement?

Section 825.300 describes the requirements for covered employers to post a notice for employees that explains the Act's provisions. If a representative of the Department of Labor determines that an employer has committed a willful violation of this posting requirement, and that the imposition of a civil money penalty for such violation is appropriate, the representative may issue and serve a notice of penalty on such employer in person or by certified mail. Where service by certified mail is not accepted, notice shall be deemed received on the date of attempted delivery. Where service is not accepted, the notice may be served by regular mail.

§ 825.403 How may an employer appeal the assessment of a penalty for willful violation of the posting requirement?

(a) An employer may obtain a review of the assessment of penalty from the Wage and Hour Regional Administrator for the region in which the alleged violation(s) occurred. If the employer does not seek such a review or fails to do so in a timely manner, the notice of the penalty constitutes the final ruling of the Secretary of Labor.

(b) To obtain review, an employer may file a petition with the Wage and Hour Regional Administrator for the region in which the alleged violations occurred. No particular form of petition for review is required, except that the petition must be in writing, should contain the legal and factual bases for the petition, and must be mailed to the Regional Administrator within 15 days of receipt of the notice of penalty. The employer may request an oral hearing which may be conducted by telephone.

(c) The decision of the Regional Administrator constitutes the final order of the Secretary.

§ 825.404 What are the consequences of an employer not paying the penalty assessment after a final order is issued?

The Regional Administrator may seek to recover the unpaid penalty pursuant to the Debt Collection Act (DCA), 31 U.S.C. 3711 *et seq.*, and, in addition to seeking recovery of the unpaid final

order, may seek interest and penalties as provided under the DCA. The final order may also be referred to the Solicitor of Labor for collection. The Secretary may file suit in any court of competent jurisdiction to recover the monies due as a result of the unpaid final order, interest, and penalties.

Subpart E—What Records Must Be Kept To Comply With the FMLA?

§ 825.500 What records must an employer keep to comply with the FMLA?

(a) FMLA provides that employers shall make, keep, and preserve records pertaining to their obligations under the Act in accordance with the recordkeeping requirements of section 11(c) of the Fair Labor Standards Act (FLSA) and in accordance with these regulations. FMLA also restricts the authority of the Department of Labor to require any employer or plan, fund or program 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 the DOL is investigating a complaint. These regulations establish no requirement for the submission of any records unless specifically requested by a Departmental official.

(b) *Form of records.* No particular order or form of records is required. These regulations establish no requirement that any employer revise its computerized payroll or personnel records systems to comply. However, employers must keep the records specified by these regulations for no less than three years and make them available for inspection, copying, and transcription by representatives of the Department of Labor upon request. The records may be maintained and preserved on microfilm or other basic source document of an automated data processing memory provided that adequate projection or viewing equipment is available, that the reproductions are clear and identifiable by date or pay period, and that extensions or transcriptions of the information required herein can be and are made available upon request. Records kept in computer form must be made available for transcription or copying.

(c) *Items required.* Records kept in accordance with this part must disclose the following:

(1) 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.

(2) Dates FMLA leave is taken by employees (e.g., 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 provided under State law or an employer plan which is not covered by FMLA.

(3) If FMLA leave is taken in increments of less than one full day, the hours of the leave.

(4) Copies of employee notices of leave furnished to the employer under FMLA, if in writing, and copies of all general and specific notices given to employees as required under FMLA and these regulations (e.g., copies may be maintained in employee personnel files).

(5) Any documents (including written and electronic records) describing employee benefits or employer policies and practices regarding the taking of paid and unpaid leaves.

(6) Premium payments of employee benefits.

(7) Records of any dispute between the employer and an 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.

(d) If employees are not subject to FLSA's 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:

(1) Eligibility for FMLA leave is presumed for any employee who has been employed for at least 12 months; and

(2) 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 maintained in accordance with paragraph (b) of this section.

(e) Records and documents relating to medical certifications, recertifications or medical histories of employees or employees' family members, shall be maintained in separate files/records and be treated as confidential medical records, except that:

(1) Supervisors and managers may be informed regarding necessary restrictions on the work or duties of an

employee and necessary accommodations;

(2) First aid and safety personnel may be informed (when appropriate) if the employee's physical or medical condition might require emergency treatment; and

(3) Government officials investigating compliance with FMLA (or other pertinent law) shall be provided relevant information upon request.

Subpart F—What Special Rules Apply to Employees of Schools?

§ 825.600 To whom do the special rules apply?

(a) Certain special rules apply to employees of "local educational agencies," including public school boards and elementary and secondary schools under their jurisdiction, and private elementary and secondary schools. The special rules do not apply to other kinds of educational institutions, such as colleges and universities, trade schools, and pre-schools.

(b) Educational institutions are covered by FMLA (and these special rules) and the Act's 50-employee coverage test does not apply. The usual requirements for employees to be "eligible" do apply, however, including employment at a worksite where at least 50 employees are employed within 75 miles. For example, employees of a rural school would not be eligible for FMLA leave if the school has fewer than 50 employees and there are no other schools under the jurisdiction of the same employer (usually, a school board) within 75 miles.

(c) The special rules affect the taking of intermittent leave or leave on a reduced leave schedule, or leave near the end of an academic term (semester), by instructional employees. "Instructional employees" are those whose principal function is to teach and instruct students in a class, a small group, or an individual setting. This term includes not only teachers, but also athletic coaches, driving instructors, and special education assistants such as signers for the hearing impaired. It does not include, and the special rules do not apply to, teacher assistants or aides who do not have as their principal job actual teaching or instructing, nor does it include auxiliary personnel such as counselors, psychologists, or curriculum specialists. It also does not include cafeteria workers, maintenance workers, or bus drivers.

(d) Special rules which apply to restoration to an equivalent position apply to all employees of local educational agencies.

§ 825.601 What limitations apply to the taking of intermittent leave or leave on a reduced leave schedule?

(a)(1) If an eligible instructional employee requests intermittent leave or leave on a reduced leave schedule to care for a family member, or for the employee's own serious health condition, which is foreseeable based on planned medical treatment, and the employee would be on leave for more than 20 percent of the total number of working days over the period the leave would extend, the employer may require the employee to choose either to:

(i) Take leave for a period or periods of a particular duration, not greater than the duration of the planned treatment; or

(ii) Transfer temporarily to an available alternative position for which the employee is qualified, which has equivalent pay and benefits and which better accommodates recurring periods of leave than does the employee's regular position.

(2) These rules apply only to a leave involving more than 20 percent of the working days during the period over which the leave extends. For example, if an instructional employee who normally works five days each week needs to take two days of FMLA leave per week over a period of several weeks, the special rules would apply. Employees taking leave which constitutes 20 percent or less of the working days during the leave period would be subject to the usual rules for taking intermittent or reduced schedule leave in §§ 825.117 and 825.203. The usual rules would apply, for example, to such an employee who needs only one day of leave per week. "Periods of a particular duration" means a block, or blocks, of time beginning no earlier than the first day for which leave is needed and ending no later than the last day on which leave is needed, and may include one uninterrupted period of leave.

(b) If an instructional employee does not give required notice of foreseeable FMLA leave (see § 825.302) to be taken intermittently or on a reduced leave schedule, the employer may require the employee to take leave of a particular duration, or to transfer temporarily to an alternative position. Alternatively, the employer may require the employee to delay the taking of leave until the notice provision is met. However, an employer may not have stricter FMLA notice requirements than are required for other employees taking paid or unpaid leave, as appropriate.

§ 825.602 What limitations apply to the taking of leave near the end of an academic term?

(a) There are also different rules for instructional employees who begin leave more than five weeks before the end of a term, less than five weeks before the end of a term, and less than three weeks before the end of a term. Regular rules apply except in circumstances when:

(1) An instructional employee begins leave more than five weeks before the end of a term. The employer may require the employee to continue taking leave until the end of the term if—

(i) The leave will last at least three weeks, and

(ii) The employee would return to work during the three-week period before the end of the term.

(2) The employee begins leave for a purpose other than the employee's own serious health condition during the five-week period before the end of a term. The employer may require the employee to continue taking leave until the end of the term if—

(i) The leave will last more than two weeks, and

(ii) The employee would return to work during the two-week period before the end of the term.

(3) The employee begins leave for a purpose other than the employee's own serious health condition during the three-week period before the end of a term, and the leave will last more than five working days. The employer may require the employee to continue taking leave until the end of the term.

(b) For purposes of these provisions, "academic term" means the school semester, which typically ends near the end of the calendar year and the end of spring each school year. In no case may a school have more than two academic terms or semesters each year for purposes of FMLA. An example of leave falling within these provisions would be where an employee plans two weeks of leave to care for a family member which will begin three weeks before the end of the term. In that situation, the employer could require the employee to stay out on leave until the end of the term.

§ 825.603 Is all leave taken during "periods of a particular duration" counted against the FMLA leave entitlement?

(a) If an employee chooses, or is required, to take leave for "periods of a particular duration" in the case of intermittent or reduced schedule leave, or is required to continue taking leave until the end of a school term in the case of leave taken near the end of the term, the entire period of leave taken will count as FMLA leave.

(b) In the case of an employee who is required to take leave until the end of an academic term, if the employee's leave entitlement under FMLA ends before the involuntary leave period is completed, the employer is required to maintain health benefits and must restore the employee and provide other FMLA entitlements when the period of leave ends.

§ 825.604 What special rules apply to restoration to "an equivalent position?"

The determination of how an employee is to be restored to "an equivalent position" upon return from FMLA leave will be made on the basis of "established school board policies and practices, private school policies and practices, and collective bargaining agreements." The "established policies" and collective bargaining agreements used as a basis for restoration must be in writing, must be made known to the employee prior to the taking of FMLA leave, and must clearly explain the employee's restoration rights upon return from leave. Any established policy which is used as the basis for restoration of an employee to "an equivalent position" must provide substantially the same protections as provided in the Act for reinstated employees. In other words, the policy or collective bargaining agreement must provide for restoration to an "equivalent position" with equivalent employment benefits, pay, and other terms and conditions of employment.

Subpart G—How Do Other Laws, Employer Practices, and Collective Bargaining Agreements Affect Employee Rights Under FMLA?

§ 825.700 What if an employer provides more generous benefits than required by FMLA?

(a) An employer must observe any employment benefit program or plan that provides greater family or medical leave rights to employees than the rights established by the FMLA. Conversely, the rights established by the Act may not be diminished by any employment benefit program or plan. For example, provisions of a CBA which, because of seniority or otherwise, provide for reinstatement to a position that is not equivalent (e.g., provides lesser pay) are superseded by FMLA. If an employer provides greater unpaid family leave rights than are afforded by FMLA, the employer is not required to extend additional rights afforded by FMLA, such as maintenance of health benefits (other than through COBRA), to the additional leave period not covered by FMLA. If an employee takes paid leave

and neither the employee nor the employer designates the leave as FMLA leave, the leave taken does not count against an employee's FMLA entitlement.

(b) Nothing in this Act prevents an employer from amending existing leave and employee benefit programs, provided they comply with FMLA. However, nothing in the Act is intended to discourage employers from adopting or retaining more generous leave policies.

(c) The Act does not apply to employees under a collective bargaining agreement (CBA) in effect on August 5, 1993, until February 5, 1994, or the date the agreement terminates (i.e., its expiration date), whichever is earlier. Thus, if the CBA contains family or medical leave benefits, whether greater or less than those under the Act, such benefits are not disturbed until the Act's provisions begin to apply to employees under that agreement. A CBA which provides no family or medical leave rights also continues in effect. For CBAs subject to the Railway Labor Act and other CBAs which do not have an expiration date for the general terms, but which may be reopened at specified times, e.g., to amend wages and benefits, the first time the agreement is amended after August 5, 1993, shall be considered the termination date of the CBA, and the effective date for FMLA. It is contemplated that collective bargaining agreements will be amended to conform to FMLA during the extended effective date period.

§ 825.701 Do State laws providing family and medical leave still apply?

(a) Nothing in FMLA supersedes any provision of State or local law that provides greater family or medical leave rights than those provided by FMLA. The Department of Labor will not, however, enforce State family leave laws, and States may not enforce the FMLA. Employees are not required to designate whether the leave they are taking is FMLA leave or leave under State law, and an employer must comply with the appropriate (applicable) provisions of both. An employer covered by one law and not the other has to comply only with the law under which it is covered. Similarly, an employee eligible under only one law must receive benefits in accordance with that law. If leave qualifies for FMLA leave and leave under State law, the leave used counts against the employee's entitlement under both laws. Examples of the interaction between FMLA and State laws include:

(1) If State law provides 16 weeks of leave entitlement over two years, an employee would be entitled to take 16 weeks one year under State law and 12 weeks the next year under FMLA. Health benefits maintenance under FMLA would be applicable only to the first 12 weeks of leave entitlement each year. If the employee took 12 weeks the first year, the employee would be entitled to a maximum of 12 weeks the second year under FMLA (not 16 weeks). An employee would not be entitled to 28 weeks in one year.

(2) If State law provides half-pay for employees temporarily disabled because of pregnancy for six weeks, the employee would be entitled to an additional six weeks of unpaid FMLA leave (or accrued paid leave).

(3) A shorter notice period under State law must be allowed by the employer unless an employer has already provided, or the employee is requesting, more leave than required under State law.

(4) If State law provides for only one medical certification, no additional certifications may be required by the employer unless the employer has already provided, or the employee is requesting, more leave than required under State law.

(5) If State law provides six weeks of leave, which may include leave to care for a seriously-ill grandparent or a "spouse equivalent," and leave was used for that purpose, the employee is still entitled to 12 weeks of FMLA leave, as the leave used was provided for a purpose not covered by FMLA. If FMLA leave is used first for a purpose also provided under State law, and State leave has thereby been exhausted, the employer would not be required to provide additional leave to care for the grandparent or "spouse equivalent."

(6) If State law prohibits mandatory leave beyond the actual period of pregnancy disability, an instructional employee of an educational agency subject to special FMLA rules may not be required to remain on leave until the end of the academic term, as permitted by FMLA under certain circumstances. (See subpart F of this part.)

an employee may be able to recover under either or both statutes.

(b) If an employee is a qualified individual with a disability within the meaning of the Americans with Disabilities Act (ADA), the employer must make reasonable accommodations, etc., in accordance with the ADA. At the same time, the employer must afford an employee his or her FMLA rights. The examples in the following paragraphs of this section demonstrate how the two laws would interact with respect to a disabled employee.

(c) If an employee became disabled, a reasonable accommodation under the ADA might be accomplished by providing the employee with a part-time job with no health benefits. However, FMLA would permit an employee to work a reduced leave schedule until 12 weeks of leave were used, with health benefits maintained during this period. At the end of the FMLA leave entitlement, an employer is required to reinstate the employee in the same or an equivalent position, with equivalent pay and benefits, to that which the employee held when leave commenced. The employer's FMLA obligations would be satisfied if the employer offered the employee an equivalent full-time position. If the employee were unable to perform the equivalent position because of a disability, and the employee had exhausted his or her FMLA entitlement, the ADA may permit or require the employer to make a reasonable accommodation at that time by placing the employee in a part-time job, with only those benefits provided to part-time employees.

(d) If FMLA entitles an employee to leave, an employer may not, in lieu of FMLA leave entitlement, require an employee to take a job with a reasonable accommodation. However, ADA may require that an employer offer an employee the opportunity to take such a position.

(e) If an employer requires certifications of an employee's fitness for duty to return to work, as permitted by FMLA under a uniform policy, it must comply with the ADA requirement that a fitness for duty physical be job-related.

(f) For further information on Federal anti-discrimination laws, including the ADA, individuals are encouraged to contact the nearest office of the U.S. Equal Employment Opportunity Commission.

Subpart H—Definitions

§ 825.800 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.*)

ADA means the Americans With Disabilities Act (42 USC 12101 *et seq.*)

Administrator means the Administrator of the Wage and Hour Division, Employment Standards Administration, 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.

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

Commerce and industry or activity affecting commerce means 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).

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

(1) The employee or family member in question is treated two or more times for the injury or illness by a health care provider. Normally this would require visits to the health care provider or to a nurse or physician's assistant under direct supervision of the health care provider.

(2) The employee or family member is treated for the injury or illness two or more times by a provider of health care services (e.g., physical therapist) under orders of, or on referral by, a health care provider, or is treated for the injury or illness 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—for example, a course of medication or therapy—to resolve the health condition.

(3) The employee or family member is under the continuing supervision of, but not necessarily being actively treated by, a health care provider due to a serious long-term or chronic condition or disability which cannot be cured. Examples include persons with Alzheimer's, persons who have suffered a severe stroke, or persons in the terminal stages of a disease who may not be receiving active medical treatment.

Eligible employee means:

§ 825.702 How does FMLA affect Federal and State anti-discrimination laws?

(a) Nothing in FMLA modifies or affects any Federal or State law prohibiting discrimination on the basis of race, religion, color, national origin, sex, age, or disability. An employer must therefore comply with whichever statute provides the greater rights to employees. When an employer violates both FMLA and a discrimination law,

(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; 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; and

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

(4) Excludes any employee of the U.S. Senate or the U.S. House of Representatives covered under title V of the FMLA; and

(5) 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.

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 U.S. Senate or U.S. House of Representatives who is covered under title V of FMLA,

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

(E) In the Library of Congress;

(ii) Any individual employed by the United States Postal Service or the Postal Rate 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 Teacher.

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).

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.

Health care provider means:

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

(2) 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; and

(3) Nurse practitioners and nurse-midwives who are authorized to practice under State law and who are performing within the scope of their practice as defined under State law; and

(4) Christian Science practitioners listed with the First Church of Christ, Scientist in Boston, Massachusetts.

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" or "ADLs." Activities of daily living include adaptive activities such as caring appropriately for one's grooming and hygiene, bathing, dressing, eating, cooking, cleaning, shopping, taking public transportation, paying bills, maintaining a residence, using telephones and directories, using a post office, etc.

Instructional employee. See Teacher.

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.

Mental disability. See *Physical or mental disability*.

Parent means the biological parent of an employee or an individual who stands or stood in loco parentis to an employee when the employee was a child. This term does not include parents "in law."

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., 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 Rate 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.

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:

(1) Any period of incapacity or treatment in connection with or consequent to inpatient care (*i.e.*, an overnight stay) in a hospital, hospice, or residential medical care facility;

(2) Any period of incapacity requiring absence from work, school, or other regular daily activities, of more than three calendar days, that also involves continuing treatment by (or under the supervision of) a health care provider; or

(3) Continuing treatment by (or under the supervision of) a health care provider for a chronic or long-term health condition that is incurable or so serious that, if not treated, would likely result in a period of incapacity of more than three calendar days; and for prenatal care.

(4) Voluntary or cosmetic treatments (such as most treatments for orthodontia or acne) which are not medically necessary are not "serious health conditions," unless inpatient hospital care is required. Restorative dental surgery after an accident, or removal of cancerous growths are serious health conditions provided all the other conditions of this regulation are met. Treatments for allergies or stress, or for substance abuse, are serious health conditions if all the conditions of the regulation are met. Prenatal care is included as a serious health condition. Routine preventive physical examinations are excluded.

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 under 18 years of age or 18 years of age or older and incapable of self-care because of a mental or physical disability.

Spouse means a husband or wife as defined or recognized under State law for purposes of marriage, 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.

Appendix A to Part 825—Index

The citations listed in this Appendix are to sections in 29 CFR Part 825.

1,250 hours of service 825.110, 825.800
12 workweeks of leave 825.200, 825.202, 825.205
12-month period 825.110, 825.200, 825.201, 825.202, 825.500, 825.800
20 or more calendar workweeks 825.104(a), 825.105, 825.108(d), 825.800
50 or more employees 825.102, 825.105, 825.106(f), 825.108(d), 825.109(e), 825.111(d), 825.600(b)
75 miles of worksite/radius 825.108(d), 825.109(e), 825.110, 825.111, 825.202(b), 825.213(a), 825.217, 825.600(b), 825.800
Academic term 825.600(c), 825.602, 825.603, 825.701(a)
Adoption 825.100(a), 825.101(a), 825.112, 825.200(a), 825.201, 825.202(a), 825.203, 825.207(b), 825.302, 825.304(c)
Alternative position 825.117, 825.204, 825.601
Americans with Disabilities Act 825.113(c), 825.115, 825.204(b), 825.215(b), 825.310(b), 825.702(b), 825.800
As soon as practicable 825.219(a), 825.302, 825.303
Birth/birth of a child 825.100(a), 825.101(a), 825.103(c), 825.112, 825.200(a), 825.201, 825.202, 825.203, 825.207, 825.209(d), 825.302(a), 825.302(c)
Certification requirements 825.207(g), 825.305, 825.306, 825.310, 825.311
Christian science practitioners 825.118(b), 825.800
COBRA 825.209(f), 825.210(c), 825.213(d), 825.309(b), 825.700(a), 825.800
Collective bargaining agreements 825.102(a), 825.211(a), 825.604, 825.700
Commerce 825.104, 825.800
Complaint 825.220, 825.400, 825.401, 825.500(a)
Continuing treatment by a health care provider 825.114, 825.800
Definitions 825.800
Designate paid leave as FMLA 825.208
Disability insurance 825.213(f), 825.215(d)
Discharging 825.106(f), 825.220
Discriminating 825.106(f), 825.220
Educational institutions 825.111(c), 825.600
Effective date 825.102, 825.103, 825.110(e), 825.700(c)
Eligible employee 825.100, 825.110, 825.111, 825.112, 825.200, 825.202, 825.206(b),

825.207, 825.216(c), 825.217, 825.312, 825.600(b), 825.601, 825.800
Employer 825.104, 825.105, 825.106, 825.107, 825.108, 825.109, 825.111, 825.800
Enforcement 825.400–825.404
Equivalent benefits 825.213(f), 825.214, 825.215(d)
Equivalent pay 825.100(c), 825.117, 825.204(c), 825.215, 825.601(a), 825.702(c)
Equivalent position 825.100(c), 825.214, 825.215, 825.218(b), 825.604, 825.702(c)
Farm Credit Administration 825.109(b)
Fitness for duty 825.216(c), 825.310, 825.702(e)
Foster care 825.100(a), 825.112, 825.200(a), 825.201, 825.202(a), 825.203(a), 825.207(b), 825.302(a)
Government Printing Office 825.109(d)
Group health plan 825.209, 825.213, 825.800
Health benefits 825.100(b), 825.106(e), 825.209, 825.210, 825.211, 825.212, 825.215(d), 825.219, 825.220(c), 825.301(c), 825.309, 825.312, 825.603, 825.700, 825.702(c)
Health care provider 825.100(d), 825.114, 825.115, 825.118, 825.302, 825.305, 825.306, 825.307, 825.310(a), 825.800
Health plan premiums 825.210, 825.213(a)
Husband and wife 825.202
In loco parentis 825.113, 825.800
Incapable of self-care 825.113(c), 825.800
Industry affecting commerce 825.104, 825.800
Instructional employee 825.601, 825.602, 825.604, 825.701(f), 825.800
Integrated employer 825.104(c)
Intermittent leave 825.116(c), 825.117, 825.203, 825.302(f), 825.600(c), 825.601, 825.800
Joint employment 825.104(c), 825.105, 825.106
Key employee 825.209(g), 825.213(a), 825.217, 825.218, 825.219, 825.301(c), 825.312(f)
Library of Congress 825.109(b), 825.800
Life insurance 825.213(f), 825.215(d), 825.800
Maintain health benefits 825.209, 825.212, 825.215(d), 825.301(c), 825.309, 825.603
Medical certification 825.116, 825.213(a), 825.301(c), 825.302(c), 825.305, 825.306, 825.307, 825.308, 825.310, 825.311, 825.312(b), 825.701(d)
Medical necessity 825.114(d), 825.117, 825.306(d)
Multi-employer health plans 825.211
Needed to care for 825.100(a), 825.114(d), 825.116, 825.207(c)
Not foreseeable 825.303, 825.311(b)
Notice 825.100(d), 825.103(b), 825.110(d), 825.200(d), 825.207(g), 825.208(a), 825.208(c), 825.209(d), 825.210(e), 825.219(a), 825.219(b), 825.220(c), 825.300, 825.301(c), 825.302, 825.303, 825.304, 825.309, 825.310(c), 825.310(d), 825.312(a), 825.402, 825.403(b), 825.601(b), 825.701(a)
Notice requirements 825.110(d), 825.301(c), 825.302(g), 825.304(a), 825.304(e), 825.601(b)
Paid leave 825.100(a), 825.207, 825.208, 825.210, 825.213(c), 825.217(c), 825.219(c), 825.301(c), 825.304(d), 825.700(a), 825.701(a)
Parent 825.100(a), 825.101(a), 825.112, 825.113, 825.116(a), 825.200(a), 825.202(a),

- 825.207(b), 825.213(a), 825.305(a),
825.306(d), 825.800
- Physical or mental disability 825.113(c),
825.114, 825.215(b), 825.500(e), 825.800
- Placement of a child 825.100(a), 825.201,
825.203(a), 825.207(b)
- Postal Rate Commission 825.109(b), 825.800
- Posting requirement 825.300, 825.402
- Premium payments 825.100(b), 825.210,
825.212, 825.213(f), 825.301(c), 825.308(d),
825.500(c)
- Private employer 825.105, 825.108(b)
- Public agency 825.104(a), 825.108, 825.109,
825.800
- Recertification 825.301(c), 825.308
- Records 825.110(c), 825.206(a), 825.500
- Reduced leave schedule 825.111(d),
825.114(d), 825.116(c), 825.117, 825.203,
825.205, 825.302(f), 825.306(d), 825.500(c),
825.601, 825.702(c), 825.800
- Restoration 825.100(d), 825.106(e),
825.209(g), 825.213(a), 825.216, 825.218,
825.219, 825.301(c), 825.311(c), 825.312
- Returning to work 825.214
- Right to reinstatement 825.100(c), 825.209(g),
825.214(b), 825.216(a), 825.219, 825.301(c),
825.311(c), 825.312, 825.400, 825.700
- Secondary employer 825.106(f)
- Serious health condition 825.100, 825.101(a),
825.112(a), 825.114, 825.116(a), 825.200(a),
825.202(a), 825.203, 825.204(a), 825.206(b),
825.207, 825.213, 825.215(b), 825.301(c),
825.302, 825.303, 825.305, 825.306,
825.308(d), 825.310(a), 825.311(c),
825.312(b), 825.601(a), 825.602(a), 825.800
- Son or daughter 825.112(a), 825.113(c),
825.202(a), 825.800
- Spouse 825.100(a), 825.101(a), 825.112(a),
825.113(a), 825.200(a), 825.202, 825.213(a),
825.303(b), 825.305(a), 825.306(d),
825.701(a), 825.800
- State laws 825.701
- Substantial and grievous economic injury
825.213(a), 825.216(c), 825.218, 825.219,
825.312(f)
- Successor in interest 825.104(a), 825.107,
825.800
- Teacher(s) 825.110(c), 825.600(c), 825.800
- U.S. Tax Court 825.109(b)
- Unpaid leave 825.100, 825.101(a), 825.105(b),
825.206, 825.208, 825.601(b)
- Waive rights 825.220(d)
- Worksite 825.108(d), 825.110(a), 825.111,
825.213(a), 825.214(e), 825.217, 825.220(b),
825.304(c), 825.800

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Appendix B to Part 825—Certification of Physician or Practitioner

U.S. Department of Labor
Employment Standards Administration
Wage and Hour Division

CERTIFICATION OF PHYSICIAN OR PRACTITIONER
(Family and Medical Leave Act of 1993)

1. Employee's Name:
2. Patient's Name (If other than employee):
3. Diagnosis:
4. Date condition commenced:
5. Probable duration of condition:
6. Regimen of treatment to be prescribed (Indicate number of visits, general nature and duration of treatment, including referral to other provider of health services. Include schedule of visits or treatment if it is medically necessary for the employee to be off work on an intermittent basis or to work less than the employee's normal schedule of hours per day or days per week.):
 - a. By Physician or Practitioner:
 - b. By another provider of health services, if referred by Physician or Practitioner:

IF THIS CERTIFICATION RELATES TO CARE FOR THE EMPLOYEE'S SERIOUSLY-ILL FAMILY MEMBER, SKIP ITEMS 7, 8 AND 9 AND PROCEED TO ITEMS 10 THRU 14 ON REVERSE SIDE. OTHERWISE, CONTINUE BELOW.

Check Yes or No in the boxes below, as appropriate.

- | | Yes | No | |
|----|--------------------------|--------------------------|---|
| 7. | ☐ | ☐ | Is inpatient hospitalization of the employee required? |
| 8. | ☐ | ☐ | Is employee able to perform work of any kind? (If "No", skip Item 9.) |
| 9. | ☐ | ☐ | Is employee able to perform the functions of employee's position? (Answer after reviewing statement from employer of essential functions of employee's position, or, if none provided, after discussing with employee.) |

15. Signature of Physician or Practitioner:
16. Date:
17. Type of Practice (Field of Specialization, if any):

FOR CERTIFICATION RELATING TO CARE FOR THE EMPLOYEE'S SERIOUSLY-ILL FAMILY MEMBER, COMPLETE ITEMS 10 THRU 14 BELOW AS THEY APPLY TO THE FAMILY MEMBER AND PROCEED TO ITEM 15 ON REVERSE SIDE.

- | | Yes | No | |
|-----|--|--------------------------|--|
| 10. | ☐ | ☐ | Is inpatient hospitalization of the family member (patient) required? |
| 11. | ☐ | ☐ | Does (or will) the patient require assistance for basic medical, hygiene, nutritional needs, safety or transportation? |
| 12. | ☐ | ☐ | After review of the employee's signed statement (<u>See</u> Item 14 below), is the employee's presence necessary or would it be beneficial for the care of the patient? (This may include psychological comfort.) |
| 13. | Estimate the period of time care is needed or the employee's presence would be beneficial: | | |

ITEM 14 IS TO BE COMPLETED BY THE EMPLOYEE NEEDING FAMILY LEAVE.

14. When Family Leave is needed to care for a seriously-ill family member, the employee shall state the care he or she will provide and an estimate of the time period during which this care will be provided, including a schedule if leave is to be taken intermittently or on a reduced leave schedule:

Employee signature:

Date:

Appendix C to Part 825—Notice to Employees of Rights Under FMLA

YOUR RIGHTS

under the

FAMILY AND MEDICAL LEAVE ACT OF 1993

FMLA requires covered employers to provide up to 12 weeks of unpaid, job-protected leave to "eligible" employees for certain family and medical reasons. Employees are eligible if they have worked for a covered employer for at least one year, and for 1,250 hours over the previous 12 months, and if there are at least 50 employees within 75 miles.

REASONS FOR TAKING LEAVE: Unpaid leave must be granted for any of the following reasons:

- ▶ to care for the employee's child after birth, or placement for adoption or foster care;
- ▶ to care for the employee's spouse, son or daughter, or parent, who has a serious health condition; or
- ▶ for a serious health condition that makes the employee unable to perform the employee's job.

At the employee's or employer's option, certain kinds of paid leave may be substituted for unpaid leave.

ADVANCE NOTICE AND MEDICAL CERTIFICATION: The employee may be required to provide advance leave notice and medical certification. Taking of leave may be denied if requirements are not met.

- ▶ The employee ordinarily must provide 30 days advance notice when the leave is "foreseeable."
- ▶ An employer may require medical certification to support a request for leave because of a serious health condition, and may require second or third opinions (at the employer's expense) and a fitness for duty report to return to work.

JOB BENEFITS AND PROTECTION:

- ▶ For the duration of FMLA leave, the employer must maintain the employee's health coverage under any "group health plan."
- ▶ Upon return from FMLA leave, most employees must be restored to their original or equivalent positions with equivalent pay, benefits, and other employment terms.
- ▶ The use of FMLA leave cannot result in the loss of any employment benefit that accrued prior to the start of an employee's leave.

UNLAWFUL ACTS BY EMPLOYERS: FMLA makes it unlawful for any employer to:

- ▶ interfere with, restrain, or deny the exercise of any right provided under FMLA;
- ▶ discharge or discriminate against any person for opposing any practice made unlawful by FMLA or for involvement in any proceeding under or relating to FMLA.

ENFORCEMENT:

- ▶ The U.S. Department of Labor is authorized to investigate and resolve complaints of violations.
- ▶ An eligible employee may bring a civil action against an employer for violations.

FMLA does not affect any Federal or State law prohibiting discrimination, or supersede any State or local law or collective bargaining agreement which provides greater family or medical leave rights.

FOR ADDITIONAL INFORMATION: Contact the nearest office of the Wage and Hour Division, listed in most telephone directories under U.S. Government, Department of Labor.

THE RIGHT

AND THE DUTY OF THE CITIZEN

BY J. H. M. [illegible]

[illegible text]

[illegible text]

[illegible text]

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Test Report

Friday
June 4, 1993

Part III

Department of Housing and Urban Development

Office of the Assistant Secretary

NOFA for Lead-Based Paint (LBP) Risk
Assessments

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

Office of the Assistant Secretary for Public and Indian Housing

[Docket No. N-93-3623; FR 3437-N-01]

NOFA for Lead-Based Paint (LBP) Risk Assessments

AGENCY: Office of the Assistant Secretary for Public and Indian Housing, HUD.

ACTION: Notice of funding availability for FY 1993.

SUMMARY: This NOFA informs Public Housing Agencies and Indian Housing Authorities (referred to jointly as "HAs") that have pre-1980 family developments in their inventories of the availability of \$14,797,634 in funding for lead-based paint (LBP) risk assessments. The NOFA contains information on the following:

(a) The purpose of the NOFA, available amounts and eligibility;
(b) Application processing, including how to apply and how selections will be made;

(c) A schedule of steps involved in the application process; and,

(d) Notice of the requirement that the Department's risk assessment protocol be used by HAs in conducting a LBP risk assessment and developing recommendations regarding in-place management.

DATES: An application may be submitted immediately after publication of this NOFA, and must be submitted by 3 p.m. local time (i.e., the time in the HUD Field Office where the application is submitted) on August 3, 1993; (see appendix 1 for a list of HUD Regional and Field Offices). Applications will be funded on a first-come, first-served basis. In cases where additional time is allowed under this NOFA to correct technical deficiencies in an application, the initial date and time of receipt will determine first-come, first-served eligibility. Every effort should be made to submit applications as soon as possible after the publication of this NOFA; furthermore, the above-stated deadline is firm as to date and hour. In the interest of fairness to all applicants, the Department will treat as ineligible for consideration any application that is received after the deadline. Applicants should take this practice into account and make early submission of their application to avoid any risk of loss of eligibility brought about by unanticipated delays or other delivery-related problems.

ADDRESSES: Application forms may be requested from HUD Field Offices listed

in appendix 1 of this NOFA. Completed applications are to be submitted to the Field Office that has jurisdiction over the HA submitting the request for funding. Copies of the Department's risk assessment protocol, which at a minimum must be used by HAs funded under this NOFA, are available at cost by calling HUD USER on 1-800-245-2691 or (301) 251-5154. The risk assessment protocol was previously published in the *Federal Register* on June 29, 1992 (57 FR 28914) and was distributed through HUD Notice PIH 92-44 (PHA).

FOR FURTHER INFORMATION CONTACT: Janice D. Rattley, Director, Office of Construction, Rehabilitation and Maintenance, Department of Housing and Urban Development, 451 Seventh Street, SW., room 4138, Washington, DC 20410, telephone (202) 708-1800. Indian Housing Authorities may contact: Dom Nessi, Director, Office of Indian Housing, Department of Housing and Urban Development, 451 Seventh Street, SW., room 4140, Washington, DC 20410, telephone (202) 708-1015, or (202) 708-0850 (voice/TDD). (These are not toll-free telephone numbers.)

SUPPLEMENTARY INFORMATION:

Paperwork Reduction Act Statement

The information collection requirements contained in this NOFA have been approved by the Office of Management and Budget (OMB), under section 3504(h) of the Paperwork Reduction Act of 1980 (44 U.S.C. 3501-3520), and assigned OMB control numbers 0348-0043, 2577-0044, and 0348-0046.

I. Purpose and Substantive Description

A. Allocation Amounts

(1) *Total amount available.* Under the FY 1992 NOFA, published June 29, 1992 (57 FR 28910), the amount of funds available for LBP risk assessment was \$23,853,455, of which the Department awarded \$9,055,821. The remaining funds, in the amount of \$14,797,634, are available for LBP risk assessment funding under this FY 1993 NOFA. This NOFA establishes a maximum of \$250,000 for an initial award to any single HA, but also establishes a mechanism for possible additional funding (see section I.D.(3) of this NOFA).

(2) *Per-unit cost.* The Department has determined that the maximum amount that can be awarded to an HA under this NOFA will be based on the amount requested in the HA's application and the availability of funding. An HA shall base its funding request on a per-unit-to-be-sampled-per-development cost.

The Department has estimated a cost of \$495 per-sampled-unit as a guide that may be used for developing HA funding requests. The per-unit cost guide includes costs for collected dust and soil samples, laboratory analysis of collection dust and soil samples, interpretation of laboratory results on samples collected, review of maintenance and management practices, and the development (not the implementation) of recommendations for in-place management. Where the estimated cost-per-unit-to-be-sampled exceeds the guidance amount of \$495, HUD may examine the cost reasonableness of the request.

The method to be used to determine the number of units to be sampled is set forth below and in the risk assessment protocol which, at a minimum, must be used by HAs funded under this NOFA:

Number of units in development	Number of units for inspecting & testing (collecting samples)
1-4	All.
5-74	5.
75-124	6.
125-174	7.
175-224	10.
225-299	12.
300-399	15.
400-499	18.
500+	20 per 500 units, plus 1 for each additional increment of 50 units.

As stated in section III.A, Application Content, of this NOFA, an application must state each development number and specify the number of units to be sampled, the amount requested for each development, and the total amount the HA is requesting.

(3) *Assignment of funds to Regional Offices.* Funds will be assigned to the HUD Regional Offices based on the estimated sample size of pre-1980 family units within each Region. The Department has determined that there are approximately 109,000 units to be sampled using the protocol. The following chart reflects that estimated percentage of these units within each Region. These percentages will be used to assign available funds to the Regions:

Region	Estimated sample size: pre-1980 family units	Percent of national sample of pre-1980 units
I	3,677	3
II	16,603	15
III	18,307	17
IV	19,213	18
V	20,247	19
VI	12,774	12
VII	1,857	2
VIII	4,077	4

Region	Estimated sample Size: pre-1980 family Units	Percent of national sample of pre-1980 units
IX	8,075	7
X	3,712	3
Total	108,542	100

As many eligible applications as possible will be funded within the Regional allocation of funds. A Region may conduct more than one round of funding, as provided in section I.D(3) of this NOFA, with its original allocation of the total funds. If after fully funding all eligible applications within its jurisdiction, a Regional Office has funds remaining from its original allocation, the Regional Office will notify Headquarters of the amounts remaining. Headquarters will redistribute funds from Regions that do not have enough fundable applications, to other Regions that have insufficient funds for fundable applications. Funds will be redistributed according to the proportions for the original distribution (see above distribution chart), excluding those Regions that do not need additional funds. This process will be repeated until all fundable applications have been fully funded, within the total amount available.

(4) *Subassignment of funds to non-Indian and Indian Field Offices.* Regional Offices shall subassign funds to each non-Indian and Indian Field Office based on funding decisions made pursuant to this NOFA.

(5) *Remaining funds.* The Departments of Veterans Affairs and Housing and Urban Development, and Independent Agencies Appropriations Act, 1992 (Pub. L. 102-139, approved October 28, 1991; at 105 Stat. 744) (Appropriations Act) targeted these funds for the assessment of risks associated with lead-based paint. Therefore, in the event that the funds awarded under this NOFA total less than the amount available, the remaining amount will be carried over to FY 1994. If funds are carried over to FY 1994, a subsequent NOFA for these remaining set-aside funds will be published.

B. Eligibility and Requirements

(1) All HAs with pre-1980 family developments are eligible (i.e., both large HAs funded under the Comprehensive Grant Program (CGP) and small HAs funded under the Comprehensive Improvement Assistance Program (CIAP)). HAs, especially smaller ones, are encouraged to form a consortium for purposes of having risk assessments conducted.

Such a consortium would enable a number of HAs to obtain coordinated services for those risk assessments.

(2) In accordance with section 14(a)(3) of the U.S. Housing Act of 1937 (1937 Act) (added by the Appropriations Act, 105 Stat. 759), all pre-1980 family developments within a HA's inventory may be the subject of a LBP risk assessment, whether or not the units have been previously tested or abated. As stated in section 14(a)(3), risk assessments are intended "to assess the risks of lead-based paint poisoning * * * in all projects constructed before 1980 that are, or will be, occupied by families."

Risk assessments are not mandatory; however, HAs are strongly encouraged to conduct them. In undertaking a risk assessment, a HA shall use a risk assessment protocol that, at a minimum, follows the Department's protocol. While the scope of the risk assessment may exceed the contents of the Department's protocol, funding shall be requested based on this protocol. The goal of the protocol is to enable a HA to identify lead hazards so that appropriate in-place management can be implemented until testing and abatement can be fully undertaken. HAs are expected to implement the in-place management recommendations resulting from the completed risk assessment, especially in cases where abatement will not be undertaken within a reasonable time frame (one year).

Section 14(a)(3) of the 1937 Act requires that professional risk assessments include dust and soil sampling and laboratory analysis. The risk assessment protocol has been developed by the Department to ensure compliance with this provision and with certain requirements of the Lead-Based Paint Poisoning Prevention Act. In no instance shall conducting a risk assessment satisfy the HA's obligation under the Lead-Based Paint Poisoning Prevention Act to test for and abate lead-based paint hazards.

Upon completion of the risk assessment, the HA must provide a copy of the results of the risk assessment to the appropriate Field Office. The risk assessment must be completed within eighteen (18) months of the fund reservation notification to the HA.

(3) CIAP implementation requirements, as set forth in 24 CFR part 968, subpart B, and the CIAP Handbook, 7485.1 REV-4, are applicable to the HAs funded under this NOFA. These requirements encompass fund requisitions, implementation schedules, quarterly progress reports, budget revisions, etc.

(4) In accepting funding to perform a risk assessment, HAs must agree to participate, if requested by HUD, in a subsequent evaluation of the risk assessment protocol. This evaluation will entail a review of collected sampling data and the effectiveness of recommended in-place management procedures.

C. Ineligible Costs and Activities

(1) Risk assessment costs from FY 1991 will not be eligible for funding or reimbursement under this NOFA. The Appropriations Act amended section 14(a) of the 1937 Act (see 105 Stat. 759) by adding clause (5), which states that risk assessment costs incurred or disbursed in FY 1991 from other accounts are to be paid or reimbursed from modernization funds in FY 1992. Therefore, while not eligible costs under this NOFA, HAs may seek reimbursement of these FY 1991 costs through CIAP or CGP funds. (Risk assessments are an eligible item for funding under CIAP and CGP, whether or not they are incurred in connection with insurance. A HA that needs additional funds for activities funded under this NOFA may reprogram CIAP funds or use its CGP allocation.)

(2) Actual implementation of recommendations that result from the risk assessment conducted is not eligible for funding under this NOFA. The implementation of resulting recommendations (e.g., comprehensive or random testing, abatement of lead, in-place management measures, and work order modifications) may be funded from other HA sources (i.e., CIAP, CGP, operating subsidy, or operating reserves). HAs are expected to implement these recommendations, especially those related to in-place management measures where abatement of lead hazards will not take place within a reasonable time (one year). In no instance shall the implementation of in-place management measures satisfy the HA's obligation under the Lead-Based Paint Poisoning Prevention Act to abate lead-based paint hazards.

D. Selection of Applications for Funding

(1) In order to be considered for funding, an application must be complete and must meet the threshold criterion that the proposed risk assessment be for pre-1980 family developments. Eligible applications will be fully funded, up to a maximum of \$250,000 in the first round of funding, on a first-come, first-served basis, as long as funds remain available. To the extent that funds remain available after the first round, HAs requesting additional funding above the \$250,000

limit may be considered for additional funds in a second or subsequent round (up to \$100,000 in each additional round), as explained below in section I.D(3) of this NOFA. All awards in a second or subsequent round will also be made on a first-come, first-served basis.

(2) Field Offices will ensure that all applications (including copies) are date- and time-stamped immediately upon receipt, and will forward a stamped copy of each application, in chronological order, to the appropriate Regional Office Director of Public Housing as soon as the application is considered eligible for funding. The Field Office will be responsible for identifying, notifying applicants of, and receiving corrections of any technical deficiencies in the application, as discussed in part IV of this NOFA.

(3) Each Regional Office will sort applications received from the Field Offices in its jurisdiction in chronological order according to the date and time stamp placed on the application by the Field Office (and taking into consideration any time zone differences). (For those Indian Offices that are collocated within a Regional Office, the Regional Administrator will designate which program office (Public or Indian) will review and sort applications from the Field Office.) From the amounts assigned to each Region, the Regional Administrator shall make final funding decisions for each round of funding on a first-come, first-served basis. As many applications as possible will be funded within the Regional allocation or any redistribution of funds. Funding will take place in rounds until either all funds have been awarded or there are no more fundable applications.

In this round of funding, each HA will be limited to a maximum award of \$250,000, although the HA is permitted to request a higher level of funding. Setting a maximum amount that can be funded will ensure an optimum number of HAs that can be accommodated within the available funding. Developments that have been funded previously for risk assessments are not eligible for additional funding under this NOFA. An HA that has applied for more than the \$250,000 limit (e.g., an HA with a large multifamily or scattered site unit inventory that requires more than the maximum of \$250,000 to conduct the risk assessment) may receive additional funds in excess of the \$250,000 maximum in any subsequent round of funding, if funds remain after all eligible applications have been identified and funded in previous rounds or additional funds become available because of a redistribution of

funds to the Region in accordance with section I.A(3) of this NOFA.

In any funding round subsequent to the first round in which the HA was awarded funding, each eligible HA may be awarded up to an additional \$100,000 per round, until all of the funds are awarded or all eligible applications are funded. Awards in this second or subsequent round will also be made on a first-come, first-served basis, using the application (date and time stamped).

Each Region will advise Headquarters, by the date specified in the Processing Schedule in section III.B of this NOFA, as to whether there are sufficient eligible applications within its jurisdiction to require all of the funds assigned to that Region. In cases where all assigned funds cannot be used within a Regional Office's jurisdiction, Headquarters will reassign the funds to other Regions that have identified a need for additional funds, as described in section I.A(3) of this NOFA.

E. Notification of Awards

Once all rounds of funding are complete, each Regional Office will notify its Field Offices of the amounts awarded to each funded HA within a Field Office's jurisdiction. The Field Office will notify the HA of HUD's funding decision after congressional notification is completed. Reservation and congressional notification documents will be prepared by the Field Office.

II. Application Process

A. General requirements

Applications are available from HUD Field Offices listed in appendix 1 of this NOFA. To be considered for funding, an original and 2 copies of the application must be submitted to the HUD Field Office that has jurisdiction over the applicant HA. An application may be submitted immediately upon publication of this NOFA, and must be submitted before 3 p.m., local time, on August 3, 1993, to the HUD Field Office that has jurisdiction over the applicant HA. The contents of the application are listed below, in section III.A of this NOFA.

The above-stated deadline is firm as to date and hour. In the interest of fairness to all applicants, the Department will treat as ineligible for consideration any application that is received after the deadline. Applicants should take this practice into account and make early submission of their materials to avoid any risk of loss of eligibility brought about by

unanticipated delays or other delivery-related problems.

B. Threshold Requirement

A HA must propose to conduct risk assessments for pre-1980 family developments to be considered eligible for funding. Developments that have been funded previously for risk assessments are not eligible for additional funding under this NOFA.

III. Checklist of Application Submission Requirements

A. Application Content

The following documents comprise the application:

(1) OMB Standard Form SF-424, Application for Federal Assistance, including SF-424B, Assurances—Non-Construction Programs. On the SF-424, HAs shall only complete items 2, 5, 12, 13, 14, 15, 17 and 18;

(2) Form HUD-52825, Comprehensive Assessment/Program Budget, Part I—Summary. The total amount requested for funding will be identified on this form under either account 1410.1, Administration (where HA staff will be used and the HA certifies that it has the capability of, and will be conducting the professional risk assessment), or account 1430.2, Consultant Fees (where the HA will be contracting for the professional risk assessment).

(3) Form HUD-52825, Comprehensive Assessment/Program Budget, Part II—Supporting Pages. Developments proposed to be the subject of a risk assessment are to be identified on this form. The applicant must provide the name; address; project number; total number of units; number of units to be sampled, in accordance with the requirements set forth in section I.A(2) of this NOFA and in the attached protocol; and amount requested for each development (see section I.A(2) of this NOFA for information on unit-cost guidance).

(4) Certification signed by the HA Executive Director that, at a minimum, the risk assessment protocol to be used will be equivalent to the Department's protocol.

(5) Certification signed by the HA Executive Director that the proposed risk assessment will be completed within eighteen (18) months of the date that funds are awarded and that the HA agrees to participate, if requested by HUD, in a subsequent evaluation of the risk assessment protocol, to assess its validity for the identification of lead paint hazards and effectiveness in addressing those hazards.

(6) Certification signed by the HA Executive Director that a copy of the

completed risk assessment will be provided to the appropriate HUD Field Office upon completion of the assessment.

(7) Certification that HA staff is qualified to conduct LBP risk assessments, if applicable.

(8) Form HUD-50070, Certification for Drug-Free Workplace.

(9) Certification for Contracts, Grants, Loans and Cooperative Agreements, required of HAs established under State law that are applying for grants exceeding \$100,000.

(10) SF-LLL, Disclosure of Lobbying Activities, required of HAs established under State law only where any funds, other than federally appropriated funds, will be or have been used to influence Federal workers or Members of Congress or their staffs regarding specific grants or contracts.

(11) Form HUD-2880, Applicant/Recipient Disclosure/Update Report.

B. Processing Schedule

The following schedule is expected to be followed, and is designed to complete the funding process during FY 1993.

(1) HAs send applications to Field Office—from date of publication of NOFA but not later than August 3, 1993.

(2) Field Offices review applications for completeness and advise HAs of any technical deficiencies—by August 10, 1993.

(3) Technical deficiencies due—at least by August 24, 1993.

(4) Field Offices complete reviews and forward applications, in chronological order to Regional Office—by August 31, 1993.

(5) Regional Offices make funding decisions based on available funds and advise Headquarters of unused funds or need for additional funds—by September 7, 1993.

(6) Headquarters redistributes unused funds—by September 21, 1993.

(7) Regional Offices subassign funds to Field Offices—September 28, 1993.

(8) Field Offices reserve funds and forward congressional notifications to Headquarters—not later than October 5, 1993.

(8) Congressional and HA notifications of funding decisions are to be completed in accordance with the procedures set forth in the CIAP NOFA published in the *Federal Register* on March 15, 1993 (58 FR 13939).

IV. Corrections to Deficient Applications

Immediately after the submission of an application, the appropriate Field Office will screen the application to determine whether all items were

submitted. If items 1, 2, and 3 listed in part III.A, Application Content, of this NOFA are missing, the application will be considered substantially incomplete and, therefore, ineligible for processing.

If the HA fails to submit any of items 4–11 listed in part III.A of this NOFA, or the application contains a technical mistake such as an incorrect signatory, the Filed Office will immediately notify the HA that it has 14 calendar days from the date of HUD's written notification to submit or correct the specified items. If any of items 4–11 are missing and the HA does not submit them within the 14-day cure period, the application will be ineligible for further processing.

HUD notes that the initial date and time of receipt will be used to determine funding under the first-come, first-served criterion; the determination of technical deficiencies will not impact upon the initial date and time of receipt.

V. Other Matters

A. Environmental Review

A finding of no significant impact with respect to the environment has been made in accordance with HUD regulations at 24 CFR part 50, which implement section 102(2)(C) of the National Environmental Policy Act of 1969. The finding of no significant impact is available for public inspection between 7:30 a.m. and 5:30 p.m. weekdays in the Office of the Rules Docket Clerk, Office of the General Counsel, room 10276, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410-0500.

B. Federalism Executive Order

The General Counsel, as the Designated Official under section 6(a) of Executive Order 12612, Federalism, has determined that the policies contained in this notice will not have substantial direct effects on States or their political subdivisions, or the relationship between the federal government and the States, or on the distribution of power and responsibilities among the various levels of government. As a result, the notice is not subject to review under the Order. The NOFA merely sets forth funding availability for HAs to conduct, at their discretion, risk assessments for lead paint hazards.

C. Family Executive Order

The General Counsel, as the Designated Official under Executive Order 12606, The Family, has determined that this notice will likely have a beneficial impact on family formation, maintenance, and general well-being. Families could benefit from

this funding action as a result of the identification of immediate and potential lead-based paint hazards; that identification will ultimately lead to a safer environment. Accordingly, since the impact on the family is beneficial, no further review is considered necessary.

D. Section 102 of the HUD Reform Act; Documentation and Public Access Requirements; Applicant/Recipient Disclosures

Disclosures

HUD will make available to the public for five years all applicant disclosure reports (HUD Form 2880) submitted in connection with this NOFA. Update reports (also Form 2880) will be made available along with the applicant disclosure reports, but in no case for a period less than three years. All reports—both applicant disclosures and updates—will be made available in accordance with the Freedom of Information Act (5 U.S.C. 552) and HUD's implementing regulations at 24 CFR part 15. (See 24 CFR part 12, subpart C, and the notice published in the *Federal Register* on January 16, 1992 (57 FR 1942), for further information on these disclosure requirements.)

Public Notice

HUD will include recipients that receive assistance pursuant to this NOFA in its quarterly *Federal Register* notice of recipients of all HUD assistance awarded on a competitive basis. (See 24 CFR 12.16(b), and the notice published in the *Federal Register* on January 16, 1992 (57 FR 1942), for further information on these requirements.)

E. Section 103 of the HUD Reform Act

HUD's regulation implementing section 103 of the Department of Housing and Urban Development Reform Act of 1989 (42 U.S.C. 3537a) was published on May 13, 1991 (56 FR 22088) and became effective on June 12, 1991. That regulation, codified as 24 CFR part 4, applies to the funding competition announced today. The requirements of the rule continue to apply until the announcement of the selection of successful applicants.

HUD employees involved in the review of applications and in the making of funding decisions are restrained by part 4 from providing advance information to any person (other than an authorized employee of HUD) concerning funding decisions, or from otherwise giving any applicant an unfair competitive advantage. Persons

who apply for assistance in this competition should confine their inquiries to the subject areas permitted under 24 CFR part 4.

Applicants who have questions should contact the HUD Office of Ethics (202) 708-3815. (This is not a toll-free number.) The Office of Ethics can provide information of a general nature to HUD employees, as well. However, a HUD employee who has specific program questions, such as whether particular subject matter can be discussed with persons outside the Department, should contact his or her Regional or Field Office Counsel, or Headquarters Counsel for the program to which the question pertains.

F. Section 112 of the Reform Act

Section 13 of the Department of Housing and Urban Development Act (42 U.S.C. 3537b), added by section 112 of the Reform Act, contains two provisions dealing with efforts to influence HUD's decisions with respect to financial assistance. The first imposes disclosure requirements on those who are typically involved in these efforts—those who pay others to influence the award of assistance or the taking of a management action by the Department and those who are paid to provide the influence. The second restricts the payment of fees to those who are paid to influence the award of HUD assistance, if the fees are tied to the number of housing units received or are based on the amount of assistance received, or if they are contingent upon the receipt of assistance.

Section 13 was implemented by final rule published in the *Federal Register* on May 17, 1991 (56 FR 22912). If readers are involved in any efforts to influence the Department in these ways, they are urged to read the final rule, particularly the examples contained in appendix A of the rule.

Any questions about the rule should be directed to the Office of Ethics, room 2158, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410-3000. Telephone: (202) 708-3815 (voice/TDD). (This is not a toll-free number.) Forms necessary for compliance with the rule may be obtained from the local HUD office.

G. Prohibition Against Lobbying Activities

The use of funds awarded under this NOFA is subject to the disclosure

requirements and prohibitions of section 319 of the Department of Interior and Related Agencies Appropriations Act for Fiscal Year 1990 (31 U.S.C. 1352) (the "Byrd Amendment") and the implementing regulations at 24 CFR part 87. These authorities prohibit recipients of federal contracts, grants, or loans from using appropriated funds for lobbying the Executive or Legislative branches of the Federal government in connection with a specific contract, grant, or loan. The prohibition also covers the awarding of contracts, grants, cooperative agreements, or loans unless the recipient has made an acceptable certification regarding lobbying. Under 24 CFR part 87, applicants, recipients, and subrecipients of assistance exceeding \$100,000 must certify that no federal funds have been or will be spent on lobbying activities in connection with the assistance. The Department has determined that an IHA established by an Indian Tribe as a result of the exercise of its sovereign power is not subject to the Byrd Amendment, but an IHA established under State law is subject to those requirements and prohibitions.

Authority: 42 U.S.C. 14371; Pub. L. 102-139 (105 Stat. 744).

Dated: May 12, 1993.

Arthur S. Newburg,

Director, Office of Lead-Based Paint Abatement and Poisoning Prevention.

Michael B. Janis,
General Deputy Assistant Secretary, Office of Public and Indian Housing.

Appendix 1—Hours of Operation for HUD Regional and Field Offices

Name of Office and Hours of Operation

Region I

Boston Regional Office—8:30 a.m.—5:00 p.m.
Hartford Office—8:00 a.m.—4:30 p.m.
Manchester Office—8:00 a.m.—4:30 p.m.
Providence Office—8:00 a.m.—4:30 p.m.

Region II

New York Regional Office—8:30 a.m.—5:00 p.m.
Albany Office—7:30 a.m.—4:00 p.m.
Buffalo Office—8:00 a.m.—4:30 p.m.
Newark Office—8:30 a.m.—5:00 p.m.

Region III

Philadelphia Regional Office—8:00 a.m.—4:30 p.m.
Baltimore Office—8:00 a.m.—4:30 p.m.
Charleston Office—8:00 a.m.—4:30 p.m.
Pittsburgh Office—8:00 a.m.—4:30 p.m.
Richmond Office—8:00 a.m.—4:30 p.m.
Washington, D.C. Office—8:00 a.m.—4:30 p.m.

Region IV

Atlanta Regional Office—8:00 a.m.—4:30 p.m.
Birmingham Office—7:45 a.m.—4:30 p.m.
Caribbean Office—8:00 a.m.—4:30 p.m.
Columbia Office—8:00 a.m.—4:45 p.m.
Greensboro Office—8:00 a.m.—4:30 p.m.
Jackson Office—8:00 a.m.—4:30 p.m.
Jacksonville Office—7:45 a.m.—4:30 p.m.
Knoxville Office—7:45 a.m.—4:30 p.m.
Louisville Office—8:00 a.m.—4:30 p.m.
Nashville Office—7:45 a.m.—4:15 p.m.

Region V

Chicago Regional Office—8:15 a.m.—4:45 p.m.
Cincinnati Office—8:00 a.m.—4:45 p.m.
Cleveland Office—8:00 a.m.—4:45 p.m.
Columbus Office—8:30 a.m.—4:45 p.m.
Detroit Office—8:00 a.m.—4:30 p.m.
Grand Rapids Office—8:00 a.m.—4:30 p.m.
Indianapolis Office—8:00 a.m.—4:45 p.m.
Milwaukee Office—8:00 a.m.—4:30 p.m.
Minneapolis-St. Paul Office—8:00 a.m.—4:30 p.m.
Chicago Indian Office—8:15 a.m.—4:45 p.m.

Region VI

Fort Worth Regional Office—8:00 a.m.—4:30 p.m.
Albuquerque Office—7:45 a.m.—4:30 p.m.
Houston Office—7:45 a.m.—4:30 p.m.
Little Rock Office—8:00 a.m.—4:30 p.m.
New Orleans Office—8:00 a.m.—4:30 p.m.
Oklahoma City Office—8:00 a.m.—4:30 p.m.
Oklahoma City Indian Office—8:00 a.m.—4:30 p.m.
San Antonio Office—8:00 a.m.—4:30 p.m.

Region VII

Kansas City Regional Office—8:00 a.m.—4:30 p.m.
Des Moines Office—8:00 a.m.—4:30 p.m.
Omaha Office—8:00 a.m.—4:30 p.m.
St. Louis Office—8:00 a.m.—4:30 p.m.

Region VIII

Denver Regional Office—8:00 a.m.—4:30 p.m.
Denver Indian Office—8:00 a.m.—4:30 p.m.

Region IX

San Francisco Regional Office—8:15 a.m.—4:45 p.m.
Honolulu Office—7:45 a.m.—4:15 p.m.
Los Angeles Office—8:00 a.m.—4:30 p.m.
Phoenix Office—8:00 a.m.—4:30 p.m.
Phoenix Indian Office—8:15 a.m.—4:45 p.m.
Sacramento Office—8:00 a.m.—4:30 p.m.

Region X

Seattle Regional Office—8:00 a.m.—4:30 p.m.
Seattle Indian Office—8:00 a.m.—4:30 p.m.
Anchorage Office—8:00 a.m.—4:30 p.m.
Anchorage Indian Office—8:00 a.m.—4:30 p.m.
Portland Office—8:00 a.m.—4:30 p.m.

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Federal Register

**Friday
June 4, 1993**

Part IV

**Department of
Housing and Urban
Development**

Office of the Secretary

**NOFA for Lead-Based Paint Hazard
Reduction in Priority Housing; Notice**

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

Office of the Secretary—Office of Lead-Based Paint Abatement and Poisoning Prevention

[Docket No. N-93-3617; FR-3444-N-01]

NOFA for Lead-Based Paint Hazard Reduction in Priority Housing: Category I and Category II Grants

AGENCY: Office of the Secretary—Office of Lead-Based Paint Abatement and Poisoning Prevention, HUD.

ACTION: Notice of funding availability.

SUMMARY: This notice announces the availability of two categories of grant funding: Category I, for approximately \$90,000,000, for a grant program for States and local governments to undertake lead-based paint hazard reduction in priority housing; and Category II, for up to \$3,000,000, for grants to States for assistance in implementing a State certification program after passing enabling legislation. Approximately 20-25 grants of \$1 million-\$6 million each will be awarded under Category I; approximately 15 to 18 grants of up to \$200,000 each will be awarded under Category II in FY 1993. The grant sum requested by applicants in either category should be based on the total for all years of the proposed project. This document includes information concerning the following:

- (1) The purpose of the NOFA, eligibility, available amounts, and selection criteria;
- (2) Application processing, including how to apply and how selections will be made; and
- (3) A checklist of steps and exhibits involved in the application process.

Appendices to the NOFA identify relevant regulations and guidelines referenced throughout the NOFA, define "administrative costs", provide a sample diagram for showing an applicant's sources and uses of the grant funds, set forth requirements for a State certification program, list eligible HUD housing programs, and provide requirements for the Comprehensive Housing Affordability Strategy (CHAS).

DATES: An original and two copies of the completed application must be submitted as follows:

Category I: No later than 3 p.m. (Eastern Time) on Wednesday, August 18, 1993; and

Category II: Applicants may file a Stage One grant application at any time after 9 a.m. (Eastern time) Tuesday, September 21, 1993. The final half of the grant sum (Stage Two) may be

requested at any time after April 28, 1994. Category II funds will be awarded on a first-come-first-served basis, so there is no deadline for application (see Section 8.5 of this NOFA for further application information).

The application deadlines are firm as to date and hour. In the interest of fairness to all competing applicants, the Department will treat as ineligible for consideration any application that is received after its deadline. Applicants should take this factor into account and make early submission of their materials to avoid loss of eligibility brought about by unanticipated delays or other delivery-related problems. Section 5 of this NOFA (for Category I grants) and Section 8 (for Category II grants) provide further information on what constitutes proper submission of an application.

ADDRESSES: Application kits may be obtained from the Office of Lead-Based Paint Abatement and Poisoning Prevention, Department of Housing and Urban Development, room B-133, 451 Seventh Street SW., Washington, DC 20410, or by phoning 1-800-RID-LEAD (1-800-743-5323). Completed applications should be submitted to this same address, and may not be faxed.

FOR FURTHER INFORMATION CONTACT:

Ellis G. Goldman, Director, Program Management Division, Office of Lead-Based Paint Abatement and Poisoning Prevention, room B-133, 451 Seventh Street SW., Washington, DC 20410, telephone 1-800-RID-LEAD (1-800-743-5323). TDD numbers for the hearing-impaired are: (202) 708-9300 (not a toll-free number), or 1-800-877-8339.

SUPPLEMENTARY INFORMATION:

Table of Contents

Section 1. Paperwork Reduction Act Statement

Section 2. Definitions

NOFA for Category I Grants

Section 3. Category I: Purpose and Description

3.1 Purpose and Authority

3.2 Background

3.3 Allocation Amounts

3.4 Eligibility

3.5 Objectives and Requirements

3.6 Environmental Review

3.7 Rating Factors

Section 4. Category I: Application Process

4.1 Submitting Applications

4.2 Threshold Requirements

Section 5. Category I: Checklist of Application Submission Requirements

5.1 Applicant Data

5.2 Proposed Activities

5.3 Certifications and Assurances

Section 6. Category I: Corrections to Deficient Applications

Section 7. Category I: Administrative Provisions

7.1 Obligation of Funds

7.2 Increases of Awards

7.3 Deobligation

7.4 Reports

NOFA for Category II Grants

Section 8. Category II: Purpose and Substantive Description

8.1 Purpose and Authority

8.2 Background

8.3 Allocation Amounts

8.4 Eligibility

8.5 Selection Criteria and Process

8.6 HUD and EPA Review of Applications

8.7 Application Requirements

8.8 Reports

Section 9. Other Matters: Category I and Category II Grants

APPENDIX A. Relevant Federal Regulations and Guidelines

APPENDIX B. Explanation of

"Administrative Costs"

APPENDIX C. Source and Use of Funds (Sample)

APPENDIX D. Eligibility of HUD-Associated Housing Units

APPENDIX E. Elements of a State Certification Program

APPENDIX F. CHAS: Statement of Requirements

Section 1. Paperwork Reduction Act Statement

The information collection requirements contained in this notice have been approved by the Office of Management and Budget (OMB), under section 3504(h) of the Paperwork Reduction Act of 1980 (44 U.S.C. 3501-3520), and assigned OMB control number 2529-0002.

Section 2. Definitions

The following definitions apply to this grant program:

Abatement—Any set of measures designed to eliminate lead-based paint hazards permanently in accordance with standards established by appropriate Federal agencies. The term includes:

- (a) The removal of lead-based paint and lead-contaminated dust, the permanent containment or encapsulation of lead-based paint, the replacement of lead-based painted surfaces or fixtures, and the removal or covering of lead contaminated soil; and
- (b) All preparation, cleanup, worker protection, disposal, and post-abatement clearance testing activities associated with such measures.

Administrative Costs—(See Appendix B of this NOFA for a detailed definition.)

Applicant—A State or a unit of general local government with an approved comprehensive Housing Affordability Strategy (CHAS) that applies for funding under this NOFA.

Certified Contractor—A contractor, inspector, or supervisor who has

successfully completed a training program certified by the appropriate Federal agency and has met any other requirements for certification or licensure established by such agency or who has been certified by any State through a program which has been found by such Federal agency to be at least as rigorous as the Federal certification program outlined in Appendix E. All lead-hazard detection or reduction work shall be performed by workers and supervisors who have passed a Federal training program or a State training program found by such Federal agency to be at least as rigorous as the Federal program.

Certified Inspector—Included in the definition of "certified contractor," above.

Clearance Testing—A HUD-required testing procedure that must be passed before a dwelling unit may be reoccupied. The unit must undergo a wipe test showing that it has lead dust levels below HUD's maximum allowable standards for floors (200 µg/sq. ft. (micrograms/square foot)), window sills (500 µg/sq. ft.), and window wells (800 µg/sq. ft.).

Encapsulation—A method of abatement that involves the coating and sealing of surfaces with durable surface coatings specifically formulated to be elastic, able to withstand sharp and blunt impacts, long-lasting, and resilient, while also resistant to cracking, peeling, algae, fungus, and ultraviolet light, so as to prevent any part of lead-containing paint from becoming part of house dust or otherwise accessible to children. Paint is not an encapsulant.

Enclosure—The resurfacing or covering of surfaces with durable materials such as gypsum board or paneling, and sealing or caulking the edges and joints so as to prevent or control chalking, flaking, peeling, scaling, or loose lead-containing substances from becoming part of house dust or otherwise accessible to children.

Hazardous Waste—Liquid or solid waste, or combination of solid wastes, which because of its quantity; concentration; or physical, chemical, or infectious characteristics may:

(a) Cause, or significantly contribute to, an increase in mortality or in serious, irreversible, or incapacitating illness; or

(b) Pose a substantial current or potential hazard to human health or the environment, when improperly treated, stored, transported, disposed of, or otherwise managed.

HEPA—(High efficiency particulate accumulator)—A vacuum cleaner fitted with a filter capable of filtering out particles of 0.3 microns or greater from

a body of air at 99.97 percent efficiency or more.

Interim Controls—A set of measures designed to reduce temporarily human exposure or likely exposure to lead-based paint hazards, including specialized cleaning, repairs, maintenance, painting, temporary containment, ongoing monitoring of lead-based paint hazards or potential hazards, and the establishment and operation of management and resident education programs.

Interim Guidelines—HUD's manual of lead-hazard reduction practices: "Lead-Based Paint: Interim Guidelines for Hazard Identification and Abatement in Public and Indian Housing," published 55 FR 14556 (April 18, 1990), and revised 55 FR 39874 (September 28, 1990) and 56 FR 21556 (May 9, 1991).

Laboratory Accreditation—A laboratory that has been approved by a State or other accrediting agency to perform analyses of lead in paint and dust and whose approval is consistent with any criteria established by the Environmental Protection Agency.

Lead-Based Paint Hazard—Any condition that causes exposure to lead from lead-contaminated dust, lead-contaminated soil, or lead-contaminated paint that is deteriorated or present in accessible surfaces, friction surfaces, or impact surfaces, that would result in adverse human health effects as established by the appropriate Federal agency.

Lead-Contaminated Soil—Bare soil on residential real property that contains lead at or in excess of the level determined to be hazardous to human health by the appropriate Federal agency.

Lead-in-Dust—Interior house surface dust that contains an area concentration of lead that may pose a threat of adverse health effects in pregnant women or young children. A hazard exists if concentrations exceed the maximum acceptable standards: 200 µg/sq. ft. on floors, 500 µg/sq. ft. on window sills, and 800 µg/sq. ft. on window wells.

Priority Housing—Target housing that qualifies as affordable housing under section 215 of the Cranston-Gonzalez National Affordable Housing Act (42 U.S.C. 12745). (See Appendix D for a list of HUD's programs and their eligibility or ineligibility as priority housing.) The term does not include any public housing (whether Federal or locally supported), any federally owned housing, or any federally assisted housing except tenant-based housing that receives assistance under sections 8(b) or 8(o) of the United States Housing Act of 1937 (42 U.S.C. 1437f (b) or (o)).

Replacement—A strategy of abatement that removes components such as windows, doors, and trim that have lead-based painted surfaces, and installs new or de-lead components free of lead-based paint.

Residential Dwelling—(a) A single-family dwelling, including attached structures, such as porches and stoops; or

(b) A single-family dwelling unit in a structure that contains more than 1 separate residential dwelling unit, and in which each unit is, or is intended to be, used or occupied, in whole or in part, as the home or residence of one or more persons.

Risk Assessment—An on-site investigation to determine and report the existence, nature, severity, and location of lead-based paint hazards in residential dwellings, including:

(a) Information gathering regarding the age and history of the housing and occupancy by children under age 6;

(b) Visual inspection;

(c) Limited wipe sampling or other environmental sampling techniques;

(d) Other activity as may be appropriate; and

(e) Provision of a report explaining the results of the investigation.

State Certification Program—(See Appendix E for extended discussion.)

Substrate—The material to which a coating such as paint is applied. Residential substrates are usually wood, plaster, masonry, gypsum board, or metal, including components such as doors and door frames, windows and window trim, other trim, walls, ceilings, cabinets, and other built-in storage.

Surface—The outer or topmost boundary of a substrate.

Target Housing—Any housing constructed prior to 1978, except housing for the elderly or persons with disabilities (unless any child who is less than 6 years of age resides or is expected to reside in the housing for the elderly or persons with disabilities) or any one-bedroom dwelling. In the case of jurisdictions that banned the sale or use of lead-based paint prior to 1978, the Secretary, at the Secretary's discretion, may designate an earlier date.

Testing—The measurement of lead in painted surfaces by Federal- or State-certified personnel using a portable X-ray fluorescence analyzer, laboratory analysis of paint samples, or other method approved by HUD.

Title X—The Residential Lead-Based Hazard Reduction Act of 1992 (title X of Pub. L. 102-550, approved October 28, 1992.)

Trained Worker—A worker who has successfully completed a Federal or State-accredited lead-based paint

training program that is at least as protective as the Federal Certification Program Standards outlined in Appendix E.

Wipe Test—The testing of a surface for the presence of lead dust by the patterned wiping of the surface, followed by analysis of the wipe by atomic absorption spectroscopy, giving the result in micrograms of lead per square foot of surface. For clearance purposes, a sample of floors, window sills and window wells shall be tested in accordance with HUD's Interim Guidelines. The guidelines also require that for clearance all surfaces shall have less than the maximum allowable concentration standard of 200 µg/sq. ft on floors, 500 µg/sq. ft on window sills, and 800 µg/sq. ft on window wells. Also see the definition for "Clearance Testing".

XRF Analyzer—A portable instrument that determines lead concentration in milligrams per square centimeter (mg/cm²) using the principle of x-ray fluorescence. The instrument may measure mean lead content or lead content plus a spectrum of other elements. The instrument shall be used in accordance with the rules for interpretation of the XRF sampling data for multi-family or scattered-site housing, as provided in the HUD Interim Guidelines.

NOFA for Category I Grants

Section 3. Category I Grants: Purpose and Description

3.1 Category I Grants: Purpose and Authority

Category I grants are to assist States and local governments in undertaking programs for the evaluation and reduction of lead-based paint hazards in private, priority housing for rental occupants and owner occupants. (Appendix D lists HUD-associated housing programs that may have dwellings that meet the definition of priority housing.) Up to \$90,000,000 will be available to fund 20–25 grants of \$1 million to \$6 million each. The amounts are for the total, multi-year work of a proposed project. Category I grants are authorized under section 1011(a–f) of Title X.

The purposes of this program include:

- (a) Implementation of a national strategy, as defined in Title X, to build the infrastructure necessary to eliminate lead-based paint hazards in all housing, as widely and expeditiously as possible;

- (b) Encouragement of effective action to prevent childhood lead poisoning by establishing a workable framework for lead-based paint hazard evaluation and reduction; and

- (c) Expeditious mobilization of national resources, involving cooperation among all levels of government and the private sector, to develop the most promising, cost-effective methods for evaluating and reducing lead-based paint hazards;

3.2 Background

Lead is a powerful toxicant that attacks the central nervous system and is particularly damaging to the neurological development of young children. Pregnant women can transfer lead through the placenta to the fetus. Lead-based paint (LBP) is one of the major sources of lead in the environment. In addition to paint, lead may be found in dust, soil, drinking water, food, emissions from leaded gasoline combustion, and industrial emissions. Human exposure to lead is found by testing blood for the presence of lead.

Based upon a national survey conducted in 1990 for HUD's *Comprehensive and Workable Plan for the Abatement of Lead-Based Paint in Privately Owned Housing* report (see Appendix A), approximately 57 million privately owned and occupied housing units built before 1980 have some lead-based paint inside or outside the dwelling. The 57 million units represent just over half of the nation's existing housing stock, and 74 percent of the dwellings built before 1980. The figures for dwellings have lead-based paint rise to 80 percent of dwellings built before 1960, and to 90 percent of those built before 1940. In addition, the older homes show both a greater concentration of lead in the paint and more areas with lead-based paint.

An estimated 9.9 million of the 57 million units are occupied by families with children under the age of six, who are most at risk. Of these, about 3.8 million units have hazards requiring prompt attention, such as peeling lead-based paint, excessive amounts of lead dust, or both. Approximately half of these units are occupied by families with incomes lower than the national median.

HUD has been actively engaged in a number of activities relating to lead-based paint as a result of the Lead-Based Paint Poisoning Prevention Act, 42 U.S.C. 4801–4846 (LBPPPA). The recently enacted Title X provides major new initiatives and more detailed requirements for this NOFA. (Appendix A identifies relevant Federal regulations and guidelines referred to in this NOFA.)

The *Comprehensive and Workable Plan* described the magnitude of the problem of lead hazards in private

housing and set forth a comprehensive strategy for reducing this threat. Also in 1990, HUD developed the first set of guidelines to be used nationally for abating lead paint in public housing (see Interim Guidelines, Appendix A). The guidelines are now being used in the Department's public housing modernization program, and an update to account for new knowledge and technology is underway.

In April 1989, HUD and the Environmental Protection Agency (EPA) executed a Memorandum of Understanding (MOU) on Lead-Based Paint. This MOU has become the basis for interagency cooperation, including a HUD-EPA Interagency Task Force on Lead-Based Paint. As another result of interagency cooperation, EPA, with assistance from HUD and the Centers for Disease Control (CDC), recently began operating a National Clearinghouse and Tollfree Hotline on lead poisoning 1-800-LEADFYI (1-800-532-3394).

3.3 Allocation Amounts

Under the Departments of Veterans Affairs and Housing and Urban Development, and Independent Agencies Appropriations Act of 1993 (Pub. L. 102-389, approved October 6, 1992) (Appropriations Act), \$100 million was appropriated for this program. The total available for Category I grants results from application of set-asides under the Appropriations Act, in the amounts of \$2 million for evaluation and technical assistance activities, \$3 million for assistance to State Certification Programs (Category II grants; see Section 8 of this NOFA), and \$5 million for research and development, leaving \$90,000,000 for Category I grants.

Because lead-based paint is a national problem, it is critical that these funds be used in a manner that maximizes the number of housing units in which lead-hazard reduction occurs, that stimulates cost-effective State and local approaches that can be replicated in as many settings as possible, and that disperses the grants as widely as possible across the nation. HUD expects to award 20 to 25 grants of \$1 million to \$6 million each. Grantees shall be reimbursed, in accordance with a schedule to be included with the applicant's proposal and approved by HUD.

3.4 Eligibility

Title X specifies the following eligibility requirements for participation in Category I grants to evaluate and reduce lead-based paint hazards in priority housing:

- (a) **Eligible Applicants.** A State or unit of local government that has an

approved Comprehensive Housing Affordability Strategy (CHAS) under section 105 (42 U.S.C. 12705) of the Cranston-Gonzalez National Affordable Housing Act (NAHA) is eligible to apply for a grant under Category I (see Appendix F).

However, applicants are advised that in selecting grantees under this NOFA, the Secretary is unlikely to select applicants that were previously funded under the FY 1992 NOFA, issued July 6, 1992 (57 FR 29774). This selection decision will be pursuant to the Secretary's authority to ensure geographic distribution, to ensure available funds are used effectively to promote the purposes of Title X. (See Section 3.7, Rating Factors (Category I), for additional discussion of this consideration for selection.) Because Category II grants cover new activities different from grants previously funded, this authority would not provide the sole basis for nonselection of a Category II applicant; therefore, States that received grants under the FY 1992 NOFA are encouraged to apply for Category II grants under this NOFA.

(b) *Capability*. Applicants shall demonstrate the capability to identify housing units with significant lead-based paint hazards, oversee the safe and effective conduct of the hazard reduction, and assure the future availability of hazard-reduced units to low- and moderate-income persons.

(c) *Eligible Housing Units*. See the definition for priority housing and Appendix D for the enumeration of HUD housing programs that may include eligible priority housing units.

(d) *Certified Performers*. Funds shall be available only for projects conducted by contractors and inspectors who are certified, and workers who are trained, through a federally or State-accredited program that is at least as protective as the Federal certification program standards outlined in Appendix E to this NOFA.

(e) *Eligible Activities*. The following direct and support activities are eligible under this grant program:

(1) *Direct Project Elements* (whether activities of the grantee or subgrantees or other subrecipients):

- Inspection and testing of housing constructed prior to 1978 to determine the presence of lead-based paint, lead dust, or leaded soil through the use of portable X-ray fluorescence analyzers or approved laboratory analyses and lead dust through wipe testing.

- Abatement of lead-based paint hazards by means of removal, enclosure, encapsulation, or replacement methods.

- Less-than-full-abatement techniques for programs that apply a differentiated

set of resources to each unit, dependent upon conditions of the unit and the extent of hazards.

- Temporary relocation of families and individuals during the period in which hazard reduction is conducted and until the time the affected unit receives clearance for reoccupancy.

- Blood testing of children under the age of six residing in units undergoing inspection or hazard reduction.

- Blood testing and air sampling to protect the health of the hazard-reduction workers, supervisors, and contractors.

- Other housing rehabilitation activities under this program that are specifically required to carry out effective abatement and without which the abatement could not be effected. Grant funds from this program may also be used for the lead-based paint hazard-reduction component in conjunction with other housing rehabilitation programs.

- Pre- and post-hazard reduction wipe testing.

- Engineering and architectural costs that are necessary to, and in direct support of, abatement.

- Interim control of lead-based paint hazards priority housing.

- Establishment of a community education program on lead hazards.

- Liability insurance for lead-hazard reduction activities.

- Data collection, analysis, evaluation, and preparation of a case study at the conclusion of grant activities. This direct project activity includes compiling and delivering such data as may be required by HUD's independent evaluation and research program. For estimating purposes, an applicant shall devote 3 percent of the total grant sum for this purpose. Note that this function is *not* included in administrative costs, for which there is a separate 10 percent limit.

- Performing risk assessments and inspections in priority housing.

- Pre- and post-hazard reduction soil testing.

(2) *Support Elements*:

- Administrative costs of the grantee (maximum of 10%) (see Appendix B for definition).

- Program planning and management costs of subgrantees and other subrecipients.

- For Local Governments only (for States, the following activities may be undertaken as direct project elements):

- (i) Contributions to the State for the establishment of State data-collection mechanisms to collect and publish data on the extent of all public and private lead-hazard reduction activities in the State, including numbers and dollar

volume of activities and number and kinds of certified performers;

- (ii) Contributions to the State for the establishment of State funding mechanisms to assist testing and abatement efforts, with particular emphasis on assistance to priority housing; and

- (iii) Contributions to the State and/or County for the State and/or County Government to design and develop standard land-record mechanisms to be used by county governments to record permanently, properly by property, the completion and approval of lead-hazard testing and reduction activities, so that future occupants or purchasers may have certain knowledge of the lead-hazard condition of the property. The land-record mechanism should include an identification of the lead-hazard reduction method: permanent abatement, partial abatement, or interim control, and should trigger a notice to housing inspection officials upon the occurrence of the expected expiration of the effectiveness of a less-than-permanent abatement method.

(f) *Ineligible Activities*. Grant funds shall not be used:

(1) To purchase capital equipment, except for XRF analyzers when it can be demonstrated that there are no XRF analyzers available locally. If purchased, the XRF analyzers shall remain the property of the grantee at the conclusion of the project. Funds may be used, however, to rent equipment specifically for the abatement project. If leased equipment, other than XRF analyzers, becomes the property of the grantee as the result of a lease arrangement, the leased equipment becomes the property of the Federal government at the end of the grant period. However, that form of lease arrangement should be avoided whenever less expensive, straight-lease arrangement is possible; or

(2) For chelation or other medical treatment costs. Funds used to cover these costs may be counted as part of the required local matching contribution, but must be obtained from other sources.

(g) *Limitations on the use of assistance*. (1) Category I grant funds are to be used to evaluate and reduce the hazards of lead-based paint in residential units constructed prior to 1978. However, if the jurisdiction has banned the sale or use of lead-based paint prior to 1978, the applicant jurisdiction may request the Department to designate an earlier date. These units must be priority housing, as defined in this NOFA.

(2) Pursuant to the Coastal Barrier Resources Act (16 U.S.C. 3501), grant funds may not be used for properties

located in the Coastal Barrier Resources System.

(3) Under the Flood Disaster Protection Act of 1973 (42 U.S.C. 4001-4128), grant funds may not be used for construction, reconstruction, repair or improvement of a building or mobile home, including lead-based paint abatement that involves permanent containment or encapsulation of lead-based paint or replacement of lead-painted surfaces or fixtures or interim control measures that involve repairs, on properties located in an area identified by the Federal Emergency Management Agency (FEMA) as having special flood hazards unless:

(A) The community in which the area is situated is participating in the National Flood Insurance Program in accordance with the applicable regulations (44 CFR parts 59-79), or less than a year has passed since FEMA notification regarding these hazards; and

(B) Flood insurance on the property is obtained in accordance with section 102(a) of the Flood Disaster Protection Act (42 U.S.C. 4012a(a)). Applicants are responsible for assuring that flood insurance is obtained and maintained for the appropriate amount and term.

(4) The National Historic Preservation Act of 1966 (16 U.S.C. 470) (NHPA) and the regulations at 36 CFR part 800 apply to the abatement activities that are to be undertaken pursuant to this NOFA. HUD is responsible for satisfying the obligation to make a historic preservation finding under section 106 of the NHPA and the regulations. Recipients are to assist HUD in making the required findings by providing information to document the determination. This information includes the address of the property, and either a complete description of the activities to be carried out or an indication that no external changes are proposed and the property is not listed on the National Register of Historic Places or eligible for inclusion on the National Register (as required by section 106 of the NHPA). In the alternative, the recipients may provide evidence of consultation with the State Historic Preservation Officer (SHPO).

(5) The applicant shall comply with the requirements of the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 (URA) (42 U.S.C. 4201-4655). These policies are described in HUD Handbook 1378, Tenant Assistance, Relocation and Real Property Acquisition. No displacement (a permanent, involuntary move) is anticipated. However, to preclude avoidable claims for relocation assistance, all occupants (owner and

tenants) shall, as soon as feasible, be notified in writing that they will not be displaced by the lead-based paint abatement program. Tenants and owners-occupants will be required to relocate temporarily to permit the lead-based paint abatement program to be carried out. All conditions of the temporary relocation must be reasonable. The policy regarding temporary relocation costs for owner-occupants who elect to participate in abatement is a matter of grantee discretion. With respect to tenants required to relocate temporarily, at a minimum the tenant shall be provided:

(A) Reimbursement for all reasonable out-of-pocket expenses incurred in connection with the temporary relocation, including the cost of moving to and from the temporarily occupied housing and any increase in monthly rent/utility costs at that housing; and

(B) Appropriate advisory services, including reasonable advance written notice of the date and approximate duration of the temporary relocation; the address of the suitable, decent, safe, and sanitary dwelling to be made available for the temporary period; and the reimbursement provisions of paragraph g(5)(A) of this section.

(6) The Resource Conservation and Recovery Act of 1976 (42 U.S.C. 6901 et seq.) (RCRA), administered by the EPA, shall govern all waste disposal resulting from abatement.

(7) The applicant shall observe the procedures for worker protection established in Chapter Eight of the Interim Guidelines. To the extent that the Occupational Health and Safety Administration (OSHA) requirements at 58 FR 26590 (May 4, 1993), or any other OSHA requirements published prior to the start of actual abatement work at any individual project site, are more stringent than the Interim Guidelines, those more stringent OSHA standards shall govern.

(8) Grantees shall be required to meet the post-abatement wipe-test clearance thresholds contained in the HUD Interim Guidelines (see Appendix A). Wipe tests shall be conducted by a certified inspector who is independent of the abatement contractor. Dust wipe samples will be analyzed by an accredited laboratory. Units shall not be reoccupied until acceptable clearance levels are achieved.

(9) Abatement methods that will not be allowed are: open-flame burning, dry scraping, uncontrolled abrasive blasting, or machine sanding without HEPA attachments. The applicant is cautioned that methods that generate high levels of lead dust, such as abrasive sanding, shall be undertaken only with requisite

worker protection, containment of dust and debris, and suitable clean-up.

3.5 Objectives and Requirements

(a) *Generally.* Grantees will be afforded considerable latitude in designing and implementing the methods of lead-based paint hazard reduction to be employed in their jurisdictions. HUD is interested in promoting innovative and creative approaches that result in the reduction of this health threat for the maximum number of low- and moderate-income residents, and that demonstrate replicable techniques that are better, faster, less expensive, or more effective than current practices. Flexibility will be allowed within the parameters established below. It is critical that procedures for all phases of testing and abatement be clearly established in writing in the planning stage, and then adhered to by all applicants, recipients, and their contractors. It is only in this manner that research and evaluation of the safety and cost-effectiveness of the methods employed can be undertaken.

Proposed methods requiring a variance from the standards of procedures cited below will be considered on their merits in a separate HUD review and approval process after the grant award is made and a specific justification has been presented. If a grant application is dependent on a variation from the procedures cited below, but otherwise is of award quality, it will be made as a conditional grant, subject to approval of the request for variation. When such a request is made, either in the application or during the planning phase, HUD intends to consult with experts from both the public and private sector as part of its final determinations and will document its findings in an environmental assessment. Approval of any proposed modifications will not involve a lowering of standards that would have a potential to affect adversely the health of residents or workers.

(b) *Testing—data collection.* Grantees will be required to collect the data necessary to document the various methods employed in order to determine the relative cost and effectiveness of these methods in reducing lead-based paint hazards. Pre- and post-abatement environmental sampling and blood testing of children under the age of six shall be a major determinant of effectiveness.

(c) *Testing—schedule.* In developing the application cost proposal, applicants shall include costs for the testing cycle for each dwelling that will undergo lead-based paint detection and hazard reduction, as follows:

(1) *XRF on-site (or supplementary laboratory) testing*: Pretest every room or area in each dwelling unit planned for hazard abatement;

(2) *Blood testing*: Of each occupant who is a child under six years old, according to the following schedule:

(A) Pretest before abatement work begins; and

(B) Test within 4 weeks of reoccupancy after completion of work, and at 6- and 12-months after reoccupancy.

(3) *Dust testing*: Of every room or area in each unit, according to the following schedule:

(A) Pretest before abatement work begins;

(B) Clearance testing before reoccupying an abated unit; and

(C) Test at 6- and 12-months after the unit is reoccupied.

(d) *Testing—guidance*. (1) *Generally*. All testing and sampling shall conform to the HUD Interim Guidelines. Note that it is particularly important to provide this full cycle of testing for less-than-full-abatement hazard reduction, even though the testing itself may become a substantial part of the cost per unit. It will be from this testing that the Department will be able to establish standards and expectations for the effective period of lead-safe conditions before the potential recurrence of any active lead hazard.

(2) *Required Thresholds for Hazard Reduction*. While the Department's Interim Guidelines (see Appendix A) employ two hazard-reduction thresholds, one milligram per square centimeter (1.0 mg/cm²) or 0.5 percent by weight, applicants may utilize other thresholds, provided that the alternative threshold is justified adequately and is accepted by HUD. The justification must state why the applicant believes the proposed approach will provide satisfactory health protection for occupants, and must discuss cost savings and benefits expected to result from using the proposed approach.

(3) *Surfaces to be abated*. HUD's Interim Guidelines currently require the abatement of all interior and exterior painted or varnished surfaces having a lead content above the permitted threshold. However, in accordance with the new guidance from Title X, the applicant may choose to abate fewer surfaces or apply any other partial-abatement or hazard-reduction techniques, provided that an adequate rationale is presented to and accepted by HUD. The rationale must state why the applicant believes the proposed approach will provide satisfactory health protection for occupants and at the same time, provide cost savings or

other benefits, and therefore would support the new Title X concept.

(4) *Clean-up*. The applicant may employ post-abatement clean-up procedures that differ from the procedures in the HUD Interim Guidelines, provided that an adequate justification is established and accepted by HUD. The justification must state why the applicant believes the proposed approach will provide satisfactory health protection for occupants, and must discuss cost savings and benefits expected to result from using the proposed approach.

3.6 Environmental Review

Because it is likely for many applicants that at the time of application submission, only neighborhoods or other locators of the housing to be abated will be known, rather than specific properties, the Department has determined that it will perform an environmental review in accordance with 24 CFR part 50 at the time each property is proposed for abatement under the grant, rather than before HUD approval of the grant.

HUD's environmental review will be limited to satisfying its obligation to make an historic preservation finding under section 106 of the NHPA and the implementing regulations. HUD has determined that lead-based paint abatement falls within a categorical exclusion (see 24 CFR 50.20(c)) from review under the National Environmental Policy Act and is not subject to the remaining authorities listed in 24 CFR 50.4, with the exception of the funding limitations under the Coastal Barrier Resources Act and the flood insurance purchase requirements of the Flood Disaster Protection Act of 1973. The applicant is responsible for compliance with these funding limitations and flood insurance purchase requirements.

3.7 Rating Factors

HUD will use the following technical and financial criteria, subject to the qualification discussed in the second paragraph of this section, to rate and rank applications received in response to this NOFA. The technical quality of an application will be rated, and then the strength, quality, and completeness of the financial and resources plan will be used to assess how well the technical plan is likely to be carried out using the available resources. The total number possible for the rating factors is 115 points.

Applicants are advised, however, that in selecting grantees under this NOFA, the Secretary is unlikely to select applicants who were previously funded

under the FY 1992 NOFA, issued July 6, 1992 (57 FR 29774). This selection prerogative will be exercised under the Secretary's authority to ensure that available funds are used effectively and to promote the purposes of Title X. See, section 1011(d)(5) of Title X (42 U.S.C. 4852(d)(5)). (Because Category II grants cover new activities different from grants previously funded, this authority would not provide the sole basis for nonselection of a Category II applicant; therefore, States that received grants under the FY 1992 NOFA are encouraged to apply for Category II grants under this NOFA.)

(a) *Strategy*. (55 points)—The quality of the proposed lead-based paint hazard reduction strategy. Strategies that promote new or innovative, cost-effective methods will be awarded a higher number of quality rating points than those of otherwise equal quality that propose only conventional testing and hazard-reduction techniques. The strategy should include:

(1) The hazard-reduction program, including selection of subgrantees and other subrecipients, abatement/hazard reduction methods, financing, community education, temporary relocation, and the degree to which the strategy focuses on households in priority housing with children under the age of 6 (15 points);

(2) A management and budget plan for the whole grant and for each major component funded directly from the grant. The plan shall include a year-by-year spreadsheet budget for the total grant, a task-by-task spreadsheet budget for the total grant, and an overall source and use of funds diagram (see Appendix C for a sample; no form is provided because programs vary too widely. Provide a year-by-year budget for each major subtask shown on the diagram.) The plan shall include a narrative describing how the parts of the grant program will be coordinated and managed (14 points);

(3) A rationale as to why the testing and hazard-reduction methods proposed for the housing units selected in this project are more cost-effective when compared with other available methods (relate treatment to level of hazard) (10 points);

(4) The identification, inspection and testing of priority housing to be treated. Housing recently inspected (within 12 months of grant) and identified prior to the date of the grant as having lead-based paint may be included (9 points); and

(5) A program for blood screening of young children and, if necessary, referral for medical treatment (7 points).

(b) *Applicant Capacity and Commitment to Hazard Reduction. (40 points)*—The capacity of the applicant to initiate and carry out the lead-based paint testing and hazard-reduction program successfully within the time frames set forth in Table 1, Category I Grants: Program Deadlines, in this NOFA. Show that the proposed staff skills match the proposed program of work described. Elements to be considered include:

(1) Demonstrated knowledge and experience of the proposed project manager in planning and managing large and complex interdisciplinary programs involving housing rehabilitation, public health, and environmental management. The percentage of time of the project manager to be devoted to this project is a significant factor, and must be disclosed in the application. (15 points);

(2) Demonstrated knowledge and experience of the staff assigned to this

project in carrying out these undertakings, including the percentage of time each person will devote to the project (15 points); and

(3) Institutional capacity, demonstrated by the experience and continuing capacity of the jurisdiction to initiate and implement similar environmental and housing projects. Applicant should describe previous related efforts and the current capacity of its agencies (10 points).

TABLE 1.—CATEGORY I GRANTS: PROGRAM DEADLINES

Status of state certification program	Time allowed—in months				
	Legislation enacted	Grace period	Planning period	Conduct testing and hazard reduction	Total time for program
Legislation already exists	n/a	n/a	6	18	24
Enact legislation	12	n/a	6	18	36
Fail to enact legislation	12	6	6	18	42
Enact, but fail to implement legislation	12	6	6	18	42

(c) *Applicant's Matching Contribution and Other Resources (10 points)*—At a minimum, the applicant shall provide a matching contribution of at least 10 percent of the requested grant sum. That contribution may be in cash or in kind. In-kind contributions shall be given a monetary value. Community Development Block Grant funds may be considered part of the matching contribution, but only when they are specifically dedicated to an integral part of the project. This rating factor provides points only for additional resources that exceed the minimum required 10% match. Each source of contributions, both for the required minimum and additional amounts, shall be made in a letter of commitment from the funding entity, whether a public or private source, and shall describe the contributed resources that will be used in the program. Absence of required letters offering specific details will result in a reduced rating under this factor.

(d) *Community and Private Sector Participation (10 points)*—The extent to which the applicant has enlisted the broad participation of neighborhood, community, and nongovernmental organizations; the private sector; and other governmental units, through consultation, employment, or other activities, as evidenced by the names and proposed roles of these participants and letters of commitment. Absence of letters of participation will result in a reduced rating under this factor.

Section 4. Category I Grants: Application Process

4.1 Submitting Applications For Category I Grants

To be considered for funding under a Category I Grant, an original and two copies of the application must be physically received in the Office of Lead-Based Paint Abatement and Poisoning Prevention (OLBPAPP), Department of Housing and Urban Development, room B-133, 451 Seventh Street, SW., Washington, DC 20410, no later than 3 p.m. (Eastern Time) on Wednesday, August 18, 1993. Electronic (FAX or equivalent transmittal) application is not an acceptable transmittal mode.

The above-stated application deadline is firm as to date and hour. In the interest of fairness to all competing applicants, the Department will treat as ineligible for consideration any application that is received after the deadline. Applicants should take this factor into account and make early submission of their materials to avoid any risk of loss of eligibility brought about by unanticipated delays, equipment breakdown, or delivery-related problems.

HUD will review each Category I application to determine whether it meets all of the threshold criteria established under Section 4.2 of this NOFA. Nonresponsive applications will be declared ineligible for further consideration. Applications that meet all of the threshold criteria will be

eligible to be scored and ranked, based on the total number of points allocated for each of the rating factors in Section 3.7 of this NOFA.

HUD intends to fund the highest ranked applications within the limits of funding availability, but reserves the right to advance other eligible applicants in funding rank, if necessary, to assure geographic diversity, to promote the purposes of Title X, broaden the range of hazard-reduction alternatives to be tested, or enhance data reliability.

4.2 Threshold Requirements for Category I Grants

(a) *Purpose.* The application must be for funds to evaluate and reduce lead hazards in priority housing (see Appendix D for program-by-program listing of eligible HUD-associated housing programs).

(b) *Eligible Applicants.* An applicant must be a State or unit of local government that has an approved Comprehensive Housing Affordability Strategy (CHAS) under section 105 of the NAHA (42 U.S.C. 12705) that includes a lead-hazard reduction element (instructions for preparing a lead-hazard reduction element are included in Appendix F. Current CHAS regulations were published in the Federal Register on September 1, 1992, at 57 FR 40038, as amended, in part, on March 12, 1993 at 58 FR 13686. Applicants under this NOFA are permitted to use an abbreviated housing strategy, as set forth in § 91.25 of the

CHAS regulations). The applicant must submit a certification that the application is consistent with the CHAS that has been submitted to HUD and a copy of the lead-hazard reduction element. Prior to or concurrently with the application deadline, the applicant must amend its CHAS in accordance with 24 CFR 91.63 by submitting a copy of the lead-hazard element to the Community Planning and Development Division of the appropriate HUD Regional or Field Office and informing the public of the change through publication of a description of the element.

(c) *Matching Contribution.* Each applicant shall provide a matching contribution of at least 10 percent of the requested grant sum.

(d) *Financial responsibility.* For purposes of this program, HUD has determined that all eligible governmental entities are deemed to meet the requirements for accounting and financial responsibility. The applicant shall be responsible for the performance of all consortium members, partners, contractors, joint venture participants, subgrantees, and other subrecipients.

(e) *Identification of significant hazard housing.* The applicant must demonstrate a commitment to focus its efforts on the identification of housing units with significant lead-based paint hazards, particularly among dwellings for lower income families, so as to concentrate its resources on the greatest needs first.

(f) *Safe and effective conduct of the abatement.* The applicant must demonstrate willingness and readiness to oversee the safe and effective conduct of the hazard-reduction work, as provided in the application kit.

(g) *Contractor certification program requirement.* Each applicant must carry out its hazard reduction program under an operational State-accredited or Federal certification/training program that is at least as protective as the Federal Certification Program standards outlined in Appendix E. The Department suggests that any State applicant or the State government of any local government applicant examine the support that will be available under Category II grants (see Section 8 and Appendix E of this NOFA). The following additional provisions apply to this requirement:

(1) To receive a grant an applicant must use contractors certified and workers trained within a State that currently has a lead-based paint certification/training program acceptable to HUD and the EPA. If the State in which the applicant is located

has such a program, the applicant should furnish copies of the enabling statutes and regulations, as well as other appropriate documentation (e.g., certificates and licenses), as proof of the program.

(2) Other applicants may be approved for a grant with the following provisions:

(A) An applicant shall furnish at the time of application, letters of intent to establish and implement a certification program. The enabling legislation shall be enacted within 12 months of the Category I application deadline date, and the designated agency implementing the program shall have completed initial training sessions within 18 months from the deadline date of the Category I application date. Letters of intent shall be from the Governor of the State and an authorized representative of the legislative body in the State. The letters shall set forth their plans to make a good faith effort to enact, within 12 months of the Category I application deadline date, enabling legislation that would establish or designate an appropriate department or office; to put an operating staff in place; and to promulgate appropriate regulations and complete the initial training sessions within 18 months of the Category I application date. These letters of intent shall be carried over to the grant agreement and become part of the grantee's assurances under it. (Note that the 12-month and 18-month implementation periods for this NOFA have a start date that is earlier than for the previous NOFA funding round. The shorter compliance period conforms to Title X, which sets an April 28, 1994, deadline for publication of Federal certification program requirements.)

(B) There may be local government applicants in States that have furnished letters of intent and have made a good faith effort to carry out that intent, but whose State governments have been unable to comply with the 12-month or 18-month time table. These local governments may, with HUD approval, choose to use workers and contractors certified or licensed under accredited programs of other States. After the 12- or 18-month deadline has been missed, the local government applicant shall have an additional 6-month grace period to arrange for the use of qualified workers/contractors and to commence the actual on-site testing and abatement activities.

(C) Except as provided in paragraph (g)(2)(B) of this section, if the commitment to establish a certification/training program is not fulfilled within the stated time, the conditional grant agreement shall immediately terminate.

(D) Any unsuccessful applicant under the July 6, 1992 NOFA (57 FR 29774) may include copies of the gubernatorial and legislative letters of intent that were submitted with its previous application (if the signatories are still in office), along with a report on the progress made after the execution of those letters of intent.

(h) *Continued Availability of Hazard Reduced Housing to Lower Income Families.* Units in which lead hazards have been treated under this program shall then be occupied by and continue to be available to low- and moderate-income residents as defined under section 215 of the NAHA.

(i) *Cooperation With Related Research and Evaluation.* Applicants shall cooperate fully with any research or evaluation sponsored by HUD and associated with this grant program, including preservation of the data and records of the project and compiling requested information in formats provided by the researchers or evaluators. This cooperation may also include the compiling of certain relevant local demographic, dwelling unit, and participant data not contemplated in applicant's original proposal. Participant data shall be subject to Privacy Act protections. For estimating purposes, an applicant shall devote three percent of the total grant sum for data collection and evaluation purposes, as discussed in the Section 3.4, Eligibility, of this NOFA.

Section 5. Category I Grants: Checklist of Application Submission Requirements

5.1 Applicant Data

Applicants must complete and submit applications in accordance with the instructions contained in the application kit. The following is a checklist of the application contents that will be specified in the application kit:

(a) The name, mailing address, telephone number, and principal contact person of the applicant. If the applicant has consortium associates, partners, major subcontractors, or joint venture participants contributing resources to the project, similar information shall also be provided for each of them.

(b) Proof of State accreditation requirements for lead-based paint certification/training programs applicable to the contractors, inspectors, and workers that will be used by the applicant, or letters of intent from both the Governor and an authorized representative of the legislative body stating that a good faith effort will be

made to have a certification/training program authorized within 12 months, and operational within 18 months, of the Category I Grant application deadline date (see section 4.2(g) of this NOFA regarding this requirement).

(c) Evidence of the applicant's commitment to eliminating or reducing significant lead-based paint hazards in housing as detailed in the applicant's strategy for lead-based paint hazard reduction (see the first rating factor, Strategy in Section 3.7 of this NOFA).

(d) A detailed description of the funding mechanism, selection process, and other proposed activities that the applicant plans to use to assist the direct performers of hazard reduction activities under this grant.

(e) The management and task budget plan that includes a summary diagram (see Appendix C) showing the source and use of all grant funds. The plan shall detail the proposed costs and schedules for starting and completing each task or major subset of project activities. The budget shall provide for each task and major subtask that is funded by the grant. All major tasks and subtasks, including data collection (allow 3% of the total grant sum requested), should be estimated (even though not precisely known). There shall be a separate estimate for the overall grant management element, "Administrative Costs," which are more fully defined in Appendix B. The budget shall include not more than 10 percent for administrative costs and not less than 90 percent for direct project elements (including data collection; see paragraph (e), Eligible Activities, in Section 3.4 of this NOFA). Estimates are not required for activities fully funded by local matching funds, but those funding sources should be shown as lump-sum amounts in the Source and Use diagram (see Appendix C).

(f) Evidence of a continuing capacity of the applicant to undertake a lead-based paint testing and abatement program safely and effectively.

(g) Information itemizing what constitutes the applicant's matching contribution, including values placed on donated in-kind services; letters or other evidence of commitment from donors; and the amounts and sources of coordinated resources.

(h) Information on the names and proposed roles of local participating community- or neighborhood-based groups or organizations, including local businesses.

(i) Completed Forms HUD-2880, Applicant/Recipient Disclosure/Update Report, and SF-LLL, Disclosure of Lobbying Activities, where applicable

(see section on Other Matters in this NOFA).

(j) Standard Forms SF-424 and 424-B, and other certifications and assurances listed in section 5.3 of this NOFA.

(k) A copy of the applicant's lead-hazard reduction element for its Comprehensive Housing Affordability Strategy (CHAS).

5.2 Proposed Activities

(a) *Affected population to be served.* The applicant shall describe the size and general characteristics of the target housing within its jurisdiction, including a description of the housing's location, condition, and occupants, and a current estimate of the number of children under the age of six in these units. Maps should be included. First preference shall be given to priority housing units. Vacant housing that subsequently will be occupied by low-income renters should also be included in this description. In addition, as a measure of its ongoing commitment to lead-based paint programs, the applicant shall provide information on the number of children diagnosed as being lead poisoned within the previous five years and the remedial measures that were taken to respond to these diagnoses.

(b) *Discussion of lead-based paint activities.* The applicant shall provide a reasoned discussion of the proposed hazard reduction activities, including, but not limited to, information on the following:

- Overall hazard reduction strategy, including priority setting;
- Specific neighborhoods, census tracts or other locators of the housing units targeted for abatement (area and local maps shall be included);
- Inspection and testing of all lead-based paint-hazard housing to be treated as part of this project;
- Blood testing of children under the age of six, and medical referral for children found to have elevated blood-lead levels;
- Hazard-reduction methods, including interim controls, in-place-management, less than full abatement and full abatement. Include lead-based paint hazard reductions in housing undergoing renovation funded by other sources, but included as part of this project;
- Community education;
- Relocation;
- Coordination and integration with public health and housing programs to effect lead-based paint hazard reduction;
- Data collection, documentation, and evaluation;

• Mechanisms that the applicant proposes to employ to provide financial assistance to low- and moderate-income owners and low-income renters under this grant program for abatement. The applicant may provide the services through a variety of programs, including grants, equity, loans, investment or seed money for non-profit performers' revolving loan funds, loan funds, loan guarantees, interest write-downs, or other forms of assistance that may be approved by the Department. Program income from loan repayments may be used only for hazard-reduction related activities; and

• Management and staffing of the project, including the extent of time commitments and areas of specialization and expertise.

5.3 Certifications and Assurances

The following certifications and assurances apply to applications for Category I grants:

(a) The application shall contain an assurance that the applicant will comply with the environmental laws and authorities at 24 CFR 50.4, and that it will:

(1) Supply information necessary for HUD to perform any required environmental review of each property;

(2) Carry out mitigating measures required by HUD or select alternate eligible property; and

(3) Not commit HUD or local funds to, or carry out, any program activities for any property until HUD approval is received.

(b) The application shall contain a certification that the applicant will comply with the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970; implementing regulations at 49 CFR part 24; and HUD Handbook 1378, Tenant Assistance, Relocation and Real Property Acquisition.

(c) The application shall be in compliance with Federal civil rights laws and requirements.

(d) The application shall contain assurances that the applicant will comply with the requirements of the Fair Housing Act (42 U.S.C. 3601-19); Executive Order 11063; Title VI of the Civil Rights Act of 1964, pertaining to equal opportunity and nondiscrimination in housing; and all regulations issued in accordance with these authorities.

(e) The application shall include assurances of nondiscrimination on the basis of age or handicap, in compliance with the Age Discrimination Act of 1975, section 504 of the Rehabilitation Act of 1973, and all regulations issued pursuant to these authorities.

(f) The application shall contain a certification that the applicant will comply with the requirements of section 3 of the Housing and Urban Development Act of 1968, pertaining to the provision of economic opportunities for low- and very low-income persons, and implementing regulations at 24 CFR part 135.

(g) The applicant shall assure that it will conduct dust-wipe testing in all units in which lead-hazard reduction occurs, both prior to and immediately after the hazard-reduction treatment and cleanup, and that the applicant will conduct dust-wipe testing at 6- and 12-months after abatement.

(h) The applicant shall assure that it will test and record the blood-lead level of all children under the age of six occupying affected units prior to abatement. The applicant shall also assure that it will test and record blood-lead levels of affected children at six months and at one year after abatement is completed. Abatement of a unit shall not commence until blood-lead tests have been administered to children under the age of six occupying the unit. Children determined to have elevated blood-lead levels, using the CDC, October 1991 Guidelines (see Appendix A to this NOFA), shall be provided appropriate medical treatment, as set forth by the CDC. If there is an existing, funded program, the costs of blood testing and medical follow-up are eligible for inclusion in the computation of the other resources contribution.

(i) The applicant shall assure that it will cooperate with any federally sponsored or endorsed monitoring or evaluation efforts carried out in conjunction with the applicant's lead-based paint activities under this program. This includes providing documentation in the formats requested of the practices and costs of all testing, inspection, and hazard-reduction work, as well as comparative costs and cost-effectiveness, where a claim for an innovative or improved method has been made. This may also include compiling certain relevant local demographic, dwelling unit, and participant data that may not have been contemplated in applicant's project activities, in order to meet HUD's research and evaluation needs. Participant data shall be subject to Privacy Act protection.

(j) The applicant shall assure that this application represents an expansion of the delivery of testing and abatement services and does not replace existing resources dedicated to any ongoing project.

(k) The application shall contain any other assurances that HUD has included in the application kit under this NOFA.

Section 6. Category I Grants: Corrections to Deficient Applications

HUD will notify an applicant, in writing, shortly after the expiration of the NOFA response deadline, of any minor deficiencies in the application that are not of a substantive nature, such as an omitted certification or illegible signature. The applicant shall submit corrections, which must be received at the Office of Lead-Based Paint Abatement and Poisoning Prevention within 21 calendar days from the date of HUD's letter notifying the applicant of any minor deficiencies. Electronic (FAX) transmittal is not an acceptable transmittal mode. Corrections to minor deficiencies will be accepted within the 21-day time limit. Applicants that do not make timely response to requests for deficiency corrections shall be removed from further consideration for an award.

Applicants shall only be permitted to correct those deficiencies determined by HUD to be minor. Deficiencies determined by HUD to be substantive may not be corrected.

Section 7. Category I Grants: Administrative Provisions

7.1 Obligation of Funds

(a) *Provision of funds.* Funding shall be provided on a cost-reimbursable basis not to exceed the amount of the grant, except as otherwise provided in Sections 7.2 and 7.3 of this NOFA. There shall be set aside from the final grant payment sufficient funds to pay for the 6-month and 12-month post-abatement testing for blood-lead levels and dust-wipe levels in the dwelling, as provided in paragraph (c) of this section.

(b) *Advance funds.* After a grant agreement has been executed with a grantee that has an acceptable, existing State certification program (in compliance with Appendix E requirements), HUD may, upon written request, provide to the grantee a cash advance that shall not exceed 10 percent of the grant amount and shall be limited to the minimum amount needed for the actual, immediate cash requirements of the grantee in carrying out the purposes of this NOFA. Similarly, those grantees whose awards are conditioned upon proof of newly-executed executive or legislative authority to carry out the requirements of this NOFA may request advances of funds, not to exceed 5 percent of the total grant amount, for purposes of implementing certification or licensing requirements and preparing

certain planning documents for HUD review and approval. Advance funds may be divided between administrative costs and direct project costs. The applicant shall provide justification for the division, and HUD may accept or modify the applicant's proposed division.

(c) *Availability of remaining funds.* HUD will not make additional payments, beyond the advance funds described in paragraph (b) of this section, from the amount awarded to a grantee until the grantee's proposed contractors and workers have met the certification and training requirements of a State-accredited program. All additional payments will be made on a cost-reimbursable basis, except that a 10 percent final payment shall be made upon completion of all tasks and delivery of an acceptable final report, subject to the set-aside for post-testing described in paragraph (a) of this section. The grantee shall specify in its request for final payment the amount of funds to be set aside from the final 10 percent for the 6- and 12-month post-abatement dust-wipe and blood tests. When results of these tests are forwarded to HUD, the testing set-aside funds will be released by HUD to the grantee.

7.2 Increases of Awards

After the signing of the grant agreement and initial obligation of funds, HUD will not increase the grant sum or the total amount to be obligated based upon the original scope of work. Amounts awarded may only be increased as provided in section 7.3, Deobligation, of this NOFA.

7.3 Deobligation

(a) *Reasons for deobligation.* HUD may deobligate amounts for the advance or grant if proposed activities are not initiated or completed within the required time after selection. The grant agreement will set forth in detail other circumstances under which funds may be deobligated and other sanctions imposed.

(b) *Treatment of deobligated funds.* HUD may undertake any one, or a combination, of the following actions, with respect to deobligated funds:

- (1) Readvertise the availability of funds that have been deobligated under this section in a new NOFA;
- (2) Reconsider applications that were submitted in response to the most recently published NOFA, and select additional applications for funding with deobligated funds. These selections will be made in accordance with the selection process described in the applicable NOFA;

(3) Fund supplemental applications from existing grantees for the performance of expanded scopes of work that may be of benefit to the overall program; and

(4) For deobligated funds that total less than a minimum grant amount (\$1 million), issue a solicitation to provide technical assistance or other program support services.

7.4 Reports

The grantee shall submit the following types of reports (this requirement is also applicable to Category II grantees, in section 8.8 of this NOFA):

(a) *Annual reports.* The grantee shall submit to HUD a report for any fiscal year in which the grantee expends grant funds. Each report shall be due six weeks after the end of the Federal Fiscal Year (September 30). The report shall:

(1) Describe the use of the amounts received;

(2) State the number of risk assessments and the number of inspections conducted in residential dwellings;

(3) State the number of residential dwellings in which lead-based paint hazards have been abated, organized by method of abatement used;

(4) State the number of residential dwellings in which lead-based paint hazards have been reduced through interim controls; and

(5) Provide any other information that the Secretary determines to be appropriate.

(b) *Progress Reports.* The grantee shall submit regular progress reports in accordance with HUD's Management Reporting System. These progress reports shall consist of graphic reports showing expenditures and technical progress to date, compared with the original plan, and a narrative describing important events and problems encountered during the period. The progress reports:

(1) Shall be filed quarterly during the planning period (and during the waiting period for the establishment of a State Certification Program);

(2) Shall be filed monthly during the active abatement-work period; and

(3) May revert to being filed quarterly after completion of active abatement work.

(c) *Final Report/Case Study.* The grantee shall submit a final report/case study in accordance with the procedures of HUD's Management Reporting System. The report shall summarize the applicant's plans, execution of the plans, and lessons learned. The report need not be lengthy, but should be of a quality and detail to

provide a free-standing description to any outside reader of all of the applicant's work and achievements under the grant.

Category II NOFA

Section 8. Category II Grants: Purpose and Substantive Description

(Category II grants are restricted to State applicants seeking assistance in establishing and implementing a State Certification Program. State applicants may apply either under Category I or Category II, or under both categories. Because Category II grants cover new activities different from grants previously funded, unlike for Category I grants, receipt of funding under the FY 1992 NOFA would not provide the sole basis for nonselection of a Category II applicant. States that received grants under the FY 1992 NOFA are encouraged to apply for Category II grants under this NOFA.)

8.1 Category II Grants: Purpose and Authority

Category II grants are assist applicant State governments (and the Virgin Islands, Puerto Rico, and the District of Columbia) in establishing and implementing State Certification Programs, once they have enacted enabling legislation acceptable to HUD. The enabling legislation must be consistent with the currently identified elements of the EPA's Model State Plan (as listed in Appendix E of this NOFA, and as being developed under sections 402 and 404 of the Toxic Substances Control Act (TSCA) (added by section 1021 of Title X); Appendix E contains an extended discussion of program elements). Category II grants are authorized under section 1011(g) of Title X. Up to \$3,000,000 will be available in FY 1993; approximately 15 to 18 grants, not to exceed \$200,000 each, are expected to be awarded in FY 1993.

Just as many building inspection departments are wholly or partially self-supporting from permits and license fees, it is expected that State lead-based paint certification programs can become at least partially self-supporting. During the startup of such efforts, however, there may be a period before potential revenues achieve expected levels. The Category II grants are intended to help States bridge that gap, by providing the initial seed money for the implementation and staffing of certification programs.

8.2 Background

(a) *Policy.* The purpose of this program is to implement a national

strategy, as defined in Title X, to build the infrastructure necessary to eliminate lead-based paint hazards in all housing as widely and expeditiously as possible. Lead-based paint hazard-reduction activities present potentially substantial hazards to workers and supervisors, occupants and neighboring residents (particularly children under age six and pregnant women), and inspectors and others who must visit the site during the course of the work. If improperly carried out, the work may result in substantially greater hazards than previously existed; therefore, this work should be performed only by thoroughly trained and licensed or certified workers, supervisors, contractors, inspectors, and others. This underscores the need for the early establishment of certification programs.

Traditionally, States and local governments have provided oversight and protection for the public against the general hazards of construction, and it is HUD's policy to draw upon this source of knowledge and expertise in providing the needed oversight and protection for the public against the hazards of lead-based paint and the work of reducing those hazards. In cooperation with HUD, the EPA has been assigned by Congress the responsibility for promulgating rules and standards governing protection against lead hazards in both residential and commercial property.

Accordingly, it is HUD policy to encourage and assist States planning to develop a certification program that will assure proper oversight and supervision of providers of lead-based paint hazard reduction services.

(b) *Development of EPA requirements.* To assure safe and effective performance of the work, Congress has required that performance of lead-hazard testing and lead-hazard reduction activities under this grant program shall be performed by certified contractors, supervisors, workers, and inspectors. Sections 402 and 404 of the TSCA set April 28, 1994, as the deadline for the promulgation of a Model State Program that contains certification and accreditation standards, and final regulations on certification. Under section 1011(n) of Title X, two years after promulgation of these final regulations, any funding available to a State through Title X (including these grants) is cut off if the State does not have an EPA-approved certification program.

Appendix E, Elements of a State Certification Program, in this NOFA provides a description of the currently identified minimum basic elements that should be included in State legislation. Nevertheless, HUD advises States that

are establishing or revising their programs that EPA is actively developing regulations that will define in detail that requirements for an acceptable State program. States should be aware that EPA may add additional basic legislative requirements to the final Model State Program. In addition, EPA's regulations will contain detailed requirements for certification/accreditation training, as well as work practice standards for conducting lead-based paint activities as mandated by Title X.

HUD urges States to watch for EPA's initial guidance on this subject in late 1993. HUD funding of lead-based paint hazard reduction activities beyond this current round for Category I grants will likely be conditioned on State conformance to EPA regulations concerning certification, rather than on the outline in Appendix E.

(c) *State enabling legislation.* Because the technology and research findings in the lead-hazard field are evolving so swiftly, and because both HUD and EPA seek to aid States in achieving an acceptable program without time-consuming reworking of legislation, HUD and EPA urge States to draft enabling legislation that avoids detailed standard setting or other overly prescriptive provisions. The legislation should permit these detailed requirements to be developed and promulgated at the regulatory level, with suitable legislative oversight.

For further information on this subject, including technical assistance, interested States may contact EPA's Chemical Management Division, Attention Ms. Gina Bushong, at (202) 260-3790, or HUD's Office of Lead-Based Paint Abatement and Poisoning Prevention, Attention Ellis Goldman, at (202) 755-1822 (these are not toll-free numbers).

(d) *Deadline for State enabling legislation.* State certification programs that are at least as protective as the Federal requirements established in EPA's regulations will continue to be accepted after April 28, 1994. By 1996, in the absence of an EPA-approved State program, lead-based paint-related Federal funding, such as this grant program, will be terminated until an EPA-approved certification program can be implemented in such States. Category II grants are intended to help States achieve that safe-performance goal, and to help avoid any period of ineligibility for this program.

8.3 Allocation Amounts

For Fiscal Year 1993, up to \$3,000,000 will be available for approximately 15 to 18 grants, not to exceed \$200,000 each.

8.4 Eligibility

(a) *Eligible applicants.* Eligible applicants are the governments of the 50 States, the Virgin Islands, Puerto Rico, and the District of Columbia, that have passed satisfactory enabling legislation for a State certification program, and that have an approved Comprehensive Housing Affordability Strategy (CHAS) (see appendix F). States will become eligible to apply for Stage One of Category II grants upon enactment of State certification legislation satisfactory to HUD and EPA (see appendix E for discussion of currently identified elements). This also includes States that may already have enacted legislation by the time of this NOFA.

Awards shall be made on a first-come, first-served basis in the order of the date an acceptable application is received by HUD, and, in the event of a tie, the date on which acceptable State legislation is signed into law, until the Category II funds under this NOFA are exhausted.

(b) *Eligible activities.* (1) All reasonable costs that directly support the purpose of a Category II grant will be considered by HUD in the applicant's Stage-One proposed plan and budget. Funds may be used for start-up expenses such as salaries, renting space, and supplies. The funds may also be used for start-up capital expenditures such as XRF testing and office equipment. However, purchase or rehabilitation of real property is not an eligible activity. Capital acquisitions occurring under a Category II Grant shall become and remain the property of the grantee.

(2) At least 90 percent of the Category II grant sum shall be for the use of the State agency established or designated to implement the State certification program. The remainder may be used by any other part of the applicant State government for the administrative costs of the Category II grant (see appendix B for full definition of administrative costs).

(3) HUD reserves the right, in negotiating the grant agreement, to delete budget items that, in its judgment, are not necessary for the direct support of program purposes, and to request the grantee to redirect the deleted sums to other acceptable purposes or make a corresponding reduction in the grant request.

(c) *Limitations on use of assistance.* The grant shall be used solely for the purposes described in the applicant's implementation plan and budget, including any changes that may be negotiated and adopted in the grant agreement.

8.5 Selection Criteria and Process

(a) *Generally.* For many States, the enactment of an acceptable certification program and the implementation of an acceptable agency plan will be several months to a year or more after the publication of this NOFA. Publication of detailed regulations applicable to the State program are likely to take up to an additional six months. For these reasons, and because funding for Fiscal Year 1994 has been authorized but not yet appropriated, the application cycle for Category II grants has been separated from the Category I application date and divided into two stages, to ease the application burden on interested States. Stage One, described in paragraph (b) of this section, will be the initial application for a grant, after satisfactory enabling legislation has been signed into law. That application will include the text of the State legislation, a program implementation plan, a budget, and a request for one-half of the total grant sum shown in the budget. Stage Two, described in paragraph (c) of this section, will be a supplemental application that includes the text of promulgated regulations, detailing the functions of the agency, and an application for the balance of the grant sum. If requested, HUD and EPA will provide technical assistance to an applicant on legislation, regulations, the implementation plan, or budget elements, before funding either Stage One or Stage Two.

(b) *Stage One.* A State that does not have a statute or that has existing legislation that is not consistent with the currently identified elements of a State certification program may file a formal grant application at any time after an enabling statute, or amendment to existing legislation, is signed into law, but not sooner than 9 a.m. (Eastern time), Tuesday, August 16, 1993. States that have existing enabling legislation that is consistent with the currently identified elements of a satisfactory State program may file a formal Stage One grant application at any time after 9 a.m. (Eastern time) Tuesday, September 21, 1993. Upon acceptance by HUD and EPA of the statute, the implementation plan, and the budget, the State may apply for one-half its total grant sum.

The application shall include:

(1) The text of the statute;

(2) An implementation plan that establishes or designates an agency, or agencies, to carry out the training and certification functions, and to promulgate or revise the detailed regulations, if necessary, including:

(A) A proposed schedule for regulation development, if applicable;
 (B) The plan to address potential conflicts in overall State program design if enabling statutes are significantly prescriptive;

(C) Delineation of agency responsibilities; and

(D) Key contacts; and

(3) A proposed budget.

(c) *Stage Two.* States that have filed an acceptable application under Stage One may file either the enabling regulations (new legislation) or the amended regulations (amended legislation), and may request the final half of the grant sum at any time after April 28, 1994.

8.6 HUD and EPA Review of Applications

HUD and EPA will provide prompt response to the State applicant at each stage of the application cycle. If the grant is disapproved, HUD and EPA will provide comments on why the application is not acceptable. The State may then resubmit an amended application for reconsideration.

Upon completion of the review and acceptance of a Stage One application, HUD will schedule an appointment for negotiation and signing of the grant agreement. Upon completion of the review and acceptance of a Stage Two application, HUD will make the balance of the grant sum available to the grantee. Approval of a State's Stage One or Stage Two application under this program does not equate to Federal approval of the State's Certification Program; approval only constitutes approval for funding for Category I and Category II grants. EPA, as required by section 404 of title X, will develop special procedures for the approval of State programs.

8.7 Application Requirements

(a) *Contents.* A Stage One application shall include a copy of the enacted or amended State legislation, together with a detailed implementation plan described in this NOFA and budget and staffing plans for carrying out the implementation. Staffing plans may be in a format suitable to the applicant; no Federal form is required. The budget shall be by task and subtask. The following requirements also apply to the application:

(1) The application shall be in compliance with Federal civil rights laws and requirements;

(2) The application shall contain assurances that the applicant will comply with the requirements of the Fair Housing Act (42 U.S.C. 3601-19); Executive Order 11063; Title VI of the

Civil Rights Act of 1964, pertaining to equal opportunity and nondiscrimination in housing; and all regulations issued in accordance with these authorities;

(3) The application shall include assurances of nondiscrimination on the basis of age or handicap, in compliance with the Age Discrimination Act of 1975, section 504 of the Rehabilitation Act of 1973, and all regulations issued pursuant to these authorities; and

(4) The application shall contain any other assurances that HUD has included in the application kit.

(b) *Environmental Review.* The activities to be supported under Category II grants do not involve physical intervention at any real properties, and therefore do not require an environmental review. However, the use of Category II assistance for the purchase of equipment for use in a building in a special flood hazard area can only be undertaken where the community participates in the National Flood Insurance Program and flood insurance is purchased in accordance with section 3.4(g)(3)(A,B) of this NOFA, unless the property is covered by a FEMA-approved State policy of self-insurance.

8.8 Reports

Category II grantees shall comply with the requirements of section 7.4 of this NOFA (Reports) for Category I Grants. If a grantee has both a Category I and a Category II grant, a copy of the Category I grant report may be filed in satisfaction of the Category II grant requirement.

Section 9. Other Matters: For Category I and Category II Grants

Environmental Review

A Finding of No Significant Impact with respect to the environment has been made in accordance with HUD regulations in 24 CFR part 50, which implements section 102(2)(C) of the National Environmental Policy Act of 1969, 42 U.S.C. 4332. The Finding of No Significant Impact is available for public inspection during regular business hours in the Office of the General Counsel, Rules Docket Clerk, Department of Housing and Urban Development, 451 Seventh Street, SW., room 10276, Washington, DC 20410.

Federalism Executive Order

The General Counsel, as the Designated Official under section 8(a) of Executive Order 12612, *Federalism*, has determined that the policies and procedures contained in this NOFA will not have substantial direct effects on States or their political subdivisions, or

the relationship between the Federal Government and the States, or the distribution of power and responsibilities among the various levels of government. Under this NOFA, grants will be made for the abatement of significant lead-based paint and lead-dust hazards in low- and moderate-income owner-occupied units and privately owned low-income rental units. Although the Department encourages States and local governments to initiate or expand lead-based paint certification, testing, abatement, and financing programs, any action by a State or local government in these areas is voluntary. Because action is not mandatory, the NOFA does not impinge upon the relationships between the Federal Government and State and local governments, and the notice is not subject to review under the Order.

Family Executive Order

The General Counsel, as the Designated Official under Executive Order 12606, *The Family*, has determined that this document will likely have a beneficial impact on family formation, maintenance and general well-being. This NOFA, insofar as it funds repairs to privately owned housing, will assist in preserving decent housing stock for resident families. Accordingly, since the impact on the family is beneficial, no further review is considered necessary.

Section 102 of the HUD Reform Act—Documentation and Public Access Requirements—Applicant/Recipient Disclosures

Documentation and Public Access Requirements

HUD will ensure that documentation and other information regarding each application submitted pursuant to this NOFA are sufficient to indicate the basis upon which assistance was provided or denied. This material, including any letters of support, will be made available for public inspection for a five-year period beginning not less than 30 days after the award of the assistance. Material will be made available in accordance with the Freedom of Information Act (5 U.S.C. 552) and HUD's implementing regulations at 24 CFR part 15. In addition, HUD will include the recipients of assistance pursuant to this NOFA in its quarterly Federal Register notice of all recipients of HUD assistance awarded on a competitive basis. (See 24 CFR 12.14(a) and 12.16(b), and the notice published in the Federal Register on January 16, 1992 (57 FR 1942), for further

information on these documentation and public access requirements.)

Disclosures

HUD will make available to the public for five years all applicant disclosure reports (HUD Form 2880) submitted in connection with this NOFA. Update reports (also Form 2880) will be made available along with the applicant disclosure reports, but in no case for a period less than three years. All reports—both applicant disclosures and updates—will be made available in accordance with the Freedom of Information Act (5 U.S.C. 552) and HUD's implementing regulations at 24 CFR part 15. (See 24 CFR part 12, subpart C, and the notice published in the *Federal Register* on January 16, 1992 (57 FR 1942), for further information on these disclosure requirements.)

Prohibition Against Lobbying Activities

The use of funds awarded under this NOFA is subject to the disclosure requirements and prohibitions of a Section 319 of the Department of the Interior and Related Agencies Appropriations Act for Fiscal Year 1990 (31 U.S.C. 1352) and the implementing regulations at 24 CFR part 87. These authorities prohibit recipients of Federal contracts, grants, or loans from using appropriated funds for lobbying the Executive or Legislative Branches of the Federal Government in connection with a specific contract, grant, or loan. The prohibition also covers the awarding of contracts, grants, cooperative agreements, or loans unless the recipient has made an acceptable certification regarding lobbying. Under 24 CFR part 87, applicants, recipients and subrecipients of assistance exceeding \$100,000 must certify that no Federal funds have been or will be spent on lobbying activities in connection with the assistance.

Procurement Standards

All grantees are governed by and should consult 24 CFR 85.36 and 85.37, which detail procedures for subcontracts and subgrants by States and local governments. Under § 85.36, which pertains to subcontracts, small purchase procedures can be used for contracts up to \$25,000, and require price or rate quotations from several sources (three is acceptable); above that threshold, more formal procedures are required (note that § 85.36 treats States differently than local governments). Section 85.37 procedures apply to subgrants, and are not as restrictive. If States have more restrictive standards for contracts and grants, the State

standards can be applied. All grantees should consult and become familiar with §§ 85.36 and 85.37 before issuing subcontracts or subgrants.

Davis-Bacon Act

The Davis-Bacon Act does not apply to this program. However, if grant funds are used in conjunction with other Federal programs in which the provisions of Davis-Bacon apply, then Davis-Bacon provisions would apply to the extent required under the other Federal programs.

Prohibition Against Lobbying of HUD Personnel

Section 112 of the Housing and Urban Development Reform Act of 1989 (Pub. L. 101-235, approved December 15, 1989) (Reform Act) added a new section 13 to the Department of Housing and Urban Development Act (42 U.S.C. 3531 et seq.). Section 13 contains two provisions concerning efforts to influence HUD's decisions with respect to financial assistance. The first imposes disclosure requirements on those who are typically involved in these efforts—those who pay others to influence the award of assistance or the taking of a management action by the Department, and those who are paid to provide the influence. The second restricts the payment of fees to those who are paid to influence the award of HUD assistance, if the fees are tied to the number of housing units received or are based on the amount of assistance received, or if they are contingent upon the receipt of assistance.

Section 13 was implemented by final rule published in the *Federal Register* on May 17, 1991 (56 FR 29912). If readers are involved in any efforts to influence the Department in these ways, they are urged to read the final rule, particularly the examples contained in Appendix A of that rule. (Section 926 of the Housing and Community Development Act of 1992 (Pub. L. 102-550, approved October 28, 1992) amended section 13(f)(1) to exempt a State or local government or the officer or employee of a State or local government or housing finance agency engaged in official State or local government business.)

Any questions concerning the rule should be directed to the Office of Ethics, room 2158, Department of Housing and Urban Development, 451 Seventh Street SW., Washington DC 20410. Telephone: (202) 708-3815 (TDD/Voice). (This is not a toll-free number.) Forms necessary for compliance with the rule may be obtained from the local HUD office.

Prohibition Against Advance Information on Funding Decisions

Section 103 of the Reform Act proscribes the communication of certain information by HUD employees to persons not authorized to receive that information during the selection process for the award of assistance. HUD's regulation implementing Section 103 is codified at 24 CFR part 4 (see 56 FR 22088, May 13, 1991). In accordance with the requirements of Section 103, HUD employees involved in the review of applications and in the making of funding decisions are restrained by 24 CFR part 4 from providing advance information to any person (other than an authorized employee of HUD) concerning funding decisions, or from otherwise giving any applicant an unfair competitive advantage. Persons who apply for assistance in this competition should confine their inquiries to the subject areas permitted by 24 CFR part 4. Applicants who have questions should contact the HUD Office of Ethics: (202) 708-3815 (TDD/Voice). (This is not a toll-free number.)

The Office of Ethics can provide information of a general nature to HUD employees, as well. However, a HUD employee who has specific program questions, such as whether particular subject matter can be discussed with persons outside the Department, should contact his or her Regional or Field Office Counsel, or Headquarters Counsel for the program to which the question pertains.

Authority: 42 U.S.C. 4821-4846; 42 U.S.C. 3535(d)

Dated: May 12, 1993.

Arthur S. Newburg,

Director, Office of Lead-Based Paint Abatement and Poisoning Prevention.

Appendix A—Relevant Federal Regulations and Guidelines

To Secure Any of the Documents Listed, Call the Listed Telephone Number (generally not toll-free).

Regulations:

1. Worker Protection: OSHA regulations (phone (202) 755-1822):
—General Industry Lead Standard, 29 CFR 1910.1025;
—Lead Exposure in Construction, 29 CFR 1926.62, and appendices A, B, C, and D; published 58 FR 26590 (May 4, 1993).
2. Waste Disposal: 40 CFR parts 260-268 (EPA regulations); phone 1-800-424-9346.

Guidelines:

1. Lead-Based Paint: Interim Guidelines for Hazard Identification and Abatement in Public and Indian Housing; HUD, revised May, 1991 (available for a charge; phone 800-245-2691);
Post Abatement Clearance, No More Than:

- 200 Micrograms/Sq. Ft. (Floors)
 500 Micrograms/Sq. Ft. (Window Sills)
 800 Micrograms/Sq. Ft. (Window Wells)
 2. HUD Handbook 1378, Tenant Assistance, Relocation and Real Property Acquisition; phone (202) 708-0336.
 3. Preventing Lead Poisoning In Young Children; Centers for Disease Control, October 1991 (phone (404) 488-4880).

Reports:

1. Comprehensive and Workable Plan for the Abatement of Lead-Based Paint in Privately Owned Housing: Report to Congress (HUD, December 7, 1990) (available for a charge; phone 800-245-2691).

Information on Content of State-Accredited Contractor Certification and Worker Training Programs:

Contact: EPA Office of Pollution Prevention and Toxics, Division of Environmental Assistance; phone (202) 260-3790.

CDC classes of blood lead levels in children

Class	Concentration (µg/dL)	Comment
I	<9	Child is not considered to be lead-poisoned.
IIA	10-14	Large number or proportion of children with blood lead levels in this range should trigger community-wide childhood lead poisoning prevention activities. Children in this range may need to be rescreened more frequently.
IIB	15-19	Child should receive nutritional and educational interventions and more frequent screening. If the blood lead level persists, environmental investigation and intervention should be done.
III	20-44	Child should receive environmental evaluation and remediation and a medical evaluation; may need pharmacologic treatment of lead poisoning.
IV	45-69	Child will need both medical and environmental interventions, including chelation therapy.
V	>70	Child is a medical emergency. Medical and environmental management must begin immediately.

Appendix B—Explanation of "Administrative Costs"

I. Purpose

The intent of this HUD grant program is to allow the grantee to be reimbursed for the reasonable direct and indirect costs, subject to a top limit, for overall management of the grant. In most circumstances the grantee, whether a State or a local government, is expected to serve principally as a conduit to pass funding to subgrantees, which are to be responsible for performance of the lead-hazard reduction work. Congress set a top limit of ten (10) percent of the total grant sum for the grantee to perform the function of overall management of the grant program, including passing on funding to subgrantees. The cost of that function, for the purpose of this grant, is defined as the "administrative cost" of the grant, and is limited to ten (10) percent of the total grant amount. The balance of ninety (90) percent or more of the total grant sum is reserved for the subgrantee/direct-performers of the lead-hazard reduction work.

II. Administrative Costs: What They Are Not

For the purposes of this HUD grant program for States and local governments to provide support for the evaluation and reduction of lead-hazards in low and moderate-income, private target housing: the term "administrative costs" should not be confused with the terms "general and administrative costs", "indirect costs", "overhead", and "burden rate". These are accounting terms, usually represented by a government-accepted standard percentage rate. The percentage rate allocates a fair share of an organization's costs that cannot be attributed to a particular project or department (such as the chief executive's

salary or the costs of the organization's headquarters building) to all projects and operating departments (such as the Fire Department; the Police Department; the Community Development Department; the Health Department or this program). Such allocated costs are added to those projects' or departments' direct costs to determine their total costs to the organization.

III. Administrative Costs: What They Are

For the purposes of this HUD grant program, "Administrative Costs" are the grantee's allowable direct costs for the overall management of the grant program plus the allocable indirect costs. The allowable limit of such costs that can be reimbursed under this program is ten (10) percent of the total grant sum. Should the grantee's actual costs for overall management of the grant program exceed ten (10) percent of the total grant sum, those excess costs shall be paid for by the grantee. However, excess costs paid for by the grantee may be shown as part of the requirement for cost-sharing funds to support the grant.

IV. Administrative Costs: Definition

A. General

Administrative costs are the allowable, reasonable, and allocable direct and indirect costs related to the overall management of the HUD grant for lead-hazard reduction activities. Those costs shall be segregated in a separate cost center within the grantee's accounting system, and are eligible for reimbursement as part of the grant, subject to the ten (10) percent limit. Administrative costs do not include any of the staff and overhead costs directly arising from specific subgrantee program activities eligible under FY 1992 NOFA Sections II.E(5) (a) and (b)(ii) through (b)(vi), because those costs are

eligible for reimbursement under a separate cost center as a direct part of project activities.

The grantee may elect to serve solely as a conduit to subgrantees, who will in turn perform the direct program activities eligible under NOFA Section II.E(5) (a) and (b)(ii) through (vi), or the grantee may elect to perform all or a part of the direct program activities in other parts of its own organization, which shall have their own segregated cost centers for those direct program activities. In either case, not more than 10 percent of the total HUD grant sum may be devoted to administrative costs, and not less than 90% of the total grant sum shall be devoted to direct program activities. The grantee shall take care not to mix or attribute administrative costs to the direct project cost centers.

B. Specific

Reasonable costs for the grantee's overall grant management, coordination, monitoring, and evaluation are eligible administrative costs. Subject to the (10) percent limit, such costs include, but are not limited to, necessary expenditures for the following, goods, activities and services:

(1) Salaries, wages, and related costs of the grantee's staff, the staff of affiliated public agencies, or other staff engaged in grantee's overall grant management activities. In charging costs to this category the recipient may either include the entire salary, wages, and related costs allocable to the program for each person whose primary responsibilities (more than 65% of their time) with regard to the grant program involve direct overall grant management assignments, or the pro rata share of the salary, wages, and related costs of each person whose job includes any overall grant management assignments. The grantee may use only one of these two

methods during this program. Overall grant management includes the following kinds of activities:

(a) Preparing grantee program budgets and schedules, and amendments thereto;

(b) Developing systems for the selection and award of funding to subgrantees and other subrecipients;

(c) Developing suitable agreements for use with subgrantees and other subrecipients to carry out grant activities;

(d) Developing systems for assuring compliance with program requirements;

(e) Monitoring subgrantee and subrecipient activities for progress and compliance with program requirements;

(f) Preparing presentations, reports, and other documents related to the program for submission to HUD;

(g) Evaluating program results against stated objectives; and

(h) Providing local officials and citizens with information about the overall grant program. (However, a more general education program—helping the public understand the nature of lead hazards, lead hazard

reduction, blood-lead screening, and the health consequences of lead poisoning—is a direct project support activity, under NOFA Section II.E(5)(b), and should not be attributed to administrative costs, but to its own cost center.)

(i) Coordinating the resolution of overall grant audit and monitoring findings;

(j) Managing or supervising persons whose responsibilities with regard to the program include such assignments as those described in paragraphs (a) through (i) of Section IV.B(1) of this Appendix.

(2) Travel costs incurred for official business in carrying out the overall grant management;

(3) Administrative services performed under third party contracts or agreements, for services directly allocable to overall grant management such as overall-grant legal services, overall-grant accounting services, and overall-grant audit services;

(4) Other costs for goods and services required for and directly related to the overall management of the grant program, including such goods and services as

telephone, postage, rental of equipment, renter's insurance for the program management space, utilities, office supplies, and rental and maintenance (but not purchase) of office space for the program.

(5) The fair and allocable share of grantee's general costs that are not directly attributable to specific projects or operating departments such as: the Mayor's and City Council's salaries and related costs; the costs of the City's General Counsel's office, not charged off to particular projects or operating departments; and the costs of the City's Accounting Department not charged back to specific projects or operating departments. (If the grantee has an established burden rate, it should be used; if not, the grantee shall be assigned a negotiated provisional burden rate, subject to final audit.)

To repeat, all of the above activities goods and services (items 1 (a-j), 2, 3, 4, and 5 in Section IV.B of this Appendix) are subject to the ten (10) percent limit.

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APPENDIX C

HUD GRANT PROGRAM FOR LEAD-HAZARD REDUCTION

Sample Diagram: SOURCE AND USE OF FUNDS

\$4,000,000 GRANT TO ANYTOWN, USA

SOURCE OF FUNDS			USE OF FUNDS		
SOURCE	AMOUNT	SUB SOURCE	AMOUNT	USER	USED FOR
FEDERAL GRANT		ADMINISTRATIVE COSTS (MAX. 10%)	NOT TO EXCEED \$400,000	ANYTOWN, USA GRANT MANAGEMENT TASK FORCE	OVERALL GRANT MANAGEMENT
	\$4,000,000	DIRECT PROJECT COSTS (MIN. 90%)	NOT LESS THAN \$3,600,000	SOUTHSIDE INC., LEAD HAZARD PREVENTION GRANT PROGRAM	GRANTS TO LOW INCOME HOMEOWNERS FOR LEAD HAZARD REDUCTION PROJECTS
				APARTMENT MANAGERS ASSOCIATION LEAD HAZARD REDUCTION REVOLVING LOAN PROGRAM	3% LOANS TO LOW INCOME APARTMENT LANDLORDS FOR LEAD HAZARD REDUCTION PROJECTS
				ROW HOUSE, LOW INCOME HOUSING IMPROVEMENT GROUP, INC.	LEAD REDUCTION SEGMENTS OF WORK ONLY: PROJECT TO BUY AND FIX UP ROW HOUSING FOR LOW INCOME RENT
				ANYTOWN, USA COMMUNITY DEVELOPMENT DEPARTMENT	REMOVE LEAD HAZARDS FROM SHELTER #3 (FOR HOMELESS FAMILIES WITH CHILDREN IN NEED OF SCHOOL CONVERSION PROJECT)
				TO BE SELECTED	DATA COLLECTION, ANALYSIS CASE STUDY OF GRANT WORK
MATCHING CONTRIBUTION		ANYTOWN COUNCIL APPROPRIATION	\$ 50,000	ANYSTATE, USA	LOCAL CONTRIBUTION TO ITS CERTIFICATION PROGRAM
		ANYTOWN COUNCIL APPROPRIATION	\$150,000	COMMUNITY DEVELOPMENT DEPARTMENT SHELTER #3 PROJECT	SHELTER #3 NON LEAD REPAIRS
		ANYTOWN COBG ALLOCATION	\$100,000	COMMUNITY DEVELOPMENT DEPARTMENT SHELTER #3 PROJECT	SHELTER #3 WINDOW REPLACEMENT COST
		ANYTOWN PUBLIC AFFAIRS DEPARTMENT	\$200,000	ANYTOWN PUBLIC AFFAIRS DEPARTMENT	LEAD HAZARDS PUBLIC EDUCATION PROGRAM
	\$1,250,000	ANYTOWN MEDIA COMP.	\$ 50,000	ANYTOWN PUBLIC HEALTH DEPARTMENT	FREE RADIO, TV SPOTS FOR PUBLIC EDUCATION PROGRAM
		ANYTOWN PUBLIC HEALTH DEPARTMENT	\$250,000	ANYTOWN PUBLIC HEALTH DEPARTMENT	BLOOD LEAD SCREENING PROGRAM CHILDREN UNDER 6
		ANYTOWN MEDICAL FOUNDATION	\$200,000	ANYTOWN PUBLIC HEALTH DEPARTMENT	CHIEFLAIN TREATMENT PROGRAM CHILDREN UNDER 6
		ANYTOWN COMMUNITY DEVELOPMENT DEPARTMENT	\$100,000	ANYTOWN COMMUNITY DEVELOPMENT DEPARTMENT	SHELTER #3 A&E SERVICES
		ANYTOWN BUILDING INSPECTION DEPARTMENT	\$ 50,000	ANYSTATE, USA	TRAIN ANYTOWN BUILDING INSPECTORS
		ANYTOWN BUILDING INSPECTION DEPARTMENT	\$100,000	ANYSTATE, USA	1. LEAD HAZARD DETECTION SERVICES 2. LEAD HAZARD REMOVAL INSPECTIONS
			\$100,000	ANYSTATE, USA	DEPARTMENT TRAVEL AND SALARIES
TOTALS:	\$5,250,000		\$5,250,000		TOTAL:
					AMOUNT USED
					NOT TO EXCEED \$400,000
					\$800,000
					\$1,000,000
					\$930,000
					\$750,000
					UP TO \$120,000
					\$ 50,000
					\$150,000
					\$100,000
					\$200,000
					\$ 50,000
					\$250,000
					\$200,000
					\$100,000
					\$ 50,000
					\$100,000
					\$ 50,000
					\$100,000

Appendix E—Elements of a State Certification Program

Congress has assigned Federal responsibility to the Environmental Protection Agency (EPA) for the definition, implementation, and oversight of State Certification Programs for workers, contractors, and inspectors engaged in the detection and reduction of lead-based paint hazards. The Department of Housing and Urban Development (HUD) has a strong interest in the strength and rigor of the EPA program, because HUD must rely on the effectiveness of the EPA program to assure the safe detection and reduction of those lead-based paint hazards.

In October 1992, Congress passed the Residential Lead-Based Paint Hazard Reduction Act. This legislation requires EPA to promulgate regulations governing the accreditation of training programs, the certification of contractors and the training of workers engaged in lead-based paint activities. These regulations must contain work practice standards. Finally, EPA must develop a model State program containing procedures for States to gain EPA approval of their programs.

Under the statute, lead-based paint activities are defined as:

(a) In the case of target housing: risk assessment, inspection, and abatement; and

(b) In the case of any public building constructed before 1978, commercial building, bridge, or other structure or superstructure: identification of lead-based paint and materials containing lead-based paint, deledding, removal of lead from bridges, and demolition.

EPA is currently developing the regulations required under this new legislation. However, since EPA's regulations are not currently available, States that commit to develop appropriate accreditation and certification programs as required by this NOFA are encouraged to enact broad enabling statutes. Legislation that is overly prescriptive may need to be modified in order to be acceptable under EPA's upcoming regulations.

HUD and EPA can, however, at this time define a minimum set of basic elements that must be contained in the enabling legislation. They are enumerated in #1 below. HUD and EPA also believe that additional elements should be included in legislation. These are identified in #2 below.

1. The enabling statute, at a minimum, shall contain the following elements:

- a. *Agency.* Establish an agency, or agencies, or designate an existing State agency, or agencies, to implement the State program.
- b. *Certification.* Authorize and direct the agency, or agencies, to promulgate regulations requiring the certification of contractors who offer to perform lead-hazard detection or lead-hazard reduction services.
- c. *Worker Training.* Authorize and direct the agency, or agencies, to promulgate regulations setting training requirements for workers, inspectors, and other persons directly and substantially involved in the performance of lead-based paint activities. Such regulations

shall establish minimum acceptable levels of training, and periodic refresher training for each class of workers, and shall require that training shall be provided by accredited training providers.

- d. *Accreditation of Training Providers.* Authorize and direct the agency, or agencies, to promulgate regulations to establish the accreditation of training programs. The legislation shall require that the regulation cover the following: (1) Minimum requirements for the accreditation of training providers; (ii) minimum training curriculum requirements; (iii) minimum training hour requirements; (iv) minimum hands-on training requirements; (v) minimum trainee competency and proficiency requirements; and (vi) minimum requirements for training program quality control.
 - e. *Standards.* Authorize and direct the agency, or agencies, to promulgate regulations establishing standards for performing lead-based paint activities, taking into account reliability, effectiveness, and safety.
 - f. *Compliance.* Authorize and direct the agency, or agencies, to promulgate regulations that will require any activity, involving lead-hazard detection or lead-hazard reduction procedures, to comply with agency regulations and to use certified and accredited personnel.
 - g. *Enforcement.* Authorize and direct the agency, or agencies, to promulgate regulations that provide for the enforcement of the State Certification Program, and that establish suitable sanctions for those who fail to comply with program requirements. The regulations shall include provisions for the decertification and deaccreditation of programs and personnel.
 - h. *Federal Funding Eligibility.* Authorize and direct the agency, or agencies, to revise its regulations and procedures from time to time to assure that State lead-hazard activities continue to be eligible for Federal funding, by meeting the State certification program standards and other requirements that may from time to time be promulgated by EPA, HUD, and such other Federal agencies as may have jurisdiction over lead hazards;
 - i. *Reciprocity.* Authorize the agency, or agencies, to establish liaison with the other states having a State Certification Program to assure the maximum consistency of program requirements, in order to facilitate reciprocity of certification and accreditation among the several States:
2. In addition to the mandatory elements present in #1 above, HUD and EPA strongly recommend that the enabling legislation include:
 - a. *Staffing.* Authorize and direct the agency, or agencies, to dedicate suitable staff and to acquire suitable space, equipment, supplies and other items necessary for the operations of the program.
 - b. *Fees.* Authorize the agency, or agencies, to collect such fees for certification,

accreditation, and other reviews as State policy may determine to be necessary to help support the activities of the agency or agencies.

- c. *Laboratory Oversight.* Authorize and direct the agency, or agencies, to cooperate with EPA in any joint oversight procedures EPA may propose for laboratories accredited under the EPA laboratory accreditation program for laboratories that offer to provide lead analysis services.
- d. *Data Collection.* Authorize the agency, or agencies, to establish a unit for the collection and analysis of data on lead-hazard detection and lead-hazard reduction activities in the State, and on the certification, accreditation, and enforcement activities of the agency.
- e. *Public Education.* Authorize the agency, or agencies, in cooperation with other relevant agencies of the State, to conduct programs of public education on the nature and consequences of lead hazards and on the need for lead-hazard reduction activities to be conducted under careful supervision and by certified and accredited personnel in order to assure the public safety.

Appendix F—Statement of Requirements: Lead-Based Paint Element for Comprehensive Housing Affordability Strategy

Section 1024 of the Housing and Community Development Act of 1992 established the requirement that, to be considered an eligible applicant for Lead-Based Paint Grant Program funds, a State or unit of general local government must have a Comprehensive Housing Affordability Strategy (CHAS) that has been approved by HUD. Current CHAS regulations were published in the *Federal Register* on September 1, 1992, at 57 FR 40038, as amended, in part, on March 12, 1993 at 58 FR 13686 (CHAS final rule).

States and units of local governments that receive direct allocations of HOME Program or Community Development Block Grant Program funds are already required to submit a full CHAS. The instructions for developing a five-year CHAS or annual update for Fiscal Year 1993 were set out in CPD Notices 92-25, 92-28, and 92-36.

Any otherwise eligible jurisdiction that wishes to apply for funds pursuant to this NOFA, but does not have an approved Fiscal Year 1993 CHAS for the purposes of HOME, CDBG, or other funding sources, may develop an abbreviated strategy for the purposes of meeting the CHAS requirement, in accordance with § 91.25 of the CHAS final rule and instructions to be issued by HUD. Applicants are advised to begin preparation of the abbreviated strategy at the earliest possible time in order to have sufficient time to fulfill the applicable citizen participation requirements, which provide that the strategy must be available to the public for at least thirty days before its submission to HUD.

Section 1014 of the Housing and Community Development Act of 1992 also established the requirement that each Comprehensive Housing Affordability Strategy (CHAS) contain a lead-based paint

element. For most jurisdictions, this requirement will be implemented beginning with the new five-year CHASs to be submitted for Fiscal Year 1994. However, to be considered an eligible applicant, States and units of local government that wish to apply for Fiscal Year 1993 Lead-Based Paint Grant Program funds pursuant to this NOFA must amend their existing CHASs to include a lead-based paint element. The amendment must be submitted to HUD prior to or concurrently with the submission of its grant application. While HUD approval of the amendment is not required, failure to submit this amendment to HUD in a timely manner will result in disqualification of a jurisdiction's application. A separate copy of this amendment must be included in the grant application.

A jurisdiction that wishes to apply for funds pursuant to this NOFA must amend its CHAS as follows:

Market and Inventory Conditions—The jurisdiction must estimate the number of housing units within the jurisdiction that are occupied by low-income and very low-income households and that contain lead-based paint hazards as defined in section 1004 of the Residential Lead-Based Paint Hazard Reduction Act of 1992. Among the

sources of information for the lead-based paint assessment are State or community health organizations, and census data on pre-1980 housing stock, which constitutes a satisfactory indicator of the lead-based paint hazard. When preparing this amendment, the jurisdiction shall consult with State or local health and child welfare agencies and examine existing data related to lead-based paint hazards and poisonings, including health department data on the addresses of housing units in which children have been identified as lead-poisoned. No special surveys are required.

Five-Year Strategy—The jurisdiction shall outline the actions proposed to be undertaken over the coming five years to evaluate and reduce lead-based paint hazard, and describe how lead-based paint hazard reduction will be integrated into housing policies and programs.

Annual Plan—Based on the strategy outlined in the five-year strategy section of its CHAS, the jurisdiction shall outline the actions to be undertaken over the coming year to evaluate and reduce lead-based paint hazards.

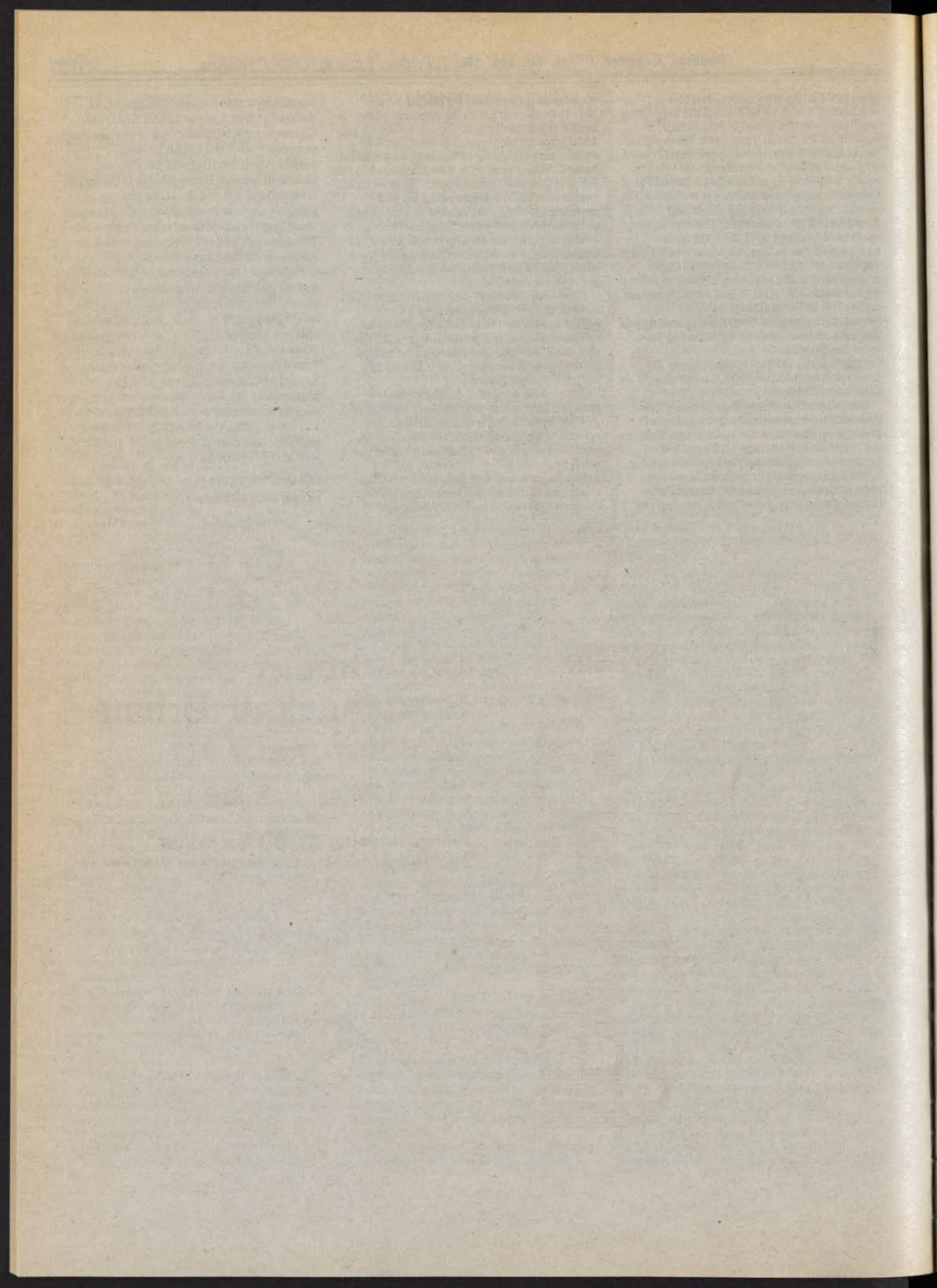
The Department has determined that an amendment that adds a lead-based paint element to an existing CHAS does not

constitute a substantial amendment, as defined at § 91.5 of the CHAS final rule. Consequently, a jurisdiction is not required to comply with the CHAS citizen participation requirement for a public comment period. However, the jurisdiction must inform the public of the change by publication of a description of the change concurrently with its submission to HUD. The jurisdiction is not required to solicit comment on the change.

Reference: For communities that wish further guidance on what classes of activities should be considered for inclusion in the lead-based paint element, you may wish to obtain a copy of a HUD's *Comprehensive and Workable Plan for the Abatement of Lead-Based Paint in Privately Owned Housing—A Report to Congress*, December, 1990, particularly the Executive Summary. A copy may be purchased from HUD USER, 1-800-245-2691, document # ACCN-5716 for a reproduction cost of about \$5.00. HUD USER will accept credit card orders.

[FR Doc. 93-13101 Filed 6-3-93; 8:45 am]

BILLING CODE 4210-32-M



Federal Register

Friday
June 4, 1993

Part V

Department of Housing and Urban Development

Office of the Assistant Secretary

Public Housing Drug Elimination
Technical Assistance Program; Notice of
Funding Availability

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

Office of the Assistant Secretary for Public and Indian Housing

[Docket No. N-93-3619; FR-3508-N-01]

Public Housing Drug Elimination, Technical Assistance Program; Notice of Funding Availability (FY 1993)

AGENCY: Office of the Assistant Secretary for Public and Indian Housing, HUD.

ACTION: Notice of Funding Availability (NOFA) for Fiscal Year (FY) 1993.

SUMMARY: This NOFA announces the availability of \$600,000 in funds to provide short-term technical assistance to public housing agencies (PHAs), Indian housing authorities (IHAs), resident management corporations (RMCs), and incorporated resident councils (RCs) that are combating abuse of controlled substances in public housing communities. These funds reimburse consultants who provide expert advice and work with housing authorities or resident councils to assist them in gaining skills and training to eliminate drug abuse and related problems from public housing communities. In the body of this

document is information concerning the purpose of the NOFA, applicant eligibility, selection criteria, eligible and ineligible activities, application processing, consultant eligibility, and consultant application processing.

DATES: This NOFA is effective upon publication. Technical assistance applications and consultant application kits may be immediately submitted to the address specified in the Application Kit. There is no application submission deadline for short-term technical assistance funds available under this NOFA. Technical assistance applications will be reviewed on a continuing basis, until funds available under this NOFA are expended.

ADDRESSES: (a) An application kit may be obtained from the local HUD Field Office with jurisdiction or by calling HUD's Resident Initiative Clearinghouse on 1-800-955-2232. The application kit contains information on all exhibits and requirements of this NOFA.

(b) An applicant must submit the application to the address specified in the application kit.

(c) In addition, applicants must simultaneously forward a copy of these documents to the HUD Field Office or Office of Indian Programs (OIP) with jurisdiction over the relevant housing authority. The HUD Field Office copy

must be addressed to Director, Division of Public Housing or Office of Indian Programs.

FOR FURTHER INFORMATION CONTACT:

Elizabeth Cocke, Drug Free Neighborhoods Division (DFND), Department of Housing and Urban Development, 451 Seventh Street, SW., room 4118, Washington, DC 20410, telephone (202) 708-1197. A telecommunications device for hearing or speech impaired persons (TDD) is available at (202) 708-0850. (These are not toll-free numbers.)

SUPPLEMENTARY INFORMATION:

Paperwork Reduction Act Statement

The information collection requirements contained in this notice have been submitted to the Office of Management and Budget for review under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501-3520). No person may be subjected to a penalty for failure to comply with these information collection requirements until they have been approved and assigned an OMB control number. The OMB control number, when assigned, will be announced by separate notice in the *Federal Register*. Information on the estimated public reporting burden is provided as follows:

Section of NOFA affected	Number of respondents	Number of responses per response	Total annual responses	Hours per response	Total hours
3.1	400	1	400	24	9,600
4.1(b)	400	1	400	16	6,400
4.2	400	1	400	1	400
5.3	300	1	300	16	4,800
Total annual reporting burden in hours					21,200

I. Purpose and Substantive Description

(a) Authority

Funds for both training and this technical assistance (TA) program have been appropriated by the Departments of Veterans Affairs and Housing and Urban Development, and Independent Agencies Appropriations Act, 1993 (Pub. L. 102-389, approved October 6, 1992) (93 App. Act).

The TA program is intended to provide immediate, short-term (90 days for completion) training, recommendations and assistance to assess needs, train staff and residents, identify and design appropriate anti-drug strategies, and generally prepare and educate public housing and resident organization staff and residents to address problems related to the abuse of controlled substances in public

housing communities. Housing authorities and eligible resident organizations with or without a drug elimination grant in their communities are encouraged to use this resource. Technical assistance is not intended for program implementation or the financial support of existing programs.

(b) Allocation Amounts

A total of \$600,000 in FY 1993 funds is being made available under this NOFA. Applications for short-term technical assistance may be funded up to \$10,000 per request.

(c) Eligibility

The following is a listing of eligible applicants, eligible consultants, eligible activities, ineligible activities, and general program requirements under this NOFA.

(1) Eligible Applicants.

(i) Public housing agencies (PHAs), Indian housing authorities (IHAs), incorporated resident councils (RCs) resident organizations (ROs) in the case of IHAs, and resident management corporations (RMCs) are eligible to receive short-term technical assistance services under this NOFA.

(ii) An eligible RC or RO must be an incorporated nonprofit organization or association that meets each of the following requirements:

(A) It must be representative of the residents it purports to represent.

(B) It may represent residents in more than one development or in all of the developments of a PHA or IHA, but it must fairly represent residents from each development that it represents.

(C) It must adopt written procedures providing for the election of specific

officers on a regular basis (but at least once every three years).

(D) It must have a democratically elected governing board. The voting membership of the board must consist of residents of the development or developments that the resident organization or resident council represents.

(iii) An eligible RMC must be an entity that proposes to enter into, or that enters into, a management contract with a PHA under 24 CFR part 964, or a management contract with an IHA. An RMC must have each of the following characteristics:

(A) It must be a nonprofit organization that is incorporated under the laws of the State or Indian tribe in which it is located.

(B) It may be established by more than one resident organization or resident council, so long as each such organization or council:

(1) Approves the establishment of the corporation; and

(2) Has representation on the Board of Directors of the corporation.

(C) It must have an elected Board of Directors.

(D) Its by-laws must require the Board of Directors to include representatives of each resident organization or resident council involved in establishing the corporation.

(E) Its voting members must be residents of the development or developments it manages.

(F) It must be approved by the resident council. If there is no council, a majority of the households of the development must approve the establishment of such an organization to determine the feasibility of establishing a corporation to manage the development.

(G) It may serve as both the resident management corporation and the resident council, so long as the corporation meets the requirements of 24 CFR part 964 for a resident council. (In the case of a resident management corporation for an Indian Housing Authority, it may serve as both the RMC and the RO, so long as the corporation meets the requirements of this NOFA for a resident organization.)

(iv) Applicants are eligible to apply to receive technical assistance if they are already receiving technical assistance under this program, as long as the request creates no scheduling conflict with other TA requests from the same applicant.

(v) Applicants are eligible to apply to receive technical assistance whether or not they are already receiving drug elimination funds under the Public Housing Drug Elimination Program.

(vi) In circumstances determined by HUD to be drug-related and to require emergency attention, eligible parties may receive technical assistance initiated and approved by HUD. These circumstances may include riots, disputes among tenants, and disputes between tenants and management. HUD will use the procedures of this NOFA to select a consultant in these cases.

(2) Eligible Consultants

Consultants who want to provide short-term technical assistance services under this NOFA must be listed in the Consultant Database approved by HUD's Drug Free Neighborhoods Division (DFND). To be included in that database, consultants must complete, in accordance with the requirements of section I.(c)(2)(ii), below, of this NOFA, a consultant application packet available from the Resident Initiatives Clearinghouse at 1-800-955-2232, and submit the packet to the address specified in the application kit. (This is a toll-free number.)

(i) *Consultant eligibility.* HUD is seeking individuals or entities who have experience working with public or Indian housing, or other low-income populations to provide short-term technical assistance under this NOFA. Consultants who have previously been deemed eligible and are part of the TA Consultant Database need not reapply. To qualify as eligible consultants, individuals or entities should have experience in one or more of the following general areas:

(A) PHA/IHA-related experience: agency organization and management; facility operations; program development; experience working with residents and community organizations.

(B) Drug-related experience: prevention/intervention programs; enforcement strategies; alternative programs.

(C) HUD especially encourages PHAs, IHAs, PHA/IHA employees, RMCs, incorporated resident councils and resident organizations, and public and Indian housing residents, with experience in the above areas, to submit a consultant application for eligibility under this NOFA. Eligible consultants will be entered into the Consultant Database for possible recommendation to Technical Assistance applicants.

(ii) *Applying to be a consultant.* Individuals or entities interested in being listed in the TA Consultant Database should prepare their applications and send them to the address specified in the application kit. Before they can be entered into the Consultant Database, consultants must

submit an application that includes the following information:

(A) The Consultant Resource Inventory Questionnaire, including three references;

(B) A resume;

(C) A narrative statement regarding the consultant's experience in the specific skills identified on the Resource Inventory Questionnaire, and outlining the consultant's overall approach;

(D) Evidence submitted by the consultant to HUD that documents the standard daily fee previously paid to the consultant for technical assistance services similar to those requested under this NOFA. This evidence can include an accountant's statement, W-2 Wage Statements, or invoices, and should be supplemented with a statement or other evidence of days worked in the course of the particular project (for an invoice) or for a tax year in the case of a W-2 Statement.

(iii) *Consultant payment.* HUD will determine a specific fee to pay a consultant under this NOFA, subject to a maximum cap of the daily equivalent of the maximum rate paid for ES-IV of the Executive Schedule for Federal White-Collar Workers, based upon the evidence submitted in section I.(c)(2)(D), above, of this NOFA.

(iv) *Conflicts of interest.* In addition to the conflict of interest requirements in 24 CFR part 85:

(A) No person who is an employee, agent, officer, or appointed official of the applicant may be funded as a consultant to the applicant by this Drug Elimination Technical Assistance program.

(B) Consultants who wish to provide Drug Elimination Technical Assistance services through this program may not have any involvement in the preparation or submission of the TA proposal which requests their services. Any involvement of the consultant will be considered a conflict of interest, which makes the consultant ineligible for providing consulting services to the applicant, and could disqualify the consultant from future consideration.

(3) Eligible Activities

To assist the eligible applicants identified in section I.(c)(1), above, of this NOFA, in responding immediately to drug-related problems in public and Indian housing developments, the U.S. Department of Housing and Urban Development (HUD) has supplemented the Public Housing Drug Elimination Program (PHDEP) and Youth Sports Program (YSP) with funds for short-term technical assistance (TA). Short-term technical assistance means that consultants shall only be reimbursed for

a maximum of 30 days of work, which must be completed in less than 90 days from the date of the approved statement of work. The TA program is intended to provide short-term, immediate assistance to PHAs, IHAs, RMCs, RCs and ROs developing and/or implementing their drug elimination strategies. The program will fund the use of consultants who can provide the necessary consultation and/or training for the types of activities outlined below, or to fund the use of consultants who will assist the applicant in undertaking a task such as program planning and development for future drug elimination strategies, or conducting a needs assessment or survey. To assist housing authorities and resident councils, the TA program funds efforts in:

(i) Assessing drug problems in public or Indian Housing development(s) and surrounding community(ies);

(iii) Designing and identifying appropriate anti-drug-related practices and programs in the following areas:

(A) Law enforcement strategies, including resident security patrols;

(B) Management techniques;

(C) Youth initiatives;

(D) Family management/parenting;

(E) Resident intervention and assistance programs;

(F) Community organization and leadership development; and

(G) Other areas that meet the drug elimination purposes of this NOFA, as determined by HUD.

(iii) Training for housing authority staff and residents in anti-drug practices, programs and management;

(iv) Improving overall agency management, operations and programming so that the applicant can more effectively respond to drug problems in the targeted public housing development(s).

(4) Ineligible Activities

(i) Funding is not permitted for any type of monetary compensation for residents unless they are listed in the TA Consultant Database and are working as consultants.

(ii) Funding is not permitted for any activity that is funded under any other HUD program.

(iii) Funding is not permitted for salary or fees to staff of the applicant, or former staff of the applicant within a year of his or her leaving the housing authority or resident organization.

(iv) Funding is not permitted for underwriting conferences.

(v) Funding is not permitted for conference speakers unless the speaker will also be providing additional TA as outlined in the eligible activities in sections (c)(3)(i)-(ii) of this NOFA.

(vi) Funding is not permitted for program implementation, proposal writing, the purchase of hardware or equipment, or any activities deemed ineligible in the Drug Elimination Program, excluding consultant's fees.

(5) General Program Requirements

(i) Applicants for short-term technical assistance may be funded up to \$10,000 per request, with HUD providing payment directly to the authorized consultant for the consultant's fee, travel, room and board, and other approved costs.

(ii) Applicants that have not previously received technical assistance under this program may submit only one application initially. After the applicant's initial technical assistance report has been received and reviewed by HUD or the contractor administering the program, as appropriate, the applicant may submit multiple applications.

(d) Selection Criteria/Ranking Factors

An application must include the minimum required elements listed as section III.(a) of this NOFA, and cannot request assistance for ineligible activities as listed in I.(c)(4)(iv), and will be scored according to the criteria outlined below:

(1) The extent to which the applicant needs short-term technical assistance. This will be measured by the applicant's discussion of the problems that triggered the request for assistance under this NOFA. (Maximum points: 10)

(2) The extent to which the applicant clearly describes the kind of technical assistance and skills needed to address the problems, and how well the technical assistance requested will address the problems. (Maximum points: 10)

(3) The likelihood that the requested technical assistance will assist the applicant's current drug elimination strategy, as described in the application; or, if the applicant does not currently have a strategy, the extent to which the technical assistance will help them develop a drug elimination strategy. (Maximum points: 10)

(e) Application Review, Awards, and Payment

(1) Application Review

Applications will be reviewed as they are received, and will be time- and date-stamped to determine their order of receipt. An application must include both the descriptive letter (or form provided in the application kit) and certification statement (or form

provided in the application kit) to be eligible for funding. All applications that qualify on the basis of the minimum required elements will be scored on the basis of the selection criteria in section I.(d) of this NOFA. Applications that receive a total of 15 or more points, with no less than 3 points in any of the three selection criteria in section I.(d) of this NOFA will be eligible for funding. Eligible applications will be funded in the order in which negotiations for a statement of work are completed between the consultant and the program administrator until all funds are expended. The basis for each funding decision under this section will be documented.

(2) Application Awards

(i) If the application includes the descriptive letter (or forms) requesting eligible activities, the certification statement (or form), and at least 15 points as described in section I.(e)(1) of this NOFA, it is eligible for funding. If sufficient funds are available to fund the technical assistance request, staff will confer with the applicant to confirm the work requirements. The TA Consultant Database will be searched to choose at least three consultants who: (1) Have a principal place of business or residence located within a reasonable distance from the applicant, as determined by HUD or its agent, or (2) appear to have the requisite knowledge and skills to assist the applicant in addressing its needs. The applicant's preference for a consultant will be taken into account. An HA employee may not serve as a consultant to his or her employer. An HA employee who serves as a consultant must be on annual leave to receive the consultant fee. A list of the suggested consultants will be forwarded to the applicant. From this list, the applicant will recommend the consultant to provide the requested TA. Instructions for consultants to be included in the TA Consultant Database are outlined above in section I.(b)(2) of this NOFA.

(ii) The applicant must contact each TA consultant from the list provided. After making contact with each consultant, the applicant must list the consultants in order of preference, indicating any that are unacceptable, and state the reasons for its preference. There is no guarantee that the applicant's first preference will be approved. Consultants will only be approved for the TA if the request is not in conflict with other requests for the consultant's services.

(iii) Staff designated by HUD will work with the consultant and applicant

to develop a statement of work that includes a timeline and estimated budget. The statement of work should also include a discussion of the kind of technical assistance and skills needed to address the problem, and how the technical assistance requested will address these needs; a description of the current drug elimination strategy, and a discussion of how the requested technical assistance will assist that strategy. If the applicant does not currently have a strategy, there should be a statement of how the technical assistance will help them develop a drug elimination strategy. When the statement of work is approved, the consultant will be authorized to start work. The consultant must receive written authorization from HUD or its authorized agent before he or she can begin to provide technical assistance under this NOFA. The applicant and the relevant Field Office or OIP will also be notified. Because this program is for short-term technical assistance, consultants shall only be reimbursed for a maximum of 30 days of work, which must be completed in fewer than 90 days from the date of the approved statement of work.

(3) Payment for TA Consultants

The consultant must submit a report of its activities, findings and recommendations, a fee invoice, and its expenses and receipts to the address specified in the application kit. A copy of the report must also be submitted to the applicant. Required elements of these reports are outlined in the application kit. After the report and expenses have been approved, and a verbal or written evaluation is received from the applicant, payment will be issued to the consultant. Evaluation forms are then sent to the applicant, to be completed and returned.

II. Application Process

(a) Application Kit

An application kit may be obtained from the local HUD FO or OIP, or by calling HUD's Resident Initiatives Clearinghouse on 1-800-955-2232. The application kit contains information on all exhibits and requirements of this NOFA.

(b) Application Submission

This NOFA is effective upon publication. Short-term (90 days from completion) technical assistance applications and consultant application kits may be immediately submitted to the address specified in the application kit. There is no application submission deadline for the short-term technical

assistance grants available under this NOFA. Technical assistance applications will be reviewed on a continuing first-come, first-serve basis, until funds under this NOFA are no longer available.

(1) An applicant must submit the application and the necessary assurances to the address specified in the Application Kit.

(2) In addition, applicants must simultaneously forward a copy of these documents to the HUD Field Office or Office of Indian Programs with jurisdiction over the relevant housing authority. The HUD Field Office copy must be addressed to Director, Division of Public Housing or Office of Indian Programs, as appropriate.

III. Checklist of Application Submission Requirements

Each application for a grant under this program must include the following:

(a) An application will not be considered for funding unless it includes, at a minimum, the following elements:

(1) An application letter, of no more than two pages, which responds to each of the selection criteria in section I.(d) of this NOFA, or the completed application forms available in the application kit, signed by the executive director of the housing authority or the authorized representative of the RMC or incorporated RC or RO, and;

(2) A certification statement, or the form provided in the application kit, signed by the executive director of the housing authority or the authorized representative of the RMC or incorporated RC or RO, certifying that any technical assistance received will be used in compliance with all requirements in the NOFA.

(b) HUD Form 2880 (Lobbying Disclosure Form).

(c) If the applicant has a particular consultant to recommend to provide the technical assistance, the response should identify the consultant and the basis for the recommendation. A consultant recommended by an applicant is not guaranteed to be approved to provide the requested technical assistance. If the consultant recommended by an applicant is not listed in the Consultant Database approved by HUD's Drug Free Neighborhoods Division (DFND), the consultant must apply as outlined in section I.(c)(2), above, of this NOFA. These consultant applications to be included in the TA Consultant Database will be given expedited review by the Department. However, a consultant must be listed to be eligible for funding under this NOFA.

IV. Corrections to Deficient Applications

(a) HUD will notify an applicant, in writing, or by telephone, of any curable technical deficiencies, such as a missing signature in the application. A log of telephone notifications will be maintained. The applicant must correct the deficiency in accordance with the information specified in HUD's notification. The application will not be given further consideration until the deficiency is corrected.

(b) Curable technical deficiencies relate to items that are not necessary to make a determination of an applicant's eligibility. The items necessary for this determination are listed at section III.(a) of this NOFA, although missing signatures on the application letter, certification or forms are curable.

V. Other Matters

(a) Nondiscrimination and equal opportunity. The following nondiscrimination and equal opportunity requirements apply:

(1) The requirements of title VIII of the Civil Rights Act of 1968, 42 U.S.C. 3600-20 (Fair Housing Act) and implementing regulations issued at subchapter A of title 24 of the Code of Federal Regulations, as amended by 54 FR 3232 (published January 23, 1989); Executive Order 11063 (Equal Opportunity in Housing) and implementing regulations at 24 CFR part 107; and title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d-2000d-4) (Nondiscrimination in Federally Assisted Programs) and implementing regulations issued at 24 CFR part 1;

(2) The Indian Civil Rights Act (ICRA) (title II of the Civil Rights Act of 1968, 25 U.S.C. 1301-1303) provides, among other things, that "no Indian tribe in exercising powers of self-government shall * * * deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law." The Indian Civil Rights Act * applies to any tribe, band, or other group of Indians subject to the jurisdiction of the United States in the exercise of recognized powers of self-government. The ICRA is applicable in all cases where an IHA has been established by exercise of tribal powers of self-government.

(3) The prohibitions against discrimination on the basis of age under the Age Discrimination Act of 1975 (42 U.S.C. 6101-07) and implementing regulations at 24 CFR part 146, and the prohibitions against discrimination against handicapped individuals under section 504 of the Rehabilitation Act of

1973 (29 U.S.C. 794) and implementing regulations at 24 CFR part 8;

(4) The requirements of Executive Order 11246 (Equal Employment Opportunity) and the regulations issued under the Order at 41 CFR chapter 60;

(5) The requirements of section 3 of the Housing and Urban Development Act of 1968, 12 U.S.C. 1701u (Employment Opportunities for Lower Income Persons in Connection with Assisted Projects); and

(6) The requirements of Executive Orders 11625, 12432, and 12138. Consistent with HUD's responsibilities under these Orders, recipients must make efforts to encourage the use of minority and women's business enterprises in connection with funded activities.

(b) Use of debarred, suspended or ineligible contractors. Applicants for short-term technical assistance under this NOFA are subject to the provisions of 24 CFR part 24 relating to the employment, engagement of services, awarding of contracts, or funding of any contractors or subcontractors during any period of debarment, suspension, or placement in ineligibility status.

(c) Drug-Free Workplace Act of 1988. The requirements of the Drug-Free Workplace Act of 1988 at 24 CFR part 24, subpart F.

(d) Environmental Impact. In accordance with 40 CFR 1508.4 of the regulations of the Council on Environmental Quality and 24 CFR 50.20(b) of the HUD regulations, the policies and procedures proposed in this document are determined not to have the potential of having a significant impact on the quality of the human environment, and, therefore, are categorically excluded from the requirements of the National Environmental Policy Act of 1969. Accordingly, a Finding of No Significant Impact is not required.

(e) Family Impact. The General Counsel, as the Designated Official for Executive Order 12606, the Family, has determined that the provisions of this NOFA have the potential for a positive, although indirect, impact on family

formation, maintenance and general well-being within the meaning of the Order. The NOFA is designed to assist housing authorities and resident organizations in their public housing anti-drug-related efforts by providing short-term technical assistance. HUD expects that the provision of such assistance will better prepare and educate housing authority and resident organization officials to confront the widespread abuse of controlled substances in public housing communities. This, in turn, would, indirectly affect the quality of life for public housing residents.

(f) Federalism Impact. The General Counsel, as the Designated Official under section 6(a) of Executive Order 12612, Federalism, has determined that the provisions of this NOFA do not have "federalism implications" within the meaning of the Order. The NOFA provides short-term technical assistance to housing authorities and resident organizations to assist them in their anti-drug efforts in public housing communities. The involvement of resident organizations should greatly increase the success of the anti-drug efforts under this technical assistance program and, therefore, should have positive effects on the target population. As such, the program helps housing authorities to combat serious drug problems in their communities.

(g) Documentation and Public Access Requirements; Applicant/Recipient Disclosures: HUD Reform Act.

Disclosures. HUD will make available to the public for five years all applicant disclosure reports (HUD Form 2880) submitted in connection with this NOFA. Update reports (also Form 2880) will be made available along with the applicant disclosure reports, but in no case for a period of less than three years. All reports—both applicant disclosures and updates—will be made available in accordance with the Freedom of Information Act (5 U.S.C. 552) and HUD's implementing regulations at 24 CFR part 15, subpart C, and the notice published in the *Federal Register* on January 16, 1992 (57 FR 1942), for

further information on these disclosure requirements.)

Public notice. HUD will include recipients that receive assistance pursuant to this NOFA in its quarterly *Federal Register* notice of recipients of all HUD assistance awarded on a competitive basis. (See 24 CFR 12.16(b), and the notice published in the *Federal Register* on January 16, 1992 (57 FR 1942), for further information on these requirements.)

(h) Section 112 HUD Reform Act. Section 13 of the Department of Housing and Urban Development Act contains two provisions dealing with efforts to influence HUD's decisions with respect to financial assistance. The first imposes disclosure requirements on those who are typically involved in these efforts—those who pay others to influence the award of assistance or the taking of a management action by the Department and those who are paid to provide the influence. The second restricts the payment of fees to those who are paid to influence the award of HUD assistance, if the fees are tied to the number of housing units received or are based on the amount of assistance received, or if they are contingent upon the receipt of assistance.

Section 13 was implemented by final rule published in the *Federal Register* on May 17, 1991 (56 FR 22912) as 24 CFR part 86. If readers are involved in any efforts to influence the Department in these ways, they are urged to read the final rule, particularly the examples contained in appendix A of the rule.

Authority: The Departments of Veterans Affairs and Housing and Urban Development, and Independent Agencies Appropriations Act of 1991 (Pub. L. 101-507, approved November 5, 1990), and the Departments of Veterans Affairs and Housing and Urban Development, and Independent Agencies Appropriations Act 1992, (Pub. L. 102-139, approved October 28, 1991).

Dated: April 28, 1993.

Michael B. Janis,
General Deputy, Assistant Secretary for Public and Indian Housing.

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