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DEPARTMENT OF LABOR

Wage and Hour Division

29 CFR Part 825

RIN 1235-AA09

The Family and Medical Leave Act

AGENCY: Wage and Hour Division, Department of Labor

ACTION: Notice of proposed rulemaking.

SUMMARY: The Department of Labor's Wage and Hour Division proposes to revise the regulation defining "spouse" under the Family and Medical Leave Act of 1993 (FMLA or the Act) in light of the United States Supreme Court's decision in United States v. Windsor, which found section 3 of the Defense of Marriage Act (DOMA) to be unconstitutional. This Notice of Proposed Rulemaking (NPRM) proposes to amend the definition of spouse to include all legally married spouses.

DATES: Comments must be received on or before [insert date 45 days after date of publication in the FEDERAL REGISTER].

ADDRESSES: You may submit comments, identified by Regulatory Information Number (RIN) 1235-AA09, by electronic submission through the Federal eRulemaking Portal http://www.regulations.gov. Follow instructions for submitting comments. You may also submit comments by mail. Address written submissions to Mary Ziegler, Director of the Division of Regulations, Legislation, and Interpretation, Wage and Hour

Division, U.S. Department of Labor, Room S-3502, 200 Constitution Avenue, N.W., Washington, D.C. 20210.

Instructions: Please submit only one copy of your comments by only one method. All submissions must include the agency name and RIN, identified above, for this rulemaking. Please be advised that comments received will be posted without change to http://www.regulations.gov, including any personal information provided, and should not include any individual's personal medical information. For questions concerning the application of the FMLA provisions, individuals may contact the Wage and Hour Division (WHD) local district offices (see contact information below). Mailed written submissions commenting on these provisions must be received by the date indicated for consideration in this rulemaking. Comments submitted through http://www.regulations.gov must be received by 11:59 p.m. Eastern Standard Time on the date indicated for consideration in this rulemaking. For additional information on submitting comments and the rulemaking process, see the "Public Participation" heading of the **SUPPLEMENTARY INFORMATION** section of this document.

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

FOR FURTHER INFORMATION CONTACT: Mary Ziegler, Director of the Division of Regulations, Legislation, and Interpretation, Wage and Hour Division, U.S. Department of Labor, Room S-3502, 200 Constitution Avenue, N.W., Washington, D.C. 20210; telephone: (202) 693-0406 (this is not a toll-free number). Copies of this rule may be obtained in alternative formats (large print, Braille, audio tape or disc), upon request, by calling (202) 693-0675 (this is not a toll-free number). TTY/TDD callers may

dial toll-free 1-877-889-5627 to obtain information or request materials in alternative formats.

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

SUPPLEMENTARY INFORMATION:

I. Electronic Access and Filing Comments

Public Participation: This NPRM is available through the Federal Register and the http://www.regulations.gov Web site. You may also access this document via the WHD's Web site at http://www.dol.gov/whd/. To comment electronically on Federal rulemakings, go to the Federal e-Rulemaking Portal at http://www.regulations.gov, which will allow you to find, review, and submit comments on Federal documents that are open for comment and published in the Federal Register. You must identify all comments submitted by including the RIN 1235-AA09 in your submission. Commenters should transmit comments early to ensure timely receipt prior to the close of the comment period (date identified above); comments received after the comment period closes will not be considered. Submit only one copy of your comments by only one method. Please be advised that all comments received will be posted without change to http://www.regulations.gov, including any personal information provided, and should not include any individual's personal medical information.

I. Background

A. What the FMLA provides

The Family and Medical Leave Act of 1993, 29 U.S.C. 2601 et seq., entitles eligible employees of covered employers to take job-protected, unpaid leave, or to substitute appropriate accrued paid leave, for up to a total of 12 workweeks in a 12-month period for the birth of the employee's son or daughter and to care for the newborn child; for the placement of a son or daughter with the employee for adoption or foster care; to care for the employee's spouse, parent, son, or daughter with a serious health condition; when the employee is unable to work due to the employee's own serious health condition; or for any qualifying exigency arising out of the fact that the employee's spouse, son, daughter, or parent is a military member on covered active duty. An eligible employee may also take up to 26 workweeks of FMLA leave during a "single 12-month period" to care for a covered servicemember with a serious injury or illness, when the employee is the spouse, son, daughter, parent, or next of kin of the servicemember.

FMLA leave may be taken in a block, or under certain circumstances, intermittently or on a reduced leave schedule. In addition to providing job protected family and medical leave, employers must also maintain any preexisting group health plan coverage for an employee on FMLA protected leave under the same conditions that would apply if the employee had not taken leave. 29 U.S.C. 2614. Once the leave period is concluded, the employer is required to restore the employee to the same or an equivalent position with equivalent employment benefits, pay, and other terms and conditions of employment. Id. If an employee believes that his or her FMLA rights have been violated, the employee may file a complaint with the Department of Labor or file a

private lawsuit in federal or state court. If the employer has violated the employee's FMLA rights, the employee is entitled to reimbursement for any monetary loss incurred, equitable relief as appropriate, interest, attorneys' fees, expert witness fees, and court costs. Liquidated damages also may be awarded. 29 U.S.C. 2617.

Title I of the FMLA is administered by the U.S. Department of Labor and applies to private sector employers of 50 or more employees, public agencies, and certain federal employers and entities, such as the U.S. Postal Service and Postal Rate Commission. Title II is administered by the U.S. Office of Personnel Management and applies to civil service employees covered by the annual and sick leave system established under 5 U.S.C. Chapter 63 and certain employees covered by other federal leave systems.

B. Who the law covers

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

C. Regulatory history

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

After publication, the Department invited further public comment on the interim regulations. 58 FR 45433 (Aug. 30, 1993). During this comment period, the Department received a significant number of substantive and editorial comments on the interim regulations from a wide variety of stakeholders. Based on this second round of public comments, the Department published final regulations to implement the FMLA on January 6, 1995. 60 FR 2180. The regulations were amended February 3, 1995 (60 FR 6658) and March 30, 1995 (60 FR 16382) to make minor technical corrections. The final regulations went into effect on April 6, 1995.

The Department published a Request for Information (RFI) in the Federal Register on December 1, 2006 requesting public comments on experiences with the FMLA (71 FR 69504) and issued a report on the RFI responses on June 28, 2007 (72 FR 35550). The Department published an NPRM in the Federal Register on February 11, 2008 proposing changes to the FMLA's regulations based on the Department's experience administering the law, two Department of Labor studies and reports on the FMLA issued in 1996 and 2001, several U.S. Supreme Court and lower court rulings on the FMLA, and a review of the comments received in response to the 2006 RFI. 73 FR 7876. The Department also sought comments on the military family leave statutory provisions, enacted by the National Defense Authorization Act for Fiscal Year 2008. In response to the NPRM, the Department received thousands of comments from a wide variety of stakeholders. The Department issued a final rule on November 17, 2008, which became effective on January 16, 2009. 73 FR 67934.

The Department published an NPRM in the Federal Register on February 15, 2012 primarily focused on changes to the FMLA's regulations to implement amendments

to the military leave provisions made by the National Defense Authorization Act for Fiscal Year 2010 and to the employee eligibility requirements for airline flight crew employees made by the Airline Flight Crew Technical Corrections Act. 77 FR 8960. The Department issued a final rule on February 6, 2013, which became effective on March 8, 2013. 78 FR 8834.

II. FMLA Spousal Leave

The FMLA provides eligible employees with leave to care for a spouse in the following situations: (1) when needed to care for a spouse due to the spouse's serious health condition; (2) when needed to care for a spouse who is a covered servicemember with a serious illness or injury; and (3) for a qualifying exigency related to the covered military service of a spouse. The FMLA defines "spouse" as "a husband or wife, as the case may be." 29 USC 2611(13). In the 1993 Interim Final Rule, the Department defined spouse as "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." 58 FR 31817, 31835 (June 4, 1993). In commenting on the Interim Final Rule, both the Society for Human Resource Management and William M. Mercer, Inc., questioned which state law would apply when an employee resided in one State but worked in another State. 60 FR 2190 (June 6, 1995). In response to these comments, the 1995 Final Rule clarified that the law of the State of the employee's residence would control for determining eligibility for FMLA spousal leave. Id. at 2191. Accordingly, since 1995 the FMLA regulations have contained the following definition of spouse: "Spouse means a husband or wife as defined or recognized under State law for purposes of marriage in the State where the employee resides, including common law marriage in States where it

is recognized." 29 CFR 825.102, 825.122(a) (prior to the 2013 final rule the same definition appeared at 29 CFR 825.113(a) and 825.800).

In 1996 the Defense of Marriage Act (DOMA) was enacted. Pub. L. 104-199, 110 Stat. 2419. Section 3 of DOMA restricted the definitions of "marriage" and "spouse" for purposes of federal law, regulations, and administrative interpretations: "the word 'marriage' means only a legal union between one man and one woman as husband and wife, and the word 'spouse' refers only to a person of the opposite sex who is a husband or a wife." 1 U.S.C. 7. For purposes of employee leave under the FMLA, the effect of DOMA was to limit the availability of FMLA leave based on a spousal relationship to opposite-sex marriages. While the Department did not revise the FMLA regulatory definition of "spouse" to incorporate DOMA's restrictions, in 1998 the Wage and Hour Division (WHD) issued an opinion letter that addressed, in part, the limitation Section 3 of DOMA imposed on the availability of FMLA spousal leave.

> Under the FMLA (29 U.S.C. 2611(13)), the term "spouse" is defined as a husband or wife, which the regulations (29 CFR 825.113(a)) clarified to mean a husband or wife as defined or recognized under State law for purposes of marriage in the State where the employee resides, including common law marriage in States where it is recognized. The legislative history confirms that this definition was adapted to ensure that employers were not required to grant FMLA leave to an employee to care for an unmarried domestic partner. (See Congressional Record, S 1347, February 4, 1993). Moreover, the subsequently enacted Defense of Marriage Act of 1996 (DOMA) (Public Law 104-199) establishes a Federal definition of "marriage" as only a legal union between one man and one woman as husband and wife, and a "spouse" as only a person of the opposite sex who is a husband or wife. Because FMLA is a Federal law, it is our interpretation that only the Federal definition of marriage and spouse as established under DOMA may be recognized for FMLA leave purposes.

Opinion Letter FMLA-98 (Nov. 18, 1998). The WHD also referenced DOMA's limitations on spousal FMLA leave in a number of sub-regulatory guidance documents posted on its Web site.

On June 26, 2013, the Supreme Court held in United States v. Windsor, 133 S. Ct. 2675 (2013), that Section 3 of DOMA was unconstitutional under the Fifth Amendment. It concluded that this section "undermines both the public and private significance of state-sanctioned same-sex marriages" and found that "no legitimate purpose overcomes" Section 3's "purpose and effect to disparage and to injure those whom the State, by its marriage laws, sought to protect[.]" Id. at 2694-96.

Because of the Supreme Court's holding in Windsor that Section 3 of DOMA is unconstitutional, the Department is no longer prohibited from recognizing same-sex marriages. Accordingly, as of June 26, 2013, under the current FMLA regulatory definition of spouse, eligible employees in a legal same-sex marriage who reside in a State that recognizes their marriage may take FMLA spousal leave. On August 9, 2013, the Department updated its FMLA sub-regulatory guidance to remove any references to the restrictions imposed by Section 3 of DOMA and to expressly note that the regulatory definition of spouse covers same-sex spouses residing in States that recognize such marriages.

III. Discussion of Proposed Changes to the FMLA Regulations

Both Section 825.102 (Definitions) and paragraph (b) of Section 825.122 (Definitions of covered servicemember, spouse, parent, son or daughter, next of kin of a covered service member, adoption, foster care, son or daughter on covered active duty or call to covered active duty status, son or daughter of a covered servicemember, and

parent of a covered servicemember) set forth the definition of "spouse" for purposes of FMLA leave as "a husband or wife as defined or recognized under State law for purposes of marriage in the State where the employee resides, including common law marriage in States where it is recognized." 29 CFR 825.102, 825.122(b).

The Department proposes to change the regulatory definition of spouse in sections 825.102 and 825.122(b) to look to the law of the jurisdiction in which the marriage was entered into (including for common law marriages), as opposed to the law of the State in which the employee resides, and to expressly reference the inclusion of same-sex marriages in addition to common law marriages. The Department also proposes to include in the definition same-sex marriages entered into abroad. The Department proposes to define spouse asthe other person to whom an individual is married as defined or recognized under State law for purposes of marriage in the State in which the marriage was entered into or, in the case of a marriage entered into outside of any State, if the marriage is valid in the place where entered into and could have been entered into in at least one State. The proposed definition includes an individual in a same-sex or common law marriage.

The proposed definition includes the statutory language defining spouse as a husband or wife but makes clear that these terms include all individuals in lawfully recognized marriages. The Department is aware that the language surrounding marriage is evolving and that not all married individuals choose to use the traditional terms of husband or wife when referring to their spouse. The Department intends the proposed definition to cover all spouses in legal marriages as defined in the regulation regardless of whether they use the terms husband or wife.

The Department is proposing to move from a state of residence rule to a rule based on the jurisdiction where the marriage was entered into (place of celebration) to ensure that same-sex couples who have legally married will have consistent FMLA rights regardless of where they live. As of June 18, 2014, nineteen States and the District of Columbia extend the right to marry to both same-sex and opposite-sex couples (California, Connecticut, Delaware, District of Columbia, Hawaii, Illinois, Iowa, Maine, Maryland, Massachusetts, Minnesota, New Hampshire, New Jersey, New Mexico, New York, Oregon, Pennsylvania, Rhode Island, Vermont, and Washington). Additionally, sixteen countries extend the right to marry to same-sex couples (Argentina, Belgium, Brazil, Canada, Denmark, England/Wales/Scotland[1], France, Iceland, The Netherlands, New Zealand, Norway, Portugal, Spain, South Africa, Sweden, and Uruguay). A place of celebration rule will allow all legally married couples, whether opposite-sex or same-sex, to have consistent federal family leave rights regardless of the State in which they reside.

A place of celebration rule will ensure that all legally married employees have consistent FMLA leave rights regardless of where they live. The Department believes that a place of celebration rule will give fullest effect to the purpose of the FMLA to permit employees to take unpaid leave to care for a seriously ill spouse. The need to provide care for a spouse is the same for all married couples and does not change depending on their state of residence. Additionally, a place of celebration rule will provide consistent federal family leave rights for legally married couples regardless of the State in which they reside, thus reducing barriers to the mobility of employees in same-sex marriages in the labor market. The Department believes such a rule will also reduce

[1] Legislation to legalize same-sex marriage has been approved in Scotland and marriages of same-sex couples are expected to begin there in the autumn of 2014.

the administrative burden on employers that operate in more than one State, or that have employees who move between States with different marriage recognition rules; such employers would not have to consider the employee's state of residence and the laws of that State in determining the employee's eligibility for FMLA leave.

As noted above, the FMLA military leave provisions also entitle employees to take FMLA leave for a qualifying exigency related to the covered military service of a spouse and when needed to care for a spouse who is a covered servicemember with a serious illness or injury. See 825.126, 825.127. The Department's proposed place of celebration rule is consistent with the Department of Defense's (DOD) policy of treating all married members of the military equally. In administering its policy DOD looks to the place of celebration to determine if a military member is in a valid marriage. The Department believes it is appropriate wherever possible to align the availability of FMLA military leave with the availability of other marriage-based benefits provided by DOD.

The proposed change to a place of celebration rule for the definition of spouse under the FMLA would also have some impact beyond spousal leave. The right to take FMLA leave to care for a child includes the right to take leave to care for a stepchild. See 825.102, which defines "son or daughter" to include a stepchild; see also 825.122(d), 825.122(h), and 825.122(i). Under the Department's proposed rule, an employee in a valid same-sex marriage would be able to take leave to care for a stepchild to whom the employee does not stand in loco parentis. The Department has consistently recognized the eligibility of same-sex partners (whether married or not) to take leave to care for a partner's child provided that they meet the in loco parentis requirement of providing day-to-day care or financial support for the child. Administrator Interpretation FMLA 2010-

3. Prior to the Supreme Court's decision in Windsor, Section 3 of DOMA prevented employees in same-sex marriages from taking such leave for a stepchild unless they satisfied the requirements of in loco parentis status. However, in light of the June 26, 2013 Windsor decision, under the current version of the regulation, employees in same-sex marriages residing in States that recognize such marriages can take leave for a stepchild to whom they do not stand in loco parentis. 29 CFR 825.122(d)(3). Under the proposed place of celebration rule, an employee in a valid same-sex marriage would be able to take leave to care for a stepchild to whom the employee does not stand in loco parentis, regardless of the State in which he or she resides.

Similarly, the proposed change would allow an employee to take FMLA leave to care for the employee's parent's same-sex spouse who did not stand in loco parentis to the employee. The regulatory definitions allow for FMLA leave to be taken to care for a stepparent as well as a parent. See 825.102, which defines "parent" to include a stepparent; see also 825.122(c) and 825.122(j). Prior to the Windsor decision, if an employee's parent's same-sex spouse did not have an in loco parentis relationship with the employee (e.g., if the employee's parent entered into a same-sex marriage when the employee was no longer a child), then the employee would not have been able to take leave to care for that stepparent. After Windsor, employees with a parent in a valid same-sex marriage living in a State that recognizes such marriages can take leave to care for the stepparent. Under the proposed place of celebration rule, an employee would be able to take leave to care for a parent's same-sex spouse, regardless of the State.

Accordingly, because the Department believes that expanding the definition of spouse to include all legally married couples is consistent both with the Court's decision

in Windsor and with the purpose of the FMLA to provide eligible employees with unpaid leave to care for a seriously ill spouse, child, or parent, the Department proposes to define "spouse" according to the law of the place of celebration. Of course, an employer may offer an employment benefit program or plan that provides greater family or medical leave rights to employees than the rights established by the FMLA. See 29 CFR 825.700(a). FMLA regulations state: "[N]othing in the Act is intended to discourage employers from adopting or retaining more generous leave policies." 29 CFR 825.700(b). The Department seeks comments on its proposed definition.

IV. Conforming Changes

Minor editorial changes are proposed to sections 825.120, 825.121, 825.122, 825.127, 825.201 and 825.202 to make references to husbands and wives, and mothers and fathers gender neutral where appropriate so that they apply equally to opposite-sex and same-sex spouses. The Department proposes using the terms "spouses" and "parents," as appropriate, in these regulations. These editorial changes do not change the availability of FMLA leave but simply clarify its availability for all eligible employees who are legally married.

V. Paperwork Reduction Act

The Paperwork Reduction Act of 1995 (PRA), 44 U.S.C. 3501 et seq., and its attendant regulations, 5 CFR part 1320, require that the Department consider the impact of paperwork and other information collection burdens imposed on the public. Under the PRA, an agency may not collect or sponsor the collection of information, nor may it impose an information collection requirement unless it displays a currently valid Office of Management and Budget (OMB) control number. See 5 CFR 1320.8(b)(3)(vi).

OMB has assigned control number 1235-0003 to the FMLA information collections. As required by the PRA (44 U.S.C. § 3507(d)), the Department has submitted these proposed information collection amendments to OMB for its review.

Summary: The Department seeks to minimize the paperwork burden for individuals, small businesses, educational and nonprofit institutions, federal contractors, state, local, and tribal governments, and other persons resulting from the collection of information by or for the agency. The PRA typically requires an agency to provide notice and seek public comments on any proposed collection of information contained in a proposed rule. See 44 U.S.C. § 3506(c)(2)(B); 5 CFR § 1320.8.

The PRA requires all federal agencies to analyze proposed regulations for potential time burdens on the regulated community created by provisions within the proposed regulations that require the submission of information. These information collection (IC) requirements must be submitted to OMB for approval. Persons are not required to respond to the information collection requirements as contained in this proposal unless and until they are approved by OMB under the PRA at the final rule stage. This "paperwork burden" analysis estimates the burdens for the proposed regulations as drafted.

The Department proposes to revise the regulation defining "spouse" under the FMLA, in light of the United States Supreme Court's holding that Section 3 of the Defense of Marriage Act is unconstitutional. Amending the definition of spouse to include all legally married spouses as recognized under state law for purposes of marriage in the State where the marriage was entered into or, in the case of a marriage entered into outside of any State, if the marriage is valid in the place where entered into

and could have been entered into in a State, would expand the availability of FMLA leave to legally married same-sex spouses regardless of the State in which they reside. Under the proposed definition of spouse, eligible employees would be able to take FMLA leave to care for their same-sex spouse, a stepparent by virtue of a parent's same-sex marriage, or a stepchild to whom the employee does not stand in loco parentis.

In light of the June 26, 2013 Windsor decision and under the current regulation, employees in same-sex marriages have the right to take FMLA leave based on their same-sex marriage only if they reside in a State that recognizes same-sex marriage. In contrast, under the proposed place of celebration rule, all eligible employees in same-sex marriages would be able to take FMLA leave, regardless of their state of residence. These proposed information collection amendments update the burden estimates to include same-sex couples nationwide – employees whom Windsor rendered eligible to take FMLA leave under the current regulation based on their same-sex marriage residing in States that recognize such marriages and employees who would become able to take such leave under this proposed rule.

Covered, eligible employees in same-sex marriages are already eligible to take FMLA leave for certain FMLA qualifying reasons (e.g., employee's own serious health condition, the employee's parent's or child's health condition, etc.). The proposed rule does not increase the number of employees eligible to take FMLA leave; rather, it would allow FMLA leave to be taken on the basis of an employee's same-sex marriage regardless of their state of residence, in addition to the other reasons for which they were already able to take leave. That is, FMLA coverage and eligibility provisions are

unchanged by this proposed rule, and employees who are not currently eligible and employed by a covered establishment would not become eligible as a result of this rule.

Accordingly, the Department developed an estimate that focuses on FMLA leave that employees can take to care for their same-sex spouse, stepchild (i.e., child of employee's same-sex spouse to whom the employee does not stand in loco parentis), or stepparent (i.e., same-sex spouse of employee's parent). The proposed regulations, which do not substantively alter the FMLA but instead allow FMLA leave to be taken on the basis of an employee's same-sex marriage regardless of their state of residence, would create additional burdens on some of the information collections.

Circumstances Necessitating Collection: The Family and Medical Leave Act of 1993 (FMLA), 29 U.S.C. 2601, et seq., requires private sector employers who employ 50 or more employees, all public and private elementary schools, and all public agencies to provide up to 12 weeks of unpaid, job-protected leave during any 12-month period to eligible employees for certain family and medical reasons (i.e., for birth of a son or daughter and to care for the newborn child; for placement with the employee of a son or daughter for adoption or foster care; to care for the employee's spouse, son, daughter, or parent with a serious health condition; because of a serious health condition that makes the employee unable to perform the functions of the employee's job; to address qualifying exigencies arising out of the deployment of the employee's spouse, son, daughter, or parent to covered active duty in the military), and up to 26 workweeks of unpaid, job-protected leave during a single 12-month period to an eligible employee who is the spouse, son, daughter, parent, or next of kin of a covered servicemember for the employee to provide care for the covered servicemember with a serious injury or illness.

FMLA section 404 requires the Secretary of Labor to prescribe such regulations as necessary to enforce this Act. 29 U.S.C. 2654.

The Department's authority for the collection of information and the required disclosure of information under the FMLA stems from the statute and/or the implementing regulations. These third-party disclosures ensure that both employers and employees are aware of and can exercise their rights and meet their respective obligations under FMLA.

Purpose and Use: No WHD forms are impacted by the proposed regulations. While the use of the Department's existing forms is optional, the regulations require employers and employees to make the third-party disclosures that the forms cover. The FMLA third-party disclosures ensure that both employers and employees are aware of and can exercise their rights and meet their respective obligations under the FMLA.

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

Aside from the general requirement that third-party notifications be in writing, with a possible exception for the employee's FMLA request that depends on the employer's leave policies, there are no restrictions on the method of transmission. Respondents may meet many of their notification obligations by using Department-prepared publications available on the WHD Web site, www.dol.gov/whd. These forms

are in PDF, fillable format for downloading and printing. Employers may maintain records in any format, including electronic, when adhering to the recordkeeping requirements covered by this information collection.

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

Minimizing Small Entity Burden: This information collection does not have a significant impact on a substantial number of small entities. The Department minimizes the FMLA information collection burden by accepting records maintained by employers as a matter of usual or customary business practices. The Department also accepts records kept due to requirements of other governmental requirements (e.g., records maintained for tax and payroll purposes). The Department has reviewed the needs of both employers and employees to determine the frequency of the third-party notifications covered by this collection to establish frequencies that provide timely information with the least burden. The Department has further minimized burden by developing prototype notices for many of the third-party disclosures covered by this information collection and giving the text employers must use, in accordance with FMLA section 109 (29 U.S.C. 2619), in providing a general notice to employees of their FMLA rights and responsibilities, in addition to the prototype optional-use forms.

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

Special Circumstances: Because of the unforeseeable and often urgent nature of the need for FMLA leave, notice and response times must be of short duration to ensure that employers and employees are sufficiently informed and can exercise their FMLA rights and obligations.

Employers must maintain employee medical information they obtain for FMLA purposes as confidential medical records in separate files/records from the usual personnel files. Employers must also maintain such records in conformance with any applicable Americans with Disabilities Act and Genetic Information Nondiscrimination Act confidentiality requirements, except that: supervisors and managers may be informed regarding necessary restrictions on the work or duties of an employee and necessary accommodations; first aid and safety personnel may be informed (when appropriate) if the employee's physical or medical condition might require emergency treatment; and government officials investigating compliance with FMLA (or other pertinent law) shall be provided relevant information upon request.

Public Comments: The Department seeks public comments regarding the burdens imposed by information collections contained in this proposed rule. In particular, the Department seeks comments that: evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; enhance the quality, utility and clarity of the information to be collected; and minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submissions of responses. Commenters may send their views about these information collections to the Department in the same way as all other comments (e.g., through the regulations.gov Web site). All

comments received will be made a matter of public record, and posted without change to http://www.regulations.gov, including any personal information provided.

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

In addition to having an opportunity to file comments with the Department, comments about the paperwork implications of the proposed regulations may be addressed to OMB. Comments to OMB should be directed to: Office of Information and Regulatory Affairs, Attention OMB Desk Officer for the Wage and Hour Division, Office of Management and Budget, Room 10235, Washington, D.C. 20503, Telephone: 202-395-7316/Fax: 202-395-6974 (these are not toll-free numbers).

Confidentiality: The Department makes no assurances of confidentiality to respondents. As a practical matter, the Department would only disclose agency investigation records of materials subject to this collection in accordance with the provisions of the Freedom of Information Act, 5 U.S.C. 552, and the attendant regulations, 29 CFR part 70, and the Privacy Act, 5 U.S.C. 552a, and its attendant regulations, 29 CFR part 71.

Agency: Wage and Hour Division.

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

OMB Control Number: 1235-0003.

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

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

Total estimated number of respondents: 14,163,289 (no change)

Total estimated number of responses: 89,320,285 (14,816 responses added by this NPRM)

Total estimated annual burden hours: 19,029,671 (2,578 hours added by this NPRM)

Total estimated annual other cost burdens: $163,536,586 ($68,671 added by this NPRM)

VI. Executive Order 12866; Executive Order 13563

Executive Orders 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. Although this rule is not economically significant within the meaning of Executive Order 12866, it has been reviewed by the Office of Management and Budget.

The Department proposes to revise the regulatory definition of "spouse" for the purpose of FMLA to allow all legally married employees to take leave to care for their spouse regardless of whether their state of residence recognizes their marriage. As a result of the proposed regulatory change, covered and eligible employees would be entitled to take FMLA leave regardless of their state of residence to care for their same-

sex spouse with a serious health condition; to care for a stepchild with a serious health condition to whom the employee does not stand in loco parentis; to care for their parent's same-sex spouse with a serious health condition; for qualifying exigency reasons related to the covered active duty of their same-sex spouse; and to care for their same-sex spouse who is a covered servicemember with a serious injury or illness. This proposed rule would not expand coverage under the FMLA, that is, the coverage and eligibility provisions of the FMLA are unchanged by this rule and employees who are not currently eligible and employed by a covered establishment would not become eligible as a result of this proposed rule.

Estimates of the number of individuals in same-sex marriages vary widely due to issues with state level data tracking, reliance on self-reporting, and changes in survey formatting. The Department bases the number of same-sex marriages on the 2010 American Community Survey (ACS), conducted by the U.S. Census Bureau.[2] The 2010 ACS showed 152,500 self-reported same-sex marriages, resulting in 305,000 individuals. The Department estimates, based on the 2010 ACS, that in about 45 percent of same-sex marriages, both partners are employed and, for the purposes of this analysis, the Department assumes that one spouse is employed in the remaining 55 percent of same-sex marriages.[3]

[2] Lofquist, Daphne, Same-Sex Couple Households: American Community Survey Briefs, September 2011, p. 3. Available at: http://www.census.gov/prod/2011pubs/acsbr10-03.pdf.
[3] U. S. Census Bureau, 2011 American Community Survey 1-year data file. Table 2. Household Characteristics of Same-sex Couple Households by Assignment Status.

The Department recently surveyed employers and employees nationwide on FMLA leave taking, Family and Medical Leave in 2012.[4] Based on these survey findings, 59.2 percent of employees meet the eligibility requirements for FMLA leave and are employed by covered establishments.[5] Of those employees, 16.8 percent were married and took FMLA leave[6] and of those who took leave, 17.6 percent took leave to care for a parent, spouse, or child, and 1.4 percent took leave to address issues related to a military family member's covered active duty.[7] Applying these findings to the number of individuals in same-sex marriages based on the 2010 ACS, results in an estimated 6,720 new instances of FMLA leave annually as a result of the proposed change to the regulatory definition of spouse.[8, 9] This likely overestimates the number of instances of

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[4] See Wage and Hour Division FMLA Surveys web page at: http://www.dol.gov/whd/fmla/survey/

[5] Family and Medical Leave in 2012: Technical Report, exhibit 2.2.1, page 20, available at: http://www.dol.gov/asp/evaluation/fmla/FMLA-2012-Technical-Report.pdf.

[6] Family and Medical Leave in 2012: Technical Report, exhibit 4.1.5, page 64.

[7] Family and Medical Leave in 2012: Technical Report, exhibits 4.4.2, page 70, and 4.4.7, page 74.

[8] (152,500 marriages x 45 percent x 2) + (152,500 x 55 percent) = 137,250 + 83,875 =221,125 employed same-sex spouses.
221,125 employees x 59.2 percent = 131,000 covered, eligible employees (rounded)
131,000 x 16.8 percent = 22,000 covered, eligible, employees taking leave (rounded).
In the 2008 proposed FMLA rule, the Department estimated that covered eligible employees take 1.5 instances of leave per year (73 FR 7944). The Department uses that same estimate for this analysis. 21,992 x 1.5 =33,000 instances of leave per year (rounded)
33,000 (rounded) x 17.6 percent = 5,800 instances of leave (rounded) to care for a parent, spouse, or child.
33,000 x 1.4 percent = 460 instances of leave (rounded) for qualifying exigency reasons. For purposes of this analysis, the Department assumes employees will take leave to care for a covered servicemember at the same rate as leave taken for a qualifying exigency.
5,800 + 460 + 460 = 6,720 new instances of FMLA leave

[9] PRA analysis estimates burdens imposed by the "paperwork" requirements, while E.O. 12866 analysis estimates the effect the proposed regulations will have on the economy. Because E.O. 12866 and the PRA impose differing requirements, and because the corresponding analyses are intended to meet different needs, the estimated number of

new leave that would be taken, as covered and eligible employees in same-sex marriages are already entitled to take FMLA leave to care for a parent or child with a serious health condition.

Because FMLA leave is unpaid leave, the costs to employers resulting from this proposed rule change are: regulatory familiarization, maintenance of preexisting employee health benefits during FMLA leave, and administrative costs associated with providing required notices to employees, requesting certifications, reviewing employee requests and medical certifications, and making necessary changes to employer policies. The costs related to requesting and reviewing employee requests for leave and certifications and of providing required notices to employees are discussed in the Paperwork Reduction Act section of this proposed rule. The Department expects the remaining costs to be minimal to employers. The Department has determined that this rule will not result in an annual effect on the economy of $100 million or more.

VII. Small Business Regulatory Enforcement Fairness Act; Regulatory Flexibility

The Regulatory Flexibility Act of 1980 (Pub. L. 96–354) requires agencies to evaluate the potential effects of their proposed and final rules on small businesses, small organizations and small governmental jurisdictions. See 5 U.S.C. 603–604. If the rule is not expected to have a significant economic impact on a substantial number of small entities, the RFA allows an agency to certify such, in lieu of preparing an analysis. See 5 U.S.C. 605.

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instances of leave in the PRA analysis differs from the estimated number in the E.O. 12866 analysis.

The Department has determined that the proposed rule will not have a significant economic impact on a substantial number of small entities within the meaning of the RFA. Therefore, an initial regulatory flexibility analysis is not required. The factual basis for this certification is set forth below.

The proposed rule amending the FMLA regulations' definition of spouse does not substantively alter current FMLA regulatory requirements, but instead allows leave to be taken on the basis of an employee's same-sex marriage. The Department estimates that the proposed definitional revision will result in 6,720 new instances of FMLA leave annually[10]. This likely overestimates the number of new instances of leave-taking as

[10] Based on 2010 American Community Survey (ACS) data, the Department estimates that there are 305,000 individuals in a same-sex marriage. Based on ACS estimates, both partners are employed in 45.2 percent of same-sex married households. We assume that one partner is employed in the remaining 54.8 percent of same-sex married households. Thus, 72.6 percent of all partners in same-sex married households are employed. Applying this percentage to the number of individuals in a same-sex marriage, we estimate that 221,400 individuals in same-sex marriages are employed. Based on a 2012 DOL survey, 59.2 percent of employed individuals are covered by and eligible to take FMLA leave. Thus, we estimate that 131,100 individuals are covered by the FMLA and eligible for FMLA leave. Also based on the 2012 DOL survey's findings on leave usage patterns, 16.8% of covered, eligible, married employees actually take FMLA leave per year. Accordingly, we estimate that 22,000 employees are FMLA-covered, FMLA-eligible, and actually take leave each year. Further, based on the 2012 DOL survey finding that 1.5 is the average number of instances of leave per taker, individuals in same-sex marriages take 33,000 instances of leave. It is important to note that this figure of 33,000 instances of leave represents the estimate of all instances of FMLA leave taken by same-sex partners for any FMLA reason, including leave which they were *already* eligible to take (i.e., leave for themselves, their child, their parent, etc.) in addition to leave that a covered employee in a same-sex marriage may take for the employee's same-sex spouse, stepchild to whom they do not stand in loco parentis, and stepparent.

The 2012 DOL survey found that 17.6 percent of FMLA leave is used to take care of an employee's parent, child, or spouse; 1.4 percent of FMLA leave is for qualifying exigency purposes; and 1.4 percent of FMLA leave is for military caregiver purposes. Applying these percentages to the 33,000 instances of FMLA leave yields the following: 5,800 instances of leave related to care of an employee's parent, child, or spouse; 460 instances for qualifying exigency; and 460 instances for military caregiver purposes, for a total of 6,720 new instances of FMLA leave per year.

covered and eligible employees in same-sex marriages are already entitled in most cases to take FMLA leave to care for a parent or child with a serious health condition.

Because the FMLA does not require the provision of paid leave, the costs of this proposal are limited to the cost of hiring replacement workers, maintenance of employer-provided health insurance to the employee while on FMLA leave, compliance with the FMLA's notice requirements, and regulatory familiarization.

The need to hire replacement workers represents a possible cost to employers. In some businesses, employers are able to redistribute work among other employees while an employee is absent on FMLA leave, but in other cases the employer may need to hire temporary replacement workers. This process involves costs resulting from recruitment of temporary workers with needed skills, training the temporary workers, and lost or reduced productivity of these workers. The cost to compensate the temporary workers is in most cases offset by the amount of wages not paid to the employee absent on FMLA leave, when the employee's FMLA leave is unpaid, (i.e., the employee is not using accrued sick or vacation leave).

In the initial FMLA rulemaking, the Department drew upon available research to suggest that the cost per employer to adjust for workers who are on FMLA leave is fairly small. 58 FR 31810 (Mar. 10, 1993). Subsequent rulemakings have not produced evidence to the contrary; therefore, for the purpose of this discussion, we will continue to assume that these costs are fairly small. Furthermore, most employers subject to this rule change have been subject to the FMLA for some time and have already developed internal systems for work redistribution and recruitment of temporary workers.

Additionally, because FMLA leave is unpaid, one cost to employers consists of the health insurance benefits maintained by employers during employees' FMLA leave. Based on the Department's recent survey on FMLA leave, Family and Medical Leave in 2012, the average length of leave taken in one year by a covered, eligible employee is 27.5 days.[11] Assuming that most employees worked an eight-hour day, the average length of FMLA leave for an employee totals 220 hours in a given year.

Further, based on methodology used in the 2008 Final Rule, which first implemented the FMLA's military leave provisions, the Department estimates that a covered, eligible employee will take 200 hours of FMLA leave for qualifying exigency leave under § 825.126 in a given year. Additionally, using the same methodology, we estimate that a covered, eligible employee will take 640 hours of FMLA leave for military caregiver leave in a given year under § 825.127. 73 FR 68051 (Nov. 17, 2008).

To calculate the costs of providing health insurance, the Department utilizes data from the BLS Employer Costs for Employee Compensation survey. According to BLS' March 2014 report, employers spend an average of $2.45 per hour on insurance.[12]

The Department estimates that, on an annual basis for employees in same-sex marriages, the proposed rule will result in: 5,800 new instances of FMLA leave taken to care for an employee's same-sex spouse, stepchild, or stepparent; 460 new instances for qualifying exigency purposes; and 460 new instances for military caregiver purposes.

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[11] 2012 FMLA survey data showed that employees' average length of leave in past twelve months was 27.5 days. Family and Medical Leave in 2012: Technical Report, page 68, available at: http://www.dol.gov/asp/evaluation/fmla/FMLA-2012-Technical-Report.pdf

[12] http://bls.gov/ro7/ro7ecec.htm

Accordingly, an estimated total of 6,720 new instances of FMLA leave might be taken as a result of this proposed rule.

Applying the average leave duration to the number of new instances of FMLA leave taken in each category, and then multiplying by the $2.45 hourly cost to employers for health insurance results in the following cost estimates:

- Estimated annual employer benefits cost for FMLA leave taken for employee's same-sex spouse, stepchild, or stepparent: $3,126,200 (5,800 new instances x 220 hours[13] x $2.45)
- Estimated annual employer benefit cost for FMLA leave taken for qualifying exigency leave: $225,400 (460 new instances x 200 hours x $2.45)
- Estimated annual employer benefit cost for FMLA leave taken for military caregiver leave: $721,280 (460 new instances x 640 hours x $2.45).

Assuming that all covered, eligible employees taking FMLA leave receive employer-provided health insurance benefits, the estimated total cost to employers for providing benefits is $4,072,880.

Further, employers will incur costs related to the increase in the number of required notices and responses to certain information collections under this proposal. As explained in the Paperwork Reduction Act section of this preamble, the Department has estimated the aggregate paperwork burden cost associated with compliance with this regulatory change to be $68,671 per year.

[13] Note that 220 hours (27.5 days) is likely an overestimate, since some of these hours would be for FMLA leave that the employee was already eligible to take (e.g., leave for employee's parent, spouse, or child).

Lastly, in response to the proposed rule, each employer will need to review the definitional change and determine what revisions are necessary to their policies, and update their handbooks or other leave-related materials to incorporate any needed changes. This is a one-time cost to each employer, calculated as 30 minutes at the loaded hourly wage of a Human Resources Specialist. The median hourly wage of a Human Resources Specialist is $27.23 plus 40 percent in fringe benefits. See BLS Occupational Employment Statistics, Occupational Employment and Wages, May 2013 (http://www.bls.gov/oes/current/oes131071.htm). The Department estimates total annual respondent costs for the value of their time to be $7,261,860 ($38.12 x 0.5 hour x 381,000 covered firms and government agencies with 1.2 million establishments subject to the FMLA).

Therefore, the Department estimates the total cost of this proposed regulatory change to be $11,403,411 ($4,072,880 in employer provided health benefits + $68,671 in paperwork burden cost + $7,261,860 in regulatory familiarization costs).

The Department believes this to be an overestimate. The FMLA applies to public agencies and to private sector employers that employ 50 or more employees for each working day during 20 or more calendar weeks in the current or preceding calendar year. 29 U.S.C. 2611(4). In addition, the FMLA excludes employees from eligibility for FMLA leave if the total number of employees employed by that employer within 75 miles of that worksite is less than 50. 29 U.S.C. 2611(2)(B)(ii). Therefore, changes to the FMLA regulations by definition will not impact small businesses with fewer than 50 employees. The Department acknowledges that some small employers that are within the

SBA definition of small business (50–500 employees) will still have to comply with the regulation and incur costs.

In its 2012 proposed rule, the Department estimated there were 381,000 covered firms and government agencies with 1.2 million establishments subject to the FMLA. 77 FR 8989 (Feb. 15, 2012). Applying the SBA size definitions for small entities, the Department estimated that 83 percent, or 314,751 firms, are small entities subject to the FMLA. 77 FR 9004. Dividing the total cost of this proposed rule by the DOL estimate for the number of affected small firms results in a cost per small firm of $36.23. This is not deemed a significant cost. In addition, if the Department assumed that the total estimated cost of this proposed rule applies to all small entities, as defined by the SBA, the economic impact would only be $29.93 per small entity [$11,403,411 (total cost) divided by 381,000 (FMLA-covered small entities)]. This amount is not deemed significant.

The Department certifies to the Chief Counsel for Advocacy that the proposed rule will not have a significant economic impact on a substantial number of small entities.

VIII. Unfunded Mandates Reform Act

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), Public Law 104-4, establishes requirements for federal agencies to assess the effects of their regulatory actions on state, local, and tribal governments as well as on the private sector. Under Section 202(a) of UMRA, the Department must generally prepare a written statement, including a cost-benefit analysis, for proposed and final regulations that "includes any Federal mandate that may result in the expenditure by State, local, and

tribal governments, in the aggregate or by the private sector" in excess of $100 million in any one year ($141 million in 2012 dollars, using the Gross Domestic Product deflator).

State, local, and tribal government entities are within the scope of the regulated community for this proposed regulation. The Department has determined that this proposed rule contains a federal mandate that is unlikely to result in expenditures of $141 million or more for state, local, and tribal governments, in the aggregate, or the private sector in any one year.

IX. Executive Order 13132, Federalism

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

X. Executive Order 13175, Indian Tribal Governments

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

XI. Effects on Families

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

XII. Executive Order 13045, Protection of Children

E.O. 13045 applies to any rule that (1) is determined to be "economically significant" as defined in E.O. 12866, and (2) concerns an environmental health or safety risk that the promulgating agency has reason to believe may have a disproportionate effect on children. This proposal is not subject to E.O. 13045 because it is not economically significant as defined in Executive Order 12866 and, although the rule addresses family and medical leave provisions of the FMLA, it does not concern environmental health or safety risks that may disproportionately affect children.

XIII. Environmental Impact Assessment

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

XIV. Executive Order 13211, Energy Supply

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

XV. Executive Order 12630, Constitutionally Protected Property Rights

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

XVI. Executive Order 12988, Civil Justice Reform Analysis

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

List of Subjects in 29 CFR Part 825

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

Signed at Washington, DC this 19th day of June, 2014.

David Weil

Administrator, Wage and Hour Division

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

PART 825 -– THE FAMILY AND MEDICAL LEAVE ACT OF 1993

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

Authority**:** 29 U.S.C. 2654.

2. In § 825.102 revise the definition of "spouse" to read as follows:

§ 825.102 Definitions.

* * * * *

Spouse, as defined in the statute, means a husband or wife. For purposes of this definition, husband or wife refers to the other person with whom an individual entered into marriage as defined or recognized under State law for purposes of marriage in the State in which the marriage was entered into or, in the case of a marriage entered into outside of any State, if the marriage is valid in the place where entered into and could have been entered into in at least one State. This definition includes an individual in a same-sex or common law marriage that either (1) was entered into in a State that recognizes such marriages or, (2) if entered into outside of any State, is valid in the place where entered into and could have been entered into in at least one State.

* * * * *

3. Amend § 825.120 by:

a. Revising paragraph (a)(1);

b. Revising the first and fifth sentences of paragraph (a)(2);

c. Revising the first, second, and fifth sentences of paragraph (a)(3);

d. Revising the first and fourth sentences of paragraph (a)(4);

e. Revising the first sentence of paragraph (a)(5);

f. Revising paragraph (a)(6); and

g. Revising the sixth sentence of paragraph (b).

The revisions to read as follows:

§ 825.120 Leave for pregnancy or birth.

(a) * * *

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

(2) Both parents are entitled to FMLA leave to be with the healthy newborn child (i.e., bonding time) during the 12-month period beginning on the date of birth. * * * Under this section, both parents are entitled to FMLA leave even if the newborn does not have a serious health condition.

(3) Spouses who are eligible for FMLA leave and are employed by the same covered employer may be limited to a combined total of 12 weeks of leave during any 12-month period if the leave is taken for birth of the employee's son or daughter or to care for the child after birth, for placement of a son or daughter with the employee for adoption or foster care or to care for the child after placement, or to care for the employee's parent with a serious health condition. This limitation on the total weeks of leave applies to leave taken for the reasons specified as long as the spouses are employed by the same employer. * * * Where spouses both use a portion of the total 12-week FMLA leave entitlement for either the birth of a child, for placement for adoption or foster care, or to care for a parent, the spouses would each be entitled to

the difference between the amount he or she has taken individually and 12 weeks for FMLA leave for other purposes. * * *Note, too, that many State pregnancy disability laws specify a period of disability either before or after the birth of a child; such periods would also be considered FMLA leave for a serious health condition of the birth mother, and would not be subject to the combined limit.

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

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

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

(b) * * * The employer's agreement is not required for intermittent leave required by the serious health condition of the expectant mother or newborn child. * * *

4. Amend § 825.121 by:

a. Revising the first, second, and fifth sentences of paragraph (a)(3); and

b. Revising the second sentence of paragraph (a)(4).

The revisions to read as follows:

§ 825.121 Leave for adoption or foster care.

* * * * *

(3) Spouses who are eligible for FMLA leave and are employed by the same covered employer may be limited to a combined total of 12 weeks of leave during any 12-month period if the leave is taken for the placement of the employee's son or daughter or to care for the child after placement, for the birth of the employee's son or daughter or to care for the child after birth, or to care for the employee's parent with a serious health condition. This limitation on the total weeks of leave applies to leave taken for the reasons specified as long as the spouses are employed by the same employer. * * * Where spouses both use a portion of the total 12-week FMLA leave entitlement for either the birth of a child, for placement for adoption or foster care, or to care for a parent, the spouses would each be entitled to the difference between the amount he or she has taken individually and 12 weeks for FMLA leave for other purposes. * * *

(4) * * * Thus, spouses may each take 12 weeks of FMLA leave if needed to care for an adopted or foster child with a serious health condition, even if both are employed by the same employer, provided they have not exhausted their entitlements during the applicable 12-month FMLA leave period.

* * * * *

5. Revise § 825.122(b) to read as follows:

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

* * * * *

(b) Spouse, as defined in the statute, means a husband or wife. For purposes of this definition, husband or wife refers to the other person with whom an individual entered into marriage as defined or recognized under State law for purposes of marriage in the State in which the marriage was entered into or, in the case of a marriage entered into outside of any State, if the marriage is valid in the place where entered into and could have been entered into in at least one State. This definition includes an individual in a same-sex or common law marriage that either (1) was entered into in a State that recognizes such marriages or, (2) if entered into outside of any State, is valid in the place where entered into and could have been entered into in at least one State.

* * * * *

6. Amend § 825.127 by revising the first and second sentences of paragraph (f) to read as follows:

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

* * * * *

(f) Spouses who are eligible for FMLA leave and are employed by the same covered employer may be limited to a combined total of 26 workweeks of leave during the single 12-month period described in paragraph (e) of this section if the leave is taken for birth of the employee's son or daughter or to care for the child after birth, for placement of a son or daughter with the employee for adoption or foster care, or to care for the child after placement, to care for the employee's parent with a serious health condition, or to care for a covered servicemember with a serious injury or illness. This limitation on the total weeks of leave applies to leave taken for the reasons specified as long as the spouses are employed by the same employer. * * *

7. Amend § 825.201 by revising the first, second, and fifth sentences of paragraph (b) to read as follows:

§ 825.201 Leave to care for a parent.

* * * * *

(b) Same employer limitation. Spouses who are eligible for FMLA leave and are employed by the same covered employer may be limited to a combined total of 12 weeks of leave during any 12-month period if the leave is taken to care for the employee's parent with a serious health condition, for the birth of the employee's son or daughter or to care for the child after the birth, or for placement of a son or daughter with the employee for adoption or foster care or to care for the child after placement. This limitation on the total weeks of leave applies to leave taken for the reasons specified as long as the spouses are employed by the same employer. * * * Where the spouses both use a portion of the total 12-week FMLA leave entitlement for either the birth of a child, for placement for adoption or foster care, or to care for a parent, the spouses would each be entitled to the difference between the amount he or she has taken individually and 12 weeks for FMLA leave for other purposes. * * *

8. Amend § 825.202 by revising the third sentence of paragraph (c) to read as follows:

§ 825.202 Intermittent leave or reduced leave schedule.

* * * * *

(c) * * * The employer's agreement is not required, however, for leave during which the expectant mother has a serious health condition in connection with the birth of her child or if the newborn child has a serious health condition. * * *

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[FR Doc. 2014-14762 Filed 06/26/2014 at 8:45 am; Publication Date: 06/27/2014]