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DEPARTMENT OF LABOR

Wage and Hour Division

29 CFR Part 825

RIN 1235-AA09

Definition of Spouse under the Family and Medical Leave Act

AGENCY: Wage and Hour Division, Department of Labor

ACTION: Final rule.

SUMMARY: The Department of Labor's (Department) Wage and Hour Division (WHD) revises 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.

DATES: This Final Rule is effective [insert date 30 days after date of publication in the FEDERAL REGISTER].

FOR FURTHER INFORMATION CONTACT: Mary Ziegler, Director of the Division of Regulations, Legislation, and Interpretation, U.S. Department of Labor, Wage and Hour Division, 200 Constitution Avenue, N.W., Room S-3502, Frances Perkins Building, Washington, D.C. 20210; telephone: (202) 693-0406 (this is not a toll-free number). Copies of this Final 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 current regulations may be directed to the nearest WHD district office. Locate the nearest office by calling 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 WHD's website for a nationwide listing of WHD district and area offices at http://www.dol.gov/whd/america2.htm. Please visit http://www.dol.gov/whd for more information and resources about the laws administered and enforced by WHD. Information and compliance assistance materials specific to this Final Rule can be found at: http://www.dol.gov/whd/fmla/spouse/.

SUPPLEMENTARY 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. 29 U.S.C. 2612. 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. Id.

FMLA leave may be taken in a block, or under certain circumstances, intermittently or on a reduced leave schedule. Id. 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, private and public elementary and secondary schools, public agencies, and certain federal employers and entities, such as the U.S. Postal Service and Postal Regulatory 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 Protects

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 a Notice of Proposed Rulemaking (NPRM) in the Federal Register on March 10, 1993. 58 FR 13394. The Department received comments from a wide variety of stakeholders, and after considering these comments the Department issued an Interim Final Rule on June 4, 1993, effective August 5, 1993. 58 FR 31794.

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

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.

The Department commenced the current rulemaking by publishing an NPRM in the Federal Register on June 27, 2014 (79 FR 36445), inviting public comment for 45 days. The comment period closed on August 11, 2014. The Department received 77

comment submissions on the NPRM, representing over 18,000 individuals. Specific comments are discussed in detail below.

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. 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 defined spouse as a husband or wife as defined or recognized under state law and the regulation has looked to the law of the State where the employee resides. §§ 825.102, 825.122(a) (prior to the 2013 Final Rule the same definition appeared at §§ 825.113(a) and 825.800). The definition has also included common law marriage in States where it is recognized. Id.

The Defense of Marriage Act (DOMA) was enacted in 1996. 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 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). WHD also referenced DOMA's limitations on spousal FMLA leave in a number of sub-regulatory guidance documents posted on its website.

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 as a basis for FMLA spousal leave. Accordingly, as of June 26, 2013, under the current FMLA regulatory definition of spouse, an eligible employee in a legal same-sex marriage who resides in a State that recognizes the employee's 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. Similarly, as a result of the Windsor decision, the interpretation expressed in Opinion Letter FMLA-98 of the definition of spouse as a person of the opposite sex as defined in DOMA is no longer valid.

III. Summary of Comments

The Department commenced this rulemaking by publishing an NPRM on June 27, 2014. 79 FR 36445. In the NPRM the Department proposed to change the definition of spouse 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 proposed to change the definition of spouse to ensure that all legally married couples, whether opposite-sex or same-sex, will have consistent federal family leave rights regardless of where they live. The Department received 77 comment submissions on the NPRM, representing over 18,000 individuals, which are available for review at the Federal eRulemaking Portal, www.regulations.gov, Docket ID WHD-2014-0002. The vast majority of those individuals submitted identical letters, which expressed strong support for the proposed rule, that were part of a comment campaign by the Human Rights Campaign (HRC). In addition, hundreds of commenters submitted nearly identical but individualized letters, which also strongly supported the proposed rule, as part of the HRC comment campaign. Beyond these campaign comments, the majority of the comments were supportive of the proposed rule. Comments were received from advocacy organizations, labor organizations, employer associations, a state agency, United States Senators, and private individuals. The Department received one comment after the close of the comment period; the comment was not considered by the Department. A number of the comments received addressed issues that are statutory and therefore beyond the scope or authority of the proposed regulations, such as expanding the coverage of the Act to include domestic partners and parents in law. Because addressing these issues would require statutory changes, these comments are not addressed in this Final Rule. Moreover, the Department has previously issued guidance on some of these issues. See, e.g., Opinion Letter FMLA-98 (Nov. 18, 1998) (the FMLA does not cover absences to care for a domestic partner with a serious

health condition)[1]; Opinion Letter FMLA-96 (June 4, 1998) ("parent" as referenced in the Act does not include a parent-in-law).

The Department has carefully considered all of the relevant and timely comments. The major comments received on the proposed regulatory changes are summarized below, together with a discussion of the Department's responses. The Final Rule adopts the changes to the regulations as proposed in the NPRM.

IV. Analysis of the Proposed Changes to the FMLA Regulations

In the NPRM the Department proposed to change the regulatory definition of spouse in §§ 825.102 and 825.122(b) to mean the other person with whom an individual entered into marriage. The Department proposed 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 proposed to include in the definition same-sex marriages entered into abroad by including marriages entered into outside of any State as long as the marriage was legally valid in the place where it was entered into and could have been entered into legally in at least one State.

The proposed definition included the statutory language defining spouse as a husband or wife but made clear that these terms included all individuals in lawfully recognized marriages. As noted in the NPRM, the Department is aware that the language

[1] As noted above, the portion of Opinion Letter FMLA-98 that relied on DOMA's definition of spouse and marriage is now invalid in light of Windsor. The remaining portion of Opinion Letter FMLA-98, however, continues to be valid. Specifically, the opinion letter noted that the FMLA's legislative history indicated that the definition of spouse was meant to ensure that employers would not be required to provide leave to care for an employee's domestic partner.

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. 79 FR 36448. The Department intended the proposed definition to cover all spouses in legally valid marriages as defined in the regulation regardless of whether they use the terms husband or wife. The Department adopts the definition of spouse as proposed.

The Department is moving 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 all legally married couples, whether opposite-sex or same-sex, will have consistent federal family leave rights regardless of where they live. 79 FR 36448. The Department noted in the proposed rule that while many States and foreign countries currently legally recognize same-sex marriage, not all do. As of February 13, 2015, thirty-two States and the District of Columbia extend the right to marry to both same-sex and opposite-sex couples (Alaska, Arizona, California, Colorado, Connecticut, Delaware, District of Columbia, Hawaii, Idaho, Illinois, Indiana, Iowa, Maine, Maryland, Massachusetts, Minnesota, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, Oklahoma, Oregon, Pennsylvania, Rhode Island, Utah, Vermont, Virginia, Washington, West Virginia, Wisconsin, and Wyoming).[2] Additionally, as of February 13, 2015, eighteen countries extend the right to marry to both same-sex and opposite-sex couples (Argentina, Belgium, Brazil, Canada, Denmark, England/Wales/Scotland, Finland, France, Iceland, Luxembourg, The Netherlands, New Zealand, Norway, Portugal, Spain, South Africa, Sweden, and Uruguay). The Department notes that this

[2] On January 16, 2015, the Supreme Court granted review of the Sixth Circuit's decision upholding state law bans on same-sex marriage in Kentucky, Michigan, Ohio, and Tennessee. See DeBoer v. Snyder, No. 14-571, 2015 WL 213650 (S. Ct. Jan. 16, 2015). The case is currently pending before the Supreme Court.

list of States and countries currently recognizing same-sex marriage does not limit the revised definition of spouse in any way. Legal recognition of same-sex marriage has expanded rapidly and the Department anticipates that the number of States and countries recognizing same-sex marriage will continue to grow.

The vast majority of commenters, including the HRC letter-writing campaign commenters, applauded the Department's proposed use of a place of celebration rule. As the Maine Women's Lobby, A Better Balance, the 9to5 National Association of Working Women, the American Federation of Teachers, the North Carolina Justice Center, the Women's Law Project, the Religious Action Center for Reform Judaism, and many other commenters noted, under a state of residence rule, employees in legally valid same-sex marriages who live in a State that does not recognize their marriage are often forced to risk their jobs and financial wellbeing when they need time off to care for their ill or injured spouse or to address qualifying exigencies relating to their spouse's military service. These commenters stated that a place of celebration rule will provide security to all legally married same-sex spouses in knowing that they will be able to exercise their FMLA rights when the need arises. An individual similarly commented that, as the mother of a daughter in a same-sex marriage, she supported the rule because it would provide comfort to her as a parent who lives far from her daughter in knowing that, should her daughter need care, her daughter's same-sex spouse would be able to care for the daughter without having to worry that she would lose her job. Commenters such as the Family Equality Council (Family Equality), the National Partnership for Women & Families (National Partnership), the National Minority AIDS Council (NMAC), and twenty-three United States Senators who submitted a joint comment, also noted that

nationally consistent and uniform access to leave as provided by the proposed rule will further the original purpose of the FMLA.

Many commenters, including the National Center for Transgender Equality, Family Values @ Work, the National Employment Lawyers Association, the National Partnership, the Feminist Majority Foundation, the National Council of Jewish Women, and Equal Rights Advocates approved of the proposed place of celebration rule because it would provide certainty to same-sex couples regarding their FMLA leave rights, which would encourage worker mobility. The National Partnership commented that "[g]eographic mobility is a significant part of economic mobility for American workers . . . . By ensuring that [lesbian, gay, bisexual, and transgender (LGBT)] couples receive the same federal family leave protections if they move to a state that does not recognize their marriage, the rule makes it easier for workers to accept promotions or new jobs . . . ." This commenter also observed that the rule would provide important protections for LGBT military families who relocate due to military assignment.

Commenters also noted that a place of celebration rule will benefit employers as well as employees. The National Partnership observed that, by securing federal family leave rights to legally married same-sex spouses regardless of the State in which they reside, employers will be able to fill job positions with the most qualified workers. The National Business Group on Health expressed support for this rule because it will reduce the administrative burden on employers that operate in more than one State or have employees who move between States. The National Consumers League and the National Women's Law Center, among other commenters, echoed this observation that a place of

celebration rule will simplify FMLA administration for employers that operate in multiple States.

The Department concurs with these comments. A place of celebration rule provides 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 and ensuring employees in same-sex marriages will be able to exercise their FMLA leave rights. Moreover, such a rule also reduces 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 will 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.

Several commenters were appreciative that the proposed place of celebration rule would be consistent with the interpretations adopted by other federal government agencies, such as the Department of Defense and the Internal Revenue Service, as this would create greater uniformity for employees and employers. See, e.g., the Legal Aid Employment Law Center, the American Federation of State, County, and Municipal Employees, AFL-CIO, the Fenway Institute at Fenway Health. The Society for Human Resource Management, the U.S. Chamber of Commerce, and the College and University Professional Association for Human Resources, which submitted a joint comment (collectively SHRM), appreciated the use by multiple federal agencies of a place of celebration rule because "consistent definitions are of tremendous importance and value for those seeking to comply with the FMLA." The Department agrees with these comments. In addition, as stated in the NPRM, the Department believes that, in relation

to Department of Defense policy, it is appropriate whenever possible to align the availability of FMLA military leave with the availability of other marriage-based benefits provided by the Department of Defense. 79 FR 36448.

SHRM, the U.S. Conference of Catholic Bishops (USCCB), and the National Automobile Dealers Association (NADA) expressed concern regarding the potential burden on employers to know the marriage laws of jurisdictions beyond those in which they operate. NADA and SHRM requested that the Department provide guidance on how to determine if a same-sex marriage is legally valid, perhaps with a chart on the Department's website with current information on the status of same-sex marriage in the States and foreign jurisdictions.

The Department does not believe that further guidance on state and foreign marriage laws is necessary at this time. Employers do not need to know the marriage laws of all 50 States and all foreign countries. Rather, employers will only need to know the same-sex marriage laws of a specific State or country in situations where an employee has requested leave to care for a spouse, child, or parent and the basis for the family relationship is a same-sex marriage. In such a situation, for purposes of confirming the qualifying basis of the leave, the employer would need to know the marriage laws of only the individual State or country where the marriage at issue was entered into. The Department believes that making this determination will not be burdensome. There are a number of organizations focused on providing up-to-date information on the status of same-sex marriages in the 50 States within the United States and foreign jurisdictions. Some examples of organizations that provide this information include http://www.freedomtomarry.org/states/ and http://gaymarriage.procon.org/. Because

such information is readily available, the Department does not believe that it is necessary at this time to provide such information on its own website.

A few commenters addressed common law marriages as referenced in the proposed definition of spouse. Family Equality questioned whether the wording of the proposed definition could be interpreted to exclude an individual in a same-sex common law marriage. This commenter requested that the definition be modified to make clear that same-sex common law spouses are included in the definition. SHRM and the Food Marketing Institute (FMI) expressed concern that knowing the common law marriage standards of numerous States will be particularly burdensome for employers.

The Department has retained the proposed language regarding common law marriage in the Final Rule. The Department believes that the language regarding common law marriage in the definition of "spouse" in the Final Rule will not result in a significant change in employers' administration of the FMLA. Common law marriages have been included in the definition of spouse under the FMLA since 1995. § 825.113(a) (1995).[3] While the majority of States do not permit the formation of common law marriages within their borders, these States generally will recognize a common law marriage that was validly entered into in another State. Therefore, under the current regulation, looking to the law of the State in which the employee resides to determine the existence of a common law marriage will often require looking, in turn, to the common law marriage standards of another State. For example, under the current regulation, an FMLA-eligible employee of a covered employer who validly entered into an opposite sex common law marriage in Alabama, a State that permits the formation of common law

[3] This definition was not changed in the 2008 and 2013 rulemakings. See 73 FR 67934; 78 FR 8834.

marriages, and later relocated to North Dakota, a State that does not permit the formation of common law marriages, would be considered to have a legal marriage and would be entitled to FMLA spousal leave.

The only change from the current definition of spouse to the definition in the Final Rule in regards to common law marriage is that in States that permit same-sex common law marriages, employees who have entered into a same-sex common law marriage in those States will now be eligible to take FMLA spousal leave regardless of the State in which they reside. In response to Family Equality's comment above, the Department believes that the language used in the proposed definition and adopted in the Final Rule already encompasses spouses in same-sex common law marriages.

Moreover, under both the current and revised definitions of spouse, an employer would only need to know the common law marriage standards for a particular State for confirmation purposes in the event that an eligible employee requests FMLA leave to care for a spouse, child, or parent and the basis for the family relationship is a common law marriage. The Department does not believe that this will be burdensome and notes that there are organizations that provide information to the public on the status of common law marriages in the 50 States within the United States. Some examples of organizations that provide this information include http://www.nolo.com/legal-encyclopedia/common-law-marriage-faq-29086-2.html and http://usmarriagelaws.com/search/united_states/common_law_marriage/. Finally, the Department notes that in its experience, the inclusion of common law marriages within the definition of spouse has not caused problems in the last 20 years and the Department

does not anticipate that the Final Rule's recognition of common law marriages based on the place of celebration will result in any significant problems.

A few commenters addressed the documentation that employers may require from employees to confirm a family relationship. SHRM recommended that the Department clarify the type of proof an employer may require to confirm that an employee has a valid marriage, and permit employers to ask for documentation of proof of marriage on a case-by-case basis. FMI commented that it will be burdensome for employers to determine whether a common law marriage is valid, and requested guidance on how to confirm the existence of a common law marriage. Due to these concerns, this commenter recommended that the definition of spouse be revised to apply only to those who have a valid, government-issued document recognizing the marriage, such as a marriage certificate, court order, or letter from a federal agency such as the Social Security Administration. The National Women's Law Center urged the Department to modify the regulation at § 825.122(k) to require that employers request documentation of a family relationship in a consistent and non-discriminatory manner so that employees in same-sex marriages are not singled out with special burdens when they attempt to exercise their FMLA rights.

The Department declines to modify the regulation at § 825.122(k). That regulation permits employers to require employees who take leave to care for a family member to provide reasonable documentation of the family relationship. Reasonable documentation may take the form of either a simple statement from the employee or documentation such as a birth certificate or court document.

In response to the comments, the Department believes that the current regulation adequately addresses the nature of the documentation that employers may require. An employee may satisfy an employer's requirement to confirm a family relationship by providing either a simple statement asserting that the requisite family relationship exists, or documentation such as a child's birth certificate, a court document, etc. It is the employee's choice whether to provide a simple statement or another type of documentation. Thus, in all cases, a simple statement of family relationship is sufficient under the regulation to satisfy the employer's request. In response to FMI's comment, the Department does not believe that it is necessary or that it would be appropriate to require government-issued documentation to confirm common law marriages when an employee can document all other marriages with a simple statement. In response to SHRM's and the National Women's Law Center's comments, the Department notes that the change to a place of celebration rule in the definition of spouse does not alter the instances in which an employer can require an employee to confirm a family relationship, nor does it alter how an employee can do so. Employers have the option to request documentation of a family relationship but are not required to do so in all instances. Employers may not, however, use a request for confirmation of a family relationship in a manner that interferes with an employee's exercise or attempt to exercise the employee's FMLA rights. See 29 U.S.C. 2615(a). The Department also notes that if an employee has already submitted proof of marriage to the employer for some other purpose, such as obtaining health care benefits for the employee's spouse, such proof is sufficient to confirm the family relationship for purposes of FMLA leave. Lastly, the Department notes that where an employee chooses to satisfy a request for documentation of family

relationship with a simple statement, the employer may require that such statement be written.

Two commenters raised concerns about a tension between the proposed definition and state laws prohibiting the recognition of same-sex marriages. USCCB commented that it believed the proposed definition of spouse is "at odds" with the Supreme Court's decision in Windsor because the definition does not defer to the laws of the States that define marriage as the union of one man and one woman. The South Dakota Department of Labor and Regulation commented that same-sex marriages are not recognized or valid under the South Dakota Constitution.

The Department believes that using a place of celebration rule in the definition of spouse under the FMLA is consistent with the Court's decision in Windsor. The FMLA is a federal law that entitles eligible employees to take unpaid, job-protected leave for qualifying reasons, and the Final Rule's definition of spouse simply defines a familial relationship that may be the basis of an employee's qualifying reason to take leave. The Final Rule does not require States to recognize or give effect to same-sex marriages or to provide any state benefit based on a same-sex marriage. The Final Rule impacts States only in their capacity as employers and merely requires them to provide unpaid FMLA leave to eligible employees based on a federal definition of spouse. The Department notes that, after Windsor, the current definition of spouse already requires States in their capacity as employers to provide unpaid FMLA leave to employees in same-sex marriages if the employees reside in a different State that recognizes same-sex marriages. Moreover, the Department believes that defining the term spouse to include all legally married couples best serves the FMLA's goal of promoting "the stability and economic

security of families," and the "national interests in preserving family integrity," 29 U.S.C. 2601, because the need to care for a spouse does not differ based on the gender of the spouses.

The Department noted in the NPRM that 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. 79 FR 36448. Specifically, the Department noted that under the Department's proposed rule, an employee in a legal same-sex marriage would be able to take leave to care for a stepchild (i.e., the employee's same-sex spouse's child) to whom the employee does not stand in loco parentis. Id. Similarly, an employee whose parent is in a legal same-sex marriage would be able to take leave to care for the parent's same-sex spouse (i.e., the employee's stepparent) who did not stand in loco parentis to the employee when the employee was a child. Id.

Several commenters addressed the interplay between the proposed rule and the Administrator's Interpretation FMLA 2010-3 (June 22, 2010) that addresses in loco parentis. See, e.g., HRC, the HRC comment campaign, the National Gay and Lesbian Task Force (Task Force), the National Center for Lesbian Rights, the Statewide Parent Advocacy Network and Family Voices. These commenters stated that basing an employee's ability to take leave to care for a child on the employee's same-sex marriage could put the employee at risk of losing the ability to take leave to care for the child should the marriage dissolve. These commenters stated that recognizing an employee as standing in loco parentis, as the Administrator's Interpretation FMLA 2010-3 does, ensures that the employee who stands in loco parentis to a child will retain the ability to take leave to care for the child despite dissolution of the marriage. Therefore, the

commenters requested that the Department clarify that this rule will not affect the in loco parentis Administrator's Interpretation both in how parents are determined to stand in loco parentis and in recognizing that more than two adults may stand in loco parentis to a child. The Department recognizes that the existence of an in loco parentis relationship, using the standards set out in Administrator's Interpretation FMLA 2010-3, is an important basis for an employee to take leave to care for a child. The Department notes that it has consistently recognized the eligibility of employees to take leave to care for a child of the employee's same-sex partner (whether the employee and the partner are married or not) provided that the employee meets the in loco parentis requirement of providing day-to-day care or financial support for the child. Id.; see Administrator's Interpretation FMLA 2010-3 (June 22, 2010). For example, where an employee and the employee's same-sex spouse provide day-to-day care for the same-sex spouse's biological child, if the marriage dissolves but the employee continues to have an in loco parentis relationship with the child, the employee would be able to take leave to care for the child notwithstanding the dissolution of the marriage.

The Department did not intend for the proposed rule to have any impact on the standards for in loco parentis set out in the Administrator's Interpretation and this Final Rule has no impact on the standards for determining the existence of an in loco parentis relationship set out in Administrator's Interpretation FMLA 2010-3. Rather, the place of celebration rule means that employees in same-sex marriages, regardless of the State in which they reside, do not need to establish the requirements for in loco parentis for their spouse's child (the employee's stepchild) in order to take leave to care for the child. Only one type of relationship need apply for an employee to satisfy the requisite family

relationship under the FMLA. See 825.102, which defines "son or daughter" to include a stepchild; see also 825.122(d), 825.122(h), and 825.122(i). Thus, the place of celebration rule expands the basis for an employee to take leave to care for a child.

A few commenters also expressed concern about the regulatory definition of "parent" in § 825.122(c), which provides that a parent means a biological, adoptive, step or foster father or mother, or any other individual who stood in loco parentis to the employee when the employee was a son or daughter as defined in paragraph (d) of this section.[4] These commenters suggested that, as currently worded, the definition could be read to imply either that a particular adult may be recognized as a biological, adoptive, step, or foster parent, or as a person who stood in loco parentis, but not both, or that a biological, adoptive, step, or foster parent must meet the criteria of in loco parentis. See, e.g., NMAC, HRC, Family Equality, Task Force. These commenters requested that the Department modify the definition of parent to avoid such misinterpretation.

The Department declines to modify the definition of parent as suggested. The Department believes that the definition of parent as currently worded is not causing confusion. Nonetheless, the Department understands that further clarification may be useful. As an initial matter, the Department notes that the definition of parent in § 825.122(c) is relevant only to instances of an employee needing FMLA leave to care for a parent or to attend to a qualifying exigency arising out of the parent's military service. It is not relevant to instances of an employee needing to take leave to care for the employee's child. The regulatory definition of parent lists various types of parents, separated by commas. §§ 825.102, 825.122(c). The term "any other individual who

[4] While the commenters cited only to § 825.122(c), this same definition of parent is contained in § 825.102.

stood in loco parentis to the employee when the employee was a son or daughter as defined in paragraph (d) of this section" is set off by a comma from the list of other types of parents (i.e., "biological, adoptive, step or foster father or mother"). By setting the phrase off by a comma, the Department believes it is clear that in loco parentis applies only to "any other individual"; it does not apply to a "biological, adoptive, step or foster father or mother." When an employee seeks leave to care for a biological, adoptive, step, or foster parent, there is no need to inquire whether the parent stood in loco parentis to the employee; that parent automatically satisfies the definition of "parent" for FMLA purposes and an analysis of whether the in loco parentis requirements are met is not necessary.

Two commenters addressed the publication and effective date of the Final Rule. FMI requested that the Department delay publication of the Final Rule until the Department provides guidance on how employers can confirm the existence of an employee's common law marriage. The National Business Group on Health requested that the Department delay the effective date of the Final Rule for at least 12 months to allow employers time to modify their policies and procedures. The Department does not believe that any delay is warranted given the limited scope of this Final Rule. Therefore, the Final Rule will become effective 30 days after publication.

Lastly, notwithstanding the Final Rule's definition of spouse as including all legally married couples according to the law of the place of celebration, an employer may, of course, 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 §

825.700(a). FMLA regulations state: "[N]othing in the Act is intended to discourage employers from adopting or retaining more generous leave policies." § 825.700(b).

V. Conforming Changes

Minor editorial changes were proposed to §§ 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 proposed using the terms "spouses" and "parents," as appropriate, in these regulations. As stated in the NPRM, these editorial changes do not change the availability of FMLA leave but simply clarify its availability for all eligible employees who are legally married. 79 FR 36449. The Department received no comments on these changes and adopts them as proposed.

VI. 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 an agency's need for its information collections, their practical utility, the impact of paperwork and other information collection burdens imposed on the public, and how to minimize those burdens. 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.

The Department will publish a notice in the Federal Register to announce the result of the OMB 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 Department's Final Rule revises 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 at least one State, expands the availability of FMLA leave to legally married same-sex spouses regardless of the State in which they reside. Under the revised definition of spouse, eligible employees are able to take FMLA leave based on a same-sex marital relationship regardless of the state in which they reside.

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 Final Rule's place of celebration rule, all eligible employees in same-sex marriages will be able to take FMLA leave based on their marital relationship,

regardless of their state of residence. These information collection amendments update the burden estimates to include same-sex couples nationwide – both employees whom Windsor rendered eligible to take FMLA leave under the current regulation and employees who will be able to take such leave due to the changes in this Final Rule.

Covered, eligible employees in same-sex marriages are already eligible to take FMLA leave for certain FMLA qualifying reasons (e.g., the employee's own serious health condition, the employee's parent's or child's serious health condition, etc.). This Final Rule does not increase the number of employees eligible to take FMLA leave; rather, it allows employees in same-sex marriages to take FMLA leave on the basis of their 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 Final Rule, and employees who were not previously eligible and employed by a covered establishment do not become eligible as a result of this rule.

Accordingly, the Department developed an estimate that focuses on FMLA leave that employees can currently and will be able to take to care for a family member based on a same-sex marital relationship. The final 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, will create additional burdens on some of the information collections.

Circumstances Necessitating Collection: The 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 with a serious injury or illness for the employee to provide care for the servicemember. FMLA section 404 requires the Secretary of Labor to prescribe such regulations as necessary to enforce this Act. 29 U.S.C. 2654.

The 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.

Purpose and Use: No WHD forms or other information collections are changed by this Final Rule, except in when they may apply. While the use of the Department's FMLA 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). Employers may maintain records in any format, including electronic, when

adhering to the recordkeeping requirements covered by this information collection. 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 such records. 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 website, www.dol.gov/whd. These forms are in PDF, fillable format for downloading and printing.

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 such 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 the 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: 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, the

Department would have difficulty determining the extent to which employers and employees had met their FMLA 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 satisfy their FMLA obligations.

Privacy: Employers must maintain employee medical information they obtain for FMLA purposes as confidential medical records separately from other 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.

Agency: Wage and Hour Division.

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

OMB Control Number: 1235-0003.

Affected Public: Individuals or Households; Private Sector—Businesses or other for profits and not for profit institutions, farms, state, local, and tribal governments.

Total estimated number of respondents: 7,182,916 (no change).

Total estimated number of responses: 82,371,724 (38,106 responses added by this Final Rule).

Total estimated annual burden hours: 9,313,503 (4,918 hours added by this Final Rule).

Burden Cost: $236,283,571 ($124,770 from this final rule)

Other Respondent Cost Burden (capital/start-up): 0.$

Other Respondent Cost Burden (operations/maintenance):$184,932,912 ($108,326 (rounded) from this final rule)

The PRA requires agencies to consider public comments on information collections and to explain in final rules how public engagement resulted in changes from proposed rules. The Department discussed public comments regarding comments on documentation requirements related to establishing a family relationship earlier in this rulemaking.

VII. Executive Orders 12866 (Regulatory Planning and Review) and 13563 (Improving Regulation and Regulatory Review)

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 OMB.

The Department revised the regulatory definition of "spouse" for the purpose of the 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 this Final Rule, covered and eligible employees will 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 who did not stand in loco parentis to the employee when the employee was a child; 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 Final Rule will not expand coverage under the FMLA; that is, the coverage and eligibility provisions of the FMLA are unchanged by this rule and employees who were not previously eligible and employed by a covered establishment will not become eligible as a result of this Final 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 its estimate of same-sex marriages on the 2013 American Community Survey (ACS), conducted by the U.S. Census Bureau. The 2013 ACS showed 251,695 self-reported same-sex marriages, which represents 503,390 individuals. The Department estimates, based on the 2013 ACS, that in 45.2 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 54.8 percent of same-sex marriages.[5]

The Department recently surveyed employers and employees nationwide on FMLA leave taking, Family and Medical Leave in 2012.[6] Based on these survey findings, 59.2 percent of employees meet the eligibility requirements for FMLA leave and are employed by covered establishments.[7] Of those employees, 16.8 percent were married and took FMLA leave[8] 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.[9] Applying these findings to the number of individuals in same-sex marriages based on the 2013 ACS results in an estimated 8,202 new instances of FMLA leave annually as a result of the proposed change to the regulatory definition of spouse.[10, 11] This likely overestimates the number of instances of

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[5] U.S. Census Bureau, 2013. American Community Survey 1-year data file. Table 1: Household Characteristics of Opposite-Sex and Same-Sex Couple Households; and, Table 2: Household Characteristics of Same-Sex Couple Households by Assignment Status. Available at: http://www.census.gov/hhes/samesex/.

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

[7] 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.

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

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

[10] (251,695 marriages x 45.2 percent x 2) + (251,695 x 54.8 percent) = 227,532 + 137,929 = 365,461 employed same-sex spouses.
365,461 employees x 59.2 percent = 216,353 covered, eligible employees.
216,353 x 16.8 percent = 36,347 covered, eligible employees taking leave.
In past rulemakings the Department has estimated that covered, eligible employees taking leave take 1.5 instances of leave per year for traditional FMLA purposes, 13 instances of leave per year for qualifying exigency purposes, 44 instances of leave per year for military caregiver leave to care for an active-duty servicemember, and 51 instances of leave per year for military caregiver leave to care for a covered veteran. The Department uses those same estimates for this analysis. The Department estimates a weighted

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

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average for an employee who takes military caregiver leave at 45.4 instances of leave per year ((29,100 respondents x 44 responses) + (6,966 respondents x 51 responses) → 1,280,400 + 355,266 = 1,635,666 → 1,635,666 / (29,100 + 6,966) = 45.4).
To determine total new instances of leave, the Department first totaled the number of respondents per type of leave, then determined the percentage that respondents for each type of leave represent of all total respondents, and lastly, applied these percentages and the averages of instances of leave per type of leave to the Department's estimate of 36,347 same-sex, married employees who are FMLA-covered, FMLA-eligible and actually take FMLA leave per year. These calculations are as follows:
Traditional FMLA leave respondents: 7,000,000 + 5,950 = 7,005,950
Qualifying Exigency leave respondents: 110,000 + 30,900 = 140,900
Military Caregiver (all) leave respondents: 29,100 + 6,966 = 36,066
Total respondents: 7,182,916.
Percentage that each type of leave represents of all total respondents:
Traditional FMLA leave respondents: 7,005,950 / 7,182,916 = 0.9754 or 97.54 percent.
Qualifying Exigency leave respondents: 140,900 / 7,182,916 = 0.0196 or 1.96 percent.
Military Caregiver (all) leave respondents: 36,066 / 7,182, 916 = 0.0050 or 0.50 percent.
36,347 employees x 0.9754 x 1.5 = 53,180 instances of traditional leave
36,347 employees x 0.0196 x 13 = 9,256 instances of qualifying exigency leave
36,347 employees x 0.0050 x 45.4 = 8,263 instances of military caregiver leave
Total instances of leave or responses taken by individuals in same-sex marriages: 70,699.
70,699 x 17.6 percent = 12,443 instances of leave to care for a parent, spouse, or child.
70,699 x 1.4 percent = 990 instances of leave for qualifying exigency reasons.
70,699 x 1.4 percent = 990 instances of leave for military caregiver reasons.
The Department assumes that half (6,222) of the 12,443 instances of leave for the employee's parent, child, or spouse would be taken for the employee's same-sex spouse, stepchild, or stepparent, in recognition of the fact than an employee with a same-sex partner is already able to take leave to care for the employee's parent or child.
6,222 + 990 + 990 = 8,202 new instances of FMLA leave.

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

Because FMLA leave is unpaid leave, the costs to employers resulting from this Final Rule 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 Final 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. No comments were received on the Department's regulatory impact analysis.

VIII. Final Regulatory Flexibility Analysis

The Regulatory Flexibility Act of 1980 (RFA) as amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), hereafter jointly referred to as the RFA, 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.

The Department certifies that this Final Rule does not have a significant economic impact on a substantial number of small entities within the meaning of the RFA. Therefore, a final regulatory flexibility analysis is not required. The factual basis for this certification is set forth below.

This Final Rule amending the FMLA regulations' definition of spouse will not substantively alter current FMLA regulatory requirements, but instead will allow more employees to take leave based on a same-sex marital relationship. The Department estimates that this definitional revision will result in 6,222 new instances of FMLA leave taken to care for an employee's same-sex spouse, stepchild, or stepparent; 990 new instances for qualifying exigency purposes; and 990 new instances for military caregiver purposes. These numbers reflect the Department's estimate that a total of 8,202 new instances of FMLA leave might be taken as a result of this Final Rule, as detailed in the Executive Orders 12866 and 13563 section of this Final Rule preamble. This likely overestimates the number of new instances of leave-taking as 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 rule 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 first 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. Subsequent rulemakings have not produced evidence to the contrary; therefore, for the purpose of this discussion, the Department will continue to assume that these costs are fairly small. Furthermore, most employers subject to this Final Rule have been subject to the FMLA for some time and have already developed internal systems for work redistribution and recruitment of temporary workers.

Additionally, 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.[12] 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, the Department estimates 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.

[12] 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.

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.[13] Cost estimates are derived by multiplying the average leave duration with both the number of new instances of FMLA leave taken in each category and the $2.45 hourly cost to employers for health insurance, as follows:

- Estimated annual employer benefits cost for FMLA leave taken for employee's same-sex spouse, stepchild, or stepparent: $3,353,658 (6,222 new instances x 220 hours[14] x $2.45)
- Estimated annual employer benefit cost for FMLA leave taken for qualifying exigency leave: $485,100 (990 new instances x 200 hours x $2.45)
- Estimated annual employer benefit cost for FMLA leave taken for military caregiver leave: $1,552,320 (990 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 $5,391,078 ($3,353,658 + $485,100 + $1,552,320).

Further, employers will incur costs related to the increase in the number of required notices and responses to certain information collections due to this Final Rule. As explained in the Paperwork Reduction Act section of this Final Rule preamble, the Department has estimated the paperwork burden cost associated with this regulatory change to be $233,096 per year.

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

[14] 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 this Final Rule, each employer will need to review the definitional change, 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 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, which results in a total hourly rate of $38.12 (($27.23 x 0.40) + $27.23). 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 dedicated to regulatory familiarization costs 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 Final Rule to be $12,886,034($5,391,078 in employer provided health benefits + $233,096 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 employee's 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. Applying the SBA size definitions for small entities, the Department estimated that approximately 83 percent, or 314,751 employers, are small entities subject to the FMLA. 77 FR 9004. Dividing the total cost of this Final Rule by the Department's estimate for the number of affected small entities results in an annual cost per small entity of $40.77 ($12,831,808 / 314,751 small entities). This is not deemed a significant cost. In addition, if the Department assumed that all covered employers were small entities, the annual cost per small entity would only be $33.82 ($12,886,034 / 381,000 small entities). This also is not deemed a significant cost.

The Department received no comments on its determination that the proposed rule would not have a significant economic impact on a substantial number of small entities within the meaning of the RFA. The Department certifies to the Chief Counsel for Advocacy that this Final Rule will not have a significant economic impact on a substantial number of small entities.

IX. 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 regulation. The Department has determined that this Final 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.

X. Executive Order 13132, Federalism

This Final Rule does not have federalism implications as outlined in E.O. 13132 regarding federalism. Although States are covered employers under the FMLA, this Final 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.

XI. Executive Order 13175, Indian Tribal Governments

This Final Rule was reviewed under the terms of E.O. 13175 and determined not to have "tribal implications." This Final Rule also 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.

XII. Effects on Families

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

XIII. 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 Final Rule 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.

XIV. Environmental Impact Assessment

A review of this Final Rule 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 this Final Rule will not have a significant impact on the quality of the human environment. Thus, no corresponding environmental assessment or environmental impact statement have been prepared.

XV. Executive Order 13211, Energy Supply

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

XVI. Executive Order 12630, Constitutionally Protected Property Rights

This Final Rule 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.

XVII. Executive Order 12988, Civil Justice Reform Analysis

This rule was drafted and reviewed in accordance with E.O. 12988 and will not unduly burden the federal court system. This Final 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 18th day of February, 2015.

David Weil

Administrator, Wage and Hour Division

For the reasons set forth in the preamble, the Department amends 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, fifth, and last 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.

(a) * * *

(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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