

**SUPPORTING STATEMENT
THE FAMILY AND MEDICAL LEAVE ACT OF 1993
REGULATIONS, 29 C.F.R. PART 825
OMB CONTROL NO. 1235-0003**

1. 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 care for a covered servicemember with a serious injury or illness who is the spouse, son, daughter, parent, or next of kin to the employee. FMLA section 404 requires the Secretary of Labor to prescribe such regulations as necessary to enforce this Act. 29 U.S.C. § 2654. In addition, the National Defense Authorization Act for FY 2010 amended the FMLA to expand qualifying exigency leave to employee-family members of the Regular Armed Forces, and military caregiver leave to certain veterans. Pub. L. 111-84. The FMLA was also amended by the Airline Flight Crew Technical Corrections Act, which amended the hours of service eligibility requirement for airline flight crew members. Pub. L. 111-119.

- A. Employee Notice of Need for FMLA Leave [29 U.S.C. § 2612(e); 29 CFR §§ 825.100(d), -.301(b), -.302, -.303]. An employee must provide the employer at least 30 days advance notice before FMLA leave is to begin if the need for the leave is foreseeable based on an expected birth, placement for adoption or foster care, or planned medical treatment for a serious health condition of the employee or of a family member or planned medical treatment for a serious injury or illness of a covered servicemember. If 30 days notice is not practicable, such as because of a lack of knowledge of approximately when leave will be required to begin, a change in circumstances, or a medical emergency, notice must be given as soon as practicable under the facts and circumstances of the particular case. When an employee seeks leave for the first time for an FMLA-qualifying reason, the employee need not expressly assert rights under the FMLA or even mention the FMLA. The employee must, however, provide sufficient information that indicates that leave is potentially FMLA-qualifying and the timing and anticipated duration of the absence. Such information may include that a condition renders the employee unable to perform the functions of the job, or if the leave is to care for a family member, that the condition renders the family member unable to perform daily activities or, that the family member is a covered servicemember with a serious injury or illness, and whether the employee or the employee's family member is under the continuing care of a health

care provider. Sufficient information for leave due to a qualifying family member's call (or impending call) to active duty status may include that the military member is on or has been called to covered active duty and that the requested leave is for one of the categories of qualify exigency leave. An employer, generally, may require an employee to comply with its usual and customary notice and procedural requirements for requesting leave.

- B. Notice to Employee of FMLA Eligibility and Rights and Responsibilities Notice [29 CFR §§ 825.219 -.300(b)]. When an employee requests FMLA leave or when the employer acquires knowledge that an employee's leave may be for an FMLA-qualifying reason, the employer must notify the employee—within five business days, absent extenuating circumstances—of the employee's eligibility to take FMLA leave and any additional requirements for taking such leave. The eligibility notice must provide information regarding the employee's eligibility for FMLA leave, and, if the employee is determined not to meet the eligibility criteria, provide at least one reason why the employee is not eligible. The rights and responsibilities notice must detail the specific rights and responsibilities of the employee, and explain any consequences of a failure to meet these responsibilities. If an employee provides notice of a subsequent need for FMLA leave during the applicable 12-month period due to a different FMLA-qualifying reason, the employer does not have to provide an additional eligibility notice if the employee's eligibility status has not changed. If the employee's eligibility status has changed, then the employer must notify the employee of the change in eligibility status within five business days, absent extenuating circumstances. The rights and responsibilities notice must be provided to the employee each time the eligibility notice is provided to the employee. Form WH-381 allows an employer to satisfy the regulatory requirement to provide employees with specific information concerning eligibility status and with written notice detailing specific rights as well as expectations and obligations of the employee and explaining any consequences of a failure to meet these obligations. See § 825.300(b) and (c).
- C. Employee Certifications – Serious Health Condition of Employee or Employee's Family Member, Recertification, Fitness for Duty, Leave for a Qualifying Exigency, and Leave to Care for a Covered Servicemember.

1. Medical Certification and Recertification [29 U.S.C. §§ 2613, 2614(c)(3); 29 CFR §§ 825.100(d), -.305—.308]. An employer may require that an employee's leave due to the employee's own serious health condition that makes the employee unable to perform one or more essential functions of the employee's position or to care for the employee's spouse, son, daughter, or parent with a serious health condition, be supported by a certification issued by the health care provider of the eligible employee or of the employee's family member. In addition, an employer may request recertification under certain conditions. The employer must provide the employee at least 15 calendar days to provide the

initial certification, and any subsequent recertification, unless the employee is not able to do so despite his or her diligent good faith efforts. An employer must advise an employee whenever it finds a certification incomplete or insufficient and state in writing what additional information is necessary to make the certification complete and sufficient and must provide the employee seven calendar days (unless not practicable under the particular circumstances despite the employee's diligent good faith efforts) to cure any identified deficiency. The employer may contact the employee's health care provider for purposes of clarification and authentication of the medical certification (whether initial certification or recertification) after the employer has given the employee an opportunity to cure any identified deficiencies. An employer, at its own expense and subject to certain limitations, may also require an employee to obtain a second and third medical opinion. Form WH-380-E allows an employee requesting FMLA leave for his or her own serious health condition to satisfy the statutory requirement to furnish, upon the employer's request, appropriate certification (including a second or third opinion and recertification) to support the need for leave for the employee's own serious health condition. See § 825.305(a). Form WH-380-F allows an employee requesting FMLA leave for a family member's serious health condition to satisfy the statutory requirement to furnish, upon the employer's request, appropriate certification (including a second or third opinion and recertification) to support the need for leave for the family member's serious health condition. See § 825.305(a).

2. Fitness-for-Duty Medical Certification [29 U.S.C. § 2614(a)(4); 29 CFR § 825.312]. As a condition of restoring an employee whose FMLA leave was occasioned by the employee's own serious health condition that made the employee unable to perform the employee's job, an employer may have a uniformly-applied policy or practice that requires all similarly situated employees (i.e., same occupation, same serious health condition) who take leave for such conditions to obtain and present certification from the employee's health care provider that the employee is able to resume work. The employee has the same obligations to participate and cooperate in providing a complete and sufficient certification to the employer in the fitness-for-duty certification process as in the initial certification process. An employer may require that the fitness-for-duty certification specifically address the employee's essential job functions if the employer has provided the employee with a list of those essential functions and notified the employee of the need for a fitness-for-duty certification in the designation notice. Certain managers for an employer, but not the employee's immediate supervisor, may contact a health care provider for purposes of clarifying and authenticating a fitness-for-duty certification. An employer is not entitled to a fitness-for-duty certification for each absence taken on an intermittent or reduced leave schedule; however, an employee may be required to furnish a fitness-for-duty certificate no more often than once every 30 days if an employee

has used intermittent leave during that period and reasonable safety concerns exist.

3. Certification for Leave for a Qualifying Exigency [29 CFR 825.309]. An employer may require an employee who requests FMLA-leave due to a qualifying exigency to certify the need for leave. In addition, the first time an employee requests leave for a qualifying exigency related to a qualifying family member's active duty status, an employer may require the employee to provide a copy of the military member's active duty orders or other documentation issued by the military that indicates the military member is on covered active duty. Optional form WH-384 allows an employee requesting FMLA leave based on a qualifying exigency to satisfy the statutory requirement to furnish, upon the employer's request, appropriate certification to support leave for a qualifying exigency.

4. Certification for Leave to Care for Covered Servicemember [29 CFR 825.310]. An employee who requests FMLA leave to care for a covered servicemember (either a current servicemember or a veteran) may be required by his or her employer to certify the need for leave. An employee requesting FMLA leave based on a covered servicemember's serious injury or illness, may satisfy the statutory requirement to furnish, upon the employer's request, a medical certification from an authorized health care provider with optional form WH-385.¹ An employer must accept as sufficient certification of leave to care for a current servicemember an invitational travel order or invitational travel authorization (ITO or ITA) issued to the employee or to another family member in lieu of optional form WH-385 or the employer's own form.

D. Notice to Employees of FMLA Designation [29 CFR §§ 825.300(c) -.301(a)]. When the employer has enough information to determine whether the leave qualifies as FMLA leave (after receiving a medical certification, for example), the employer must notify the employee within five business days of making such determination whether the leave has or has not been designated as FMLA leave and the number of hours, days or weeks that will be counted against the employee's FMLA leave entitlement. If it is not possible to provide the hours, days or weeks that will be counted against the employee's FMLA leave entitlement (such as in the case of unforeseeable intermittent leave), then such information must be provided upon request by the employee but not more often than once every 30 days if leave is taken during the 30-day period. If the employer requires paid leave to be substituted for unpaid leave, or that paid leave taken under an existing leave plan be counted as FMLA leave, this designation also must be made at the time of the FMLA designation. In addition, if

¹ In the Notice of Proposed Rulemaking (NPRM), the Department proposed creating a separate form for the certification of a serious injury or illness of a covered servicemember who is a covered veteran. At this stage the Department has not proposed a specific format of this form, nor has it prepared a prototype of the proposed form. However, the information that is to be disclosed during the medical certification process for a veteran is identified in the NPRM.

the employer will require the employee to submit a fitness-for-duty certification, the employer must provide notice of the requirement with the designation notice. Form WH-382 allows an employer to meet its obligation to designate leave as FMLA-qualifying. See § 825.300(d).

- E. Notice to Employees of Change of 12-Month Period for Determining FMLA Entitlement [29 CFR § 825.200(d)(1)]. An employer generally must choose a single uniform method from four options available under the regulations for determining the 12-month period for FMLA leave reasons other than care of a covered servicemember with a serious injury or illness (which is subject to a set “single 12-month period”). An employer wishing to change to another alternative is required to give at least 60 days notice to all employees.
- F. Key Employee Notification [29 U.S.C. § 2614(b)(1)(B); 29 CFR §§ 825.217 -.219 and 825.300(c)(1)(v)]. An employer that believes that it may deny reinstatement to a key employee must give written notice to the employee at the time the employee gives notice of the need for FMLA leave (or when FMLA leave commences, if earlier) that he or she qualifies as a key employee. At the same time, the employer must also fully inform the employee of the potential consequences with respect to reinstatement and maintenance of health benefits if the employer should determine that substantial and grievous economic injury to the employer’s operations would result if the employer were to reinstate the employee from FMLA leave. If the employer cannot immediately give such notice, because of the need to determine whether the employee is a key employee, the employer must give the notice as soon as practicable after receiving the employee’s notice of a need for leave (or the commencement of leave, if earlier). If an employer fails to provide such timely notice it loses its right to deny restoration, even if substantial and grievous economic injury will result from reinstatement.

As soon as an employer makes a good faith determination—based on the facts available—that substantial and grievous economic injury to its operations will result if a key employee who has given notice of the need for FMLA leave or is using FMLA leave is reinstated, the employer must notify the employee in writing of its determination, including that the employer cannot deny FMLA leave and that the employer intends to deny restoration to employment on completion of the FMLA leave. The employer must serve this notice either in person or by certified mail. This notice must explain the basis for the employer’s finding that substantial and grievous economic injury will result, and, if leave has commenced, must provide the employee a reasonable time in which to return to work, taking into account the circumstances, such as the length of the leave and the urgency of the need for the employee to return.

An employee may still request reinstatement at the end of the leave period, even if the employee did not return to work in response to the employer’s notice. The employer must then again determine whether there will be substantial and grievous economic

injury from reinstatement, based on the facts at that time. If the employer determines that substantial and grievous economic injury will result from reinstating the employee, the employer must notify the employee in writing (in person or by certified mail) of the denial of restoration.

- G. Periodic Employee Status Reports [29 CFR §§ 825.300(b)(4)]. An employer may require an employee to provide periodic reports regarding the employee's status and intent to return to work.
- H. Notice to Employee of Pending Cancellation of Health Benefits [29 CFR § 825.212(a)]. Unless an employer establishes a policy providing a longer grace period, an employer's obligation to maintain health insurance coverage ceases under FMLA if an employee's premium payment is more than 30 days late. In order to drop the coverage for an employee whose premium payment is late, the employer must provide written notice to the employee that the payment has not been received. Such notice must be mailed to the employee at least 15 days before coverage is to cease and advise the employee that coverage will be dropped on a specified date at least 15 days after the date of the letter unless the payment has been received by that date.
- I. Documenting Family Relationship [29 CFR § 825.122(j)]. An employer may require an employee giving notice of the need for FMLA leave to provide reasonable documentation or statement of family relationship. This documentation may take the form of a simple statement from the employee, or a child's birth certificate, a court document, etc. The employer is entitled to examine documentation such as a birth certificate, etc., but the employee is entitled to the return of the official document submitted for this purpose.
- J. General FMLA Recordkeeping [29 U.S.C. § 2616; 29 CFR § 825.500]. The FMLA provides that employers shall make, keep, and preserve records pertaining to the FMLA in accordance with the recordkeeping requirements of Fair Labor Standards Act section 11(c), 29 U.S.C. § 211(c), and regulations issued by the Secretary of Labor. This statutory authority provides that no employer or plan, fund, or program shall be required to submit books or records more than once during any 12-month period unless the Department has reasonable cause to believe a violation of the FMLA exists or is investigating a complaint.

Covered employers who have eligible employees must maintain basic payroll and identifying employee data, including name, address, and occupation; rate or basis of pay and terms of compensation; daily and weekly hours worked per pay period; additions to or deductions from wages; total compensation paid; and dates FMLA leave is taken by FMLA eligible employees (available from time records, requests for leave, etc., if so designated). Leave must be designated in records as FMLA leave and leave so designated may not include leave required under State law or an

employer plan which is not also covered by FMLA; if FMLA leave is taken by eligible employees in increments of less than one full day, the hours of the leave; copies of employee notices of leave furnished to the employer under FMLA, if in writing, and copies of all eligibility notices given to employees as required under FMLA and these regulations; any documents (including written and electronic records) describing employee benefits or employer policies and practices regarding the taking of paid and unpaid leaves; premium payments of employee benefits; records of any dispute between the employer and an eligible employee regarding designation of leave as FMLA leave, including any written statement from the employer or employee of the reasons for the designation and for the disagreement.

Covered employers with no eligible employees must maintain the basic payroll and identifying employee data already discussed. Covered employers that jointly employ workers with other employers must keep all the records required by the regulations with respect to any primary employees, and must keep the basic payroll and identifying employee data with respect to any secondary employees.

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

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

The FLSA recordkeeping requirements, contained in Regulations 29 CFR part 516, are currently approved under OMB control number 1215-0018; consequently, this information collection does not duplicate their burden, despite the fact that for the administrative ease of the regulated community this information collection restates them.

2. Purpose and Use: The WHD created optional use forms: WHD Publication 1420, WH-380-E, WH-380-F, WH-381, WH-382, WH-384, and WH-385 to assist employers and employees in meeting their FMLA third-party notification obligations. The Department is considering the creation of a new optional use form for the certification of leave to care for a covered veteran. WHD Publication 1420 allows employers to satisfy the general notice requirement. *See* § 825.300(a). Form WH-380-E allows an employee requesting FMLA leave for his or her own serious health condition to satisfy the statutory requirement to furnish, upon the employer's request, appropriate certification (including a second or third opinion and recertification) to support the need for leave for the employee's own serious health condition. *See* § 825.305(a). Form WH-380-F allows an employee requesting FMLA-leave for a family member's serious health condition to satisfy the statutory requirement to furnish, upon the employer's request, appropriate certification (including a second or third opinion and recertification) to support the need for leave for the family member's serious health condition. *See* § 825.305(a). Form WH-381 allows an employer to satisfy the regulatory requirement to provide employees taking FMLA leave with written notice detailing specific expectations and obligations of the employee and explaining any consequences of a failure to meet these obligations. *See* 825 § 825.300(b) and (c). Form WH-382 allows an employer to meet its obligation to designate leave as FMLA-qualifying. *See* § 825.301(a). Form WH-384 allows an employee requesting FMLA leave based on a qualifying exigency to satisfy the statutory requirement to furnish, upon the employer's request, appropriate certification to support leave for a qualifying exigency. *See* § 825.309. Form WH-385 currently allows an employee requesting FMLA leave based on an active duty covered servicemember's serious injury or illness to satisfy the statutory requirement to furnish, upon the employer's request, a medical certification from an authorized health care provider. *See* § 825.310. The Department is considering the development of a separate optional use form for the certification for a serious injury or illness of a covered veteran or alternatively, whether to amend Form WH-385 to cover certification of the serious injury or illness of both an active duty servicemember and a covered veteran.

While the use of the Department's forms is optional, the regulations require employers and employees to make the third-party disclosures that the forms cover. The FMLA third-party disclosures ensure that both employers and employees are aware of and can exercise their rights and meet their respective obligations under FMLA.

The recordkeeping requirements are necessary in order for the Department to carry out its statutory obligation under FMLA section 106 to investigate and ensure employer compliance. The WHD uses these records to determine employer compliance.

3. Information 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 basic requirement that all 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. The employers may keep recordkeeping requirements covered by this information collection in any form, including electronic.

4. Minimizing Duplication: The FMLA information collections do not duplicate other existing information collections. In order to provide all relevant FMLA information in one set of requirements, the recordkeeping requirements restate a portion of the records employers must maintain under the FLSA. Employers do not need to duplicate the records when basic records maintained to meet FLSA requirements also document FMLA compliance. With the exception of records specifically tracking FMLA leave, the additional records required by the FMLA regulations, including records that must be maintained by covered employers in the airline industry as outlined in proposed § 825.500(h), are records that employers ordinarily maintain in the usual and ordinary course of business. The regulations do impose, however, a three-year minimum time limit that employers must maintain the records. The Department minimizes the FMLA information collection 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 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 the burden by developing prototype notices for many of the third-party disclosures covered by this information collection.
5. Small Entities: 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.

6. 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.
7. 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. Section 1 discusses the details of when employers and employees must provide certain notices.

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 ADA confidentiality requirements, except that: supervisors and managers may be informed regarding necessary restrictions on the work or duties of an employee and necessary accommodations; first aid and safety personnel may be informed (when appropriate) if the employee's physical or medical condition might require emergency treatment; and government officials investigating compliance with FMLA (or other pertinent law) shall be provided relevant information upon request.

8. Public Comments:

On February 15, 2012 the Department published a proposed rule and sought comments on the burdens imposed by the information collections covered by the proposed regulations. 77 FR 8960. The same notice provided that comments could also be sent directly to OMB, in accordance with provisions of 5 C.F.R. § 1320.11.

The Department is seeking public comment regarding the burdens imposed by the information collection contained in this proposed rule through the published NPRM. 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 commenters (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.

9. **Payments or Gifts:** The Department makes no payments or gifts to respondents completing these information collections.
10. **Confidentiality:** The Department makes no assurances of confidentiality to respondents. Much of the information covered by this information collection consists of third-party disclosures. As explained in Section 1-J, employers generally must maintain records and documents relating to any medical certification, recertification or medical history of an employee or employee's family members as confidential medical records in separate files/records from usual personnel files. Employers must also generally maintain such records in conformance with any applicable Americans with Disabilities (ADA) confidentiality requirements. As a practical matter, the Department would only disclose agency investigation records of materials subject to this collection in accordance with the provisions of the Freedom of Information Act, 5 U.S.C. § 552, and the attendant regulations, 29 C.F.R. part 70, and the Privacy Act, 5 U.S.C. § 552a, and its attendant regulations 29 C.F.R. part 71.
11. **Sensitive Questions:** The FMLA authorizes employers to require their employees to submit a medical certification, including a second or third opinion and subsequent recertifications, to substantiate the need for FMLA leave. These records may contain sensitive information, because of the personal and delicate nature of a request for FMLA leave; however, as noted in Section 1-J, the regulations specify how employers must limit access to such information.
12. **Burden Hours Estimates:**

The PRA section of the FMLA NPRM published February 15, 2012 (77 FR 8960) used the 2008 analysis as the baseline to determine the burden increase for this paperwork package, and accounts for respondent and burden increases resulting from the statutory amendments to the FMLA covering military qualifying leave, military caregiver leave, and airline flight crew eligibility. Subsequent to OIRA's clearance of the NPRM, but before its publication in the Federal Register, OIRA approved the re-clearance of the existing 2008 ICRs under the PRA. That re-clearance reflected in increases in respondents and burden stemming from the self-executing portions of the FY 2010 NDAA and the Airline Flight Crew Technical Corrections Act. The proceeding burden analysis reflects the increase in respondents and burdens resulting from the extension of military caregiver leave to certain veterans. The baseline used in this analysis is drawn from the 2012 re-clearance issued on February 9, 2012.

2008 analysis: Except as otherwise noted, the DOL bases the following burden estimates on the Paperwork Reduction Act supporting statement or the Preliminary Regulatory

Impact Analysis, 73 Fed. Reg. 7940, related to the February 11, 2008, FMLA NPRM (73 Fed. Reg. 7876) that did not change as a result of the final rule published on November 17, 2008 (73 Fed. Reg. 67934). The DOL estimates the FMLA covers 95.8 million workers. The DOL estimates 285,237 employers, of which 211,170 are private businesses and 74,067 are governmental entities, respond to the FMLA information collections. 73 Fed. Reg. 7943. For PRA purposes, 74,000 employers are assumed to be state, local, and tribal governmental entities and 67 are assumed Federal entities. The DOL assumes a proportional response burden between the employer entities (74.033172415 percent private, 25.94333834 percent state, local and tribal governments, and 0.02348951 percent Federal). The DOL also estimates that 12.7 million employees will request to take an average of 1.5 leaves each for “traditional” FMLA purposes (*i.e.*, leave because of a serious health condition or due to the birth or adoption of a child); however, the DOL estimates that only 7,139,100 employees seeking traditional FMLA leave will actually be both eligible for FMLA and request it for a truly qualifying purpose. The FMLA regulations require employers to respond to all FMLA requests, in order to bring closure to the requests, even when the leave does not qualify for FMLA protection; thus, the DOL claims a burden for the employer responses to some 5,563,900 employees requesting FMLA that will be denied. The DOL assumes half of these invalid requests will be because the leave requestor is not an eligible employee and the other half of the denials will be because the basis for the leave itself is not for a qualifying reason. In addition, 110,000 employees will take an average of 13 leaves each for qualifying exigencies under the NDAA amendments to the FMLA, and 29,100 employees will take an average of 44 FMLA leaves to care for a qualifying servicemember. Within each information collection the total respondents, total responses, and total burden estimates are rounded to the nearest whole number.

2012 analysis: Except as otherwise noted, the Department bases the following burden estimates on the Paperwork Reduction Act supporting statement or the Preliminary Regulatory Analysis, 73 FR 7940, related to the February 11, 2008, FMLA NPRM (73 FR 7876) that did not change as a result of the final rule published on November 17, 2008. 73 FR 67934. The Department estimates that the FMLA covers 95.8 million workers. The Department estimates 285,237 employers, of which 211,170 are private businesses and 74,067 are governmental entities, respond to the FMLA information collections. 73 FR 7943. For PRA purposes, 74,000 employers are assumed to be state, local, tribal, governmental entities and 67 are assumed Federal entities. The Department assumes a proportional response burden between the employer entities (74.033172415 percent private, 25.94333834 percent state, local, and tribal governments, and 0.02348951 percent Federal). Within each information collection, the respondents, response, and burden estimates are rounded to the nearest whole number.

NPRM analysis: The Department bases the following burden estimates on the Preliminary Regulatory Impact Analysis (PRIA) estimates, except as otherwise noted. The Department estimates that there are 381,000 covered employers with 291,159 assumed to be private businesses and 89,526 to be government entities. The Department

assumes a proportional response burden between employer entities (74.033172415 percent private, 25.94333834 percent state, local, tribal, governments, and .02348951 percent federal government). There are 72.9 million employees working for covered employers who are eligible for leave. In 2005, 7 million employees took leave. 73 FR 7938. Within each information collection, the respondents, response, and burden estimates are rounded to the nearest whole number.

A. Employee Notice of Need for FMLA Leave.

2008 analysis: While employees normally will provide general information regarding their absences, the regulations may impose requirements for workers to provide their employers with more detailed information than might otherwise be the case. The DOL estimates that providing this additional information will take approximately two minutes per employee notice of the need to take FMLA leave. In addition, Westat Report data indicate about 75 percent of FMLA users take leave in a single block, 15 percent take leave in two blocks, and 10 percent take leave in more than two blocks. See 2000 Westat Report at 2-3, <http://www.dol.gov/esa/whd/fmla/chapter2.pdf>.

Category	Respondents	x	Response Rate	Total Responses
Traditional FMLA	7,139,100	x	1.5	10,708,650
Qualifying Exigency	110,000	x	13	1,430,000
<u>Servicemember Care</u>	<u>29,100 (Duplicated)</u>	<u>x</u>	<u>44</u>	<u>1,280,400</u>
Unduplicated Totals	7,249,100			13,419,050

Per capita number of responses = 1.85113324 (13,419,050/7,249,100)

New 2008 burden: 13,419,050 total responses x 2 minutes = 447,302 hours

2012 analysis: While employees normally will provide general information regarding their absences, the regulations may impose requirements for workers to provide their employers with more detailed information than might otherwise be the case. The Department estimates that providing this additional information will take approximately two minutes per employee notice of the need to take FMLA leave.

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

Department discussed in the PRIA, the Department estimates that there will be 679,800 employee requests for qualifying exigency leave.

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

Burden: 1,479,230 employee respondent notices of leave x 2 minutes/60 minutes per hour = 49,308 hours.

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

Burden: 790,500 employee respondent notices of leave x 2 minutes/60 minutes per hour = 26,350 hours.

Existing burden for this requirement: 13,829,680 responses and 460,990 hours.

Total burden requested for this requirement: 14,620,180 responses and 487,340 hours.

B. Notice to Employee of FMLA Eligibility and Rights and Responsibilities Notice.

2008 analysis: The DOL believes all covered employers with eligible employees will need to notify their employees of their FMLA eligibility. To provide finality to all FMLA leave requests, the notice must be provided to all FMLA leave requestors, even those who do not qualify for leave. The DOL estimates that each notice to an employee of FMLA eligibility, rights, and responsibilities takes approximately 10 to 30 minutes, depending on whether the employee is found eligible for FMLA leave. The DOL assumes, for purposes of this estimate, that 2,781,950 employees will each make average of 1.5 leave requests (total 4,172,925) will receive responses that they

are not eligible for FMLA, and those responses each take 10 minutes. The DOL estimates all other responses (including 13,419,050 for eligible employees who take qualifying leave and 4,172,925 responses to eligible employees who seek FMLA protections for non-FMLA purposes) take 30 minutes, because of the mandatory disclosure of employee rights and responsibilities.

Category	Total Responses	x	Response Time	Hours Burden
Not Eligible	4,172,925	x	10 minutes	695,488
<u>Eligible</u>	<u>17,591,975</u>	<u>x</u>	<u>30 minutes</u>	<u>8,795,988</u>
Unduplicated Totals	21,764,900			9,491,476

The DOL has further refined the response burden as follows:

Per capita responses = 76.304616862 (21,764,900 responses/285,237 respondents)

Per capita average response time = 26.165457227 minutes (21,764,900 responses/9,491,476 hours)

Burden Disaggregation

Sector	Responses	x	Response Time =	Hours Burden
Private (74.03317215 %)	16,113,246	x	26.165457227 minutes =	7,026,841
State, local, tribal (25.943338 %)	5,646,542	x	26.165457227 minutes =	2,462,406
<u>Federal (0.02348951 %)</u>	<u>5112</u>	<u>x</u>	<u>26.165457227 minutes =</u>	<u>2229</u>
Unduplicated Totals	21,764,900	x	26.165457227 minutes =	9,491,476

2012 analysis: The Department estimates that each written notice to an employee of FMLA eligibility and rights and responsibilities takes approximately ten minutes. The number of eligibility and rights and responsibilities notices that employers must provide is equal to the number of leave takers.² The Department estimates that employers will provide 55,330 FMLA eligibility and rights and responsibilities notices to employees under the new military and airline amendments to the FMLA. Employers may use optional Form WH-381 to satisfy this requirement.

² Based on the leave usage patterns for qualifying exigency, the Department is assuming that all subsequent leave requests will be for the same servicemember for whom the leave was originally requested. The employee is required to notify the employer in each instance of the need for leave. But the employer is not required to provide the employee with a notice of eligibility or rights and responsibilities unless the employee's eligibility status changes. For qualifying exigency leave, 30,900 leave takers will provide 679,800 employer notices of their need for leave. However, employers will only have to issue 30,900 eligibility and rights and responsibilities notices. However, for the eligible employees who are airline flight crew members, the Department is assuming that each of the employees' 1.5 employer notices of the need for leave are for different FMLA-qualifying reasons, and therefore, employers will need to provide a notice of eligibility and rights and responsibilities for each request for leave. 5,951 leave takers will issue 8,930 employer notices for leave (5,951 x 1.5 leaves = 8,930 notices). Employers will issue 8,930 notices of eligibility and notices of rights and responsibilities.

Burden: 39,830 total responses (notices of eligibility and rights and responsibilities) x 10 minutes/60 minutes per hour = 6,638 hours

Burden Disaggregation by Sector

Private (74.03317215%): 29,487 responses x 10 minutes/60 minutes = 4,914 hours
State, local, tribal (25.943338%): 10,333 responses x 10 minutes/60 minutes = 1,722 hours
Federal (0.02348951%): 9 responses x 10 minutes/60 minutes = 2 hours

NPRM analysis: Based on the leave usage patterns for military caregiver leave, the Department is assuming that all subsequent leave requests will be for the same servicemember for whom the leave was originally requested. The employee is required to notify the employer in each instance of the need for leave. But the employer is not required to provide the employee with a notice of eligibility or rights and responsibilities unless the employee's eligibility status changes. For military caregiver leave, 15,500 leave takers will provide 790,500 employer notices of their need for leave, but employers will only have to issue 15,500 eligibility and rights and responsibilities notices.

New burden: 15,500 total responses (notices of eligibility and rights and responsibilities) x 10 minutes/60 minutes per hour = 2,583 hours

Burden Disaggregation by Sector

Private (74.03317215%): 11,475 responses x 10 minutes/60 minutes = 1,913 hours
State, local, tribal (25.943338%): 4,021 responses x 10 minutes/60 minutes = 670 hours
Federal (0.02348951%): 6 response x 10 minutes/60 minutes = 1 hours

Existing burden requirement is

Private: 16,142,733 responses and 7,031,755 hours
State, local, tribal: 5,656,874 responses and 2,464,128 hours
Federal: 5,121 responses and 2,231 hours

Total burden requested for this requirement is

Private: 16,136,208 responses and 7,033,668 hours
State: 5,660,895 responses and 2,464,798 hours
Federal: 5,127 responses and 2,232 hours

C. Employee Certifications

2008 analysis: Employee Certifications–Serious Health Condition Certification, Recertification, and Fitness-for-Duty Certification; Documenting Call to Military

Active Duty; Certification of Qualifying Exigency Due to Call to Military Active Duty; Covered Servicemember's Serious Injury or Illness Certification.

The DOL estimates 81.5 percent of traditional FMLA leave is because of a serious health condition. See 2000 Westat Report at 2-5, <http://www.dol.gov/esa/whd/fmla/chapter2.pdf>. This includes 52.4 percent for employee's serious health conditions. *Id.* The DOL also estimates employers require employees to provide medical certifications in 92 percent of traditional leave cases for a serious health condition. See 2000 Westat Report at A-2-51. <http://www.dol.gov/esa/whd/fmla/appendixa-2.pdf>. Additionally, the DOL estimates that second or third opinions and/or recertifications add 15 percent (apportioned for PRA purposes as 10 percent recertifications and five percent second/third opinions) to the total number of certifications. The DOL also estimates ten percent of employees taking FMLA leave for their own serious health condition must submit one fitness-for-duty certification and five percent of intermittent leave users will be asked to present an average of three such certifications because of reasonable safety concerns. 73 Fed. Reg. 7952. Consistent with the pattern for requesting medical certifications, the DOL assumes employers will require certifications for 92 percent of the leaves employees take for either qualifying exigencies or caring for a covered servicemember under the NDAA amendments to the FMLA. Finally, the DOL estimates employees spend an average of 20 minutes in obtaining and providing the certifications, with the exception of providing the call to military active duty. The DOL estimates documenting calls to active duty will take 10 minutes.

Respondents: 7,139,100 traditional FMLA leave takers x .815 response rate for serious

condition x 0.92 response request rate = 5,352,897

110,000 Military-FMLA leave takers x 0.92 response request rate = 101,200

Total = 5,454,097

Responses

10,708,650 eligible "traditional" leave requests x 0.815 serious health

condition rate x 0.92 initial certification request rate = 8,029,346

8,029,346 initial certifications x 0.15 second/third/recertification rate = 1,204,402

5,611,333 initial certifications (employee's own condition) x 0.10

non-intermittent fitness-for-duty certification request rate = 561,133

5,611,333 initial certifications (employee's own condition) x 0.05

intermittent fitness-for duty response request rate x 3 frequency rate = 841,700

110,000 calls to active duty x 0.92 response rate = 101,200

1,430,000 qualifying exigency leave request rates x 0.92 response rate = 1,315,600

29,100 care for qualifying servicemember leave requests x 0.92 response request rate =	26,772
Total	12,080,153

Per capita number of responses = 1.6664348678 (12,080,153 responses/5,454,097 respondents)

Burden Hours

Type	Responses	x	Response Time =	Hours
Call to active duty documentation	101,200	x	10 minutes =	16,867
<u>All other certifications</u>	<u>11,978,953</u>	<u>x</u>	<u>20 minutes =</u>	<u>3,992,984</u>
Total	12,080,153			4,009,851

Per capita average response time = 19.9162262266 minutes (12,080,153 responses/4,009,851 hours).

Generally, the DOL associates no paperwork burden with the portion of this information collection applicable to employers, since—even absent the FMLA—similar information would customarily appear in their internal instructions requesting a medical certification or recertification. In addition, employers only seek second or third opinions are permissive under the statute; thus, employers seek them only when to do so makes prudent business sense. The burden for employer recordkeeping requirements for the certifications is subsumed in the general FMLA recordkeeping estimate. The DOL accounts for health care provider burdens to complete medical certifications as a “maintenance and operation” cost burden, discussed later and it is apportioned to employees.

1. Medical Certification and Recertification.

2008 analysis: See above.

2012 analysis: The Department estimates that 90 percent of airline flight crew employees who take FMLA leave will do so for a serious health condition of their own or that of a family member. The Department also assumes, due to the safety concerns of the airline industry that employers will require that all of these employees provide medical certification to their employer. As the Department did in the 2008 paperwork analysis, and with no present reason to change its estimate, the Department further estimates that second or third opinions and/or recertifications add 15 percent to the total number of

certifications, and that employees spend 20 minutes in obtaining the certifications³. Employers may have employees use optional Forms WH-380-E and WH-380-F to satisfy this statutory requirement.

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

Burden: 4,820 x 1.15 subsequent medical certifications = 5,543 total employee medical certifications.

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

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

NPRM analysis: Not applicable.

2. Fitness-for-Duty Medical Certification.

2008 analysis: See above.

2012 analysis: The Department assumes that the Federal Aviation Authority (FAA) requires airline flight crew employees, specifically pilots and flight attendants, to receive regular medical evaluations as a condition of their continued employment. Therefore the Department estimates that 50 percent of airline pilots and 10 percent of flight attendants will be required to submit fitness-for-duty medical certifications pursuant to the FMLA regulations. The Department estimates that completing a fitness-for-duty certification will take an employee ten minutes.

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

NPRM analysis: Not applicable.

3. Certification of Qualifying Exigency for Military Family Leave.

2008 analysis: See above.

³ The estimated time of 20 minutes reflects the Department’s expectation that it will take 20 minutes to complete optional form WH-380. The Department assumes that while visiting the health care provider for a previously scheduled appointment, the individual will have the certification completed by the doctor’s office.

2012 analysis: The Department estimates that 30,900 employee-family members will be eligible to take FMLA leave to address qualifying exigencies due to the expansion of qualifying exigency leave under the FY 2010 NDAA to certain family members of members of the Regular Armed Forces. The Department estimates that employers will request certification from 30,900 employees for qualifying exigency leave. Employers may use optional Form WH-384 to satisfy this requirement. The Department further estimates that it will take approximately 20 minutes for a Human Resources staff member to request, review, and verify the employee's certification papers.

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

NPRM analysis: Not applicable.

4. Certification for Leave Taken to Care for a Covered Servicemember – Current Servicemember.

2008 analysis: See above.

2012 analysis: Pursuant to the FY 2010 NDAA, an eligible employee-family member may take FMLA leave to care for a current servicemember who has a serious injury or illness that existed before the member's active duty and was aggravated by service in the line of duty while on active duty. At this time the Department does not have sufficient information to develop an estimate of employees who will qualify for military caregiver leave for a covered servicemember with a serious injury or illness that existed prior to the servicemember's active duty and was aggravated in the line of duty on active duty. Accordingly, the Department will not revise the current burden analysis for certification of leave to care for a current servicemember at this time. The Department will review the comments that it receives in response to the NPRM and based on the received comments may revise the burden analysis at the final rule stage.

NPRM analysis: Not applicable.

5. Certification for Leave Taken to Care for a Covered Servicemember – Covered Veteran.

2008 analysis: Not applicable.

2012 analysis: Not applicable.

NPRM analysis: The FY 2010 NDAA provided FMLA leave for eligible employees to care for a covered veteran with a serious injury or illness that was incurred in the line of duty on active duty (or existed before the member's active duty and was aggravated in

the line of duty on active duty) and manifested itself before or after the member became a veteran. The Department estimates that 15,500 employees will be eligible to take leave to care for a covered veteran. The Department expects that employers will request certification forms for this leave. The Department estimates that it will take a Human Resources specialist 30 minutes to request, review, and verify the employee's certification papers.

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

All new certification and recertification requirements as a result of this NPRM impose a burden of 15,500 responses and 7,750 hours.

Existing total burden for this requirement is 12,118,019 responses and 4,022,236 hours.

Total burden for this requirement is estimated to be 12,133,519 responses and 4,029,986 hours.

D. Notice to Employees of FMLA Designation.

2008 analysis: The DOL estimates that all covered employers with eligible employees will need to provide notify their employees whether leave has been designated as FMLA-protected. The DOL estimates that each written FMLA designation notice takes approximately 10-30 minutes to prepare, depending on whether the employer must notify the employee in writing of any additional information needed to provide a complete and sufficient certification or explain why the leave does not qualify. While the employer must state that leave does not qualify in writing, the explanation of why may be oral. The DOL further estimates employers will have to explain why leave does not qualify in 4,172,925 instances (same number as employees found not to be eligible) and take 20 minutes. The DOL further estimates that about 13,210,400 qualifying leaves will take minutes. Finally, the DOL estimates 3,302,600 (25 percent of qualifying leaves) leave requests will require additional information and require the employer to complete an addition designation notice that will take 30 minutes in order to explain what additional information is needed.

Category	Total Responses	x	Response Time	Hours Burden
Designated	9,907,800	x	10	1,651,300
Not designated	4,172,925	x	20	1,390,975
<u>Additional information needed</u>	<u>3,302,600</u>	<u>x</u>	<u>30</u>	<u>1,651,300</u>
Total	17,383,325			4,693,575

Per capita responses = 60.943444 (17,383,325 responses/285,237 respondents)
 Per capita response time = 16.20026663 minutes (17,383,325 responses/4,693,575 hours).

Burden Disaggregation

Sector	Responses	x	Response Time =	Hours Burden
Private (74.03317215 %)	12,869,427	x	16.200267 min. =	3,474,803
State, local, tribal (25.94333834 %)	4,509,815	x	16.200267 min. =	1,217,670
<u>Federal (0.02348951 %)</u>	<u>4083</u>	<u>x</u>	<u>16.200267 min. =</u>	<u>1102</u>
Unduplicated Totals	17,383,325	x	16.200267 min.	4,693,575

2012 analysis: The Department estimates that each written FMLA designation notice takes approximately ten minutes to complete.

Burden: 39,830 total responses (designation notices) x 10 minutes/60 minutes per hour = 6,638 hours.

Burden Disaggregation by Sector

Private (74.03317215%): 29,487 responses x 10 minutes/60 minutes = 4,914 hours
 State, local, tribal (25.943338%): 10,333 responses x 10 minutes/60 minutes = 1,722 hours
 Federal (0.02348951%): 9 responses x 10 minutes/60 minutes = 2 hours

NPRM analysis: The Department estimates that each written FMLA designation notice takes approximately ten minutes to complete.

Burden: 15,500 total responses (designation notices) x 10 minutes/60 minutes per hour = 2,583 hours.

Burden Disaggregation by Sector:

Private (74.03317215%): 11,475 responses x 10 minutes/60 minutes = 1,913 hours
 State, local, tribal (25.943338%): 4,021 responses x 10 minutes/60 minutes = 670 hours
 Federal (0.02348951%): 4 responses x 10 minutes/60 minutes = 1 hour

Existing total burden for this requirement:

Private: 12,898,914 responses and 3,479,716 hours
 State, local, tribal: 4,520,148 responses and 1,219,392 hours
 Federal: 4,092 responses and 1,104 hours

Total burden requested for this requirement:
 Private: 12,910,389 responses and 3,481,629 hours
 State, local, tribal: 4,524,169 responses and 1,220,062 hours
 Federal: 4,096 responses and 1,105 hours

E. Notice to Employees of Change of 12-month period of determining FMLA eligibility.

2008 analysis: The DOL estimates that annually 10 percent of FMLA covered employers choose to change their 12-month period for determining FMLA eligibility and must notify employees of the change. The DOL also assumes these employers also employ ten percent of the 95.8 million workers covered by the FMLA. These notifications can be accomplished via email or posting and require about approximately 10 minutes for the employer’s entire workforce.

285,237 covered employers x 10% response rate = 28,524 respondents
 95.8 covered employees x 10% = 9,580,000 responses.
 Per capita responses = 335.857523489 (9,580,000/28,634)
 Per capita response time = 1.79336117 seconds

Total Responses	x	Response Time	Hours Burden
9,580,000	x	1.79336117	4772

Burden Disaggregation

Sector	Respondents	Responses	x	Response Time	=	Hours Burden
Private (74.03317215 %)	21,117	7,092,303	x	1.79336117 sec.	=	3533
State, local, tribal (25.943338 %)	7400	2,485,346	x	1.79336117 sec.	=	1238
<u>Federal (0.02348951 %)</u>	<u>7</u>	<u>2351</u>	<u>x</u>	<u>1.79336117 sec.</u>	<u>=</u>	<u>1</u>
Unduplicated Totals	28,524	9,580,000	x	1.79336117 sec.	=	4772

2012 analysis: The Department assumes that 10 percent of covered airline employers will choose to change their 12-month period for determining eligibility since the AFCTCA. The Department also assumes these employers will employ 10 percent of newly added eligible employees in the airline industry. Based on the 2008 analysis, the Department continues to estimate that it will take an employer 10 minutes to make this employee notification, and this time was amortized to 1.79336117 seconds per individual response.

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

9,056 responses x 1.79336117 = 5 hours.

Burden Disaggregation by Sector:

Since there is a minimal change to this information collection, the Department is not listing the burden disaggregation by sector. The private sector and state, local, tribal government sectors are affected. Three hours are attributed to the private sector, for a total of 7,099,007 responses and 3,536 hours. One hour is attributed to the state, local, tribal government sector, for a total of 2,490,070 responses and 1,240 hours. There is not a change attributed to the federal sector.

NPRM analysis: Not applicable.

Existing burden for this requirement:

Private: 7,099,082 respondents and 3,536 hours

State, local, tribal: 2,487,721 respondents and 1,239 hours

Federal: 2,351 respondents and 1 hour

Total burden requested for this requirement:

Private: 7,099,082 respondents and 3,536 hours

State, local, tribal: 2,487,721 respondents and 1,239 hours

Federal: 2,351 respondents and 1 hour

F. **Key Employee Notification.**

2008 analysis: The “key employee” status notification to an employee is part of the employee eligibility notice; accordingly, that notice includes the burden for the initial notification. The DOL estimates that annually 10 percent of employers notify one employee of the intent not to restore the employee at the conclusion of FMLA leave. In addition, the DOL estimates half of these cases will require the employer to issue a second notice from the employer to address a key employee’s subsequent request for reinstatement. Finally, the DOL estimates each key employee notification takes approximately 5 minutes. The DOL associates no paperwork burden with the employee requests, since these employees would ordinarily ask for reinstatement even if the rule were not to exist.

285,237 covered employers x 10 % response rate = 28,524 respondents

28,524 respondents x 1.5 responses = 42,786 responses (Due to rounding, one additional response appears in the burden disaggregation chart)

42,786 responses x 5 minutes = 3566 hours

Burden Disaggregation

Sector Respondents Responses x Response Time = Hours Burden

Private (74.03317215 %)	21,117	31,676 x	5 min. =	2640
State, local, tribal (25.943338 %)	7400	11,100 x	5 min. =	925
Federal (0.02348951 %)	7	11 x	5 min. =	1
Unduplicated Totals	28,524	42,787 x	5 min. =	3566

2012 analysis: The Department assumes that a very small percentage of airline flight crew employees will be determined key employees. As such, the Department does not associate a burden hour estimate with this provision.

NPRM analysis: Not applicable.

Existing burden for this requirement:

Private: 31,676 respondents and 2,640 hours

State, local, tribal: 11,100 respondents and 925 hours

Federal: 11 respondents and 1 hour

Total burden requested for this requirement:

Private: 31,676 respondents and 2,640 hours

State, local, tribal: 11,100 respondents and 925 hours

Federal: 11 respondents and 1 hour

G. Periodic Employee Status Reports.

2008 analysis: The DOL estimates employers require periodic reports from 25.5 percent of FMLA leave users (based on the percentage of FMLA leave takers with absences lasting more than 30 days). See *2000 Westat Report* at A-2-29, <http://www.dol.gov/esa/whd/fmla/appendixa-2.pdf>. The DOL also estimates a typical employee would normally respond to an employer's request for a status report; however, to account for any additional burden the regulations might impose, the DOL estimates a 10 percent response rate and a burden of two minutes per response. The DOL also estimates that each such respondent annually provides two periodic status reports. While the DOL believes most employers would only seek these reports in accordance with customary business practices, the agency has accounted for any potential additional employer burden in the "Eligibility Notice."

Traditional FMLA 7,249,100 FMLA leave takers x 0.255 employer request rate x 10% regulatory burden = 184,852 respondents.

184,852 respondents x 2 responses = 369,704 responses

369,704 total responses x 2 minutes = 12,323 hours

2012 analysis: The Department estimated in the 2008 paperwork analysis that employers require periodic reports from 25 percent of FMLA-leave users, and since it has not received any evidence to believe otherwise, it continues to estimate 25 percent

today. The Department also estimates a typical employee would normally respond to an employer’s request for a status report; however, to account for any additional burden the regulations might impose, the Department estimates that 10 percent of employees will respond to a request only because of the regulatory requirement, imposing a burden of two minutes per response. The Department also estimates that each such employee provides two annual periodic status reports.

Burden: 36,851 leave takers x 25% rate of employer requests x 10% of employees who comply due to the regulations = 921 employee responses.
 921 employee responses x 2 responses = 1,843 total responses.
 1,843 responses x 2 minutes/60 minutes = 61 hours.

NPRM analysis: 15,500 leave takers x 25% x 10% = 388 employee responses.
 388 employee responses x 2 responses = 776 total responses.
 776 responses x 2 minutes/60 minutes = 26 hours.

Existing burden for this requirement is 371,547 responses and 12,384 hours
Total burden for this requirement is estimated to be 372,323 responses and 12,410 hours.

H. Documenting Family Relationships.

2008 analysis: The DOL estimates 50 percent of traditional FMLA leave takers do so for “family” related reasons, such as caring for a newborn or recently adopted child or a qualifying family member with a serious health condition. *See 2000 Westat Report* at 2-5, <http://www.dol.gov/esa/whd/fmla/chapter2.pdf>. All leave takers for the NDAA amendments to the FMLA will do so for family members. The DOL also estimates employers require additional documentation to support a family relationship in 5 percent of these cases (2.5 percent for traditional FMLA and 5 percent for military FMLA leave users), and the additional documentation requires 5 minutes.

Category	Leave Takers	x	Response Rate	Respondents
Traditional FMLA	7,139,100	x	.025	178,478
<u>Military FMLA</u>	<u>110,000</u>	<u>x</u>	<u>.050</u>	<u>5500</u>
Totals	7,249,100			183,987

183,987 x 5 minutes = 15332 hours

2012 analysis: As it did in the 2008 analysis, the Department estimates that 50 percent of traditional FMLA leave takers do so for “family” related reasons, such as caring for a newborn or recently adopted child or a qualifying family member with a serious health condition. 73 FR 7939. As such, the Department assumes that 50 percent of airline flight crewmembers who take leave will take it for family reasons.

(2,976 of 5,951 leave takers.) Under the military amendments all employees who take leave will be doing so for a family related reason. (46,400 leave takers).

In the 2008 PRA analysis, the Department estimated that employers may require additional documentation to support a family relationship in five percent of these cases, and the additional documentation will take 5 minutes.

Burden: 33,876 (employees taking leave for family-related reasons) x 5% (additional documentation) = 1,694 employees required to document family relationships.
1,694 employees x 5 minutes/60 minutes per hour = 141 hours.

NPRM analysis: 15,500 (employees taking leave for family-related reasons) x 5% (additional documentation) = 775 employees required to document family relationships.

775 employees x 5 minutes/60 minutes per hour = 65 hours.

Existing burden for this requirement: 185,681 responses and 15,473 hours

Total burden requested for this requirement: 186,456 responses and 15,538 hours.

I. Notice to Employee of Pending Cancellation of Health Benefits.

2008 analysis: Based on the number of employees indicating they have lost benefits, the DOL estimates half of FMLA covered employers are each send one FMLA leave taker a notification of not having received health insurance premiums. See 2000 Westat Report at 4-4, <http://www.dol.gov/esa/whd/fmla/chapter4.pdf> . For purposes of estimating the paperwork burden associated with this information collection, the DOL estimates that unique respondents would send all responses, and each notification will take 5 minutes.

Burden Disaggregation

Sector	Respondents/Responses	x	Response Time	=	Hours Burden
Private (74.03317215 %)	105,585	x	5 min.	=	8799
State, local, tribal (25.9433384 %)	37,000	x	5 min.	=	3083
<u>Federal (0.02348951 %)</u>	<u>34</u>	<u>x</u>	<u>5 min.</u>	<u>=</u>	<u>3</u>
Unduplicated Totals	144,982	x	5 min.	=	12,082

2012 analysis: Pursuant to the AFCTCA, airline flight crew employees are newly eligible to take FMLA-qualifying leave. However, the Department believes that employer policies and agreements that airline flight crew members may be a party to preclude employers from canceling an employee’s health benefits. Therefore, at this time, the Department will not revise the current burden analysis for employee notice of pending cancellation of health benefits.

NPRM analysis: Not applicable.

Existing burden for this requirement:

Private: 105,585 responses and 8,799 hours

State, local, tribal: 37,000 responses and 3,083 hours

Federal: 34 responses and 3 hours

Total burden requested for this requirement:

Private: 105,585 responses and 8,799 hours

State, local, tribal: 37,000 responses and 3,083 hours

Federal: 34 responses and 3 hours

J. General Recordkeeping.

2008 analysis: The DOL estimates the FMLA imposes an additional general recordkeeping burden on each FMLA covered employer that equals 1.25 minutes for each FMLA leave; thus, the number of responses equals the number of FMLA leaves.

13,419,050 responses x 1.25 minutes = 279,564 hours

Per capita responses = 47.0452641137 (13,419,050/285,237)

Burden Disaggregation

Sector	Responses	x	Response Time	=	Hours Burden
Private (74.03317215 %)	9,934,548	x	1.25 min.	=	206,970
State, local, tribal (25.9433384 %)	3,481,350	x	1.25 min.	=	72,528
Federal (0.02348951 %)	3152	x	1.25 min.	=	66
Unduplicated Totals	13,419,050	x	1.25 min.	=	279,564

2012 analysis: The Department believes that the FMLA does not impose any additional burden on employers in the airline industry, as the records required to be maintained by the FMLA should already be maintained by the employers as a part of their usual and customary business practices. Therefore, the Department is not proposing a new burden hour estimate for this provision.

Existing burden for this requirement:

Private: 9,934,548 responses and 206,970 hours

State, local, tribal: 3,481,350 responses and 72,528 hours

Federal: 3,152 responses and 66 hours

Total burden requested for this requirement:

Private: 9,934,548 responses and 206,970 hours

State, local, tribal: 3,481,350 responses and 72,528 hours

Federal: 3,152 responses and 66 hours.

GRAND TOTAL ANNUAL BURDEN HOURS = 19,048,559 HOURS

Persons responding to the various FMLA information collections may be employees of any of a wide variety of businesses. Absent specific wage data regarding respondents, the Department used the median hourly wage for a non-supervisory Human Resources Assistant (Except Payroll and Timekeeping) for May 2010. The median hourly wage is \$17.69 plus 40 percent in fringe benefits. See BLS Occupational Employment Statistics, Occupational Employment and Wages, May 2010 (<http://www.bls.gov/oes/current/oes434161.htm>). The Department estimates total annual respondent costs for the value of their time to be \$472,218,475 (\$24.77 x 19,064,129 total annual burden hours).

13 Other Respondent Cost Burdens (Maintenance and Operation):

2008 analysis: Employees seeking FMLA leave for a serious health condition must obtain, upon their employer's request, a certification of the serious health condition from a health care provider. Often the health care provider's office staff completes the form for the provider's signature. In other cases, the health care provider personally completes it. While most health care providers do not charge for completing these certifications, some do. The DOL estimates completion of Form WH-380 to take about 20 minutes and a fitness-for-duty certification to require 10 minutes; thus, the time would equal the respondent's time in obtaining the certification. The DOL has used the 2005 average hourly wage rate for a physician's assistant of \$36.49 plus 40 percent in fringe benefits to compute a \$17.03 cost for the initial medical certifications and fitness-for-duty certifications (\$51.09 x 20 minutes) and \$8.52 cost for fitness-for-duty certifications (\$51.09 x 10 minutes) *See National Compensation Survey 2005, DOL, BLS.*

8,859,053 (8,029,346 initial medical certifications + 802,935 recertifications + 26,772 servicemember certifications) x \$17.03 cost per certification =	\$150,869,673
<u>402,833 fitness-for-duty certifications x \$8.52 cost per certification =</u>	<u>\$11,952,137</u>
Total Maintenance and Operations Cost Burden for Respondents	\$162,821,810

[$\$162,821,810 \div (8,859,053 + 402,833)$] = \$17.60 per capita response cost]

2012 analysis: Airline flight crew employees seeking FMLA-leave for their own serious health condition or the serious health condition of a family member, must obtain, upon their employer's request, a certification of their own or a family member's serious health condition. Similarly, employees seeking FMLA leave for a serious health condition must obtain, upon their employer's request, a certification of the serious health condition from

a health care provider. Often the health care provider's office staff completes the form for the provider's signature. In other cases, the health care provider personally completes it. In 2008, the Department assumed that while most health care providers do not charge for completing these certifications, some do. The Department has no reason to believe that this assumption has changed since its last analysis.

New burden (airline flight crews): 5,543 medical certifications x \$19.39 cost per certification = \$107,479.

1,423 fitness-for-duty certifications x \$9.69 cost per certification = \$13,789.

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

23,095 certifications for medical caregiver leave x \$19.39 cost per certification = \$447,812

Total maintenance operations cost estimate: \$569,080,

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

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

The existing maintenance and operations cost estimate for the existing FMLA information collections is \$163,332,185.

Grand total of maintenance and operations cost burden for respondents = \$163,691,435.

14. Federal Costs:

2008 analysis: The Federal costs that the DOL associates with this information collection relate to printing/duplicating and mailing the subject forms. The DOL also estimates it will annually receive 415,000 requests to provide one copy of each form

covered by this information collection, and that the agency will mail all forms simultaneously to any given requestor.

415,000 Forms WH-380-E x 4 pages =	1,660,000 pages
415,000 Forms WH-380-F x 4 pages =	1,660,000 pages
415,000 Forms WH-381 x 2 pages =	830,000 pages
415,000 Forms WH-382 x 1 page =	415,000 pages
415,000 Forms WH-384 x 3 pages =	1,024,500 pages
415,000 Forms WH-385 x 4 pages =	1,660,000 pages

Total Forms = 1,245,000, Total pages = 7,470,000

7,470,000 pages x \$0.03 printing costs =	\$224,100
<u>415,000 mailings x \$1.03 (\$0.03 envelopes + \$1.00 postage) =</u>	<u>\$427,450</u>
Total Estimated Annual Federal Costs =	\$651,550

2012 analysis:

The Federal costs that the Department associates with this information collection relate to printing/duplicating and mailing the subject forms. The Department also estimates it will annually provide an average of one copy of each form covered by this information collection to each FMLA-covered employer, and that the agency will mail all forms simultaneously to any given requestor. The Department further estimates information technology costs will offset some of the printing and duplicating costs in an equal amount; therefore, the agency is presenting only the costs of the latter:

415,000 Forms WH-380-E x 4 pages =	1,660,000 pages
415,000 Forms WH-380-F x 4 pages =	1,660,000 pages
415,000 Forms WH-385 x 4 pages =	1,660,000 pages
415,000 Forms WH-384 x 3 pages =	1,245,000
415,000 Forms WH-381 x 2 pages =	830,000 pages
415,000 Forms WH-382 x 1 page =	415,000 pages

Total Forms = 6

Total pages = 7,470,000

7,470,000 pages x \$0.03 printing costs =	\$224,100
415,000 mailings x \$1.03 (\$0.03 envelopes + \$1.00 postage) =	\$427,450
Total Estimated Annual Federal Costs =	\$651,550

NPRM analysis:

The Federal costs that the DOL associates with this information collection relate to printing/duplicating and mailing the subject forms. The DOL also estimates it will annually provide an average of one copy of each form covered by this information

collection to each FMLA-covered employer, and that the agency will mail all forms simultaneously to any given requestor. The DOL further estimates information technology costs will offset some of the printing and duplicating costs in an equal amount; therefore, the agency is presenting only the costs of the latter:

381,000 Forms WH-380-E x 4 pages = 1,524,000 pages

381,000 Forms WH-380-F x 4 pages = 1,524,000 pages

381,000 Forms WH-381 x 2 pages = 762,000 pages

381,000 Forms WH-382 x 1 page = 381,000 pages

381,000 Forms WH-384 x 3 pages = 1,143,000 pages

381,000 Forms WH 385 x 4 pages = 1,524,000

381,000 Forms WH-385A (Certification of a Serious Injury or Illness for a Covered Servicemember – Covered Veteran) x 4 pages = 1,524,000⁴

Total Forms = 2,667,000

Total pages = 8,382,000

8,382,000 pages x \$0.03 printing costs =	\$251,460
381,000 mailings x \$1.03 (\$0.03 envelopes + \$1.00 postage) =	\$392,430
Total Estimated Annual Federal Costs =	\$643,890

15. Changes in Burden: Compared to the last OMB clearance of the FMLA information collections on February 9, 2012, this request reflects an overall burden increase of 39,358 hours that result from proposed regulatory changes. In addition, this request reflects an increase of 820,553 responses, which also stem from proposed regulatory changes, and a difference of \$300,545 in maintenance and operations costs. The changed paperwork burden estimates stem from (1) the expansion of FMLA-leave eligibility to airline flight crew employees; (2) the expansion of FMLA-leave to employees to care for covered veterans with serious injuries or illnesses; (3) an expansion of FMLA-leave to employee-family members of covered servicemen in the Regular Armed Forces; and (4) increased wages rates for persons completing the information collections and other higher costs, as discussed in Item 13 of the supporting statement.

⁴ In this proposed rule, the Department has proposed creating a separate form for the certification of a serious injury or illness of a covered servicemember who is a covered veteran. The Department identified the information that is to be captured on this form, but at this stage has not proposed a specific format of this form, nor has it prepared a prototype of the proposed form. However, for purposes of the “paperwork” analysis, the Department is assuming that the proposed form will mirror current WH-385 in the number of pages that it will consist of.

16. Publication: This information collection does not entail information that the Department will publish.
17. Displaying OMB Expiration Date: The Department will display the expiration dates for OMB clearances on the Department forms cleared under this information collection.
18. Certification Requirements: The Department does not seek an exception to the OMB certification requirements.