IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
WICHITA FALLS DIVISION

STATE OF TEXAS,	§	
	§	
STATE OF ARKANSAS,	§	
	§	
STATE OF GEORGIA,	§	
	§	
STATE OF LOUISIANA,	§	
	§	
STATE OF NEBRASKA,	§	
	§	
Plaintiffs,	§	
	§	
v.	§	CIVIL ACTION NO. 7:15-cv-56
	§	
UNITED STATES OF AMERICA,	§	
UNITED STATES DEPARTMENT	§	
OF LABOR, and THOMAS E. PEREZ,	§	
in his Official Capacity as	§	
SECRETARY OF LABOR,	§	
	§	
Defendants.	§	

SECOND AMENDED COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF AND APPLICATION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION/STAY OF ADMINISTRATIVE PROCEEDINGS

TO THE HONORABLE JUDGE OF SAID COURT:

The State of Texas, the State of Arkansas, the State of Georgia, the State of Louisiana, and the State of Nebraska (collectively, "Plaintiffs" or "Plaintiff States") seek declaratory and injunctive relief against the United States of America, the United States Department of Labor ("Department"), and Thomas E. Perez in his official capacity as Secretary of Labor, regarding the Department's recently

promulgated rule redefining "spouse" under the Family and Medical Leave Act ("FMLA"), which will be effective and binding on all qualifying employers—including the States—beginning March 27, 2015. The Department's rule attempts to override State law and force employers, including state agencies, to recognize out-of-state same-sex unions as marriages and grant leave on that basis. By attempting to sideline State law by agency rule and require state employers to grant FMLA spousal care benefits to individuals in relationships not recognized as marriage in the Plaintiff States, the Department's action flies in the face of the Supreme Court's ruling in *United States v. Windsor*, 133 S.Ct. 2675, 2695 (2013), which struck down federal interference with state law governing domestic relations. 80 Fed. Reg. No. 37, at 9989-10001 ("Final Rule" or "Rule"), attached as Ex. A. The Rule is also contrary to the federal full faith and credit statute, invalidly attempts to abrogate the States' sovereign immunity, invalidly attempts to preempt the States' domestic-relations law, and invalidly attempts to commandeer the States. For these reasons and others, the Rule is invalid on its face.

I. PARTIES

1. Plaintiffs are State of Texas, the State of Arkansas, the State of Georgia, the State of Louisiana, and the State of Nebraska, five of the sovereign States of the United States of America. If the Final Rule takes effect, it would purportedly nullify State law. Moreover, the Plaintiff States are "employers" as defined in 29 U.S.C. § 2611(4)(A)(iii); (B). The Department's Final Rule impacts the Plaintiff States in their capacity as an employer. Ex. A at 9994. It also impacts the Plaintiff States by interfering with their sovereign interest in enforcement of their laws, invalidly

attempting to abrogate the States' sovereign immunity, invalidly attempting to preempt the States' domestic-relations law, and invalidly attempting to commandeer the States.

2. Defendants are the United States of America, the United States Department of Labor, and Thomas E. Perez, in his official capacity as Secretary of Labor (collectively "Defendants"). Defendants have appeared through counsel.[1]

II. JURISDICTION AND VENUE

3. This Court has subject matter jurisdiction pursuant to 28 U.S.C. § 1331 because this suit concerns the scope of the Department's authority to issue the Final Rule redefining the term spouse and granting leave to include same-sex spouses contrary to law. This Court also has jurisdiction to compel an officer of the Department of Labor to perform his or her duty pursuant to 28 U.S.C. § 1361.

4. Venue is proper in the Northern District of Texas pursuant to 28 U.S.C. § 1391(e) because the United States, one of its agencies, and one of its officers in his official capacity are Defendants; a substantial part of the events or omissions giving rise to Plaintiffs' claims occurred in this District; and Plaintiff Texas and its constituent agencies are employers in Wichita Falls, Texas who the Department seeks to make violate Texas law on March 27, 2015 should the Final Rule go into effect.

[1] The Defendants have filed an Opposition to Plaintiff's Application for a Preliminary Injunction. Doc. 11. In light of that intervening filing, this Amended Complaint adds new parties but adds no new claims or other independent legal bases for temporary relief in an effort to not moot the Defendant's Opposition.

5. The Court is authorized to award the requested declaratory relief under the Administrative Procedure Act and the Declaratory Judgment Act, 5 U.S.C. § 706, 28 U.S.C. §§ 2201-2202, and is authorized to award the requested injunctive relief under 28 U.S.C. § 1361.

III. FACTUAL BACKGROUND

A. *Windsor* and the Full Faith and Credit Statute.

6. "'[W]hen the Constitution was adopted the common understanding was that the domestic relations of husband and wife and parent and child were matters reserved to the States.'" *United States v. Windsor*, 133 S.Ct. 2675, 2695 (2013) (quoting *Ohio ex rel. Popovici v. Agler*, 280 U.S. 379, 383–384 (1930)). In 1996, Congress enacted Section 3 of the Defense of Marriage Act ("DOMA"), which defined "marriage" as "only a legal union between one man and one woman as husband and wife; the word 'spouse' refers only to a person of the opposite sex who is a husband or a wife." 1 U.S.C. § 7. The Supreme Court held this provision to be unconstitutional in *Windsor* because it was a "deviation from the usual tradition of recognizing and accepting state definitions of marriage . . . operat[ing] to deprive same-sex couples of the benefits and responsibilities that come with the federal recognition of their marriages." 133 S.Ct. at 2693.

7. By contrast, Section 2 of DOMA was not challenged in *Windsor* and amends the federal full faith and credit statute to permit States to refuse to recognize out-of-state same-sex unions as marriages. *Id*. 2682-83. Specifically, the full faith and credit statute currently provides that:

> [n]o State . . . shall be required to give effect to any public act, record, or judicial proceeding of any other State . . . respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State . . . or a right or claim arising from such relationship.

28 U.S.C. § 1738C.

8. The Supreme Court in *Windsor* did not alter any State's right to define marriage according to the will of its electorate. Instead, the *Windsor* Court reaffirmed the States' authority to define and regulate marriage, 133 S.Ct. at 2691-93, which is the very principle embodied in the full faith and credit statute. Far from mandating State marriage policy, the Court disapproved of federal interference with State marriage law. *See id*. at 2692-93 ("'[T]he states, at the time of the adoption of the Constitution, possessed full power over the subject of marriage and divorce . . . [and] the Constitution delegated no authority to the Government of the United States on the subject of marriage and divorce.'" (quoting *Haddock v. Haddock*, 201 U.S. 562, 575 (1906) (alterations and omission in original)).

9. In reaction to the *Windsor* decision, the President urged the Cabinet to "review all relevant federal statutes to implement the decision, including its implications for federal benefits and programs." U.S. Department of Labor, Wage and Hour Division, Fact Sheet: Final Rule to Amend the Definition of Spouse in the Family and Medical Leave Act Regulations, Feb. 2014, at 1, attached as Ex. B. The Department concluded that "[b]ecause of the Supreme Court's ruling 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." Ex. A at 9991.

B. The Department Rewrites the FMLA.

10. The FMLA defines "spouse" as "a husband or wife, as the case may be." 29 U.S.C. § 2611(13). The Department's 1993 Interim Final Rule defined "spouse" as "a husband or wife as defined or recognized under state law for purposes of marriage in states where it is recognized." Ex. A at 9990 (citing 58 FR 31817, 31835 (June 4, 1993)). "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.* (citing 60 FR 2191).

11. After *Windsor*, on June 27, 2014, the Department commenced rulemaking in which it "proposed to change the definition of spouse to look to the law of the jurisdiction in which the marriage was entered into (including common law marriages), as opposed to the law of the State in which the employee resides." Ex. A at 9991 (III. Summary of Comments) (hereinafter "Notice"). The proposed rule, which became final on February 25 and becomes effective on March 27, reads as follows:

> **825.102 Definitions.**
> * * * * *
> *Spouse,* as defined in the [FMLA], 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.
> * * * *

Ex. A at 9991; 79 Fed. Reg. 36445, attached as Ex. C. The Department contends it "is moving from a state of residence rule to a rule based on the jurisdiction where the marriage was entered into (place of celebration) . . . ." Ex. A at 9991.

12. The Department received 77 comments to the Notice, including two that "raised concerns about a tension between the proposed definition and state laws prohibiting the recognition of same-sex marriages" and noting that 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," in direct contravention of the full faith and credit statute. Ex. A at 9991.

13. In response to the concerns about the conflict with State laws that prohibit same-sex marriage, the Department concluded that "[t]he 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." Ex. A at 9994. Instead, the Department contends "[t]he 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." Ex. A at 9994. The Department's conclusion ignores that the federal full faith and credit statute expressly reserves the right to the States to refuse to recognize as marriages same-sex unions performed under the laws of other States. 28 U.S.C. § 1738C; *see also Windsor,* 133 S.Ct. at 2693 (criticizing the federal law's "unusual deviation from the usual tradition of recognizing and accepting state definitions of marriage").

14. The Final Rule redefining "spouse" takes effect on March 27, 2015.

C. The Plaintiff States Do Not Recognize Same-Sex Unions as Marriages.

15. Consistent with the federal full faith and credit statute and *Windsor*, Texas law limits recognition of out-of-state marriages to opposite-sex unions. TEX. CONST. art. I, § 32; TEX. FAM. CODE § 6.204. Texas law further prohibits the issuance of a Texas license "for the marriage of persons of the same sex." TEX. FAM. CODE § 2.001(b); *see also id.*§ 2.401(a) (limiting informal marriages to unions of "a man and woman"). Texas law also declares same-sex marriages void as against public policy and prohibits any State agency or political subdivision from "giving effect to" a "(1) public act, record, or judicial proceeding that creates, recognizes, or validates a marriage between persons of the same sex or a civil union in this state or any other jurisdiction; or (2) right or claim to any legal protection, benefit, or responsibility asserted as a result of a marriage between persons of the same sex or a civil union in this state or in any other jurisdiction." TEX. FAM. CODE § 6.204(b), (c).

16. Arkansas's constitution and statutes similarly limit the recognition of out-of-states marriages to opposite-sex unions. *See, e.g.*, ARK. CONST. amend. 83, § 2 ("Legal status for unmarried persons which is identical or substantially similar to marital status shall not be valid or recognized in Arkansas, except that the legislature may recognize a common law marriage from another state between a man and a woman."); ARK. STAT. § 9-11-1-9 ("All marriages contracted outside this state which would be valid by the laws of the state or country in which the marriages were consummated and in which the parties then actually resided shall be valid in all the

courts in this state [but] [t]his section shall not apply to a marriage between persons of the same sex."). Arkansas law also declares same-sex marriages to be void as against public policy. *See, e.g.*, ARK. STAT. § 9-11-107 ("Marriage shall be only between a man and a woman. A marriage between persons of the same sex is void.").

17. Likewise, Georgia's constitution and statutes likewise limit the recognition of out-of-state marriages to opposite-sex unions. *See, e.g.*, Ga. Const. art. I, § 4 ("(a) This state shall recognize as marriage only the union of man and woman. Marriages between persons of the same sex are prohibited in this state. (b) No union between persons of the same sex shall be recognized by this state as entitled to the benefits of marriage. This state shall not give effect to any public act, record, or judicial proceeding of any other state or jurisdiction respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other state or jurisdiction . . . ."); GA. CODE ANN. § 19-3-3.1 ("(a) It is declared to be the public policy of this state to recognize the union only of man and woman. Marriages between persons of the same sex are prohibited in this state. (b) No marriage between persons of the same sex shall be recognized as entitled to the benefits of marriage. Any marriage entered into by persons of the same sex pursuant to a marriage license issued by another state or foreign jurisdiction or otherwise shall be void in this state . . . .").

18. Louisiana's constitution and statutes also limit the recognition of out-of-state marriages to opposite-sex unions. *See* LA. CONST. art. VII, § 15 (providing, *inter alia*, that "[n]o official or court of the state of Louisiana shall recognize any marriage

contracted in any other jurisdiction which is not the union of one man and one woman"); LA. CIV. CODE art. 89 (providing that "[a] purported marriage between persons of the same sex contracted in another state shall be governed by the provisions of Title II of Book IV of the Civil Code"); *id.* art. 96 (providing that "[a] purported marriage between parties of the same sex does not produce any civil effects"); *id.* art. 3520(B) (providing that a same-sex marriage "contracted in another state shall not be recognized in this state for any purpose, including the assertion of any right or claim as a result of the purported marriage"). Louisiana law also declares that same-sex marriages violate strong public policy. LA. CIV. CODE art. 3520(B) (providing that "[a] purported marriage between persons of the same sex violates a strong public policy of the state of Louisiana").

19. Nebraska's constitution similarly provides that "[o]nly marriage between a man and a woman shall be valid or recognized in Nebraska. The uniting of two persons of the same sex in a civil union, domestic partnership, or other similar same-sex relationship shall not be valid or recognized in Nebraska." NEB. CONST. art. 1, § 29.

20. By requiring the Plaintiff States to recognize out-of-state same-sex marriages for purposes of the FMLA, the Department is interfering with the Plaintiff States' enforcement of their duly enacted law by, among other things, forcing the Plaintiff States to violate either State law or a federal regulation.

D. The Final Rule Conflicts with the Federal Full Faith and Credit Statute and *Windsor*.

21. The Final Rule conflicts with the federal full faith and credit statute, which acknowledges the States' right to refuse to recognize same-sex unions as marriages performed under the laws of other States. 28 U.S.C. § 1738C. To grant an application for FMLA spousal benefits under the Final Rule, the Plaintiff States must necessarily give force and effect to out-of-state same-sex marriages, even though those marriages are void under the laws of the Plaintiff States.

22. The Final Rule also conflicts with *Windsor,* in which the Supreme Court struck down Section 3 of DOMA, in part, because "regulation of domestic relations" is "an area that has long been regarded as a virtually exclusive province of the States." *Windsor*, 133 S.Ct. at 2691 (quoting *Sosna v. Iowa*, 419 U.S. 393, 404 (1975)). Section 3 of DOMA's interference with State regulations had the effect of creating contradictory federal and State marriage regimes, thereby "diminishing the stability and predictability of basic personal relations the State has found it proper to acknowledge and protect." *Id.* at 2694.

23. The Final Rule, like Section 3 of DOMA, interferes with the Plaintiff States' statutes and constitutions that prohibit same-sex marriage and bar recognition of out-of-state same-sex unions as marriages. *See, e.g., Windsor*, 133 S.Ct. at 2693 (explaining that Section 3 of DOMA had the invalid "purpose to influence or interfere with state sovereign choices about who may be married"). The Department's Rule diminishes stability and predictability of marriage in the Plaintiff States by forcing employers in those States to acknowledge same-sex unions as marriages to

grant the spousal care benefit, while the federal full faith and credit statute upholds the States' right to disregard such unions according to State policy. This erosion of stability and predictability of State definitions of marriage runs afoul of *Windsor*.

24. Further, as the Supreme Court explained in *Windsor*, "the Federal Government, through our history, has deferred to state-law policy decisions with respect to domestic relations," and "[i]n order to respect this principle, the federal courts, as a general rule, do not adjudicate issues of marital status even when there might otherwise be a basis for federal jurisdiction." *Windsor*, 133 S.Ct. at 2691; *see also Ankenbrandt v. Richards*, 504 U.S. 689, 703 (1992) (noting that the "domestic relations exception . . . divests the federal courts of power to issue divorce, alimony, and child custody decrees"). Any claim against an employer under the FMLA for violation of the Rule would naturally require a federal court to determine whether the claimant is actually married, which necessarily forces federal courts to adjudicate matters the Supreme Court has repeatedly held there is no federal jurisdiction over. *See id*.

E. Congress Did Not Preempt State Law Defining Marriage in the FMLA.

25. Congress did not preempt State law defining "marriage" in the FMLA, and the Final Rule is a regulatory attempt to do just that. Indeed, Congress could not have intended to preempt State law refusing to recognize same-sex marriage because when the FMLA was enacted in 1993, no State had acted to permit same-sex marriage. *See Windsor*, 133 S.Ct. at 2683. Because the intent of Congress guides the preemption inquiry and Congress could not have intended to preempt laws such as

those in the Plaintiff States, the Department cannot accomplish by Rule the preemption is seeks. *See Wyeth v. Levine*, 555 U.S. 555, 565 (2009) ("the purpose of Congress is the ultimate touchstone in every pre-emption case").

26. Moreover, conflict preemption does not apply because the laws of the Plaintiff States do not conflict with the plain language of the FMLA or Congressional intent, but rather only with the Department's regulatory expansion of the FMLA. *See Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 372 (2000) ("[S]tate law is naturally preempted to the extent of any conflict with a federal statute."). This is made all the more clear by the fact the rule in place on March 26 gives full effect to the Plaintiff States' laws, but the Final Rule that takes effect on March 27 will seek to supplant those laws.

27. The Department's conclusion that "[t]he 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" ignores the fact that the Plaintiff States cannot comply with the Final Rule and with their own laws at the same time. Accordingly, the Rule could be valid only if Congress intended to preempt the States' definitions of marriage, which is something "'that has long been regarded as a virtually exclusive province of the States.'" *Windsor*, 133 S.Ct. at 2691 (quoting *Sosna*, 419 U.S. at 404).

F. The New Rule Harms the States as Well as Employers Within the States.

28. The Final Rule requires the Plaintiff States, as employers, to violate their own State laws by giving effect to the laws of other States and foreign countries relating to same-sex marriages. The Rule also irreparably harms the Plaintiff States

by hindering their sovereign interest in enforcing the will of the people of the Plaintiff States as expressed in state law. *See Alfred L. Snapp & Son, Inc. v. Puerto Rico, ex rel., Barez*, 458 U.S. 592, 601 (1982) (recognizing that States have a legally protected interest in "the exercise of sovereign power over individuals and entities within the relevant jurisdiction-this involves the power to create and enforce a legal code"); *Maine v. Taylor*, 477 U.S. 131, 137 (1986) (explaining that "a State clearly has a legitimate interest in the continued enforceability of its own statutes"); *Castillo v. Cameron Cnty., Tex.*, 238 F.3d 339, 351 (5th Cir. 2001) (acknowledging a State's "sovereign interest in enforcing its laws"); *cf. New Motor Vehicle Bd. v. Orrin W. Fox Co.*, 434 U.S. 1345, 1351 (1977) (Rehnquist, Circuit Justice) ("[A]ny time a State is enjoined by a Court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury."); *Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott*, 734 F.3d 406, 419 (5th Cir. 2013) ("When a statute is enjoined, the State necessarily suffers the irreparable harm of denying the public interest in the enforcement of its laws."); *Coal. for Econ. Equity v. Wilson*, 122 F.3d 718, 719 (9th Cir. 1997) ("[I]t is clear that a state suffers irreparable injury whenever an enactment of its people . . . is enjoined.").

29. In addition to harming the Plaintiff States by preventing them from enforcing its laws, the Final Rule places an enormous burden on the Plaintiff States as employers to approve or disapprove leave requests that have already been made—all without the final guidance of the United States Supreme Court and the Fifth Circuit Court of Appeals, both of which have pending cases to decide this very

contested underlying issue. The Plaintiff States as employers will be called upon to decide issues that the Supreme Court has not yet decided, and those employers do so without the benefit of briefing and oral arguments for the full presentation of the issues on both sides. Declaration of Christopher Adams, attached as Ex. D at 3-4. This includes the States of Texas and Louisiana as employers, which employ over 310,000 and 60,000 full-time equivalent employees, respectively. *See* State Auditor's Office, A Summary Report on Full-time Equivalent State Employees for Fiscal Year 2014, Feb. 2015, *available at* http://www.sao.state.tx.us/Reports/report.aspx?report number=15-705; Louisiana Dep't of State Civil Service, 2013-14 Annual Report, at 11, *available at* http://www.civilservice.louisiana.gov/files/publications/annual_ reports/AnnualReport13-14.pdf. One Texas agency employing over 54,000 employs has already received inquiries about regarding the agency's leave policy with respect to the Final Rule and expects to receive FMLA leave requests once the Final Rule takes effect. Ex. D at 4. Additionally, the Final Rule will require changing agency FMLA policies. For example, the Final Rule would require the Office of the Attorney General to amend its FMLA policy, which defines "spouse" as "a husband of wife as recognized in the Texas Family Code." The Attorney General of Texas, Policies & Procedures Manual at 45, attached as Ex. E.

30. The Plaintiff States are also harmed by the Department's Rule because they will suffer a drain on their limited resources in defending state agencies, and other public employers in FMLA lawsuits that will inevitably flow from this Rule if the States continue to enforce their law. When state employees claiming FMLA leave

based on an out-of-state same-sex marriage sue to challenge the denial of leave based on state law, as the FMLA allows, 29 U.S.C. § 2617(a)(2), the Plaintiff states will be required to defend these lawsuits, thereby draining state resources even if the States ultimately prevail.

IV. CLAIMS FOR RELIEF

COUNT ONE

Declaratory Judgment Under the Administrative Procedure Act, 5 U.S.C. § 706, that the Final Rule Is Unlawful.

31. The allegations in paragraphs 1 through 30 are reincorporated herein.

32. The Department's Rule redefining "spouse" for purposes of the FMLA constitutes "[a]gency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court." 5 U.S.C. § 704.

33. The Administrative Procedure Act requires this Court to hold unlawful and set aside any agency action that is "(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (B) contrary to constitutional right, power, privilege, or immunity; [or] (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right." 5 U.S.C. § 706(2).

34. The Final Rule conflicts with the definition of "spouse" in the FMLA. 29 U.S.C. § 2611(13).

35. The Final Rule violates the federal full faith and credit statute, which expressly relieves any State from giving effect to "any public act, record, or judicial proceeding of any other State . . . respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State, . . . or a

right or claim arising from such relationship" and preserves the States' rights to regulate marriage. 28 U.S.C. § 1738C. Instead, the Rule forces the Plaintiff States to "give effect to" a same-sex marriage from another State by granting FMLA benefits in violation of State law.

36. The Department's Final Rule also violates separation of powers by purporting to expand federal court jurisdiction to cover domestic relations issues. "'[R]egulation of domestic relations'" is "'an area that has long been regarded as a virtually exclusive province of the States,'" which is why the Supreme Court has long held that federal courts lack jurisdiction to resolve those issues. *Windsor*, 133 S.Ct. 2691 (quoting *Sosna*, 419 U.S. at 404)). Congress, not an agency, can expand federal court jurisdiction, U.S. CONST. art. III, § 1-2; *Vaden v. Discover Bank*, 556 U.S. 49, 59 n.9 (U.S. 2009), and the Department's subtle attempt to do so in the Rule violates the constitutional separation of powers.

37. The Final Rule illegally attempts to preempt State law defining marriage because historic powers reserved to the States, such as domestic relations, cannot be superseded by federal act, "unless that was the clear and manifest purpose of Congress." *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947); *see also Wyeth v. Levine*, 555 U.S. 555, 565 (2009); *Gregory v. Ashcroft*, 501 U.S. 452, 460-70 (1991). Congress expressed its clear and manifest purpose in the FMLA to "minimize the potential for employment discrimination" and to "promote the goal of equal employment opportunity for women and men . . . ." 29 U.S.C. § 2601(b)(5).

38. Because the Department's Final Rule is not in accordance with the law as articulated above, it is unlawful, violates 5 U.S.C. § 706, and should be set aside.

COUNT TWO

Declaratory Judgment Under the Administrative Procedure Act, 5 U.S.C. § 706, that the Final Rule Is Unlawful.

39. The allegations in paragraphs 1 through 38 are reincorporated herein.

40. The Department's Rule redefining "spouse" for purposes of the FMLA constitutes "[a]gency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court." 5 U.S.C. § 704.

41. The Rule violates the Tenth Amendment because its interpretation of "spouse" effectively commandeers the Plaintiff States' regulation of domestic relations by requiring the States to apply another State's marriage law. *See Windsor*, 133 S. Ct. at 2691 (explaining that "regulation of domestic relations is an area that has long been regarded as a virtually exclusive province of the States," and "recognition of civil marriages is central to state domestic relations law applicable to its residents and citizens") (internal quotation marks and citations omitted); *New York v. United States*, 505 U.S. 144, 162 (1992) ("While Congress has substantial powers to govern the Nation directly, including in areas of intimate concern to the States, the Constitution has never been understood to confer upon Congress the ability to require the States to govern according to Congress' instructions.").

42. Because the Rule is not in accordance with the law articulated above, it is unlawful, violates 5 U.S.C. § 706, and should be set aside.

COUNT THREE

Declaratory Judgment Under 28 U.S.C. §§ 2201-2202 and 5 U.S.C. § 706 that the Department's Rule Unlawfully Attempts to Abrogate State Sovereign Immunity.

43. The allegations in paragraphs 1 through 42 are reincorporated herein.

44. The Final Rule improperly abrogates the Plaintiff States' sovereign immunity based upon anecdotal comments in the Federal Register rather than on the basis of Congressional findings and concerns about State workplace discrimination against employees with same-sex spouses with a remedy proportional and congruent to the relevant wrongs.

45. Although the Supreme Court held that Congress validly abrogated the States' sovereign immunity with the family-care provision of the FMLA, it did so only on the basis of Congressional findings and concerns about State workplace gender discrimination. *Nevada Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 728 and n.2 (2003) (observing that the FMLA aims to promote the goal of equal employment opportunity for women and men). The Supreme Court later concluded that the self-care provision of the FMLA did not abrogate the States' sovereign immunity, because the self-care provision was designed to address discrimination based on illness and there was no "evidence of a pattern of state constitutional violations accompanied by a remedy drawn in narrow terms to address or prevent those violations." *Coleman v. Court of Appeals of Maryland*, 132 S.Ct. 1327, 1334-35 (2012).

46. In adoption of the Final Rule, the Department of Labor pointed to no Congressional findings or concerns about workplace leave discrimination by the States (or any other employer) based on sexual-orientation. Indeed, the Department

did not even consider whether Congress intended the term "spouse" to include individuals in same-sex relationships that are not recognized as marriages in their State of residence. Had it, the Department would have found nothing to support its new interpretation because when the FMLA was enacted in 1993, States did not permit same-sex marriage. The Department cannot expand abrogation of the State's sovereign immunity by rewriting the FMLA's definition of "spouse" as it was originally adopted by Congress. *See* 29 U.S.C. § 2611(13) ("The term "spouse" means a husband or wife, as the case may be."); *see also Neinast v. Texas*, 217 F.3d 275, 281 (5th Cir. 2000) ("[O]ur operating premise must be that an agency . . . cannot have greater power to regulate state conduct than does Congress."). If there are no Congressional findings of State wrongdoing regarding the conduct at issue in the Final Rule, the Department's mandate that the Plaintiff States comply with the FMLA framework in this new area cannot be a proportional and congruent remedy to the relevant wrongs.

V. DEMAND FOR JUDGMENT

Plaintiffs respectfully request the following relief from the Court:

1. A declaratory judgment that the Department's Final Rule redefining "spouse" under the FMLA is substantively unlawful under the Administrative Procedure Act;
2. Setting aside the Department's Final Rule redefining "spouse" under the FMLA under the Administrative Procedure Act because it is substantively unlawful;

3. A declaratory judgment that the Department's Final Rule redefining "spouse" under the FMLA is invalid because it attempts to abrogate the Plaintiff States' sovereign immunity;

3. Temporary relief, enjoining the Final Rule from taking effect on March 27, 2015;

4. A final, permanent injunction preventing the Department from implementing the Final Rule; and

5. All other relief to which the Plaintiff States may show themselves to be entitled.

VI. APPLICATION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION/STAY OF ADMINISTRATIVE PROCEEDINGS

1. The Plaintiff States seek a temporary restraining order and a preliminary injunction pursuant to Federal Rule of Civil Procedure Rule 65 and alternatively, a stay of administrative proceeding pursuant to the Administrative Procedure Act, 5 U.S.C. § 705. In particular, the Plaintiff States request this Court to enjoin and/or stay the application of the Final Rule promulgated by the United States Department of Labor effective March 27, 2015, and codified as 29 C.F.R. Part 825 which changes the definition of "spouse" and adds FMLA leave based thereon.

2. The requirements for showing entitlement to a temporary restraining order and preliminary injunction under Federal Rule of Civil Procedure 65 are identical. *See Clark v. Prichard*, 812 F.2d 991, 993 (5th Cir. 1987). To obtain a temporary restraining order and a preliminary injunction, the Plaintiff States must show:

A. there is a substantial likelihood that the Plaintiff States will prevail on the merits;

B. there is a substantial threat that irreparable injury will result if the injunction is not granted;

C. the threatened injury outweighs the threatened harm to the Defendants; and

D. granting the preliminary injunction will not disserve the public interest.

Janvey v. Alguire, 647 F.3d 585, 595 (5th Cir. 2011); *Canal Auth. of Florida v. Callaway,* 489 F.2d 567, 572 (5th Cir. 1974). The requisite showing for a stay pending review is the same as that which applies to preliminary injunctions. *Corning Sav. & Loan Assoc. v. Federal Home Loan Bank Bd.,* 562 F.Supp. 279, 280 (U.S.D.C.–E.D. Arkansas, 1983).

A. <u>There Is a Substantial likelihood That the Plaintiff States Will Prevail</u>.

3. For the reasons articulated in paragraphs 1 through 46, *supra*, of their Complaint for Declaratory and Injunctive Relief, the Plaintiff States have met their burden to show a substantial likelihood that they will prevail on their claims that the Department's Final Rule redefining "spouse" for purposes of the FMLA is invalid.

B. <u>There Is a Substantial Threat That Irreparable Injury Will Result.</u>

4. On March 27, 2015 the Final Rule becomes effective. The Plaintiff States have no adequate remedy at law to contest the application of the Final Rule. Preliminarily, by forcing state officials to choose between violating a federal rule or complying with state law, and *vice versa*, and by obstructing the Plaintiff States' sovereign authority to enforce state law, the Rule causes an irreparable injury. *See*

Alfred L. Snapp & Son, Inc. v. Puerto Rico, ex rel., Barez, 458 U.S. 592, 601 (1982) (recognizing that States have a legally protected interest in "the exercise of sovereign power over individuals and entities within the relevant jurisdiction-this involves the power to create and enforce a legal code"); *Maine v. Taylor*, 477 U.S. 131, 137 (1986) (explaining that "a State clearly has a legitimate interest in the continued enforceability of its own statutes"); *Castillo v. Cameron Cnty., Tex.*, 238 F.3d 339, 351 (5th Cir. 2001) (acknowledging a State's "sovereign interest in enforcing its laws"); *see also Abbott*, 734 F.3d at 419 ("When a statute is enjoined, the State necessarily suffers the irreparable harm of denying the public interest in the enforcement of its laws."); *Wilson*, 122 F.3d at 719 ("[I]t is clear that a state suffers irreparable injury whenever an enactment of its people . . . is enjoined.").

5. Moreover, once the Final Rule goes into effect, employers must research and apply marriage law—including the common-law of marriage—of other States and foreign countries. In the Plaintiff States, where statutes and the State constitutions prohibit the recognition of same-sex unions as marriage, the Final Rule places an enormous burden on those employers to approve or disapprove FMLA spousal leave requests—all without final guidance from the United States Supreme Court and the Fifth Circuit Court of Appeals on this contested issue.

C. The Threatened Injury Outweighs any Threatened Harm to Defendants.

6. The Plaintiff States cannot simultaneously comply with the Final Rule and with state law prohibiting recognition of same-sex marriage. Today, before the Final Rule's effective date, federal law does not preempt the Plaintiff States'

definitions of marriage, which is something "that has long been regarded as a virtually exclusive province of the States." *Windsor*, 133 S.Ct. at 2691.

7. In most cases challenging same-sex marriage bans, courts have stayed their own orders striking down the ban pending the appeal to the Supreme Court, including in the Texas litigation. *De Leon v. Perry*, 5:13-CV-982-OLG, 975 F. Supp. 2d 632, 666 (W.D. Tex. Feb. 26, 2014) (staying a preliminary-injunction order on same-sex marriage pending appeal); *id.*, Doc. 76 (W.D. Tex. Mar. 7, 2014) (staying all trial proceedings pending resolution of the interlocutory appeal); *see, e.g.*, Stay Order, *Herbert v. Kitchen*, No. 13A687 (U.S. Sup. Ct., Jan. 6, 2014) (staying a permanent injunction regarding same-sex marriage while the case is reviewed on appeal); *Perry. v. Schwarzenegger*, No. 10-16696, Doc. No. 14 (9th Cir. Aug. 16, 2010); *id.*, Doc. No. 425-1 (June 5, 2012) (staying an order on same-sex marriage as well as the court's own mandate pending resolution of the case by the Supreme Court); *Bishop v. Holder*, 962 F.Supp.2d 1252, 1296 (N.D. Okla. 2014) (staying order on same-sex marriage "pending the final disposition of any appeal"); *Wolf v. Walker,* 14-CV-64-BBC, 2014 WL 2693963 (W.D. Wis. June 13, 2014) (same); *Griego v. Olver*, D-202-CV-2013-2757, 2013 WL 5768197 (N.M. Dist. Ct. Sept. 3, 2013) (staying an injunction against New Mexico's same-sex marriage ban "pending appellate review"); *In re the Marriage of Heather Brassner & Megan E. Lade,* No. 13-012058(37), Fla. Cir. Ct., Broward Cnty (Aug. 4, 2014) (same). Moreover, Louisiana's marriage recognition laws survived federal constitutional challenge in the district court and are not now subject to any

federal court order at all. *See Robicheaux v. Caldwell*, 2 F.Supp.3d 910 (E.D. La. 2014), *appeal docketed*, No. 14-31037 (5th Cir. Sept. 4 & 5, 2014).

8. The Department's Final Rule renews a tension in the law that courts have remedied by issuing stays in the federal and State court proceedings governing same-sex marriage in Texas and throughout the nation. Furthermore, the Department's Final Rule would effectively overturn Louisiana's marriage recognition laws, which were upheld by a federal district court against constitutional challenge.

D. A TRO and a Preliminary Injunction Will Not Disserve the Public Interest.

9. A TRO and a preliminary injunction would allow the Plaintiff States to carry out the longstanding statutory policy of their legislatures, which "is in itself a declaration of the public interest . . . ." *Virginian Ry. Co. v. Sys. Fed'n No. 40*, 300 U.S. 515, 552 (1937); *see also Abbott*, 734 F.3d at 419 ("When a statute is enjoined, the State necessarily suffers the irreparable harm of denying the public interest in the enforcement of its laws" and when "the State is the appealing party, its interest and harm merges with that of the public.").

10. Granting the preliminary injunction will maintain the status quo.

CONCLUSION AND PRAYER FOR RELIEF

11. Plaintiffs respectfully request temporary relief, enjoining the Final Rule from taking effect on March 27, 2015, and for all other relief to which the Plaintiff States may show themselves to be entitled.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing instrument has been served electronically through the electronic-filing manager to all parties in compliance with TRCP 21a on this the 23rd day of April, 2015.

/s/ William T. Deane
WILLIAM T. DEANE
Assistant Attorney General

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
WICHITA FALLS DIVISION

STATE OF TEXAS	§	
	§	
et al.	§	
	§	
	§	
Plaintiffs,	§	
	§	
v.	§	CIVIL ACTION NO. 7:15-cv-56
	§	
UNITED STATES OF AMERICA,	§	
UNITED STATES DEPARTMENT	§	
OF LABOR, and THOMAS E. PEREZ,	§	
in his Official Capacity as	§	
SECRETARY OF LABOR,	§	
	§	
Defendants.	§	

DECLARATION OF BRANTLEY STARR

My name is Brantley Starr and I am over the age of 18 and fully competent to make this declaration and state the following:

1. I am the Deputy for General Counsel for the Texas Office of the Attorney General. The Texas Attorney General is the chief legal officer of the State of Texas, and employs hundreds of employees throughout Texas, including in Wichita Falls, Texas.

2. The facts as alleged in the Amended Complaint for Declaratory and Injunctive Relief and Application for Temporary Restraining Order and Preliminary Injunction/Stay of Administrative Proceedings are true and correct.

3. The State of Texas, in its Amended Complaint for Declaratory and

Injunctive Relief and Application for Temporary Restraining Order and Preliminary Injunction/Stay of Administrative Proceedings relies on the following publically available, governmental documents:

- 80 Fed. Reg. No. 37, at 9989-10001;
- 79 Fed. Reg. 36445;
- U.S. Department of Labor, Wage and Hour Division, Fact Sheet: Final Rule to Amend the Definition of Spouse in the Family and Medical Leave Act Regulations, Feb. 2014; and
- State Auditor's Office, A Summary Report on Full-time Equivalent State Employees for Fiscal Year 2014, Feb. 2015, *available at* http://www.sao.state.tx.us/Reports/ report.aspx?reportnumber=15-705.
- Louisiana Dep't of State Civil Service, 2013-14 Annual Report, at 11, *available at* http://www.civilservice.louisiana.gov/files/publications/annual_reports/ AnnualReport13-14.pdf.

The documents attached as exhibits to the Complaint and Application are true and correct copies of the originals.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

Executed on this the 9th day of April, 2015.

BRANTLEY STARR

jobs, the environment, public health or safety, or State, local, or tribal government or communities. Accordingly, this rule is not a "significant regulatory action" as defined in Executive Order 12866.

Executive Order 12988

This regulation meets the applicable standards set forth in sections 3(a) and 3(b)(2) of Executive Order 12988, "Civil Justice Reform."

Executive Order 13132

This rule will 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. Therefore, in accordance with Executive Order 13132, "Federalism," the Department has determined that this rule does not have sufficient federalism implications to warrant the preparation of a federalism summary impact statement.

Unfunded Mandates Reform Act of 1995

This rule will not result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of $100 million or more in any one year, and it will not significantly or uniquely affect small governments. Therefore, no actions are necessary under the provisions of the Unfunded Mandates Reform Act of 1995, 2 U.S.C. 1501 *et seq.*

Small Business Regulatory Enforcement Fairness Act of 1996

This rule is not a major rule as defined by section 251 of the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), 5 U.S.C. 804. This rule will not result in an annual effect on the economy of $100 million or more; a major increase in costs or prices; or significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of United States-based enterprises to compete with foreign-based enterprises in domestic and export markets.

Congressional Review Act

This action pertains to agency management, personnel, and organization and does not substantially affect the rights or obligations of non-agency parties. Accordingly, it is not a rule for purposes of the reporting requirement of 5 U.S.C. 801.

List of Subjects in 28 CFR Part 0

Authority delegations (Government agencies), Government employees, Organization and functions (Government agencies), Privacy, Reporting and recordkeeping requirements, Whistleblowing.

Authority and Issuance

Accordingly, by virtue of the authority vested in me as Attorney General, including 5 U.S.C. 301 and 28 U.S.C. 509, 510, and for the reasons set forth in the preamble, part 0 of title 28 of the Code of Federal Regulations is amended as follows:

PART 0—ORGANIZATION OF THE DEPARTMENT OF JUSTICE

■ 1. The authority citation for 28 CFR part 0 continues to read as follows:

Authority: 5 U.S.C. 301; 28 U.S.C. 509, 510, 515–519.

§ 0.130 [Amended]

■ 2. In § 0.130, amend paragraph (b)(2) by removing the second sentence.

Dated: February 20, 2015.

Eric H. Holder, Jr.,

Attorney General.

[FR Doc. 2015–03839 Filed 2–24–15; 8:45 am]

BILLING CODE 4410–19–P

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 March 27, 2015.

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 NW., Room S–3502, Frances Perkins Building, Washington, DC 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 Web site 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 U.S.C. 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. Public Law 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) (Pub. L. 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 Web site.

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

Because of the Supreme Court's holding in *Windsor* that section 3 of DOMA is unconstitutional, the Department is no longer prohibited from recognizing same-sex marriages 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 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

[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.

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 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 Web site with current information on the status of same-sex marriage in the States and foreign jurisdictions.

[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.

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 Web site.

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 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

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

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

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

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 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 Web site, *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

[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 Web page 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 × 45.2 percent × 2) + (251,695 × 54.8 percent) = 227,532 + 137,929 = 365,461 employed same-sex spouses.

365,461 employees × 59.2 percent = 216,353 covered, eligible employees.

216,353 × 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 average for an employee who takes military caregiver leave at 45.4 instances of leave per year ((29,100 respondents × 44 responses) + (6,966 respondents × 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 × 0.9754 × 1.5 = 53,180 instances of traditional leave

36,347 employees × 0.0196 × 13 = 9,256 instances of qualifying exigency leave

36,347 employees × 0.0050 × 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 × 17.6 percent = 12,443 instances of leave to care for a parent, spouse, or child.

70,699 × 1.4 percent = 990 instances of leave for qualifying exigency reasons.

Continued

overestimates the number of instances of 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.

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.

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 × 220 hours[14] × $2.45)
- Estimated annual employer benefit cost for FMLA leave taken for qualifying

70,699 × 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 that 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.

[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.*

[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).

exigency leave: $485,100 (990 new instances × 200 hours × $2.45)

- Estimated annual employer benefit cost for FMLA leave taken for military caregiver leave: $1,552,320 (990 new instances × 640 hours × $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.

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 × 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 × 0.5 hour × 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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BILLING CODE 4510–27–P

DEPARTMENT OF VETERANS AFFAIRS

38 CFR Part 3

RIN 2900–AP26

Automobile or Other Conveyance and Adaptive Equipment Certificate of Eligibility for Veterans or Members of the Armed Forces With Amyotrophic Lateral Sclerosis

AGENCY: Department of Veterans Affairs.

ACTION: Interim final rule.

SUMMARY: The Department of Veterans Affairs (VA) is amending its adjudication regulation regarding certificates of eligibility for financial assistance in the purchase of an automobile or other conveyance and adaptive equipment. The amendment authorizes automatic issuance of a certificate of eligibility for financial assistance in the purchase of an automobile or other conveyance and adaptive equipment to all veterans with service-connected amyotrophic lateral sclerosis (ALS) and members of the Armed Forces serving on active duty with ALS.

DATES: *Effective Date:* This interim final rule is effective February 25, 2015.

Comment Date: Comments must be received by VA on or before April 27, 2015.

Applicability Date: The provisions of this regulatory amendment apply to all applications for a certificate of eligibility for an automobile or other conveyance and adaptive equipment allowance pending before VA on or received after February 25, 2015.

ADDRESSES: Written comments may be submitted through *www.Regulations.gov*; by mail or hand-delivery to Director, Regulation Policy and Management (02REG), Department of Veterans Affairs, 810 Vermont Ave. NW., Room 1068, Washington, DC 20420; or by fax to (202) 273–9026. Comments should indicate that they are submitted in response to "RIN 2900–AP26—Automobile or Other Conveyance and Adaptive Equipment Certificate of Eligibility for Veterans or Members of the Armed Forces With Amyotrophic Lateral Sclerosis Connected to Military Service." Copies of comments received will be available for public inspection in the Office of Regulation Policy and Management, Room 1068, between the hours of 8:00 a.m. and 4:30 p.m., Monday through Friday (except holidays). Please call (202) 461–4902 for an appointment. (This is not a toll free number.) In addition, during the comment period,

U.S. Department of Labor
Wage and Hour Division

U.S. Wage and Hour Division

(February 2015)

FACT SHEET: FINAL RULE TO AMEND THE DEFINITION OF SPOUSE IN THE FAMILY AND MEDICAL LEAVE ACT REGULATIONS

In 2013, the Supreme Court in *United States v. Windsor* struck down section 3 of the Defense of Marriage Act (DOMA) as unconstitutional. In a June 26, 2013, press release responding to the decision, President Obama said: "This ruling is a victory for couples who have long fought for equal treatment under the law, for children whose parents' marriages will now be recognized, rightly, as legitimate; for families that, at long last, will get the respect and protection they deserve; and for friends and supporters who have wanted nothing more than to see their loved ones treated fairly and have worked hard to persuade their nation to change for the better."

The President instructed the Cabinet to review all relevant federal statutes to implement the decision, including its implications for federal benefits and programs. The Department reviewed the application of the President's directive to the Family and Medical Leave Act (FMLA), which entitles eligible employees of covered employers to take unpaid, job-protected leave for specified family and medical reasons.

Immediately following the *Windsor* decision, the Department announced what the then-current definition of spouse under the FMLA allowed, given the decision: Eligible employees could take leave under the FMLA to care for a same-sex spouse, but only if the employee resided in a state that recognizes same-sex marriage. This ensured that as many families as possible would have the opportunity to deal with serious medical and family situations without fearing the threat of job loss.

In order to provide FMLA rights to all legally married same-sex couples consistent with the *Windsor* decision and the President's directive, the Department subsequently issued a Final Rule on February 25, 2015, revising the regulatory definition of spouse under the FMLA. The Final Rule amends the regulatory definition of spouse under the FMLA so that eligible employees in legal same-sex marriages will be able to take FMLA leave to care for their spouse or family member, regardless of where they live. This will ensure that the FMLA will give spouses in same-sex marriages the same ability as all spouses to fully exercise their FMLA rights. The Final Rule is effective on March 27, 2015.

What is the Family and Medical Leave Act?

The FMLA entitles eligible employees of covered employers to take unpaid, job-protected leave for specified family and medical reasons. A covered employer is a:

- private sector employer with 50 or more employees in 20 or more workweeks in the current or preceding calendar year;
- public agency, including a local, state, or federal government agency, regardless of the number of employees it employs; or
- public or private elementary or secondary school, regardless of the number of employees it employs.

Eligible employees may take up to 12 workweeks of FMLA leave in a 12-month period

- for the birth of the employee's child and for bonding with the newborn;
- for the placement of a child with the employee for adoption or foster care and for bonding with the newly-placed child;
- to care for the employee's spouse, son, daughter, or parent with a serious health condition; or
- when the employee is unable to perform the essential functions of his or her job due to the employee's own serious health condition.

The FMLA also includes certain military family leave provisions:

- *Military Caregiver Leave*: Entitles eligible employees who are the spouse, son, daughter, parent, or next of kin of a covered servicemember (current member or veteran of the National Guard, Reserves, or Regular Armed Forces) with a serious injury or illness incurred or aggravated in the line of duty to take up to 26 workweeks of FMLA leave during a single 12-month period to care for their family member.

- *Qualifying Exigency Leave*: Entitles eligible employees to take up to 12 workweeks of FMLA leave in a 12-month period for a "qualifying exigency" related to the foreign deployment of the employee's spouse, son, daughter, or parent.

Major features of the Final Rule

- The Department has moved from a "state of residence" rule to a "place of celebration" rule for the definition of spouse under the FMLA regulations. The Final Rule changes the regulatory definition of spouse in 29 CFR §§ 825.102 and 825.122(b) to look to the law of the place in which the marriage was entered into, as opposed to the law of the state in which the employee resides. A place of celebration rule allows all legally married couples, whether opposite-sex or same-sex, or married under common law, to have consistent federal family leave rights regardless of where they live.

- The Final Rule's definition of spouse expressly includes individuals in lawfully recognized same-sex and common law marriages and marriages that were validly entered into outside of the United States if they could have been entered into in at least one state.

What impact does this definitional change have on FMLA leave usage?

- This definitional change means that eligible employees, regardless of where they live, will be able to
  - take FMLA leave to care for their lawfully married same-sex spouse with a serious health condition,
  - take qualifying exigency leave due to their lawfully married same-sex spouse's covered military service, or
  - take military caregiver leave for their lawfully married same-sex spouse.

- This change entitles eligible employees to take FMLA leave to care for their stepchild (child of employee's same-sex spouse) regardless of whether the *in loco parentis* requirement of providing day-to-day care or financial support for the child is met.[1]

[1] Apart from the Final Rule, the Department has consistently recognized the eligibility of individuals, whether married or not, to take leave to care for a partner's child if they meet the *in loco parentis* requirement of providing day-to-day care or financial support for the child. For more information on

- This change also entitles eligible employees to take FMLA leave to care for a stepparent who is a same-sex spouse of the employee's parent, regardless of whether the stepparent ever stood *in loco parentis* to the employee.

The full text of the Final Rule can be found at http://www.dol.gov/whd/fmla/spouse/.

For additional information on the FMLA, please visit www.dol.gov/whd/fmla.

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FMLA leave on the basis of an *in loco parentis* relationship, *see* Fact Sheet #28B at http://www.dol.gov/whd/regs/compliance/whdfs28B.htm.

PROPOSED RULES

DEPARTMENT OF LABOR

Wage and Hour Division

29 CFR Part 825

RIN 1235-AA09

The Family and Medical Leave Act

Friday, June 27, 2014

AGENCY: Wage and Hour Division, Department of Labor.

***36445** ACTION: Notice of proposed rulemaking.

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

DATES: Comments must be received on or before August 11, 2014.

ADDRESSES: You may submit comments, identified by Regulatory Information Number (RIN) 1235-AA09, by electronic submission through the Federal eRulemaking Portal http://www.regulations.gov. Follow ***36446** instructions for submitting comments. You may also submit comments by mail. Address written submissions to Mary Ziegler, Director of the Division of Regulations, Legislation, and Interpretation, Wage and Hour Division, U.S. Department of Labor, Room S-3502, 200 Constitution Avenue NW., Washington, DC 20210.

Instructions: Please submit only one copy of your comments by only one method. All submissions must include the agency name and RIN, identified above, for this rulemaking. Please be advised that comments received will be posted without change to http://www.regulations.gov, including any personal information provided, and should not include any individual's personal medical information. For questions concerning the application of the FMLA provisions,

individuals may contact the Wage and Hour Division (WHD) local district offices (see contact information below). Mailed written submissions commenting on these provisions must be received by the date indicated for consideration in this rulemaking. Comments submitted through http://www.regulations.gov must be received by 11:59 p.m. Eastern Standard Time on the date indicated for consideration in this rulemaking. For additional information on submitting comments and the rulemaking process, see the "Public Participation" heading of the SUPPLEMENTARY INFORMATION section of this document.

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

FOR FURTHER INFORMATION CONTACT: Mary Ziegler, Director of the Division of Regulations, Legislation, and Interpretation, Wage and Hour Division, U.S. Department of Labor, Room S-3502, 200 Constitution Avenue NW., Washington, DC 20210; telephone: (202) 693-0406 (this is not a toll-free number). Copies of this rule may be obtained in alternative formats (large print, Braille, audio tape or disc), upon request, by calling (202) 693-0675 (this is not a toll-free number). TTY/TDD callers may dial toll-free 1-877-889-5627 to obtain information or request materials in alternative formats.

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

SUPPLEMENTARY INFORMATION:

I. Electronic Access and Filing Comments

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

I. Background

A. What the FMLA Provides

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

FMLA leave may be taken in a block, or under certain circumstances, intermittently or on a reduced leave schedule. In addition to providing job protected family and medical leave, employers must also maintain any preexisting group health plan coverage for an employee on FMLA protected leave under the same conditions that would apply if the employee had not taken leave. 29 U.S.C. 2614. Once the leave period is concluded, the employer is required to restore the employee to the same or an equivalent position with equivalent employment benefits, pay, and other terms and conditions of employment. Id. If an employee believes that his or her FMLA rights have been violated, the employee may file a complaint with the Department of Labor or file a private lawsuit in federal or state court. If the employer has violated the employee's FMLA rights, the employee is entitled to reimbursement for any monetary loss incurred, equitable relief as appropriate, interest, attorneys' fees, expert witness fees, and court costs. Liquidated damages also may be awarded. 29 U.S.C. 2617.

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

B. Who the Law Covers

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

C. Regulatory History

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

After publication, the Department invited further public comment on the ***36447** interim regulations. 58 FR 45433 (Aug. 30, 1993). During this comment period, the Department received a significant number of substantive and editorial comments on the interim regulations from a wide variety of stakeholders. Based on this second round of public comments, the Department published final regulations to implement the FMLA on January 6, 1995. 60 FR 2180. The regulations were amended February 3, 1995 (60 FR 6658) and March 30, 1995 (60 FR 16382) to make minor technical corrections. The final regulations went into effect on April 6, 1995.

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

The Department published an NPRM in the Federal Register on February 15, 2012 primarily focused on changes to the FMLA's regulations to implement amendments to the military leave provisions made by the National Defense Authorization Act for Fiscal Year 2010 and to the employee eligibility requirements for airline flight crew employees made by the Airline Flight Crew Technical Corrections Act. 77 FR 8960. The Department issued a final rule on February 6, 2013, which became effective on March 8, 2013. 78 FR 8834.

II. FMLA Spousal Leave

The FMLA provides eligible employees with leave to care for a spouse in the following situations: (1) When needed to care for a spouse due to the spouse's serious health condition; (2) when needed to care for a spouse who is a covered servicemember with a serious illness or injury; and (3) for a qualifying exigency related to the covered military service of a spouse. The FMLA defines “spouse” as “a husband or wife, as the case may be.”29 U.S.C. 2611(13). In the 1993 Interim Final Rule, the Department defined spouse as “a husband or wife as defined or recognized under State law for purposes of marriage, including common law marriage in States where it is recognized.”58 FR 31817, 31835 (June 4, 1993). In commenting on the Interim Final Rule, both the Society for Human Resource Management and William M. Mercer, Inc., questioned which state law would apply when an employee resided in one State but worked in another State. 60 FR 2190 (June 6, 1995). In response to these comments, the 1995 Final Rule clarified that the law of the State of the employee's residence would control for determining eligibility for FMLA spousal leave. Id. at 2191. Accordingly, since 1995 the FMLA regulations have contained the following definition of spouse: “Spouse means a husband or wife as defined or recognized under State law for purposes of marriage in the State where the employee resides, including common law marriage in States where it is recognized.”29 CFR 825.102, 825.122(a) (prior to the 2013 final rule the same definition appeared at 29 CFR 825.113(a) and 825.800).

In 1996 the Defense of Marriage Act (DOMA) was enacted. Public Law 104-199, 110 Stat. 2419.Section 3 of DOMA

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

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

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

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

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

III. Discussion of Proposed Changes to the FMLA Regulations

Both Section 825.102 (Definitions) and paragraph (b) of Section 825.122 (Definitions of covered servicemember, spouse, parent, son or daughter, next of kin of a covered service member, adoption, foster care, son or daughter on covered active duty or call to covered active duty status, son or daughter of a covered servicemember, and parent of a covered servicemember) set forth the definition of “spouse” for purposes of ***36448** FMLA leave as “a husband or wife as defined or recognized under State law for purposes of marriage in the State where the employee resides, in-

cluding common law marriage in States where it is recognized."29 CFR 825.102, 825.122(b).

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

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

The Department is proposing to move from a state of residence rule to a rule based on the jurisdiction where the marriage was entered into (place of celebration) to ensure that same-sex couples who have legally married will have consistent FMLA rights regardless of where they live. As of June 18, 2014, nineteen States and the District of Columbia extend the right to marry to both same-sex and opposite-sex couples (California, Connecticut, Delaware, District of Columbia, Hawaii, Illinois, Iowa, Maine, Maryland, Massachusetts, Minnesota, New Hampshire, New Jersey, New Mexico, New York, Oregon, Pennsylvania, Rhode Island, Vermont, and Washington). Additionally, sixteen countries extend the right to marry to same-sex couples (Argentina, Belgium, Brazil, Canada, Denmark, England/Wales/Scotland,[FN1] France, Iceland, The Netherlands, New Zealand, Norway, Portugal, Spain, South Africa, Sweden, and Uruguay). A place of celebration rule will allow all legally married couples, whether opposite-sex or same-sex, to have consistent federal family leave rights regardless of the State in which they reside.

> FN1 Legislation to legalize same-sex marriage has been approved in Scotland and marriages of same-sex couples are expected to begin there in the autumn of 2014.

A place of celebration rule will ensure that all legally married employees have consistent FMLA leave rights regardless of where they live. The Department believes that a place of celebration rule will give fullest effect to the purpose of the FMLA to permit employees to take unpaid leave to care for a seriously ill spouse. The need to provide care for a spouse is the same for all married couples and does not change depending on their state of residence. Additionally, a place of celebration rule will provide consistent federal family leave rights for legally married couples regardless of the State in which they reside, thus reducing barriers to the mobility of employees in same-sex marriages in the labor market. The Department believes such a rule will also reduce the administrative burden on employers that operate in more than one State, or that have employees who move between States with different marriage recognition rules; such employers would not have to consider the employee's state of residence and the laws of that State in determining the employee's eligibility for FMLA leave.

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

The proposed change to a place of celebration rule for the definition of spouse under the FMLA would also have some impact beyond spousal leave. The right to take FMLA leave to care for a child includes the right to take leave to care for a stepchild. See 825.102, which defines “son or daughter” to include a stepchild; see also 825.122(d), 825.122(h), and 825.122(i). Under the Department's proposed rule, an employee in a valid same-sex marriage would be able to take leave to care for a stepchild to whom the employee does not stand in loco parentis. The Department has consistently recognized the eligibility of same-sex partners (whether married or not) to take leave to care for a partner's child provided that they meet the in loco parentis requirement of providing day-to-day care or financial support for the child. Administrator Interpretation FMLA 2010-3. Prior to the Supreme Court's decision in Windsor, Section 3 of DOMA prevented employees in same-sex marriages from taking such leave for a stepchild unless they satisfied the requirements of in loco parentis status. However, in light of the June 26, 2013 Windsor decision, under the current version of the regulation, employees in same-sex marriages residing in States that recognize such marriages can take leave for a stepchild to whom they do not stand in loco parentis. 29 CFR 825.122(d)(3). Under the proposed place of celebration rule, an employee in a valid same-sex marriage would be able to take leave to care for a stepchild to whom the employee does not stand in loco parentis, regardless of the State in which he or she resides.

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

Accordingly, because the Department believes that expanding the definition of spouse to include all legally married couples is consistent both with the ***36449** Court's decision in Windsor and with the purpose of the FMLA to provide eligible employees with unpaid leave to care for a seriously ill spouse, child, or parent, the Department proposes to define “spouse” according to the law of the place of celebration. Of course, an employer may offer an employment benefit program or plan that provides greater family or medical leave rights to employees than the rights established by the FMLA. See 29 CFR 825.700(a). FMLA regulations state: “[N]othing in the Act is intended to discourage employers from adopting or retaining more generous leave policies.”29 CFR 825.700(b). The Department seeks comments on its proposed definition.

IV. Conforming Changes

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

V. Paperwork Reduction Act

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

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

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

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

The Department proposes to revise the regulation defining “spouse” under the FMLA, in light of the United States Supreme Court's holding that Section 3 of the Defense of Marriage Act is unconstitutional. Amending the definition of spouse to include all legally married spouses as recognized under state law for purposes of marriage in the State where the marriage was entered into or, in the case of a marriage entered into outside of any State, if the marriage is valid in the place where entered into and could have been entered into in a State, would expand the availability of FMLA leave to legally married same-sex spouses regardless of the State in which they reside. Under the proposed definition of spouse, eligible employees would be able to take FMLA leave to care for their same-sex spouse, a stepparent by virtue of a parent's same-sex marriage, or a stepchild to whom the employee does not stand in loco parentis.

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

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

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

Circumstances Necessitating Collection: The Family and Medical Leave Act of 1993 (FMLA), 29 U.S.C. 2601, et seq., requires private sector employers who employ 50 or more employees, all public and private elementary schools, and all public agencies to provide up to 12 weeks of unpaid, job-protected leave during any 12-month period to eligible employees for certain family and medical reasons (i.e., for birth of a son or daughter and to care for the newborn child; for placement with the employee of a son or daughter for adoption or foster care; to care for the employee's spouse, son, daughter, or parent with a serious health condition; because of a serious health condition that makes the employee unable to perform the functions of the employee's job; to address qualifying exigencies arising out of the deployment of the employee's spouse, son, daughter, or parent to covered active duty in the military), and up to 26 workweeks of unpaid, job-protected leave during a single 12-month period to an eligible employee who is the spouse, son, daughter, parent, or next of kin of a covered servicemember for the employee to provide care for the covered servicemember with a serious injury or illness. FMLA section 404 requires the Secretary of Labor to ***36450** prescribe such regulations as necessary to enforce this Act. 29 U.S.C. 2654.

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

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

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

Aside from the general requirement that third-party notifications be in writing, with a possible exception for the employee's FMLA request that depends on the employer's leave policies, there are no restrictions on the method of transmission. Respondents may meet many of their notification obligations by using Department-prepared publications available on the WHD Web site, www.dol.gov/whd. These forms are in PDF, fillable format for downloading and printing. Employers may maintain records in any format, including electronic, when adhering to the record-keeping requirements covered by this information collection.

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

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

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

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

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

Public Comments: The Department seeks public comments regarding the burdens imposed by information collections contained in this proposed rule. In particular, the Department seeks comments that: Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; enhance the quality, utility and clarity of the information to be collected; and minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submissions of responses. Commenters may send their views about these information collections to the Department in the same way as all other comments (e.g., through the regulations.gov Web site). All comments received will be made a matter of public record, and posted without change to http://www.regulations.gov, including any personal information provided.

An agency may not conduct an information collection unless it has a ***36451** currently valid OMB approval, and the Department has submitted the identified information collection contained in the proposed rule to OMB for review under the PRA under the Control Number 1235-0003. See 44 U.S.C. 3507(d); 5 CFR 1320.11. Interested parties may obtain a copy of the full supporting statement by sending a written request to the mail address shown in the ADDRESSES section at the beginning of this preamble or by visiting the http://www.reginfo.gov/public/do/PRAMain Web site.

In addition to having an opportunity to file comments with the Department, comments about the paperwork implications of the proposed regulations may be addressed to OMB. Comments to OMB should be directed to: Office of Information and Regulatory Affairs, Attention OMB Desk Officer for the Wage and Hour Division, Office of Management and Budget, Room 10235, Washington, DC 20503, Telephone: 202-395-7316/Fax: 202-395-6974 (these are

not toll-free numbers).

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

AGENCY: Wage and Hour Division.

***36451** Title of Collection: Family and Medical Leave Act, as Amended.

OMB Control Number: 1235-0003.

Affected Public: Individuals or households; private sector—businesses or other for profits.

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

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

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

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

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

VI. Executive Order 12866; Executive Order 13563

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

The Department proposes to revise the regulatory definition of “spouse” for the purpose of FMLA to allow all legally married employees to take leave to care for their spouse regardless of whether their state of residence recognizes their marriage. As a result of the proposed regulatory change, covered and eligible employees would be entitled to take FMLA leave regardless of their state of residence to care for their same-sex spouse with a serious health condition; to care for a stepchild with a serious health condition to whom the employee does not stand in loco parentis; to care for their parent's same-sex spouse with a serious health condition; for qualifying exigency reasons related to the covered active duty of their same-sex spouse; and to care for their same-sex spouse who is a covered servicemember with a

serious injury or illness. This proposed rule would not expand coverage under the FMLA, that is, the coverage and eligibility provisions of the FMLA are unchanged by this rule and employees who are not currently eligible and employed by a covered establishment would not become eligible as a result of this proposed rule.

Estimates of the number of individuals in same-sex marriages vary widely due to issues with state level data tracking, reliance on self-reporting, and changes in survey formatting. The Department bases the number of same-sex marriages on the 2010 American Community Survey (ACS), conducted by the U.S. Census Bureau.[FN2] The 2010 ACS showed 152,500 self-reported same-sex marriages, resulting in 305,000 individuals. The Department estimates, based on the 2010 ACS, that in about 45 percent of same-sex marriages, both partners are employed and, for the purposes of this analysis, the Department assumes that one spouse is employed in the remaining 55 percent of same-sex marriages.[FN3]

FN2 Lofquist, Daphne, Same-Sex Couple Households: American Community Survey Briefs, September 2011, p. 3. Available at: http://www.census.gov/prod/2011pubs/acsbr10-03.pdf.

FN3 U.S. Census Bureau, 2011 American Community Survey 1-year data file. Table 2. Household Characteristics of Same-sex Couple Households by Assignment Status.

The Department recently surveyed employers and employees nationwide on FMLA leave taking, Family and Medical Leave in 2012.[FN4] Based on these survey findings, 59.2 percent of employees meet the eligibility requirements for FMLA leave and are employed by covered establishments.[FN5] Of those employees, 16.8 percent were married and took FMLA leave [FN6] 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.[FN7] Applying these findings to the number of individuals in same-sex marriages based on the 2010 ACS, results in an estimated 6,720 new instances of FMLA leave annually as a result of the proposed change to the regulatory definition of spouse.[FN8] [FN9] This likely overestimates the number of instances of new leave that would be taken, as covered and eligible employees in same-sex marriages are already entitled to take FMLA leave to care for a parent or child with a serious health condition.

FN4 See Wage and Hour Division FMLA Surveys Web page at: http://www.dol.gov/whd/fmla/ survey/.

FN5 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.

FN6 Family and Medical Leave in 2012: Technical Report, exhibit 4.1.5, page 64.

FN7 Family and Medical Leave in 2012: Technical Report, exhibits 4.4.2, page 70, and 4.4.7, page 74.

FN8 (152,500 marriages x 45 percent x 2) + (152,500 x 55 percent) = 137,250 + 83,875 = 221,125 employed same-sex spouses. 221,125 employees x 59.2 percent = 131,000 covered, eligible employees (rounded) 131,000 x 16.8 percent = 22,000 covered, eligible, employees taking leave (rounded). In the 2008 proposed FMLA rule, the Department estimated that covered eligible employees take 1.5 instances of leave per year (73 FR 7944). The Department uses that same estimate for this analysis. 21,992 x 1.5 = 33,000 instances of leave per year (rounded) 33,000 (rounded) x 17.6 percent = 5,800 instances of leave (rounded) to care for a parent, spouse, or child. 33,000 x 1.4 percent = 460 instances of leave (rounded) for qualifying exigency reasons. For purposes of this analysis, the Department assumes employees will take leave to care for a covered servicemember at the same rate as leave taken for a qualifying exigency. 5,800 + 460 + 460 = 6,720 new instances of FMLA leave

FN9 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 proposed rule change are: Regulatory familiarization, maintenance of preexisting employee health benefits during FMLA leave, and administrative ***36452** costs associated with providing required notices to employees, requesting certifications, reviewing employee requests and medical certifications, and making necessary changes to employer policies. The costs related to requesting and reviewing employee requests for leave and certifications and of providing required notices to employees are discussed in the Paperwork Reduction Act section of this proposed rule. The Department expects the remaining costs to be minimal to employers. The Department has determined that this rule will not result in an annual effect on the economy of $100 million or more.

VII. Small Business Regulatory Enforcement Fairness Act; Regulatory Flexibility

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

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

The proposed rule amending the FMLA regulations' definition of spouse does not substantively alter current FMLA

regulatory requirements, but instead allows leave to be taken on the basis of an employee's same-sex marriage. The Department estimates that the proposed definitional revision will result in 6,720 new instances of FMLA leave annually.[FN10] 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.

> FN10 Based on 2010 American Community Survey (ACS) data, the Department estimates that there are 305,000 individuals in a same-sex marriage. Based on ACS estimates, both partners are employed in 45.2 percent of same-sex married households. We assume that one partner is employed in the remaining 54.8 percent of same-sex married households. Thus, 72.6 percent of all partners in same-sex married households are employed. Applying this percentage to the number of individuals in a same-sex marriage, we estimate that 221,400 individuals in same-sex marriages are employed. Based on a 2012 DOL survey, 59.2 percent of employed individuals are covered by and eligible to take FMLA leave. Thus, we estimate that 131,100 individuals are covered by the FMLA and eligible for FMLA leave. Also based on the 2012 DOL survey's findings on leave usage patterns, 16.8% of covered, eligible, married employees actually take FMLA leave per year. Accordingly, we estimate that 22,000 employees are FMLA-covered, FMLA-eligible, and actually take leave each year. Further, based on the 2012 DOL survey finding that 1.5 is the average number of instances of leave per taker, individuals in same-sex marriages take 33,000 instances of leave. It is important to note that this figure of 33,000 instances of leave represents the estimate of all instances of FMLA leave taken by same-sex partners for any FMLA reason, including leave which they were already eligible to take (i.e., leave for themselves, their child, their parent, etc.) in addition to leave that a covered employee in a same-sex marriage may take for the employee's same-sex spouse, stepchild to whom they do not stand in loco parentis, and stepparent.
>
> The 2012 DOL survey found that 17.6 percent of FMLA leave is used to take care of an employee's parent, child, or spouse; 1.4 percent of FMLA leave is for qualifying exigency purposes; and 1.4 percent of FMLA leave is for military caregiver purposes. Applying these percentages to the 33,000 instances of FMLA leave yields the following: 5,800 instances of leave related to care of an employee's parent, child, or spouse; 460 instances for qualifying exigency; and 460 instances for military caregiver purposes, for a total of 6,720 new instances of FMLA leave per year.

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

The need to hire replacement workers represents a possible cost to employers. In some businesses, employers are able to redistribute work among other employees while an employee is absent on FMLA leave, but in other cases the employer may need to hire temporary replacement workers. This process involves costs resulting from recruitment of temporary workers with needed skills, training the temporary workers, and lost or reduced productivity of these

workers. The cost to compensate the temporary workers is in most cases offset by the amount of wages not paid to the employee absent on FMLA leave, when the employee's FMLA leave is unpaid, (i.e., the employee is not using accrued sick or vacation leave).

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

Additionally, because FMLA leave is unpaid, one cost to employers consists of the health insurance benefits maintained by employers during employees' FMLA leave. Based on the Department's recent survey on FMLA leave, Family and Medical Leave in 2012, the average length of leave taken in one year by a covered, eligible employee is 27.5 days.[FN11] 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.

> FN11 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.

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

To calculate the costs of providing health insurance, the Department utilizes data from the BLS Employer Costs for Employee Compensation survey. According to BLS' March 2014 report, employers spend an average of $2.45 per hour on insurance.[FN12]

> FN12 http://bls.gov/ro7/ro7ecec.htm.

The Department estimates that, on an annual basis for employees in same-sex marriages, the proposed rule will result in: 5,800 new instances of FMLA leave taken to care for an employee's same-sex spouse, stepchild, or stepparent; 460 new instances for qualifying exigency purposes; and 460 new instances for military caregiver purposes. Accordingly, an estimated total of 6,720 new instances of FMLA leave might be taken as a result of this proposed rule.

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

ssquf] Estimated annual employer benefits cost for FMLA leave taken for ***36453** employee's same-sex spouse, stepchild, or stepparent: $3,126,200 (5,800 new instances x 220 hours [FN13] x $2.45)

> FN13 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).

ssquf] Estimated annual employer benefit cost for FMLA leave taken for qualifying exigency leave: $225,400 (460 new instances x 200 hours x $2.45)

ssquf] Estimated annual employer benefit cost for FMLA leave taken for military caregiver leave: $721,280 (460 new instances x 640 hours x $2.45).

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

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

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

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

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

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

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

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

VIII. Unfunded Mandates Reform Act

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), Public Law 104-4, establishes requirements for federal agencies to assess the effects of their regulatory actions on state, local, and tribal governments as well as on the private sector. Under Section 202(a) of UMRA, the Department must generally prepare a written statement, including a cost-benefit analysis, for proposed and final regulations that "includes any Federal mandate that may result in the expenditure by State, local, and tribal governments, in the aggregate or by the private sector" in excess of $100 million in any one year ($141 million in 2012 dollars, using the Gross Domestic Product deflator).

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

IX. Executive Order 13132, Federalism

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

X. Executive Order 13175, Indian Tribal Governments

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

XI. Effects on Families

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

XII. Executive Order 13045, Protection of Children

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

XIII. Environmental Impact Assessment

A review of this proposal in accordance with the requirements of the National Environmental Policy Act of ***36454** 1969 (NEPA), 42 U.S.C. 4321 et seq.; the regulations of the Council on Environmental Quality, 40 CFR part 1500 et seq.; and the Departmental NEPA procedures, 29 CFR part 11, indicates that the proposed rule will not have a significant impact on the quality of the human environment. There is, thus, no corresponding environmental assessment or an environmental impact statement.

XIV. Executive Order 13211, Energy Supply

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

XV. Executive Order 12630, Constitutionally Protected Property Rights

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

XVI. Executive Order 12988, Civil Justice Reform Analysis

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

List of Subjects in 29 CFR Part 825

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

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

David Weil,

Administrator, Wage and Hour Division.

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

PART 825—THE FAMILY AND MEDICAL LEAVE ACT OF 19931. The authority citation for part 825 continues to read as follows:

Authority: 29 U.S.C. 2654.

29 CFR § 825.102

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

29 CFR § 825.102

§ 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.

* * * * *

29 CFR § 825.120

3. Amend § 825.120 by:

a. Revising paragraph (a)(1);

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

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

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

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

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

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

The revisions to read as follows:

29 CFR § 825.120

§ 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. * * *

29 CFR § 825.121

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:

29 CFR § 825.121

§ 825.121 Leave for adoption or foster care.

* * * * *

(3) Spouses who are eligible for FMLA leave and are employed by the same covered employer may be limited to a combined total of 12 weeks of leave during any 12-month period if the leave is taken for the placement of the employee's son or daughter or to care for the child after placement, for the birth of the employee's son or daughter or to care for the child after birth, or to care for the employee's parent with a serious health condition. This limitation ***36455** 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 pur-

poses. * * *

(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.

* * * * *

29 CFR § 825.122

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

29 CFR § 825.122

§ 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.

* * * * *

29 CFR § 825.127

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

29 CFR § 825.127

§ 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. * * *

29 CFR § 825.201

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

29 CFR § 825.201

§ 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. * * *

29 CFR § 825.202

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

29 CFR § 825.202

§ 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. * * *

* * * * *

[FR Doc. 2014-14762 Filed 6-26-14; 8:45 am]

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79 FR 36445-01, 2014 WL 2887808 (F.R.)
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IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
WICHITA FALLS DIVISION

STATE OF TEXAS, *et al.*,	§	
	§	
	§	
Plaintiffs,	§	
	§	
v.	§	CIVIL ACTION NO. 7:15-cv-56
	§	
UNITED STATES OF AMERICA, *et al.*,	§	
	§	
	§	
Defendants.	§	

DECLARATION OF CHRISTOPHER ADAMS

My name is Christopher Adams and I am over the age of 18 and fully competent to make this declaration and state the following:

1. I am the Human Resources Director for Texas Health and Human Services Commission (HHSC). HHSC is an agency of the State of Texas. HHSC is responsible for human resources for 54,300 employees of it and 4 subordinate state institutions and agencies. Among those institutions is the North Texas State Hospital, located in Wichita Falls, Texas. Six other HHSC agency offices are also located in Wichita Falls.

2. I am aware that the Texas Constitution defines marriage only as the union of one man and one woman and prohibits HHSC from creating or recognizing any legal status identical or similar to marriage. I am also aware that the Texas Family Code section 6.204 declares same-sex marriage against the State's public

policy and prohibits the State, state agencies, and political subdivisions from giving effect to a "public act, record, or judicial proceeding that creates, recognizes, or validates a marriage between persons of the same sex or a civil union in this state or in any other jurisdiction" or a "right or claim to any legal protection, benefit, or responsibility asserted as a result of a marriage between persons of the same sex or a civil union in this state or in any other jurisdiction."

3. Pursuant to state law, HHSC does not grant leave under the Family and Medical Leave Act ("FMLA") to an employee to care for a same-sex spouse because that would require (1) recognition of a union Texas law does not recognize and (2) giving effect to a right, claim, or benefit in the form of workplace leave as a result of an out-of-state same-sex marriage.

4. HHSC currently complies with both Texas law and federal FMLA regulations under its current FMLA policy, which allows for its use for any of the following reasons:

- the birth of the employee's child and care of the infant;
- the placement of a child with the employee for adoption or foster care and the care of the newly placed child;
- the care of a spouse, child, or parent of the employee if that individual has a serious health condition;
- the employee's own serious health condition that makes the employee unable to perform the essential functions of his or her job;

- to care for a service member or an honorably discharged veteran who incurred a serious injury or illness; or
- a qualifying exigency arising from the employee's spouse, child or parent being deployed or being notified of impending deployment to a foreign country.

A true and correct copy of the HHSC FMLA policy is attached as Exhibit A.

5. It is my understanding that under the Department of Labor's final rule set to take effect March 27, 2015, HHSC will be required to grant FMLA leave to an employee to care for a purported same-sex spouse. 80 Fed. Reg. No. 37, at 9989-10001.

6. If the final rule takes effect, HHSC will not be able to comply with both Texas law, which prohibits giving effect to any claim or benefit based on a same-sex marriage, and the Department of Labor's final rule, which requires granting FMLA leave based on out-of-state same-sex marriages.

7. Complying with the final rule would also require HHSC to research the common law, statues, regulations, and constitutional provisions regarding the definitions of marriage in other states and foreign countries, inquire into the status of any pending divorce actions, and whether the employee complies with the requirements of common-law marriage in another state. This would be a significant burden on HHSC resources given the large number of FMLA leave requests that we process. During calendar year 2014, 6,589 HHS employee requests for FMLA leave

were approved.

8. HHSC has already received inquiries about its FMLA leave policy regarding the Department of Labor's final rule, and I expect that HHSC will receive FMLA leave requests based on the Department of Labor's final rule when it goes into effect.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

Executed on this the 9th day of April, 2015.

CHRISTOPHER ADAMS

I. Family and Medical Leave Act (FMLA) Leave

(Revised 5/15/09)

Policy

(Revised 8/1/05, 3/7/08, 1/16/09, 5/15/09, 1/25/10)

The FMLA of 1993 entitles eligible employees to take up to 12 weeks of job-protected accrued paid or unpaid leave during a 12-month period. The 12-month period for FMLA is measured backward from the date on which an employee uses any FMLA leave. This is referred to as a rolling 12-month period.

An eligible employee who is the spouse, son, daughter, parent, or nearest blood relative of a member or an honorably discharged veteran of the Armed Forces is entitled to take up to 26 weeks of job-protected accrued paid or unpaid leave during a 12-month period to care for the service member or honorably discharged veteran. For more information on Service Member Family Leave, see Chapter 5, Work Leave (I. Family and Medical Leave Act [FMLA] Leave; Service Member Family Leave).

The amount of leave a part-time employee is entitled to take is determined on a pro rata basis. **Example**: The entitlement for a full-time employee is 12 weeks (480 hours). If a part-time employee works a 30-hour per week work schedule (30 divided by 40 equals .75), this employee would be entitled to 360 hours of FMLA leave (480 multiplied by .75 equals 360 hours).

FMLA may be used for any of the following:

- the birth of the employee's child and care of the infant;
- the placement of a child with the employee for adoption or foster care and the care of the newly placed child;
- the care of a spouse, child, or parent of the employee if that individual has a serious health condition;
- the employee's own serious health condition that makes the employee unable to perform the essential functions of his or her job;
- to care for a service member or an honorably discharged veteran who incurred a serious injury or illness. For more information, see Chapter 5, Work Leave (I. Family and Medical Leave Act [FMLA] Leave; Service Member Family Leave); or
- a qualifying exigency arising from the employee's spouse, child or parent being deployed or being notified of impending deployment to a foreign country. For more information, see Chapter 5, Work Leave (I. Family and Medical Leave Act [FMLA] Leave; Leave for a Qualifying Exigency).

A parent includes an individual who stood in loco parentis (role of parent) to an employee.

A child includes an individual who is either under age 18 or age 18 or older and incapable of self-care because of mental or physical disability, and is

- the employee's biological, adopted, or foster child;
- the employee's stepchild;
- the employee's legal ward; or
- a child for whom the employee stands in loco parentis.

For more information on relationships that qualify for FMLA leave, contact the HHS Human Resources Office, Employee Relations Unit.

Authority

The FMLA allows employees to take reasonable leave for family and medical reasons while providing job protection.

It is a federal law administered by the U.S. Department of Labor's Wage and Hour Division. In addition, the Texas Government Code, Chapter 661, authorizes FMLA leave for state employees.

Eligibility

(Revised 12/3/07, 5/15/09)

A full-time or part-time employee is eligible to take FMLA leave if the employee

- has a total of at least 12 months of state service, and
- has physically worked at least 1,250 hours in the rolling 12-month period immediately preceding the commencement of leave. **Note:** Any paid leave or holidays taken are not counted as hours physically worked.

Service Member Family Leave

(Added 3/7/08, revised 1/16/09, 1/25/10, 3/11/13), 5/21/13)

Eligible employees who are the spouse, son, daughter, parent, or nearest blood relative of a member or an honorably discharged veteran of the Armed Forces (including a member of the National Guard or Reserves) are entitled to take up to 26 weeks of job-protected accrued paid or unpaid leave during a 12-month period to care for:

- a service member who incurred a serious injury or illness in the line of duty while the member is deployed to a foreign country or that existed before the beginning of the member’s deployment and was aggravated by service in the line of duty while the member was deployed to the foreign country. Such serious injury or illness may render the service member medically unfit to perform the duties of the member's office, grade, rank, or rating, and have resulted in the member:

- undergoing medical treatment, recuperation, or therapy;
- being otherwise placed in outpatient status; or
- being otherwise placed on the temporary disability retired list; or

- a veteran undergoing medical treatment, recuperation, or therapy for a serious injury or illness incurred in the line of duty while the veteran was deployed to a foreign country or that existed before the beginning of the member's deployment and was aggravated by service in the line of duty while the member was deployed to the foreign country. Such serious injury or illness is either:
  - a continuation of a serious injury or illness that was incurred or aggravated when the veteran was a member of the Armed Forces and rendered the member unable to perform the duties of the member's office, grade, rank, or rating;
  - a physical or mental condition for which the veteran has received a Department of Veterans Affairs Service-Related Disability Rating (VASRD) of 50 percent or greater. (The rating may be based on multiple conditions);
  - a physical or mental condition that substantially impairs the veteran's ability to work because of a disability or disabilities related to military service, or would do so absent treatment; or
  - an injury that is the basis for the veteran's enrollment in the Department of Veterans Affairs Program of Comprehensive Assistance for Family Caregivers.

  An employee may take leave for this purpose up to five years after the veteran was discharged or released from the military. **Note**: The period between October 28, 2009 and March 8, 2013 does not count when determining whether the five-year period has expired.

The length of such leave, when combined with other FMLA qualifying leave, is limited to 26 weeks during a single 12-month period. For example, during the 12-month period, an employee:

- could claim up to 12 weeks of FMLA leave for the birth of a child, and later claim up to an additional 14 weeks of FMLA leave for a qualifying military illness or injury; and
- could not claim 26 weeks of leave to care for a sibling with a qualifying military illness or injury, and later claim an additional 12 weeks of FMLA leave for the birth of a child.

For information on the certification and approval process, see Chapter 5, Work Leave (I. Family and Medical Leave Act [FMLA] Leave; Processing Requests for FMLA Leave Related to Service Member Family Leave).

Processing Requests for FMLA Leave for Service Member Family Leave

(Added 1/16/09, revised 1/25/10, 10/19/12 11/12/12, 3/11/13, 3/14/13, 9/1/13)

The following table describes the actions taken to request leave to care for a service member or an honorably discharged veteran.

Step	Action
1	The employee submits to the supervisor: • a request using the leave request screen in CAPPS; and • any supplemental documentation, if applicable.
2	The supervisor: • reviews the employee's request and supplemental documentation, if applicable; • consults with the HHS human resources office, employee relations unit; and • within five business days of receiving the leave request: ○ notifies the employee whether or not he or she is eligible for the FMLA leave using form WH-381, Notice of Eligibility and Rights and Responsibilities; ○ (if eligible to use FMLA leave) designates the leave as FMLA leave on the consolidated timesheet in CAPPS by selecting the FMLA override reason code, based on information provided by the employee; and ○ requests that the employee provide: ▪ medical certification of the qualifying condition by: • informing the employee that an authorized health care provider for the service member should supply appropriate medical certification as soon as possible (but no later than 15 calendar days after the date of the supervisor's request). **Note**: Authorized health care providers include those affiliated with the Department of Defense (DOD), the Department of Veterans Affairs (VA), or TRICARE (the DOD heath care program), as well as health care providers listed in Chapter 5, Work Leave (I. Family and Medical Leave Act [FMLA] Leave; Health Care Provider); and • providing the employee with form HR0513, Genetic Information Nondiscrimination Act Notice; and: ○ (if for a current service member's condition) form WH-385, Certification for Serious Injury or Illness of Current Servicemember -- for Military Family Leave; or ○ (if for a veteran's condition) form WH-385-

	V, Certification for Serious Injury or Illness of a Veteran for Military Caregiver Leave.
3	The employee and health care provider complete and send to the immediate supervisor form WH-385 or form WH-385-V.
4	The supervisor: • consults with the HHS human resources office, employee relations unit; • (within five business days of receiving the completed form WH-385 or form WH-385-V) makes the final determination on FMLA designation for leave by sending the employee a completed form WH-382, Designation Notice; and • maintains for three years the original form WH-385 or form WH-385-V, and copies of form WH-381 and form WH-382.

Leave for a Qualifying Exigency

(Added 1/16/09, revised 1/25/10, 3/11/13)

An eligible employee is entitled to take up to 12 weeks of job-protected accrued paid or unpaid leave during a 12-month period for a qualifying exigency if the employee is the spouse, son, daughter, or parent of a military member which includes:

- a member of the Regular Armed Forces who has been deployed to a foreign country, or has been notified of impending deployment to a foreign country; or
- a member of the reserve components of the Armed Forces (National Guard and Reserves) who has been deployed to a foreign country, or has been notified of impending deployment to a foreign country under a call or order to active duty in support of a contingency operation.

Military members include the employee's:

- parent (biological, adoptive, step or foster father or mother, or any individual who stood in loco parentis to the employee when he or she was a child);
- son or daughter (biological, adopted, or foster child, stepchild, legal ward, or a child for whom the employee stood in loco parentis, and who is of any age); or
- spouse.

The following table describes acceptable qualifying exigency situations.

Leave may be taken for...	**Leave could be used...**
Short-notice deployment	To address any issue that arises from the fact that a military member is notified of an impending call or order to covered active duty in support of a contingency operation seven or less calendar

	days prior to the date of deployment. **Note**: Leave taken for this purpose can be used for a period of seven calendar days beginning on the date a military member is notified of an impending call or order to covered active duty in support of a contingency operation.
Military events and related activities	To attend: • any official ceremony, program, or event sponsored by the military that is related to the covered active duty or call to covered active duty status of a military member; and • family support or assistance programs and informational briefings sponsored or promoted by the military, military service organizations, or the American Red Cross that are related to the covered active duty or call to covered active duty status of a military member.
Childcare and school activities	• To arrange for alternative childcare when the covered active duty or call to covered active duty status of a military member necessitates a change in the existing childcare arrangement for a biological, adopted, or foster child, a stepchild, or a legal ward of a military member, or a child for whom a military member stands in loco parentis, who is either under age 18, or age 18 or older and incapable of self-care because of a mental or physical disability at the time that FMLA leave is to commence; • To provide childcare on an urgent, immediate need basis (but not on a routine, regular, or everyday basis) when the need to provide such care arises from the covered active duty or call to covered active duty status of a military member for a biological, adopted, or foster child, a stepchild, or a legal ward of a military member, or a child for whom a military member stands in loco parentis, who is either under age 18, or age 18 or older and incapable of self-care because of a mental or physical disability at the time that FMLA leave is to commence; • To enroll in or transfer to a new school or day care facility a biological, adopted, or foster child, a stepchild, or a legal ward of the military member, or a child for whom the military member stands in loco parentis, who is either under age 18, or age 18 or older and incapable of self-care because of a mental or physical disability at the time that FMLA leave is to commence, when enrollment or transfer is necessitated by the covered active duty or call to covered active duty status of a military member; and • To attend meetings with staff at a school or a daycare facility, such as meetings with school officials regarding disciplinary measures, parent-teacher conferences, or

	meetings with school counselors, for a biological, adopted, or foster child, a stepchild, or a legal ward of the military member, or a child for whom the military member stands in loco parentis, who is either under age 18, or age 18 or older and incapable of self-care because of a mental or physical disability at the time that FMLA leave is to commence, when such meetings are necessary due to circumstances arising from the covered active duty or call to covered active duty status of a military member.
Financial and legal arrangements	• To make or update financial or legal arrangements to address the military member's absence while on covered active duty or call to covered active duty status, such as preparing and executing financial and healthcare powers of attorney, transferring bank account signature authority, enrolling in the Defense Enrollment Eligibility Reporting System (DEERS), obtaining military identification cards, or preparing or updating a will or living trust; and • To act as the military member's representative before a federal, state, or local agency for purposes of obtaining, arranging, or appealing military service benefits while the military member is on covered active duty or call to covered active duty status, and for a period of 90 days following the termination of the military member's covered active duty status.
Counseling	To attend counseling provided by someone other than a health care provider for oneself, for the military member, or for the biological, adopted, or foster child, a stepchild, or a legal ward of the military member, or a child for whom the military member stands in loco parentis, who is either under age 18, or age 18 or older and incapable of self-care because of a mental or physical disability at the time that FMLA leave is to commence, provided that the need for counseling arises from the covered active duty or call to covered active duty status of a military member.
Rest and recuperation	To spend time with a military member who is on short-term, temporary, rest and recuperation leave during the period of deployment. **Note**: Eligible employees may take up to 15 days of leave for each instance of rest and recuperation.
Post-deployment activities	• To attend arrival ceremonies, reintegration briefings and events, and any other official ceremony or program sponsored by the military for a period of 90 days following the termination of the military member's covered active duty status; and • To address issues that arise from the death of a military member while on covered active duty status, such as meeting and recovering the body of the military member and

	making funeral arrangements.
Parental care	• To arrange for alternative care for a parent of the military member when the parent is incapable of self-care and the covered active duty or call to covered active duty status of the military member necessitates a change in the existing care arrangement for the parent; • To provide care for a parent of the military member on an urgent, immediate need basis (but not on a routine, regular, or everyday basis) when the parent is incapable of self-care and the need to provide such care arises from the covered active duty or call to covered active duty status of the military member; • To admit to or transfer to a care facility a parent of the military member when admittance or transfer is necessitated by the covered active duty or call to covered active duty status of the military member; and • To attend meetings with staff at a care facility, such as meetings with hospice or social service providers for a parent of the military member, when such meetings are necessary due to circumstances arising from the covered active duty or call to covered active duty status of the military member but not for routine or regular meetings.
Additional activities	To address other events which arise out of the military member's covered active duty or call to covered active duty status provided that the employer and employee agree that such leave shall qualify as an exigency, and agree to both the timing and duration of such leave.

For information on the certification and approval process, see Chapter 5, Work Leave (I. Family and Medical Leave Act [FMLA] Leave; Processing Requests for FMLA Leave Related to a Qualifying Exigency).

Processing Requests for FMLA Leave for a Qualifying Exigency

(Added 1/16/09, revised 1/25/10, 10/19/12, 11/12/12, 3/11/13, 9/1/13)

The following table describes the actions taken to request leave for a qualifying exigency arising from the employee's spouse, child or parent being deployed or being notified of impending deployment to a foreign country.

Step	Action
1	The employee submits to the supervisor: • a request using the leave request screen in CAPPS; and • any supplemental documentation, if applicable.
2	The supervisor:

	• reviews the employee's request and supplemental documentation, if applicable; • consults with the HHS human resources office, employee relations unit; and • within five business days of receiving the leave request: ○ notifies the employee whether or not he or she is eligible for the FMLA leave using form WH-381, Notice of Eligibility and Rights and Responsibilities; ○ requests a copy of: ▪ the military member's covered active duty orders, or ▪ other documentation issued by the military that indicates the military member is on covered active duty or call to covered active duty status in support of a contingency operation, and the dates of the military member's covered active duty service; ○ (if eligible to use FMLA leave) designates the leave as FMLA leave on the consolidated timesheet in CAPPS by selecting the FMLA override reason code, based on information provided by the employee; and ○ provides the employee with form WH-384, Certification of Qualifying Exigency for Military Family Leave, and informs the employee that this certification form must be returned to the supervisor as soon as possible (but no later than 15 calendar days after the date of the supervisor's request).
3	The employee completes and sends to the immediate supervisor form WH-384.
4	The supervisor: • consults with the HHS human resources office, employee relations unit; • (within five business days of receiving the completed WH-384) makes the final determination on FMLA designation for leave by sending the employee a completed form WH-382, Designation Notice; and • maintains for three years the original form WH-384 and copies of form WH-381 and form WH-382.

Requirement to Exhaust Paid Leave

(Revised 3/7/08, 1/16/09, 5/15/09)

Employees are required to use all applicable accrued paid leave concurrently with FMLA leave. The use of sick leave (including extended sick leave and sick leave pool leave) under this policy is limited to those situations that meet the definition/criteria for the use of sick leave, extended sick leave, or sick leave pool leave (see Chapter 5, Work Leave [F. Sick Leave; Policy]; Chapter 5, Work Leave

[G. Extended Sick Leave; Policy]; Chapter 5, Work Leave [H. Sick Leave Pool; Policy]).

Exception: Employees who are on FMLA leave and receiving temporary disability benefit payments or workers' compensation benefits are not required to first exhaust vacation leave or sick leave while receiving those benefits.

Health Benefits

(Revised 3/11/13)

An employee on an unpaid leave of absence while on FMLA leave is entitled to have health benefits maintained while on leave as if the employee had continued to work, or the employee may choose to reduce the employee's level of coverage to Employee Only.

If the employee paid part of the premiums prior to the leave, the employee continues to pay that part during the leave period.

Serious Health Condition

(Revised 1/16/09)

The FMLA defines a serious health condition as any illness, injury, impairment, or physical or mental condition that involves either any period of incapacity or treatment connected with inpatient care or continuing treatment by a health care provider that includes any period of incapacity due to:

- a health condition lasting more than three consecutive full calendar days involving treatment of two or more times within 30 days of the first day of incapacity (unless extenuating circumstances exist), by, or under the supervision of, a health care provider, or treatment by a health care provider on at least one occasion with a regimen of continuing treatment. **Note**: Extenuating circumstances are circumstances beyond the employee's control that prevent the follow-up visit from occurring as planned by the health care provider. For example, it would be considered an extenuating circumstance if no appointments were available during that time period;
- pregnancy, including severe morning sickness, or time needed for prenatal care;
- a chronic serious health condition, which is one that continues over an extended period of time, requires periodic visits to a health care provider, and may cause episodic periods rather than a continuing period of incapacity, such as asthma, diabetes, or epilepsy;
- a permanent or long-term condition for which treatment may not be effective, if the employee is under the supervision of a health care provider (but is not necessarily undergoing active treatment) such as when the employee has suffered a severe stroke or is in the terminal stages of cancer; or
- any period of absence to receive multiple treatments by, or under the orders

of, a health care provider either for restorative surgery after an accident or other injury, or for a condition that would likely result in a period of incapacity for more than three consecutive full calendar days if left untreated, such as dialysis for kidney disease or chemotherapy for cancer.

Inpatient Care

Inpatient care under the FMLA is an overnight stay in a hospital, hospice, or residential medical care facility. It also includes any period of incapacity or any subsequent treatment in connection with such inpatient care.

Health Care Provider

(Revised 12/3/07, 3/11/13)

A health care provider is broadly defined to include:

- doctors of medicine or osteopathy;
- physician's assistants;
- podiatrists;
- dentists;
- optometrists;
- chiropractors (limited to treatment consisting of manual manipulations of the spine to correct a subluxation as demonstrated by x-ray);
- nurse practitioners;
- nurse midwives;
- clinical psychologists;
- clinical social workers;
- Christian Scientist practitioners (listed with the First Church of Christ, Scientist, in Boston, Massachusetts); and
- any other health care provider approved under the Uniform Group Insurance Plan.

With the exception of the Christian Scientist practitioners, health care providers must be authorized to practice by the state in which they practice.

Health care providers who practice in a country other than the United States may be included in the FMLA definition of a health care provider if they are:

- authorized to practice in accordance with the law of that country, and
- performing within the scope of his or her practice as defined under such law.

For additional guidance, consult with the HHS human resources office, employee relations unit.

Intermittent or Reduced Leave

Under certain circumstances, employees may take FMLA leave for a serious health condition on an intermittent or reduced leave schedule. Such leave must be granted if medically necessary.

Schedule Type	Description and Example
Intermittent leave	Leave taken in separate blocks of time (rather than in one continuous period of time) for the same serious health condition, such as required for chemotherapy or physical therapy.
Reduced schedule	A schedule that reduces an employee's usual number of hours per workweek or workday for a period of time, such as switching from full-time to part-time for a limited period.

Medical Certification

(Revised 1/18/06, 12/3/07, 3/7/08, 1/16/09, 3/11/13)

Employees must provide the supervisor with medical certification by the health care provider to support a request for FMLA leave under the following situations:

- to care for the employee's spouse, child, or parent who has a serious health condition;
- to care for the employee's spouse, son, daughter, parent, or nearest blood relative who is a member of the Armed Forces, and who is rendered medically unfit to perform the duties of the member's office, grade, rank, or rating; or
- to care for the employee's own serious health condition, which renders the employee unable to perform the essential functions of the job.

Medical certification is provided using either form WH-380-E, Certification of Health Care Provider for Employee's Serious Health Condition, form WH-380-F, Certification of Health Care Provider for Family Member's Serious Health Condition, or form WH-385, Certification for Serious Injury or Illness of Covered Servicemember - - for Military Family Leave.

If the employee fails to provide the supervisor with a completed form WH-380-E, form WH-380-F, or form WH-385, the supervisor must contact the HHS human resources office, employee relations unit for additional guidance.

Note: If the agency determines the employee's medical certification is incomplete or insufficient, the supervisor must provide the employee with form WH-382, Designation Notice, indicating that the employee must provide the supervisor with the specified additional information within at least seven calendar days or the leave request may be denied.

Validity of Medical Certification

(Revised 10/16/13)

If the supervisor receives complete and sufficient medical certification but doubts the validity of the certification, the agency may require the employee to obtain a second certification from a health care provider selected by the agency, at the agency's expense.

The following table describes the actions taken, based on the results of the second opinion:

If the second opinion…	Then…
agrees with the first opinion	the employee is notified that the leave will be designated as FMLA.
does not agree with the first opinion and the employee agrees, in writing, that the leave is not protected under FMLA	the employee is notified that the leave will not be designated as FMLA.
does not agree with the first opinion and the employee disputes this finding	the agency may require the employee to obtain certification from a third health care provider, again at the agency's expense. The agency and employee must jointly approve of the third health care provider. The third medical certification is final and binding. **Note:** If the agency chooses not to require a third opinion, the employee is notified that the leave will be designated as FMLA.

Pending the receipt of the second or third medical certification, the employee is provisionally entitled to the benefits of the FMLA, including maintenance of group health insurance.

Note: If the employee refuses to obtain the second or third opinion, the employee is notified that the leave will not be designated as FMLA.

Documentation of Birth or Placement of Child

(Revised 8/1/05)

Employees may be required to provide the supervisor with a copy of the birth certificate, or a copy of foster care or adoption papers, to support a request for FMLA leave under the following situations:

- the birth of the employee's child and care of the infant, or
- the placement of a child with the employee for adoption or foster care and the care of the newly placed child.

Both Spouses Employed by the Same State Agency

(Revised 3/7/08, 1/25/10)

If both spouses are employed by the same state agency and both are eligible for FMLA leave, they are entitled to a **combined** total of

- 12 weeks of leave during any rolling 12-month period when the qualifying event is:
  - the birth of the employees' child and care of the infant, or
  - the placement of a child with the employees for adoption or foster care and the care of the newly placed child; or
- 26 weeks of leave during a 12-month period when the qualifying event is the qualifying military illness or injury of the employees' son, daughter, parent, or nearest blood relative.

Advance Notification

Under the FMLA, employees must let the agency know that they need leave. The employee's spouse, family member, or other responsible party may also provide notice if the employee is personally unable to do so.

Ordinarily, the employee must provide at least 30 days advance notice when the need is foreseeable.

Examples of foreseeable needs include:

- an expected birth,
- placement for adoption or foster care, or
- planned medical treatment.

If 30 days advance notice is not possible, such as for a medical emergency, notice must be given as soon as practicable, ordinarily within two business days.

Processing Requests for FMLA Leave for Employee's or Family Member's Serious Health Condition, and Birth or Child Placement

(Revised 3/22/05, 1/18/06, 12/3/07, 1/16/09, 5/15/09, 9/21/11, 10/19/12, 11/12/12, 3/11/13, 9/1/13)

The following table describes the actions taken to request leave for an FMLA qualifying event.

Step	Action
1	The employee submits to the supervisor: • a request using the leave request screen in CAPPS; and

	• any supplemental documentation, if applicable.
2	The supervisor: • reviews the employee's request and supplemental documentation, if applicable; • consults with the HHS human resources office, employee relations unit; and • within five business days of receiving the leave request: ○ notifies the employee whether or not he or she is eligible for the FMLA leave using form WH-381, Notice of Eligibility and Rights and Responsibilities; ○ (if eligible to use FMLA leave) designates the leave as FMLA leave on the consolidated timesheet in CAPPS by selecting the FMLA override reason code, based on information provided by the employee or his or her representative; and ○ requests that the employee provide: ▪ (if for a medical condition other than a pregnancy) medical certification of the qualifying condition by: • informing the employee that the relevant health care provider should supply appropriate medical certification as soon as possible (but no later than 15 calendar days after the date of the supervisor's request); and • giving the employee: ○ (if for the employee's own serious health condition) a job description, a list of physical requirements for the employee's job, form HR0513, Genetic Information Nondiscrimination Act Notice, and form WH-380-E, Certification of Health Care Provider for Employee's Serious Health Condition, or ○ (if for a covered family member's serious health condition) form HR0513 and form WH-380-F, Certification of Health Care Provider for Family Member's Serious Health Condition; ▪ (if for a pregnancy) a copy of the birth certificate or other acceptable medical documentation; or ▪ (if for foster care or adoption) foster care or adoption papers.
3	If not for a pregnancy, foster care, or adoption, the employee and health care provider complete and send to the immediate supervisor form WH-380-E or form WH-380-F.

4	The supervisor:
	• consults with the HHS human resources office, employee relations unit;
	• (within five business days of receiving the completed form WH-380-E or form WH-380-F, and/or other relevant documentation) makes the final determination on FMLA designation for leave by:
	  ○ sending the employee a completed form WH-382, Designation Notice; and
	  ○ (if the leave request is approved for the employee's own serious health condition) attaching a job description, a list of physical requirements for the employee's job, and a form HR0512, Fitness for Duty Certification; and
	• maintains for three years all relevant documentation, including the original form WH-380-E or form WH-380-F and copies of form WH-381 and form WH-382.

If the request is for extended sick leave (ESL) or sick leave pool (SLP) leave, follow the procedures in Chapter 5, Work Leave (G. Extended Sick Leave; Processing Requests for Extended Sick Leave), or Chapter 5, Work Leave (H. Sick Leave Pool; Processing Requests for Leave from the Sick Leave Pool).

Insurance Coverage While on Unpaid FMLA Leave

(Revised 1/18/06, 7/23/10)

If an employee is on unpaid FMLA leave and

- has insurance coverage other than "Employee Only" (and the employee does not wish to drop the additional coverages),
- wishes to continue to receive the state's share of the insurance premium, and
- is on unpaid leave for
  - a full calendar month, or
  - less than a full calendar month, but does not receive enough salary for the month to cover the employee's premium deduction,

the employee must pay the employee's share by personal check, cashier's check or money order, payable to "Employees Group Insurance Fund."

The Employees Retirement System of Texas (ERS) must receive the payment no later than the last day of the month in which the employee is on unpaid leave.

Leave Can Be FMLA, Even When Not Requested

It is not necessary for an employee to identify an absence or the need for leave specifically as FMLA leave.

The supervisor must determine whether any request for leave, paid or unpaid, meets the requirements for FMLA leave.

When Any Type of Leave Is Requested

(Revised 1/18/06, 3/7/08, 1/16/09, 5/15/09, 1/25/10)

The supervisor should determine an employee's eligibility for FMLA leave whenever an employee requests any type of leave, paid or unpaid, for one of the following reasons:

- the birth of the employee's child and care of the infant;
- the placement of a child with the employee for adoption or foster care and the care of the newly placed child;
- the care of the employee's spouse, son, daughter, parent, or nearest blood relative who is a member or an honorably discharged veteran of the Armed Forces, and who may be rendered medically unfit to perform the duties of the member's office, grade, rank, or rating;
- a qualifying exigency arising from the employee's spouse, child or parent being deployed or being notified of impending deployment to a foreign country; or
- the health condition of the employee or the employee's spouse, child, or parent causes the employee to be absent for more than three consecutive full calendar days.

For more information on the supervisor's responsibilities in determining whether requested leave should be designated as FMLA leave, see Family and Medical Leave Policy - Questions and Answers; Chapter 5, Work Leave (I. Family and Medical Leave Act (FMLA) Leave; Processing Requests for FMLA Leave for Service Member Family Leave); Chapter 5, Work Leave (I. Family and Medical Leave Act (FMLA) Leave; Processing Requests for FMLA Leave for a Qualifying Exigency); and Chapter 5, Work Leave (I. Family and Medical Leave Act (FMLA) Leave; Processing Requests for FMLA Leave for Employee's or Family Member's Serious Health Condition, and Birth or Child Placement).

Place Eligible Employees on FMLA Leave Immediately

The supervisor places a qualified employee on FMLA leave immediately after determining the employee's eligibility, without waiting until after all paid leaves are used.

FMLA Runs Concurrently with Other Leaves

(Revised 8/3/09, 3/11/13)

FMLA leave runs concurrently with the following leaves, whenever the reason for the employee's absence qualifies for FMLA leave:

- sick leave,
- vacation leave,
- state compensatory leave,
- FLSA overtime,
- leave from the sick leave pool,
- extended sick leave,
- leave associated with Workers' Compensation, and
- unpaid leave.

FMLA Leave and Holidays or Office Closures

(Revised 3/7/08)

The following table describes when a holiday or office closure counts against an employee's FMLA entitlement.

If a holiday or office closure occurs while an employee is using FMLA...	**Then the time...**
in one continuous block	counts against the FMLA entitlement.
while on an intermittent or reduced leave schedule	does not count against the FMLA entitlement.

For definitions of intermittent leave and reduced schedule, see Chapter 5, Work Leave (I. Family Medical Leave Act [FMLA] Leave; Intermittent or Reduced Leave).

Retroactive Designation of FMLA Leave

(Revised 3/7/08)

A supervisor may designate leave as FMLA-qualified after the fact if

- an employee on leave unexpectedly experiences an FMLA leave event and requests an extension of leave, in which case all leave after the qualifying event may be counted against the employee's entitlement;
- the supervisor is unaware until the employee returns from leave that the reason for the absence was an FMLA qualifying event; or
- the supervisor is unable to confirm that the leave qualifies as FMLA leave, the employee returns from leave or does not provide requested medical certification, and the supervisor subsequently confirms that the absence qualifies as FMLA leave.

Reinstatement

The FMLA generally requires employees to be reinstated to the same or an equivalent position on return from leave.

Denying Reinstatement

Under the FMLA, an employee may be denied reinstatement at the end of leave if

- the agency can show an employee would not otherwise have been employed at the time reinstatement is requested, such as when the position is eliminated during a reduction in force; or
- the employee is unable to perform an essential function of the position, with or without reasonable accommodation, because of a physical or mental condition, including the continuation of a serious health condition.

FMLA and Light Duty Assignments

Under the FMLA, an employee may refuse an offer of a modified or alternate-duty assignment until the employee's FMLA covered leave expires.

For more information, see Chapter 3, General Employment (P. Return to Work Program).

Release to Return to Work

(Revised 1/18/06, 6/1/06, 12/3/07)

Before returning to work following FMLA leave for the employee's own serious health condition, the employee must provide the supervisor with an HR0512, Fitness for Duty Certification, and a DWC 73, Work Status Report (if for a workers' compensation-related injury or occupational illness) completed by the employee's treating health care provider. The supervisor is responsible for providing the employee with an HR0512, a job description, and a list of physical requirements for the employee's job. The health care provider will provide the employee with DWC 73 (if for a workers' compensation-related injury or occupational illness).

FMLA and ADA

In some cases, a serious health condition may also qualify as a disability under the ADA. If so, an employee may request a reasonable accommodation, or a position for which he or she qualifies, although at a different salary, shift, or pattern.

For more information on the ADA and reasonable accommodations, see Chapter 16, Equal Employment Opportunity (D. Reasonable Accommodation).

Inability to Work after FMLA

(Revised 3/7/08, 1/16/09)

If an employee is unable to return to work due to the employee's own serious health condition after exhausting the FMLA leave entitlement,

- the employee may exhaust any remaining accrued paid leave;
- the Agency Head may grant leave without pay for up to a total of 12 months, including FMLA leave; or
- the employee may be dismissed.

Intent Not to Return to Work

If an employee gives unequivocal notice of intent not to return to work, the agency's obligations cease under FMLA to maintain health benefits (subject to COBRA requirements) and to restore the employee to employment.

However, these obligations continue if an employee indicates a desire to return to work.

Providing Notice

Each agency must post notices explaining FMLA provisions and procedures for filing complaints with the Department of Labor's Wage and Hour Division.

The notices must be posted where employees and applicants for employment can readily see them.

FMLA Medical Records

Records and documents relating to medical certifications, recertifications, or medical histories of the employee or employee's family members should be maintained, to the extent allowed by law, as confidential medical records in a file separate from the employee's personnel files.

For more information, see Chapter 14, Employment Records (E. Restricted Access to Employee Medical Information).

Additional Information

(Added 8/3/09, Revised 9/1/13)

For additional information on FMLA leave, see Family and Medical Leave Policy - Questions and Answers and Manager's FMLA Checklist.

Policies & Procedures Manual

Chapter 1. Introduction

Disclaimers

revised: 06/01/2014

This Policies and Procedures Manual (Manual) establishes policies, procedures, and practices that shall be followed by all employees of the Office of the Attorney General (OAG) as a condition of employment. Unless otherwise excepted in a specific policy or procedure, every policy and procedure applies to any individual performing work for or on behalf of the OAG, including employees paid by the OAG, IV-D contractors, on-site and off-site vendors, consultants, contingent workers, interns, and volunteers.

This Manual is not a contract of employment nor is it intended to create contractual obligations of any kind for the OAG or alter the **at-will employment** doctrine. The policies contained in this Manual do not in any manner constitute the terms of an employment agreement, expressed or implied, or create any property right for any employee.

The OAG reserves the right to add, delete, or change the policies, procedures, and practices in this Manual at any time, for any reason, and without prior notice. The OAG shall make every effort to notify employees of policy, procedure, and practice changes in a timely manner. The policies, procedures, and practices of the OAG shall be interpreted and applied at the sole discretion of the OAG.

Division Management shall be responsible for ensuring that their employees adhere to the agency's policies, procedures, and practices. Nevertheless, every employee is responsible for knowing and following the agency's policies, procedures, and practices. An employee who violates any policy may be subject to corrective or disciplinary action, up to and including immediate termination of his/her **at-will employment**.

The First Assistant Attorney General or designee may grant an exception to any policy in this Manual when it is in the best interest of the agency and fully complies with state and federal law.

Agency Mission and Philosophy

revised: 11/01/2011

Agency Mission

The Attorney General of Texas is the State's chief legal officer. To fulfill its constitutional and statutory responsibilities, the Office of the Attorney General (OAG) provides legal representation to State officials and agencies, investigates and prosecutes criminal activity when authorized by law to do so, renders formal legal opinions, and defends the Texas Constitution in courts of law. The OAG is committed to protecting all Texans, including children, consumers, senior citizens, and crime victims. Equally important, as the agency charged with administering and enforcing the Public Information Act, the OAG must safeguard transparency, openness, and honesty within Texas State government.

Agency Philosophy

As the State's law firm, the OAG will provide exemplary legal representation to the State of Texas. Across the State, OAG attorneys, peace officers, and staff will work diligently to protect and serve children, senior citizens, consumers, and crime victims while also aggressively fighting to prevent crime and fraud before it occurs. Consistent with the mandates provided in State and federal law, the OAG will employ efficient, effective measures to collect child support for Texas children. At all times, OAG employees will conduct the taxpayers' business in a manner that comports with the highest standards of ethical conduct and will serve the people of Texas with unfailing diligence, courtesy, and respect.

Executive Administration

revised: 09/01/2013

As used by the Office of the Attorney General (OAG) in this manual and in other communications, the terms "Executive Administration," "Executive Management," and "Executive Management Team" refer to the First Assistant Attorney General, who serves as the executive head of the agency, and the Executive Deputies, jointly or individually, depending on the specific matter. When an approval process is undefined or unclear in a policy or communication, the OAG's **Signature Matrix** shall be followed.

Chapter 2. Special Agency Policies

Representing the Agency

revised: 12/01/2014

Payment of Sick Leave

A current employee is not entitled to payment for any sick leave balance during or after employment except in the event of the employee's death. In such a situation, half of the deceased employee's sick-leave balance or 336 hours of sick leave, whichever is less, shall be paid to the employee's estate.

Sick Leave for Educational Activities

revised: 08/01/2014

An employee of the Office of the Attorney General may use up to eight hours of accrued sick leave each fiscal year to attend educational activities of the employee's children who are in pre-kindergarten through 12th grade. The employee must give reasonable notice to his/her supervisor(s) of the intention to use this leave. Unless the absence will cause an unreasonable disruption to the division's operations or for other good cause, the request shall be granted. Educational activities involve school-sponsored activities, such as parent-teacher conferences; field trips; classroom programs; school committee meetings; academic competitions; and athletic, music, or theater programs. Absences for approved educational activities shall be entered as "SC" in the e-Leave system.

Family and Medical Leave

revised: 05/14/2010

The Office of the Attorney General (OAG) complies fully with the federal Family and Medical Leave Act (FMLA) and the National Defense Authorization Act as well as any similar state statutory leave provisions. These laws recognize the need for balancing family, work, and personal obligations, and entitle eligible employees to certain protections. Along with this policy, employees needing FMLA information can access **The Family and Medical Leave Act Frequently Asked Questions**.

FMLA General Information

The FMLA requires the agency to provide an eligible employee with job-protected leave for:

1. the birth, adoption, or foster placement of a child;
2. a serious health condition of the employee or a spouse, parent, or child of the employee;
3. qualifying events arising out of the fact that the employee's spouse, son, daughter, or parent is a covered military member; and
4. the care of a covered service member with a serious injury or illness if the employee is the spouse, son, daughter, parent, or next of kin of the service member.

In addition to the protected leave, other FMLA safeguards include:

1. restoring the employee to the same position upon returning to work, or if the same position is unavailable, the agency must provide the employee with a position that is substantially equal in pay, benefits, and responsibility;
2. protecting the employee's benefits while on leave and reinstating all benefits to which the employee was entitled before going on leave; and
3. continuing the state-paid portion of the employee's monthly insurance premium if the employee is in a Leave Without Pay status for a full calendar month while taking FMLA leave.

Under federal regulations, it is the agency's responsibility to designate leave, paid or unpaid, as FMLA-qualifying, and to give notice of the designation to the employee. **Designation by the OAG of FMLA-qualifying leave is non-discretionary.** Employees are required to provide sufficient information to allow the agency to make a determination of whether an employee's leave is for an FMLA-qualifying event. An employee who fails to reasonably cooperate in this determination process may be subject to disciplinary action, up to and including termination.

Definitions

For purposes of this policy:

"Active duty or call to active duty status" is defined as military service under a call or order to active duty in support of a contingency operation under certain provisions of federal law. [29 C.F.R. §825.126(b)(2) and §825.800]

"As soon as practicable" is defined as at the earliest time that is both possible and practical. [29 C.F.R. §825.302(b)]

"Child" is defined as a biological, adopted or foster child, a stepchild, a legal ward, or a child of a person standing *in loco parentis*, who is either under age 18 or age 18 or older and incapable of self-care because of a mental or physical disability at the time that FMLA leave is to commence. [29 C.F.R. §825.122(c)]

"Chronic serious health condition" is defined as an illness, injury, impairment, or physical or mental condition which:

1. requires at least two visits per year for treatment by a health care provider or by a nurse under direct supervision of a health care provider;
2. continues over an extended period of time (including recurring episodes of a single underlying condition); and
3. may cause episodic instead of a continuing period of incapacity (e.g., asthma, diabetes, epilepsy). [29 C.F.R. §825.115(c) and §825.800]

"Complete and sufficient certification" is defined as an FMLA certification that has all required entries of information and that information is clear, unambiguous, and fully responsive. [29 C.F.R. §825.305(c)]

"Contingency operation" is defined as a military operation (a) designated by the Secretary of Defense as an operation in which members of the U.S. armed forces are or may become involved in military actions, operations, or hostilities against an enemy of the United States or against an opposing military force; or (b) that results in the call or order to, or retention on, active duty of members of the U.S. uniformed services under certain provisions of federal law during a war or during a national emergency declared by the President or Congress. [29 C.F.R. §825.1262(b)(3) and §825.800]

"Continuing treatment by a health care provider" is defined as any period of:

1. incapacity of more than three consecutive, full calendar days, and any subsequent treatment or period of incapacity related to the same condition that also involves: (a) two or more in-person visits to a health care provider within 30 days of the first day of the incapacity, unless extenuating circumstances exist, with the first visit to occur within seven days of the first day of incapacity; or (b) at least one in-person visit to a health care provider, within seven days of the first day of incapacity, that results in a regimen of on-going treatment;
2. incapacity due to pregnancy or any absence for prenatal care;
3. incapacity or treatment for such incapacity due to a chronic serious health condition;
4. incapacity which is permanent or long-term due to a condition for which treatment may not be effective (e.g., Alzheimer's, severe stroke, terminal stages of a disease); or

"Son or daughter on active duty or call to active duty status" is defined as an employee's biological, adopted, or foster child, stepchild, legal ward, or a child for whom the employee stood *in loco parentis*, who is on active duty or call to active duty status, and who is of any age. [29 C.F.R. §825.122(g) and §825.800]

"Spouse" is defined as a husband or wife as recognized in the Texas Family Code. [29 C.F.R. §82.122(a) and §825.800]

"Unable to perform the functions of the position" is defined as the circumstances in which a health care provider states that an employee is incapable of working, or is incapable of performing any one of the essential duties of the employee's job. An employee who must be absent from work to receive medical treatment for a serious health condition is considered to be unable to perform his/her essential job functions during the absence for treatment. [29 C.F.R. §825.123(a)]

There are numerous additional definitions in 29 C.F.R. Part 825 that apply to this policy and are incorporated by reference to the controlling federal regulations.

FMLA-Qualifying Events

An eligible employee, as that term is described below, is entitled to up to 12 work weeks of FMLA leave during a 12-month period measured prospectively from the date the employee first uses any designated FMLA leave for any of the following reasons:

1. the birth of a child to the employee and to care for the newborn child (including any period of incapacity due to pregnancy or for pre-natal care);
2. the placement, with the employee, of a child for adoption or foster care;
3. to care for the employee's spouse, child, or parent with a serious health condition;
4. a serious health condition that makes the employee unable to perform the essential functions of the employee's job; or
5. any qualifying event arising out of the fact that the employee's spouse, son, daughter, or parent is a covered military member on active duty (or has been notified of an impending call or order to active duty) in support of a contingency operation.

Additionally, an eligible employee is entitled to up to 26 work weeks of FMLA leave during a 12-month period measured prospectively from the date the employee first uses this type of leave to care for a covered service member with a serious injury or illness if the employee is the spouse, son, daughter, parent, or next of kin of the service member.

Employee Responsibilities

Foreseeable FMLA Leave

Whenever practicable, an employee must provide at least 30 days advance written notice to his/her Division Chief or designee before FMLA leave is to begin if the need for the leave is foreseeable based on:

1. an expected birth;
2. an expected placement for adoption or foster care;
3. planned medical treatment for a serious health condition of the employee or the employee's spouse, child, or parent; or
4. planned medical treatment for a serious injury or illness of a covered service member.

If 30 days advance notice is not practicable, notice must be given as soon as practicable for the above FMLA-qualifying events.

Whenever military-related FMLA leave is foreseeable due to a qualifying event, an employee must provide advance written notice to his/her Division Chief or designee as soon as practicable regardless of how far in advance the leave is foreseeable.

Notice for foreseeable FMLA leave shall include the reason for the leave, and the anticipated date(s) and time(s) of the leave. The employee shall notify his/her Division Chief or designee and the Special Leave Coordinator in the Human Resources Division (HRD) as soon as practicable if dates or times of scheduled leave change.

When planning his/her own medical treatment, the employee must consult with his/her Division Chief or designee and make a reasonable effort to schedule the treatment to avoid unduly disrupting business operations, subject to the approval of the employee's health care provider for the FMLA-qualifying event.

Unforseeable FMLA Leave

When the need for FMLA leave is unforeseeable, an employee must provide notice to his/her Division Chief or designee as soon as practicable given the facts and circumstances of the particular FMLA-qualifying event. Except in extenuating circumstances, the employee is expected to provide notice of the leave in accordance with the agency's **Sick Leave Policy**. Notice may be given by the employee's spokesperson (e.g., spouse, parent, other adult family member, or other responsible party) if the employee is personally unable to do so.

The employee must provide sufficient information for his/her Division Chief or designee to reasonably determine whether the leave is for an FMLA-qualifying event. Calling in "sick" without providing further information will not be adequate when the leave is for an FMLA-qualifying event. In any circumstance in which the Division Chief or designee has insufficient information about the reason for an employee's leave, the Division Chief or designee must further inquire of the employee or the employee's spokesperson to ascertain whether the leave involves an FMLA-qualifying event. The employee must respond to any such inquiries.

FMLA Eligibility and Certification for an FMLA-Qualifying Event

For purposes of the FMLA, an "eligible employee" is one who has been employed by the State of Texas for at least 12 months and who has worked at least 1,250 hours during the 12 months immediately preceding the FMLA-qualifying event. When calculating the required 12 months of state employment for FMLA eligibility, all state employment will be counted and it need not be continuous. The 1,250 hours refer to hours actually worked and do not include any paid or unpaid time off. (Employees who have less than the requisite 12 months of service and 1,250 hours may still be eligible for leave in accordance with the agency's **Non-FMLA Parental Leave Policy** for the birth, adoption, or foster placement of a child under three years of age). Eligibility is determined at the beginning of the first instance of leave for each FMLA-qualifying event in an applicable 12-month period.

Within three business days from the date an employee requests FMLA leave or the date an employee's manager acquires knowledge that an employee's leave may be for an FMLA-qualifying event, the employee's Division Chief or designee must provide written notice to the Special Leave Coordinator in HRD of the employee's possible FMLA-qualifying event. In addition, if a Division Chief or designee has knowledge after the fact that leave has been or is being taken for an FMLA-qualifying reason, he/she must provide the Special Leave Coordinator with written notice of the leave within three business days of acquiring the information.

Within two business days of the notice from the Division Chief or designee, the Special Leave Coordinator shall provide the employee with notice of the employee's eligibility for FMLA leave by giving the employee an *FMLA Notice of Eligibility and Rights & Responsibilities* with a copy of the notice to the employee's Division Chief or designee. The employee must return (e.g., by FAX, scanned e-mail attachment, U.S. mail, etc.) a copy of the *FMLA Notice of Eligibility and Rights & Responsibilities*, signed and dated by the employee, to the Special Leave Coordinator within two business days after the employee receives the notice.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
WICHITA FALLS DIVISION

STATE OF TEXAS, STATE OF ARKANSAS, STATE OF GEORGIA, STATE OF LOUISIANA, STATE OF NEBRASKA,	§ § § § §	
Plaintiffs,	§	CIVIL ACTION NO. 7:15-cv-00056-O
v.	§	
UNITED STATES OF AMERICA, UNITED STATES DEPARTMENT OF LABOR, and THOMAS E. PEREZ, in his Official Capacity as SECRETARY OF LABOR,	§ § § § §	
Defendants.	§	

ORDER

Before the Court is *Plaintiffs' Motion for Leave to File Second Amended Complaint*. The Motion is hereby GRANTED and the clerk shall enter Second Amended Complaint for Declaratory and Injunctive Relief and Application for Temporary Restraining Order and Preliminary Injunction / Stay of Administrative Proceedings in the record in this cause.

It is so ORDERED this _____ day of _____, 2015.

_____
REED O'CONNOR
UNITED STATES DISTRICT JUDGE