

117TH CONGRESS
2D SESSION

H. RES. 1516

Approving certain regulations to implement provisions of the Congressional Accountability Act of 1995 relating to the Family and Medical Leave Act of 1993 with respect to employees of the House of Representatives covered under section 202 of the Act and relating to the Fair Labor Standards Act of 1938 with respect to employees of the House of Representatives covered under section 203 of the Act, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

DECEMBER 12, 2022

Ms. LOFGREN submitted the following resolution; which was referred to the Committee on House Administration, and in addition to the Committee on Education and Labor, for a period to be subsequently determined by the Speaker, in each case for consideration of such provisions as fall within the jurisdiction of the committee concerned

RESOLUTION

Approving certain regulations to implement provisions of the Congressional Accountability Act of 1995 relating to the Family and Medical Leave Act of 1993 with respect to employees of the House of Representatives covered under section 202 of the Act and relating to the Fair Labor Standards Act of 1938 with respect to employees of the House of Representatives covered under section 203 of the Act, and for other purposes.

1 *Resolved,*

1 **SECTION 1. APPROVAL OF REGULATIONS RELATING TO**
2 **FAMILY AND MEDICAL LEAVE ACT.**

3 (a) **IN GENERAL.**—The regulations described in sub-
4 section (b) are hereby approved, insofar as such regula-
5 tions apply to covered employees of the House of Rep-
6 resentatives under the Congressional Accountability Act of
7 1995 and to the extent such regulations are consistent
8 with the provisions of such Act.

9 (b) **REGULATIONS APPROVED.**—The regulations de-
10 scribed in this subsection are the regulations issued by the
11 Office of Congressional Workplace Rights on December 7,
12 2021, under section 202(e) of the Congressional Account-
13 ability Act of 1995 to implement section 202 of such Act
14 (relating to the application of sections 101 through 105
15 of the Family and Medical Leave Act of 1993), as pub-
16 lished in the Congressional Record on December 7, 2021
17 (Volume 167, daily edition) on pages H7230 through
18 H7258, and stated as follows:

19 **“§ 825.1 Purpose and scope**

20 “(a) Section 202 of the Congressional Accountability
21 Act (CAA) (2 U.S.C. 1312) applies the rights and protec-
22 tions of sections 101 through 105 of the Family and Med-
23 ical Leave Act of 1993 (FMLA) (29 U.S.C. 2611–2615)
24 to covered employees. (The term ‘covered employee’ is de-
25 fined in section 101(3) of the CAA (2 U.S.C. 1301(3)).
26 See 825.102 of these regulations for that definition.) The

1 purpose of this part is to set forth the regulations to carry
2 out the provisions of section 202 of the CAA.

3 “(b) These regulations are issued by the Board of Di-
4 rectors (Board) of the Office of Congressional Workplace
5 Rights, pursuant to sections 202(d) and 304 of the CAA,
6 which direct the Board to promulgate regulations imple-
7 menting section 202 that are ‘the same as substantive reg-
8 ulations promulgated by the Secretary of Labor to imple-
9 ment the statutory provisions referred to in subsection (a)
10 **【of section 202 of the CAA】** except insofar as the Board
11 may determine, for good cause shown . . . that a modifica-
12 tion of such regulations would be more effective for the
13 implementation of the rights and protections under this
14 section.’. The regulations issued by the Board herein are
15 on all matters for which section 202 of the CAA requires
16 regulations to be issued. Specifically, it is the Board’s con-
17 sidered judgment, based on the information available to
18 it at the time of the promulgation of these regulations,
19 that, with the exception of regulations adopted and set
20 forth herein, there are no other ‘substantive regulations
21 promulgated by the Secretary of Labor to implement the
22 statutory provisions referred to in subsection (a) **【of sec-
23 tion 202 of the CAA】**.’.

24 “(c) On December 20, 2019, Congress enacted the
25 Federal Employee Paid Leave Act (subtitle A of title

1 LXXVI of division F of the National Defense Authoriza-
2 tion Act for Fiscal Year 2020, Public Law 116–92, De-
3 cember 20, 2019) (FEPLA). FEPLA amended the FMLA
4 to allow most Federal employees, including eligible em-
5 ployees in the legislative branch, to substitute up to 12
6 weeks of paid parental leave (PPL) for unpaid FMLA
7 leave granted in connection with the birth of an employee’s
8 son or daughter or for the placement of a son or daughter
9 with an employee for adoption or foster care.

10 In order to implement FEPLA in the legislative branch,
11 the Board is amending its substantive FMLA regulations
12 pursuant to the CAA rulemaking procedures set forth at
13 sections 202(d) and 304 of the CAA. The Secretary of
14 Labor has not promulgated FEPLA regulations, however,
15 because FEPLA does not extend PPL to private sector
16 employees or other employees directly covered by FMLA
17 title I. The Board has determined that these cir-
18 cumstances constitute good cause for modification of its
19 substantive FMLA regulations in order to effectively im-
20 plement FEPLA’s rights and protections to covered em-
21 ployees in the legislative branch.

22 “(d) In promulgating these regulations, the Board
23 has made certain technical and nomenclature changes to
24 the regulations as promulgated by the Secretary. Such
25 changes are intended to make the provisions adopted ac-

1 cord more naturally to situations in the legislative branch.
2 However, by making these changes, the Board does not
3 intend a substantive difference between these regulations
4 and those of the Secretary from which they are derived.
5 Moreover, such changes, in and of themselves, are not in-
6 tended to constitute an interpretation of the regulation or
7 of the statutory provisions of the CAA upon which they
8 are based.

9 “(e) Pursuant to section 304(b)(4) of the CAA, (2
10 U.S.C. 1384(b)(4)), the Board of Directors is required to
11 recommend to Congress a method of approval for these
12 regulations. As the Board has adopted the same regula-
13 tions for the Senate, the House of Representatives, and
14 the other covered entities and facilities, it therefore rec-
15 ommends that the adopted regulations be approved by
16 concurrent resolution of the Congress.

17 **“Subpart A—Coverage Under The Family And Med-**
18 **ical Leave Act, As Made Applicable By The Con-**
19 **gressional Accountability Act**

20 **“§ 825.100 The Family and Medical Leave Act**

21 “(a) The Family and Medical Leave Act of 1993
22 (FMLA), as made applicable by the Congressional Ac-
23 countability Act (CAA), allows eligible employees of an
24 employing office to take job-protected, unpaid leave, or to
25 substitute appropriate paid leave if the employee has

1 earned or accrued it, for up to a total of 12 workweeks
2 in any 12 months (See 825.200(b)) because of the birth
3 of a child and to care for the newborn child, because of
4 the placement of a child with the employee for adoption
5 or foster care, because the employee is needed to care for
6 a family member (child, spouse, or parent) with a serious
7 health condition, because the employee's own serious
8 health condition makes the employee unable to perform
9 the functions of his or her job, or because of any qualifying
10 exigency arising out of the fact that the employee's spouse,
11 son, daughter, or parent is a military member on active
12 duty or call to covered active duty status (or has been noti-
13 fied of an impending call or order to covered active duty).
14 In addition, eligible employees of a covered employing of-
15 fice may take job-protected, unpaid leave, or substitute ap-
16 propriate paid leave if the employee has earned or accrued
17 it, for up to a total of 26 workweeks in a single 12-month
18 period to care for a covered servicemember with a serious
19 injury or illness. In certain cases, FMLA leave may be
20 taken on an intermittent basis rather than all at once, or
21 the employee may work a part-time schedule.

22 “(b) An employee on FMLA leave is also entitled to
23 have health benefits maintained while on leave as if the
24 employee had continued to work instead of taking the
25 leave. If an employee was paying all or part of the pre-

1 mium payments prior to leave, the employee would con-
2 tinue to pay his or her share during the leave period. Sub-
3 ject to 825.208(k), the employing office or a disbursing
4 or other financial office may recover its share only if the
5 employee does not return to work for a reason other than
6 the serious health condition of the employee or the employ-
7 ee’s covered family member, the serious injury or illness
8 of a covered servicemember, or another reason beyond the
9 employee’s control.

10 “(c) An employee generally has a right to return to
11 the same position or an equivalent position with equivalent
12 pay, benefits, and working conditions at the conclusion of
13 the leave. The taking of FMLA leave cannot result in the
14 loss of any benefit that accrued prior to the start of the
15 leave.

16 “(d) The employing office generally has a right to ad-
17 vance notice from the employee. In addition, the employing
18 office may require an employee to submit certification to
19 substantiate that the leave is due to the serious health
20 condition of the employee or the employee’s covered family
21 member, due to the serious injury or illness of a covered
22 servicemember, or because of a qualifying exigency. Fail-
23 ure to comply with these requirements may result in a
24 delay in the start of FMLA leave. Pursuant to a uniformly
25 applied policy, the employing office may also require that

1 an employee present a certification of fitness to return to
2 work when the absence was caused by the employee's seri-
3 ous health condition (See 825.312 and 825.313)). The em-
4 ploying office may delay restoring the employee to employ-
5 ment without such certificate relating to the health condi-
6 tion which caused the employee's absence.

7 **“§ 825.101 Purpose of the FMLA**

8 “(a) FMLA is intended to allow employees to balance
9 their work and family life by taking reasonable unpaid
10 leave for medical reasons, for the birth or adoption of a
11 child, for the care of a child, spouse, or parent who has
12 a serious health condition, for the care of a covered serv-
13 icemember with a serious injury or illness, or because of
14 a qualifying exigency arising out of the fact that the em-
15 ployee's spouse, son, daughter, or parent is a military
16 member on covered active duty or call to covered active
17 duty status. The FMLA is intended to balance the de-
18 mands of the workplace with the needs of families, to pro-
19 mote the stability and economic security of families, and
20 to promote national interests in preserving family integ-
21 rity. It was intended that the FMLA accomplish these
22 purposes in a manner that accommodates the legitimate
23 interests of employing offices, and in a manner consistent
24 with the Equal Protection Clause of the Fourteenth
25 Amendment in minimizing the potential for employment

1 discrimination on the basis of sex, while promoting equal
2 employment opportunity for men and women.

3 “(b) The FMLA was predicated on two fundamental
4 concerns—the needs of the American workforce, and the
5 development of high-performance organizations. Increas-
6 ingly, America’s children and elderly are dependent upon
7 family members who must spend long hours at work.
8 When a family emergency arises, requiring workers to at-
9 tend to seriously-ill children or parents, or to newly-born
10 or adopted infants, or even to their own serious illness,
11 workers need reassurance that they will not be asked to
12 choose between continuing their employment, and meeting
13 their personal and family obligations or tending to vital
14 needs at home.

15 “(c) The FMLA is both intended and expected to
16 benefit employing offices as well as their employees. A di-
17 rect correlation exists between stability in the family and
18 productivity in the workplace. FMLA will encourage the
19 development of high-performance organizations. When
20 workers can count on durable links to their workplace they
21 are able to make their own full commitments to their jobs.
22 The record of hearings on family and medical leave indi-
23 cate the powerful productive advantages of stable work-
24 place relationships, and the comparatively small costs of
25 guaranteeing that those relationships will not be dissolved

1 while workers attend to pressing family health obligations
2 or their own serious illness.

3 **“§ 825.102 Definitions**

4 “For purposes of this part:

5 “(1) *ADA* means the Americans with Disabil-
6 ities Act (42 U.S.C. 12101 et seq., as amended), as
7 made applicable by the Congressional Accountability
8 Act.

9 “(2) *Birth* means the delivery of a child. When
10 the term ‘birth’ under this subpart is used in con-
11 nection with the use of leave before birth, it refers
12 to an anticipated birth.

13 “(3) *CAA* means the Congressional Account-
14 ability Act of 1995 (Pub. Law 104–1, 109 Stat. 3,
15 2 U.S.C. 1301 et seq., as amended).

16 “(4) *COBRA* means the continuation coverage
17 requirements of Title X of the Consolidated Omni-
18 bus Budget Reconciliation Act of 1986 (Pub. Law
19 99–272, title X, section 10002; 100 Stat. 227; 29
20 U.S.C. 1161–1168).

21 “(5) *Contingency operation* means a military
22 operation that:

23 “(A) Is designated by the Secretary of De-
24 fense as an operation in which members of the
25 Armed Forces are or may become involved in

1 military actions, operations, or hostilities
2 against an enemy of the United States or
3 against an opposing military force; or

4 “(B) Results in the call or order to, or re-
5 tention on, active duty of members of the uni-
6 formed services under section 688, 12301(a),
7 12302, 12304, 12305, or 12406 of Title 10 of
8 the United States Code, chapter 15 of Title 10
9 of the United States Code, or any other provi-
10 sion of law during a war or during a national
11 emergency declared by the President or Con-
12 gress. See also 825.126(a)(2).

13 “(6) *Continuing treatment by a health care pro-*
14 *vider* means any one of the following:

15 “(A) *Incapacity and treatment.* A period of
16 incapacity of more than three consecutive, full
17 calendar days, and any subsequent treatment or
18 period of incapacity relating to the same condi-
19 tion, that also involves:

20 “(i) Treatment two or more times,
21 within 30 days of the first day of inca-
22 pacity, unless extenuating circumstances
23 exist, by a health care provider, by a nurse
24 under direct supervision of a health care
25 provider, or by a provider of health care

1 services (e.g., physical therapist) under or-
2 ders of, or on referral by, a health care
3 provider; or

4 “(ii) Treatment by a health care pro-
5 vider on at least one occasion, which re-
6 sults in a regimen of continuing treatment
7 under the supervision of the health care
8 provider.

9 “(iii) The requirement in paragraphs
10 (i) and (ii) of this definition for treatment
11 by a health care provider means an in-per-
12 son visit to a health care provider. The
13 first in-person treatment visit must take
14 place within seven days of the first day of
15 incapacity.

16 “(iv) Whether additional treatment
17 visits or a regimen of continuing treatment
18 is necessary within the 30-day period shall
19 be determined by the health care provider.

20 “(v) The term ‘extenuating cir-
21 cumstances’ in paragraph (i) means cir-
22 cumstances beyond the employee’s control
23 that prevent the follow-up visit from occur-
24 ring as planned by the health care pro-
25 vider. Whether a given set of cir-

1 cumstances are extenuating depends on the
2 facts. See also 825.115(a)(5).

3 “(B) *Pregnancy or prenatal care.* Any pe-
4 riod of incapacity due to pregnancy, or for pre-
5 natal care. See also 825.120.

6 “(C) *Chronic conditions.* Any period of in-
7 capacity or treatment for such incapacity due to
8 a chronic serious health condition. A chronic se-
9 rious health condition is one which:

10 “(i) Requires periodic visits (defined
11 as at least twice a year) for treatment by
12 a health care provider, or by a nurse under
13 direct supervision of a health care pro-
14 vider;

15 “(ii) Continues over an extended pe-
16 riod of time (including recurring episodes
17 of a single underlying condition); and

18 “(iii) May cause episodic rather than
19 a continuing period of incapacity (e.g.,
20 asthma, diabetes, epilepsy, etc.).

21 “(D) *Permanent or long-term conditions.* A
22 period of incapacity which is permanent or
23 long-term due to a condition for which treat-
24 ment may not be effective. The employee or
25 family member must be under the continuing

1 supervision of, but need not be receiving active
2 treatment by, a health care provider. Examples
3 include Alzheimer's, a severe stroke, or the ter-
4 minal stages of a disease.

5 “(E) *Conditions requiring multiple treat-*
6 *ments.* Any period of absence to receive multiple
7 treatments (including any period of recovery
8 therefrom) by a health care provider or by a
9 provider of health care services under orders of,
10 or on referral by, a health care provider, for:

11 “(i) Restorative surgery after an acci-
12 dent or other injury; or

13 “(ii) A condition that would likely re-
14 sult in a period of incapacity of more than
15 three consecutive full calendar days in the
16 absence of medical intervention or treat-
17 ment, such as cancer (chemotherapy, radi-
18 ation, etc.), severe arthritis (physical ther-
19 apy), kidney disease (dialysis).

20 “(F) Absences attributable to incapacity
21 under paragraphs (A) or (B) of this definition
22 qualify for FMLA leave even though the em-
23 ployee or the covered family member does not
24 receive treatment from a health care provider
25 during the absence, and even if the absence

1 does not last more than three consecutive, full
2 calendar days. For example, an employee with
3 asthma may be unable to report for work due
4 to the onset of an asthma attack or because the
5 employee's health care provider has advised the
6 employee to stay home when the pollen count
7 exceeds a certain level. An employee who is
8 pregnant may be unable to report to work be-
9 cause of severe morning sickness.

10 “(7) *Covered active duty or call to covered active*
11 *duty status* means:

12 “(A) In the case of a member of the Reg-
13 ular Armed Forces, duty during the deployment
14 of the member with the Armed Forces to a for-
15 eign country; and,

16 “(B) In the case of a member of the Re-
17 serve components of the Armed Forces, duty
18 during the deployment of the member with the
19 Armed Forces to a foreign country under a
20 Federal call or order to active duty in support
21 of a contingency operation pursuant to: Section
22 688 of Title 10 of the United States Code,
23 which authorizes ordering to active duty retired
24 members of the Regular Armed Forces and
25 members of the retired Reserve who retired

1 after completing at least 20 years of active
2 service; Section 12301(a) of Title 10 of the
3 United States Code, which authorizes ordering
4 all reserve component members to active duty
5 in the case of war or national emergency; Sec-
6 tion 12302 of Title 10 of the United States
7 Code, which authorizes ordering any unit or un-
8 assigned member of the Ready Reserve to active
9 duty; Section 12304 of Title 10 of the United
10 States Code, which authorizes ordering any unit
11 or unassigned member of the Selected Reserve
12 and certain members of the Individual Ready
13 Reserve to active duty; Section 12305 of Title
14 10 of the United States Code, which authorizes
15 the suspension of promotion, retirement or sep-
16 aration rules for certain Reserve components;
17 Section 12406 of Title 10 of the United States
18 Code, which authorizes calling the National
19 Guard into Federal service in certain cir-
20 cumstances; chapter 15 of Title 10 of the
21 United States Code, which authorizes calling
22 the National Guard and State military into
23 Federal service in the case of insurrections and
24 national emergencies; or any other provision of
25 law during a war or during a national emer-

1 agency declared by the President or Congress so
2 long as it is in support of a contingency oper-
3 ation. See 10 U.S.C. 101(a)(13)(B). See also
4 825.126(a).

5 “(8) *Covered employee* as defined in the CAA,
6 means any employee of—(1) the House of Rep-
7 resentatives; (2) the Senate; (3) the Office of Con-
8 gressional Accessibility Services; (4) the Capitol Po-
9 lice; (5) the Congressional Budget Office; (6) the Of-
10 fice of the Architect of the Capitol; (7) the Office of
11 the Attending Physician; (8) the Office of Congres-
12 sional Workplace Rights; (9) the Library of Con-
13 gress; (10) the Stennis Center for Public Service;
14 (11) the Office of Technology Assessment; (12) the
15 China Review Commission; (13) the Congressional
16 Executive China Commission; (14) the Helsinki
17 Commission; or (15) the United States Commission
18 on International Religious Freedom.

19 “(9) *Covered servicemember* means:

20 “(A) A current member of the Armed
21 Forces, including a member of the National
22 Guard or Reserves, who is undergoing medical
23 treatment, recuperation, or therapy, is other-
24 wise in outpatient status, or is otherwise on the

1 temporary disability retired list, for a serious
2 injury or illness, or

3 “(B) A covered veteran who is undergoing
4 medical treatment, recuperation, or therapy for
5 a serious injury or illness.

6 “(10) *Covered veteran* means an individual who
7 was a member of the Armed Forces (including a
8 member of the National Guard or Reserves), and
9 was discharged or released under conditions other
10 than dishonorable at any time during the five-year
11 period prior to the first date the eligible employee
12 takes FMLA leave to care for the covered veteran.
13 See 825.127(b)(2).

14 “(11) *Eligible employee* as defined in the CAA,
15 means:

16 “(A) For purposes of leave under subpara-
17 graphs (a)(1) or (a)(2) of section 825.112 [or
18 subsections (A) or (B) of section 102(a)(1) of
19 the FMLA], a covered employee as defined in
20 the CAA.

21 “(B) For purposes of leave under subpara-
22 graphs (a)(3)–(6) of section 825.112 [or sub-
23 sections (C)–(F) of section 102(a)(1) of the
24 FMLA], a covered employee who has been em-
25 ployed for a total of at least 12 months in any

1 employing office on the date on which any
2 FMLA leave is to commence, except that an
3 employing office need not consider any period of
4 previous employment that occurred more than
5 seven years before the date of the most recent
6 hiring of the employee, unless:

7 “(i) The break in service is occasioned
8 by the fulfillment of the employee’s Uni-
9 formed Services Employment and Reem-
10 ployment Rights Act (USERRA), 38
11 U.S.C. 4301, et seq., covered service obli-
12 gation (the period of absence from work
13 due to or necessitated by USERRA-cov-
14 ered service must be also counted in deter-
15 mining whether the employee has been em-
16 ployed for at least 12 months by any em-
17 ploying office, but this section does not
18 provide any greater entitlement to the em-
19 ployee than would be available under the
20 USERRA, as made applicable by the
21 CAA); or

22 “(ii) A written agreement, including a
23 collective bargaining agreement, exists con-
24 cerning the employing office’s intention to
25 rehire the employee after the break in serv-

1 ice (e.g., for purposes of the employee fur-
2 thering his or her education or for
3 childrearing purposes); and

4 “(C) Who, on the date on which any
5 FMLA leave is to commence, has met the hours
6 of service requirement by having been employed
7 for at least 1,250 hours of service with an em-
8 ploying office during the previous 12-month pe-
9 riod, except that:

10 “(i) An employee returning from ful-
11 filling his or her USERRA-covered service
12 obligation shall be credited with the hours
13 of service that would have been performed
14 but for the period of absence from work
15 due to or necessitated by USERRA-cov-
16 ered service in determining whether the
17 employee met the hours of service require-
18 ment (accordingly, a person reemployed
19 following absence from work due to or ne-
20 cessitated by USERRA-covered service has
21 the hours that would have been worked for
22 the employing office added to any hours
23 actually worked during the previous 12-
24 month period to meet the hours of service
25 requirement);

1 “(ii) To determine the hours that
2 would have been worked during the period
3 of absence from work due to or neces-
4 sitated by USERRA-covered service, the
5 employee’s pre-service work schedule can
6 generally be used for calculations; and

7 “(iii) Any service on active duty (as
8 defined in 29 U.S.C. 2611(14)) by a cov-
9 ered employee who is a member of the Na-
10 tional Guard or Reserves shall be counted
11 as time during which such employee has
12 been employed in an employing office for
13 purposes of subparagraph (C) of this sec-
14 tion.

15 “(12) *Employ* means to suffer or permit to
16 work.

17 “(13) *Employee* means an employee as defined
18 by the CAA and includes an applicant for employ-
19 ment and a former employee.

20 “(14) *Employee employed in an instructional*
21 *capacity*. See the definition of Teacher in this sec-
22 tion.

23 “(15) *Employee of the Capitol Police* means any
24 member or officer of the Capitol Police.

1 “(16) *Employee of the House of Representatives*
2 means an individual occupying a position the pay for
3 which is disbursed by the Chief Administrative Offi-
4 cer of the House of Representatives, or another offi-
5 cial designated by the House of Representatives, or
6 any employment position in an entity that is paid
7 with funds derived from the Members’ Representa-
8 tional Allowance of the House of Representatives but
9 not any such individual employed by any entity list-
10 ed in subparagraphs (3) through (9) under the defi-
11 nition of covered employee above.

12 “(17) *Employee of the Office of the Architect of*
13 *the Capitol* means any employee of the Office of the
14 Architect of the Capitol or the Botanic Garden.

15 “(18) *Employee of the Senate* means any em-
16 ployee whose pay is disbursed by the Secretary of
17 the Senate, but not any such individual employed by
18 any entity listed in subparagraphs (3) through (9)
19 under the definition of covered employee above.

20 “(19) *Employing Office*, as defined by the CAA,
21 means:

22 “(A) The personal office of a Member of
23 the House of Representatives or of a Senator;

24 “(B) A committee of the House of Rep-
25 resentatives or the Senate or a joint committee;

1 “(C) Any other office headed by a person
2 with the final authority to appoint, hire, dis-
3 charge, and set the terms, conditions, or privi-
4 leges of the employment of an employee of the
5 House of Representatives or the Senate; or

6 “(D) The Office of Congressional Accessi-
7 bility Services, the United States Capitol Police,
8 the Congressional Budget Office, the Office of
9 the Architect of the Capitol, the Office of the
10 Attending Physician, the Office of Congres-
11 sional Workplace Rights, the Library of Con-
12 gress, the Stennis Center for Public Service, the
13 Office of Technology Assessment, the United
14 States Commission on International Religious
15 Freedom, the China Review Commission, the
16 Congressional Executive China Commission,
17 and the Helsinki Commission.

18 “(20) *Employment benefits* means all benefits
19 provided or made available to employees by an em-
20 ploying office, including group life insurance, health
21 insurance, disability insurance, sick leave, annual
22 leave, educational benefits, and pensions, regardless
23 of whether such benefits are provided by a practice
24 or written policy of an employing office or through
25 an employee benefit plan. The term does not include

1 non-employment related obligations paid by employ-
2 ees through voluntary deductions such as supple-
3 mental insurance coverage. See also 825.209(a).

4 “(21) *Family and medical leave* means an em-
5 ployee’s entitlement of up to 12 workweeks (or 26
6 workweeks in the case of leave under 825.127) of
7 unpaid leave for certain family and medical needs,
8 as prescribed under the FMLA, as made applicable
9 by the CAA.

10 “(22) *FLSA* means the Fair Labor Standards
11 Act (29 U.S.C. 201 et seq.), as made applicable by
12 the CAA.

13 “(23) *FMLA* means the Family and Medical
14 Leave Act of 1993, Public Law 103–3 (February 5,
15 1993), 107 Stat. 6 (29 U.S.C. 2601 et seq., as
16 amended), as made applicable by the CAA.

17 “(24) *Group health plan* means the Federal
18 Employees Health Benefits Program and any other
19 plan of, or contributed to by, an employing office
20 (including a self-insured plan) to provide health care
21 (directly or otherwise) to the employing office’s em-
22 ployees, former employees, or the families of such
23 employees or former employees. For purposes of
24 FMLA, as made applicable by the CAA, the term
25 group health plan shall not include an insurance

1 program providing health coverage under which em-
2 ployees purchase individual policies from insurers
3 provided that:

4 “(A) No contributions are made by the em-
5 ploying office;

6 “(B) Participation in the program is com-
7 pletely voluntary for employees;

8 “(C) The sole functions of the employing
9 office with respect to the program are, without
10 endorsing the program, to permit the insurer to
11 publicize the program to employees, to collect
12 premiums through payroll deductions and to
13 remit them to the insurer;

14 “(D) The employing office receives no con-
15 sideration in the form of cash or otherwise in
16 connection with the program, other than rea-
17 sonable compensation, excluding any profit, for
18 administrative services actually rendered in con-
19 nection with payroll deduction; and

20 “(E) The premium charged with respect to
21 such coverage does not increase in the event the
22 employment relationship terminates.

23 “(25) *Health care provider* means:

24 “(A) The FMLA, as made applicable by
25 the CAA, defines health care provider as:

1 “(i) A doctor of medicine or osteop-
2 athy who is authorized to practice medicine
3 or surgery (as appropriate) by the State in
4 which the doctor practices; or

5 “(ii) Any other person determined by
6 the Department of Labor to be capable of
7 providing health care services.

8 “(B) Others ‘capable of providing health
9 care services’ include only:

10 “(i) Podiatrists, dentists, clinical psy-
11 chologists, optometrists, and chiropractors
12 (limited to treatment consisting of manual
13 manipulation of the spine to correct a sub-
14 luxation as demonstrated by X-ray to
15 exist) authorized to practice in the State
16 and performing within the scope of their
17 practice as defined under State law;

18 “(ii) Nurse practitioners, nurse-mid-
19 wives and clinical social workers and physi-
20 cian assistants who are authorized to prac-
21 tice under State law and who are per-
22 forming within the scope of their practice
23 as defined under State law;

24 “(iii) Christian Science practitioners
25 listed with the First Church of Christ, Sci-

1 entist in Boston, Massachusetts. Where an
2 employee or family member is receiving
3 treatment from a Christian Science practi-
4 tioner, an employee may not object to any
5 requirement from an employing office that
6 the employee or family member submit to
7 examination (though not treatment) to ob-
8 tain a second or third certification from a
9 health care provider other than a Christian
10 Science practitioner except as otherwise
11 provided under applicable State or local
12 law or collective bargaining agreement;

13 “(iv) Any health care provider from
14 whom an employing office or a group
15 health plan’s benefits manager will accept
16 certification of the existence of a serious
17 health condition to substantiate a claim for
18 benefits; and

19 “(v) A health care provider listed
20 above who practices in a country other
21 than the United States, who is authorized
22 to practice in accordance with the law of
23 that country, and who is performing within
24 the scope of his or her practice as defined
25 under such law.

1 “(C) The phrase ‘authorized to practice in
2 the State’ as used in this section means that
3 the provider must be authorized to diagnose
4 and treat physical or mental health conditions.

5 “(26) *Incapable of self-care* means that the indi-
6 vidual requires active assistance or supervision to
7 provide daily self-care in several of the ‘activities of
8 daily living’ (ADLs) or ‘instrumental activities of
9 daily living’ (IADLs). Activities of daily living in-
10 clude adaptive activities such as caring appropriately
11 for one’s grooming and hygiene, bathing, dressing
12 and eating. Instrumental activities of daily living in-
13 clude cooking, cleaning, shopping, taking public
14 transportation, paying bills, maintaining a residence,
15 using telephones and directories, using a post office,
16 etc.

17 “(27) *Instructional employee*: See the definition
18 of Teacher in this section.

19 “(28) *Intermittent leave* means leave taken in
20 separate periods of time due to a single illness or in-
21 jury, birth, or placement, rather than for one contin-
22 uous period of time, and may include leave of peri-
23 ods from an hour or more to several weeks. Exam-
24 ples of intermittent leave would include leave taken
25 on an occasional basis for medical appointments, or

1 leave taken several days at a time spread over a pe-
2 riod of six months, such as for chemotherapy.

3 “(29) *Invitational travel authorization (ITA) or*
4 *Invitational travel order (ITO)* mean orders issued
5 by the Armed Forces to a family member to join an
6 injured or ill servicemember at his or her bedside.
7 See also 825.310(e).

8 “(30) *Key employee* means a salaried FMLA-el-
9 igible employee who is among the highest paid 10
10 percent of all the employees employed by the employ-
11 ing office within 75 miles of the employee’s worksite.
12 See also 825.217.

13 “(31) *Mental disability*: See the definition of
14 Physical or mental disability in this section.

15 “(32) *Military caregiver leave* means leave
16 taken to care for a covered servicemember with a se-
17 rious injury or illness under the Family and Medical
18 Leave Act of 1993. See also 825.127.

19 “(33) *Next of kin of a covered servicemember*
20 means the nearest blood relative other than the cov-
21 ered servicemember’s spouse, parent, son, or daugh-
22 ter, in the following order of priority: blood relatives
23 who have been granted legal custody of the covered
24 servicemember by court decree or statutory provi-
25 sions, brothers and sisters, grandparents, aunts and

1 uncles, and first cousins, unless the covered service-
2 member has specifically designated in writing an-
3 other blood relative as his or her nearest blood rel-
4 ative for purposes of military caregiver leave under
5 the FMLA. When no such designation is made, and
6 there are multiple family members with the same
7 level of relationship to the covered servicemember,
8 all such family members shall be considered the cov-
9 ered servicemember's next of kin and may take
10 FMLA leave to provide care to the covered service-
11 member, either consecutively or simultaneously.
12 When such designation has been made, the des-
13 ignated individual shall be deemed to be the covered
14 servicemember's only next of kin. See also
15 825.127(d)(3).

16 “(34) *Office of Congressional Workplace Rights*
17 means the independent office established in the leg-
18 islative branch under section 301 of the CAA (2
19 U.S.C. 1381).

20 “(35) *Outpatient status* means, with respect to
21 a covered servicemember who is a current member of
22 the Armed Forces, the status of a member of the
23 Armed Forces assigned to either a military medical
24 treatment facility as an outpatient; or a unit estab-
25 lished for the purpose of providing command and

1 control of members of the Armed Forces receiving
2 medical care as outpatients. See also 825.127(b)(1).

3 “(36) *Parent* means a biological, adoptive, step
4 or foster father or mother or any other individual
5 who stood in loco parentis to the employee when the
6 employee was a son or daughter as defined below.
7 This term does not include parents ‘in law’.

8 “(37) *Parent of a covered servicemember* means
9 a covered servicemember’s biological, adoptive, step
10 or foster father or mother, or any other individual
11 who stood in loco parentis to the covered service-
12 member. This term does not include parents ‘in law’.
13 See also 825.127(d)(2).

14 “(38) *Physical or mental disability* means a
15 physical or mental impairment that substantially
16 limits one or more of the major life activities of an
17 individual. Regulations at 29 C.F.R. part 1630,
18 issued by the Equal Employment Opportunity Com-
19 mission under the Americans with Disabilities Act
20 (ADA), 42 U.S.C. 12101 et seq., as amended, pro-
21 vide guidance for these terms.

22 “(39) *Reduced leave schedule* means a leave
23 schedule that reduces the usual number of hours per
24 workweek, or hours per workday, of an employee.

1 “(40) *Reserve components of the Armed Forces*,
2 for purposes of qualifying exigency leave, include the
3 Army National Guard of the United States, Army
4 Reserve, Navy Reserve, Marine Corps Reserve, Air
5 National Guard of the United States, Air Force Re-
6 serve, and Coast Guard Reserve, and retired mem-
7 bers of the Regular Armed Forces or Reserves who
8 are called up in support of a contingency operation.
9 See also 825.126(a)(2)(i).

10 “(41) *Secretary* means the Secretary of Labor
11 or authorized representative.

12 “(42) *Serious health condition* means an illness,
13 injury, impairment, or physical or mental condition
14 that involves inpatient care as defined in 825.114 or
15 continuing treatment by a health care provider as
16 defined in 825.115. Conditions for which cosmetic
17 treatments are administered (such as most treat-
18 ments for acne or plastic surgery) are not serious
19 health conditions unless inpatient hospital care is re-
20 quired or unless complications develop. Restorative
21 dental or plastic surgery after an injury or removal
22 of cancerous growths are serious health conditions
23 provided all the other conditions of this regulation
24 are met. Mental illness or allergies may be serious

1 health conditions, but only if all the conditions of
2 825.113 are met.

3 “(43) *Serious injury or illness* means:

4 “(A) In the case of a current member of
5 the Armed Forces, including a member of the
6 National Guard or Reserves, an injury or illness
7 that was incurred by the covered servicemember
8 in the line of duty on active duty in the Armed
9 Forces or that existed before the beginning of
10 the member’s active duty and was aggravated
11 by service in the line of duty on active duty in
12 the Armed Forces and that may render the
13 servicemember medically unfit to perform the
14 duties of the member’s office, grade, rank, or
15 rating; and

16 “(B) In the case of a covered veteran, an
17 injury or illness that was incurred by the mem-
18 ber in the line of duty on active duty in the
19 Armed Forces (or existed before the beginning
20 of the member’s active duty and was aggra-
21 vated by service in the line of duty on active
22 duty in the Armed Forces) and manifested
23 itself before or after the member became a vet-
24 eran, and is:

1 “(i) A continuation of a serious injury
2 or illness that was incurred or aggravated
3 when the covered veteran was a member of
4 the Armed Forces and rendered the serv-
5 icemember unable to perform the duties of
6 the servicemember’s office, grade, rank, or
7 rating; or

8 “(ii) A physical or mental condition
9 for which the covered veteran has received
10 a U.S. Department of Veterans Affairs
11 Service-Related Disability Rating
12 (VASRD) of 50 percent or greater, and
13 such VASRD rating is based, in whole or
14 in part, on the condition precipitating the
15 need for military caregiver leave; or

16 “(iii) A physical or mental condition
17 that substantially impairs the covered vet-
18 eran’s ability to secure or follow a substan-
19 tially gainful occupation by reason of a dis-
20 ability or disabilities related to military
21 service, or would do so absent treatment;
22 or

23 “(iv) An injury, including a psycho-
24 logical injury, on the basis of which the
25 covered veteran has been enrolled in the

1 Department of Veterans Affairs Program
2 of Comprehensive Assistance for Family
3 Caregivers. See also 825.127(c).

4 “(44) *Son or daughter* means a biological,
5 adopted, or foster child, a stepchild, a legal ward, or
6 a child of a person standing in loco parentis, who is
7 either under age 18, or age 18 or older and ‘incapa-
8 ble of self-care because of a mental or physical dis-
9 ability’ at the time that FMLA leave is to com-
10 mence.

11 “(45) *Son or daughter of a covered servicemem-*
12 *ber* means a covered servicemember’s biological,
13 adopted, or foster child, stepchild, legal ward, or a
14 child for whom the covered servicemember stood in
15 loco parentis, and who is of any age. See also
16 825.127(d)(1).

17 “(46) *Son or daughter on covered active duty or*
18 *call to covered active duty status* means the employ-
19 ee’s biological, adopted, or foster child, stepchild,
20 legal ward, or a child for whom the employee stood
21 in loco parentis, who is on covered active duty or call
22 to covered active duty status, and who is of any age.
23 See also 825.126(a)(5).

24 “(47) *Spouse* means a husband or wife. For
25 purposes of this definition, husband or wife refers to

1 the other person with whom an individual entered
2 into marriage as defined or recognized under State
3 law for purposes of marriage in the State in which
4 the marriage was entered into or, in the case of a
5 marriage entered into outside of any State, if the
6 marriage is valid in the place where entered into and
7 could have been entered into in at least one State.
8 This definition includes an individual in a same-sex
9 or common law marriage that either:

10 “(A) Was entered into in a State that rec-
11 ognizes such marriages; or

12 “(B) If entered into outside of any State,
13 is valid in the place where entered into and
14 could have been entered into in at least one
15 State.

16 “(48) *Teacher (or employee employed in an in-*
17 *structional capacity, or instructional employee)*
18 means an employee employed principally in an in-
19 structional capacity by an educational agency or
20 school whose principal function is to teach and in-
21 struct students in a class, a small group, or an indi-
22 vidual setting, and includes athletic coaches, driving
23 instructors, and special education assistants such as
24 signers for the hearing impaired. The term does not
25 include teacher assistants or aides who do not have

1 as their principal function actual teaching or in-
2 structing, nor auxiliary personnel such as counselors,
3 psychologists, curriculum specialists, cafeteria work-
4 ers, maintenance workers, bus drivers, or other pri-
5 marily noninstructional employees.

6 “(49) *TRICARE* is the health care program
7 serving active duty servicemembers, National Guard
8 and Reserve members, retirees, their families, sur-
9 vivors, and certain former spouses worldwide.

10 **“§ 825.103 [Reserved]**

11 **“§ 825.104 Covered employing offices**

12 “The FMLA, as made applicable by the CAA, covers
13 all employing offices. As used in the CAA, the term em-
14 ploying office means:

15 “(1) The personal office of a Member of the
16 House of Representatives or of a Senator;

17 “(2) A committee of the House of Representa-
18 tives or the Senate or a joint committee;

19 “(3) Any other office headed by a person with
20 the final authority to appoint, hire, discharge, and
21 set the terms, conditions, or privileges of the employ-
22 ment of an employee of the House of Representa-
23 tives or the Senate; or

24 “(4) The Office of Congressional Accessibility
25 Services, the United States Capitol Police, the Con-

1 gressional Budget Office, the Office of the Architect
2 of the Capitol, the Office of the Attending Physician,
3 the Office of Congressional Workplace Rights, the
4 Library of Congress, the Stennis Center for Public
5 Service, the China Review Commission, the Congres-
6 sional Executive China Commission, the Helsinki
7 Commission, the United States Commission on
8 International Religious Freedom, and the Office of
9 Technology Assessment.

10 **“§ 825.105 [Reserved]”**

11 **“§ 825.106 Joint employer coverage”**

12 “(a) Where two or more employing offices exercise
13 some control over the work or working conditions of the
14 employee, the employing offices may be joint employers
15 under FMLA, as made applicable by the CAA. Where the
16 employee performs work which simultaneously benefits
17 two or more employing offices, or works for two or more
18 employing offices at different times during the workweek,
19 a joint employment relationship generally will be consid-
20 ered to exist in situations such as:

21 “(1) Where there is an arrangement between
22 employing offices to share an employee’s services or
23 to interchange employees;

1 “(2) Where one employing office acts directly or
2 indirectly in the interest of the other employing of-
3 fice in relation to the employee; or

4 “(3) Where the employing offices are not com-
5 pletely disassociated with respect to the employee’s
6 employment and may be deemed to share control of
7 the employee, directly or indirectly, because one em-
8 ploying office controls, is controlled by, or is under
9 common control with the other employing office.

10 “(b) A determination of whether or not a joint em-
11 ployment relationship exists is not determined by the ap-
12 plication of any single criterion, but rather the entire rela-
13 tionship is to be viewed in its totality. For example, joint
14 employment will ordinarily be found to exist when:

15 “(1) An employee, who is employed by an em-
16 ploying office other than the personal office of a
17 Member of the House of Representatives or of a
18 Senator, is under the actual direction and control of
19 the Member of the House of Representatives or Sen-
20 ator; or

21 “(2) Two or more employing offices employ an
22 individual to work on common issues or other mat-
23 ters for both or all of them.

24 “(c) When employing offices employ a covered em-
25 ployee jointly, they may designate one of themselves to be

1 the primary employing office, and the other or others to
2 be the secondary employing office(s). Such a designation
3 shall be made by written notice to the covered employee.

4 “(d) If an employing office is designated a primary
5 employing office pursuant to paragraph (c) of this section,
6 only that employing office is responsible for giving re-
7 quired notices to the covered employee, providing FMLA
8 leave, and maintenance of health benefits. Job restoration
9 is the primary responsibility of the primary employing of-
10 fice, and the secondary employing office(s) may, subject
11 to the limitations in 825.216, be responsible for accepting
12 the employee returning from FMLA leave.

13 “(e) If employing offices employ an employee jointly,
14 but fail to designate a primary employing office pursuant
15 to paragraph (c) of this section, then all of these employ-
16 ing offices shall be jointly and severally liable for giving
17 required notices to the employee, for providing FMLA
18 leave, for assuring that health benefits are maintained,
19 and for job restoration. The employee may give notice of
20 need for FMLA leave, as described in 825.302 and
21 825.303, to whichever of these employing offices the em-
22 ployee chooses. If the employee makes a written request
23 for restoration to one of these employing offices, that em-
24 ploying office shall be primarily responsible for job res-
25 toration, and the other employing office(s) may, subject

1 to the limitations in 825.216, be responsible for accepting
2 the employee returning from FMLA leave.

3 **“§ 825.107 [Reserved]**

4 **“§ 825.108 [Reserved]**

5 **“§ 825.109 [Reserved]**

6 **“§ 825.110 Eligible employee, general rule**

7 “(a) Subject to the exceptions provided in 825.111,
8 an eligible employee is a covered employee of an employing
9 office who:

10 “(1) Has been employed by any employing of-
11 fice for at least 12 months, and

12 “(2) Has been employed for at least 1,250
13 hours of service during the 12-month period imme-
14 diately preceding the commencement of the leave.

15 “(b) Any service on active duty (as defined in 29
16 U.S.C. 2611(14)) by a covered employee who is a member
17 of the National Guard or Reserves shall be counted as
18 time during which such employee has been employed in
19 an employing office for purposes of paragraph (a)(1) and
20 (2) of this section.

21 “(c) The 12 months an employee must have been em-
22 ployed by any employing office need not be consecutive
23 months, provided:

24 “(1) Subject to the exceptions provided in para-
25 graph (c)(2) of this section, employment periods

1 prior to a break in service of seven years or more
2 need not be counted in determining whether the em-
3 ployee has been employed by any employing office
4 for at least 12 months.

5 “(2) Employment periods preceding a break in
6 service of more than seven years must be counted in
7 determining whether the employee has been em-
8 ployed by any employing office for at least 12
9 months where:

10 “(A) The employee’s break in service is oc-
11 casioned by the fulfillment of his or her Uni-
12 formed Services Employment and Reemploy-
13 ment Rights Act (USERRA), 38 U.S.C. 4301,
14 et seq., covered service obligation. The period of
15 absence from work due to or necessitated by
16 USERRA-covered service must be also counted
17 in determining whether the employee has been
18 employed for at least 12 months by any employ-
19 ing office. However, this section does not pro-
20 vide any greater entitlement to the employee
21 than would be available under the USERRA; or

22 “(B) A written agreement, including a col-
23 lective bargaining agreement, exists concerning
24 the employing office’s intention to rehire the
25 employee after the break in service (e.g., for

1 purposes of the employee furthering his or her
2 education or for childrearing purposes).

3 “(3) If an employee worked for two or more
4 employing offices sequentially, the time worked will
5 be aggregated to determine whether it equals 12
6 months.

7 “(4) If an employee is maintained on the pay-
8 roll for any part of a week, including any periods of
9 paid or unpaid leave (sick, vacation) during which
10 other benefits or compensation are provided by the
11 employing office (e.g., Federal Employees’ Com-
12 pensation, group health plan benefits, etc.), the week
13 counts as a week of employment. For purposes of
14 determining whether intermittent/occasional/casual
15 employment qualifies as at least 12 months, 52
16 weeks is deemed to be equal to 12 months.

17 “(5) Nothing in this section prevents employing
18 offices from considering employment prior to a con-
19 tinuous break in service of more than seven years
20 when determining whether an employee has met the
21 12-month employment requirement. However, if an
22 employing office chooses to recognize such prior em-
23 ployment, the employing office must do so uniformly,
24 with respect to all employees with similar breaks in
25 service.

1 “(d)(1) If an employee was employed by two or more
2 employing offices, either sequentially or concurrently, the
3 hours of service will be aggregated to determine whether
4 the minimum of 1,250 hours has been reached.

5 “(2) Except as provided in paragraph (c)(3) of this
6 section, whether an employee has worked the minimum
7 1,250 hours of service is determined according to the prin-
8 ciples established under the Fair Labor Standards Act
9 (FLSA), as applied by section 203 of the CAA (2 U.S.C.
10 1313), for determining compensable hours of work. The
11 determining factor is the number of hours an employee
12 has worked for one or more employing offices as defined
13 by the CAA. The determination is not limited by methods
14 of recordkeeping, or by compensation agreements that do
15 not accurately reflect all of the hours an employee has
16 worked for or been in service to the employing office. Any
17 accurate accounting of actual hours worked under the
18 FLSA’s principles, as made applicable by the CAA (2
19 U.S.C. 1313), may be used.

20 “(3) An employee returning from USERRA-covered
21 service shall be credited with the hours of service that
22 would have been performed but for the period of absence
23 from work due to or necessitated by USERRA-covered
24 service in determining the employee’s eligibility for
25 FMLA-qualifying leave. Accordingly, a person reemployed

1 following USERRA-covered service has the hours that
2 would have been worked for the employing office added
3 to any hours actually worked during the previous 12-
4 month period to meet the hours of service requirement.
5 In order to determine the hours that would have been
6 worked during the period of absence from work due to or
7 necessitated by USERRA-covered service, the employee's
8 pre-service work schedule can generally be used for cal-
9 culations.

10 “(4) In the event an employing office does not main-
11 tain an accurate record of hours worked by an employee,
12 including for employees who are exempt from the overtime
13 requirements of the FLSA, as made applicable by the
14 CAA and its regulations, the employing office has the bur-
15 den of showing that the employee has not worked the req-
16 uisite hours. An employing office must be able to clearly
17 demonstrate, for example, that full time teachers (See
18 825.102 for definition) of an elementary or secondary
19 school system, or institution of higher education, or other
20 educational establishment or institution (who often work
21 outside the classroom or at their homes) did not work
22 1,250 hours during the previous 12 months in order to
23 claim that the teachers are not covered or eligible for
24 FMLA leave.

1 “(e) The determination of whether an employee meets
2 the hours of service requirement for any employing office
3 and has been employed by any employing office for a total
4 of at least 12 months, must be made as of the date the
5 FMLA leave is to start. An employee may be on non-
6 FMLA leave at the time he or she meets the 12-month
7 eligibility requirement, and in that event, any portion of
8 the leave taken for an FMLA-qualifying reason after the
9 employee meets the eligibility requirement would be
10 FMLA leave. See 825.300(b) for rules governing the con-
11 tent of the eligibility notice given to employees.

12 **“§ 825.111 Eligible employee, birth or placement**

13 “For purposes of leave under subparagraphs (A) or
14 (B) of section 102(a)(1) of the FMLA, 29 U.S.C.
15 2612(a)(1)(A) or (B):

16 “(1) an eligible employee is a covered employee
17 of an employing office; and

18 “(2) the eligibility requirements of section
19 825.110 shall not apply. See also 825.120-21.

20 **“§ 825.112 Qualifying reasons for leave, general rule**

21 “(a) *Circumstances qualifying for leave.* Employing
22 offices covered by FMLA as made applicable by the CAA
23 are required to grant leave to eligible employees:

24 “(1) For birth of a son or daughter, and to
25 care for the newborn child (See 825.120);

1 “(2) For the placement of a son or daughter
2 with the employee for adoption or foster care and
3 the care of such son or daughter (See 825.121);

4 “(3) To care for the employee’s spouse, son,
5 daughter, or parent with a serious health condition
6 (See 825.113 and 825.122);

7 “(4) Because of a serious health condition that
8 makes the employee unable to perform the functions
9 of the employee’s job (See 825.113 and 825.123);

10 “(5) Because of any qualifying exigency arising
11 out of the fact that the employee’s spouse, son,
12 daughter, or parent is a military member on covered
13 active duty (or has been notified of an impending
14 call or order to covered active duty status) (See
15 825.122 and 825.126); and

16 “(6) To care for a covered servicemember with
17 a serious injury or illness if the employee is the
18 spouse, son, daughter, parent, or next of kin of the
19 covered servicemember (See 825.122 and 825.127).

20 “(b) *Equal Application.* The right to take leave under
21 FMLA, as made applicable by the CAA, applies equally
22 to male and female employees. A father, as well as a moth-
23 er, can take family leave for the birth, placement for adop-
24 tion, or foster care of a child.

1 “(c) *Active employee*. In situations where the employ-
2 ing office/employee relationship has been interrupted, such
3 as an employee who has been on layoff, the employee must
4 be recalled or otherwise be re-employed before being eligi-
5 ble for FMLA leave. Under such circumstances, an eligible
6 employee is immediately entitled to further FMLA leave
7 for a qualifying reason.

8 “§ 825.113 **Serious health condition**

9 “(a) For purposes of FMLA, serious health condition
10 entitling an employee to FMLA leave means an illness,
11 injury, impairment, or physical or mental condition that
12 involves inpatient care as defined in 825.114 or continuing
13 treatment by a health care provider as defined in 825.115.

14 “(b) The term incapacity means inability to work, at-
15 tend school, or perform other regular daily activities due
16 to the serious health condition, treatment therefore, or re-
17 covery therefrom.

18 “(c) The term treatment includes (but is not limited
19 to) examinations to determine if a serious health condition
20 exists and evaluations of the condition. Treatment does
21 not include routine physical examinations, eye examina-
22 tions, or dental examinations. A regimen of continuing
23 treatment includes, for example, a course of prescription
24 medication (e.g., an antibiotic) or therapy requiring spe-
25 cial equipment to resolve or alleviate the health condition

1 (e.g., oxygen). A regimen of continuing treatment that in-
2 cludes the taking of over-the-counter medications such as
3 aspirin, antihistamines, or salves; or bed-rest, drinking
4 fluids, exercise, and other similar activities that can be ini-
5 tiated without a visit to a health care provider, is not, by
6 itself, sufficient to constitute a regimen of continuing
7 treatment for purposes of FMLA leave.

8 “(d) Conditions for which cosmetic treatments are
9 administered (such as most treatments for acne or plastic
10 surgery) are not serious health conditions unless inpatient
11 hospital care is required or unless complications develop.
12 Ordinarily, unless complications arise, the common cold,
13 the flu, ear aches, upset stomach, minor ulcers, headaches
14 other than migraine, routine dental or orthodontia prob-
15 lems, periodontal disease, etc., are examples of conditions
16 that do not meet the definition of a serious health condi-
17 tion and do not qualify for FMLA leave. Restorative den-
18 tal or plastic surgery after an injury or removal of can-
19 cerous growths are serious health conditions provided all
20 the other conditions of this regulation are met. Mental ill-
21 ness or allergies may be serious health conditions, but only
22 if all the conditions of this section are met.

23 **“§ 825.114 Inpatient care**

24 “Inpatient care means an overnight stay in a hos-
25 pital, hospice, or residential medical care facility, including

1 any period of incapacity as defined in 825.113(b), or any
2 subsequent treatment in connection with such inpatient
3 care.

4 **“§ 825.115 Continuing treatment**

5 “A serious health condition involving continuing
6 treatment by a health care provider includes any one or
7 more of the following:

8 “(a) *Incapacity and treatment.* A period of incapacity
9 of more than three consecutive, full calendar days, and
10 any subsequent treatment or period of incapacity relating
11 to the same condition, that also involves:

12 “(1) Treatment two or more times, within 30
13 days of the first day of incapacity, unless extenu-
14 ating circumstances exist, by a health care provider,
15 by a nurse under direct supervision of a health care
16 provider, or by a provider of health care services
17 (e.g., physical therapist) under orders of, or on re-
18 ferral by, a health care provider.

19 “(2) Treatment by a health care provider on at
20 least one occasion, which results in a regimen of
21 continuing treatment under the supervision of the
22 health care provider.

23 “(3) The requirement in paragraphs (a)(1) and
24 (2) of this section for treatment by a health care
25 provider means an in-person visit to a health care

1 provider. The first (or only) in-person treatment
2 visit must take place within seven days of the first
3 day of incapacity.

4 “(4) Whether additional treatment visits or a
5 regimen of continuing treatment is necessary within
6 the 30-day period shall be determined by the health
7 care provider.

8 “(5) The term extenuating circumstances in
9 paragraph (a)(1) of this section means cir-
10 cumstances beyond the employee’s control that pre-
11 vent the follow-up visit from occurring as planned by
12 the health care provider. Whether a given set of cir-
13 cumstances are extenuating depends on the facts.
14 For example, extenuating circumstances exist if a
15 health care provider determines that a second in-per-
16 son visit is needed within the 30-day period, but the
17 health care provider does not have any available ap-
18 pointments during that time period.

19 “(b) *Pregnancy or prenatal care.* Any period of inca-
20 pacity due to pregnancy, or for prenatal care. See also
21 825.120.

22 “(c) *Chronic conditions.* Any period of incapacity or
23 treatment for such incapacity due to a chronic serious
24 health condition. A chronic serious health condition is one
25 which:

1 “(1) Requires periodic visits (defined as at least
2 twice a year) for treatment by a health care pro-
3 vider, or by a nurse under direct supervision of a
4 health care provider;

5 “(2) Continues over an extended period of time
6 (including recurring episodes of a single underlying
7 condition); and

8 “(3) May cause episodic rather than a con-
9 tinuing period of incapacity (e.g., asthma, diabetes,
10 epilepsy, etc.).

11 “(d) *Permanent or long-term conditions.* A period of
12 incapacity which is permanent or long-term due to a condi-
13 tion for which treatment may not be effective. The em-
14 ployee or family member must be under the continuing
15 supervision of, but need not be receiving active treatment
16 by, a health care provider. Examples include Alzheimer’s,
17 a severe stroke, or the terminal stages of a disease.

18 “(e) *Conditions requiring multiple treatments.* Any
19 period of absence to receive multiple treatments (including
20 any period of recovery therefrom) by a health care pro-
21 vider or by a provider of health care services under orders
22 of, or on referral by, a health care provider, for:

23 “(1) Restorative surgery after an accident or
24 other injury; or

1 “(2) A condition that would likely result in a
2 period of incapacity of more than three consecutive,
3 full calendar days in the absence of medical inter-
4 vention or treatment, such as cancer (chemotherapy,
5 radiation, etc.), severe arthritis (physical therapy),
6 or kidney disease (dialysis).

7 “(f) Absences attributable to incapacity under para-
8 graphs (b) or (c) of this section qualify for FMLA leave
9 even though the employee or the covered family member
10 does not receive treatment from a health care provider
11 during the absence, and even if the absence does not last
12 more than three consecutive, full calendar days. For exam-
13 ple, an employee with asthma may be unable to report for
14 work due to the onset of an asthma attack or because the
15 employee’s health care provider has advised the employee
16 to stay home when the pollen count exceeds a certain level.
17 An employee who is pregnant may be unable to report to
18 work because of severe morning sickness.

19 **“§ 825.116 [Reserved]**

20 **“§ 825.117 [Reserved]**

21 **“§ 825.118 [Reserved]**

22 **“§ 825.119 Leave for treatment of substance abuse**

23 “(a) Substance abuse may be a serious health condi-
24 tion if the conditions of 825.113 through 825.115 are met.
25 However, FMLA leave may only be taken for treatment

1 for substance abuse by a health care provider or by a pro-
2 vider of health care services on referral by a health care
3 provider. On the other hand, absence because of the em-
4 ployee's use of the substance, rather than for treatment,
5 does not qualify for FMLA leave.

6 “(b) Treatment for substance abuse does not prevent
7 an employing office from taking employment action
8 against an employee. The employing office may not take
9 action against the employee because the employee has ex-
10 ercised his or her right to take FMLA leave for treatment.
11 However, if the employing office has an established policy,
12 applied in a non-discriminatory manner that has been
13 communicated to all employees, that provides under cer-
14 tain circumstances an employee may be terminated for
15 substance abuse, pursuant to that policy the employee may
16 be terminated whether or not the employee is presently
17 taking FMLA leave. An employee may also take FMLA
18 leave to care for a covered family member who is receiving
19 treatment for substance abuse. The employing office may
20 not take action against an employee who is providing care
21 for a covered family member receiving treatment for sub-
22 stance abuse.

1 **“§ 825.120 Leave for pregnancy or birth**

2 “(a) *General rules.* Eligible employees are entitled to
3 FMLA leave for pregnancy or birth of a son or daughter
4 and to care for the newborn child as follows:

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

7 “(2) Both parents are entitled to FMLA leave
8 to be with the healthy newborn child (i.e., bonding
9 time) during the 12-month period beginning on the
10 date of birth. An employee’s entitlement to FMLA
11 leave for a birth expires at the end of the 12-month
12 period beginning on the date of the birth. If the em-
13 ploying office permits bonding leave to be taken be-
14 yond this period, such leave will not qualify as
15 FMLA leave. Under this section, both parents are
16 entitled to FMLA leave even if the newborn does not
17 have a serious health condition.

18 “(3) Spouses who are eligible for FMLA leave
19 and are employed by the same employing office may
20 be limited to a combined total of 12 weeks of leave
21 during any 12-month period if the leave is taken for
22 birth of the employee’s son or daughter or to care
23 for the child after birth, for placement of a son or
24 daughter with the employee for adoption or foster
25 care or to care for the child after placement, or to
26 care for the employee’s parent with a serious health

1 condition. This limitation on the total weeks of leave
2 applies to leave taken for the reasons specified as
3 long as the spouses are employed by the same em-
4 ploying office. It would apply, for example, even
5 though the spouses are employed at two different
6 worksites of an employing office. On the other hand,
7 if one spouse is ineligible for FMLA leave, the other
8 spouse would be entitled to a full 12 weeks of
9 FMLA leave. Where spouses both use a portion of
10 the total 12-week FMLA leave entitlement for either
11 the birth of a child, for placement for adoption or
12 foster care, or to care for a parent, the spouses
13 would each be entitled to the difference between the
14 amount he or she has taken individually and 12
15 weeks for FMLA leave for other purposes. For ex-
16 ample, if each spouse took six weeks of leave to care
17 for a healthy, newborn child, each could use an addi-
18 tional six weeks due to his or her own serious health
19 condition or to care for a child with a serious health
20 condition.

21 “(4) The expectant mother is entitled to FMLA
22 leave for incapacity due to pregnancy, for prenatal
23 care, or for her own serious health condition fol-
24 lowing the birth of the child. An expectant mother
25 may take FMLA leave before the birth of the child

1 for prenatal care or if her condition makes her un-
2 able to work. The expectant mother is entitled to
3 leave for incapacity due to pregnancy even though
4 she does not receive treatment from a health care
5 provider during the absence, and even if the absence
6 does not last for more than three consecutive cal-
7 endar days.

8 “(5) A spouse is entitled to FMLA leave if
9 needed to care for a pregnant spouse who is inca-
10 pacitated or if needed to care for her during her pre-
11 natal care, or if needed to care for her following the
12 birth of a child if she has a serious health condition.
13 See 825.124.

14 “(6) Both parents are entitled to FMLA leave
15 if needed to care for a child with a serious health
16 condition if the requirements of 825.113 through
17 825.115 and 825.122(d) are met. Thus, spouses
18 may each take 12 weeks of FMLA leave if needed
19 to care for their newborn child with a serious health
20 condition, even if both are employed by the same
21 employing office, provided they have not exhausted
22 their entitlements during the applicable 12-month
23 FMLA leave period.

24 “(b) *Intermittent and reduced schedule leave.* An eligi-
25 ble employee may use intermittent or reduced schedule

1 leave after the birth to be with a healthy newborn child
2 only if the employing office agrees. For example, an em-
3 ploying office and employee may agree to a part-time work
4 schedule after the birth. If the employing office agrees to
5 permit intermittent or reduced schedule leave for the birth
6 of a child, the employing office may require the employee
7 to transfer temporarily, during the period the intermittent
8 or reduced leave schedule is required, to an available alter-
9 native position for which the employee is qualified and
10 which better accommodates recurring periods of leave than
11 does the employee's regular position. Transfer to an alter-
12 native position may require compliance with any applicable
13 collective bargaining agreement and Federal law (such as
14 the Americans with Disabilities Act, as made applicable
15 by the CAA). Transfer to an alternative position may in-
16 clude altering an existing job to better accommodate the
17 employee's need for intermittent or reduced leave. The em-
18 ploying office's agreement is not required for intermittent
19 leave required by the serious health condition of the ex-
20 pectant mother or newborn child. See 825.202–825.205
21 for general rules governing the use of intermittent and re-
22 duced schedule leave. See 825.121 for rules governing
23 leave for adoption or foster care. See 825.601 for special
24 rules applicable to instructional employees of schools.

1 **“§ 825.121 Leave for adoption or foster care**

2 “(a) *General rules.* Eligible employees are entitled to
3 FMLA leave for placement with the employee of a son or
4 daughter for adoption or foster care and to care for the
5 newly placed child as follows:

6 “(1) Employees may take FMLA leave before
7 the actual placement or adoption of a child if an ab-
8 sence from work is required for the placement for
9 adoption or foster care to proceed. For example, the
10 employee may be required to attend counseling ses-
11 sions, appear in court, consult with his or her attor-
12 ney or the doctor(s) representing the birth parent,
13 submit to a physical examination, or travel to an-
14 other country to complete an adoption. The source
15 of an adopted child (e.g., whether from a licensed
16 placement agency or otherwise) is not a factor in de-
17 termining eligibility for leave for this purpose.

18 “(2) An employee’s entitlement to leave for
19 adoption or foster care expires at the end of the 12-
20 month period beginning on the date of the place-
21 ment. If the employing office permits leave for adop-
22 tion or foster care to be taken beyond this period,
23 such leave will not qualify as FMLA leave. Under
24 this section, the employee is entitled to FMLA leave
25 even if the adopted or foster child does not have a
26 serious health condition.

1 “(3) Spouses who are eligible for FMLA leave
2 and are employed by the same covered employing of-
3 fice may be limited to a combined total of 12 weeks
4 of leave during any 12-month period if the leave is
5 taken for the placement of the employee’s son or
6 daughter or to care for the child after placement, for
7 the birth of the employee’s son or daughter or to
8 care for the child after birth, or to care for the em-
9 ployee’s parent with a serious health condition. This
10 limitation on the total weeks of leave applies to leave
11 taken for the reasons specified as long as the
12 spouses are employed by the same employing office.
13 It would apply, for example, even though the spouses
14 are employed at two different worksites of an em-
15 ploying office. On the other hand, if one spouse is
16 ineligible for FMLA leave, the other spouse would be
17 entitled to a full 12 weeks of FMLA leave. Where
18 spouses both use a portion of the total 12-week
19 FMLA leave entitlement for either the birth of a
20 child, for placement for adoption or foster care, or
21 to care for a parent, the spouses would each be enti-
22 tled to the difference between the amount he or she
23 has taken individually and 12 weeks for FMLA leave
24 for other purposes. For example, if each spouse took
25 six weeks of leave to care for a healthy, newly placed

1 child, each could use an additional six weeks due to
2 his or her own serious health condition or to care for
3 a child with a serious health condition.

4 “(4) An eligible employee is entitled to FMLA
5 leave in order to care for an adopted or foster child
6 with a serious health condition if the requirements
7 of 825.113 through 825.115 and 825.122(d) are
8 met. Thus, spouses may each take 12 weeks of
9 FMLA leave if needed to care for an adopted or fos-
10 ter child with a serious health condition, even if both
11 are employed by the same employing office, provided
12 they have not exhausted their entitlements during
13 the applicable 12-month FMLA leave period.

14 “(b) *Use of intermittent and reduced schedule leave.*
15 An eligible employee may use intermittent or reduced
16 schedule leave after the placement of a healthy child for
17 adoption or foster care only if the employing office agrees.
18 Thus, for example, the employing office and employee may
19 agree to a part-time work schedule after the placement
20 for bonding purposes. If the employing office agrees to
21 permit intermittent or reduced schedule leave for the
22 placement for adoption or foster care, the employing office
23 may require the employee to transfer temporarily, during
24 the period the intermittent or reduced leave schedule is
25 required, to an available alternative position for which the

1 employee is qualified and which better accommodates re-
 2 curring periods of leave than does the employee’s regular
 3 position. Transfer to an alternative position may require
 4 compliance with any applicable collective bargaining agree-
 5 ment and Federal law (such as the Americans with Dis-
 6 abilities Act, as made applicable by the CAA). Transfer
 7 to an alternative position may include altering an existing
 8 job to better accommodate the employee’s need for inter-
 9 mittent or reduced leave. The employing office’s agree-
 10 ment is not required for intermittent leave required by the
 11 serious health condition of the adopted or foster child. See
 12 825.202–825.205 for general rules governing the use of
 13 intermittent and reduced schedule leave. See 825.120 for
 14 general rules governing leave for pregnancy and birth of
 15 a child. See 825.601 for special rules applicable to instruc-
 16 tional employees of schools.

17 **“§ 825.122 Definitions of covered servicemember,**
 18 **spouse, parent, son or daughter, next of**
 19 **kin of a covered servicemember, adop-**
 20 **tion, foster care, son or daughter on cov-**
 21 **ered active duty or call to covered active**
 22 **duty status, son or daughter of a covered**
 23 **servicemember, and parent of a covered**
 24 **servicemember**

25 “(a) *Covered servicemember* means:

1 “(1) A current member of the Armed Forces,
2 including a member of the National Guard or Re-
3 serves, who is undergoing medical treatment, recu-
4 peration or therapy, is otherwise in outpatient sta-
5 tus, or is otherwise on the temporary disability re-
6 tired list, for a serious injury or illness; or

7 “(2) A covered veteran who is undergoing med-
8 ical treatment, recuperation, or therapy for a serious
9 injury or illness. Covered veteran means an indi-
10 vidual who was a member of the Armed Forces (in-
11 cluding a member of the National Guard or Re-
12 serves), and was discharged or released under condi-
13 tions other than dishonorable at any time during the
14 five-year period prior to the first date the eligible
15 employee takes FMLA leave to care for the covered
16 veteran. See 825.127(b)(2).

17 “(b) *Spouse* means a husband or wife. For purposes
18 of this definition, husband or wife refers to the other per-
19 son with whom an individual entered into marriage as de-
20 fined or recognized under State law for purposes of mar-
21 riage in the State in which the marriage was entered into
22 or, in the case of a marriage entered into outside of any
23 State, if the marriage is valid in the place where entered
24 into and could have been entered into in at least one State.

1 This definition includes an individual in a same-sex or
2 common law marriage that either:

3 “(1) Was entered into in a State that recog-
4 nizes such marriages; or

5 “(2) If entered into outside of any State, is
6 valid in the place where entered into and could have
7 been entered into in at least one State.

8 “(c) *Parent*. Parent means a biological, adoptive,
9 step, or foster father or mother, or any other individual
10 who stood in loco parentis to the employee when the em-
11 ployee was a son or daughter as defined in paragraph (d)
12 of this section. This term does not include parents ‘in law’.

13 “(d) *Son or daughter*. For purposes of FMLA leave
14 taken for birth or adoption, or to care for a family member
15 with a serious health condition, son or daughter means
16 a biological, adopted, or foster child, a stepchild, a legal
17 ward, or a child of a person standing in loco parentis, who
18 is either under age 18, or age 18 or older and ‘incapable
19 of self-care because of a mental or physical disability’ at
20 the time that FMLA leave is to commence.

21 “(1) *Incapable of self-care* means that the indi-
22 vidual requires active assistance or supervision to
23 provide daily self-care in three or more of the activi-
24 ties of daily living (ADLs) or instrumental activities
25 of daily living (IADLs). Activities of daily living in-

1 include adaptive activities such as caring appropriately
2 for one's grooming and hygiene, bathing, dressing,
3 and eating. Instrumental activities of daily living in-
4 clude cooking, cleaning, shopping, taking public
5 transportation, paying bills, maintaining a residence,
6 using telephones and directories, using a post office,
7 etc.

8 “(2) *Physical or mental disability* means a
9 physical or mental impairment that substantially
10 limits one or more of the major life activities of an
11 individual. Regulations at 29 C.F.R. 1630.2(h), (i),
12 and (j), issued by the Equal Employment Oppor-
13 tunity Commission under the Americans with Dis-
14 abilities Act (ADA), (42 U.S.C. 12101 et seq.), pro-
15 vide guidance for these terms.

16 “(3) Persons who are ‘in loco parentis’ include
17 those with day-to-day responsibilities to care for and
18 financially support a child, or, in the case of an em-
19 ployee, who had such responsibility for the employee
20 when the employee was a child. A biological or legal
21 relationship is not necessary.

22 “(e) *Next of kin* of a covered servicemember means
23 the nearest blood relative other than the covered
24 servicemember's spouse, parent, son, or daughter, in the
25 following order of priority: blood relatives who have been

1 granted legal custody of the covered servicemember by
2 court decree or statutory provisions, brothers and sisters,
3 grandparents, aunts and uncles, and first cousins, unless
4 the covered servicemember has specifically designated in
5 writing another blood relative as his or her nearest blood
6 relative for purposes of military caregiver leave under the
7 FMLA. When no such designation is made, and there are
8 multiple family members with the same level of relation-
9 ship to the covered servicemember, all such family mem-
10 bers shall be considered the covered servicemember's next
11 of kin and may take FMLA leave to provide care to the
12 covered servicemember, either consecutively or simulta-
13 neously. When such designation has been made, the des-
14 ignated individual shall be deemed to be the covered
15 servicemember's only next of kin. See 825.127(d)(3).

16 “(f) *Adoption* means legally and permanently assum-
17 ing the responsibility of raising a child as one's own. The
18 source of an adopted child (e.g., whether from a licensed
19 placement agency or otherwise) is not a factor in deter-
20 mining eligibility for FMLA leave. See 825.121 for rules
21 governing leave for adoption.

22 “(g) *Foster care* means 24-hour care for children in
23 substitution for, and away from, their parents or guard-
24 ian. Such placement is made by or with the agreement
25 of the State as a result of a voluntary agreement between

1 the parent or guardian that the child be removed from
2 the home, or pursuant to a judicial determination of the
3 necessity for foster care, and involves agreement between
4 the State and foster family that the foster family will take
5 care of the child. Although foster care may be with rel-
6 atives of the child, State action is involved in the removal
7 of the child from parental custody. See 825.121 for rules
8 governing leave for foster care.

9 “(h) Son or daughter on covered active duty or call
10 to covered active duty status means the employee’s biologi-
11 cal, adopted, or foster child, stepchild, legal ward, or a
12 child for whom the employee stood in loco parentis, who
13 is on covered active duty or call to covered active duty
14 status, and who is of any age. See 825.126(a)(5).

15 “(i) Son or daughter of a covered servicemember
16 means the covered servicemember’s biological, adopted, or
17 foster child, stepchild, legal ward, or a child for whom the
18 covered servicemember stood in loco parentis, and who is
19 of any age. See 825.127(d)(1).

20 “(j) *Parent of a covered servicemember* means a cov-
21 ered servicemember’s biological, adoptive, step, or foster
22 father or mother, or any other individual who stood in loco
23 parentis to the covered servicemember. This term does not
24 include parents ‘in law.’ See 825.127(d)(2).

1 “(k) *Documenting relationships.* For purposes of con-
 2 firmation of family relationship, the employing office may
 3 require the employee giving notice of the need for leave
 4 to provide reasonable documentation or statement of fam-
 5 ily relationship. This documentation may take the form
 6 of a simple statement from the employee, or a child’s birth
 7 certificate, a court document, etc. The employing office is
 8 entitled to examine documentation such as a birth certifi-
 9 cate, etc., but the employee is entitled to the return of
 10 the official document submitted for this purpose.

11 **“§ 825.123 Unable to perform the functions of the po-**
 12 **sition**

13 “(a) *Definition.* An employee is unable to perform the
 14 functions of the position where the health care provider
 15 finds that the employee is unable to work at all or is un-
 16 able to perform any one of the essential functions of the
 17 employee’s position within the meaning of the Americans
 18 with Disabilities Act (ADA), as amended and made appli-
 19 cable by section 201(a) of the CAA (2 U.S.C. 1311(a)(3)).
 20 An employee who must be absent from work to receive
 21 medical treatment for a serious health condition is consid-
 22 ered to be unable to perform the essential functions of the
 23 position during the absence for treatment.

24 “(b) *Statement of functions.* An employing office has
 25 the option, in requiring certification from a health care

1 provider, to provide a statement of the essential functions
2 of the employee's position for the health care provider to
3 review. A sufficient medical certification must specify what
4 functions of the employee's position the employee is unable
5 to perform so that the employing office can then determine
6 whether the employee is unable to perform one or more
7 essential functions of the employee's position. For pur-
8 poses of the FMLA, the essential functions of the employ-
9 ee's position are to be determined with reference to the
10 position the employee held at the time notice is given or
11 leave commenced, whichever is earlier. See 825.306.

12 **“§ 825.124 Needed to care for a family member or cov-**
13 **ered servicemember**

14 “(a) The medical certification provision that an em-
15 ployee is needed to care for a family member or covered
16 servicemember encompasses both physical and psycho-
17 logical care. It includes situations where, for example, be-
18 cause of a serious health condition, the family member is
19 unable to care for his or her own basic medical, hygienic,
20 or nutritional needs or safety, or is unable to transport
21 himself or herself to the doctor. The term also includes
22 providing psychological comfort and reassurance which
23 would be beneficial to a child, spouse or parent with a
24 serious health condition who is receiving inpatient or home
25 care.

1 “(b) The term also includes situations where the em-
2 ployee may be needed to substitute for others who nor-
3 mally care for the family member or covered servicemem-
4 ber, or to make arrangements for changes in care, such
5 as transfer to a nursing home. The employee need not be
6 the only individual or family member available to care for
7 the family member or covered servicemember.

8 “(c) An employee’s intermittent leave or a reduced
9 leave schedule necessary to care for a family member or
10 covered servicemember includes not only a situation where
11 the condition of the family member or covered servicemem-
12 ber itself is intermittent, but also where the employee is
13 only needed intermittently—such as where other care is
14 normally available, or care responsibilities are shared with
15 another member of the family or a third party. See
16 825.202–825.205 for rules governing the use of intermit-
17 tent or reduced schedule leave.

18 **“§ 825.125 Definition of health care provider**

19 “(a) The FMLA, as made applicable by the CAA, de-
20 fines *health care provider* as:

21 “(1) A doctor of medicine or osteopathy who is
22 authorized to practice medicine or surgery (as ap-
23 propriate) by the State in which the doctor prac-
24 tices; or

1 “(2) Any other person determined by the Office
2 of Congressional Workplace Rights to be capable of
3 providing health care services.

4 “(3) In making a determination referred to in
5 subparagraph (a)(2), and absent good cause shown
6 to do otherwise, the Office of Congressional Work-
7 place Rights will follow any determination made by
8 the Department of Labor (under section 101(6)(B)
9 of FMLA (29 U.S.C. 2611(6)(B))) that a person is
10 capable of providing health care services, provided
11 the determination by the Department of Labor was
12 not made at the request of a person who was then
13 a covered employee.

14 “(b) Others capable of providing health care services
15 include only:

16 “(1) Podiatrists, dentists, clinical psychologists,
17 optometrists, and chiropractors (limited to treatment
18 consisting of manual manipulation of the spine to
19 correct a subluxation as demonstrated by X-ray to
20 exist) authorized to practice in the State and per-
21 forming within the scope of their practice as defined
22 under State law;

23 “(2) Nurse practitioners, nurse-midwives, clin-
24 ical social workers, and physician assistants who are
25 authorized to practice under State law and who are

1 performing within the scope of their practice as de-
2 fined under State law;

3 “(3) Christian Science Practitioners listed with
4 the First Church of Christ, Scientist in Boston,
5 Massachusetts. Where an employee or family mem-
6 ber is receiving treatment from a Christian Science
7 practitioner, an employee may not object to any re-
8 quirement from an employing office that the em-
9 ployee or family member submit to examination
10 (though not treatment) to obtain a second or third
11 certification from a health care provider other than
12 a Christian Science practitioner except as otherwise
13 provided under applicable State or local law or col-
14 lective bargaining agreement;

15 “(4) Any health care provider from whom an
16 employing office or the employing office’s group
17 health plan’s benefits manager will accept certifi-
18 cation of the existence of a serious health condition
19 to substantiate a claim for benefits; and

20 “(5) A health care provider listed above who
21 practices in a country other than the United States,
22 who is authorized to practice in accordance with the
23 law of that country, and who is performing within
24 the scope of his or her practice as defined under
25 such law.

1 “(c) The phrase authorized to practice in the State
 2 as used in this section means that the provider must be
 3 authorized to diagnose and treat physical or mental health
 4 conditions.

5 **“§ 825.126 Leave because of a qualifying exigency**

6 “(a) Eligible employees may take FMLA leave for a
 7 qualifying exigency while the employee’s spouse, son,
 8 daughter, or parent (the military member or member) is
 9 on covered active duty or call to covered active duty status
 10 (or has been notified of an impending call or order to cov-
 11 ered active duty).

12 “(1) *Covered active duty or call to covered active*
 13 *duty status* in the case of a member of the Regular
 14 Armed Forces means duty during the deployment of
 15 the member with the Armed Forces to a foreign
 16 country. The active duty orders of a member of the
 17 Regular components of the Armed Forces will gen-
 18 erally specify if the member is deployed to a foreign
 19 country.

20 “(2) *Covered active duty or call to covered active*
 21 *duty status* in the case of a member of the Reserve
 22 components of the Armed Forces means duty during
 23 the deployment of the member with the Armed
 24 Forces to a foreign country under a Federal call or
 25 order to active duty in support of a contingency op-

1 eration pursuant to: section 688 of title 10 of the
2 United States Code, which authorizes ordering to ac-
3 tive duty retired members of the Regular Armed
4 Forces and members of the retired Reserve who re-
5 tired after completing at least 20 years of active
6 service; section 12301(a) of title 10 of the United
7 States Code, which authorizes ordering all reserve
8 component members to active duty in the case of
9 war or national emergency; section 12302 of title 10
10 of the United States Code, which authorizes order-
11 ing any unit or unassigned member of the Ready
12 Reserve to active duty; section 12304 of title 10 of
13 the United States Code, which authorizes ordering
14 any unit or unassigned member of the Selected Re-
15 serve and certain members of the Individual Ready
16 Reserve to active duty; section 12305 of title 10 of
17 the United States Code, which authorizes the sus-
18 pension of promotion, retirement or separation rules
19 for certain Reserve components; section 12406 of
20 title 10 of the United States Code, which authorizes
21 calling the National Guard into Federal service in
22 certain circumstances; chapter 15 of title 10 of the
23 United States Code, which authorizes calling the
24 National Guard and State military into Federal
25 service in the case of insurrections and national

1 emergencies; or any other provision of law during a
2 war or during a national emergency declared by the
3 President or Congress so long as it is in support of
4 a contingency operation. See 10 U.S.C.
5 101(a)(13)(B).

6 “(A) For purposes of covered active duty
7 or call to covered active duty status, the Re-
8 serve components of the Armed Forces include
9 the Army National Guard of the United States,
10 Army Reserve, Navy Reserve, Marine Corps Re-
11 serve, Air National Guard of the United States,
12 Air Force Reserve, and Coast Guard Reserve,
13 and retired members of the Regular Armed
14 Forces or Reserves who are called up in support
15 of a contingency operation pursuant to one of
16 the provisions of law identified in paragraph
17 (a)(2).

18 “(B) The active duty orders of a member
19 of the Reserve components will generally specify
20 if the military member is serving in support of
21 a contingency operation by citation to the rel-
22 evant section of title 10 of the United States
23 Code and/or by reference to the specific name
24 of the contingency operation and will specify
25 that the deployment is to a foreign country.

1 “(3) *Deployment of the member with the Armed*
2 *Forces to a foreign country* means deployment to
3 areas outside of the United States, the District of
4 Columbia, or any Territory or possession of the
5 United States, including international waters.

6 “(4) A call to covered active duty for purposes
7 of leave taken because of a qualifying exigency refers
8 to a Federal call to active duty. State calls to active
9 duty are not covered unless under order of the Presi-
10 dent of the United States pursuant to one of the
11 provisions of law identified in paragraph (a)(2) of
12 this section.

13 “(5) *Son or daughter on covered active duty or*
14 *call to covered active duty status* means the employ-
15 ee’s biological, adopted, or foster child, stepchild,
16 legal ward, or a child for whom the employee stood
17 in loco parentis, who is on covered active duty or call
18 to covered active duty status, and who is of any age.

19 “(b) An eligible employee may take FMLA leave for
20 one or more of the following qualifying exigencies:

21 “(1) *Short-notice deployment.* (A) To address
22 any issue that arises from the fact that the military
23 member is notified of an impending call or order to
24 covered active duty seven or less calendar days prior
25 to the date of deployment;

1 “(B) Leave taken for this purpose can be
2 used for a period of seven calendar days begin-
3 ning on the date the military member is notified
4 of an impending call or order to covered active
5 duty;

6 “(2) *Military events and related activities.*

7 “(A) To attend any official ceremony, pro-
8 gram, or event sponsored by the military that
9 is related to the covered active duty or call to
10 covered active duty status of the military mem-
11 ber; and

12 “(B) To attend family support or assist-
13 ance programs and informational briefings
14 sponsored or promoted by the military, military
15 service organizations, or the American Red
16 Cross that are related to the covered active
17 duty or call to covered active duty status of the
18 military member;

19 “(3) *Childcare and school activities.* For the
20 purposes of leave for childcare and school activities
21 listed in (A) through (D) of this paragraph, a child
22 of the military member must be the military mem-
23 ber’s biological, adopted, or foster child, stepchild,
24 legal ward, or child for whom the military member
25 stands in loco parentis, who is either under 18 years

1 of age or 18 years of age or older and incapable of
2 self-care because of a mental or physical disability at
3 the time that FMLA leave is to commence. As with
4 all instances of qualifying exigency leave, the mili-
5 tary member must be the spouse, son, daughter, or
6 parent of the employee requesting qualifying exi-
7 gency leave.

8 “(A) To arrange for alternative childcare
9 for a child of the military member when the
10 covered active duty or call to covered active
11 duty status of the military member necessitates
12 a change in the existing childcare arrangement;

13 “(B) To provide childcare for a child of the
14 military member on an urgent, immediate need
15 basis (but not on a routine, regular, or everyday
16 basis) when the need to provide such care arises
17 from the covered active duty or call to covered
18 active duty status of the military member;

19 “(C) To enroll in or transfer to a new
20 school or day care facility a child of the military
21 member when enrollment or transfer is neces-
22 sitated by the covered active duty or call to cov-
23 ered active duty status of the military member;
24 and

1 “(D) To attend meetings with staff at a
2 school or a daycare facility, such as meetings
3 with school officials regarding disciplinary
4 measures, parent-teacher conferences, or meet-
5 ings with school counselors, for a child of the
6 military member, when such meetings are nec-
7 essary due to circumstances arising from the
8 covered active duty or call to covered active
9 duty status of the military member;

10 “(4) *Financial and legal arrangements.* (A) To
11 make or update financial or legal arrangements to
12 address the military member’s absence while on cov-
13 ered active duty or call to covered active duty status,
14 such as preparing and executing financial and
15 healthcare powers of attorney, transferring bank ac-
16 count signature authority, enrolling in the Defense
17 Enrollment Eligibility Reporting System (DEERS),
18 obtaining military identification cards, or preparing
19 or updating a will or living trust; and

20 “(B) To act as the military member’s rep-
21 resentative before a Federal, State, or local
22 agency for purposes of obtaining, arranging, or
23 appealing military service benefits while the
24 military member is on covered active duty or
25 call to covered active duty status, and for a pe-

1 riod of 90 days following the termination of the
2 military member's covered active duty status;

3 “(5) *Counseling*. To attend counseling provided
4 by someone other than a health care provider, for
5 oneself, for the military member, or for the biological,
6 adopted, or foster child, a stepchild, or a legal
7 ward of the military member, or a child for whom
8 the military member stands in loco parentis, who is
9 either under age 18, or age 18 or older and incapable
10 of self-care because of a mental or physical disability
11 at the time that FMLA leave is to commence,
12 provided that the need for counseling arises from the
13 covered active duty or call to covered active duty status
14 of the military member;

15 “(6) *Rest and Recuperation*. (A) To spend time
16 with the military member who is on short-term, temporary,
17 Rest and Recuperation leave during the period of deployment;
18

19 “(B) Leave taken for this purpose can be
20 used for a period of 15 calendar days beginning
21 on the date the military member commences
22 each instance of Rest and Recuperation leave;

23 “(7) *Post-deployment activities*. (A) To attend
24 arrival ceremonies, reintegration briefings and
25 events, and any other official ceremony or program

1 sponsored by the military for a period of 90 days fol-
2 lowing the termination of the military member's cov-
3 ered active duty status; and

4 “(B) To address issues that arise from the
5 death of the military member while on covered
6 active duty status, such as meeting and recov-
7 ering the body of the military member, making
8 funeral arrangements, and attending funeral
9 services;

10 “(8) *Parental care*. For purposes of leave for
11 parental care listed in (A) through (D) of this para-
12 graph, the parent of the military member must be
13 incapable of self-care and must be the military mem-
14 ber's biological, adoptive, step, or foster father or
15 mother, or any other individual who stood in loco
16 parentis to the military member when the member
17 was under 18 years of age. A parent who is incapa-
18 ble of self-care means that the parent requires active
19 assistance or supervision to provide daily self-care in
20 three or more of the activities of daily living or in-
21 strumental activities of daily living. Activities of
22 daily living include adaptive activities such as caring
23 appropriately for one's grooming and hygiene, bath-
24 ing, dressing, and eating. Instrumental activities of
25 daily living include cooking, cleaning, shopping, tak-

1 ing public transportation, paying bills, maintaining a
2 residence, using telephones and directories, using a
3 post office, etc. As with all instances of qualifying
4 exigency leave, the military member must be the
5 spouse, son, daughter, or parent of the employee re-
6 questing qualifying exigency leave.

7 “(A) To arrange for alternative care for a
8 parent of the military member when the parent
9 is incapable of self-care and the covered active
10 duty or call to covered active duty status of the
11 military member necessitates a change in the
12 existing care arrangement for the parent;

13 “(B) To provide care for a parent of the
14 military member on an urgent, immediate need
15 basis (but not on a routine, regular, or everyday
16 basis) when the parent is incapable of self-care
17 and the need to provide such care arises from
18 the covered active duty or call to covered active
19 duty status of the military member;

20 “(C) To admit to or transfer to a care fa-
21 cility a parent of the military member when ad-
22 mittance or transfer is necessitated by the cov-
23 ered active duty or call to covered active duty
24 status of the military member; and

1 “(D) To attend meetings with staff at a
2 care facility, such as meetings with hospice or
3 social service providers for a parent of the mili-
4 tary member, when such meetings are necessary
5 due to circumstances arising from the covered
6 active duty or call to covered active duty status
7 of the military member but not for routine or
8 regular meetings;

9 “(9) *Additional activities.* To address other
10 events which arise out of the military member’s cov-
11 ered active duty or call to covered active duty status
12 provided that the employing office and employee
13 agree that such leave shall qualify as an exigency,
14 and agree to both the timing and duration of such
15 leave.

16 **“§ 825.127 Leave to care for a covered servicemember**
17 **with a serious injury or illness (military**
18 **caregiver leave)**

19 “(a) Eligible employees are entitled to FMLA leave
20 to care for a covered servicemember with a serious illness
21 or injury.

22 “(b) Covered servicemember means:

23 “(1) A current member of the Armed Forces,
24 including a member of the National Guard or Re-
25 serves, who is undergoing medical treatment, recu-

1 peration, or therapy, is otherwise in outpatient sta-
2 tus; or is otherwise on the temporary disability re-
3 tired list, for a serious injury or illness. Outpatient
4 status means the status of a member of the Armed
5 Forces assigned to either a military medical treat-
6 ment facility as an outpatient or a unit established
7 for the purpose of providing command and control of
8 members of the Armed Forces receiving medical care
9 as outpatients.

10 “(2) A covered veteran who is undergoing med-
11 ical treatment, recuperation or therapy for a serious
12 injury or illness. Covered veteran means an indi-
13 vidual who was a member of the Armed Forces (in-
14 cluding a member of the National Guard or Re-
15 serves), and was discharged or released under condi-
16 tions other than dishonorable at any time during the
17 five-year period prior to the first date the eligible
18 employee takes FMLA leave to care for the covered
19 veteran. An eligible employee must commence leave
20 to care for a covered veteran within five years of the
21 veteran’s active duty service, but the single 12-
22 month period described in paragraph (e)(1) of this
23 section may extend beyond the five-year period.

24 “(3) For an individual who was a member of
25 the Armed Forces (including a member of the Na-

1 tional Guard or Reserves) and who was discharged
2 or released under conditions other than dishonorable
3 prior to the effective date of this Final Rule, the pe-
4 riod between October 28, 2009, and the effective
5 date of this Final Rule shall not count towards the
6 determination of the five-year period for covered vet-
7 eran status.

8 “(c) A serious injury or illness means:

9 “(1) In the case of a current member of the
10 Armed Forces, including a member of the National
11 Guard or Reserves, means an injury or illness that
12 was incurred by the covered servicemember in the
13 line of duty on active duty in the Armed Forces or
14 that existed before the beginning of the member’s
15 active duty and was aggravated by service in the line
16 of duty on active duty in the Armed Forces, and
17 that may render the member medically unfit to per-
18 form the duties of the member’s office, grade, rank,
19 or rating; and

20 “(2) In the case of a covered veteran, means an
21 injury or illness that was incurred by the member in
22 the line of duty on active duty in the Armed Forces
23 (or existed before the beginning of the member’s ac-
24 tive duty and was aggravated by service in the line
25 of duty on active duty in the Armed Forces), and

1 manifested itself before or after the member became
2 a veteran, and is:

3 “(A) A continuation of a serious injury or
4 illness that was incurred or aggravated when
5 the covered veteran was a member of the
6 Armed Forces and rendered the servicemember
7 unable to perform the duties of the
8 servicemember’s office, grade, rank, or rating;
9 or

10 “(B) A physical or mental condition for
11 which the covered veteran has received a De-
12 partment of Veterans Affairs Service-Related
13 Disability Rating (VASRD) of 50 percent or
14 greater, and such VASRD rating is based, in
15 whole or in part, on the condition precipitating
16 the need for military caregiver leave; or

17 “(C) A physical or mental condition that
18 substantially impairs the covered veteran’s abil-
19 ity to secure or follow a substantially gainful
20 occupation by reason of a disability or disabil-
21 ities related to military service, or would do so
22 absent treatment; or

23 “(D) An injury, including a psychological
24 injury, on the basis of which the covered vet-
25 eran has been enrolled in the Department of

1 Veterans Affairs Program of Comprehensive
2 Assistance for Family Caregivers.

3 “(d) In order to care for a covered servicemember,
4 an eligible employee must be the spouse, son, daughter,
5 or parent, or next of kin of a covered servicemember.

6 “(1) Son or daughter of a covered servicemem-
7 ber means the covered servicemember’s biological,
8 adopted, or foster child, stepchild, legal ward, or a
9 child for whom the covered servicemember stood in
10 loco parentis, and who is of any age.

11 “(2) Parent of a covered servicemember means
12 a covered servicemember’s biological, adoptive, step,
13 or foster father or mother, or any other individual
14 who stood in loco parentis to the covered service-
15 member. This term does not include parents ‘in law’.

16 “(3) Next of kin of a covered servicemember
17 means the nearest blood relative, other than the cov-
18 ered servicemember’s spouse, parent, son, or daugh-
19 ter, in the following order of priority: blood relatives
20 who have been granted legal custody of the service-
21 member by court decree or statutory provisions,
22 brothers and sisters, grandparents, aunts and un-
23 cles, and first cousins, unless the covered service-
24 member has specifically designated in writing an-
25 other blood relative as his or her nearest blood rel-

1 ative for purposes of military caregiver leave under
2 the FMLA. When no such designation is made, and
3 there are multiple family members with the same
4 level of relationship to the covered servicemember,
5 all such family members shall be considered the cov-
6 ered servicemember's next of kin and may take
7 FMLA leave to provide care to the covered service-
8 member, either consecutively or simultaneously.
9 When such designation has been made, the des-
10 ignated individual shall be deemed to be the covered
11 servicemember's only next of kin. For example, if a
12 covered servicemember has three siblings and has
13 not designated a blood relative to provide care, all
14 three siblings would be considered the covered
15 servicemember's next of kin. Alternatively, where a
16 covered servicemember has a sibling(s) and des-
17 ignates a cousin as his or her next of kin for FMLA
18 purposes, then only the designated cousin is eligible
19 as the covered servicemember's next of kin. An em-
20 ploying office is permitted to require an employee to
21 provide confirmation of covered family relationship
22 to the covered servicemember pursuant to
23 825.122(k).

1 “(e) An eligible employee is entitled to 26 workweeks
2 of leave to care for a covered servicemember with a serious
3 injury or illness during a single 12-month period.

4 “(1) The single 12-month period described in
5 paragraph (e) of this section begins on the first day
6 the eligible employee takes FMLA leave to care for
7 a covered servicemember and ends 12 months after
8 that date, regardless of the method used by the em-
9 ploying office to determine the employee’s 12 work-
10 weeks of leave entitlement for other FMLA-quali-
11 fying reasons. If an eligible employee does not take
12 all of his or her 26 workweeks of leave entitlement
13 to care for a covered servicemember during this sin-
14 gle 12-month period, the remaining part of his or
15 her 26 workweeks of leave entitlement to care for
16 the covered servicemember is forfeited.

17 “(2) The leave entitlement described in para-
18 graph (e) of this section is to be applied on a per-
19 covered-servicemember, per-injury basis such that an
20 eligible employee may be entitled to take more than
21 one period of 26 workweeks of leave if the leave is
22 to care for different covered servicemembers or to
23 care for the same servicemember with a subsequent
24 serious injury or illness, except that no more than
25 26 workweeks of leave may be taken within any sin-

1 gle 12-month period. An eligible employee may take
2 more than one period of 26 workweeks of leave to
3 care for a covered servicemember with more than
4 one serious injury or illness only when the serious
5 injury or illness is a subsequent serious injury or ill-
6 ness. When an eligible employee takes leave to care
7 for more than one covered servicemember or for a
8 subsequent serious injury or illness of the same cov-
9 ered servicemember, and the single 12-month peri-
10 ods corresponding to the different military caregiver
11 leave entitlements overlap, the employee is limited to
12 taking no more than 26 workweeks of leave in each
13 single 12-month period.

14 “(3) An eligible employee is entitled to a com-
15 bined total of 26 workweeks of leave for any FMLA-
16 qualifying reason during the single 12-month period
17 described in paragraph (e) of this section, provided
18 that the employee is entitled to no more than 12
19 workweeks of leave for one or more of the following:
20 in connection with the birth of a son or daughter of
21 the employee and in order to care for such son or
22 daughter; in connection with the placement of a son
23 or daughter with the employee for adoption or foster
24 care; in order to care for the spouse, son, daughter,
25 or parent with a serious health condition; because of

1 the employee's own serious health condition; or be-
2 cause of a qualifying exigency. Thus, for example, an
3 eligible employee may, during the single 12-month
4 period, take 16 workweeks of FMLA leave to care
5 for a covered servicemember and 10 workweeks of
6 FMLA leave to care for a newborn child. However,
7 the employee may not take more than 12 weeks of
8 FMLA leave to care for the newborn child during
9 the single 12-month period, even if the employee
10 takes fewer than 14 workweeks of FMLA leave to
11 care for a covered servicemember.

12 “(4) In all circumstances, including for leave
13 taken to care for a covered servicemember, the em-
14 ploying office is responsible for designating leave,
15 paid or unpaid, as FMLA-qualifying, and for giving
16 notice of the designation to the employee as provided
17 in 825.300. In the case of leave that qualifies as
18 both leave to care for a covered servicemember and
19 leave to care for a family member with a serious
20 health condition during the single 12-month period
21 described in paragraph (e) of this section, the em-
22 ploying office must designate such leave as leave to
23 care for a covered servicemember in the first in-
24 stance. Leave that qualifies as both leave to care for
25 a covered servicemember and leave taken to care for

1 a family member with a serious health condition
2 during the single 12-month period described in para-
3 graph (e) of this section must not be designated and
4 counted as both leave to care for a covered service-
5 member and leave to care for a family member with
6 a serious health condition. As is the case with leave
7 taken for other qualifying reasons, employing offices
8 may retroactively designate leave as leave to care for
9 a covered servicemember pursuant to 825.301(d).

10 “(f) Spouses who are eligible for FMLA leave and
11 are employed by the same covered employing office may
12 be limited to a combined total of 26 workweeks of leave
13 during the single 12-month period described in paragraph
14 (e) of this section if the leave is taken for birth of the
15 employee’s son or daughter or to care for the child after
16 birth, for placement of a son or daughter with the em-
17 ployee for adoption or foster care, or to care for the child
18 after placement, to care for the employee’s parent with
19 a serious health condition, or to care for a covered service-
20 member with a serious injury or illness. This limitation
21 on the total weeks of leave applies to leave taken for the
22 reasons specified as long as the spouses are employed by
23 the same employing office. It would apply, for example,
24 even though the spouses are employed at two different
25 worksites. On the other hand, if one spouse is ineligible

1 for FMLA leave, the other spouse would be entitled to a
2 full 26 workweeks of FMLA leave.

3 **“Subpart B—Employee Leave Entitlements Under**
4 **The Family And Medical Leave Act, As Made Ap-**
5 **plicable By The Congressional Accountability**
6 **Act**

7 **“§ 825.200 Amount of leave**

8 “(a) Except in the case of leave to care for a covered
9 servicemember with a serious injury or illness, an eligible
10 employee’s FMLA leave entitlement is limited to a total
11 of 12 workweeks of leave during any 12-month period for
12 any one, or more, of the following reasons:

13 “(1) The birth of the employee’s son or daugh-
14 ter, and to care for the newborn child;

15 “(2) The placement with the employee of a son
16 or daughter for adoption or foster care, and to care
17 for the newly placed child;

18 “(3) To care for the employee’s spouse, son,
19 daughter, or parent with a serious health condition;

20 “(4) Because of a serious health condition that
21 makes the employee unable to perform one or more
22 of the essential functions of his or her job; and

23 “(5) Because of any qualifying exigency arising
24 out of the fact that the employee’s spouse, son,
25 daughter, or parent is a military member on covered

1 active duty status (or has been notified of an im-
2 pending call or order to covered active duty).

3 “(b) An employing office is permitted to choose any
4 one of the following methods for determining the 12-
5 month period in which the 12 weeks of leave entitlement
6 described in paragraph (a) of this section occurs:

7 “(1) The calendar year;

8 “(2) Any fixed 12-month leave year, such as a
9 fiscal year or a year starting on an employee’s anni-
10 versary date;

11 “(3) The 12-month period measured forward
12 from the date any employee’s first FMLA leave
13 under paragraph (a) begins; or

14 “(4) A ‘rolling’ 12-month period measured
15 backward from the date an employee uses any
16 FMLA leave as described in paragraph (a).

17 “(c) Under methods in paragraphs (b)(1) and (b)(2)
18 of this section an employee would be entitled to up to 12
19 weeks of FMLA leave at any time in the fixed 12-month
20 period selected. An employee could, therefore, take 12
21 weeks of leave at the end of the year and 12 weeks at
22 the beginning of the following year. Under the method in
23 paragraph (b)(3) of this section, an employee would be
24 entitled to 12 weeks of leave during the year beginning
25 on the first date FMLA leave is taken; the next 12-month

1 period would begin the first time FMLA leave is taken
2 after completion of any previous 12-month period. Under
3 the method in paragraph (b)(4) of this section, the ‘roll-
4 ing’ 12-month period, each time an employee takes FMLA
5 leave the remaining leave entitlement would be any bal-
6 ance of the 12 weeks which has not been used during the
7 immediately preceding 12 months. For example, if an em-
8 ployee has taken eight weeks of leave during the past 12
9 months, an additional four weeks of leave could be taken.
10 If an employee used four weeks beginning February 1,
11 2008, four weeks beginning June 1, 2008, and four weeks
12 beginning December 1, 2008, the employee would not be
13 entitled to any additional leave until February 1, 2009.
14 However, beginning on February 1, 2009, the employee
15 would again be eligible to take FMLA leave, recouping the
16 right to take the leave in the same manner and amounts
17 in which it was used in the previous year. Thus, the em-
18 ployee would recoup (and be entitled to use) one additional
19 day of FMLA leave each day for four weeks, commencing
20 February 1, 2009. The employee would also begin to re-
21 coup additional days beginning on June 1, 2009, and addi-
22 tional days beginning on December 1, 2009. Accordingly,
23 employing offices using the rolling 12-month period may
24 need to calculate whether the employee is entitled to take
25 FMLA leave each time that leave is requested, and em-

1 ployees taking FMLA leave on such a basis may fall in
2 and out of FMLA protection based on their FMLA usage
3 in the prior 12 months. For example, in the example
4 above, if the employee needs six weeks of leave for a seri-
5 ous health condition commencing February 1, 2009, only
6 the first four weeks of the leave would be FMLA-pro-
7 tected.

8 “(d)(1) Employing offices will be allowed to choose
9 any one of the alternatives in paragraph (b) of this section
10 for the leave entitlements described in paragraph (a) of
11 this section provided the alternative chosen is applied con-
12 sistently and uniformly to all employees. An employing of-
13 fice wishing to change to another alternative is required
14 to give at least 60 days’ notice to all employees, and the
15 transition must take place in such a way that the employ-
16 ees retain the full benefit of 12 weeks of leave under
17 whichever method affords the greatest benefit to the em-
18 ployee. Under no circumstances may a new method be im-
19 plemented in order to avoid the CAA’s FMLA leave re-
20 quirements.

21 “(2) **【Reserved】**

22 “(e) If an employing office fails to select one of the
23 options in paragraph (b) of this section for measuring the
24 12-month period for the leave entitlements described in
25 paragraph (a), the option that provides the most beneficial

1 outcome for the employee will be used. The employing of-
2 fice may subsequently select an option only by providing
3 the 60-day notice to all employees of the option the em-
4 ploying office intends to implement. During the running
5 of the 60-day period any other employee who needs FMLA
6 leave may use the option providing the most beneficial out-
7 come to that employee. At the conclusion of the 60-day
8 period the employing office may implement the selected
9 option.

10 “(f) An eligible employee’s FMLA leave entitlement
11 is limited to a total of 26 workweeks of leave during a
12 single 12-month period to care for a covered servicemem-
13 ber with a serious injury or illness. An employing office
14 shall determine the single 12- month period in which the
15 26 weeks of leave entitlement described in this paragraph
16 occurs using the 12-month period measured forward from
17 the date an employee’s first FMLA leave to care for the
18 covered servicemember begins. See 825.127(e)(1).

19 “(g) During the single 12-month period described in
20 paragraph (f), an eligible employee’s FMLA leave entitle-
21 ment is limited to a combined total of 26 workweeks of
22 FMLA leave for any qualifying reason. See 825.127(e)(3).

23 “(h) For purposes of determining the amount of leave
24 used by an employee, the fact that a holiday may occur
25 within the week taken as FMLA leave has no effect; the

1 week is counted as a week of FMLA leave. However, if
2 an employee is using FMLA leave in increments of less
3 than one week, the holiday will not count against the em-
4 ployee's FMLA entitlement unless the employee was oth-
5 erwise scheduled and expected to work during the holiday.
6 Similarly, if for some reason the employing office's busi-
7 ness activity has temporarily ceased and employees gen-
8 erally are not expected to report for work for one or more
9 weeks (e.g., a school closing two weeks for the Christmas/
10 New Year holiday or the summer vacation or an employing
11 office closing the office for repairs), the days the employ-
12 ing office's activities have ceased do not count against the
13 employee's FMLA leave entitlement. Methods for deter-
14 mining an employee's 12-week leave entitlement are also
15 described in 825.205.

16 “(i)(1) If employing offices jointly employ an em-
17 ployee, and if they designate a primary employing office
18 pursuant to 825.106(c), the primary employing office may
19 choose any one of the alternatives in paragraph (b) of this
20 section for measuring the 12-month period, provided that
21 the alternative chosen is applied consistently and uni-
22 formly to all employees of the primary employing office
23 including the jointly employed employee.

24 “(2) If employing offices fail to designate a pri-
25 mary employing office pursuant to 825.106(c), an

1 employee jointly employed by the employing offices
2 may, by so notifying one of the employing offices, se-
3 lect that employing office to be the primary employ-
4 ing office of the employee for purposes of the appli-
5 cation of paragraphs (d) and (e) of this section.

6 “(j) If, before beginning employment with an employ-
7 ing office, an employee had been employed by another em-
8 ploying office, the subsequent employing office may count
9 against the employee’s FMLA leave entitlement FMLA
10 leave taken from the prior employing office, so long as
11 the prior employing office properly designated the leave
12 as FMLA under these regulations or other applicable re-
13 quirements.

14 **“§ 825.201 Leave to care for a parent**

15 “(a) *General rule.* An eligible employee is entitled to
16 FMLA leave if needed to care for the employee’s parent
17 with a serious health condition. Care for parents-in-law
18 is not covered by the FMLA. See 825.122(c) for definition
19 of parent.

20 “(b) *Same employing office limitation.* Spouses who
21 are eligible for FMLA leave and are employed by the same
22 covered employing office may be limited to a combined
23 total of 12 weeks of leave during any 12-month period if
24 the leave is taken to care for the employee’s parent with
25 a serious health condition, for the birth of the employee’s

1 son or daughter or to care for the child after the birth,
2 or for placement of a son or daughter with the employee
3 for adoption or foster care or to care for the child after
4 placement. This limitation on the total weeks of leave ap-
5 plies to leave taken for the reasons specified as long as
6 the spouses are employed by the same employing office.
7 It would apply, for example, even though the spouses are
8 employed at two different worksites of an employing office.
9 On the other hand, if one spouse is ineligible for FMLA
10 leave, the other spouse would be entitled to a full 12 weeks
11 of FMLA leave. Where the spouses both use a portion of
12 the total 12-week FMLA leave entitlement for either the
13 birth of a child, for placement for adoption or foster care,
14 or to care for a parent, the spouses would each be entitled
15 to the difference between the amount he or she has taken
16 individually and 12 weeks for FMLA leave for other pur-
17 poses. For example, if each spouse took six weeks of leave
18 to care for a parent, each could use an additional six weeks
19 due to his or her own serious health condition or to care
20 for a child with a serious health condition. See also
21 825.127(d).

22 **“§ 825.202 Intermittent leave or reduced leave sched-**
23 **ule**

24 “(a) *Definition.* FMLA leave may be taken intermit-
25 tently or on a reduced leave schedule under certain cir-

1 cumstances. Intermittent leave is FMLA leave taken in
2 separate blocks of time due to a single qualifying reason.
3 A reduced leave schedule is a leave schedule that reduces
4 an employee's usual number of working hours per work-
5 week, or hours per workday. A reduced leave schedule is
6 a change in the employee's schedule for a period of time,
7 normally from full-time to part-time.

8 “(b) *Medical necessity*. For intermittent leave or leave
9 on a reduced leave schedule taken because of one's own
10 serious health condition, to care for a spouse, parent, son,
11 or daughter with a serious health condition, or to care for
12 a covered servicemember with a serious injury or illness,
13 there must be a medical need for leave and it must be
14 that such medical need can be best accommodated through
15 an intermittent or reduced leave schedule. The treatment
16 regimen and other information described in the certifi-
17 cation of a serious health condition and in the certification
18 of a serious injury or illness, if required by the employing
19 office, addresses the medical necessity of intermittent
20 leave or leave on a reduced leave schedule. See 825.306,
21 825.310. Leave may be taken intermittently or on a re-
22 duced leave schedule when medically necessary for planned
23 and/or unanticipated medical treatment of a serious health
24 condition or of a covered servicemember's serious injury
25 or illness, or for recovery from treatment or recovery from

1 a serious health condition or a covered servicemember's
2 serious injury or illness. It may also be taken to provide
3 care or psychological comfort to a covered family member
4 with a serious health condition or a covered servicemember
5 with a serious injury or illness.

6 “(1) Intermittent leave may be taken for a seri-
7 ous health condition of a spouse, parent, son, or
8 daughter, for the employee's own serious health con-
9 dition, or a serious injury or illness of a covered
10 servicemember which requires treatment by a health
11 care provider periodically, rather than for one con-
12 tinuous period of time, and may include leave of pe-
13 riods from an hour or more to several weeks. Exam-
14 ples of intermittent leave would include leave taken
15 on an occasional basis for medical appointments, or
16 leave taken several days at a time spread over a pe-
17 riod of six months, such as for chemotherapy. A
18 pregnant employee may take leave intermittently for
19 prenatal examinations or for her own condition, such
20 as for periods of severe morning sickness. An exam-
21 ple of an employee taking leave on a reduced leave
22 schedule is an employee who is recovering from a se-
23 rious health condition and is not strong enough to
24 work a full-time schedule.

1 “(2) Intermittent or reduced schedule leave
2 may be taken for absences where the employee or
3 family member is incapacitated or unable to perform
4 the essential functions of the position because of a
5 chronic serious health condition or a serious injury
6 or illness of a covered servicemember, even if he or
7 she does not receive treatment by a health care pro-
8 vider. See 825.113 and 825.127.

9 “(c) *Birth or placement.* When leave is taken after
10 the birth of a healthy child or placement of a healthy child
11 for adoption or foster care, an employee may take leave
12 intermittently or on a reduced leave schedule only if the
13 employing office agrees. Such a schedule reduction might
14 occur, for example, where an employee, with the employing
15 office’s agreement, works part-time after the birth of a
16 child, or takes leave in several segments. The employing
17 office’s agreement is not required, however, for leave dur-
18 ing which the expectant mother has a serious health condi-
19 tion in connection with the birth of her child or if the new-
20 born child has a serious health condition. See 825.204 for
21 rules governing transfer to an alternative position that
22 better accommodates intermittent leave. See also 825.120
23 (pregnancy) and 825.121 (adoption and foster care).

1 “(d) *Qualifying exigency*. Leave due to a qualifying
 2 exigency may be taken on an intermittent or reduced leave
 3 schedule basis.

4 **“§ 825.203 Scheduling of intermittent or reduced**
 5 **schedule leave**

6 “Eligible employees may take FMLA leave on an
 7 intermittent or reduced schedule basis when medically nec-
 8 essary due to the serious health condition of a covered
 9 family member or the employee or the serious injury or
 10 illness of a covered servicemember. See 825.202. Eligible
 11 employees may also take FMLA leave on an intermittent
 12 or reduced schedule basis when necessary because of a
 13 qualifying exigency. If an employee needs leave intermit-
 14 tently or on a reduced leave schedule for planned medical
 15 treatment, then the employee must make a reasonable ef-
 16 fort to schedule the treatment so as not to disrupt unduly
 17 the employing office’s operations.

18 **“§ 825.204 Transfer of an employee to an alternative**
 19 **position during intermittent leave or re-**
 20 **duced schedule leave**

21 “(a) *Transfer or reassignment*. If an employee needs
 22 intermittent leave or leave on a reduced leave schedule
 23 that is foreseeable based on planned medical treatment for
 24 the employee, a family member, or a covered servicemem-
 25 ber, including during a period of recovery from one’s own

1 serious health condition, a serious health condition of a
2 spouse, parent, son, or daughter, or a serious injury or
3 illness of a covered servicemember, or if the employing of-
4 fice agrees to permit intermittent or reduced schedule
5 leave for the birth of a child or for placement of a child
6 for adoption or foster care, the employing office may re-
7 quire the employee to transfer temporarily, during the pe-
8 riod the intermittent or reduced leave schedule is required,
9 to an available alternative position for which the employee
10 is qualified and which better accommodates recurring peri-
11 ods of leave than does the employee's regular position. See
12 825.601 for special rules applicable to instructional em-
13 ployees of schools.

14 “(b) *Compliance*. Transfer to an alternative position
15 may require compliance with any applicable collective bar-
16 gaining agreement and Federal law (such as the Ameri-
17 cans with Disabilities Act, as made applicable by the
18 CAA). Transfer to an alternative position may include al-
19 tering an existing job to better accommodate the employ-
20 ee's need for intermittent or reduced scheduled leave.

21 “(c) *Equivalent pay and benefits*. The alternative po-
22 sition must have equivalent pay and benefits. An alter-
23 native position for these purposes does not have to have
24 equivalent duties. The employing office may increase the
25 pay and benefits of an existing alternative position, so as

1 to make them equivalent to the pay and benefits of the
2 employee's regular job. The employing office may also
3 transfer the employee to a part-time job with the same
4 hourly rate of pay and benefits, provided the employee is
5 not required to take more leave than is medically nec-
6 essary. For example, an employee desiring to take leave
7 in increments of four hours per day could be transferred
8 to a half-time job, or could remain in the employee's same
9 job on a part-time schedule, paying the same hourly rate
10 as the employee's previous job and enjoying the same ben-
11 efits. The employing office may not eliminate benefits
12 which otherwise would not be provided to part-time em-
13 ployees; however, an employing office may proportionately
14 reduce benefits such as vacation leave where an employing
15 office's normal practice is to base such benefits on the
16 number of hours worked.

17 “(d) *Employing office limitations.* An employing of-
18 fice may not transfer the employee to an alternative posi-
19 tion in order to discourage the employee from taking leave
20 or otherwise work a hardship on the employee. For exam-
21 ple, a white collar employee may not be assigned to per-
22 form laborer's work; an employee working the day shift
23 may not be reassigned to the graveyard shift; an employee
24 working in the headquarters facility may not be reassigned
25 to a branch a significant distance away from the employ-

1 ee's normal job location. Any such attempt on the part
2 of the employing office to make such a transfer will be
3 held to be contrary to the prohibited acts provisions of
4 the FMLA, as made applicable by the CAA.

5 “(e) *Reinstatement of employee.* When an employee
6 who is taking leave intermittently or on a reduced leave
7 schedule and has been transferred to an alternative posi-
8 tion no longer needs to continue on leave and is able to
9 return to full-time work, the employee must be placed in
10 the same or equivalent job as the job he or she left when
11 the leave commenced. An employee may not be required
12 to take more leave than necessary to address the cir-
13 cumstance that precipitated the need for leave.

14 **“§ 825.205 Increments of fmla leave for intermittent**
15 **or reduced schedule leave**

16 “(a) *Minimum increment.* (1) When an employee
17 takes FMLA leave on an intermittent or reduced leave
18 schedule basis, the employing office must account for the
19 leave using an increment no greater than the shortest pe-
20 riod of time that the employing office uses to account for
21 use of other forms of leave provided that it is not greater
22 than one hour and provided further that an employee's
23 FMLA leave entitlement may not be reduced by more than
24 the amount of leave actually taken. An employing office
25 may not require an employee to take more leave than is

1 necessary to address the circumstances that precipitated
2 the need for the leave, provided that the leave is counted
3 using the shortest increment of leave used to account for
4 any other type of leave. See also 825.205(a)(2) for the
5 physical impossibility exception, and 825.600 and 825.601
6 for special rules applicable to employees of schools. If an
7 employing office uses different increments to account for
8 different types of leave, the employing office must account
9 for FMLA leave in the smallest increment used to account
10 for any other type of leave. For example, if an employing
11 office accounts for the use of annual leave in increments
12 of one hour and the use of sick leave in increments of
13 one-half hour, then FMLA leave use must be accounted
14 for using increments no larger than one-half hour. If an
15 employing office accounts for use of leave in varying incre-
16 ments at different times of the day or shift, the employing
17 office may also account for FMLA leave in varying incre-
18 ments, provided that the increment used for FMLA leave
19 is no greater than the smallest increment used for any
20 other type of leave during the period in which the FMLA
21 leave is taken. If an employing office accounts for other
22 forms of leave use in increments greater than one hour,
23 the employing office must account for FMLA leave use
24 in increments no greater than one hour. An employing of-
25 fice may account for FMLA leave in shorter increments

1 than used for other forms of leave. For example, an em-
2 ploying office that accounts for other forms of leave in
3 one hour increments may account for FMLA leave in a
4 shorter increment when the employee arrives at work sev-
5 eral minutes late, and the employing office wants the em-
6 ployee to begin work immediately. Such accounting for
7 FMLA leave will not alter the increment considered to be
8 the shortest period used to account for other forms of
9 leave or the use of FMLA leave in other circumstances.
10 In all cases, employees may not be charged FMLA leave
11 for periods during which they are working.

12 “(2) Where it is physically impossible for an
13 employee using intermittent leave or working a re-
14 duced leave schedule to commence or end work mid-
15 way through a shift, such as where a flight attend-
16 ant or a railroad conductor is scheduled to work
17 aboard an airplane or train, or a laboratory em-
18 ployee is unable to enter or leave a sealed ‘clean
19 room’ during a certain period of time and no equiva-
20 lent position is available, the entire period that the
21 employee is forced to be absent is designated as
22 FMLA leave and counts against the employee’s
23 FMLA entitlement. The period of the physical im-
24 possibility is limited to the period during which the
25 employing office is unable to permit the employee to

1 work prior to a period of FMLA leave or return the
2 employee to the same or equivalent position due to
3 the physical impossibility after a period of FMLA
4 leave. See 825.214.

5 “(b) *Calculation of leave.* (1) When an employee takes
6 leave on an intermittent or reduced leave schedule, only
7 the amount of leave actually taken may be counted toward
8 the employee’s leave entitlement. The actual workweek is
9 the basis of leave entitlement. Therefore, if an employee
10 who would otherwise work 40 hours a week takes off eight
11 hours, the employee would use one-fifth ($1/5$) of a week
12 of FMLA leave. Similarly, if a full-time employee who
13 would otherwise work eight-hour days works four-hour
14 days under a reduced leave schedule, the employee would
15 use one half ($1/2$) week of FMLA leave each week. Where
16 an employee works a part-time schedule or variable hours,
17 the amount of FMLA leave that an employee uses is deter-
18 mined on a pro rata or proportional basis. If an employee
19 who would otherwise work 30 hours per week, but works
20 only 20 hours a week under a reduced leave schedule, the
21 employee’s 10 hours of leave would constitute one-third
22 ($1/3$) of a week of FMLA leave for each week the employee
23 works the reduced leave schedule. An employing office may
24 convert these fractions to their hourly equivalent so long
25 as the conversion equitably reflects the employee’s total

1 normally scheduled hours. An employee does not accrue
2 FMLA-protected leave at any particular hourly rate. An
3 eligible employee is entitled to up to a total of 12 work-
4 weeks of leave, or 26 workweeks in the case of military
5 caregiver leave, and the total number of hours contained
6 in those workweeks is necessarily dependent on the specific
7 hours the employee would have worked but for the use
8 of leave. See also 825.601 and 825.602 on special rules
9 for schools.

10 “(2) If an employing office has made a perma-
11 nent or long-term change in the employee’s schedule
12 (for reasons other than FMLA, and prior to the no-
13 tice of need for FMLA leave), the hours worked
14 under the new schedule are to be used for making
15 this calculation.

16 “(3) If an employee’s schedule varies from week
17 to week to such an extent that an employing office
18 is unable to determine with any certainty how many
19 hours the employee would otherwise have worked
20 (but for the taking of FMLA leave), a weekly aver-
21 age of the hours worked over the 12 months prior
22 to the beginning of the leave period (including any
23 hours for which the employee took leave of any type)
24 would be used for calculating the employee’s leave
25 entitlement.

1 “(c) *Overtime*. If an employee would normally be re-
2 quired to work overtime, but is unable to do so because
3 of a FMLA-qualifying reason that limits the employee’s
4 ability to work overtime, the hours which the employee
5 would have been required to work may be counted against
6 the employee’s FMLA entitlement. In such a case, the em-
7 ployee is using intermittent or reduced schedule leave. For
8 example, if an employee would normally be required to
9 work for 48 hours in a particular week, but due to a seri-
10 ous health condition the employee is unable to work more
11 than 40 hours that week, the employee would utilize eight
12 hours of FMLA-protected leave out of the 48-hour work-
13 week, or one-sixth (1/6) of a week of FMLA leave. Vol-
14 untary overtime hours that an employee does not work due
15 to an FMLA-qualifying reason may not be counted against
16 the employee’s FMLA leave entitlement.

17 **“§ 825.206 Interaction with the FLSA, as made appli-**
18 **cable by the congressional accountability**
19 **act**

20 “(a) Leave taken under FMLA, as made applicable
21 by the CAA, may be unpaid. If an employee is otherwise
22 exempt from minimum wage and overtime requirements
23 of the Fair Labor Standards Act (FLSA), as made appli-
24 cable by the CAA, and as exempt under regulations issued
25 by the Board, at part 541, providing unpaid FMLA-quali-

1 fying leave to such an employee will not cause the em-
2 ployee to lose the FLSA exemption. This means that
3 under regulations currently in effect, where an employee
4 meets the specified duties test, is paid on a salary basis,
5 and is paid a salary of at least the amount specified in
6 the regulations, the employing office may make deductions
7 from the employee’s salary for any hours taken as inter-
8 mittent or reduced FMLA leave within a workweek, with-
9 out affecting the exempt status of the employee.

10 “(b) For an employee paid in accordance with a fluc-
11 tuating workweek method of payment for overtime, where
12 permitted by section 203 of the CAA (2 U.S.C. 1313),
13 the employing office, during the period in which intermit-
14 tent or reduced schedule FMLA leave is scheduled to be
15 taken, may compensate an employee on an hourly basis
16 and pay only for the hours the employee works, including
17 time and one-half the employee’s regular rate for overtime
18 hours. The change to payment on an hourly basis would
19 include the entire period during which the employee is tak-
20 ing intermittent leave, including weeks in which no leave
21 is taken. The hourly rate shall be determined by dividing
22 the employee’s weekly salary by the employee’s normal or
23 average schedule of hours worked during weeks in which
24 FMLA leave is not being taken. If an employing office
25 chooses to follow this exception from the fluctuating work-

1 week method of payment, the employing office must do
2 so uniformly, with respect to all employees paid on a fluctuating
3 workweek basis for whom FMLA leave is taken
4 on an intermittent or reduced leave schedule basis. If an
5 employing office does not elect to convert the employee's
6 compensation to hourly pay, no deduction may be taken
7 for FMLA leave absences. Once the need for intermittent
8 or reduced scheduled leave is over, the employee may be
9 restored to payment on a fluctuating workweek basis.

10 “(c) This special exception to the salary basis require-
11 ments of the FLSA exemption or fluctuating workweek
12 payment requirements applies only to employees of covered
13 employing offices who are eligible for FMLA leave,
14 and to leave which qualifies as FMLA leave. Hourly or
15 other deductions which are not in accordance with the
16 Board's FLSA regulations at part 541 or with a permissible
17 fluctuating workweek method of payment for over-
18 time may not be taken, for example, where the employee
19 has not worked long enough to be eligible for FMLA leave
20 without potentially affecting the employee's eligibility for
21 exemption. Nor may deductions which are not permitted
22 by the Board's FLSA regulations at part 541 or by a permissible
23 fluctuating workweek method of payment for
24 overtime be taken from such an employee's salary for any
25 leave which does not qualify as FMLA leave, for example,

1 deductions from an employee’s pay for leave required
2 under an employing office’s policy or practice for a reason
3 which does not qualify as FMLA leave, e.g., leave to care
4 for a grandparent or for a medical condition which does
5 not qualify as a serious health condition or serious injury
6 or illness; or for leave which is more generous than pro-
7 vided by the FMLA, as made applicable by the CAA. Em-
8 ploying offices may comply with the employing office’s own
9 policy/practice under these circumstances and maintain
10 the employee’s eligibility for exemption or for the fluc-
11 tuating workweek method of pay by not taking hourly de-
12 ductions from the employee’s pay, in accordance with
13 FLSA requirements, as made applicable by the CAA, or
14 may take such deductions, treating the employee as an
15 hourly employee and pay overtime premium pay for hours
16 worked over 40 in a workweek.

17 **“§ 825.207 Substitution of paid leave, generally**

18 “(a) Generally, FMLA leave is unpaid leave. How-
19 ever, under the circumstances described in this section, the
20 FMLA, as made applicable by the CAA, permits an eligi-
21 ble employee to choose to substitute accrued paid leave
22 for unpaid FMLA leave. Subject to 825.208, if an em-
23 ployee does not choose to substitute accrued paid leave,
24 the employing office may require the employee to sub-
25 stitute accrued paid leave for unpaid FMLA leave. The

1 term substitute means that the paid leave provided by the
2 employing office, and accrued pursuant to established poli-
3 cies of the employing office, will run concurrently with the
4 unpaid FMLA leave. Accordingly, the employee receives
5 pay pursuant to the employing office's applicable paid
6 leave policy during the period of otherwise unpaid FMLA
7 leave. An employee's ability to substitute accrued paid
8 leave is determined by the terms and conditions of the em-
9 ploying office's normal leave policy. When an employee
10 chooses, or an employing office requires, substitution of
11 accrued paid leave, the employing office must inform the
12 employee that the employee must satisfy any procedural
13 requirements of the paid leave policy only in connection
14 with the receipt of such payment. See 825.300(c). If an
15 employee does not comply with the additional require-
16 ments in an employing office's paid leave policy, the em-
17 ployee is not entitled to substitute accrued paid leave, but
18 the employee remains entitled to take unpaid FMLA leave.
19 Employing offices may not discriminate against employees
20 on FMLA leave in the administration of their paid leave
21 policies.

22 “(b) If neither the employee nor the employing office
23 elects to substitute paid leave for unpaid FMLA leave
24 under the above conditions and circumstances, the em-
25 ployee will remain entitled to all the paid leave which is

1 earned or accrued under the terms of the employing of-
2 fice’s plan.

3 “(c) If an employee uses paid leave under cir-
4 cumstances which do not qualify as FMLA leave, the leave
5 will not count against the employee’s FMLA leave entitle-
6 ment. For example, paid sick leave used for a medical con-
7 dition which is not a serious health condition or serious
8 injury or illness does not count against the employee’s
9 FMLA leave entitlement.

10 “(d) Leave taken pursuant to a disability leave plan
11 would be considered FMLA leave for a serious health con-
12 dition and counted in the leave entitlement permitted
13 under FMLA if it meets the criteria set forth above in
14 825.112 through 825.115. In such cases, the employing
15 office may designate the leave as FMLA leave and count
16 the leave against the employee’s FMLA leave entitlement.
17 Because leave pursuant to a disability benefit plan is not
18 unpaid, the provision for substitution of the employee’s ac-
19 crued paid leave is inapplicable, and neither the employee
20 nor the employing office may require the substitution of
21 paid leave. However, employing offices and employees may
22 agree to have paid leave supplement the disability plan
23 benefits, such as in the case where a plan only provides
24 replacement income for two-thirds of an employee’s salary.

1 “(e) The FMLA, as made applicable by the CAA,
2 provides that a serious health condition may result from
3 injury to the employee on or off the job. If the employing
4 office designates the leave as FMLA leave in accordance
5 with 825.300(d), the leave counts against the employee’s
6 FMLA leave entitlement. Because the workers’ compensa-
7 tion absence is not unpaid, the provision for substitution
8 of the employee’s accrued paid leave is not applicable, and
9 neither the employee nor the employing office may require
10 the substitution of paid leave. However, employing offices
11 and employees may agree, to have paid leave supplement
12 workers’ compensation benefits, such as in the case where
13 workers’ compensation only provides replacement income
14 for two-thirds of an employee’s salary. If the health care
15 provider treating the employee for the workers’ compensa-
16 tion injury certifies the employee is able to return to a
17 light duty job but is unable to return to the same or equiv-
18 alent job, the employee may decline the employing office’s
19 offer of a light duty job. As a result, the employee may
20 lose workers’ compensation payments, but is entitled to
21 remain on unpaid FMLA leave until the employee’s
22 FMLA leave entitlement is exhausted. As of the date
23 workers’ compensation benefits cease, the substitution
24 provision becomes applicable and either the employee may
25 elect or the employing office may require the use of ac-

1 accrued paid leave. See also 825.210(f), 825.216(d),
2 825.220(d), 825.307(a) and 825.702 (d)(1) and (2) re-
3 garding the relationship between workers' compensation
4 absences and FMLA leave.

5 “(f) Under the FLSA, as made applicable by the
6 CAA, an employing office always has the right to cash out
7 an employee's compensatory time or to require the em-
8 ployee to use the time. Therefore, if an employee requests
9 and is permitted to use accrued compensatory time to re-
10 ceive pay for time taken off for an FMLA reason, or if
11 the employing office requires such use pursuant to the
12 FLSA, the time taken may be counted against the employ-
13 ee's FMLA leave entitlement.

14 **“§ 825.208 Substitution of paid leave—special rule for**
15 **paid parental leave**

16 “(a) This section applies to births or placements oc-
17 ccurring on or after October 1, 2020.

18 “(b) This section provides the basis for determining
19 the periods of unpaid leave for which paid parental leave
20 or accrued paid leave may be substituted in connection
21 with:

22 “(1) The birth of a son or daughter, and to
23 care for the newborn child (See 825.120); or

1 “(2) The placement of a son or daughter with
2 the employee for adoption or foster care and the
3 care of such son or daughter (See 825.121);

4 “(c) *Leave connected to birth or placement.* For un-
5 paid leave described in paragraph (b) of this section, an
6 employee may elect to substitute—

7 “(1) Up to 12 workweeks of paid parental leave
8 in connection with the occurrence of a birth or place-
9 ment, and

10 “(2) Any additional paid annual, vacation, per-
11 sonal, family, medical, or sick leave provided by the
12 employing office to such employee.

13 “(d) *Leave entitlement.* Since an employee may use
14 only 12 weeks of unpaid FMLA leave in any 12-month
15 period under 825.200(a), any use of unpaid FMLA leave
16 not associated with paid parental leave may affect an em-
17 ployee’s ability to use the full 12 weeks of paid parental
18 leave within a single 12-month period. The specific
19 amount of paid parental leave available will depend on
20 when the employee uses various types of unpaid FMLA
21 leave relative to any 12-month period established under
22 825.200(b).

23 “(e) *Employee entitlement to substitute.* (1) An em-
24 ployee is entitled to substitute paid leave for leave without
25 pay as provided in paragraph (c) of this section.

1 “(2) An employing office may not require that
2 an employee first use all or any portion of the leave
3 described in subparagraph (c)(2) of this section be-
4 fore being allowed to use the leave described in sub-
5 paragraph (c)(1) of this section.

6 “(3) An employing office may not require an
7 employee to substitute paid leave for leave without
8 pay as described in subparagraph (c)(2) of this sec-
9 tion.

10 “(4) An employee may request to use annual,
11 vacation, personal, family, medical, or sick leave for
12 the reasons described in paragraph (b) of this sec-
13 tion without invoking family and medical leave, and,
14 in that case, the employing office exercises its nor-
15 mal authority with respect to approving or dis-
16 approving the timing of when the leave may be used.
17 If the employing office grants the leave request, it
18 must designate whether any leave granted is FMLA
19 leave, in accordance with sections 825.300 and
20 825.301.

21 “(f) *Notification by employee and retroactive substi-*
22 *tution.* (1) An employee must notify the employing office
23 of the employee’s election to substitute paid leave for leave
24 without pay under this section prior to the date such paid
25 leave commences (i.e., no retroactive substitution), except

1 as provided in paragraphs (f)(2) and (f)(3) of this section,
2 and provided such retroactive substitution does not violate
3 any applicable law or regulation.

4 “(2) An employee may retroactively substitute
5 paid leave for leave without pay as permitted in
6 paragraph (c) of this section, if the substitution is
7 made in conjunction with the retroactive granting of
8 leave without pay.

9 “(3) An employee may retroactively substitute
10 transferred (donated) annual leave for leave without
11 pay granted under this subpart.

12 “(g) *Pay during leave.* The pay an employee receives
13 when using paid parental leave shall be the same pay the
14 employee would receive if the employee were using annual
15 leave.

16 “(h) *Treatment of unused leave.* If an employee has
17 any unused balance of paid parental leave that remains
18 at the end of the 12-month period following the birth or
19 placement involved, the entitlement to the unused leave
20 elapses at that time. No payment may be made for unused
21 paid parental leave that has expired. Paid parental leave
22 may not be considered annual leave for purposes of mak-
23 ing a lump-sum payment for annual leave or for any other
24 purpose. The forfeiture of any unused balance of paid pa-
25 rental leave does not impact an employee’s ability to use

1 unpaid FMLA leave for other qualifying reasons, if eligible
2 pursuant to 825.110, 825.112 and 825.200.

3 “(i) *Employing office responsibilities.* An employing
4 office that has employees covered by this subpart is re-
5 sponsible for the proper administration of 825.208, includ-
6 ing the responsibility of informing employees of their enti-
7 tlements and obligations.

8 “(j) *Library of Congress.* The OCWR will defer to
9 supplemental regulations on paid parental leave issued by
10 the Library of Congress pursuant to the authority in sec-
11 tion 107 of the Family and Medical Leave Act of 1993,
12 provided those supplemental regulations are consistent
13 with the regulations in this subpart.

14 “(k) *Work obligation.* Paid parental leave under this
15 subpart shall apply without regard to:

16 “(1) the limitations in subparagraphs (E), (F),
17 or (G) of section 6382(d)(2) of title 5, United States
18 Code (requiring employees of executive branch agen-
19 cies to agree in writing to work for the executive
20 branch agency for at least 12 months after returning
21 from leave); or

22 “(2) the limitations in 825.213 (permitting em-
23 ploying offices to recover an amount equal to the
24 total amount of government contributions for main-

1 taining such employee’s health coverage if the em-
2 ployee fails to return from leave).

3 “(1) *Cases of employee incapacitation.* (1) If an em-
4 ploying office determines that an otherwise eligible em-
5 ployee who could have made an election for a past leave
6 period to substitute paid parental leave (as provided in
7 paragraph (c) of this section) was physically or mentally
8 incapable of doing so during that past period, the em-
9 ployee may, within 5 workdays of the employee’s return
10 to duty status, make an election to substitute paid paren-
11 tal leave for applicable unpaid FMLA leave under para-
12 graph (c) of this section on a retroactive basis, provided
13 such retroactive substitution does not violate any applica-
14 ble law or regulation. Such a retroactive election shall be
15 effective on the date that such an election would have been
16 effective if the employee had not been incapacitated at the
17 time.

18 “(2) If an employing office learns that an oth-
19 erwise eligible employee is physically or mentally in-
20 capable of making an election to substitute paid pa-
21 rental leave (as provided in 825.207), the employing
22 office must, upon the request of a personal rep-
23 resentative of the employee, provide conditional ap-
24 proval of substitution of paid parental leave for ap-
25 plicable unpaid FMLA leave on a prospective basis.

1 The conditional approval is based on the presump-
2 tion that the employee would have elected to sub-
3 stitute paid parental leave for the applicable unpaid
4 FMLA leave. An employee may, within 5 workdays
5 of the employee's return to duty status, request to
6 substitute other leave for the paid parental leave.

7 “(m) *Cases of multiple children born or placed in the*
8 *same time period.* (1) If an employee has multiple children
9 born or placed on the same day, the multiple-child birth/
10 placement event is considered to be a single event that
11 triggers a single entitlement of up to 12 weeks of paid
12 parental leave under paragraph (d) of this section.

13 “(2) If an employee has one or more children
14 born or placed during the 12-month period following
15 the date of an earlier birth or placement of a child
16 of the employee, the provisions of this subpart shall
17 be independently administered for each birth or
18 placement event.

19 **“§ 825.209 Maintenance of employee benefits**

20 “(a) During any FMLA leave, an employing office
21 must maintain the employee's coverage under the Federal
22 Employees Health Benefits Program or any group health
23 plan (as defined in the Internal Revenue Code of 1986
24 at 26 U.S.C. 5000(b)(1)) on the same conditions as cov-
25 erage would have been provided if the employee had been

1 continuously employed during the entire leave period. All
2 employing offices are subject to the requirements of the
3 FMLA, as made applicable by the CAA, to maintain
4 health coverage. The definition of group health plan is set
5 forth in 825.102. For purposes of FMLA, the term group
6 health plan shall not include an insurance program pro-
7 viding health coverage under which employees purchase in-
8 dividual policies from insurers provided that:

9 “(1) No contributions are made by the employ-
10 ing office;

11 “(2) Participation in the program is completely
12 voluntary for employees;

13 “(3) The sole functions of the employing office
14 with respect to the program are, without endorsing
15 the program, to permit the insurer to publicize the
16 program to employees, to collect premiums through
17 payroll deductions and to remit them to the insurer;

18 “(4) The employing office receives no consider-
19 ation in the form of cash or otherwise in connection
20 with the program, other than reasonable compensa-
21 tion, excluding any profit, for administrative services
22 actually rendered in connection with payroll deduc-
23 tion; and

1 “(5) The premium charged with respect to such
2 coverage does not increase in the event the employ-
3 ment relationship terminates.

4 “(b) The same group health plan benefits provided
5 to an employee prior to taking FMLA leave must be main-
6 tained during the FMLA leave. For example, if family
7 member coverage is provided to an employee, family mem-
8 ber coverage must be maintained during the FMLA leave.
9 Similarly, benefit coverage during FMLA leave for medical
10 care, surgical care, hospital care, dental care, eye care,
11 mental health counseling, substance abuse treatment, etc.,
12 must be maintained during leave if provided in an employ-
13 ing office’s group health plan, including a supplement to
14 a group health plan, whether or not provided through a
15 flexible spending account or other component of a cafe-
16 teria plan.

17 “(c) If an employing office provides a new health plan
18 or benefits or changes health benefits or plans while an
19 employee is on FMLA leave, the employee is entitled to
20 the new or changed plan/benefits to the same extent as
21 if the employee were not on leave. For example, if an em-
22 ploying office changes a group health plan so that dental
23 care becomes covered under the plan, an employee on
24 FMLA leave must be given the same opportunity as other
25 employees to receive (or obtain) the dental care coverage.

1 Any other plan changes (e.g., in coverage, premiums,
2 deductibles, etc.) which apply to all employees of the work-
3 force would also apply to an employee on FMLA leave.

4 “(d) Notice of any opportunity to change plans or
5 benefits must also be given to an employee on FMLA
6 leave. If the group health plan permits an employee to
7 change from single to family coverage upon the birth of
8 a child or otherwise add new family members, such a
9 change in benefits must be made available while an em-
10 ployee is on FMLA leave. If the employee requests the
11 changed coverage it must be provided by the employing
12 office.

13 “(e) An employee may choose not to retain group
14 health plan coverage during FMLA leave. However, when
15 an employee returns from leave, the employee is entitled
16 to be reinstated on the same terms as prior to taking the
17 leave, including family or dependent coverages, without
18 any qualifying period, physical examination, exclusion of
19 pre-existing conditions, etc. See 825.212(e).

20 “(f) Except as required by the Consolidated Omnibus
21 Budget Reconciliation Act of 1986 (COBRA) or 5 U.S.C.
22 8905a, whichever is applicable, and for key employees (as
23 discussed below), an employing office’s obligation to main-
24 tain health benefits during leave (and to restore the em-
25 ployee to the same or equivalent employment) under

1 FMLA ceases if and when the employment relationship
2 would have terminated if the employee had not taken
3 FMLA leave (e.g., if the employee’s position is eliminated
4 as part of a nondiscriminatory reduction in force and the
5 employee would not have been transferred to another posi-
6 tion); an employee informs the employing office of his or
7 her intent not to return from leave (including before start-
8 ing the leave if the employing office is so informed before
9 the leave starts); or the employee fails to return from leave
10 or continues on leave after exhausting his or her FMLA
11 leave entitlement in the 12-month period.

12 “(g) If a key employee (See 825.218) does not return
13 from leave when notified by the employing office that sub-
14 stantial or grievous economic injury will result from his
15 or her reinstatement, the employee’s entitlement to group
16 health plan benefits continues unless and until the em-
17 ployee advises the employing office that the employee does
18 not desire restoration to employment at the end of the
19 leave period, or the FMLA leave entitlement is exhausted,
20 or reinstatement is actually denied.

21 “(h) An employee’s entitlement to benefits other than
22 group health benefits during a period of FMLA leave (e.g.,
23 holiday pay) is to be determined by the employing office’s
24 established policy for providing such benefits when the em-

1 ployee is on other forms of leave (paid or unpaid, as appro-
2 priate).

3 **“§ 825.210 Employee payment of group health benefit**
4 **premiums**

5 “(a) Group health plan benefits must be maintained
6 on the same basis as coverage would have been provided
7 if the employee had been continuously employed during
8 the FMLA leave period. Therefore, any share of group
9 health plan premiums which had been paid by the em-
10 ployee prior to FMLA leave must continue to be paid by
11 the employee during the FMLA leave period. If premiums
12 are raised or lowered, the employee would be required to
13 pay the new premium rates. Maintenance of health insur-
14 ance policies which are not a part of the employing office’s
15 group health plan, as described in 825.209(a), are the sole
16 responsibility of the employee. The employee and the in-
17 surer should make necessary arrangements for payment
18 of premiums during periods of unpaid FMLA leave.

19 “(b) If the FMLA leave is substituted paid leave, the
20 employee’s share of premiums must be paid by the method
21 normally used during any paid leave, presumably as a pay-
22 roll deduction.

23 “(c) If FMLA leave is unpaid, the employing office
24 has a number of options for obtaining payment from the
25 employee. The employing office may require that payment

1 be made to the employing office or to the insurance car-
2 rier, but no additional charge may be added to the employ-
3 ee's premium payment for administrative expenses. The
4 employing office may require employees to pay their share
5 of premium payments in any of the following ways:

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

8 “(2) Payment would be due on the same sched-
9 ule as payments are made under COBRA or 5
10 U.S.C. 8905a, whichever is applicable;

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

13 “(4) The employing office's existing rules for
14 payment by employees on leave without pay would be
15 followed, provided that such rules do not require
16 prepayment (i.e., prior to the commencement of the
17 leave) of the premiums that will become due during
18 a period of unpaid FMLA leave or payment of high-
19 er premiums than if the employee had continued to
20 work instead of taking leave; or

21 “(5) Another system voluntarily agreed to be-
22 tween the employing office and the employee, which
23 may include prepayment of premiums (e.g., through
24 increased payroll deductions when the need for the
25 FMLA leave is foreseeable).

1 “(d) The employing office must provide the employee
2 with advance written notice of the terms and conditions
3 under which these payments must be made. See
4 825.300(c).

5 “(e) An employing office may not require more of an
6 employee using unpaid FMLA leave than the employing
7 office requires of other employees on leave without pay.

8 “(f) An employee who is receiving payments as a re-
9 sult of a workers’ compensation injury must make ar-
10 rangements with the employing office for payment of
11 group health plan benefits when simultaneously taking
12 FMLA leave. See 825.207(e).

13 **“§ 825.211 Maintenance of benefits under multi-em-**
14 **ployer health plans**

15 “(a) A multi-employer health plan is a plan to which
16 more than one employing office is required to contribute,
17 and which is maintained pursuant to one or more collective
18 bargaining agreements between employee organization(s)
19 and the employing offices.

20 “(b) An employing office under a multi-employer plan
21 must continue to make contributions on behalf of an em-
22 ployee using FMLA leave as though the employee had
23 been continuously employed, unless the plan contains an
24 explicit FMLA provision for maintaining coverage such as

1 through pooled contributions by all employing offices party
2 to the plan.

3 “(c) During the duration of an employee’s FMLA
4 leave, coverage by the group health plan, and benefits pro-
5 vided pursuant to the plan, must be maintained at the
6 level of coverage and benefits which were applicable to the
7 employee at the time FMLA leave commenced.

8 “(d) An employee using FMLA leave cannot be re-
9 quired to use banked hours or pay a greater premium than
10 the employee would have been required to pay if the em-
11 ployee had been continuously employed.

12 “(e) As provided in 825.209(f) of this part, group
13 health plan coverage must be maintained for an employee
14 on FMLA leave until:

15 “(1) The employee’s FMLA leave entitlement is
16 exhausted;

17 “(2) The employing office can show that the
18 employee would have been laid off and the employ-
19 ment relationship terminated; or

20 “(3) The employee provides unequivocal notice
21 of intent not to return to work.

22 **“§ 825.212 Employee failure to pay health plan pre-**
23 **mium payments**

24 “(a)(1) In the absence of an established employing
25 office policy providing a longer grace period, an employing

1 office's obligations to maintain health insurance coverage
2 cease under FMLA if an employee's premium payment is
3 more than 30 days late. In order to drop the coverage for
4 an employee whose premium payment is late, the employ-
5 ing office must provide written notice to the employee that
6 the payment has not been received. Such notice must be
7 mailed to the employee at least 15 days before coverage
8 is to cease, advising that coverage will be dropped on a
9 specified date at least 15 days after the date of the letter
10 unless the payment has been received by that date. If the
11 employing office has established policies regarding other
12 forms of unpaid leave that provide for the employing office
13 to cease coverage retroactively to the date the unpaid pre-
14 mium payment was due, the employing office may drop
15 the employee from coverage retroactively in accordance
16 with that policy, provided the 15-day notice was given. In
17 the absence of such a policy, coverage for the employee
18 may be terminated at the end of the 30-day grace period,
19 where the required 15-day notice has been provided.

20 “(2) An employing office has no obligation re-
21 garding the maintenance of a health insurance policy
22 which is not a group health plan. See 825.209(a).

23 “(3) All other obligations of an employing office
24 under FMLA would continue; for example, the em-

1 plying office continues to have an obligation to re-
2 instate an employee upon return from leave.

3 “(b) The employing office may recover the employee’s
4 share of any premium payments missed by the employee
5 for any FMLA leave period during which the employing
6 office maintains health coverage by paying the employee’s
7 share after the premium payment is missed.

8 “(c) If coverage lapses because an employee has not
9 made required premium payments, upon the employee’s
10 return from FMLA leave the employing office must still
11 restore the employee to coverage/benefits equivalent to
12 those the employee would have had if leave had not been
13 taken and the premium payment(s) had not been missed,
14 including family or dependent coverage. See
15 825.215(d)(1)–(5). In such case, an employee may not be
16 required to meet any qualification requirements imposed
17 by the plan, including any new preexisting condition wait-
18 ing period, to wait for an open season, or to pass a medical
19 examination to obtain reinstatement of coverage. If an em-
20 ploying office terminates an employee’s insurance in ac-
21 cordance with this section and fails to restore the employ-
22 ee’s health insurance as required by this section upon the
23 employee’s return, the employing office may be liable for
24 benefits lost by reason of the violation, for other actual
25 monetary losses sustained as a direct result of the viola-

1 tion, and for appropriate equitable relief tailored to the
2 harm suffered.

3 **“§ 825.213 Employing office recovery of benefit costs**

4 “(a) In addition to the circumstances discussed in
5 825.212(b), and subject to the exceptions provided in
6 825.208(k), an employing office may recover its share of
7 health plan premiums during a period of unpaid FMLA
8 leave from an employee if the employee fails to return to
9 work after the employee’s FMLA leave entitlement has
10 been exhausted or expires, unless the reason the employee
11 does not return is due to:

12 “(1) The continuation, recurrence, or onset of
13 either a serious health condition of the employee or
14 the employee’s family member, or a serious injury or
15 illness of a covered servicemember, which would oth-
16 erwise entitle the employee to leave under FMLA; or

17 “(2) Other circumstances beyond the employ-
18 ee’s control. Examples of other circumstances be-
19 yond the employee’s control are necessarily broad.
20 They include such situations as where a parent
21 chooses to stay home with a newborn child who has
22 a serious health condition; an employee’s spouse is
23 unexpectedly transferred to a job location more than
24 75 miles from the employee’s worksite; a relative or
25 individual other than a covered family member has

1 a serious health condition and the employee is need-
2 ed to provide care; the employee is laid off while on
3 leave; or, the employee is a key employee who de-
4 cides not to return to work upon being notified of
5 the employing office's intention to deny restoration
6 because of substantial and grievous economic injury
7 to the employing office's operations and is not rein-
8 stated by the employing office. Other circumstances
9 beyond the employee's control would not include a
10 situation where an employee desires to remain with
11 a parent in a distant city even though the parent no
12 longer requires the employee's care, or a parent
13 chooses not to return to work to stay home with a
14 well, newborn child.

15 “(3) When an employee fails to return to work
16 because of the continuation, recurrence, or onset of
17 either a serious health condition of the employee or
18 employee's family member, or a serious injury or ill-
19 ness of a covered servicemember, thereby precluding
20 the employing office from recovering its (share of)
21 health benefit premium payments made on the em-
22 ployee's behalf during a period of unpaid FMLA
23 leave, the employing office may require medical cer-
24 tification of the employee's or the family member's
25 serious health condition or the covered

1 servicemember’s serious injury or illness. Such cer-
2 tification is not required unless requested by the em-
3 ploying office. The cost of the certification shall be
4 borne by the employee, and the employee is not enti-
5 tled to be paid for the time or travel costs spent in
6 acquiring the certification. The employee is required
7 to provide medical certification in a timely manner
8 which, for purposes of this section, is within 30 days
9 from the date of the employing office’s request. For
10 purposes of medical certification, the employee may
11 use the optional forms developed for this purpose.
12 See 825.306(b), 825.310(e)–(d) and Forms A, B,
13 and F. If the employing office requests medical cer-
14 tification and the employee does not provide such
15 certification in a timely manner (within 30 days), or
16 the reason for not returning to work does not meet
17 the test of other circumstances beyond the employ-
18 ee’s control, the employing office may recover 100
19 percent of the health benefit premiums it paid dur-
20 ing the period of unpaid FMLA leave.

21 “(b) Under some circumstances an employing office
22 may elect to maintain other benefits, e.g., life insurance,
23 disability insurance, etc., by paying the employee’s (share
24 of) premiums during periods of unpaid FMLA leave. For
25 example, to ensure the employing office can meet its re-

1 sponsibilities to provide equivalent benefits to the em-
2 ployee upon return from unpaid FMLA leave, it may be
3 necessary that premiums be paid continuously to avoid a
4 lapse of coverage. If the employing office elects to main-
5 tain such benefits during the leave, at the conclusion of
6 leave, the employing office is entitled to recover only the
7 costs incurred for paying the employee's share of any pre-
8 miums whether or not the employee returns to work.

9 “(c) An employee who returns to work for at least
10 30 calendar days is considered to have returned to work.
11 An employee who transfers directly from taking FMLA
12 leave to retirement, or who retires during the first 30 days
13 after the employee returns to work, is deemed to have re-
14 turned to work.

15 “(d) When an employee elects or an employing office
16 requires paid leave to be substituted for FMLA leave, the
17 employing office may not recover its (share of) health in-
18 surance or other non-health benefit premiums for any pe-
19 riod of FMLA leave covered by paid leave. Because paid
20 leave provided under a plan covering temporary disabilities
21 (including workers' compensation) is not unpaid, recovery
22 of health insurance premiums does not apply to such paid
23 leave.

24 “(e) The amount that self-insured employing offices
25 may recover is limited to only the employing office's share

1 of allowable premiums as would be calculated under
2 COBRA, excluding the two percent fee for administrative
3 costs.

4 “(f) When an employee fails to return to work, any
5 health and non-health benefit premiums which this section
6 of the regulations permits an employing office to recover
7 are a debt owed by the non-returning employee to the em-
8 ploying office. The existence of this debt caused by the
9 employee’s failure to return to work does not alter the em-
10 ploying office’s responsibilities for health benefit coverage
11 and, under a self-insurance plan, payment of claims in-
12 curred during the period of FMLA leave. To the extent
13 recovery is allowed, the employing office may recover the
14 costs through deduction from any sums due to the em-
15 ployee (e.g., unpaid wages, vacation pay, etc.), provided
16 such deductions do not otherwise violate applicable wage
17 payment or other laws. Alternatively, the employing office
18 may initiate legal action against the employee to recover
19 such costs.

20 **“§ 825.214 Employee right to reinstatement**

21 “*General Rule.* On return from FMLA leave, an em-
22 ployee is entitled to be returned to the same position the
23 employee held when leave commenced, or to an equivalent
24 position with equivalent benefits, pay, and other terms and
25 conditions of employment. An employee is entitled to such

1 reinstatement even if the employee has been replaced or
2 his or her position has been restructured to accommodate
3 the employee's absence. See also 825.106(e) for the obliga-
4 tions of employing offices that are joint employers.

5 **“§ 825.215 Equivalent position**

6 “(a) *Equivalent position*. An equivalent position is
7 one that is virtually identical to the employee's former po-
8 sition in terms of pay, benefits, and working conditions,
9 including privileges, prerequisites, and status. It must in-
10 volve the same or substantially similar duties and respon-
11 sibilities, which must entail substantially equivalent skill,
12 effort, responsibility, and authority.

13 “(b) *Conditions to qualify*. If an employee is no longer
14 qualified for the position because of the employee's inabil-
15 ity to attend a necessary course, renew a license, etc., as
16 a result of the leave, the employee shall be given a reason-
17 able opportunity to fulfill those conditions upon return to
18 work.

19 “(c) *Equivalent Pay*. (1) An employee is entitled to
20 any unconditional pay increases which may have occurred
21 during the FMLA leave period, such as cost of living in-
22 creases. Pay increases conditioned upon seniority, length
23 of service, or work performed must be granted in accord-
24 ance with the employing office's policy or practice with re-
25 spect to other employees on an equivalent leave status for

1 a reason that does not qualify as FMLA leave. An em-
2 ployee is entitled to be restored to a position with the same
3 or equivalent pay premiums, such as a shift differential.
4 If an employee departed from a position averaging ten
5 hours of overtime (and corresponding overtime pay) each
6 week, an employee is ordinarily entitled to such a position
7 on return from FMLA leave.

8 “(2) Equivalent pay includes any bonus or pay-
9 ment, whether it is discretionary or non-discre-
10 tionary, made to employees consistent with the pro-
11 visions of paragraph (c)(1) of this section. However,
12 if a bonus or other payment is based on the achieve-
13 ment of a specified goal such as hours worked, prod-
14 ucts sold or perfect attendance, and the employee
15 has not met the goal due to FMLA leave, then the
16 payment may be denied, unless otherwise paid to
17 employees on an equivalent leave status for a reason
18 that does not qualify as FMLA leave. For example,
19 if an employee who used paid vacation leave for a
20 non-FMLA purpose would receive the payment, then
21 the employee who used paid vacation leave for an
22 FMLA-protected purpose also must receive the pay-
23 ment.

24 “(d) *Equivalent benefits*. Benefits include all benefits
25 provided or made available to employees by an employing

1 office, including group life insurance, health insurance,
2 disability insurance, sick leave, annual leave, educational
3 benefits, and pensions, regardless of whether such benefits
4 are provided by a practice or written policy of an employ-
5 ing office through an employee benefit plan.

6 “(1) At the end of an employee’s FMLA leave,
7 benefits must be resumed in the same manner and
8 at the same levels as provided when the leave began,
9 and subject to any changes in benefit levels that may
10 have taken place during the period of FMLA leave
11 affecting the entire work force, unless otherwise
12 elected by the employee. Upon return from FMLA
13 leave, an employee cannot be required to requalify
14 for any benefits the employee enjoyed before FMLA
15 leave began (including family or dependent cov-
16 erages). For example, if an employee was covered by
17 a life insurance policy before taking leave but is not
18 covered or coverage lapses during the period of un-
19 paid FMLA leave, the employee cannot be required
20 to meet any qualifications, such as taking a physical
21 examination, in order to requalify for life insurance
22 upon return from leave. Accordingly, some employ-
23 ing offices may find it necessary to modify life insur-
24 ance and other benefits programs in order to restore
25 employees to equivalent benefits upon return from

1 FMLA leave, make arrangements for continued pay-
2 ment of costs to maintain such benefits during un-
3 paid FMLA leave, or pay these costs subject to re-
4 covery from the employee on return from leave. See
5 825.213(b).

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

13 “(3) If, while on unpaid FMLA leave, an em-
14 ployee desires to continue life insurance, disability
15 insurance, or other types of benefits for which he or
16 she typically pays, the employing office is required
17 to follow established policies or practices for con-
18 tinuing such benefits for other instances of leave
19 without pay. If the employing office has no estab-
20 lished policy, the employee and the employing office
21 are encouraged to agree upon arrangements before
22 FMLA leave begins.

23 “(4) With respect to pension and other retire-
24 ment plans, any period of unpaid FMLA leave shall
25 not be treated as or counted toward a break in serv-

1 ice for purposes of vesting and eligibility to partici-
2 pate. Also, if the plan requires an employee to be
3 employed on a specific date in order to be credited
4 with a year of service for vesting, contributions or
5 participation purposes, an employee on unpaid
6 FMLA leave on that date shall be deemed to have
7 been employed on that date. However, unpaid
8 FMLA leave periods need not be treated as credited
9 service for purposes of benefit accrual, vesting and
10 eligibility to participate.

11 “(5) Employees on unpaid FMLA leave are to
12 be treated as if they continued to work for purposes
13 of changes to benefit plans. They are entitled to
14 changes in benefits plans, except those which may be
15 dependent upon seniority or accrual during the leave
16 period, immediately upon return from leave or to the
17 same extent they would have qualified if no leave
18 had been taken. For example if the benefit plan is
19 predicated on a pre-established number of hours
20 worked each year and the employee does not have
21 sufficient hours as a result of taking unpaid FMLA
22 leave, the benefit is lost. (In this regard, 825.209
23 addresses health benefits.)

24 “(e) *Equivalent terms and conditions of employment.*
25 An equivalent position must have substantially similar du-

1 ties, conditions, responsibilities, privileges, and status as
2 the employee's original position.

3 “(1) The employee must be reinstated to the
4 same or a geographically proximate worksite (i.e.,
5 one that does not involve a significant increase in
6 commuting time or distance) from where the em-
7 ployee had previously been employed. If the employ-
8 ee's original worksite has been closed, the employee
9 is entitled to the same rights as if the employee had
10 not been on leave when the worksite closed. For ex-
11 ample, if an employing office transfers all employees
12 from a closed worksite to a new worksite in a dif-
13 ferent city, the employee on leave is also entitled to
14 transfer under the same conditions as if he or she
15 had continued to be employed.

16 “(2) The employee is ordinarily entitled to re-
17 turn to the same shift or the same or an equivalent
18 work schedule.

19 “(3) The employee must have the same or an
20 equivalent opportunity for bonuses, and other simi-
21 lar discretionary and non-discretionary payments.

22 “(4) FMLA does not prohibit an employing of-
23 fice from accommodating an employee's request to
24 be restored to a different shift, schedule, or position
25 which better suits the employee's personal needs on

1 return from leave, or to offer a promotion to a bet-
2 ter position. However, an employee cannot be in-
3 duced by the employing office to accept a different
4 position against the employee's wishes.

5 “(f) *De minimis exception*. The requirement that an
6 employee be restored to the same or equivalent job with
7 the same or equivalent pay, benefits, and terms and condi-
8 tions of employment does not extend to de minimis, intan-
9 gible, or unmeasurable aspects of the job.

10 **“§ 825.216 Limitations on an employee's right to rein-**
11 **statement**

12 “(a) An employee has no greater right to reinstate-
13 ment or to other benefits and conditions of employment
14 than if the employee had been continuously employed dur-
15 ing the FMLA leave period. An employing office must be
16 able to show that an employee would not otherwise have
17 been employed at the time reinstatement is requested in
18 order to deny restoration to employment. For example:

19 “(1) If an employee is laid off during the course
20 of taking FMLA leave and employment is termi-
21 nated, the employing office's responsibility to con-
22 tinue FMLA leave, maintain group health plan bene-
23 fits and restore the employee ceases at the time the
24 employee is laid off, provided the employing office
25 has no continuing obligations under a collective bar-

1 gaining agreement or otherwise. An employing office
2 would have the burden of proving that an employee
3 would have been laid off during the FMLA leave pe-
4 riod and, therefore, would not be entitled to restora-
5 tion. Restoration to a job slated for lay-off when the
6 employee's original position is not would not meet
7 the requirements of an equivalent position.

8 “(2) If a shift has been eliminated, or overtime
9 has been decreased, an employee would not be enti-
10 tled to return to work that shift or the original over-
11 time hours upon restoration. However, if a position
12 on, for example, a night shift has been filled by an-
13 other employee, the employee is entitled to return to
14 the same shift on which employed before taking
15 FMLA leave.

16 “(3) If an employee was hired for a specific
17 term or only to perform work on a discrete project,
18 the employing office has no obligation to restore the
19 employee if the employment term or project is over
20 and the employing office would not otherwise have
21 continued to employ the employee. On the other
22 hand, if an employee was hired to perform work for
23 one employing office for a specific time period, and
24 after that time period has ended, the work was as-
25 signed to another employing office, the successor

1 employing office may be required to restore the em-
2 ployee if it is a successor employing office.

3 “(b) In addition to the circumstances explained
4 above, an employing office may deny job restoration to sal-
5 aried eligible employees (key employees, as defined in
6 825.217(c)), if such denial is necessary to prevent sub-
7 stantial and grievous economic injury to the operations of
8 the employing office; or may delay restoration to an em-
9 ployee who fails to provide a fitness-for-duty certificate to
10 return to work under the conditions described in 825.312.

11 “(c) If the employee is unable to perform an essential
12 function of the position because of a physical or mental
13 condition, including the continuation of a serious health
14 condition or an injury or illness also covered by workers’
15 compensation, the employee has no right to restoration to
16 another position under the FMLA. The employing office’s
17 obligations may, however, be governed by the Americans
18 with Disabilities Act (ADA), as amended and as made ap-
19 plicable by the CAA. See 825.702.

20 “(d) An employee who fraudulently obtains FMLA
21 leave from an employing office is not protected by the job
22 restoration or maintenance of health benefits provisions
23 of the FMLA, as made applicable by the CAA.

24 “(e) If the employing office has a uniformly-applied
25 policy governing outside or supplemental employment,

1 such a policy may continue to apply to an employee while
2 on FMLA leave. An employing office which does not have
3 such a policy may not deny benefits to which an employee
4 is entitled under FMLA, as made applicable by the CAA,
5 on this basis unless the FMLA leave was fraudulently ob-
6 tained as in paragraph (d) of this section.

7 **“§ 825.217 Key employee, general rule**

8 “(a) A key employee is a salaried FMLA-eligible em-
9 ployee who is among the highest paid 10 percent of all
10 the employees employed by the employing office within 75
11 miles of the employee’s worksite.

12 “(b) The term salaried means paid on a salary basis,
13 within the meaning of the Board’s FLSA regulations at
14 part 541, implementing section 203 of the CAA (2 U.S.C.
15 1313), regarding employees who may qualify as exempt
16 from the minimum wage and overtime requirements of the
17 FLSA, as made applicable by the CAA.

18 “(c) A key employee must be among the highest paid
19 10 percent of all the employees—both salaried and non-
20 salaried, eligible and ineligible—who are employed by the
21 employing office within 75 miles of the worksite.

22 “(1) In determining which employees are
23 among the highest paid 10 percent, year-to-date
24 earnings are divided by weeks worked by the em-
25 ployee (including weeks in which paid leave was

1 taken). Earnings include wages, premium pay, in-
2 centive pay, and non-discretionary and discretionary
3 bonuses. Earnings do not include incentives whose
4 value is determined at some future date, e.g., bene-
5 fits or prerequisites.

6 “(2) The determination of whether a salaried
7 employee is among the highest paid 10 percent shall
8 be made at the time the employee gives notice of the
9 need for leave. No more than 10 percent of the em-
10 ploying office’s employees within 75 miles of the
11 worksite may be key employees.

12 **“§ 825.218 Substantial and grievous economic injury**

13 “(a) In order to deny restoration to a key employee,
14 an employing office must determine that the restoration
15 of the employee to employment will cause substantial and
16 grievous economic injury to the operations of the employ-
17 ing office, not whether the absence of the employee will
18 cause such substantial and grievous injury.

19 “(b) An employing office may take into account its
20 ability to replace on a temporary basis (or temporarily do
21 without) the employee on FMLA leave. If permanent re-
22 placement is unavoidable, the cost of then reinstating the
23 employee can be considered in evaluating whether substan-
24 tial and grievous economic injury will occur from restora-
25 tion; in other words, the effect on the operations of the

1 employing office of reinstating the employee in an equiva-
2 lent position.

3 “(c) A precise test cannot be set for the level of hard-
4 ship or injury to the employing office which must be sus-
5 tained. If the reinstatement of a key employee threatens
6 the economic viability of the employing office, that would
7 constitute substantial and grievous economic injury. A
8 lesser injury which causes substantial, long-term economic
9 injury would also be sufficient. Minor inconveniences and
10 costs that the employing office would experience in the
11 normal course would certainly not constitute substantial
12 and grievous economic injury.

13 “(d) FMLA’s substantial and grievous economic in-
14 jury standard is different from and more stringent than
15 the undue hardship test under the ADA, as made applica-
16 ble by the CAA. See also 825.702.

17 **“§ 825.219 Rights of a key employee**

18 “(a) An employing office that believes that reinstatement
19 may be denied to a key employee, must give written
20 notice to the employee at the time the employee gives notice
21 of the need for FMLA leave (or when FMLA leave
22 commences, if earlier) that he or she qualifies as a key
23 employee. At the same time, the employing office must
24 also fully inform the employee of the potential consequences
25 with respect to reinstatement and maintenance

1 of health benefits if the employing office should determine
2 that substantial and grievous economic injury to the em-
3 ploying office's operations will result if the employee is re-
4 instated from FMLA leave. If such notice cannot be given
5 immediately because of the need to determine whether the
6 employee is a key employee, it shall be given as soon as
7 practicable after being notified of a need for leave (or the
8 commencement of leave, if earlier). It is expected that in
9 most circumstances there will be no desire that an em-
10 ployee be denied restoration after FMLA leave and, there-
11 fore, there would be no need to provide such notice. How-
12 ever, an employing office who fails to provide such timely
13 notice will lose its right to deny restoration even if sub-
14 stantial and grievous economic injury will result from rein-
15 statement.

16 “(b) As soon as an employing office makes a good
17 faith determination, based on the facts available, that sub-
18 stantial and grievous economic injury to its operations will
19 result if a key employee who has given notice of the need
20 for FMLA leave or is using FMLA leave is reinstated, the
21 employing office shall notify the employee in writing of
22 its determination, that it cannot deny FMLA leave, and
23 that it intends to deny restoration to employment on com-
24 pletion of the FMLA leave. It is anticipated that an em-
25 ploying office will ordinarily be able to give such notice

1 prior to the employee starting leave. The employing office
2 must serve this notice either in person or by certified mail.
3 This notice must explain the basis for the employing of-
4 fice’s finding that substantial and grievous economic in-
5 jury will result, and, if leave has commenced, must provide
6 the employee a reasonable time in which to return to work,
7 taking into account the circumstances, such as the length
8 of the leave and the urgency of the need for the employee
9 to return.

10 “(c) If an employee on leave does not return to work
11 in response to the employing office’s notification of intent
12 to deny restoration, the employee continues to be entitled
13 to maintenance of health benefits and the employing office
14 may not recover its cost of health benefit premiums. A
15 key employee’s rights under FMLA continue unless and
16 until the employee either gives notice that he or she no
17 longer wishes to return to work, or the employing office
18 actually denies reinstatement at the conclusion of the leave
19 period.

20 “(d) After notice to an employee has been given that
21 substantial and grievous economic injury will result if the
22 employee is reinstated to employment, an employee is still
23 entitled to request reinstatement at the end of the leave
24 period even if the employee did not return to work in re-
25 sponse to the employing office’s notice. The employing of-

1 fice must then again determine whether there will be sub-
2 stantial and grievous economic injury from reinstatement,
3 based on the facts at that time. If it is determined that
4 substantial and grievous economic injury will result, the
5 employing office shall notify the employee in writing (in
6 person or by certified mail) of the denial of restoration.

7 **“§ 825.220 Protection for employees who request**
8 **leave or otherwise assert FMLA rights**

9 “(a) The FMLA, as made applicable by the CAA,
10 prohibits interference with an employee’s rights under the
11 law, and with legal proceedings or inquiries relating to an
12 employee’s rights. More specifically, the law contains the
13 following employee protections:

14 “(1) An employing office is prohibited from
15 interfering with, restraining, or denying the exercise
16 of (or attempts to exercise) any rights provided by
17 the FMLA, as made applicable by the CAA.

18 “(2) An employing office is prohibited from dis-
19 charging or in any other way discriminating against
20 any covered employee (whether or not an eligible em-
21 ployee) for opposing or complaining about any un-
22 lawful practice under the FMLA, as made applicable
23 by the CAA.

24 “(3) All employing offices are prohibited from
25 discharging or in any other way discriminating

1 against any covered employee (whether or not an eli-
2 gible employee) because that covered employee has—

3 “(A) Filed any claim, or has instituted (or
4 caused to be instituted) any proceeding under
5 or related to the FMLA, as made applicable by
6 the CAA;

7 “(B) Given, or is about to give, any infor-
8 mation in connection with an inquiry or pro-
9 ceeding relating to a right under the FMLA, as
10 made applicable by the CAA;

11 “(C) Testified, or is about to testify, in
12 any inquiry or proceeding relating to a right
13 under the FMLA, as made applicable by the
14 CAA.

15 “(b) Any violations of the FMLA, as made applicable
16 by the CAA, or of these regulations constitute interfering
17 with, restraining, or denying the exercise of rights pro-
18 vided by the FMLA, as made applicable by the CAA. An
19 employing office may be liable for compensation and bene-
20 fits lost by reason of the violation, for other actual mone-
21 tary losses sustained as a direct result of the violation,
22 and for appropriate equitable or other relief, including em-
23 ployment, reinstatement, promotion, or any other relief
24 tailored to the harm suffered. See 825.400(b). Interfering
25 with the exercise of an employee’s rights would include,

1 for example, not only refusing to authorize FMLA leave,
2 but discouraging an employee from using such leave. It
3 would also include manipulation by a covered employing
4 office to avoid responsibilities under FMLA, for example:

5 “(1) **Reserved**”

6 “(2) Changing the essential functions of the job
7 in order to preclude the taking of leave; or

8 “(3) Reducing hours available to work in order
9 to avoid employee eligibility.

10 “(c) The FMLA’s prohibition against interference
11 prohibits an employing office from discriminating or re-
12 taliating against an employee or prospective employee for
13 having exercised or attempted to exercise FMLA rights.
14 For example, if an employee on leave without pay would
15 otherwise be entitled to full benefits (other than health
16 benefits), the same benefits would be required to be pro-
17 vided to an employee on unpaid FMLA leave. By the same
18 token, employing offices cannot use the taking of FMLA
19 leave as a negative factor in employment actions, such as
20 hiring, promotions or disciplinary actions; nor can FMLA
21 leave be counted under no fault attendance policies. See
22 825.215.

23 “(d) Employees cannot waive, nor may employing of-
24 fices induce employees to waive, their rights under FMLA.
25 For example, employees (or their collective bargaining rep-

1 representatives) cannot trade off the right to take FMLA
2 leave against some other benefit offered by the employing
3 office. Except for settlement agreements covered by 1414
4 and/or 1415 of the Congressional Accountability Act, this
5 does not prevent the settlement or release of FMLA claims
6 by employees based on past employing office conduct with-
7 out the approval of the Office of Congressional Workplace
8 Rights or a court. Nor does it prevent an employee's vol-
9 untary and uncoerced acceptance (not as a condition of
10 employment) of a light duty assignment while recovering
11 from a serious health condition. See 825.702(d). An em-
12 ployee's acceptance of such light duty assignment does not
13 constitute a waiver of the employee's prospective rights,
14 including the right to be restored to the same position the
15 employee held at the time the employee's FMLA leave
16 commenced or to an equivalent position. The employee's
17 right to restoration, however, ceases at the end of the ap-
18 plicable 12-month FMLA leave year.

19 “(e) Covered employees, and not merely eligible em-
20 ployees, are protected from retaliation for opposing (e.g.,
21 filing a complaint about) any practice which is unlawful
22 under the FMLA, as made applicable by the CAA. They
23 are similarly protected if they oppose any practice which
24 they reasonably believe to be a violation of the FMLA,
25 as made applicable by the CAA, or regulations.

1 **“Subpart C—Employee and Employing Office Rights**
2 **and Obligations Under The FMLA, As Made Ap-**
3 **plicable by the CAA**

4 **“§ 825.300 Employing office notice requirements**

5 “(a)(1) If an employing office has any eligible em-
6 ployees and has any written guidance to employees con-
7 cerning employee benefits or leave rights, such as in an
8 employee handbook, information concerning both entitle-
9 ments and employee obligations under the FMLA, as
10 made applicable by the CAA, must be included in the
11 handbook or other document. For example, if an employ-
12 ing office provides an employee handbook to all employees
13 that describes the employing office’s policies regarding
14 leave, wages, attendance, and similar matters, the hand-
15 book must incorporate information on FMLA rights and
16 responsibilities and the employing office’s policies regard-
17 ing the FMLA, as made applicable by the CAA. Informa-
18 tional publications describing the provisions of the FMLA,
19 as made applicable by the CAA, are available from the
20 Office of Congressional Workplace Rights and may be in-
21 corporated in such employing office handbooks or written
22 policies.

23 “(2) If such an employing office does not have
24 written policies, manuals, or handbooks describing
25 employee benefits and leave provisions, the employ-
26 ing office shall provide written guidance to an em-

1 ployee concerning all the employee’s rights and obli-
2 gations under the FMLA, as made applicable by the
3 CAA. This notice shall be provided to employees
4 each time notice is given pursuant to paragraph (c),
5 and in accordance with the provisions of that para-
6 graph. Employing offices may duplicate and provide
7 the employee a copy of the FMLA Fact Sheet avail-
8 able from the Office of Congressional Workplace
9 Rights to provide such guidance.

10 “(b) *Eligibility notice.* (1) When an employee re-
11 quests FMLA leave, or when the employing office acquires
12 knowledge that an employee’s leave may be for an FMLA-
13 qualifying reason, the employing office must notify the
14 employee of the employee’s eligibility to take FMLA leave
15 within five business days, absent extenuating cir-
16 cumstances. See 825.110 for definition of an eligible em-
17 ployee. Employee eligibility is determined (and notice must
18 be provided) at the commencement of the first instance
19 of leave for each FMLA-qualifying reason in the applicable
20 12-month period. See 825.127(c) and 825.200(b). All
21 FMLA absences for the same qualifying reason are consid-
22 ered a single leave and employee eligibility as to that rea-
23 son for leave does not change during the applicable 12-
24 month period.

1 “(2) The eligibility notice must state whether
2 the employee is eligible for FMLA leave as defined
3 in 825.110. If the employee is not eligible for FMLA
4 leave, the notice must state at least one reason why
5 the employee is not eligible, including as applicable
6 the number of months the employee has been em-
7 ployed by the employing office and the hours of serv-
8 ice with the employing office during the 12-month
9 period. Notification of eligibility may be oral or in
10 writing; employing offices may use Form C to pro-
11 vide such notification to employees.

12 “(3) If, at the time an employee provides notice
13 of a subsequent need for FMLA leave during the ap-
14 plicable 12-month period due to a different FMLA-
15 qualifying reason, and the employee’s eligibility sta-
16 tus has not changed, no additional eligibility notice
17 is required. If, however, the employee’s eligibility
18 status has changed (e.g., if the employee has not
19 met the hours of service requirement in the 12
20 months preceding the commencement of leave for
21 the subsequent qualifying reason), the employing of-
22 fice must notify the employee of the change in eligi-
23 bility status within five business days, absent ex-
24 tenuating circumstances.

1 “(c) *Rights and responsibilities notice.* (1) Employing
2 offices shall provide written notice detailing the specific
3 expectations and obligations of the employee and explain-
4 ing any consequences of a failure to meet these obliga-
5 tions. This notice shall be provided to the employee each
6 time the eligibility notice is provided pursuant to para-
7 graph (b) of this section. If leave has already begun, the
8 notice should be mailed to the employee’s address of
9 record. Such specific notice must include, as appropriate:

10 “(A) That the leave may be designated and
11 counted against the employee’s annual FMLA
12 leave entitlement if qualifying (See 825.300(c)
13 and 825.301) and the applicable 12-month pe-
14 riod for FMLA entitlement (See 825.127(c),
15 825.200(b), (f), and (g));

16 “(B) Any requirements for the employee to
17 furnish certification of a serious health condi-
18 tion, serious injury or illness, or qualifying exi-
19 gency arising out of covered active duty or call
20 to covered active duty status, and the con-
21 sequences of failing to do so (See 825.305,
22 825.309, 825.310, 825.313);

23 “(C) If applicable, the employee’s right to
24 substitute paid parental leave for unpaid FMLA
25 leave for a birth or placement (See 825.208)

1 and the employee's right to substitute paid
2 leave generally, whether the employing office
3 will require the substitution of paid leave, the
4 conditions related to any substitution, and the
5 employee's entitlement to take unpaid FMLA
6 leave if the employee does not meet the condi-
7 tions for paid leave (See 825.207);

8 “(D) Any requirement for the employee to
9 make any premium payments to maintain
10 health benefits and the arrangements for mak-
11 ing such payments (See 825.210), and the pos-
12 sible consequences of failure to make such pay-
13 ments on a timely basis (i.e., the circumstances
14 under which coverage may lapse);

15 “(E) The employee's status as a key em-
16 ployee and the potential consequence that res-
17 toration may be denied following FMLA leave,
18 explaining the conditions required for such de-
19 nial (See 825.218);

20 “(F) The employee's right to maintenance
21 of benefits during the FMLA leave and restora-
22 tion to the same or an equivalent job upon re-
23 turn from FMLA leave (See 825.214 and
24 825.604); and

1 “(G) The employee’s potential liability for
2 payment of health insurance premiums paid by
3 the employing office during the employee’s un-
4 paid FMLA leave if the employee fails to return
5 to work after taking FMLA leave (See 825.213,
6 825.208(k)).

7 “(2) The notice of rights and responsibilities
8 may include other information—e.g., whether the
9 employing office will require periodic reports of the
10 employee’s status and intent to return to work—but
11 is not required to do so.

12 “(3) The notice of rights and responsibilities
13 may be accompanied by any required certification
14 form.

15 “(4) If the specific information provided by the
16 notice of rights and responsibilities changes, the em-
17 ploying office shall, within five business days of re-
18 ceipt of the employee’s first notice of need for leave
19 subsequent to any change, provide written notice ref-
20 erencing the prior notice and setting forth any of the
21 information in the notice of rights and responsibil-
22 ities that has changed. For example, if the initial
23 leave period was paid leave and the subsequent leave
24 period would be unpaid leave, the employing office

1 may need to give notice of the arrangements for
2 making premium payments.

3 “(5) Employing offices are also expected to re-
4 sponsively answer questions from employees con-
5 cerning their rights and responsibilities under the
6 FMLA, as made applicable under the CAA.

7 “(6) A prototype notice of rights and respon-
8 sibilities may be obtained in Form C, or from the
9 Office of Congressional Workplace Rights. Employ-
10 ing offices may adapt the prototype notice as appro-
11 priate to meet these notice requirements. The notice
12 of rights and responsibilities may be distributed elec-
13 tronically so long as it otherwise meets the require-
14 ments of this section.

15 “(d) *Designation notice.* (1) The employing office is
16 responsible in all circumstances for designating leave as
17 FMLA-qualifying, and for giving notice of the designation
18 to the employee as provided in this section. When the em-
19 ploying office has enough information to determine wheth-
20 er the leave is being taken for a FMLA-qualifying reason
21 (e.g., after receiving a certification), the employing office
22 must notify the employee whether the leave will be des-
23 ignated and will be counted as FMLA leave within five
24 business days absent extenuating circumstances. Only one
25 notice of designation is required for each FMLA-quali-

1 fying reason per applicable 12-month period, regardless of
2 whether the leave taken due to the qualifying reason will
3 be a continuous block of leave or intermittent or reduced
4 schedule leave. If the employing office determines that the
5 leave will not be designated as FMLA-qualifying (e.g., if
6 the leave is not for a reason covered by FMLA or the
7 FMLA leave entitlement has been exhausted), the employ-
8 ing office must notify the employee of that determination.
9 Subject to 825.208, if the employing office requires paid
10 leave to be substituted for unpaid FMLA leave, or that
11 paid leave taken under an existing leave plan be counted
12 as FMLA leave, the employing office must inform the em-
13 ployee of this designation at the time of designating the
14 FMLA leave.

15 “(2) If the employing office has sufficient infor-
16 mation to designate the leave as FMLA leave imme-
17 diately after receiving notice of the employee’s need
18 for leave, the employing office may provide the em-
19 ployee with the designation notice at that time.

20 “(3) If the employing office will require the em-
21 ployee to present a fitness-for-duty certification to
22 be restored to employment, the employing office
23 must provide notice of such requirement with the
24 designation notice. If the employing office will re-
25 quire that the fitness-for-duty certification address

1 the employee's ability to perform the essential func-
2 tions of the employee's position, the employing office
3 must so indicate in the designation notice, and must
4 include a list of the essential functions of the em-
5 ployee's position. See 825.312. If the employing of-
6 fice's handbook or other written documents (if any)
7 describing the employing office's leave policies clear-
8 ly provide that a fitness-for- duty certification will be
9 required in specific circumstances (e.g., by stating
10 that fitness- for-duty certification will be required in
11 all cases of back injuries for employees in a certain
12 occupation), the employing office is not required to
13 provide written notice of the requirement with the
14 designation notice, but must provide oral notice no
15 later than with the designation notice.

16 “(4) The designation notice must be in writing.
17 A prototype designation notice is contained in Form
18 D which may be obtained from the Office of Con-
19 gressional Workplace Rights. If the leave is not des-
20 ignated as FMLA leave because it does not meet the
21 requirements of the FMLA, as made applicable by
22 the CAA, the notice to the employee that the leave
23 is not designated as FMLA leave may be in the form
24 of a simple written statement. The designation no-
25 tice may be distributed electronically so long as it

1 otherwise meets the requirements of this section and
2 the employing office can demonstrate that the em-
3 ployee (who may already be on leave and who may
4 not have access to employing office-provided com-
5 puters) has access to the information electronically.

6 “(5) If the information provided by the employ-
7 ing office to the employee in the designation notice
8 changes (e.g., the employee exhausts the FMLA
9 leave entitlement), the employing office shall provide,
10 within five business days of receipt of the employee’s
11 first notice of need for leave subsequent to any
12 change, written notice of the change.

13 “(6) The employing office must notify the em-
14 ployee of the amount of leave counted against the
15 employee’s FMLA leave entitlement and, if applica-
16 ble, the employee’s paid parental leave entitlement.
17 If the amount of leave needed is known at the time
18 the employing office designates the leave as FMLA-
19 qualifying, the employing office must notify the em-
20 ployee of the number of hours, days, or weeks that
21 will be counted against the employee’s FMLA leave
22 entitlement in the designation notice. If it is not pos-
23 sible to provide the hours, days, or weeks that will
24 be counted against the employee’s FMLA leave enti-
25 tlement (such as in the case of unforeseeable inter-

1 mittent leave), then the employing office must pro-
2 vide notice of the amount of leave counted against
3 the employee’s FMLA leave entitlement and, if ap-
4 plicable, paid parental leave entitlement, upon the
5 request by the employee, but no more often than
6 once in a 30–day period and only if leave was taken
7 in that period. The notice of the amount of leave
8 counted against the employee’s FMLA entitlement
9 and, if applicable, paid parental leave entitlement
10 may be oral or in writing. If such notice is oral, it
11 shall be confirmed in writing no later than the fol-
12 lowing payday (unless the payday is less than one
13 week after the oral notice, in which case the notice
14 must be no later than the subsequent payday). Such
15 written notice may be in any form, including a nota-
16 tion on the employee’s pay stub.

17 “(e) *Consequences of failing to provide notice.* Failure
18 to follow the notice requirements set forth in this section
19 may constitute an interference with, restraint, or denial
20 of the exercise of an employee’s FMLA rights. An employ-
21 ing office may be liable for compensation and benefits lost
22 by reason of the violation, for other actual monetary losses
23 sustained as a direct result of the violation, and for appro-
24 priate equitable or other relief, including employment, re-

1 instatement, promotion, or any other relief tailored to the
2 harm suffered. See 825.400(b).

3 **“§ 825.301 Designation of FMLA leave**

4 “(a) *Employing office responsibilities.* The employing
5 office’s decision to designate leave as FMLA-qualifying
6 must be based only on information received from the em-
7 ployee or the employee’s spokesperson (e.g., if the em-
8 ployee is incapacitated, the employee’s spouse, adult child,
9 parent, doctor, etc., may provide notice to the employing
10 office of the need to take FMLA leave). In any cir-
11 cumstance where the employing office does not have suffi-
12 cient information about the reason for an employee’s use
13 of leave, the employing office should inquire further of the
14 employee or the spokesperson to ascertain whether leave
15 is potentially FMLA-qualifying. Once the employing office
16 has acquired knowledge that the leave is being taken for
17 a FMLA-qualifying reason, the employing office must no-
18 tify the employee as provided in 825.300(d).

19 “(b) *Employee responsibilities.* An employee giving
20 notice of the need for FMLA leave does not need to ex-
21 pressly assert rights under the FMLA, as made applicable
22 by the CAA, or even mention the FMLA to meet his or
23 her obligation to provide notice, though the employee
24 would need to state a qualifying reason for the needed
25 leave and otherwise satisfy the notice requirements set

1 forth in 825.302 or 825.303 depending on whether the
2 need for leave is foreseeable or unforeseeable. An employee
3 giving notice of the need for FMLA leave must explain
4 the reasons for the needed leave so as to allow the employ-
5 ing office to determine whether the leave qualifies under
6 the FMLA, as made applicable by the CAA. If the em-
7 ployee fails to explain the reasons, leave may be denied.
8 In many cases, in explaining the reasons for a request to
9 use leave, especially when the need for the leave was unex-
10 pected or unforeseen, an employee will provide sufficient
11 information for the employing office to designate the leave
12 as FMLA leave. An employee using accrued paid leave
13 may in some cases not spontaneously explain the reasons
14 or their plans for using their accrued leave. However, if
15 an employee requesting to use paid leave for a FMLA-
16 qualifying reason does not explain the reason for the leave
17 and the employing office denies the employee's request,
18 the employee will need to provide sufficient information
19 to establish a FMLA-qualifying reason for the needed
20 leave so that the employing office is aware that the leave
21 may not be denied and may designate that the paid leave
22 be appropriately counted against (substituted for) the em-
23 ployee's FMLA leave entitlement. Similarly, an employee
24 using accrued paid vacation leave who seeks an extension
25 of unpaid leave for a FMLA-qualifying reason will need

1 to state the reason. If this is due to an event which oc-
2 curred during the period of paid leave, the employing of-
3 fice may count the leave used after the FMLA-qualifying
4 reason against the employee's FMLA leave entitlement.

5 “(c) *Disputes*. If there is a dispute between an em-
6 ploying office and an employee as to whether leave quali-
7 fies as FMLA leave, it should be resolved through discus-
8 sions between the employee and the employing office. Such
9 discussions and the decision must be documented.

10 “(d) *Retroactive designation*. Subject to 825.208, if
11 an employing office does not designate leave as required
12 by 825.300, the employing office may retroactively des-
13 ignate leave as FMLA leave with appropriate notice to the
14 employee as required by 825.300 provided that the em-
15 ploying office's failure to timely designate leave does not
16 cause harm or injury to the employee. In all cases where
17 leave would qualify for FMLA protections, an employing
18 office and an employee can mutually agree that leave be
19 retroactively designated as FMLA leave.

20 “(e) *Remedies*. If an employing office's failure to
21 timely designate leave in accordance with 825.300 causes
22 the employee to suffer harm, it may constitute an inter-
23 ference with, restraint of, or denial of the exercise of an
24 employee's FMLA rights. An employing office may be lia-
25 ble for compensation and benefits lost by reason of the

1 violation, for other actual monetary losses sustained as a
2 direct result of the violation, and for appropriate equitable
3 or other relief, including employment, reinstatement, pro-
4 motion, or any other relief tailored to the harm suffered.
5 See 825.400(b). For example, if an employing office that
6 was put on notice that an employee needed FMLA leave
7 failed to designate the leave properly, but the employee's
8 own serious health condition prevented him or her from
9 returning to work during that time period regardless of
10 the designation, an employee may not be able to show that
11 the employee suffered harm as a result of the employing
12 office's actions. However, if an employee took leave to pro-
13 vide care for a son or daughter with a serious health condi-
14 tion believing it would not count toward his or her FMLA
15 entitlement, and the employee planned to later use that
16 FMLA leave to provide care for a spouse who would need
17 assistance when recovering from surgery planned for a
18 later date, the employee may be able to show that harm
19 has occurred as a result of the employing office's failure
20 to designate properly. The employee might establish this
21 by showing that he or she would have arranged for an
22 alternative caregiver for the seriously-ill son or daughter
23 if the leave had been designated timely.

1 **“§ 825.302 Employee notice requirements for foresee-**
2 **able FMLA leave**

3 “(a) *Timing of notice.* An employee must provide the
4 employing office at least 30 days advance notice before
5 FMLA leave is to begin if the need for the leave is foresee-
6 able based on an expected birth, placement for adoption
7 or foster care, planned medical treatment for a serious
8 health condition of the employee or of a family member,
9 or the planned medical treatment for a serious injury or
10 illness of a covered servicemember. If 30 days’ notice is
11 not practicable, such as because of a lack of knowledge
12 of approximately when leave will be required to begin, a
13 change in circumstances, or a medical emergency, notice
14 must be given as soon as practicable. For example, an em-
15 ployee’s health condition may require leave to commence
16 earlier than anticipated before the birth of a child. Simi-
17 larly, little opportunity for notice may be given before
18 placement for adoption. For foreseeable leave due to a
19 qualifying exigency, notice must be provided as soon as
20 practicable, regardless of how far in advance such leave
21 is foreseeable. Whether FMLA leave is to be continuous
22 or is to be taken intermittently or on a reduced schedule
23 basis, notice need only be given one time, but the employee
24 shall advise the employing office as soon as practicable if
25 dates of scheduled leave change or are extended, or were
26 initially unknown. In those cases where the employee is

1 required to provide at least 30 days' notice of foreseeable
2 leave and does not do so, the employee shall explain the
3 reasons why such notice was not practicable upon a re-
4 quest from the employing office for such information.

5 “(b) As soon as practicable means as soon as both
6 possible and practical, taking into account all of the facts
7 and circumstances in the individual case. When an em-
8 ployee becomes aware of a need for FMLA leave less than
9 30 days in advance, it should be practicable for the em-
10 ployee to provide notice of the need for leave either the
11 same day or the next business day. In all cases, however,
12 the determination of when an employee could practicably
13 provide notice must take into account the individual facts
14 and circumstances.

15 “(c) *Content of notice.* An employee shall provide at
16 least verbal notice sufficient to make the employing office
17 aware that the employee needs FMLA-qualifying leave,
18 and the anticipated timing and duration of the leave. De-
19 pending on the situation, such information may include
20 that a condition renders the employee unable to perform
21 the functions of the job; that the employee is pregnant
22 or has been hospitalized overnight; whether the employee
23 or the employee's family member is under the continuing
24 care of a health care provider; if the leave is due to a
25 qualifying exigency, that a military member is on covered

1 active duty or call to covered active duty status (or has
2 been notified of an impending call or order to covered ac-
3 tive duty), and that the requested leave is for one of the
4 reasons listed in 825.126(b); if the leave is for a family
5 member, that the condition renders the family member un-
6 able to perform daily activities, or that the family member
7 is a covered servicemember with a serious injury or illness;
8 and the anticipated duration of the absence, if known.
9 When an employee seeks leave for the first time for a
10 FMLA-qualifying reason, the employee need not expressly
11 assert rights under the FMLA, as made applicable by the
12 CAA, or even mention the FMLA. When an employee
13 seeks leave due to a FMLA-qualifying reason, for which
14 the employing office has previously provided FMLA-pro-
15 tected leave, the employee must specifically reference the
16 qualifying reason for leave or the need for FMLA leave.
17 In all cases, the employing office should inquire further
18 of the employee if it is necessary to have more information
19 about whether FMLA leave is being sought by the em-
20 ployee, and obtain the necessary details of the leave to be
21 taken. In the case of medical conditions, the employing
22 office may find it necessary to inquire further to determine
23 if the leave is because of a serious health condition and
24 may request medical certification to support the need for
25 such leave. See 825.305. An employing office may also re-

1 quest certification to support the need for leave for a
2 qualifying exigency or for military caregiver leave. See
3 825.309, 825.310. When an employee has been previously
4 certified for leave due to more than one FMLA-qualifying
5 reason, the employing office may need to inquire further
6 to determine for which qualifying reason the leave is need-
7 ed. An employee has an obligation to respond to an em-
8 ploying office’s questions designed to determine whether
9 an absence is potentially FMLA-qualifying. Failure to re-
10 spond to reasonable employing office inquiries regarding
11 the leave request may result in denial of FMLA protection
12 if the employing office is unable to determine whether the
13 leave is FMLA-qualifying.

14 “(d) *Complying with the employing office policy.* An
15 employing office may require an employee to comply with
16 the employing office’s usual and customary notice and pro-
17 cedural requirements for requesting leave, absent unusual
18 circumstances. For example, an employing office may re-
19 quire that written notice set forth the reasons for the re-
20 quested leave, the anticipated duration of the leave, and
21 the anticipated start of the leave. An employee also may
22 be required by an employing office’s policy to contact a
23 specific individual. Unusual circumstances would include
24 situations such as when an employee is unable to comply
25 with the employing office’s policy that requests for leave

1 should be made by contacting a specific number because
2 on the day the employee needs to provide notice of his
3 or her need for FMLA leave there is no one to answer
4 the call-in number and the voice mail box is full. Where
5 an employee does not comply with the employing office's
6 usual notice and procedural requirements, and no unusual
7 circumstances justify the failure to comply, FMLA-pro-
8 tected leave may be delayed or denied. However, FMLA-
9 protected leave may not be delayed or denied where the
10 employing office's policy requires notice to be given sooner
11 than set forth in paragraph (a) of this section and the
12 employee provides timely notice as set forth in paragraph
13 (a) of this section.

14 “(e) *Scheduling planned medical treatment.* When
15 planning medical treatment, the employee must consult
16 with the employing office and make a reasonable effort
17 to schedule the treatment so as not to disrupt unduly the
18 employing office's operations, subject to the approval of
19 the health care provider. Employees are ordinarily ex-
20 pected to consult with their employing offices prior to the
21 scheduling of treatment in order to work out a treatment
22 schedule which best suits the needs of both the employing
23 office and the employee. For example, if an employee who
24 provides notice of the need to take FMLA leave on an
25 intermittent basis for planned medical treatment neglects

1 to consult with the employing office to make a reasonable
2 effort to arrange the schedule of treatments so as not to
3 unduly disrupt the employing office's operations, the em-
4 ploying office may initiate discussions with the employee
5 and require the employee to attempt to make such ar-
6 rangements, subject to the approval of the health care pro-
7 vider. See 825.203 and 825.205.

8 “(f) Intermittent leave or leave on a reduced leave
9 schedule must be medically necessary due to a serious
10 health condition or a serious injury or illness. An employee
11 shall advise the employing office, upon request, of the rea-
12 sons why the intermittent/reduced leave schedule is nec-
13 essary and of the schedule for treatment, if applicable.
14 The employee and employing office shall attempt to work
15 out a schedule for such leave that meets the employee's
16 needs without unduly disrupting the employing office's op-
17 erations, subject to the approval of the health care pro-
18 vider.

19 “(g) An employing office may waive employees'
20 FMLA notice requirements. See 825.304(e).

21 **“§ 825.303 Employee notice requirements for unfore-**
22 **seeable FMLA leave**

23 “(a) *Timing of notice.* When the approximate timing
24 of the need for leave is not foreseeable, an employee must
25 provide notice to the employing office as soon as prac-

1 ticable under the facts and circumstances of the particular
2 case. It generally should be practicable for the employee
3 to provide notice of leave that is unforeseeable within the
4 time prescribed by the employing office's usual and cus-
5 tomary notice requirements applicable to such leave. See
6 825.303(c). Notice may be given by the employee's spokes-
7 person (e.g., spouse, adult family member, or other re-
8 sponsible party) if the employee is unable to do so person-
9 ally. For example, if an employee's child has a severe asth-
10 ma attack and the employee takes the child to the emer-
11 gency room, the employee would not be required to leave
12 his or her child in order to report the absence while the
13 child is receiving emergency treatment. However, if the
14 child's asthma attack required only the use of an inhaler
15 at home followed by a period of rest, the employee would
16 be expected to call the employing office promptly after en-
17 suring the child has used the inhaler.

18 “(b) *Content of notice.* An employee shall provide suf-
19 ficient information for an employing office to reasonably
20 determine whether the FMLA may apply to the leave re-
21 quest. Depending on the situation, such information may
22 include that a condition renders the employee unable to
23 perform the functions of the job; that the employee is
24 pregnant or has been hospitalized overnight; whether the
25 employee or the employee's family member is under the

1 continuing care of a health care provider; if the leave is
2 due to a qualifying exigency, that a military member is
3 on covered active duty or call to covered active duty status
4 (or has been notified of an impending call or order to cov-
5 ered active duty), that the requested leave is for one of
6 the reasons listed in 825.126(b), and the anticipated dura-
7 tion of the absence; or if the leave is for a family member
8 that the condition renders the family member unable to
9 perform daily activities or that the family member is a
10 covered servicemember with a serious injury or illness; and
11 the anticipated duration of the absence, if known. When
12 an employee seeks leave for the first time for a FMLA-
13 qualifying reason, the employee need not expressly assert
14 rights under the FMLA, as made applicable by the CAA,
15 or even mention the FMLA. When an employee seeks leave
16 due to a qualifying reason, for which the employing office
17 has previously provided the employee FMLA-protected
18 leave, the employee must specifically reference either the
19 qualifying reason for leave or the need for FMLA leave.
20 Calling in 'sick' without providing more information will
21 not be considered sufficient notice to trigger an employing
22 office's obligations under the FMLA, as made applicable
23 by the CAA. The employing office will be expected to ob-
24 tain any additional required information through informal
25 means. An employee has an obligation to respond to an

1 employing office’s questions designed to determine wheth-
2 er an absence is potentially FMLA-qualifying. Failure to
3 respond to reasonable employing office inquiries office re-
4 garding the leave request may result in denial of FMLA
5 protection if the employing office is unable to determine
6 whether the leave is FMLA-qualifying.

7 “(c) *Complying with employing office policy.* When
8 the need for leave is not foreseeable, an employee must
9 comply with the employing office’s usual and customary
10 notice and procedural requirements for requesting leave,
11 absent unusual circumstances. For example, an employing
12 office may require employees to call a designated number
13 or a specific individual to request leave. However, if an
14 employee requires emergency medical treatment, he or she
15 would not be required to follow the call-in procedure until
16 his or her condition is stabilized and he or she has access
17 to, and is able to use, a phone. Similarly, in the case of
18 an emergency requiring leave because of a FMLA-quali-
19 fying reason, written advance notice pursuant to an em-
20 ploying office’s internal rules and procedures may not be
21 required when FMLA leave is involved. If an employee
22 does not comply with the employing office’s usual notice
23 and procedural requirements, and no unusual cir-
24 cumstances justify the failure to comply, FMLA-protected
25 leave may be delayed or denied.

1 **“§ 825.304 Employee failure to provide notice**

2 “(a) *Proper notice required.* In all cases, in order for
3 the onset of an employee’s FMLA leave to be delayed due
4 to lack of required notice, it must be clear that the em-
5 ployee had actual notice of the FMLA notice require-
6 ments. This condition would be satisfied by the employing
7 office’s proper posting, at the worksite where the employee
8 is employed, of the information regarding the FMLA pro-
9 vided (pursuant to section 301(h)(2) of the CAA, 2 U.S.C.
10 1381(h)(2)) by the Office of Congressional Workplace
11 Rights to the employing office in a manner suitable for
12 posting.

13 “(b) *Foreseeable leave—30 days.* When the need for
14 FMLA leave is foreseeable at least 30 days in advance
15 and an employee fails to give timely advance notice with
16 no reasonable excuse, the employing office may delay
17 FMLA coverage until 30 days after the date the employee
18 provides notice. The need for leave and the approximate
19 date leave would be taken must have been clearly foresee-
20 able to the employee 30 days in advance of the leave. For
21 example, knowledge that an employee would receive a tele-
22 phone call about the availability of a child for adoption
23 at some unknown point in the future would not be suffi-
24 cient to establish the leave was clearly foreseeable 30 days
25 in advance.

1 “(c) *Foreseeable leave—less than 30 days.* When the
2 need for FMLA leave is foreseeable fewer than 30 days
3 in advance and an employee fails to give notice as soon
4 as practicable under the particular facts and cir-
5 cumstances, the extent to which an employing office may
6 delay FMLA coverage for leave depends on the facts of
7 the particular case. For example, if an employee reason-
8 ably should have given the employing office two weeks’ no-
9 tice but instead only provided one week’s notice, then the
10 employing office may delay FMLA-protected leave for one
11 week (thus, if the employing office elects to delay FMLA
12 coverage and the employee nonetheless takes leave one
13 week after providing the notice (i.e., a week before the two
14 week notice period has been met) the leave will not be
15 FMLA-protected).

16 “(d) *Unforeseeable leave.* When the need for FMLA
17 leave is unforeseeable and an employee fails to give notice
18 in accordance with 825.303, the extent to which an em-
19 ploying office may delay FMLA coverage for leave depends
20 on the facts of the particular case. For example, if it would
21 have been practicable for an employee to have given the
22 employing office notice of the need for leave very soon
23 after the need arises consistent with the employing office’s
24 policy, but instead the employee provided notice two days

1 after the leave began, then the employing office may delay
2 FMLA coverage of the leave by two days.

3 “(e) *Waiver of notice.* An employing office may waive
4 employees’ FMLA notice obligations or the employing of-
5 fice’s own internal rules on leave notice requirements. If
6 an employing office does not waive the employee’s obliga-
7 tions under its internal leave rules, the employing office
8 may take appropriate action under its internal rules and
9 procedures for failure to follow its usual and customary
10 notification rules, absent unusual circumstances, as long
11 as the actions are taken in a manner that does not dis-
12 criminate against employees taking FMLA leave and the
13 rules are not inconsistent with 825.303(a).

14 **“§ 825.305 Certification, general rule**

15 “(a) *General.* An employing office may require that
16 an employee’s leave to care for the employee’s covered
17 family member with a serious health condition, or due to
18 the employee’s own serious health condition that makes
19 the employee unable to perform one or more of the essen-
20 tial functions of the employee’s position, be supported by
21 a certification issued by the health care provider of the
22 employee or the employee’s family member. An employing
23 office may also require that an employee’s leave because
24 of a qualifying exigency or to care for a covered service-
25 member with a serious injury or illness be supported by

1 a certification, as described in 825.309 and 825.310, re-
2 spectively. An employing office must give notice of a re-
3 quirement for certification each time a certification is re-
4 quired; such notice must be written notice whenever re-
5 quired by 825.300(c). An employing office's oral request
6 to an employee to furnish any subsequent certification is
7 sufficient.

8 “(b) *Timing.* In most cases, the employing office
9 should request that an employee furnish certification at
10 the time the employee gives notice of the need for leave
11 or within five business days thereafter, or, in the case of
12 unforeseen leave, within five business days after the leave
13 commences. The employing office may request certifi-
14 cation at some later date if the employing office later has
15 reason to question the appropriateness of the leave or its
16 duration. The employee must provide the requested certifi-
17 cation to the employing office within 15 calendar days
18 after the employing office's request, unless it is not prac-
19 ticable under the particular circumstances to do so despite
20 the employee's diligent, good faith efforts or the employing
21 office provides more than 15 calendar days to return the
22 requested certification.

23 “(c) *Complete and sufficient certification.* The em-
24 ployee must provide a complete and sufficient certification
25 to the employing office if required by the employing office

1 in accordance with 825.306, 825.309, and 825.310. The
2 employing office shall advise an employee whenever the
3 employing office finds a certification incomplete or insuffi-
4 cient, and shall state in writing what additional informa-
5 tion is necessary to make the certification complete and
6 sufficient. A certification is considered incomplete if the
7 employing office receives a certification, but one or more
8 of the applicable entries have not been completed. A cer-
9 tification is considered insufficient if the employing office
10 receives a complete certification, but the information pro-
11 vided is vague, ambiguous, or non-responsive. The employ-
12 ing office must provide the employee with seven calendar
13 days (unless not practicable under the particular cir-
14 cumstances despite the employee's diligent good faith ef-
15 forts) to cure any such deficiency. If the deficiencies speci-
16 fied by the employing office are not cured in the resub-
17 mitted certification, the employing office may deny the
18 taking of FMLA leave, in accordance with 825.313. A cer-
19 tification that is not returned to the employing office is
20 not considered incomplete or insufficient, but constitutes
21 a failure to provide certification.

22 “(d) *Consequences.* At the time the employing office
23 requests certification, the employing office must also ad-
24 vise an employee of the anticipated consequences of an em-
25 ployee's failure to provide adequate certification. If the

1 employee fails to provide the employing office with a com-
2 plete and sufficient certification, despite the opportunity
3 to cure the certification as provided in paragraph (c) of
4 this section, or fails to provide any certification, the em-
5 ploying office may deny the taking of FMLA leave, in ac-
6 cordance with 825.313. It is the employee's responsibility
7 either to furnish a complete and sufficient certification or
8 to furnish the health care provider providing the certifi-
9 cation with any necessary authorization from the employee
10 or the employee's family member in order for the health
11 care provider to release a complete and sufficient certifi-
12 cation to the employing office to support the employee's
13 FMLA request. This provision will apply in any case
14 where an employing office requests a certification per-
15 mitted by these regulations, whether it is the initial certifi-
16 cation, a recertification, a second or third opinion, or a
17 fitness-for-duty certificate, including any clarifications
18 necessary to determine if such certifications are authentic
19 and sufficient. See 825.306, 825.307, 825.308, and
20 825.312. (e) Annual medical certification. Where the em-
21 ployee's need for leave due to the employee's own serious
22 health condition, or the serious health condition of the em-
23 ployee's covered family member, lasts beyond a single
24 leave year (as defined in 825.200), the employing office
25 may require the employee to provide a new medical certifi-

1 cation in each subsequent leave year. Such new medical
2 certifications are subject to the provisions for authentica-
3 tion and clarification set forth in 825.307, including sec-
4 ond and third opinions.

5 **“§ 825.306 Content of medical certification for leave**
6 **taken because of an employee’s own seri-**
7 **ous health condition or the serious health**
8 **condition of a family member**

9 “(a) *Required information.* When leave is taken be-
10 cause of an employee’s own serious health condition, or
11 the serious health condition of a family member, an em-
12 ploying office may require an employee to obtain a medical
13 certification from a health care provider that sets forth
14 the following information:

15 “(1) The name, address, telephone number, and
16 fax number of the health care provider and type of
17 medical practice/specialization;

18 “(2) The approximate date on which the serious
19 health condition commenced, and its probable dura-
20 tion;

21 “(4) If the employee is the patient, information
22 sufficient to establish that the employee cannot per-
23 form the essential functions of the employee’s job as
24 well as the nature of any other work restrictions,

1 and the likely duration of such inability (See
2 825.123(b));

3 “(5) If the patient is a covered family member
4 with a serious health condition, information suffi-
5 cient to establish that the family member is in need
6 of care, as described in 825.124, and an estimate of
7 the frequency and duration of the leave required to
8 care for the family member;

9 “(6) If an employee requests leave on an inter-
10 mittent or reduced schedule basis for planned med-
11 ical treatment of the employee’s or a covered family
12 member’s serious health condition, information suffi-
13 cient to establish the medical necessity for such
14 intermittent or reduced schedule leave and an esti-
15 mate of the dates and duration of such treatments
16 and any periods of recovery;

17 “(7) If an employee requests leave on an inter-
18 mittent or reduced schedule basis for the employee’s
19 serious health condition, including pregnancy, that
20 may result in unforeseeable episodes of incapacity,
21 information sufficient to establish the medical neces-
22 sity for such intermittent or reduced schedule leave
23 and an estimate of the frequency and duration of
24 the episodes of incapacity; and

1 “(8) If an employee requests leave on an inter-
2 mittent or reduced schedule basis to care for a cov-
3 ered family member with a serious health condition,
4 a statement that such leave is medically necessary to
5 care for the family member, as described in 825.124
6 and 825.203(b), which can include assisting in the
7 family member’s recovery, and an estimate of the
8 frequency and duration of the required leave.

9 “(b) The Office of Congressional Workplace Rights
10 has developed two optional forms (Form A and Form B)
11 for use in obtaining medical certification, including second
12 and third opinions, from health care providers that meets
13 FMLA’s certification requirements, as made applicable by
14 the CAA. (See Forms A and B.) Optional Form A is for
15 use when the employee’s need for leave is due to the em-
16 ployee’s own serious health condition. Optional Form B
17 is for use when the employee needs leave to care for a
18 family member with a serious health condition. These op-
19 tional forms reflect certification requirements so as to per-
20 mit the health care provider to furnish appropriate med-
21 ical information. Forms A and B are modeled closely on
22 Form WH–380E and Form WH–380F, as revised, which
23 were developed by the Department of Labor (See 29
24 C.F.R. Part 825). The employing office may use the Office
25 of Congressional Workplace Rights’s forms, or Form WH–

1 380E and Form WH-380F, as revised, or another form
2 containing the same basic information; however, no infor-
3 mation may be required beyond that specified in 825.306,
4 825.307, and 825.308. In all instances the information on
5 the form must relate only to the serious health condition
6 for which the current need for leave exists.

7 “(c) If an employee is on FMLA leave running con-
8 currently with a workers’ compensation absence, and the
9 provisions of the workers’ compensation statute permit the
10 employing office or the employing office’s representative
11 to request additional information from the employee’s
12 workers’ compensation health care provider, the FMLA
13 does not prevent the employing office from following the
14 applicable workers’ compensation provisions and informa-
15 tion received under those provisions may be considered in
16 determining the employee’s entitlement to FMLA-pro-
17 tected leave. Similarly, an employing office may request
18 additional information in accordance with a paid leave pol-
19 icy or disability plan that requires greater information to
20 qualify for payments or benefits, provided that the employ-
21 ing office informs the employee that the additional infor-
22 mation only needs to be provided in connection with re-
23 ceipt of such payments or benefits. Any information re-
24 ceived pursuant to such policy or plan may be considered
25 in determining the employee’s entitlement to FMLA-pro-

1 tected leave. If the employee fails to provide the informa-
2 tion required for receipt of such payments or benefits,
3 such failure will not affect the employee's entitlement to
4 take unpaid FMLA leave. See 825.207(a).

5 “(d) If an employee's serious health condition may
6 also be a disability within the meaning of the Americans
7 with Disabilities Act (ADA), as amended and as made ap-
8 plicable by the CAA, the FMLA does not prevent the em-
9 ploying office from following the procedures for requesting
10 medical information under the ADA. Any information re-
11 ceived pursuant to these procedures may be considered in
12 determining the employee's entitlement to FMLA-pro-
13 tected leave.

14 “(e) While an employee may choose to comply with
15 the certification requirement by providing the employing
16 office with an authorization, release, or waiver allowing
17 the employing office to communicate directly with the
18 health care provider of the employee or his or her covered
19 family member, the employee may not be required to pro-
20 vide such an authorization, release, or waiver. In all in-
21 stances in which certification is requested, it is the em-
22 ployee's responsibility to provide the employing office with
23 complete and sufficient certification and failure to do so
24 may result in the denial of FMLA leave. See 825.305(d).

1 **“§ 825.307 Authentication and clarification of medical**
2 **certification for leave taken because of**
3 **an employee’s own serious health condi-**
4 **tion or the serious health condition of a**
5 **family member; second and third opin-**
6 **ions**

7 “(a) *Clarification and authentication.* (1) If an em-
8 ployee submits a complete and sufficient certification
9 signed by the health care provider, the employing office
10 may not request additional information from the health
11 care provider. However, the employing office may contact
12 the health care provider for purposes of clarification and
13 authentication of the medical certification (whether initial
14 certification or recertification) after the employing office
15 has given the employee an opportunity to cure any defi-
16 ciencies as set forth in 825.305(c). To make such contact,
17 the employing office must use a health care provider, a
18 human resources professional, a leave administrator, or a
19 management official. An employee’s direct supervisor may
20 not contact the employee’s health care provider, unless the
21 direct supervisor is also the only individual in the employ-
22 ing office designated to process FMLA requests and the
23 direct supervisor receives specific authorization from the
24 employee to contact the employee’s health care provider.
25 For purposes of these regulations, authentication means
26 providing the health care provider with a copy of the cer-

1 tification and requesting verification that the information
2 contained on the certification form was completed and/ or
3 authorized by the health care provider who signed the doc-
4 ument; no additional medical information may be re-
5 quested.

6 “(2) Clarification means contacting the health
7 care provider to understand the handwriting on the
8 medical certification or to understand the meaning
9 of a response. Employing offices may not ask health
10 care providers for additional information beyond
11 that required by the certification form. The require-
12 ments of the Health Insurance Portability and Ac-
13 countability Act (HIPAA) Privacy Rule, (See 45
14 C.F.R. parts 160 and 164), which governs the pri-
15 vacy of individually-identifiable health information
16 created or held by HIPAA-covered entities, must be
17 satisfied when individually-identifiable health infor-
18 mation of an employee is shared with an employing
19 office by a HIPAA-covered health care provider. If
20 an employee chooses not to provide the employing
21 office with authorization allowing the employing of-
22 fice to clarify the certification with the health care
23 provider, and does not otherwise clarify the certifi-
24 cation, the employing office may deny the taking of
25 FMLA leave if the certification is unclear. See

1 825.305(d). It is the employee's responsibility to
2 provide the employing office with a complete and
3 sufficient certification and to clarify the certification
4 if necessary.

5 “(b) *Second Opinion.* (1) An employing office that
6 has reason to doubt the validity of a medical certification
7 may require the employee to obtain a second opinion at
8 the employing office's expense. Pending receipt of the sec-
9 ond (or third) medical opinion, the employee is provision-
10 ally entitled to the benefits of the FMLA, as made applica-
11 ble by the CAA, including maintenance of group health
12 benefits. If the certifications do not ultimately establish
13 the employee's entitlement to FMLA leave, the leave shall
14 not be designated as FMLA leave and may be treated as
15 paid or unpaid leave under the employing office's estab-
16 lished leave policies. In addition, the consequences set
17 forth in 825.305(d) will apply if the employee or the em-
18 ployee's family member fails to authorize his or her health
19 care provider to release all relevant medical information
20 pertaining to the serious health condition at issue if re-
21 quested by the health care provider designated to provide
22 a second opinion in order to render a sufficient and com-
23 plete second opinion.

24 “(2) The employing office is permitted to des-
25 ignate the health care provider to furnish the second

1 opinion, but the selected health care provider may
2 not be employed on a regular basis by the employing
3 office. The employing office may not regularly con-
4 tract with or otherwise regularly utilize the services
5 of the health care provider furnishing the second
6 opinion unless the employing office is located in an
7 area where access to health care is extremely limited
8 (e.g., a rural area where no more than one or two
9 doctors practice in the relevant specialty in the vicin-
10 ity).

11 “(c) *Third opinion.* If the opinions of the employee’s
12 and the employing office’s designated health care pro-
13 viders differ, the employing office may require the em-
14 ployee to obtain certification from a third health care pro-
15 vider, again at the employing office’s expense. This third
16 opinion shall be final and binding. The third health care
17 provider must be designated or approved jointly by the em-
18 ploying office and the employee. The employing office and
19 the employee must each act in good faith to attempt to
20 reach agreement on whom to select for the third opinion
21 provider. If the employing office does not attempt in good
22 faith to reach agreement, the employing office will be
23 bound by the first certification. If the employee does not
24 attempt in good faith to reach agreement, the employee
25 will be bound by the second certification. For example, an

1 employee who refuses to agree to see a doctor in the spe-
2 cialty in question may be failing to act in good faith. On
3 the other hand, an employing office that refuses to agree
4 to any doctor on a list of specialists in the appropriate
5 field provided by the employee and whom the employee
6 has not previously consulted may be failing to act in good
7 faith. In addition, the consequences set forth in
8 825.305(d) will apply if the employee or the employee's
9 family member fails to authorize his or her health care
10 provider to release all relevant medical information per-
11 taining to the serious health condition at issue if requested
12 by the health care provider designated to provide a third
13 opinion in order to render a sufficient and complete third
14 opinion.

15 “(d) *Copies of opinions.* The employing office is re-
16 quired to provide the employee with a copy of the second
17 and third medical opinions, where applicable, upon request
18 by the employee. Requested copies are to be provided with-
19 in five business days unless extenuating circumstances
20 prevent such action.

21 “(e) *Travel expenses.* If the employing office requires
22 the employee to obtain either a second or third opinion
23 the employing office must reimburse an employee or fam-
24 ily member for any reasonable ‘out of pocket’ travel ex-
25 penses incurred to obtain the second and third medical

1 opinions. The employing office may not require the em-
2 ployee or family member to travel outside normal com-
3 muting distance for purposes of obtaining the second or
4 third medical opinions except in very unusual cir-
5 cumstances.

6 “(f) *Medical certification abroad.* In circumstances in
7 which the employee or a family member is visiting in an-
8 other country, or a family member resides in another
9 country, and a serious health condition develops, the em-
10 ploying office shall accept a medical certification as well
11 as second and third opinions from a health care provider
12 who practices in that country. Where a certification by a
13 foreign health care provider is in a language other than
14 English, the employee must provide the employing office
15 with a written translation of the certification upon re-
16 quest.

17 **“§ 825.308 Recertifications for leave taken because of**
18 **an employee’s own serious health condi-**
19 **tion or the serious health condition of a**
20 **family member**

21 “(a) *30-day rule.* An employing office may request re-
22 certification no more often than every 30 days and only
23 in connection with an absence by the employee, unless
24 paragraphs (b) or (c) of this section apply.

1 “(b) *More than 30 days.* If the medical certification
2 indicates that the minimum duration of the condition is
3 more than 30 days, an employing office must wait until
4 that minimum duration expires before requesting a recer-
5 tification, unless paragraph (c) of this section applies. For
6 example, if the medical certification states that an em-
7 ployee will be unable to work, whether continuously or on
8 an intermittent basis, for 40 days, the employing office
9 must wait 40 days before requesting a recertification. In
10 all cases, an employing office may request a recertification
11 of a medical condition every six months in connection with
12 an absence by the employee. Accordingly, even if the med-
13 ical certification indicates that the employee will need
14 intermittent or reduced schedule leave for a period in ex-
15 cess of six months (e.g., for a lifetime condition), the em-
16 ploying office would be permitted to request recertification
17 every six months in connection with an absence.

18 “(c) *Less than 30 days.* An employing office may re-
19 quest recertification in less than 30 days if:

20 “(1) The employee requests an extension of
21 leave;

22 “(2) Circumstances described by the previous
23 certification have changed significantly (e.g., the du-
24 ration or frequency of the absence, the nature or se-
25 verity of the illness, complications). For example, if

1 a medical certification stated that an employee
2 would need leave for one to two days when the em-
3 ployee suffered a migraine headache and the employ-
4 ee's absences for his or her last two migraines lasted
5 four days each, then the increased duration of ab-
6 sence might constitute a significant change in cir-
7 cumstances allowing the employing office to request
8 a recertification in less than 30 days. Likewise, if an
9 employee had a pattern of using unscheduled FMLA
10 leave for migraines in conjunction with his or her
11 scheduled days off, then the timing of the absences
12 also might constitute a significant change in cir-
13 cumstances sufficient for an employing office to re-
14 quest a recertification more frequently than every 30
15 days; or

16 “(3) The employing office receives information
17 that casts doubt upon the employee's stated reason
18 for the absence or the continuing validity of the cer-
19 tification. For example, if an employee is on FMLA
20 leave for four weeks due to the employee's knee sur-
21 gery, including recuperation, and the employee plays
22 in company softball league games during the employ-
23 ee's third week of FMLA leave, such information
24 might be sufficient to cast doubt upon the con-
25 tinuing validity of the certification allowing the em-

1 employing office to request a recertification in less than
2 30 days.

3 “(d) *Timing*. The employee must provide the re-
4 requested recertification to the employing office within the
5 time frame requested by the employing office (which must
6 allow at least 15 calendar days after the employing office’s
7 request), unless it is not practicable under the particular
8 circumstances to do so despite the employee’s diligent,
9 good faith efforts.

10 “(e) *Content*. The employing office may ask for the
11 same information when obtaining recertification as that
12 permitted for the original certification as set forth in
13 825.306. The employee has the same obligations to par-
14 ticipate and cooperate (including providing a complete and
15 sufficient certification or adequate authorization to the
16 health care provider) in the recertification process as in
17 the initial certification process. See 825.305(d). As part
18 of the information allowed to be obtained on recertification
19 for leave taken because of a serious health condition, the
20 employing office may provide the health care provider with
21 a record of the employee’s absence pattern and ask the
22 health care provider if the serious health condition and
23 need for leave is consistent with such a pattern.

24 “(f) Any recertification requested by the employing
25 office shall be at the employee’s expense unless the em-

1 plying office provides otherwise. No second or third opin-
2 ion on recertification may be required.

3 **“§ 825.309 Certification for leave taken because of a**
4 **qualifying exigency**

5 “(a) *Active Duty Orders.* The first time an employee
6 requests leave because of a qualifying exigency arising out
7 of the covered active duty or call to covered active duty
8 status (or notification of an impending call or order to
9 covered active duty) of a military member (See
10 825.126(a)), an employing office may require the em-
11 ployee to provide a copy of the military member’s active
12 duty orders or other documentation issued by the military
13 which indicates that the military member is on covered
14 active duty or call to covered active duty status, and the
15 dates of the military member’s covered active duty service.
16 This information need only be provided to the employing
17 office once. A copy of new active duty orders or other doc-
18 umentation issued by the military may be required by the
19 employing office if the need for leave because of a quali-
20 fying exigency arises out of a different covered active duty
21 or call to covered active duty status (or notification of an
22 impending call or order to covered active duty) of the same
23 or a different military member;

24 “(b) *Required information.* An employing office may
25 require that leave for any qualifying exigency specified in

1 825.126 be supported by a certification from the employee
2 that sets forth the following information:

3 “(1) A statement or description, signed by the
4 employee, of appropriate facts regarding the quali-
5 fying exigency for which FMLA leave is requested.
6 The facts must be sufficient to support the need for
7 leave. Such facts should include information on the
8 type of qualifying exigency for which leave is re-
9 quested and any available written documentation
10 which supports the request for leave; such docu-
11 mentation, for example, may include a copy of a
12 meeting announcement for informational briefings
13 sponsored by the military, a document confirming an
14 appointment with a counselor or school official, or a
15 copy of a bill for services for the handling of legal
16 or financial affairs;

17 “(2) The approximate date on which the quali-
18 fying exigency commenced or will commence;

19 “(3) If an employee requests leave because of a
20 qualifying exigency for a single, continuous period of
21 time, the beginning and end dates for such absence;

22 “(4) If an employee requests leave because of a
23 qualifying exigency on an intermittent or reduced
24 schedule basis, an estimate of the frequency and du-
25 ration of the qualifying exigency;

1 “(5) If the qualifying exigency involves meeting
2 with a third party, appropriate contact information
3 for the individual or entity with whom the employee
4 is meeting (such as the name, title, organization, ad-
5 dress, telephone number, fax number, and email ad-
6 dress) and a brief description of the purpose of the
7 meeting; and

8 “(6) If the qualifying exigency involves Rest
9 and Recuperation leave, a copy of the military mem-
10 ber’s Rest and Recuperation orders, or other docu-
11 mentation issued by the military which indicates
12 that the military member has been granted Rest and
13 Recuperation leave, and the dates of the military
14 member’s Rest and Recuperation leave.

15 “(c) The Office of Congressional Workplace Rights
16 has developed an optional form (Form E) for employees’
17 use in obtaining a certification that meets FMLA’s certifi-
18 cation requirements. This optional form reflects certifi-
19 cation requirements so as to permit the employee to fur-
20 nish appropriate information to support his or her request
21 for leave because of a qualifying exigency. Form E, or
22 Form WH–384 (developed by the Department of Labor),
23 or another form containing the same basic information,
24 may be used by the employing office; however, no informa-
25 tion may be required beyond that specified in this section.

1 “(d) *Verification*. If an employee submits a complete
2 and sufficient certification to support his or her request
3 for leave because of a qualifying exigency, the employing
4 office may not request additional information from the
5 employee. However, if the qualifying exigency involves
6 meeting with a third party, the employing office may con-
7 tact the individual or entity with whom the employee is
8 meeting for purposes of verifying a meeting or appoint-
9 ment schedule and the nature of the meeting between the
10 employee and the specified individual or entity. The em-
11 ployee’s permission is not required in order to verify meet-
12 ings or appointments with third parties, but no additional
13 information may be requested by the employing office. An
14 employing office also may contact an appropriate unit of
15 the Department of Defense to request verification that a
16 military member is on covered active duty or call to cov-
17 ered active duty status (or has been notified of an impend-
18 ing call or order to covered active duty); no additional in-
19 formation may be requested and the employee’s permis-
20 sion is not required.

21 **“§ 825.310 Certification for leave taken to care for a**
22 **covered servicemember (military care-**
23 **giver leave)**

24 “(a) *Required information from health care provider*.
25 When leave is taken to care for a covered servicemember

1 with a serious injury or illness, an employing office may
2 require an employee to obtain a certification completed by
3 an authorized health care provider of the covered service-
4 member. For purposes of leave taken to care for a covered
5 servicemember, any one of the following health care pro-
6 viders may complete such a certification:

7 “(1) A United States Department of Defense
8 (‘DOD’) health care provider;

9 “(2) A United States Department of Veterans
10 Affairs (‘VA’) health care provider;

11 “(3) A DOD TRICARE network authorized
12 private health care provider;

13 “(4) A DOD non-network TRICARE author-
14 ized private health care provider; or

15 “(5) Any health care provider as defined in
16 825.125.

17 “(b) If the authorized health care provider is unable
18 to make certain military-related determinations outlined
19 below, the authorized health care provider may rely on de-
20 terminations from an authorized DOD representative
21 (such as a DOD recovery care coordinator) or an author-
22 ized VA representative. An employing office may request
23 that the health care provider provide the following infor-
24 mation:

1 “(1) The name, address, and appropriate con-
2 tact information (telephone number, fax number,
3 and/or email address) of the health care provider,
4 the type of medical practice, the medical specialty,
5 and whether the health care provider is one of the
6 following:

7 “(A) A DOD health care provider;

8 “(B) A VA health care provider;

9 “(C) A DOD TRICARE network author-
10 ized private health care provider;

11 “(D) A DOD non-network TRICARE au-
12 thorized private health care provider; or

13 “(E) A health care provider as defined in
14 825.125.

15 “(2) Whether the covered servicemember’s in-
16 jury or illness was incurred in the line of duty on
17 active duty or, if not, whether the covered
18 servicemember’s injury or illness existed before the
19 beginning of the servicemember’s active duty and
20 was aggravated by service in the line of duty on ac-
21 tive duty;

22 “(3) The approximate date on which the serious
23 injury or illness commenced, or was aggravated, and
24 its probable duration;

1 “(4) A statement or description of appropriate
2 medical facts regarding the covered servicemember’s
3 health condition for which FMLA leave is requested.
4 The medical facts must be sufficient to support the
5 need for leave.

6 “(A) In the case of a current member of
7 the Armed Forces, such medical facts must in-
8 clude information on whether the injury or ill-
9 ness may render the covered servicemember
10 medically unfit to perform the duties of the
11 servicemember’s office, grade, rank, or rating
12 and whether the member is receiving medical
13 treatment, recuperation, or therapy;

14 “(B) In the case of a covered veteran, such
15 medical facts must include:

16 “(i) Information on whether the vet-
17 eran is receiving medical treatment, recu-
18 peration, or therapy for an injury or illness
19 that is the continuation of an injury or ill-
20 ness that was incurred or aggravated when
21 the covered veteran was a member of the
22 Armed Forces and rendered the service-
23 member medically unfit to perform the du-
24 ties of the servicemember’s office, grade,
25 rank, or rating; or

1 “(ii) Information on whether the vet-
2 eran is receiving medical treatment, recu-
3 peration, or therapy for an injury or illness
4 that is a physical or mental condition for
5 which the covered veteran has received a
6 U.S. Department of Veterans Affairs Serv-
7 vice-Related Disability Rating (VASRD) of
8 50 percent or greater, and that such
9 VASRD rating is based, in whole or in
10 part, on the condition precipitating the
11 need for military caregiver leave; or

12 “(iii) Information on whether the vet-
13 eran is receiving medical treatment, recu-
14 peration, or therapy for an injury or illness
15 that is a physical or mental condition that
16 substantially impairs the covered veteran’s
17 ability to secure or follow a substantially
18 gainful occupation by reason of a disability
19 or disabilities related to military service, or
20 would do so absent treatment; or

21 “(iv) Documentation of enrollment in
22 the Department of Veterans Affairs Pro-
23 gram of Comprehensive Assistance for
24 Family Caregivers.

1 “(5) Information sufficient to establish that the
2 covered servicemember is in need of care, as de-
3 scribed in 825.124, and whether the covered service-
4 member will need care for a single continuous period
5 of time, including any time for treatment and recov-
6 ery, and an estimate as to the beginning and ending
7 dates for this period of time;

8 “(6) If an employee requests leave on an inter-
9 mittent or reduced schedule basis for planned med-
10 ical treatment appointments for the covered service-
11 member, whether there is a medical necessity for the
12 covered servicemember to have such periodic care
13 and an estimate of the treatment schedule of such
14 appointments;

15 “(7) If an employee requests leave on an inter-
16 mittent or reduced schedule basis to care for a cov-
17 ered servicemember other than for planned medical
18 treatment (e.g., episodic flare-ups of a medical con-
19 dition), whether there is a medical necessity for the
20 covered servicemember to have such periodic care,
21 which can include assisting in the covered
22 servicemember’s recovery, and an estimate of the
23 frequency and duration of the periodic care.

24 “(c) Required information from employee and/ or cov-
25 ered servicemember. In addition to the information that

1 may be requested under 825.310(b), an employing office
2 may also request that such certification set forth the fol-
3 lowing information provided by an employee and/or cov-
4 ered servicemember:

5 “(1) The name and address of the employing
6 office of the employee requesting leave to care for a
7 covered servicemember, the name of the employee re-
8 questing such leave, and the name of the covered
9 servicemember for whom the employee is requesting
10 leave to care;

11 “(2) The relationship of the employee to the
12 covered servicemember for whom the employee is re-
13 questing leave to care;

14 “(3) Whether the covered servicemember is a
15 current member of the Armed Forces, the National
16 Guard or Reserves, and the covered servicemember’s
17 military branch, rank, and current unit assignment;

18 “(4) Whether the covered servicemember is as-
19 signed to a military medical facility as an outpatient
20 or to a unit established for the purpose of providing
21 command and control of members of the Armed
22 Forces receiving medical care as outpatients (such
23 as a medical hold or warrior transition unit), and
24 the name of the medical treatment facility or unit;

1 “(5) Whether the covered servicemember is on
2 the temporary disability retired list;

3 “(6) Whether the covered servicemember is a
4 veteran, the date of separation from military service,
5 and whether the separation was other than dishonor-
6 able. The employing office may require the employee
7 to provide documentation issued by the military
8 which indicates that the covered servicemember is a
9 veteran, the date of separation, and that the separa-
10 tion is other than dishonorable. Where an employing
11 office requires such documentation, an employee
12 may provide a copy of the veteran’s Certificate of
13 Release or Discharge from Active Duty issued by the
14 U.S. Department of Defense (DD Form 214) or
15 other proof of veteran status. See 825.127(c)(2).

16 “(7) A description of the care to be provided to
17 the covered servicemember and an estimate of the
18 leave needed to provide the care.

19 “(d) The Office of Congressional Workplace Rights
20 has developed an optional form (Form F) for employees’
21 use in obtaining certification that meets FMLA’s certifi-
22 cation requirements. This optional form reflects certifi-
23 cation requirements so as to permit the employee to fur-
24 nish appropriate information to support his or her request
25 for leave to care for a covered servicemember with a seri-

1 ous injury or illness. Form F, or Form WH-385 (devel-
2 oped by the Department of Labor), or another form con-
3 taining the same basic information, may be used by the
4 employing office; however, no information may be required
5 beyond that specified in this section. In all instances the
6 information on the certification must relate only to the
7 serious injury or illness for which the current need for
8 leave exists. An employing office may seek authentication
9 and/or clarification of the certification under 825.307.
10 Second and third opinions under 825.307 are not per-
11 mitted for leave to care for a covered servicemember when
12 the certification has been completed by one of the types
13 of healthcare providers identified in section 825.310(a)(1-
14 4). However, second and third opinions under 825.307 are
15 permitted when the certification has been completed by a
16 health care provider as defined in 825.125 that is not one
17 of the types identified in 825.310(a)(1)-(4). Additionally,
18 recertifications under 825.308 are not permitted for leave
19 to care for a covered servicemember. An employing office
20 may require an employee to provide confirmation of cov-
21 ered family relationship to the seriously injured or ill serv-
22 icemember pursuant to 825.122(k) of the FMLA.

23 “(e) An employing office requiring an employee to
24 submit a certification for leave to care for a covered serv-
25 icemember must accept as sufficient certification, in lieu

1 of the Office of Congressional Workplace Rights’s optional
2 certification form (Form F) or an employing office’s own
3 certification form, invitational travel orders (ITOs) or in-
4 vitational travel authorizations (ITAs) issued to any fam-
5 ily member to join an injured or ill servicemember at his
6 or her bedside. An ITO or ITA is sufficient certification
7 for the duration of time specified in the ITO or ITA. Dur-
8 ing that time period, an eligible employee may take leave
9 to care for the covered servicemember in a continuous
10 block of time or on an intermittent basis. An eligible em-
11 ployee who provides an ITO or ITA to support his or her
12 request for leave may not be required to provide any addi-
13 tional or separate certification that leave taken on an
14 intermittent basis during the period of time specified in
15 the ITO or ITA is medically necessary. An ITO or ITA
16 is sufficient certification for an employee entitled to take
17 FMLA leave to care for a covered servicemember regard-
18 less of whether the employee is named in the order or au-
19 thorization.

20 “(1) If an employee will need leave to care for
21 a covered servicemember beyond the expiration date
22 specified in an ITO or ITA, an employing office may
23 request that the employee have one of the authorized
24 health care providers listed under 825.310(a) com-
25 plete the Office of Congressional Workplace Rights

1 optional certification form (Form F) or an employ-
2 ing office's own form, as requisite certification for
3 the remainder of the employee's necessary leave pe-
4 riod.

5 “(2) An employing office may seek authentica-
6 tion and clarification of the ITO or ITA under
7 825.307. An employing office may not utilize the
8 second or third opinion process outlined in 825.307
9 or the recertification process under 825.308 during
10 the period of time in which leave is supported by an
11 ITO or ITA.

12 “(3) An employing office may require an em-
13 ployee to provide confirmation of covered family re-
14 lationship to the seriously injured or ill servicemem-
15 ber pursuant to 825.122(k) when an employee sup-
16 ports his or her request for FMLA leave with a copy
17 of an ITO or ITA.

18 “(f) An employing office requiring an employee to
19 submit a certification for leave to care for a covered serv-
20 icemember must accept as sufficient certification of the
21 servicemember's serious injury or illness documentation
22 indicating the servicemember's enrollment in the Depart-
23 ment of Veterans Affairs Program of Comprehensive As-
24 sistance for Family Caregivers. Such documentation is
25 sufficient certification of the servicemember's serious in-

1 jury or illness to support the employee’s request for mili-
2 tary caregiver leave regardless of whether the employee is
3 the named caregiver in the enrollment documentation.

4 “(1) An employing office may seek authentica-
5 tion and clarification of the documentation indi-
6 cating the servicemember’s enrollment in the De-
7 partment of Veterans Affairs Program of Com-
8 prehensive Assistance for Family Caregivers under
9 825.307. An employing office may not utilize the
10 second or third opinion process outlined in 825.307
11 or the recertification process under 825.308 when
12 the servicemember’s serious injury or illness is
13 shown by documentation of enrollment in this pro-
14 gram.

15 “(2) An employing office may require an em-
16 ployee to provide confirmation of covered family re-
17 lationship to the seriously injured or ill servicemem-
18 ber pursuant to 825.122(k) when an employee sup-
19 ports his or her request for FMLA leave with a copy
20 of such enrollment documentation. An employing of-
21 fice may also require an employee to provide docu-
22 mentation, such as a veteran’s Form DD–214, show-
23 ing that the discharge was other than dishonorable
24 and the date of the veteran’s discharge.

1 “(g) Where medical certification is requested by an
2 employing office, an employee may not be held liable for
3 administrative delays in the issuance of military docu-
4 ments, despite the employee’s diligent, good-faith efforts
5 to obtain such documents. See 825.305(b). In all instances
6 in which certification is requested, it is the employee’s re-
7 sponsibility to provide the employing office with complete
8 and sufficient certification and failure to do so may result
9 in the denial of FMLA leave. See 825.305(d).

10 **“§ 825.311 Intent to return to work**

11 “(a) An employing office may require an employee
12 on FMLA leave to report periodically on the employee’s
13 status and intent to return to work. The employing office’s
14 policy regarding such reports may not be discriminatory
15 and must take into account all of the relevant facts and
16 circumstances related to the individual employee’s leave
17 situation.

18 “(b) If an employee gives unequivocal notice of intent
19 not to return to work, the employing office’s obligations
20 under FMLA, as made applicable by the CAA, to maintain
21 health benefits (subject to COBRA requirements) and to
22 restore the employee cease. However, these obligations
23 continue if an employee indicates he or she may be unable
24 to return to work but expresses a continuing desire to do
25 so.

1 “(c) It may be necessary for an employee to take
2 more leave than originally anticipated. Conversely, an em-
3 ployee may discover after beginning leave that the cir-
4 cumstances have changed and the amount of leave origi-
5 nally anticipated is no longer necessary. An employee may
6 not be required to take more FMLA leave than necessary
7 to resolve the circumstance that precipitated the need for
8 leave. In both of these situations, the employing office may
9 require that the employee provide the employing office rea-
10 sonable notice (i.e., within two business days) of the
11 changed circumstances where foreseeable. The employing
12 office may also obtain information on such changed cir-
13 cumstances through requested status reports.

14 **“§ 825.312 Fitness-for-duty certification**

15 “(a) As a condition of restoring an employee whose
16 FMLA leave was occasioned by the employee’s own serious
17 health condition that made the employee unable to per-
18 form the employee’s job, an employing office may have a
19 uniformly-applied policy or practice that requires all simi-
20 larly-situated employees (i.e., same occupation, same seri-
21 ous health condition) who take leave for such conditions
22 to obtain and present certification from the employee’s
23 health care provider that the employee is able to resume
24 work. The employee has the same obligations to partici-
25 pate and cooperate (including providing a complete and

1 sufficient certification or providing sufficient authorization
2 to the health care provider to provide the information di-
3 rectly to the employing office) in the fitness-for-duty cer-
4 tification process as in the initial certification process. See
5 825.305(d).

6 “(b) An employing office may seek a fitness-for-duty
7 certification only with regard to the particular health con-
8 dition that caused the employee’s need for FMLA leave.
9 The certification from the employee’s health care provider
10 must certify that the employee is able to resume work.
11 Additionally, an employing office may require that the cer-
12 tification specifically address the employee’s ability to per-
13 form the essential functions of the employee’s job. In order
14 to require such a certification, an employing office must
15 provide an employee with a list of the essential functions
16 of the employee’s job no later than with the designation
17 notice required by 825.300(d), and must indicate in the
18 designation notice that the certification must address the
19 employee’s ability to perform those essential functions. If
20 the employing office satisfies these requirements, the em-
21 ployee’s health care provider must certify that the em-
22 ployee can perform the identified essential functions of his
23 or her job. Following the procedures set forth in
24 825.307(a), the employing office may contact the employ-
25 ee’s health care provider for purposes of clarifying and au-

1 authenticating the fitness-for-duty certification. Clarification
2 may be requested only for the serious health condition for
3 which FMLA leave was taken. The employing office may
4 not delay the employee's return to work while contact with
5 the health care provider is being made. No second or third
6 opinions on a fitness-for-duty certification may be re-
7 quired.

8 “(c) The cost of the certification shall be borne by
9 the employee, and the employee is not entitled to be paid
10 for the time or travel costs spent in acquiring the certifi-
11 cation.

12 “(d) The designation notice required in 825.300(d)
13 shall advise the employee if the employing office will re-
14 quire a fitness-for-duty certification to return to work and
15 whether that fitness-for-duty certification must address
16 the employee's ability to perform the essential functions
17 of the employee's job.

18 “(e) An employing office may delay restoration to em-
19 ployment until an employee submits a required fitness-for-
20 duty certification unless the employing office has failed to
21 provide the notice required in paragraph (d) of this sec-
22 tion. If an employing office provides the notice required,
23 an employee who does not provide a fitness-for-duty cer-
24 tification or request additional FMLA leave is no longer

1 entitled to reinstatement under the FMLA. See
2 825.313(d).

3 “(f) An employing office is not entitled to a certifi-
4 cation of fitness to return to duty for each absence taken
5 on an intermittent or reduced leave schedule. However, an
6 employing office is entitled to a certification of fitness to
7 return to duty for such absences up to once every 30 days
8 if reasonable safety concerns exist regarding the employ-
9 ee’s ability to perform his or her duties, based on the seri-
10 ous health condition for which the employee took such
11 leave. If an employing office chooses to require a fitness-
12 for-duty certification under such circumstances, the em-
13 ploying office shall inform the employee at the same time
14 it issues the designation notice that for each subsequent
15 instance of intermittent or reduced schedule leave, the em-
16 ployee will be required to submit a fitness-for-duty certifi-
17 cation unless one has already been submitted within the
18 past 30 days. Alternatively, an employing office can set
19 a different interval for requiring a fitness-for-duty certifi-
20 cation as long as it does not exceed once every 30 days
21 and as long as the employing office advises the employee
22 of the requirement in advance of the employee taking the
23 intermittent or reduced schedule leave. The employing of-
24 fice may not terminate the employment of the employee
25 while awaiting such a certification of fitness to return to

1 duty for an intermittent or reduced schedule leave ab-
2 sence. Reasonable safety concerns means a reasonable be-
3 lief of significant risk of harm to the individual employee
4 or others. In determining whether reasonable safety con-
5 cerns exist, an employing office should consider the nature
6 and severity of the potential harm and the likelihood that
7 potential harm will occur.

8 “(g) If the terms of a collective bargaining agreement
9 govern an employee’s return to work, those provisions
10 shall be applied.

11 “(h) Requirements under the Americans with Disabil-
12 ities Act (ADA), as amended and as made applicable by
13 the CAA, apply. After an employee returns from FMLA
14 leave, the ADA requires any medical examination at an
15 employing office’s expense by the employing office’s health
16 care provider be job-related and consistent with business
17 necessity. For example, an attorney could not be required
18 to submit to a medical examination or inquiry just because
19 her leg had been amputated. The essential functions of
20 an attorney’s job do not require use of both legs; therefore
21 such an inquiry would not be job related. An employing
22 office may require a warehouse laborer, whose back im-
23 pairment affects the ability to lift, to be examined by an
24 orthopedist, but may not require this employee to submit
25 to an HIV test where the test is not related to either the

1 essential functions of his or her job or to his/her impair-
2 ment. If an employee's serious health condition may also
3 be a disability within the meaning of the ADA, as made
4 applicable by the CAA, the FMLA does not prevent the
5 employing office from following the procedures for re-
6 questing medical information under the ADA.

7 **“§ 825.313 Failure to provide certification**

8 “(a) *Foreseeable leave*. In the case of foreseeable leave,
9 if an employee fails to provide certification in a timely
10 manner as required by 825.305, then an employing office
11 may deny FMLA coverage until the required certification
12 is provided. For example, if an employee has 15 days to
13 provide a certification and does not provide the certifi-
14 cation for 45 days without sufficient reason for the delay,
15 the employing office can deny FMLA protections for the
16 30-day period following the expiration of the 15-day time
17 period, if the employee takes leave during such period.

18 “(b) *Unforeseeable leave*. In the case of unforeseeable
19 leave, an employing office may deny FMLA coverage for
20 the requested leave if the employee fails to provide a cer-
21 tification within 15 calendar days from receipt of the re-
22 quest for certification unless not practicable due to extenu-
23 ating circumstances. For example, in the case of a medical
24 emergency, it may not be practicable for an employee to
25 provide the required certification within 15 calendar days.

1 Absent such extenuating circumstances, if the employee
2 fails to timely return the certification, the employing office
3 can deny FMLA protections for the leave following the
4 expiration of the 15-day time period until a sufficient cer-
5 tification is provided. If the employee never produces the
6 certification, the leave is not FMLA leave.

7 “(c) *Recertification*. An employee must provide recer-
8 tification within the time requested by the employing office
9 (which must allow at least 15 calendar days after the re-
10 quest) or as soon as practicable under the particular facts
11 and circumstances. If an employee fails to provide a recer-
12 tification within a reasonable time under the particular
13 facts and circumstances, then the employing office may
14 deny continuation of the FMLA leave protections until the
15 employee produces a sufficient recertification. If the em-
16 ployee never produces the recertification, the leave is not
17 FMLA leave. Recertification does not apply to leave taken
18 for a qualifying exigency or to care for a covered service-
19 member.

20 “(d) *Fitness-for-duty certification*. When requested by
21 the employing office pursuant to a uniformly applied pol-
22 icy for similarly-situated employees, the employee must
23 provide medical certification, at the time the employee
24 seeks reinstatement at the end of FMLA leave taken for
25 the employee’s serious health condition, that the employee

1 is fit for duty and able to return to work (see 825.312(a))
2 if the employing office has provided the required notice
3 (see 825.300(e)); the employing office may delay restora-
4 tion until the certification is provided. Unless the employee
5 provides either a fitness-for-duty certification or a new
6 medical certification for a serious health condition at the
7 time FMLA leave is concluded, the employee may be ter-
8 minated. See also 825.213(a)(3).

9 **“Subpart D—Administrative Process**

10 **“§ 825.400 Administrative process, general rules**

11 “(a) The Procedural Rules of the Office of Congres-
12 sional Workplace Rights set forth the procedures that
13 apply to the administrative process for considering and re-
14 solving alleged violations of the laws made applicable by
15 the CAA, including the FMLA. The Rules include proce-
16 dures for filing claims and participating in administrative
17 dispute resolution proceedings at the Office of Congres-
18 sional Workplace Rights, including procedures for the con-
19 duct of hearings and for appeals to the Board of Directors.
20 The Procedural Rules also address other matters of gen-
21 eral applicability to the dispute resolution process and to
22 the operations of the Office.

23 “(b) If an employing office has violated one or more
24 provisions of FMLA, as incorporated by the CAA, and if
25 justified by the facts of a particular case, an employee may

1 receive one or more of the following: wages, employment
2 benefits, or other compensation denied or lost to such em-
3 ployee by reason of the violation; or, where no such tan-
4 gible loss has occurred, such as when FMLA leave was
5 unlawfully denied, any actual monetary loss sustained by
6 the employee as a direct result of the violation, such as
7 the cost of providing care, up to a sum equal to 26 weeks
8 of wages for the employee in a case involving leave to care
9 for a covered servicemember or 12 weeks of wages for the
10 employee in a case involving leave for any other FMLA
11 qualifying reason. In addition, the employee may be enti-
12 tled to interest on such sum, calculated at the prevailing
13 rate. An amount equaling the preceding sums may also
14 be awarded as liquidated damages unless such amount is
15 reduced by the hearing officer or the Board because the
16 violation was in good faith and the employing office had
17 reasonable grounds for believing the employer had not vio-
18 lated the CAA. When appropriate, the employee may also
19 obtain appropriate equitable relief, such as employment,
20 reinstatement and promotion. When the employing office
21 is found in violation, the employee may recover a reason-
22 able attorney's fee, reasonable expert witness fees, and
23 other costs as would be appropriate if awarded under sec-
24 tion 2000e-5(k) of title 42.

1 “(c) The Procedural Rules of the Office of Congres-
2 sional Workplace Rights are found at 165 Cong. Rec.
3 H4896 (daily ed. June 19, 2019) and 165 Cong. Rec.
4 S4105 (daily ed. June 19, 2019), and may also be found
5 on the Office’s website at www.ocwr.gov.

6 **“§ 825.401 [Reserved]**

7 **“§ 825.402 [Reserved]**

8 **“§ 825.403 [Reserved]**

9 **“§ 825.404 [Reserved]**

10 **“Subpart E—[Reserved]**

11 **“Subpart F—Special Rules Applicable to Employees**

12 **of Schools**

13 **“§ 825.600 Special rules for school employees, defini-**

14 **tions**

15 “(a) Certain special rules apply to employees of local
16 educational agencies, including public school boards and
17 elementary schools under their jurisdiction, and private el-
18 ementary and secondary schools. The special rules do not
19 apply to other kinds of educational institutions, such as
20 colleges and universities, trade schools, and preschools.

21 “(b) Educational institutions are covered by FMLA,
22 as made applicable by the CAA (and these special rules).
23 The usual requirements for employees to be eligible do
24 apply.

1 against the employee’s FMLA leave entitlement. An in-
2 structional employee who is on FMLA leave at the end
3 of the school year must be provided with any benefits over
4 the summer vacation that employees would normally re-
5 ceive if they had been working at the end of the school
6 year.

7 “(1) If an eligible instructional employee needs
8 intermittent leave or leave on a reduced leave sched-
9 ule to care for a family member with a serious
10 health condition, to care for a covered servicemem-
11 ber, or for the employee’s own serious health condi-
12 tion, which is foreseeable based on planned medical
13 treatment, and the employee would be on leave for
14 more than 20 percent of the total number of work-
15 ing days over the period the leave would extend, the
16 employing office may require the employee to choose
17 either to:

18 “(A) Take leave for a period or periods of
19 a particular duration, not greater than the du-
20 ration of the planned treatment; or

21 “(B) Transfer temporarily to an available
22 alternative position for which the employee is
23 qualified, which has equivalent pay and benefits
24 and which better accommodates recurring peri-

1 ods of leave than does the employee’s regular
2 position.

3 “(2) These rules apply only to a leave involving
4 more than 20 percent of the working days during
5 the period over which the leave extends. For exam-
6 ple, if an instructional employee who normally works
7 five days each week needs to take two days of
8 FMLA leave per week over a period of several
9 weeks, the special rules would apply. Employees tak-
10 ing leave which constitutes 20 percent or less of the
11 working days during the leave period would not be
12 subject to transfer to an alternative position. Periods
13 of a particular duration means a block, or blocks, of
14 time beginning no earlier than the first day for
15 which leave is needed and ending no later than the
16 last day on which leave is needed, and may include
17 one uninterrupted period of leave.

18 “(b) If an instructional employee does not give re-
19 quired notice of foreseeable FMLA leave (See 825.302)
20 to be taken intermittently or on a reduced leave schedule,
21 the employing office may require the employee to take
22 leave of a particular duration, or to transfer temporarily
23 to an alternative position. Alternatively, the employing of-
24 fice may require the employee to delay the taking of leave
25 until the notice provision is met.

1 **“§ 825.602 Special rules for school employees, limita-**
2 **tions on leave near the end of an aca-**
3 **demie term**

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

9 “(1) An instructional employee begins leave
10 more than five weeks before the end of a term. The
11 employing office may require the employee to con-
12 tinue taking leave until the end of the term if—

13 “(A) The leave will last at least three
14 weeks, and

15 “(B) The employee would return to work
16 during the three-week period before the end of
17 the term.

18 “(2) The employee begins leave during the five-
19 week period before the end of a term because of the
20 birth of a son or daughter; the placement of a son
21 or daughter for adoption or foster care; to care for
22 a spouse, son, daughter, or parent with a serious
23 health condition; or to care for a covered service-
24 member. The employing office may require the em-
25 ployee to continue taking leave until the end of the
26 term if—

1 “(A) The leave will last more than two
2 weeks, and

3 “(B) The employee would return to work
4 during the two-week period before the end of
5 the term.

6 “(3) The employee begins leave during the
7 three-week period before the end of a term because
8 of the birth of a son or daughter; the placement of
9 a son or daughter for adoption or foster care; to
10 care for a spouse, son, daughter, or parent with a
11 serious health condition; or to care for a covered
12 servicemember. The employing office may require
13 the employee to continue taking leave until the end
14 of the term if the leave will last more than five
15 working days.

16 “(b) For purposes of these provisions, academic term
17 means the school semester, which typically ends near the
18 end of the calendar year and the end of spring each school
19 year. In no case may a school have more than two aca-
20 demic terms or semesters each year for purposes of
21 FMLA, as made applicable by the CAA. An example of
22 leave falling within these provisions would be where an em-
23 ployee plans two weeks of leave to care for a family mem-
24 ber which will begin three weeks before the end of the

1 term. In that situation, the employing office could require
2 the employee to stay out on leave until the end of the term.

3 **“§ 825.603 Special rules for school employees, dura-**
4 **tion of FMLA leave**

5 “(a) If an employee chooses to take leave for periods
6 of a particular duration in the case of intermittent or re-
7 duced schedule leave, the entire period of leave taken will
8 count as FMLA leave.

9 “(b) In the case of an employee who is required to
10 take leave until the end of an academic term, only the
11 period of leave until the employee is ready and able to
12 return to work shall be charged against the employee’s
13 FMLA leave entitlement. The employing office has the op-
14 tion not to require the employee to stay on leave until the
15 end of the school term. Therefore, any additional leave re-
16 quired by the employing office to the end of the school
17 term is not counted as FMLA leave; however, the employ-
18 ing office shall be required to maintain the employee’s
19 group health insurance and restore the employee to the
20 same or equivalent job including other benefits at the con-
21 clusion of the leave.

22 **“§ 825.604 Special rules for school employees, restora-**
23 **tion to an equivalent position**

24 “ The determination of how an employee is to be re-
25 stored to an equivalent position upon return from FMLA

1 leave will be made on the basis of ‘established school board
2 policies and practices, private school policies and practices,
3 and collective bargaining agreements.’ The ‘established
4 policies’ and collective bargaining agreements used as a
5 basis for restoration must be in writing, must be made
6 known to the employee prior to the taking of FMLA leave,
7 and must clearly explain the employee’s restoration rights
8 upon return from leave. Any established policy which is
9 used as the basis for restoration of an employee to an
10 equivalent position must provide substantially the same
11 protections as provided in the FMLA, as made applicable
12 by the CAA, for reinstated employees. See 825.215. In
13 other words, the policy or collective bargaining agreement
14 must provide for restoration to an equivalent position with
15 equivalent employment benefits, pay, and other terms and
16 conditions of employment. For example, an employee may
17 not be restored to a position requiring additional licensure
18 or certification.

19 **“Subpart G—Effect of Other Laws, Employing Office**
20 **Practices, and Collective Bargaining Agree-**
21 **ments on Employee Rights Under the FMLA, As**
22 **Made Applicable By the CAA**

23 **“§ 825.700 Interaction with employing office’s policies**

24 “(a) An employing office must observe any employ-
25 ment benefit program or plan that provides greater family

1 or medical leave rights to employees than the rights estab-
2 lished by the FMLA. Conversely, the rights established by
3 the FMLA, as made applicable by the CAA, may not be
4 diminished by any employment benefit program or plan.
5 For example, a provision of a collective bargaining agree-
6 ment (CBA) which provides for reinstatement to a position
7 that is not equivalent because of seniority (e.g., provides
8 lesser pay) is superseded by FMLA. If an employing office
9 provides greater unpaid family leave rights than are af-
10 farded by FMLA, the employing office is not required to
11 extend additional rights afforded by FMLA, such as main-
12 tenance of health benefits (other than through COBRA
13 or 5 U.S.C. 8905a, whichever is applicable), to the addi-
14 tional leave period not covered by FMLA.

15 “(b) Nothing in the FMLA, as made applicable by
16 the CAA, prevents an employing office from amending ex-
17 isting leave and employee benefit programs, provided they
18 comply with FMLA, as made applicable by the CAA. How-
19 ever, nothing in the FMLA, as made applicable by the
20 CAA, is intended to discourage employing offices from
21 adopting or retaining more generous leave policies.

1 **“§ 825.701 [Reserved]**

2 **“§ 825.702 Interaction with anti-discrimination laws,**
3 **as applied by section 201 of the CAA**

4 “(a) Nothing in the FMLA modifies or affects any
5 applicable law prohibiting discrimination on the basis of
6 race, religion, color, national origin, sex, age, or disability
7 (e.g., title VII of the Civil Rights Act of 1964, as amended
8 by the Pregnancy Discrimination Act and as made appli-
9 cable by the CAA). FMLA’s legislative history explains
10 that FMLA is ‘not intended to modify or affect the Reha-
11 bilitation Act of 1973, as amended, the regulations con-
12 cerning employment which have been promulgated pursu-
13 ant to that statute, or the Americans with Disabilities Act
14 of 1990 [as amended] or the regulations issued under that
15 act. Thus, the leave provisions of the [FMLA] are wholly
16 distinct from the reasonable accommodation obligations of
17 employers covered under the [ADA] . . . or the Federal
18 government itself. The purpose of the FMLA, as applied
19 by the CAA, is to make leave available to eligible employ-
20 ees and [employing offices] within its coverage, and not
21 to limit already existing rights and protection.’ S. Rep.
22 No. 3, 103d Cong., 1st Sess. 38 (1993). An employing
23 office must therefore provide leave under whichever statu-
24 tory provision provides the greater rights to employees.
25 When an employer violates both FMLA and a discrimina-
26 tion law, an employee may be able to recover under either

1 or both statutes (double relief may not be awarded for the
2 same loss; when remedies coincide a claimant may be al-
3 lowed to utilize whichever avenue of relief is desired.
4 *Laffey v. Northwest Airlines, Inc.*, 567 F.2d 429, 445
5 (D.C. Cir. 1976), cert. denied, 434 U.S. 1086 (1978).

6 “(b) If an employee is a qualified individual with a
7 disability within the meaning of the Americans with Dis-
8 abilities Act (ADA), as made applicable by the CAA, the
9 employing office must make reasonable accommodations,
10 etc., barring undue hardship, in accordance with the ADA.
11 At the same time, the employing office must afford an em-
12 ployee his or her FMLA rights, as made applicable by the
13 CAA. ADA’s ‘disability’ and FMLA’s ‘serious health con-
14 dition’ are different concepts, and must be analyzed sepa-
15 rately. FMLA entitles eligible employees to 12 weeks of
16 leave in any 12-month period due to their own serious
17 health condition, whereas the ADA allows an indetermi-
18 nate amount of leave, barring undue hardship, as a rea-
19 sonable accommodation. FMLA requires employing offices
20 to maintain employees’ group health plan coverage during
21 FMLA leave on the same conditions as coverage would
22 have been provided if the employee had been continuously
23 employed during the leave period, whereas ADA does not
24 require maintenance of health insurance unless other em-

1 ployees receive health insurance during leave under the
2 same circumstances.

3 “(c)(1) A reasonable accommodation under the ADA
4 might be accomplished by providing an individual with a
5 disability with a part-time job with no health benefits, as-
6 suming the employing office did not ordinarily provide
7 health insurance for part-time employees. However,
8 FMLA would permit an employee to work a reduced leave
9 schedule until the equivalent of 12 workweeks of leave
10 were used, with group health benefits maintained during
11 this period. FMLA permits an employing office to tempo-
12 rarily transfer an employee who is taking leave intermit-
13 tently or on a reduced leave schedule to an alternative po-
14 sition, whereas the ADA allows an accommodation of reas-
15 signment to an equivalent, vacant position only if the em-
16 ployee cannot perform the essential functions of the em-
17 ployee’s present position and an accommodation is not
18 possible in the employee’s present position, or an accom-
19 modation in the employee’s present position would cause
20 an undue hardship. The examples in the following para-
21 graphs of this section demonstrate how the two laws would
22 interact with respect to a qualified individual with a dis-
23 ability.

24 “(2) A qualified individual with a disability who
25 is also an eligible employee entitled to FMLA leave

1 requests 10 weeks of medical leave as a reasonable
2 accommodation, which the employing office grants
3 because it is not an undue hardship. The employing
4 office advises the employee that the 10 weeks of
5 leave is also being designated as FMLA leave and
6 will count towards the employee's FMLA leave enti-
7 tlement. This designation does not prevent the par-
8 ties from also treating the leave as a reasonable ac-
9 commodation and reinstating the employee into the
10 same job, as required by the ADA, rather than an
11 equivalent position under FMLA, if that is the
12 greater right available to the employee. At the same
13 time, the employee would be entitled under FMLA
14 to have the employing office maintain group health
15 plan coverage during the leave, as that requirement
16 provides the greater right to the employee.

17 “(3) If the same employee needed to work part-
18 time (a reduced leave schedule) after returning to
19 his or her same job, the employee would still be enti-
20 tled under FMLA to have group health plan cov-
21 erage maintained for the remainder of the two-week
22 equivalent of FMLA leave entitlement, notwith-
23 standing an employing office policy that part-time
24 employees do not receive health insurance. This em-
25 ployee would be entitled under the ADA to reason-

1 able accommodations to enable the employee to per-
2 form the essential functions of the part-time posi-
3 tion. In addition, because the employee is working a
4 part-time schedule as a reasonable accommodation,
5 the FMLA's provision for temporary assignment to
6 a different alternative position would not apply.
7 Once the employee has exhausted his or her remain-
8 ing FMLA leave entitlement while working the re-
9 duced (part-time) schedule, if the employee is a
10 qualified individual with a disability, and if the em-
11 ployee is unable to return to the same full-time posi-
12 tion at that time, the employee might continue to
13 work part-time as a reasonable accommodation, bar-
14 ring undue hardship; the employee would then be en-
15 titled to only those employment benefits ordinarily
16 provided by the employing office to part-time em-
17 ployees.

18 “(4) At the end of the FMLA leave entitlement,
19 an employing office is required under FMLA to rein-
20 state the employee in the same or an equivalent po-
21 sition, with equivalent pay and benefits, to that
22 which the employee held when leave commenced. The
23 employing office's FMLA obligations would be satis-
24 fied if the employing office offered the employee an
25 equivalent full-time position. If the employee were

1 unable to perform the essential functions of that
2 equivalent position even with reasonable accommoda-
3 tion, because of a disability, the ADA may require
4 the employing office to make a reasonable accommo-
5 dation at that time by allowing the employee to work
6 part-time or by reassigning the employee to a vacant
7 position, barring undue hardship.

8 “(d)(1) If FMLA entitles an employee to leave, an
9 employing office may not, in lieu of FMLA leave entitle-
10 ment, require an employee to take a job with a reasonable
11 accommodation. However, ADA may require that an em-
12 ploying office offer an employee the opportunity to take
13 such a position. An employing office may not change the
14 essential functions of the job in order to deny FMLA
15 leave. See 825.220(b).

16 “(2) An employee may be on a workers’ com-
17 pensation absence due to an on-the-job injury or ill-
18 ness which also qualifies as a serious health condi-
19 tion under FMLA. The workers’ compensation ab-
20 sence and FMLA leave may run concurrently (sub-
21 ject to proper notice and designation by the employ-
22 ing office). At some point the health care provider
23 providing medical care pursuant to the workers’
24 compensation injury may certify the employee is able
25 to return to work in a light duty position. If the em-

1 employing office offers such a position, the employee is
2 permitted but not required to accept the position.
3 See 825.220(d). As a result, the employee may no
4 longer qualify for payments from the workers' com-
5 pensation benefit plan, but the employee is entitled
6 to continue on unpaid FMLA leave either until the
7 employee is able to return to the same or equivalent
8 job the employee left or until the 12-week FMLA
9 leave entitlement is exhausted. See 825.207(e). If
10 the employee returning from the workers' compensa-
11 tion injury is a qualified individual with a disability,
12 he or she will have rights under the ADA, as made
13 applicable by the CAA.

14 “(e) If an employing office requires certifications of
15 an employee's fitness for duty to return to work, as per-
16 mitted by FMLA under a uniform policy, it must comply
17 with the ADA requirement that a fitness for duty physical
18 be job-related and consistent with business necessity.

19 “(f) Under Title VII of the Civil Rights Act of 1964,
20 as amended by the Pregnancy Discrimination Act, and as
21 made applicable by the CAA, an employing office should
22 provide the same benefits for women who are pregnant
23 as the employing office provides to other employees with
24 short-term disabilities. Because Title VII does not require
25 employees to be employed for a certain period of time to

1 be protected, an employee employed for less than 12
2 months by the employing office may not be denied mater-
3 nity leave if the employing office normally provides short-
4 term disability benefits to employees with the same tenure
5 who are experiencing other short-term disabilities.

6 “(g) Under the Uniformed Services Employment and
7 Reemployment Rights Act of 1994 (USERRA), 38 U.S.C.
8 4301, et seq., veterans are entitled to receive all rights
9 and benefits of employment that they would have obtained
10 if they had been continuously employed. Therefore, under
11 USERRA, a returning servicemember would be eligible for
12 FMLA leave if the months and hours that he or she would
13 have worked for the civilian employing office during the
14 period of absence due to or necessitated by USERRA-cov-
15 ered service, combined with the months employed and the
16 hours actually worked, meet the FMLA eligibility thresh-
17 old of 12 months of employment and the hours of service
18 requirement. See 825.110(b)(2)(i) and (c)(2) and
19 825.802(c).

20 “(h) For further information on Federal antidiscrimi-
21 nation laws applied by section 201 of the CAA (2 U.S.C.
22 1311), including Title VII, the Rehabilitation Act, and the
23 ADA, individuals are encouraged to contact the Office of
24 Congressional Workplace Rights.

1 **“Subpart H—[Reserved]”.**

2 **SEC. 2. APPROVAL OF REGULATIONS RELATING TO FAIR**
3 **LABOR STANDARDS ACT.**

4 (a) **IN GENERAL.**—The regulations described in sub-
5 section (b) are hereby approved, insofar as such regula-
6 tions apply to covered employees of the House of Rep-
7 resentatives under the Congressional Accountability Act of
8 1995 and to the extent such regulations are consistent
9 with the provisions of such Act.

10 (b) **REGULATIONS APPROVED.**—The regulations de-
11 scribed in this subsection are the regulations issued by the
12 Office of Congressional Workplace Rights on September
13 28, 2022, under section 203(c)(2) of the Congressional
14 Accountability Act of 1995 to implement section 203 of
15 such Act (relating to the application of overtime require-
16 ments under the Fair Labor Standards Act of 1938), as
17 published in the Congressional Record on September 28,
18 2022 (Volume 168, daily edition) on pages H8203 through
19 H8217, and stated as follows:

1 **“PART 541—DEFINING AND DELIMITING THE EX-**
2 **EMPTIONS FOR EXECUTIVE, ADMINISTRA-**
3 **TIVE, PROFESSIONAL, AND COMPUTER [AND**
4 **OUTSIDE SALES] EMPLOYEES**

5 **“Subpart A—General Regulations (§§541.0-541.4)**

6 **“§ 541.0 Introductory statement**

7 “(a) Section 13(a)(1) of the Fair Labor Standards
8 Act, as amended, provides an exemption from the Act’s
9 minimum wage and overtime requirements for any em-
10 ployee employed in a bona fide executive, administrative,
11 or professional capacity (including any employee employed
12 in the capacity of academic administrative personnel or
13 teacher in elementary or secondary schools)【, or in the
14 capacity of an outside sales employee, as such terms are
15 defined and delimited from time to time by regulations
16 of the Secretary, subject to the provisions of the Adminis-
17 trative Procedure Act.】<< and applies to covered employ-
18 ees by virtue of section 225(e)(1) of the CAA, as amended,
19 2 U.S.C. 1361(e)(1).>> Section 13(a)(17) of the Act pro-
20 vides an exemption from the minimum wage and overtime
21 requirements for computer systems analysts, computer
22 programmers, software engineers, and other similarly
23 skilled computer employees << and applies to covered
24 employees by virtue of section 225(e)(1) of the CAA, as
25 amended, 2 U.S.C. 1361(e)(1)>>.

1 “(b) The requirements for these exemptions are con-
2 tained in this part as follows: executive employees, subpart
3 B; administrative employees, subpart C; professional em-
4 ployees, subpart D; computer employees, subpart E【; out-
5 side sales employees, subpart F】. Subpart G contains reg-
6 ulations regarding salary requirements applicable to most
7 of the exemptions, including salary levels and the salary
8 basis test. Subpart G also contains a provision for exempt-
9 ing certain highly compensated employees. Subpart H con-
10 tains definitions and other miscellaneous provisions appli-
11 cable to all or several of the exemptions.

12 “(c) Effective July 1, 1972, the Fair Labor Stand-
13 ards Act was amended to include within the protection of
14 the equal pay provisions those employees exempt from the
15 minimum wage and overtime pay provisions as bona fide
16 executive, administrative, and professional employees (in-
17 cluding any employee employed in the capacity of aca-
18 demic administrative personnel or teacher in elementary
19 or secondary schools)【, or in the capacity of an outside
20 sales employee under section 13(a)(1) of the Act】. The
21 equal pay provisions in section 6(d) of the Fair Labor
22 Standards Act are administered and enforced by the
23 【United States Equal Employment Opportunity Commis-
24 sion】<<Office of Congressional Workplace Rights>>.

1 **“§ 541.1 Terms used in regulations**

2 “Act means the Fair Labor Standards Act of 1938,
 3 as amended. [Administrator means the Administrator of
 4 the Wage and Hour Division, United States Department
 5 of Labor. The Secretary of Labor has delegated to the
 6 Administrator the functions vested in the Secretary under
 7 sections 13(a)(1) and 13(a)(17) of the Fair Labor Stand-
 8 ards Act.] <<CAA means Congressional Accountability
 9 Act of 1995, as amended. Office means the Office of Con-
 10 gressional Workplace Rights. Employee means a ‘covered
 11 employee’ as defined in section 101(a)(3) through (a)(8)
 12 of the CAA, 2 U.S.C. 1301(a)(3) through (a)(8), but not
 13 an ‘intern’ as defined in section 203(a)(2) of the CAA,
 14 2 U.S.C. 1313(a)(2). Employer, company, business, or en-
 15 terprise each mean an ‘employing office’ as defined in sec-
 16 tion 101(a)(9) of the CAA, 2 U.S.C. 1301(a)(9).>>

17 **“§ 541.2 Job titles insufficient**

18 “A job title alone is insufficient to establish the ex-
 19 empt status of an employee. The exempt or nonexempt
 20 status of any particular employee must be determined on
 21 the basis of whether the employee’s salary and duties meet
 22 the requirements of the regulations in this part.

23 **“§ 541.3 Scope of the section 13(a)(1) exemptions**

24 “(a) The section 13(a)(1) exemptions and the regula-
 25 tions in this part do not apply to manual laborers or other
 26 ‘blue collar’ workers who perform work involving repetitive

1 operations with their hands, physical skill and energy.
2 Such nonexempt ‘blue collar’ employees gain the skills and
3 knowledge required for performance of their routine man-
4 ual and physical work through apprenticeships and on-the-
5 job training, not through the prolonged course of special-
6 ized intellectual instruction required for exempt learned
7 professional employees such as medical doctors, architects
8 and archeologists. Thus, for example, non-management
9 production-line employees and non-management employ-
10 ees in maintenance, construction and similar occupations
11 such as carpenters, electricians, mechanics, plumbers, iron
12 workers, craftsmen, operating engineers, longshoremen,
13 construction workers and laborers are entitled to min-
14 imum wage and overtime premium pay under the Fair
15 Labor Standards Act, and are not exempt under the regu-
16 lations in this part no matter how highly paid they might
17 be.

18 “(b)(1) The section 13(a)(1) exemptions and the reg-
19 ulations in this part also do not apply to police officers,
20 detectives, [deputy sheriffs, state troopers, highway patrol
21 officers,] investigators, inspectors, [correctional officers,
22 parole or probation officers,] park rangers, fire fighters,
23 paramedics, emergency medical technicians, ambulance
24 personnel, rescue workers, hazardous materials workers
25 and similar employees, regardless of rank or pay level, who

1 perform work such as preventing, controlling or extin-
2 guishing fires of any type; rescuing fire, crime or accident
3 victims; preventing or detecting crimes; conducting inves-
4 tigations or inspections for violations of law; performing
5 surveillance; pursuing, restraining and apprehending sus-
6 pects; detaining or supervising suspected and convicted
7 criminals, including those on probation or parole; inter-
8 viewing witnesses; interrogating and fingerprinting sus-
9 pects; preparing investigative reports; or other similar
10 work.

11 “(2) Such employees do not qualify as exempt execu-
12 tive employees because their primary duty is not manage-
13 ment of the [enterprise] <<employing office>> in
14 which the employee is employed or a customarily recog-
15 nized department or subdivision thereof as required under
16 §541.100. Thus, for example, a police officer or fire fight-
17 er whose primary duty is to investigate crimes or fight
18 fires is not exempt under section 13(a)(1) of the Act mere-
19 ly because the police officer or fire fighter also directs the
20 work of other employees in the conduct of an investigation
21 or fighting a fire.

22 “(3) Such employees do not qualify as exempt admin-
23 istrative employees because their primary duty is not the
24 performance of work directly related to the management
25 or general business operations of the employer or the em-

1 ployer's customers<<, constituents or stakeholders>> as
2 required under §541.200.

3 “(4) Such employees do not qualify as exempt profes-
4 sionals because their primary duty is not the performance
5 of work requiring knowledge of an advanced type in a field
6 of science or learning customarily acquired by a prolonged
7 course of specialized intellectual instruction or the per-
8 formance of work requiring invention, imagination, origi-
9 nality or talent in a recognized field of artistic or creative
10 endeavor as required under §541.300. Although some po-
11 lice officers, fire fighters, paramedics, emergency medical
12 technicians and similar employees have college degrees, a
13 specialized academic degree is not a standard prerequisite
14 for employment in such occupations.

15 **“§ 541.4 Other laws and collective bargaining agree-**
16 **ments**

17 “The Fair Labor Standards Act provides minimum
18 standards that may be exceeded, but cannot be waived or
19 reduced. Employers must comply, for example, with any
20 Federal【, State or municipal】 laws, regulations or ordi-
21 nances establishing a higher minimum wage or lower max-
22 imum workweek than those established under the Act.
23 Similarly, employers, on their own initiative or under a
24 collective bargaining agreement with a labor union, are not
25 precluded by the Act from providing a wage higher than

1 the statutory minimum, a shorter workweek than the stat-
2 utory maximum, or a higher overtime premium (double
3 time, for example) than provided by the Act. While collec-
4 tive bargaining agreements cannot waive or reduce the
5 Act's protections, nothing in the Act or the regulations
6 in this part relieves employers from their contractual obli-
7 gations under collective bargaining agreements.

8 **“Subpart B—Executive Employees (§§541.100-541.106)**

9 **“§ 541.100 General rule for executive employees**

10 “(a) The term ‘employee employed in a bona fide ex-
11 ecutive capacity’ in section 13(a)(1) of the Act shall mean
12 any employee:

13 “(1) Compensated on a salary basis pursuant to
14 §541.600 at a rate of not less than \$684 per week
15 [(or \$455 per week if employed in the Common-
16 wealth of the Northern Mariana Islands, Guam,
17 Puerto Rico, or the U.S. Virgin Islands by employ-
18 ers other than the Federal government, or \$380 per
19 week if employed in American Samoa by employers
20 other than the Federal government)], exclusive of
21 board, lodging or other facilities;

22 “(2) Whose primary duty is management of the
23 [enterprise] <<employing office>> in which the
24 employee is employed or of a customarily recognized
25 department or subdivision thereof;

1 “(3) Who customarily and regularly directs the
2 work of two or more other employees; and

3 “(4) Who has the authority to hire or fire other
4 employees or whose suggestions and recommenda-
5 tions as to the hiring, firing, advancement, pro-
6 motion or any other change of status of other em-
7 ployees are given particular weight.

8 “(b) The phrase ‘salary basis’ is defined at §541.602;
9 ‘board, lodging or other facilities’ is defined at §541.606;
10 ‘primary duty’ is defined at §541.700; and ‘customarily
11 and regularly’ is defined at §541.701.

12 **【“§ 541.101 Business owner**

13 “The term ‘employee employed in a bona fide execu-
14 tive capacity’ in section 13(a)(1) of the Act also includes
15 any employee who owns at least a bona fide 20-percent
16 equity interest in the enterprise in which the employee is
17 employed, regardless of whether the business is a cor-
18 porate or other type of organization, and who is actively
19 engaged in its management. The term ‘management’ is de-
20 fined in §541.102. The requirements of Subpart G (salary
21 requirements) of this part do not apply to the business
22 owners described in this section.】

23 **“§ 541.102 Management**

24 “Generally, ‘management’ includes, but is not limited
25 to, activities such as interviewing, selecting, and training

1 of employees; setting and adjusting their rates of pay and
2 hours of work; directing the work of employees; maintain-
3 ing production or sales records for use in supervision or
4 control; appraising employees' productivity and efficiency
5 for the purpose of recommending promotions or other
6 changes in status; handling employee complaints and
7 grievances; disciplining employees; planning the work; de-
8 termining the techniques to be used; apportioning the
9 work among the employees; determining the type of mate-
10 rials, supplies, machinery, equipment or tools to be used
11 or merchandise to be bought, stocked and sold; controlling
12 the flow and distribution of materials or merchandise and
13 supplies; providing for the safety and security of the em-
14 ployees or the property; planning and controlling the budg-
15 et; and monitoring or implementing legal compliance
16 measures.

17 **“§ 541.103 Department or subdivision**

18 “(a) The phrase ‘a customarily recognized depart-
19 ment or subdivision’ is intended to distinguish between a
20 mere collection of employees assigned from time to time
21 to a specific job or series of jobs and a unit with perma-
22 nent status and function. A customarily recognized de-
23 partment or subdivision must have a permanent status
24 and a continuing function. For example, a large employ-
25 er’s human resources department might have subdivisions

1 for labor relations, pensions and other benefits, equal em-
2 ployment opportunity, and personnel management, each of
3 which has a permanent status and function.

4 “(b) When an **【enterprise】** <<employing office>>
5 has more than one **【establishment】** <<location>>, the
6 employee in charge of each **【establishment】**
7 <<location>> may be considered in charge of a recog-
8 nized subdivision of the **【enterprise】** <<employing
9 office>>.

10 “(c) A recognized department or subdivision need not
11 be physically within the employer’s establishment and may
12 move from place to place. The mere fact that the employee
13 works in more than one location does not invalidate the
14 exemption if other factors show that the employee is actu-
15 ally in charge of a recognized unit with a continuing func-
16 tion in the organization.

17 “(d) Continuity of the same subordinate personnel is
18 not essential to the existence of a recognized unit with a
19 continuing function. An otherwise exempt employee will
20 not lose the exemption merely because the employee draws
21 and supervises workers from a pool or supervises a team
22 of workers drawn from other recognized units, if other fac-
23 tors are present that indicate that the employee is in
24 charge of a recognized unit with a continuing function.

1 **“§ 541.104 Two or more other employees**

2 “(a) To qualify as an exempt executive under
3 §541.100, the employee must customarily and regularly
4 direct the work of two or more other employees. The
5 phrase ‘two or more other employees’ means two full-time
6 employees or their equivalent. One full-time and two half-
7 time employees, for example, are equivalent to two full-
8 time employees. Four half-time employees are also equiva-
9 lent.

10 “(b) The supervision can be distributed among two,
11 three or more employees, but each such employee must
12 customarily and regularly direct the work of two or more
13 other full-time employees or the equivalent. Thus, for ex-
14 ample, a department with five full-time nonexempt work-
15 ers may have up to two exempt supervisors if each such
16 supervisor customarily and regularly directs the work of
17 two of those workers.

18 “(c) An employee who merely assists the manager of
19 a particular department and supervises two or more em-
20 ployees only in the actual manager’s absence does not
21 meet this requirement.

22 “(d) Hours worked by an employee cannot be credited
23 more than once for different executives. Thus, a shared
24 responsibility for the supervision of the same two employ-
25 ees in the same department does not satisfy this require-
26 ment. However, a full-time employee who works four hours

1 for one supervisor and four hours for a different super-
2 visor, for example, can be credited as a half-time employee
3 for both supervisors.

4 **“§ 541.105 Particular weight**

5 “To determine whether an employee’s suggestions
6 and recommendations are given ‘particular weight,’ factors
7 to be considered include, but are not limited to, whether
8 it is part of the employee’s job duties to make such sugges-
9 tions and recommendations; the frequency with which
10 such suggestions and recommendations are made or re-
11 quested; and the frequency with which the employee’s sug-
12 gestions and recommendations are relied upon. Generally,
13 an executive’s suggestions and recommendations must
14 pertain to employees whom the executive customarily and
15 regularly directs. It does not include an occasional sugges-
16 tion with regard to the change in status of a co-worker.
17 An employee’s suggestions and recommendations may still
18 be deemed to have ‘particular weight’ even if a higher level
19 manager’s recommendation has more importance and even
20 if the employee does not have authority to make the ulti-
21 mate decision as to the employee’s change in status.

22 **“§ 541.106 Concurrent duties**

23 “(a) Concurrent performance of exempt and non-
24 exempt work does not disqualify an employee from the ex-
25 ecutive exemption if the requirements of §541.100 are oth-

1 erwise met. Whether an employee meets the requirements
2 of §541.100 when the employee performs concurrent du-
3 ties is determined on a case-by-case basis and based on
4 the factors set forth in §541.700. Generally, exempt ex-
5 ecutives make the decision regarding when to perform
6 nonexempt duties and remain responsible for the success
7 or failure of business operations under their management
8 while performing the nonexempt work. In contrast, the
9 nonexempt employee generally is directed by a supervisor
10 to perform the exempt work or performs the exempt work
11 for defined time periods. An employee whose primary duty
12 is ordinary production work or routine, recurrent or repet-
13 itive tasks cannot qualify for exemption as an executive.

14 “(b) For example, an assistant manager in a retail
15 establishment may perform work such as serving cus-
16 tomers, cooking food, stocking shelves and cleaning the es-
17 tablishment, but performance of such nonexempt work
18 does not preclude the exemption if the assistant manager’s
19 primary duty is management. An assistant manager can
20 supervise employees and serve customers at the same time
21 without losing the exemption. An exempt employee can
22 also simultaneously direct the work of other employees and
23 stock shelves.

24 “(c) In contrast, a relief supervisor or working super-
25 visor whose primary duty is performing nonexempt work

1 on the production line in a manufacturing plant does not
2 become exempt merely because the nonexempt production
3 line employee occasionally has some responsibility for di-
4 recting the work of other nonexempt production line em-
5 ployees when, for example, the exempt supervisor is un-
6 available. Similarly, an employee whose primary duty is
7 to work as an electrician is not an exempt executive even
8 if the employee also directs the work of other employees
9 on the job site, orders parts and materials for the job,
10 and handles requests from the prime contractor.

11 **“Subpart C—Administrative Employees (§§541.200-**
12 **541.204)**

13 **“§ 541.200 General rule for administrative employees**

14 “(a) The term ‘employee employed in a bona fide ad-
15 ministrative capacity’ in section 13(a)(1) of the Act shall
16 mean any employee:

17 “(1) Compensated on a salary or fee basis pur-
18 suant to §541.600 at a rate of not less than \$684
19 per week [(or \$455 per week if employed in the
20 Commonwealth of the Northern Mariana Islands,
21 Guam, Puerto Rico, or the U.S. Virgin Islands by
22 employers other than the Federal government, or
23 \$380 per week if employed in American Samoa by
24 employers other than the Federal government)], ex-
25 clusive of board, lodging or other facilities;

1 production line or selling a product in a retail or service
2 establishment.

3 “(b) Work directly related to management or general
4 business operations includes, but is not limited to, work
5 in functional areas such as tax; finance; accounting; budg-
6 eting; auditing; insurance; quality control; purchasing;
7 procurement; advertising; marketing; research; safety and
8 health; personnel management; human resources; em-
9 ployee benefits; labor relations; public relations, govern-
10 ment relations; computer network, internet and database
11 administration; legal and regulatory compliance; and simi-
12 lar activities. Some of these activities may be performed
13 by employees who also would qualify for another exemp-
14 tion.

15 “(c) An employee may qualify for the administrative
16 exemption if the employee’s primary duty is the perform-
17 ance of work directly related to the management or gen-
18 eral business operations of the employer’s customers<<,
19 constituents and/or stakeholders>>. Thus, for example,
20 employees acting as advisers or consultants to their em-
21 ployer’s [clients or] customer<<, constituents or
22 stakeholders>> (as tax experts or financial consultants,
23 for example) may be exempt.

1 **“§ 541.202 Discretion and independent judgment**

2 “(a) To qualify for the administrative exemption, an
3 employee’s primary duty must include the exercise of dis-
4 cretion and independent judgment with respect to matters
5 of significance. In general, the exercise of discretion and
6 independent judgment involves the comparison and the
7 evaluation of possible courses of conduct, and acting or
8 making a decision after the various possibilities have been
9 considered. The term ‘matters of significance’ refers to the
10 level of importance or consequence of the work performed.

11 “(b) The phrase ‘discretion and independent judg-
12 ment’ must be applied in the light of all the facts involved
13 in the particular employment situation in which the ques-
14 tion arises. Factors to consider when determining whether
15 an employee exercises discretion and independent judg-
16 ment with respect to matters of significance include, but
17 are not limited to: whether the employee has authority to
18 formulate, affect, interpret, or implement management
19 policies or operating practices; whether the employee car-
20 ries out major assignments in conducting the operations
21 of the **【business】** <<employing office>>; whether the
22 employee performs work that affects business operations
23 <<of the employing office>>to a substantial degree,
24 even if the employee’s assignments are related to operation
25 of a particular segment of the **【business】** <<employing
26 office>>; whether the employee has authority to commit

1 the employer in matters that have significant financial im-
2 pact; whether the employee has authority to waive or devi-
3 ate from established policies and procedures without prior
4 approval; whether the employee has authority to negotiate
5 and bind the **【company】**<<employing office>> on sig-
6 nificant matters; whether the employee provides consulta-
7 tion or expert advice to management; whether the em-
8 ployee is involved in planning longer short-term **【busi-
9 ness】** <<employing office>> objectives; whether the em-
10 ployee investigates and resolves matters of significance on
11 behalf of management; and whether the employee rep-
12 resents the **【company】**<<employing office>> in han-
13 dling complaints, arbitrating disputes or resolving griev-
14 ances.

15 “(c) The exercise of discretion and independent judg-
16 ment implies that the employee has authority to make an
17 independent choice, free from immediate direction or su-
18 pervision. However, employees can exercise discretion and
19 independent judgment even if their decisions or rec-
20 ommendations are reviewed at a higher level. Thus, the
21 term ‘discretion and independent judgment’ does not re-
22 quire that the decisions made by an employee have a final-
23 ity that goes with unlimited authority and a complete ab-
24 sence of review. The decisions made as a result of the exer-
25 cise of discretion and independent judgment may consist

1 of recommendations for action rather than the actual tak-
2 ing of action. The fact that an employee's decision may
3 be subject to review and that upon occasion the decisions
4 are revised or reversed after review does not mean that
5 the employee is not exercising discretion and independent
6 judgment. For example, the policies formulated by the
7 **【credit】** manager of a<<n>> **【large corpora-**
8 **tion】**<<employing office>> may be subject to review by
9 higher **【company】**<<employing office>> officials who
10 may approve or disapprove these policies. The **【manage-**
11 **ment consultant】** <<department director>> who has
12 made a study of the operations of a **【business】**
13 <<department>> and who has drawn a proposed change
14 in organization may have the plan reviewed or revised by
15 superiors before it is **【submitted to the cli-**
16 **ent】**<<approved>>.

17 “(d) An employer's volume of **【business】**
18 <<work>> may make it necessary to employ a number
19 of employees to perform the same or similar work. The
20 fact that many employees perform identical work or work
21 of the same relative importance does not mean that the
22 work of each such employee does not involve the exercise
23 of discretion and independent judgment with respect to
24 matters of significance.

1 “(e) The exercise of discretion and independent judg-
2 ment must be more than the use of skill in applying well-
3 established techniques, procedures or specific standards
4 described in manuals or other sources. See also §541.704
5 regarding use of manuals. The exercise of discretion and
6 independent judgment also does not include clerical or sec-
7 retarial work, recording or tabulating data, or performing
8 other mechanical, repetitive, recurrent or routine work. An
9 employee who simply tabulates data is not exempt, even
10 if labeled as a ‘statistician.’

11 “(f) An employee does not exercise discretion and
12 independent judgment with respect to matters of signifi-
13 cance merely because the employer will experience finan-
14 cial losses if the employee fails to perform the job properly.
15 For example, a messenger who is entrusted with carrying
16 large sums of money does not exercise discretion and inde-
17 pendent judgment with respect to matters of significance
18 even though serious consequences may flow from the em-
19 ployee’s neglect. Similarly, an employee who operates very
20 expensive equipment does not exercise discretion and inde-
21 pendent judgment with respect to matters of significance
22 merely because improper performance of the employee’s
23 duties may cause serious financial loss to the employer.

1 **“§ 541.203 Administrative exemption examples**

2 “(a) **[Insurance claims adjusters]** <<Employees who
3 investigate claims>> generally meet the duties require-
4 ments for the administrative exemption**[**, whether they
5 work for an insurance company or other type of com-
6 pany,**]** if their duties include activities such as inter-
7 viewing **[insureds,]** witnesses **[and physicians]**; inspect-
8 ing property damage; reviewing factual information to pre-
9 pare damage estimates; evaluating and making rec-
10 ommendations regarding coverage of claims; determining
11 liability and total value of a claim; negotiating settlements;
12 and making recommendations regarding litigation.

13 “(b) Employees in **[the]** financial services **[indus-**
14 **try]** generally meet the duties requirements for the admin-
15 istrative exemption if their duties include work such as
16 collecting and analyzing information regarding the cus-
17 tomer’s income, assets, investments or debts; determining
18 which financial products best meet the customer’s needs
19 and financial circumstances; advising the customer re-
20 garding the advantages and disadvantages of different fi-
21 nancial products; and marketing, servicing or promoting
22 the employer’s financial products. However, an employee
23 whose primary duty is selling financial products does not
24 qualify for the administrative exemption.

25 “(c) An employee who leads a team of other employ-
26 ees assigned to complete major projects for the employer

1 (such as [purchasing, selling or closing all or part of the
2 business,] negotiating a real estate transaction or a collec-
3 tive bargaining agreement, or designing and implementing
4 productivity improvements) generally meets the duties re-
5 quirements for the administrative exemption, even if the
6 employee does not have direct supervisory responsibility
7 over the other employees on the team.

8 “(d) An executive assistant or administrative assist-
9 ant to a [business owner or senior executive of a large
10 business] <<senior management official of an employing
11 office>> generally meets the duties requirements for the
12 administrative exemption if such employee, without spe-
13 cific instructions or prescribed procedures, has been dele-
14 gated authority regarding matters of significance.

15 “(e) Human resources managers who formulate, in-
16 terpret or implement employment policies and manage-
17 ment consultants who study the operations of a [busi-
18 ness] <<employing office>> and propose changes in or-
19 ganization generally meet the duties requirements for the
20 administrative exemption. However, personnel clerks who
21 ‘screen’ applicants to obtain data regarding their min-
22 imum qualifications and fitness for employment generally
23 do not meet the duties requirements for the administrative
24 exemption. Such personnel clerks typically will reject all
25 applicants who do not meet minimum standards for the

1 particular job or for employment by the **【company】**
2 <<employing office>>. The minimum standards are
3 usually set by the exempt human resources manager or
4 other **【company】** <<employing office>> officials, and
5 the decision to hire from the group of qualified applicants
6 who do meet the minimum standards is similarly made
7 by the exempt human resources manager or other **【com-
8 pany】** <<employing office>> officials. Thus, when the
9 interviewing and screening functions are performed by the
10 human resources manager or personnel manager who
11 makes the hiring decision or makes recommendations for
12 hiring from the pool of qualified applicants, such duties
13 constitute exempt work, even though routine, because this
14 work is directly and closely related to the employee's ex-
15 empt functions.

16 “(f) Purchasing agents with authority to bind the
17 **【company】** <<employing office>> on significant pur-
18 chases generally meet the duties requirements for the ad-
19 ministrative exemption even if they must consult with top
20 management officials when making a purchase commit-
21 ment for **【raw】** materials in excess of the contemplated
22 **【plant】** needs.

23 “(g) Ordinary inspection work generally does not
24 meet the duties requirements for the administrative ex-
25 emption. Inspectors normally perform specialized work

1 along standardized lines involving well-established tech-
2 niques and procedures which may have been catalogued
3 and described in manuals or other sources. Such inspec-
4 tors rely on techniques and skills acquired by special train-
5 ing or experience. They have some leeway in the perform-
6 ance of their work but only within closely prescribed limits.

7 “(h) Employees usually called examiners or graders,
8 such as employees that grade lumber, generally do not
9 meet the duties requirements for the administrative ex-
10 emption. Such employees usually perform work involving
11 the comparison of products with established standards
12 which are frequently catalogued. Often, after continued
13 reference to the written standards, or through experience,
14 the employee acquires sufficient knowledge so that ref-
15 erence to written standards is unnecessary. The substi-
16 tution of the employee’s memory for a manual of stand-
17 ards does not convert the character of the work performed
18 to exempt work requiring the exercise of discretion and
19 independent judgment.

20 “(i) [Comparison shopping performed by an em-
21 ployee of a retail store who merely reports to the buyer
22 the prices at a competitor’s store does not qualify for the
23 administrative exemption. However, the buyer who evalu-
24 ates such reports on competitor prices to set the employ-

1 er's prices generally meets the duties requirements for the
2 administrative exemption.】<<Reserved.>>

3 “(j) 【Public sector i】<<I>>nspectors or investiga-
4 tors of various types, such as fire prevention or safety,
5 building or construction, health or sanitation, environ-
6 mental or soils specialists and similar employees, generally
7 do not meet the duties requirements for the administrative
8 exemption because their work typically does not involve
9 work directly related to the management or general busi-
10 ness operations of the employer. Such employees also do
11 not qualify for the administrative exemption because their
12 work involves the use of skills and technical abilities in
13 gathering factual information, applying known standards
14 or prescribed procedures, determining which procedure to
15 follow, or determining whether prescribed standards or
16 criteria are met.

17 **“§ 541.204 Educational establishments**

18 “(a) The term ‘employee employed in a bona fide ad-
19 ministrative capacity’ in section 13(a)(1) of the Act also
20 includes employees:

21 “(1) Compensated on a salary or fee basis at a
22 rate of not less than \$684 per week 【(or \$455 per
23 week if employed in the Commonwealth of the
24 Northern Mariana Islands, Guam, Puerto Rico, or
25 the U.S. Virgin Islands by employers other than the

1 Federal government, or \$380 per week if employed
2 in American Samoa by employers other than the
3 Federal government)], exclusive of board, lodging,
4 or other facilities; or on a salary basis which is at
5 least equal to the entrance salary for teachers in the
6 educational establishment by which employed; and

7 “(2) Whose primary duty is performing admin-
8 istrative functions directly related to academic in-
9 struction or training in an educational establishment
10 or department or subdivision thereof.

11 “(b) The term ‘educational establishment’ means an
12 elementary or secondary school system, an institution of
13 higher education or other educational institution. Sections
14 3(v) and 3(w) of the Act define elementary and secondary
15 schools as those day or residential schools that provide ele-
16 mentary or secondary education, as determined under
17 State law. Under the laws of most States, such education
18 includes the curriculums in grades 1 through 12; under
19 many it includes also the introductory programs in kinder-
20 garten. Such education in some States may also include
21 nursery school programs in elementary education and jun-
22 ior college curriculums in secondary education. The term
23 ‘other educational establishment’ includes special schools
24 for mentally or physically disabled or gifted children, re-
25 gardless of any classification of such schools as elemen-

1 tary, secondary or higher. Factors relevant in determining
2 whether post-secondary career programs are educational
3 institutions include whether the school is licensed by a
4 state agency responsible for the state's educational system
5 or accredited by a nationally recognized accrediting orga-
6 nization for career schools. Also, for purposes of the ex-
7 emption, no distinction is drawn between public and pri-
8 vate schools, or between those operated for profit and
9 those that are not for profit.

10 “(c) The phrase ‘performing administrative functions
11 directly related to academic instruction or training’ means
12 work related to the academic operations and functions in
13 a school rather than to administration along the lines of
14 general business operations. Such academic administrative
15 functions include operations directly in the field of edu-
16 cation. Jobs relating to areas outside the educational field
17 are not within the definition of academic administration.

18 “(1) Employees engaged in academic adminis-
19 trative functions include: the superintendent or other
20 head of an elementary or secondary school system,
21 and any assistants, responsible for administration of
22 such matters as curriculum, quality and methods of
23 instructing, measuring and testing the learning po-
24 tential and achievement of students, establishing and
25 maintaining academic and grading standards, and

1 other aspects of the teaching program; the principal
2 and any vice-principals responsible for the operation
3 of an elementary or secondary school; department
4 heads in institutions of higher education responsible
5 for the administration of the mathematics depart-
6 ment, the English department, the foreign language
7 department, etc.; academic counselors who perform
8 work such as administering school testing programs,
9 assisting students with academic problems and ad-
10 vising students concerning degree requirements; and
11 other employees with similar responsibilities.

12 “(2) Jobs relating to building management and
13 maintenance, jobs relating to the health of the stu-
14 dents, and academic staff such as social workers,
15 psychologists, lunch room managers or dietitians do
16 not perform academic administrative functions. Al-
17 though such work is not considered academic admin-
18 istration, such employees may qualify for exemption
19 under §541.200 or under other sections of this part,
20 provided the requirements for such exemptions are
21 met.

1 facilities' is defined at §541.606; and 'primary duty' is de-
2 fined at §541.700.

3 **“§ 541.301 Learned professionals**

4 “(a) To qualify for the learned professional exemp-
5 tion, an employee's primary duty must be the performance
6 of work requiring advanced knowledge in a field of science
7 or learning customarily acquired by a prolonged course of
8 specialized intellectual instruction. This primary duty test
9 includes three elements:

10 “(1) The employee must perform work requir-
11 ing advanced knowledge;

12 “(2) The advanced knowledge must be in a field
13 of science or learning; and

14 “(3) The advanced knowledge must be custom-
15 arily acquired by a prolonged course of specialized
16 intellectual instruction.

17 “(b) The phrase 'work requiring advanced knowledge'
18 means work which is predominantly intellectual in char-
19 acter, and which includes work requiring the consistent
20 exercise of discretion and judgment, as distinguished from
21 performance of routine mental, manual, mechanical or
22 physical work. An employee who performs work requiring
23 advanced knowledge generally uses the advanced knowl-
24 edge to analyze, interpret or make deductions from vary-

1 ing facts or circumstances. Advanced knowledge cannot be
2 attained at the high school level.

3 “(c) The phrase ‘field of science or learning’ includes
4 the traditional professions of law, medicine, theology, ac-
5 counting, actuarial computation, engineering, architec-
6 ture, teaching, various types of physical, chemical and bio-
7 logical sciences, pharmacy and other similar occupations
8 that have a recognized professional status as distinguished
9 from the mechanical arts or skilled trades where in some
10 instances the knowledge is of a fairly advanced type, but
11 is not in a field of science or learning.

12 “(d) The phrase ‘customarily acquired by a prolonged
13 course of specialized intellectual instruction’ restricts the
14 exemption to professions where specialized academic train-
15 ing is a standard prerequisite for entrance into the profes-
16 sion. The best prima facie evidence that an employee
17 meets this requirement is possession of the appropriate
18 academic degree. However, the word ‘customarily’ means
19 that the exemption is also available to employees in such
20 professions who have substantially the same knowledge
21 level and perform substantially the same work as the
22 degreed employees, but who attained the advanced knowl-
23 edge through a combination of work experience and intel-
24 lectual instruction. Thus, for example, the learned profes-
25 sional exemption is available to the occasional lawyer who

1 has not gone to law school, or the occasional chemist who
2 is not the possessor of a degree in chemistry. However,
3 the learned professional exemption is not available for oc-
4 cupations that customarily may be performed with only
5 the general knowledge acquired by an academic degree in
6 any field, with knowledge acquired through an apprentice-
7 ship, or with training in the performance of routine men-
8 tal, manual, mechanical or physical processes. The learned
9 professional exemption also does not apply to occupations
10 in which most employees have acquired their skill by expe-
11 rience rather than by advanced specialized intellectual in-
12 struction.

13 “(e)(1) Registered or certified medical technologists.
14 Registered or certified medical technologists who have suc-
15 cessfully completed three academic years of pre-profes-
16 sional study in an accredited college or university plus a
17 fourth year of professional course work in a school of med-
18 ical technology approved by the Council of Medical Edu-
19 cation of the American Medical Association generally meet
20 the duties requirements for the learned professional ex-
21 emption.

22 “(2) Nurses. Registered nurses who are registered by
23 the appropriate State examining board generally meet the
24 duties requirements for the learned professional exemp-
25 tion. Licensed practical nurses and other similar health

1 care employees, however, generally do not qualify as ex-
2 empt learned professionals because possession of a special-
3 ized advanced academic degree is not a standard pre-
4 requisite for entry into such occupations.

5 “(3) Dental hygienists. Dental hygienists who have
6 successfully completed four academic years of pre-profes-
7 sional and professional study in an accredited college or
8 university approved by the Commission on Accreditation
9 of Dental and Dental Auxiliary Educational Programs of
10 the American Dental Association generally meet the duties
11 requirements for the learned professional exemption.

12 “(4) Physician assistants. Physician assistants who
13 have successfully completed four academic years of pre-
14 professional and professional study, including graduation
15 from a physician assistant program accredited by the Ac-
16 creditation Review Commission on Education for the Phy-
17 sician Assistant, and who are certified by the National
18 Commission on Certification of Physician Assistants gen-
19 erally meet the duties requirements for the learned profes-
20 sional exemption.

21 “(5) Accountants. Certified public accountants gen-
22 erally meet the duties requirements for the learned profes-
23 sional exemption. In addition, many other accountants
24 who are not certified public accountants but perform simi-
25 lar job duties may qualify as exempt learned professionals.

1 However, accounting clerks, bookkeepers and other em-
2 ployees who normally perform a great deal of routine work
3 generally will not qualify as exempt professionals.

4 “(6) Chefs. Chefs, such as executive chefs and sous
5 chefs, who have attained a four-year specialized academic
6 degree in a culinary arts program, generally meet the du-
7 ties requirements for the learned professional exemption.
8 The learned professional exemption is not available to
9 cooks who perform predominantly routine mental, manual,
10 mechanical or physical work.

11 “(7) Paralegals. Paralegals and legal assistants gen-
12 erally do not qualify as exempt learned professionals be-
13 cause an advanced specialized academic degree is not a
14 standard prerequisite for entry into the field. Although
15 many paralegals possess general four-year advanced de-
16 grees, most specialized paralegal programs are two-year
17 associate degree programs from a community college or
18 equivalent institution. However, the learned professional
19 exemption is available for paralegals who possess advanced
20 specialized degrees in other professional fields and apply
21 advanced knowledge in that field in the performance of
22 their duties. For example, if a law firm hires an engineer
23 as a paralegal to provide expert advice on product liability
24 cases or to assist on patent matters, that engineer would
25 qualify for exemption.

1 “(8) Athletic trainers. Athletic trainers who have suc-
2 cessfully completed four academic years of pre-profes-
3 sional and professional study in a specialized curriculum
4 accredited by the Commission on Accreditation of Allied
5 Health Education Programs and who are certified by the
6 Board of Certification of the National Athletic Trainers
7 Association Board of Certification generally meet the du-
8 ties requirements for the learned professional exemption.

9 【“(9) Funeral directors or embalmers. Licensed fu-
10 neral directors and embalmers who are licensed by and
11 working in a state that requires successful completion of
12 four academic years of pre-professional and professional
13 study, including graduation from a college of mortuary
14 science accredited by the American Board of Funeral
15 Service Education, generally meet the duties requirements
16 for the learned professional exemption.】

17 “(f) The areas in which the professional exemption
18 may be available are expanding. As knowledge is devel-
19 oped, academic training is broadened and specialized de-
20 grees are offered in new and diverse fields, thus creating
21 new specialists in particular fields of science or learning.
22 When an advanced specialized degree has become a stand-
23 ard requirement for a particular occupation, that occupa-
24 tion may have acquired the characteristics of a learned
25 profession. Accrediting and certifying organizations simi-

1 lar to those listed in paragraphs (e)(1), (e)(3), (e)(4) and
2 (e)(8) of this section also may be created in the future.
3 Such organizations may develop similar specialized cur-
4 riculums and certification programs which, if a standard
5 requirement for a particular occupation, may indicate that
6 the occupation has acquired the characteristics of a
7 learned profession.

8 **“§ 541.302 Creative professionals**

9 “(a) To qualify for the creative professional exemp-
10 tion, an employee’s primary duty must be the performance
11 of work requiring invention, imagination, originality or tal-
12 ent in a recognized field of artistic or creative endeavor
13 as opposed to routine mental, manual, mechanical or phys-
14 ical work. The exemption does not apply to work which
15 can be produced by a person with general manual or intel-
16 lectual ability and training.

17 “(b) To qualify for exemption as a creative profes-
18 sional, the work performed must be ‘in a recognized field
19 of artistic or creative endeavor.’ This includes such fields
20 as music, writing, acting and the graphic arts.

21 “(c) The requirement of ‘invention, imagination, orig-
22 inality or talent’ distinguishes the creative professions
23 from work that primarily depends on intelligence, diligence
24 and accuracy. The duties of employees vary widely, and
25 exemption as a creative professional depends on the extent

1 of the invention, imagination, originality or talent exer-
2 cised by the employee. Determination of exempt creative
3 professional status, therefore, must be made on a case-
4 by-case basis. This requirement generally is met by actors,
5 musicians, composers, conductors, and soloists; painters
6 who at most are given the subject matter of their painting;
7 cartoonists who are merely told the title or underlying con-
8 cept of a cartoon and must rely on their own creative abil-
9 ity to express the concept; essayists, novelists, short-story
10 writers and screen-play writers who choose their own sub-
11 jects and hand in a finished piece of work to their employ-
12 ers (the majority of such persons are, of course, not em-
13 ployees but self-employed); and persons holding the more
14 responsible writing positions in advertising agencies. This
15 requirement generally is not met by a person who is em-
16 ployed as a copyist, as an ‘animator’ of motion-picture car-
17 toons, or as a retoucher of photographs, since such work
18 is not properly described as creative in character.

19 “(d) Journalists may satisfy the duties requirements
20 for the creative professional exemption if their primary
21 duty is work requiring invention, imagination, originality
22 or talent, as opposed to work which depends primarily on
23 intelligence, diligence and accuracy. Employees of news-
24 papers, magazines, television and other media are not ex-
25 empt creative professionals if they only collect, organize

1 and record information that is routine or already public,
2 or if they do not contribute a unique interpretation or
3 analysis to a news product. Thus, for example, newspaper
4 reporters who merely rewrite press releases or who write
5 standard recounts of public information by gathering facts
6 on routine community events are not exempt creative pro-
7 fessionals. Reporters also do not qualify as exempt cre-
8 ative professionals if their work product is subject to sub-
9 stantial control by the employer. However, journalists may
10 qualify as exempt creative professionals if their primary
11 duty is performing on the air in radio, television or other
12 electronic media; conducting investigative interviews; ana-
13 lyzing or interpreting public events; writing editorials,
14 opinion columns or other commentary; or acting as a nar-
15 rator or commentator.

16 **“§ 541.303 Teachers**

17 “(a) The term ‘employee employed in a bona fide pro-
18 fessional capacity’ in section 13(a)(1) of the Act also
19 means any employee with a primary duty of teaching, tu-
20 toring, instructing or lecturing in the activity of imparting
21 knowledge and who is employed and engaged in this activ-
22 ity as a teacher in an educational establishment by which
23 the employee is employed. The term ‘educational establish-
24 ment’ is defined in §541.204(b).

1 “(b) Exempt teachers include, but are not limited to:
2 Regular academic teachers; teachers of kindergarten or
3 nursery school pupils; teachers of gifted or disabled chil-
4 dren; teachers of skilled and semi-skilled trades and occu-
5 pations; teachers engaged in automobile driving instruc-
6 tion; aircraft flight instructors; home economics teachers;
7 and vocal or instrumental music instructors. Those faculty
8 members who are engaged as teachers but also spend a
9 considerable amount of their time in extracurricular activi-
10 ties such as coaching athletic teams or acting as modera-
11 tors or advisors in such areas as drama, speech, debate
12 or journalism are engaged in teaching. Such activities are
13 a recognized part of the schools’ responsibility in contrib-
14 uting to the educational development of the student.

15 “(c) The possession of an elementary or secondary
16 teacher’s certificate provides a clear means of identifying
17 the individuals contemplated as being within the scope of
18 the exemption for teaching professionals. Teachers who
19 possess a teaching certificate qualify for the exemption re-
20 gardless of the terminology (e.g., permanent, conditional,
21 standard, provisional, temporary, emergency, or unlim-
22 ited) used by the State to refer to different kinds of certifi-
23 cates. However, private schools and public schools are not
24 uniform in requiring a certificate for employment as an
25 elementary or secondary school teacher, and a teacher’s

1 certificate is not generally necessary for employment in in-
2 stitutions of higher education or other educational estab-
3 lishments. Therefore, a teacher who is not certified may
4 be considered for exemption, provided that such individual
5 is employed as a teacher by the employing school or school
6 system.

7 “(d) The requirements of §541.300 and Subpart G
8 (salary requirements) of this part do not apply to the
9 teaching professionals described in this section.

10 **“§ 541.304 Practice of law or medicine**

11 “(a) The term ‘employee employed in a bona fide pro-
12 fessional capacity’ in section 13(a)(1) of the Act also shall
13 mean:

14 “(1) Any employee who is the holder of a valid
15 license or certificate permitting the practice of law
16 or medicine or any of their branches and is actually
17 engaged in the practice thereof; and

18 “(2) Any employee who is the holder of the req-
19 uisite academic degree for the general practice of
20 medicine and is engaged in an internship or resident
21 program pursuant to the practice of the profession.

22 “(b) In the case of medicine, the exemption applies
23 to physicians and other practitioners licensed and prac-
24 ticing in the field of medical science and healing or any
25 of the medical specialties practiced by physicians or practi-

1 tioners. The term ‘physicians’ includes medical doctors in-
2 cluding general practitioners and specialists, osteopathic
3 physicians (doctors of osteopathy), podiatrists, dentists
4 (doctors of dental medicine), and optometrists (doctors of
5 optometry or bachelors of science in optometry).

6 “(c) Employees engaged in internship or resident pro-
7 grams, whether or not licensed to practice prior to com-
8 mencement of the program, qualify as exempt profes-
9 sionals if they enter such internship or resident programs
10 after the earning of the appropriate degree required for
11 the general practice of their profession.

12 “(d) The requirements of §541.300 and subpart G
13 (salary requirements) of this part do not apply to the em-
14 ployees described in this section.

15 **“Subpart E—Computer Employees (§§541.400-541.402)**

16 **“§ 541.400 General rule for computer employees**

17 “(a) Computer systems analysts, computer program-
18 mers, software engineers or other similarly skilled workers
19 in the computer field are eligible for exemption as profes-
20 sionals under section 13(a)(1) of the Act and under sec-
21 tion 13(a)(17) of the Act. Because job titles vary widely
22 and change quickly in the computer industry, job titles
23 are not determinative of the applicability of this exemp-
24 tion.

1 “(b) The section 13(a)(1) exemption applies to any
2 computer employee who is compensated on a salary or fee
3 basis at a rate of not less than \$684 per week [(or \$455
4 per week if employed in the Commonwealth of the North-
5 ern Mariana Islands, Guam, Puerto Rico, or the U.S. Vir-
6 gin Islands by employers other than the Federal govern-
7 ment, or \$380 per week if employed in American Samoa
8 by employers other than the Federal government)], exclu-
9 sive of board, lodging, or other facilities.

10 “The section 13(a)(17) exemption applies to any
11 computer employee compensated on an hourly basis at a
12 rate of not less than \$27.63 an hour. In addition, under
13 either section 13(a)(1) or section 13(a)(17) of the Act, the
14 exemptions apply only to computer employees whose pri-
15 mary duty consists of:

16 “(1) The application of systems analysis tech-
17 niques and procedures, including consulting with
18 users, to determine hardware, software or system
19 functional specifications;

20 “(2) The design, development, documentation,
21 analysis, creation, testing or modification of com-
22 puter systems or programs, including prototypes,
23 based on and related to user or system design speci-
24 fications;

1 “(3) The design, documentation, testing, cre-
2 ation or modification of computer programs related
3 to machine operating systems; or

4 “(4) A combination of the aforementioned du-
5 ties, the performance of which requires the same
6 level of skills.

7 “(c) The term ‘salary basis’ is defined at §541.602;
8 ‘fee basis’ is defined at §541.605; ‘board, lodging or other
9 facilities’ is defined at §541.606; and ‘primary duty’ is de-
10 fined at §541.700.

11 **“§ 541.401 Computer manufacture and repair**

12 “The exemption for employees in computer occupa-
13 tions does not include employees engaged in the manufac-
14 ture or repair of computer hardware and related equip-
15 ment. Employees whose work is highly dependent upon,
16 or facilitated by, the use of computers and computer soft-
17 ware programs (e.g., engineers, drafters and others skilled
18 in computer-aided design software), but who are not pri-
19 marily engaged in computer systems analysis and pro-
20 gramming or other similarly skilled computer-related occu-
21 pations identified in §541.400(b), are also not exempt
22 computer professionals.

1 **“§ 541.402 Executive and administrative computer**
2 **employees**

3 “Computer employees within the scope of this exemp-
4 tion, as well as those employees not within its scope, may
5 also have executive and administrative duties which qual-
6 ify the employees for exemption under subpart B or sub-
7 part C of this part. For example, systems analysts and
8 computer programmers generally meet the duties require-
9 ments for the administrative exemption if their primary
10 duty includes work such as planning, scheduling, and co-
11 ordinating activities required to develop systems to solve
12 complex business, scientific or engineering problems of the
13 employer or the employer’s customers<<, constituents or
14 stakeholders>>. Similarly, a senior or lead computer pro-
15 grammer who manages the work of two or more other pro-
16 grammers in a customarily recognized department or sub-
17 division of the employer, and whose recommendations as
18 to the hiring, firing, advancement, promotion or other
19 change of status of the other programmers are given par-
20 ticular weight, generally meets the duties requirements for
21 the executive exemption.

1 **“Subpart F—<<Reserved>>**

2 **【“Subpart F—Outside Sales Employees (§§541.500-**
3 **541.504)】**

4 **【“§ 541.500 General rule for outside sales employees**

5 **【“(a) The term ‘employee employed in the capacity**
6 of outside salesman’ in section 13(a)(1) of the Act shall
7 mean any employee:】

8 **【“(1) Whose primary duty is:】**

9 **【“(i) making sales within the meaning of**
10 section 3(k) of the Act, or】

11 **【“(ii) obtaining orders or contracts for**
12 services or for the use of facilities for which a
13 consideration will be paid by the client or cus-
14 tomer; and】

15 **【“(2) Who is customarily and regularly en-**
16 gaged away from the employer’s place or places of
17 business in performing such primary duty.】

18 **【“(b) The term ‘primary duty’ is defined at**
19 §541.700. In determining the primary duty of an outside
20 sales employee, work performed incidental to and in con-
21 junction with the employee’s own outside sales or solicita-
22 tions, including incidental deliveries and collections, shall
23 be regarded as exempt outside sales work. Other work that
24 furthers the employee’s sales efforts also shall be regarded
25 as exempt work including, for example, writing sales re-
26 ports, updating or revising the employee’s sales or display

1 catalogue, planning itineraries and attending sales con-
2 ferences.】

3 【“(c) The requirements of subpart G (salary require-
4 ments) of this part do not apply to the outside sales em-
5 ployees described in this section.】

6 **【“§ 541.501 Making sales or obtaining orders**

7 【“(a) Section 541.500 requires that the employee be
8 engaged in:】

9 【“(1) Making sales within the meaning of sec-
10 tion 3(k) of the Act, or】

11 【“(2) Obtaining orders or contracts for services
12 or for the use of facilities.】

13 【“(b) Sales within the meaning of section 3(k) of the
14 Act include the transfer of title to tangible property, and
15 in certain cases, of tangible and valuable evidences of in-
16 tangible property. Section 3(k) of the Act states that ‘sale’
17 or ‘sell’ includes any sale, exchange, contract to sell, con-
18 signment for sale, shipment for sale, or other disposition.】

19 【“(c) Exempt outside sales work includes not only
20 the sales of commodities, but also ‘obtaining orders or con-
21 tracts for services or for the use of facilities for which a
22 consideration will be paid by the client or customer.’ Ob-
23 taining orders for ‘the use of facilities’ includes the selling
24 of time on radio or television, the solicitation of adver-
25 tising for newspapers and other periodicals, and the solici-

1 tation of freight for railroads and other transportation
2 agencies.】

3 【“(d) The word ‘services’ extends the outside sales
4 exemption to employees who sell or take orders for a serv-
5 ice, which may be performed for the customer by someone
6 other than the person taking the order.】

7 **【“§ 541.502 Away from employer’s place of business**

8 “An outside sales employee must be customarily and
9 regularly engaged ‘away from the employer’s place or
10 places of business.’ The outside sales employee is an em-
11 ployee who makes sales at the customer’s place of business
12 or, if selling door-to-door, at the customer’s home. Outside
13 sales does not include sales made by mail, telephone or
14 the Internet unless such contact is used merely as an ad-
15 junct to personal calls. Thus, any fixed site, whether home
16 or office, used by a salesperson as a headquarters or for
17 telephonic solicitation of sales is considered one of the em-
18 ployer’s places of business, even though the employer is
19 not in any formal sense the owner or tenant of the prop-
20 erty. However, an outside sales employee does not lose the
21 exemption by displaying samples in hotel sample rooms
22 during trips from city to city; these sample rooms should
23 not be considered as the employer’s places of business.
24 Similarly, an outside sales employee does not lose the ex-
25 emption by displaying the employer’s products at a trade

1 show. If selling actually occurs, rather than just sales pro-
2 motion, trade shows of short duration (i.e., one or two
3 weeks) should not be considered as the employer's place
4 of business.】

5 **【“§ 541.503 Promotion work**

6 【“(a) Promotion work is one type of activity often
7 performed by persons who make sales, which may or may
8 not be exempt outside sales work, depending upon the cir-
9 cumstances under which it is performed. Promotional
10 work that is actually performed incidental to and in con-
11 junction with an employee's own outside sales or solicita-
12 tions is exempt work. On the other hand, promotional
13 work that is incidental to sales made, or to be made, by
14 someone else is not exempt outside sales work. An em-
15 ployee who does not satisfy the requirements of this sub-
16 part may still qualify as an exempt employee under other
17 subparts of this rule.】

18 【“(b) A manufacturer's representative, for example,
19 may perform various types of promotional activities such
20 as putting up displays and posters, removing damaged or
21 spoiled stock from the merchant's shelves or rearranging
22 the merchandise. Such an employee can be considered an
23 exempt outside sales employee if the employee's primary
24 duty is making sales or contracts. Promotion activities di-
25 rected toward consummation of the employee's own sales

1 are exempt. Promotional activities designed to stimulate
2 sales that will be made by someone else are not exempt
3 outside sales work.】

4 【“(c) Another example is a company representative
5 who visits chain stores, arranges the merchandise on
6 shelves, replenishes stock by replacing old with new mer-
7 chandise, sets up displays and consults with the store
8 manager when inventory runs low, but does not obtain a
9 commitment for additional purchases. The arrangement of
10 merchandise on the shelves or the replenishing of stock
11 is not exempt work unless it is incidental to and in con-
12 junction with the employee’s own outside sales. Because
13 the employee in this instance does not consummate the
14 sale nor direct efforts toward the consummation of a sale,
15 the work is not exempt outside sales work.】

16 【“§ 541.504 Drivers who sell

17 【“(a) Drivers who deliver products and also sell such
18 products may qualify as exempt outside sales employees
19 only if the employee has a primary duty of making sales.
20 In determining the primary duty of drivers who sell, work
21 performed incidental to and in conjunction with the em-
22 ployee’s own outside sales or solicitations, including load-
23 ing, driving or delivering products, shall be regarded as
24 exempt outside sales work.】

1 【“(b) Several factors should be considered in deter-
2 mining if a driver has a primary duty of making sales,
3 including, but not limited to: a comparison of the driver’s
4 duties with those of other employees engaged as truck
5 drivers and as salespersons; possession of a selling or so-
6 licitor’s license when such license is required by law or
7 ordinances; presence or absence of customary or contrac-
8 tual arrangements concerning amounts of products to be
9 delivered; description of the employee’s occupation in col-
10 lective bargaining agreements; the employer’s specifica-
11 tions as to qualifications for hiring; sales training; attend-
12 ance at sales conferences; method of payment; and propor-
13 tion of earnings directly attributable to sales.】

14 【“(c) Drivers who may qualify as exempt outside
15 sales employees include:】

16 【“(1) A driver who provides the only sales con-
17 tact between the employer and the customers visited,
18 who calls on customers and takes orders for prod-
19 ucts, who delivers products from stock in the em-
20 ployee’s vehicle or procures and delivers the product
21 to the customer on a later trip, and who receives
22 compensation commensurate with the volume of
23 products sold.】

1 【“(2) A driver who obtains or solicits orders for
2 the employer’s products from persons who have au-
3 thority to commit the customer for purchases.】

4 【“(3) A driver who calls on new prospects for
5 customers along the employee’s route and attempts
6 to convince them of the desirability of accepting reg-
7 ular delivery of goods.】

8 【“(4) A driver who calls on established cus-
9 tomers along the route and persuades regular cus-
10 tomers to accept delivery of increased amounts of
11 goods or of new products, even though the initial
12 sale or agreement for delivery was made by someone
13 else.】

14 【“(d) Drivers who generally would not qualify as ex-
15 empt outside sales employees include:】

16 【“(1) A route driver whose primary duty is to
17 transport products sold by the employer through
18 vending machines and to keep such machines
19 stocked, in good operating condition, and in good lo-
20 cations.】

21 【“(2) A driver who often calls on established
22 customers day after day or week after week, deliv-
23 ering a quantity of the employer’s products at each
24 call when the sale was not significantly affected by
25 solicitations of the customer by the delivering driver

1 or the amount of the sale is determined by the vol-
 2 ume of the customer’s sales since the previous deliv-
 3 ery.】

4 【“(3) A driver primarily engaged in making de-
 5 liveries to customers and performing activities in-
 6 tended to promote sales by customers (including
 7 placing point-of-sale and other advertising materials,
 8 price stamping commodities, arranging merchandise
 9 on shelves, in coolers or in cabinets, rotating stock
 10 according to date, and cleaning and otherwise serv-
 11 icing display cases), unless such work is in further-
 12 ance of the driver’s own sales efforts.】

13 **“Subpart G—Salary Requirements (§§541.600-541.607)**

14 **“§ 541.600 Amount of salary required**

15 “(a) To qualify as an exempt executive, administra-
 16 tive or professional employee under section 13(a)(1) of the
 17 Act, an employee must be compensated on a salary basis
 18 at a rate of not less than \$684 per week 【(or \$455 per
 19 week if employed in the Commonwealth of the Northern
 20 Mariana Islands, Guam, Puerto Rico, or the U.S. Virgin
 21 Islands by employers other than the Federal Government,
 22 or \$380 per week if employed in American Samoa by em-
 23 ployers other than the Federal Government)】, exclusive of
 24 board, lodging or other facilities. Administrative and pro-

1 fessional employees may also be paid on a fee basis, as
2 defined in §541.605.

3 “(b) The required amount of compensation per week
4 may be translated into equivalent amounts for periods
5 longer than one week. For example, the \$684-per-week re-
6 quirement will be met if the employee is compensated bi-
7 weekly on a salary basis of not less than \$1,368, semi-
8 monthly on a salary basis of not less than \$1,482, or
9 monthly on a salary basis of not less than \$2,964. How-
10 ever, the shortest period of payment that will meet this
11 compensation requirement is one week.

12 “(c) In the case of academic administrative employ-
13 ees, the compensation requirement also may be met by
14 compensation on a salary basis at a rate at least equal
15 to the entrance salary for teachers in the educational es-
16 tablishment by which the employee is employed, as pro-
17 vided in §541.204(a)(1).

18 “(d) In the case of computer employees, the com-
19 pensation requirement also may be met by compensation
20 on an hourly basis at a rate not less than \$27.63 an hour,
21 as provided in §541.400(b).

22 “(e) In the case of professional employees, the com-
23 pensation requirements in this section shall not apply to
24 employees engaged as teachers (see §541.303); employees
25 who hold a valid license or certificate permitting the prac-

1 tice of law or medicine or any of their branches and are
2 actually engaged in the practice thereof (see §541.304);
3 or to employees who hold the requisite academic degree
4 for the general practice of medicine and are engaged in
5 an internship or resident program pursuant to the practice
6 of the profession (see §541.304). In the case of medical
7 occupations, the exception from the salary or fee require-
8 ment does not apply to pharmacists, nurses, therapists,
9 technologists, sanitarians, dietitians, social workers, psy-
10 chologists, psychometrists, or other professions which
11 service the medical profession.

12 **“§ 541.601 Highly compensated employees**

13 “(a)(1) Beginning on **【January 1, 2020】**<<the ef-
14 fective date of these Substantive Regulations>>, an em-
15 ployee with total annual compensation of at least
16 \$107,432 is deemed exempt under section 13(a)(1) of the
17 Act if the employee customarily and regularly performs
18 any one or more of the exempt duties or responsibilities
19 of an executive, administrative or professional employee
20 as identified in subparts B, C or D of this part.

21 “(2) Where the annual period covers periods both
22 prior to and after **【January 1, 2020】**<<the effective date
23 of these Substantive Regulations>>, the amount of total
24 annual compensation due will be determined on a propor-
25 tional basis.

1 “(b)(1) ‘Total annual compensation’ must include at
2 least \$684 per week paid on a salary or fee basis as set
3 forth in §541.602 and 541.605, except that
4 §541.602(a)(3) shall not apply to highly compensated em-
5 ployees. Total annual compensation may also include com-
6 missions, nondiscretionary bonuses and other nondis-
7 cretionary compensation earned during a 52-week period.
8 Total annual compensation does not include board, lodg-
9 ing and other facilities as defined in §541.606, and does
10 not include payments for medical insurance, payments for
11 life insurance, contributions to retirement plans and the
12 cost of other fringe benefits.

13 “(2) If an employee’s total annual compensation does
14 not total at least the amount specified in the applicable
15 subsection of paragraph (a) by the last pay period of the
16 52-week period, the employer may, during the last pay pe-
17 riod or within one month after the end of the 52-week
18 period, make one final payment sufficient to achieve the
19 required level. For example, for a 52-week period **【begin-**
20 **ning January 1, 2020】**, an employee may earn \$90,000
21 in base salary, and the employer may anticipate **【based**
22 **upon past sales】** that the employee also will earn \$17,432
23 in **【commissions】**<<other payments>>. However, **【due**
24 **to poor sales】** in the final quarter of the year, the em-
25 ployee actually only earns \$12,000 in **【commis-**

1 sions] <<other payments>>. In this situation, the em-
2 ployer may within one month after the end of the year
3 make a payment of at least \$5,432 to the employee. Any
4 such final payment made after the end of the 52-week pe-
5 riod may count only toward the prior year's total annual
6 compensation and not toward the total annual compensa-
7 tion in the year it was paid. If the employer fails to make
8 such a payment, the employee does not qualify as a highly
9 compensated employee, but may still qualify as exempt
10 under subparts B, C, or D of this part.

11 “(3) An employee who does not work a full year for
12 the employer, either because the employee is newly hired
13 after the beginning of the year or ends the employment
14 before the end of the year, may qualify for exemption
15 under this section if the employee receives a pro rata por-
16 tion of the minimum amount established in paragraph (a)
17 of this section, based upon the number of weeks that the
18 employee will be or has been employed. An employer may
19 make one final payment as under paragraph (b)(2) of this
20 section within one month after the end of employment.

21 “(4) The employer may utilize any 52-week period
22 as the year, such as a calendar year, a fiscal year, or an
23 anniversary of hire year. If the employer does not identify
24 some other year period in advance, the calendar year will
25 apply.

1 “(c) A high level of compensation is a strong indi-
2 cator of an employee’s exempt status, thus eliminating the
3 need for a detailed analysis of the employee’s job duties.
4 Thus, a highly compensated employee will qualify for ex-
5 emption if the employee customarily and regularly per-
6 forms any one or more of the exempt duties or responsibil-
7 ities of an executive, administrative or professional em-
8 ployee identified in subparts B, C or D of this part. An
9 employee may qualify as a highly compensated executive
10 employee, for example, if the employee customarily and
11 regularly directs the work of two or more other employees,
12 even though the employee does not meet all of the other
13 requirements for the executive exemption under §541.100.

14 “(d) This section applies only to employees whose pri-
15 mary duty includes performing office or non-manual work.
16 Thus, for example, non-management production-line work-
17 ers and non-management employees in maintenance, con-
18 struction and similar occupations such as carpenters, elec-
19 tricians, mechanics, plumbers, iron workers, craftsmen,
20 operating engineers, longshoremen, construction workers,
21 laborers and other employees who perform work involving
22 repetitive operations with their hands, physical skill and
23 energy are not exempt under this section no matter how
24 highly paid they might be.

1 **“§ 541.602 Salary basis**

2 “(a) General rule. An employee will be considered to
3 be paid on a ‘salary basis’ within the meaning of this part
4 if the employee regularly receives each pay period on a
5 weekly, or less frequent basis, a predetermined amount
6 constituting all or part of the employee’s compensation,
7 which amount is not subject to reduction because of vari-
8 ations in the quality or quantity of the work performed.

9 “(1) Subject to the exceptions provided in para-
10 graph (b) of this section, an exempt employee must
11 receive the full salary for any week in which the em-
12 ployee performs any work without regard to the
13 number of days or hours worked. Exempt employees
14 need not be paid for any workweek in which they
15 perform no work.

16 “(2) An employee is not paid on a salary basis
17 if deductions from the employee’s predetermined
18 compensation are made for absences occasioned by
19 the employer or by the operating requirements of the
20 **【business】** <<employing office>>. If the employee
21 is ready, willing and able to work, deductions may
22 not be made for time when work is not available.

23 “(3) Up to ten percent of the salary amount re-
24 quired by §541.600(a) may be satisfied by the pay-
25 ment of nondiscretionary bonuses, incentives and
26 commissions, that are paid annually or more fre-

1 frequently. The employer may utilize any 52-week pe-
2 riod as the year, such as a calendar year, a fiscal
3 year, or an anniversary of hire year. If the employer
4 does not identify some other year period in advance,
5 the calendar year will apply. This provision does not
6 apply to highly compensated employees under
7 §541.601.

8 “(i) If by the last pay period of the 52-
9 week period the sum of the employee’s weekly
10 salary plus nondiscretionary bonus, incentive,
11 and commission payments received is less than
12 52 times the weekly salary amount required by
13 §541.600(a), the employer may make one final
14 payment sufficient to achieve the required level
15 no later than the next pay period after the end
16 of the year. Any such final payment made after
17 the end of the 52-week period may count only
18 toward the prior year’s salary amount and not
19 toward the salary amount in the year it was
20 paid.

21 “(ii) An employee who does not work a full
22 52-week period for the employer, either because
23 the employee is newly hired after the beginning
24 of this period or ends the employment before
25 the end of this period, may qualify for exemp-

1 tion if the employee receives a pro rata portion
2 of the minimum amount established in para-
3 graph (a)(3) of this section, based upon the
4 number of weeks that the employee will be or
5 has been employed. An employer may make one
6 final payment as under paragraph (a)(3)(i) of
7 this section within one pay period after the end
8 of employment.

9 “(b) Exceptions. The prohibition against deductions
10 from pay in the salary basis requirement is subject to the
11 following exceptions:

12 “(1) Deductions from pay may be made when
13 an exempt employee is absent from work for one or
14 more full days for personal reasons, other than sick-
15 ness or disability. Thus, if an employee is absent for
16 two full days to handle personal affairs, the employ-
17 ee’s salaried status will not be affected if deductions
18 are made from the salary for two full-day absences.
19 However, if an exempt employee is absent for one
20 and a half days for personal reasons, the employer
21 can deduct only for the one full-day absence.

22 “(2) Deductions from pay may be made for ab-
23 sences of one or more full days occasioned by sick-
24 ness or disability (including work-related accidents)
25 if the deduction is made in accordance with a bona

1 fide plan, policy or practice of providing compensa-
2 tion for loss of salary occasioned by such sickness or
3 disability. The employer is not required to pay any
4 portion of the employee's salary for full-day absences
5 for which the employee receives compensation under
6 the plan, policy or practice. Deductions for such full-
7 day absences also may be made before the employee
8 has qualified under the plan, policy or practice, and
9 after the employee has exhausted the leave allowance
10 thereunder. Thus, for example, if an employer main-
11 tains a short-term disability insurance plan pro-
12 viding salary replacement for 12 weeks starting on
13 the fourth day of absence, the employer may make
14 deductions from pay for the three days of absence
15 before the employee qualifies for benefits under the
16 plan; for the twelve weeks in which the employee re-
17 ceives salary replacement benefits under the plan;
18 and for absences after the employee has exhausted
19 the 12 weeks of salary replacement benefits. [Simi-
20 larly, an employer may make deductions from pay
21 for absences of one or more full days if salary re-
22 placement benefits are provided under a State dis-
23 ability insurance law or under a State workers' com-
24 pensation law.]

1 “(3) While an employer cannot make deduc-
2 tions from pay for absences of an exempt employee
3 occasioned by jury duty, attendance as a witness or
4 temporary military leave, the employer can offset
5 any amounts received by an employee as jury fees,
6 witness fees or military pay for a particular week
7 against the salary due for that particular week with-
8 out loss of the exemption.

9 “(4) Deductions from pay of exempt employees
10 may be made for penalties imposed in good faith for
11 infractions of safety rules of major significance.
12 Safety rules of major significance include those re-
13 lating to the prevention of serious danger in the
14 workplace or to other employees, such as rules pro-
15 hibiting smoking in explosive plants, oil refineries
16 and coal mines.

17 “(5) Deductions from pay of exempt employees
18 may be made for unpaid disciplinary suspensions of
19 one or more full days imposed in good faith for in-
20 fractions of workplace conduct rules. Such suspen-
21 sions must be imposed pursuant to a written policy
22 applicable to all employees. Thus, for example, an
23 employer may suspend an exempt employee without
24 pay for three days for violating a generally applica-
25 ble written policy prohibiting sexual harassment.

1 Similarly, an employer may suspend an exempt em-
2 ployee without pay for twelve days for violating a
3 generally applicable written policy prohibiting work-
4 place violence.

5 “(6) An employer is not required to pay the full
6 salary in the initial or terminal week of employment.
7 Rather, an employer may pay a proportionate part
8 of an employee’s full salary for the time actually
9 worked in the first and last week of employment. In
10 such weeks, the payment of an hourly or daily equiv-
11 alent of the employee’s full salary for the time actu-
12 ally worked will meet the requirement. However, em-
13 ployees are not paid on a salary basis within the
14 meaning of these regulations if they are employed
15 occasionally for a few days, and the employer pays
16 them a proportionate part of the weekly salary when
17 so employed.

18 “(7) An employer is not required to pay the full
19 salary for weeks in which an exempt employee takes
20 unpaid leave under the Family and Medical Leave
21 Act. Rather, when an exempt employee takes unpaid
22 leave under the Family and Medical Leave Act, an
23 employer may pay a proportionate part of the full
24 salary for time actually worked. For example, if an
25 employee who normally works 40 hours per week

1 uses four hours of unpaid leave under the Family
2 and Medical Leave Act, the employer could deduct
3 10 percent of the employee's normal salary that
4 week.

5 “(c) When calculating the amount of a deduction
6 from pay allowed under paragraph (b) of this section, the
7 employer may use the hourly or daily equivalent of the
8 employee's full weekly salary or any other amount propor-
9 tional to the time actually missed by the employee. A de-
10 duction from pay as a penalty for violations of major safe-
11 ty rules under paragraph (b)(4) of this section may be
12 made in any amount.

13 **“§ 541.603 Effect of improper deductions from salary**

14 “(a) An employer who makes improper deductions
15 from salary shall lose the exemption if the facts dem-
16 onstrate that the employer did not intend to pay employees
17 on a salary basis. An actual practice of making improper
18 deductions demonstrates that the employer did not intend
19 to pay employees on a salary basis. The factors to consider
20 when determining whether an employer has an actual
21 practice of making improper deductions include, but are
22 not limited to: the number of improper deductions, par-
23 ticularly as compared to the number of employee infrac-
24 tions warranting discipline; the time period during which
25 the employer made improper deductions; the number and

1 geographic location of employees whose salary was im-
2 properly reduced; the number and geographic location of
3 managers responsible for taking the improper deductions;
4 and whether the employer has a clearly communicated pol-
5 icy permitting or prohibiting improper deductions.

6 “(b) If the facts demonstrate that the employer has
7 an actual practice of making improper deductions, the ex-
8 emption is lost during the time period in which the im-
9 proper deductions were made for employees in the same
10 job classification working for the same managers respon-
11 sible for the actual improper deductions. Employees in dif-
12 ferent job classifications or who work for different man-
13 agers do not lose their status as exempt employees. Thus,
14 for example, if a manager [at a company facility] rou-
15 tinely docks the pay of engineers at that facility for par-
16 tial-day personal absences, then all engineers at that facil-
17 ity whose pay could have been improperly docked by the
18 manager would lose the exemption; engineers at other fa-
19 cilities or working for other managers, however, would re-
20 main exempt.

21 “(c) Improper deductions that are either isolated or
22 inadvertent will not result in loss of the exemption for any
23 employees subject to such improper deductions, if the em-
24 ployer reimburses the employees for such improper deduc-
25 tions.

1 “(d) If an employer has a clearly communicated pol-
2 icy that prohibits the improper pay deductions specified
3 in §541.602(a) and includes a complaint mechanism, re-
4 imburses employees for any improper deductions and
5 makes a good faith commitment to comply in the future,
6 such employer will not lose the exemption for any employ-
7 ees unless the employer willfully violates the policy by con-
8 tinuing to make improper deductions after receiving em-
9 ployee complaints. If an employer fails to reimburse em-
10 ployees for any improper deductions or continues to make
11 improper deductions after receiving employee complaints,
12 the exemption is lost during the time period in which the
13 improper deductions were made for employees in the same
14 job classification working for the same managers respon-
15 sible for the actual improper deductions. The best evidence
16 of a clearly communicated policy is a written policy that
17 was distributed to employees prior to the improper pay
18 deductions by, for example, providing a copy of the policy
19 to employees at the time of hire, publishing the policy in
20 an employee handbook or publishing the policy on the em-
21 ployer’s Intranet.

22 “(e) This section shall not be construed in an unduly
23 technical manner so as to defeat the exemption.

1 **“§ 541.604 Minimum guarantee plus extras**

2 “(a) An employer may provide an exempt employee
3 with additional compensation without losing the exemption
4 or violating the salary basis requirement, if the employ-
5 ment arrangement also includes a guarantee of at least
6 the minimum weekly-required amount paid on a salary
7 basis. Thus, for example, an exempt employee guaranteed
8 at least \$684 each week paid on a salary basis may also
9 receive additional compensation of a one percent commis-
10 sion on sales. An exempt employee also may receive a per-
11 centage of the sales or profits of the employer if the em-
12 ployment arrangement also includes a guarantee of at
13 least \$684 each week paid on a salary basis. Similarly,
14 the exemption is not lost if an exempt employee who is
15 guaranteed at least \$684 each week paid on a salary basis
16 also receives additional compensation based on hours
17 worked for work beyond the normal workweek. Such addi-
18 tional compensation may be paid on any basis (e.g., flat
19 sum, bonus payment, straight-time hourly amount, time
20 and one-half or any other basis), and may include paid
21 time off.

22 “(b) An exempt employee’s earnings may be com-
23 puted on an hourly, a daily or a shift basis, without losing
24 the exemption or violating the salary basis requirement,
25 if the employment arrangement also includes a guarantee
26 of at least the minimum weekly required amount paid on

1 a salary basis regardless of the number of hours, days or
2 shifts worked, and a reasonable relationship exists between
3 the guaranteed amount and the amount actually earned.
4 The reasonable relationship test will be met if the weekly
5 guarantee is roughly equivalent to the employee's usual
6 earnings at the assigned hourly, daily or shift rate for the
7 employee's normal scheduled workweek. Thus, for exam-
8 ple, an exempt employee guaranteed compensation of at
9 least \$725 for any week in which the employee performs
10 any work, and who normally works four or five shifts each
11 week, may be paid \$210 per shift without violating the
12 \$684-per-week salary basis requirement. The reasonable
13 relationship requirement applies only if the employee's pay
14 is computed on an hourly, daily or shift basis. It does not
15 apply, for example, to an exempt store manager paid a
16 guaranteed salary per week that exceeds the current salary
17 level who also receives a commission of one-half percent
18 of all sales in the store or five percent of the store's prof-
19 its, which in some weeks may total as much as, or even
20 more than, the guaranteed salary.

21 **“§ 541.605 Fee basis**

22 “(a) Administrative and professional employees may
23 be paid on a fee basis, rather than on a salary basis. An
24 employee will be considered to be paid on a ‘fee basis’
25 within the meaning of these regulations if the employee

1 is paid an agreed sum for a single job regardless of the
2 time required for its completion. These payments resemble
3 piecework payments with the important distinction that
4 generally a ‘fee’ is paid for the kind of job that is unique
5 rather than for a series of jobs repeated an indefinite num-
6 ber of times and for which payment on an identical basis
7 is made over and over again. Payments based on the num-
8 ber of hours or days worked and not on the accomplish-
9 ment of a given single task are not considered payments
10 on a fee basis.

11 “(b) To determine whether the fee payment meets the
12 minimum amount of salary required for exemption under
13 these regulations, the amount paid to the employee will
14 be tested by determining the time worked on the job and
15 whether the fee payment is at a rate that would amount
16 to at least the minimum salary per week, as required by
17 §541.600(a) and 541.602(a), if the employee worked 40
18 hours. Thus, an artist paid \$350 for a picture that took
19 20 hours to complete meets the \$684 minimum salary re-
20 quirement for exemption since earnings at this rate would
21 yield the artist \$700 if 40 hours were worked.

22 **“§ 541.606 Board, lodging or other facilities**

23 “(a) To qualify for exemption under section 13(a)(1)
24 of the Act, an employee must earn the minimum salary
25 amount set forth in §541.600, ‘exclusive of board, lodging

1 or other facilities.’ The phrase ‘exclusive of board, lodging
2 or other facilities’ means ‘free and clear’ or independent
3 of any claimed credit for non-cash items of value that an
4 employer may provide to an employee. Thus, the costs in-
5 curred by an employer to provide an employee with board,
6 lodging or other facilities may not count towards the min-
7 imum salary amount required for exemption under this
8 part 541. Such separate transactions are not prohibited
9 between employers and their exempt employees, but the
10 costs to employers associated with such transactions may
11 not be considered when determining if an employee has
12 received the full required minimum salary payment.

13 “(b) Regulations defining what constitutes ‘board,
14 lodging, or other facilities’ are contained in 29 CFR part
15 531. As described in 29 CFR 531.32, the term ‘other fa-
16 cilities’ refers to items similar to board and lodging, such
17 as meals furnished at company restaurants or cafeterias
18 or by hospitals, hotels, or restaurants to their employees;
19 meals, dormitory rooms, and tuition furnished by a college
20 to its student employees; merchandise furnished at com-
21 pany stores or commissaries, including articles of food,
22 clothing, and household effects; housing furnished for
23 dwelling purposes; and transportation furnished to em-
24 ployees for ordinary commuting between their homes and
25 work.

1 **[“§ 541.607 Reserved by 85 FR 34970 Effective: June**
2 **8, 2020 <<541.607 - Reserved.>>**

3 **“Subpart H—Definitions and Miscellaneous**
4 **Provisions (§§541.700-541.710)**

5 **“§ 541.700 Primary duty**

6 “(a) To qualify for exemption under this part, an em-
7 ployee’s ‘primary duty’ must be the performance of exempt
8 work. The term ‘primary duty’ means the principal, main,
9 major or most important duty that the employee performs.
10 Determination of an employee’s primary duty must be
11 based on all the facts in a particular case, with the major
12 emphasis on the character of the employee’s job as a
13 whole. Factors to consider when determining the primary
14 duty of an employee include, but are not limited to, the
15 relative importance of the exempt duties as compared with
16 other types of duties; the amount of time spent performing
17 exempt work; the employee’s relative freedom from direct
18 supervision; and the relationship between the employee’s
19 salary and the wages paid to other employees for the kind
20 of nonexempt work performed by the employee.

21 “(b) The amount of time spent performing exempt
22 work can be a useful guide in determining whether exempt
23 work is the primary duty of an employee. Thus, employees
24 who spend more than 50 percent of their time performing
25 exempt work will generally satisfy the primary duty re-
26 quirement. Time alone, however, is not the sole test, and

1 nothing in this section requires that exempt employees
2 spend more than 50 percent of their time performing ex-
3 empt work. Employees who do not spend more than 50
4 percent of their time performing exempt duties may none-
5 theless meet the primary duty requirement if the other
6 factors support such a conclusion.

7 “(c) Thus, for example, assistant managers in a retail
8 establishment who perform exempt executive work such as
9 supervising and directing the work of other employees, or-
10 dering merchandise, managing the budget and authorizing
11 payment of bills may have management as their primary
12 duty even if the assistant managers spend more than 50
13 percent of the time performing nonexempt work such as
14 running the cash register. However, if such assistant man-
15 agers are closely supervised and earn little more than the
16 nonexempt employees, the assistant managers generally
17 would not satisfy the primary duty requirement.

18 **“§ 541.701 Customarily and regularly**

19 “The phrase ‘customarily and regularly’ means a fre-
20 quency that must be greater than occasional but which,
21 of course, may be less than constant. Tasks or work per-
22 formed ‘customarily and regularly’ includes work normally
23 and recurrently performed every workweek; it does not in-
24 clude isolated or one-time tasks.

1 **“§ 541.702 Exempt and nonexempt work**

2 “The term ‘exempt work’ means all work described
3 in §541.100, 541.101, 541.200, 541.300, 541.301,
4 541.302, 541.303, 541.304, <<and>> 541.400 [and
5 541.500], and the activities directly and closely related
6 to such work. All other work is considered ‘nonexempt.’

7 **“§ 541.703 Directly and closely related**

8 “(a) Work that is ‘directly and closely related’ to the
9 performance of exempt work is also considered exempt
10 work. The phrase ‘directly and closely related’ means
11 tasks that are related to exempt duties and that contribute
12 to or facilitate performance of exempt work. Thus, ‘di-
13 rectly and closely related’ work may include physical tasks
14 and menial tasks that arise out of exempt duties, and the
15 routine work without which the exempt employee’s exempt
16 work cannot be performed properly. Work ‘directly and
17 closely related’ to the performance of exempt duties may
18 also include recordkeeping; monitoring and adjusting ma-
19 chinery; taking notes; using the computer to create docu-
20 ments or presentations; opening the mail for the purpose
21 of reading it and making decisions; and using a photo-
22 copier or fax machine. Work is not ‘directly and closely
23 related’ if the work is remotely related or completely unre-
24 lated to exempt duties.

1 “(b) The following examples further illustrate the
2 type of work that is and is not normally considered as
3 directly and closely related to exempt work:

4 “(1) Keeping time, production or sales records
5 for subordinates is work directly and closely related
6 to an exempt executive’s function of managing a de-
7 partment and supervising employees.

8 “(2) The distribution of materials, merchandise
9 or supplies to maintain control of the flow of and ex-
10 penditures for such items is directly and closely re-
11 lated to the performance of exempt duties.

12 “(3) A supervisor who spot checks and exam-
13 ines the work of subordinates to determine whether
14 they are performing their duties properly, and
15 whether the product is satisfactory, is performing
16 work which is directly and closely related to manage-
17 rial and supervisory functions, so long as the check-
18 ing is distinguishable from the work ordinarily per-
19 formed by a nonexempt inspector.

20 “(4) A supervisor who sets up a machine may
21 be engaged in exempt work, depending upon the na-
22 ture of the industry and the operation. In some
23 cases the setup work, or adjustment of the machine
24 for a particular job, is typically performed by the
25 same employees who operate the machine. Such

1 setup work is part of the production operation and
2 is not exempt. In other cases, the setting up of the
3 work is a highly skilled operation which the ordinary
4 production worker or machine tender typically does
5 not perform. In large plants, non-supervisors may
6 perform such work. However, particularly in small
7 plants, such work may be a regular duty of the execu-
8 tive and is directly and closely related to the execu-
9 tive's responsibility for the work performance of sub-
10 ordinates and for the adequacy of the final product.
11 Under such circumstances, it is exempt work.

12 “(5) A department manager in a retail or serv-
13 ice establishment who walks about the sales floor ob-
14 serving the work of sales personnel under the em-
15 ployee's supervision to determine the effectiveness of
16 their sales techniques, checks on the quality of cus-
17 tomer service being given, or observes customer pref-
18 erences is performing work which is directly and
19 closely related to managerial and supervisory func-
20 tions.

21 “(6) A business consultant may take extensive
22 notes recording the flow of work and materials
23 through the office or plant of the client; after re-
24 turning to the office of the employer, the consultant
25 may personally use the computer to type a report

1 and create a proposed table of organization. Stand-
2 ing alone, or separated from the primary duty, such
3 note-taking and typing would be routine in nature.
4 However, because this work is necessary for ana-
5 lyzing the data and making recommendations, the
6 work is directly and closely related to exempt work.
7 While it is possible to assign note-taking and typing
8 to nonexempt employees, and in fact it is frequently
9 the practice to do so, delegating such routine tasks
10 is not required as a condition of exemption.

11 “(7) A **【credit】** manager who makes and ad-
12 ministers the **【credit】**<<budget>> policy of the
13 **【employer】**<<employing office>>, establishes
14 **【credit】**<<spending>> limits for **【cus-**
15 **tomers】**<<the employing office>>, <<and>>
16 authorizes **【the shipment of orders on credit, and**
17 **makes decisions on whether to exceed credit lim-**
18 **its】**<<expenditures>> would be performing work
19 exempt under §541.200. Work that is directly and
20 closely related to these exempt duties may include
21 checking the status of accounts to determine wheth-
22 er the credit limit would be exceeded by the ship-
23 ment of a new order, removing credit reports from
24 the files for analysis, and writing letters giving cred-

1 it data and experience to other employers or credit
2 agencies.

3 “(8) A traffic manager in charge of planning a
4 company’s transportation, including the most eco-
5 nomical and quickest routes for shipping merchan-
6 dise to and from the plant, contracting for common-
7 carrier and other transportation facilities, negoti-
8 ating with carriers for adjustments for damages to
9 merchandise, and making the necessary rearrange-
10 ments resulting from delays, damages or irregular-
11 ities in transit, is performing exempt work. If the
12 employee also spends part of the day taking tele-
13 phone orders for local deliveries, such order-taking is
14 a routine function and is not directly and closely re-
15 lated to the exempt work.

16 “(9) An example of work directly and closely re-
17 lated to exempt professional duties is a chemist per-
18 forming menial tasks such as cleaning a test tube in
19 the middle of an original experiment, even though
20 such menial tasks can be assigned to laboratory as-
21 sistants.

22 “(10) A teacher performs work directly and
23 closely related to exempt duties when, while taking
24 students on a field trip, the teacher drives a school

1 van or monitors the students' behavior in a res-
2 taurant.

3 **“§ 541.704 Use of manuals**

4 “The use of manuals, guidelines or other established
5 procedures containing or relating to highly technical, sci-
6 entific, legal, financial or other similarly complex matters
7 that can be understood or interpreted only by those with
8 advanced or specialized knowledge or skills does not pre-
9 clude exemption under section 13(a)(1) of the Act or the
10 regulations in this part. Such manuals and procedures
11 provide guidance in addressing difficult or novel cir-
12 cumstances and thus use of such reference material would
13 not affect an employee's exempt status. The section
14 13(a)(1) exemptions are not available, however, for em-
15 ployees who simply apply well-established techniques or
16 procedures described in manuals or other sources within
17 closely prescribed limits to determine the correct response
18 to an inquiry or set of circumstances.

19 **“§ 541.705 Trainees**

20 “The executive, administrative, professional, [outside
21 sales] and computer employee exemptions do not apply
22 to employees training for employment in an executive, ad-
23 ministrative, professional, [outside sales] or computer
24 employee capacity who are not actually performing the du-

1 ties of an executive, administrative, professional, [outside
2 sales] or computer employee.

3 **“§ 541.706 Emergencies**

4 “(a) An exempt employee will not lose the exemption
5 by performing work of a normally nonexempt nature be-
6 cause of the existence of an emergency. Thus, when emer-
7 gencies arise that threaten the safety of employees, a ces-
8 sation of operations or serious damage to the employer’s
9 property, any work performed in an effort to prevent such
10 results is considered exempt work.

11 “(b) An ‘emergency’ does not include occurrences
12 that are not beyond control or for which the employer can
13 reasonably provide in the normal course of business.
14 Emergencies generally occur only rarely, and are events
15 that the employer cannot reasonably anticipate.

16 “(c) The following examples illustrate the distinction
17 between emergency work considered exempt work and rou-
18 tine work that is not exempt work:

19 “(1) [A mine superintendent who pitches in
20 after an explosion and digs out workers who are
21 trapped in the mine is still a bona fide execu-
22 tive.] <<Reserved.>>

23 “(2) Assisting nonexempt employees with their
24 work during periods of heavy workload or to handle
25 rush orders is not exempt work.

1 “(3) Replacing a nonexempt employee during
2 the first day or partial day of an illness may be con-
3 sidered exempt emergency work depending on fac-
4 tors such as the size of the [establish-
5 ment] <<location>> and of the executive’s depart-
6 ment, the nature of the [industry] <<work per-
7 formed by the employing office>>, the con-
8 sequences that would flow from the failure to replace
9 the ailing employee immediately, and the feasibility
10 of filling the employee’s place promptly.

11 “(4) Regular repair and cleaning of equipment
12 is not emergency work, even when necessary to pre-
13 vent fire or explosion; however, repairing equipment
14 may be emergency work if the breakdown of or dam-
15 age to the equipment was caused by accident or
16 carelessness that the employer could not reasonably
17 anticipate.

18 **“§ 541.707 Occasional tasks**

19 “Occasional, infrequently recurring tasks that cannot
20 practicably be performed by nonexempt employees, but are
21 the means for an exempt employee to properly carry out
22 exempt functions and responsibilities, are considered ex-
23 empt work. The following factors should be considered in
24 determining whether such work is exempt work: Whether
25 the same work is performed by any of the exempt employ-

1 ee's subordinates; practicability of delegating the work to
2 a nonexempt employee; whether the exempt employee per-
3 forms the task frequently or occasionally; and existence
4 of an industry practice for the exempt employee to per-
5 form the task.

6 **“§ 541.708 Combination exemptions**

7 “Employees who perform a combination of exempt
8 duties as set forth in the regulations in this part for execu-
9 tive, administrative, professional, [outside sales] and
10 computer employees may qualify for exemption. Thus, for
11 example, an employee whose primary duty involves a com-
12 bination of exempt administrative and exempt executive
13 work may qualify for exemption. In other words, work that
14 is exempt under one section of this part will not defeat
15 the exemption under any other section.

16 **[“§ 541.709 Motion picture producing industry**

17 [“The requirement that the employee be paid ‘on a
18 salary basis’ does not apply to an employee in the motion
19 picture producing industry who is compensated at a base
20 rate of at least \$1,043 per week (exclusive of board, lodg-
21 ing, or other facilities). Thus, an employee in this industry
22 who is otherwise exempt under subparts B, C, or D of
23 this part, and who is employed at a base rate of at least
24 the applicable current minimum amount a week is exempt
25 if paid a proportionate amount (based on a week of not

1 more than 6 days) for any week in which the employee
2 does not work a full workweek for any reason. Moreover,
3 an otherwise exempt employee in this industry qualifies
4 for exemption if the employee is employed at a daily rate
5 under the following circumstances:】

6 【“(a) The employee is in a job category for which
7 a weekly base rate is not provided and the daily base rate
8 would yield at least the minimum weekly amount if 6 days
9 were worked; or】

10 【“(b) The employee is in a job category having the
11 minimum weekly base rate and the daily base rate is at
12 least one-sixth of such weekly base rate.】

13 **“§ 541.709 <<Reserved.>>**

14 **“§ 541.710 [Employees of public agencies]<<Effect of
15 certain deductions on exempt employee
16 pay>>**

17 “(a) An employee 【of a public agency】 who otherwise
18 meets the salary basis requirements of §541.602 shall not
19 be disqualified from exemption under §541.100, 541.200,
20 541.300 or 541.400 on the basis that such employee is
21 paid according to a pay system established by statute, or-
22 dinance or regulation, or by a policy or practice estab-
23 lished pursuant to principles of public accountability,
24 under which the employee accrues personal leave and sick
25 leave and which requires the 【public agency】 employee’s

1 pay to be reduced or such employee to be placed on leave
2 without pay for absences for personal reasons or because
3 of illness or injury of less than one work-day when accrued
4 leave is not used by an employee because:

5 “(1) Permission for its use has not been sought
6 or has been sought and denied;

7 “(2) Accrued leave has been exhausted; or

8 “(3) The employee chooses to use leave without
9 pay.

10 “(b) Deductions from the pay of an employee **【**of a
11 public agency**】** for absences due to a budget-required fur-
12 lough shall not disqualify the employee from being paid
13 on a salary basis except in the workweek in which the fur-
14 lough occurs and for which the employee’s pay is accord-
15 ingly reduced.”.

○