

Rules and Regulations

Federal Register

Vol. 85, No. 154

Monday, August 10, 2020

This section of the FEDERAL REGISTER contains regulatory documents having general applicability and legal effect, most of which are keyed to and codified in the Code of Federal Regulations, which is published under 50 titles pursuant to 44 U.S.C. 1510.

The Code of Federal Regulations is sold by the Superintendent of Documents.

OFFICE OF PERSONNEL MANAGEMENT

5 CFR Part 630

RIN 3206-AN96

Paid Parental Leave

AGENCY: Office of Personnel Management.

ACTION: Interim final rule; request for comments.

SUMMARY: The Office of Personnel Management is issuing an interim final rule to implement the Federal Employee Paid Leave Act, which provides 12 weeks of paid parental leave to certain Federal employees covered by the Family and Medical Leave Act (FMLA). Implementation of the new law also requires changes to OPM's existing FMLA regulations.

DATES: *Effective date:* October 1, 2020.

Comments: Comments must be received on or before September 9, 2020.

ADDRESSES: You may submit comments, identified by docket number and/or Regulatory Information Number (RIN) and title, by the following method:

- *Federal Rulemaking Portal:* <http://www.regulations.gov>. Follow the instructions for submitting comments.

All submissions received must include the agency name and docket number or RIN for this document. The general policy for comments and other submissions from members of the public is to make these submissions available for public viewing at <http://www.regulations.gov> as they are received without change, including any personal identifiers or contact information.

FOR FURTHER INFORMATION CONTACT:

Bryce Baker by email at pay-leave-policy@opm.gov or by telephone at (202) 606-2858.

SUPPLEMENTARY INFORMATION: The Office of Personnel Management (OPM) is issuing an interim final rule to

implement provisions of the Federal Employee Paid Leave Act (subtitle A of title LXXXVI of division F of the National Defense Authorization Act for Fiscal Year 2020, Pub. L. 116-92, December 20, 2019), which will hereafter be referred to as "FEPLA." FEPLA makes paid parental leave available to certain categories of Federal civilian employees. These OPM regulations will implement FEPLA provisions dealing with Federal employees covered by the Family and Medical Leave Act (FMLA) provisions in subchapter V of chapter 63 of title 5, United States Code, which were originally enacted through title II of the Family and Medical Leave Act of 1993. (See sections 7602, 7605(a), and 7606 of FEPLA.) The title 5 FMLA provisions, which apply to the majority of civilian Federal employees, are administered by OPM. (See 5 CFR part 630, subpart L.)

FEPLA amended 5 U.S.C. 6382(d) to allow the substitution of up to 12 weeks of paid parental leave for FMLA unpaid leave granted in connection with the birth of an employee's son or daughter or the placement of a son or daughter with an employee for adoption or foster care. (See 5 U.S.C. 6382(a)(1)(A) and (B).) In order to implement FEPLA, OPM is adding a new subpart—subpart Q (Paid Parental Leave)—in part 630 (Absence and Leave) of title 5, Code of Federal Regulations, and making necessary clarifications, changes, and additions in subpart L (Family and Medical Leave).

Effective Dates

Section 7602(c) of FEPLA provides that the amendments to 5 U.S.C. 6382 dealing with paid parental leave are not effective with respect to any birth or placement (for adoption or foster care) occurring before October 1, 2020. Thus, by law, paid parental leave is available to covered employees only in connection with the birth or placement of a son or daughter that occurs on or after October 1, 2020. Since paid parental leave may not be used prior to the birth or placement involved, paid parental leave may not be used for any period of time prior to October 1, 2020.

Section 7605(a) of FEPLA, dealing with the crediting of certain periods of active duty in the uniformed services performed by members of the National Guard or Reserves for the purpose of the 12-month service requirement for FMLA leave eligibility in 5 U.S.C. 6381(1)(B),

was effective on December 20, 2019—the date FEPLA was enacted.

Section 7606 of FEPLA, dealing with the coverage of screener personnel employed by the Transportation Security Administration (TSA) under the title 5 FMLA law, was effective on December 20, 2019, the date FEPLA was enacted. However, as noted above, use of paid parental leave by TSA screener personnel under the title 5 FMLA law is available only in connection with the birth or placement (for adoption or foster care) of a son or daughter that occurs on or after October 1, 2020.

Summary of Law

A summary of the paid parental leave provisions incorporated within the title 5 FMLA provisions is provided below.

An employee is eligible for paid parental leave only if he or she is a covered "employee" under the definition in 5 U.S.C. 6381(1)(A) and has completed at least 12 months of service as such an employee, as required by 5 U.S.C. 6381(1)(B). (See also 5 CFR 630.1201(b).) We note that the section 6381(1)(A) definition of "employee" excludes individuals employed on a temporary or intermittent basis. Unlike the title 29 FMLA eligibility requirements, employees under the title 5 FMLA are *not* required to be employed by a specific employer for at least 12 months or to have at least 1,250 hours of service during the previous 12-month period; instead, they need only 12 months of covered service performed at any time in the past. Also, although title 29 FMLA limits to 12 workweeks the combined FMLA leave entitlement for two parents of the same child who are spouses and who are employed by the same employer, there is no such limitation under title 5 FMLA; instead, each parent-employee has a separate 12-workweek entitlement.

A covered employee may elect to substitute up to 12 weeks of paid parental leave for FMLA unpaid leave granted under 5 U.S.C. 6382(a)(1)(A) or (B) in connection with the occurrence of the birth or placement (for adoption or foster care) of a son or daughter. Such FMLA unpaid leave may be used to care for the newly born or placed son or daughter, and thus allows for bonding between parent and child.

By law, FMLA unpaid leave is generally limited to a total of 12 weeks in any 12-month period. The FMLA unpaid leave is permitted for various

specified purposes, not just a birth or placement event. Thus, use of FMLA unpaid leave for other purposes (e.g., based on the employee's own serious health condition or to care for certain family members with a serious health condition) can—depending on the timeframe in which it is taken—limit the amount of FMLA unpaid leave available for a birth or placement event, and thus limit the amount of paid parental leave that can be substituted for it. (Employees may request to use their annual or sick leave to cover other periods of time outside of FMLA leave periods in accordance with governing statutes and regulations.)

Paid parental leave may be used only “in connection with the birth or placement involved” (5 U.S.C. 6382(d)(2)(B)(i))—that is, *after* the occurrence of the birth or placement involved—which results in the employee assuming a “parental” role with respect to the newly born or placed child. An employee may take *unpaid* FMLA leave under 5 U.S.C. 6382(a)(1)(A) or (B) before the birth or placement to cover certain activities related to the birth or placement but cannot substitute paid parental leave for those pre-birth/placement FMLA unpaid leave periods. However, an employee could substitute annual leave or sick leave for pre-birth/placement FMLA unpaid leave periods (e.g., sick leave for prenatal care up to the point of birth or in connection with pre-placement activities necessary to allow an adoption to proceed).

Paid parental leave may be used no later than the end of the 12-month period beginning on the date of the birth or placement involved. At the end of that 12-month period, any unused balance of paid parental leave granted in connection with the given birth or placement permanently expires and is not available for future use. No payment may be made for unused paid parental leave or paid parental leave that has expired. Paid parental leave is not considered to be annual leave and thus may not be included in a lump-sum payment for annual leave following separation (5 U.S.C. 6382(d)(2)(D)).

Under the law, an employee may not use any paid parental leave unless the employee agrees in writing, before commencement of the leave, to subsequently work for the applicable employing agency for at least 12 weeks. This 12-week work obligation is triggered once the employee's paid parental leave concludes. The work obligation is statutorily fixed at 12 weeks regardless of the amount of leave used by an employee. An agency head must waive the work obligation if an

employee is unable to return to work because of the continuation, recurrence, or onset of a serious health condition (including mental health) of the employee or the newly born/placed child—but only if the condition is related to the applicable birth or placement.

If an employee fails to return to work for the required 12 weeks, the employing agency “may” (but is not required to) recover from the employee an amount equal to the total amount of Government contributions paid by the agency under 5 U.S.C. 8906 on behalf of the employee to maintain the employee's health insurance coverage during the period of paid parental leave. This reimbursement provision may not be applied if the employee is unable to return to work based on the conditions that qualify for waiver described in the preceding paragraph. Also, this provision may not be applied if the employee fails to meet the 12-week work obligation for any other circumstance beyond the employee's control (see 5 CFR 630.1705(h)).

Interim Final Rule

OPM is issuing interim final regulations that will provide more detail regarding the implementation of the statutory provisions summarized above.

In order to implement FEPLA, OPM is amending part 630 (Absence and Leave) of title 5, Code of Federal Regulations, by amending subpart L (Family and Medical Leave) and adding a new subpart Q (Paid Parental Leave). OPM is making changes in subpart L to establish how the FMLA provisions will now operate, since the appropriate substitution of paid parental leave for FMLA unpaid leave hinges on having a complete understanding of the standards for granting FMLA unpaid leave. Below we provide a section-by-section explanation of the changes in subpart L and the new provisions in the new subpart Q. Hereafter in this **SUPPLEMENTARY INFORMATION**, references to statutory provisions in title 5 of the United States Code and to regulatory provisions in title 5 of the Code of Federal Regulations will generally be referred to by section number without restating the title 5 reference.

Revisions of FMLA Regulations in Subpart L of 5 CFR Part 630

Subpart L deals with FMLA *unpaid* leave. We are making conforming changes to the provisions dealing with the substitution of paid leave for FMLA unpaid leave. We are also making various changes to clarify the appropriate application of the rules governing FMLA unpaid leave. While

paid parental leave may be substituted for FMLA unpaid leave only for periods after birth or placement of a child, employees will still be able to use FMLA unpaid leave for certain purposes related to an anticipated future birth or placement and will be able to substitute annual or sick leave (as appropriate) for such unpaid FMLA leave.

§ 630.1201—Purpose, Applicability, and Agency Responsibilities

The section heading for § 630.1201 is revised to specifically reference agency responsibilities, which are described in an amended paragraph (c). (In current regulations, § 630.1203(g) also addresses agency responsibilities. We believe it is better to address agency responsibilities in one place in the introductory § 630.1201. We are revising § 630.1203(g) to address other matters.) We have added a sentence to paragraph (a) to note that the subpart L regulations also are used in establishing eligibility for paid parental leave under subpart Q. Paragraph (b) is revised to (1) address the coverage of TSA screener personnel, consistent with section 7606 of FEPLA; (2) clarify that temporary and intermittent employees in each listed category of employees are excluded from FMLA coverage; (3) correct obsolete references to the Secretary of Transportation (related to the fact that Coast Guard nonappropriated fund instrumentalities are now located in the Department of Homeland Security); and (4) address the creditability of certain active duty service by employees who are members of the National Guard or Reserves towards the 12-month service requirement, consistent with section 7605(a) of FEPLA.

§ 630.1202—Definitions

Section 630.1202 is amended by (1) removing the definitions for *regularly scheduled*, *regularly scheduled administrative workweek*, and *tour of duty*; (2) revising the definitions of *administrative workweek*, *family and medical leave*, *leave without pay*, and *reduced leave schedule*; and (3) adding new definitions for *birth*, *placement*, and *scheduled tour of duty*. The new term *scheduled tour of duty* is replacing other terms in order to clarify that the tour referenced in the FMLA regulations is the tour of duty established for purposes of charging leave when an employee is absent. The definition of that term also clarifies that there is no tour of duty during the off-season period for seasonal employees; thus, FMLA unpaid leave and paid parental leave would not apply during such an off-season period. The revised definition of *family and medical leave* includes new

language addressing leave to care for covered servicemembers under section 6382(a)(3), which is being regulated for the first time in a new paragraph (j) in § 630.1203.

The new definition of *placement* clarifies that it refers to a *new* placement. Thus, the term excludes the adoption of a stepchild or a foster child who has already been a member of the employee's household and has an existing parent-child relationship with an adopting parent. This definition of *placement* is consistent with Department of Labor FMLA guidance at https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/2005_08_26_1A_FMLA.pdf. If a foster child is later adopted, the placement has already occurred; there is no new placement with a family that would warrant another use of FMLA leave for the same child.

Also, in the definitions of *birth* and *placement*, we are clarifying that the terms may refer to an anticipated birth or placement. This aligns with the regulation in § 630.1203(d), which provides that FMLA unpaid leave based on birth or placement of a child may be used prior to the actual birth or placement.

§ 630.1203—Leave Entitlement

Section 630.1203(a)(2) is revised to clarify that FMLA leave taken “because of the placement” of a son or daughter for adoption or foster care includes the care of the newly placed son or daughter after the placement. This is consistent with the “care” language in the provision dealing with FMLA leave for a newly born son or daughter.

Section 630.1203(b) is revised to give an employee who was incapacitated more time to retroactively invoke FMLA leave. The employee must retroactively invoke FMLA leave within 5 workdays—instead of 2 workdays—after returning to work. A parallel deadline is being established for cases of incapacitation in the paid parental leave regulations in subpart Q.

Section 630.1203(d) is revised to delete language that seems to suggest that there is always only one 12-month period in connection with FMLA unpaid leave used in connection with a birth or placement. As provided in section 6382(a)(2) and § 630.1203(d), the entitlement to use FMLA unpaid leave in connection with a birth or placement terminates at the end of the 12-month period beginning on the date of birth or placement. However, if an employee uses FMLA unpaid leave before birth or placement, the associated 12-month FMLA period may end during the 12-month period that begins on the date of

birth or placement, and the employee will be eligible to start a new entitlement to FMLA unpaid leave after the prior FMLA period ends. (See section 630.1203(c).) If the employee uses FMLA unpaid leave after obtaining that new entitlement, a new 12-month FMLA period will commence, and the employee will be able to use 12 weeks of FMLA unpaid leave during that period. However, no FMLA unpaid leave for birth or placement purposes may be used after the date that is 12 months after birth or placement. Paid parental leave may be substituted for FMLA unpaid leave used after birth or placement even if there are two 12-month periods involved; however, the total amount of paid parental leave in connection with any given birth or placement is limited to 12 weeks.

For example, after not using FMLA leave for at least 12 months, an employee uses a type of FMLA leave described in § 630.1203(a) (*i.e.*, for birth, placement, serious health condition of employee or certain family members, or exigency related to certain family members being called to active duty) on June 1, 2021, triggering the commencement of a 12-month FMLA period. The total amount of FMLA unpaid leave used during the period from June 1, 2021, through May 31, 2022, may not exceed 12 weeks. The employee uses 5 weeks of FMLA unpaid leave in June and July of 2021. Then the employee has a child born on October 15, 2021. Because of the 12-week limit, the employee would be able to use no more than 7 additional weeks of FMLA unpaid leave before the end of the 12-month FMLA period expiring on May 31, 2022. On October 15, 2021, the employee invokes FMLA leave under § 630.1203(a)(1) based on the birth of, and need to care for, the new child, and uses 7 weeks of FMLA unpaid leave during the October-December 2021 period. However, when the 12-month FMLA period ends on May 31, 2022, the employee may start a new 12-month entitlement to FMLA unpaid leave under § 630.1203(a)(1) to care for the child. If the employee invokes FMLA leave in order to care for the child starting on June 1, 2022, a new 12-month FMLA period would begin at that time. However, the entitlement to FMLA unpaid leave based on the birth of a child ends 12 months after the date of birth; therefore, the employee would have the period from June 1, 2022, through October 14, 2022, to use up to 12 weeks of additional FMLA leave under § 630.1203(a)(1). Since the 12-month period after birth or placement includes parts of two 12-month FMLA

periods, the employee could have more than 12 weeks of FMLA unpaid leave under § 630.1203(a)(1); however, only 12 weeks of paid parental leave could be substituted in connection with this particular birth or placement during the 12-month period that begins on the date of the child's birth or placement. Thus, the employee could substitute 12 weeks of paid parental leave for any period during which the employee used FMLA unpaid leave under § 630.1203(a)(1) from October 15, 2021 through October 14, 2022.

Section 630.1203(d) is also revised to address the circumstances under which an employee may use FMLA unpaid leave because of an anticipated birth (under § 630.1203(a)(1)) or because of an anticipated placement (under § 630.1203(a)(2)) prior to the date of the birth or placement. In the case of an anticipated birth, the allowed circumstances involve a pregnancy-related health condition of the expectant mother that prevents her from working or prenatal care provided to that expectant mother by health care providers. This provision applies not only to an employee who is an expectant mother but also to an employee who is the other parent of the expected child, to the extent that other parent is providing necessary care for the expectant mother. We rely on the definition of “serious health condition” in § 630.1202 in applying this provision. We recognize that an employee may be able to use FMLA unpaid leave before birth based on § 630.1203(a)(1) or § 630.1203(a)(3) or (a)(4) based on the same set of circumstances. We note that certain statutory and regulatory rules differ based on which provisions are invoked (*e.g.*, certification requirements). In the case of an anticipated placement, the permissible circumstances are limited to those in which the employee must be absent to engage in activities necessary to allow an anticipated adoption or a foster care arrangement to proceed. For example, an employee may be required to attend counseling sessions, appear in court, or consult with an attorney or a doctor.

Section 630.1203(e) is revised to clarify how the entitlement of 12 administrative workweeks of family and medical leave is converted to hours or days, depending on the nature of an employee's scheduled tour of duty and whether leave is charged on an hourly or daily basis. For example, for a regular full-time employee who has 80 hours in the biweekly scheduled tour of duty and who is charged leave on an hourly basis, 12 administrative workweeks translate into 480 hours. (12 weeks = 6 biweekly periods. 6 times 80 hours = 480 hours.)

Paragraph (e) also addresses employees with part-time work schedules or uncommon tours or who are charged leave on a daily basis.

Section 630.1203(f) is revised to clarify how to recalculate an employee's unused balance of family and medical leave if there is a change in an employee's scheduled tour of duty during any 12-month FMLA period that commenced due to use of family and medical leave. For example, if a regular full-time employee has a balance of 120 hours of unused family and medical leave for a 12-month FMLA period that is in progress and then converts to a part-time schedule of 20 hours per week, the balance would be recalculated to be 60 hours. (The new part-time tour is 40 hours biweekly, compared to 80 for a regular full-time tour. 40/80 times 120 equals 60 hours remaining under the new scheduled tour of duty.)

Paragraph (g) in § 630.1203 is revised. The current paragraph (g) deals with agency responsibilities to provide information to employees. This matter is now addressed in a revised § 630.1201(c). The revised paragraph (g) establishes that FMLA unpaid leave linked to a birth event includes leave necessary for an employee who is the birth mother to recover from giving birth, even if the employee is not involved in caring for the son or daughter during portions of that recovery period. (The recovery period would be whatever is specified by a health care provider. The medical standard for a normal recovery period is generally 6 weeks for vaginal birth and 8 weeks for caesarian section, unless complications arise.) The birth event provision in law states that it applies to leave taken "because of the birth of a son or daughter of the employee and in order to care for such son or daughter" (section 6382(a)(1)(A)). A birth mother's need to recover from giving birth is clearly "because of the birth" of a child.

A new paragraph (i) in § 630.1203 clarifies that FMLA unpaid leave taken to care for a newly born child generally refers to leave covering periods when the parent-employee is in the home with the child or is otherwise involved in spending time with the child (bonding). Such FMLA unpaid leave may also be used to cover short periods away from the child's physical presence to support the care of the child (e.g., buying baby food, diapers, or other supplies). However, leave would not be appropriate if an employee is engaged in activities not directly connected to care of the child or if the employee is outside the local geographic area where the child is located. For example, it is possible that a biological father may not

reside in the same home as the birth mother and the new child. The father could receive FMLA unpaid leave and associated paid parental leave only for the care activities described in this paragraph.

A new paragraph (j) in § 630.1203 provides regulations on FMLA leave to care for a covered servicemember, as provided in 5 U.S.C. 6382(a)(3)–(4). OPM has not issued final regulations to address this type of FMLA leave, which was added by Public Law 110–181 in 2008. This FMLA unpaid leave to care for covered servicemembers is subject to special rules, including special rules related to the substitution of annual and sick leave. Since we are revising the leave substitution regulations in § 630.1206 to address changes made by FEPLA, we determined we should address FMLA leave for care of covered servicemembers in subpart L. (See revised § 630.1206(d), which links to § 630.1203(j).) In contrast to other types of FMLA leave, the leave entitlement for FMLA leave to care for a covered service member is 26 administrative workweeks during a single 12-month period. If an employee uses other types of FMLA leave in that single 12-month period, the combined amount of FMLA leave is limited to 26 administrative workweeks. Thus, there could be circumstances where the substitution of paid parental leave for a period of FMLA unpaid leave for birth or adoption purposes would potentially be affected by the 26-workweek limit. (See revised § 630.1203(j)(3).) For example, consider an employee who invokes FMLA unpaid leave to care for a covered servicemember and uses 16 weeks of such leave starting on August 15, 2022. If the same employee gave birth to a child on October 7, 2022, the employee would be able to use only 10 weeks of FMLA unpaid leave under § 630.1203(a)(1) during the single 12-month period from August 15, 2022, to August 14, 2023, since there is a 26-week limit for that single 12-month period. That would also limit the employee to no more than 10 weeks of paid parental leave during that single 12-month period. However, the employee would be able to use FMLA unpaid leave under § 630.1203(a)(1)—and to substitute 2 weeks of paid parental leave for that unpaid leave—after August 14, 2023, and no later than October 6, 2023 (the expiration of the 12-month period following the birth on October 7, 2022)—since only 12 weeks of paid parental leave is available in connection with any given birth or placement (i.e., only 12 weeks of paid parental leave is available for

substitution for a 12-month period commencing on the date of birth or placement because the entitlement to FMLA unpaid leave for birth or placement expires at the end of that 12-month period).

§ 630.1206—Substitution of Paid Leave

Section 630.1206, dealing with substitution of paid leave for FMLA unpaid leave, is revised to reflect changes in the law and to clarify certain matters. Section 7602(a) of FEPLA amended section 6382(d) of title 5, United States Code, by making the statutory leave substitution rules that had applied to all types of FMLA leave apply only to FMLA leave granted under subparagraphs (C), (D), and (E) of section 6382(a)(1) and section 6382(a)(3)—which deal with an employee's care of certain family members who have a serious health condition, the incapacitation of an employee due to a serious health condition, a qualifying exigency related to certain family members' Armed Forces deployments, and an employee's care of certain covered servicemembers, respectively. The paid leave substitution rules for FMLA unpaid leave granted under subparagraphs (A) and (B) of section 6382(a)(1)—dealing with a child birth event and with the placement of a child for adoption or foster care, respectively—are now addressed in a new subsection (d)(2) of section 6382. Section 630.1206 addresses paid leave substitution for the various categories of FMLA unpaid leave.

Section 630.1206(b) provides that paid parental leave may be substituted for FMLA unpaid leave based on a birth or placement event as provided in the new subpart Q. Paragraph (b) also addresses the possibility of substituting annual and sick leave for FMLA unpaid leave based on birth or placement. If an employee has not already (before birth or placement) begun a 12-month FMLA period, the employee could have no more than 12 weeks of FMLA unpaid leave between the date of birth or placement and the date that is 12 months after the date of birth or placement. Thus, the 12 weeks of paid parental leave would completely fill any FMLA unpaid leave for birth or placement purposes, and there would be no opportunity to substitute annual or sick leave.

However, if an employee has a 12-month "FMLA period" (as established under § 630.1203(c)) in progress at the time of birth or placement, that 12-month FMLA period would end after birth or placement and before the date that is 12 months after the birth or placement. When that 12-month FMLA

period ends, the employee will be eligible to start a new 12-month entitlement to FMLA unpaid leave for birth or placement. If the employee uses FMLA unpaid leave and thus commences a new 12-month FMLA period, the employee will be able to use up to 12 weeks of FMLA unpaid leave during that period. If that new FMLA period begins during the 12-month period following the birth or placement, it would be possible for the employee to use more than 12 weeks of FMLA unpaid leave for birth or placement purposes between the date of birth or placement and the date that is 12 months after the date of birth or placement. In that case, only 12 weeks of paid parental leave could be substituted, since only 12 weeks of paid parental leave is available in connection with any given birth or placement (*i.e.*, only 12 weeks of paid parental leave is available for substitution for a 12-month period beginning on the date of birth or placement because the entitlement to FMLA unpaid leave for birth or placement expires at the end of that 12-month period). An employee would be able to substitute annual or sick leave, as appropriate, for any remaining unpaid FMLA leave.

Section 630.1206(c) addresses the paid leave substitution rules for FMLA leave connected to a serious health condition or an exigency. (See paragraph (3), (4), and (5) of § 630.1203(a), which correspond to subparagraphs (C), (D) and (E) of section 6382(a)(1), respectively.) These rules are consistent with existing rules on paid leave substitution.

Section 630.1206(d) addresses paid leave substitution for FMLA leave to care for a covered servicemember. These rules are consistent with statutory rules on paid leave substitution for this category of FMLA leave. (See section 6382(a)(3), which provides authority to provide 26 weeks of FMLA unpaid leave in a single 12-month period to care for a covered servicemember. There are currently no OPM FMLA regulations regarding this category of leave. In the absence of regulations, statutory provisions of sections 6382–6383 that refer to section 6382(a)(3) are governing.)

Section 630.1206(e) states various general rules related to an employee's entitlement to substitute paid leave. An employee is entitled to elect whether or not to substitute paid leave for FMLA unpaid leave, subject to applicable law and regulation. Thus, an agency may not deny an employee's election to make a substitution permitted under this section. Nor may an agency require an employee to substitute paid leave for

FMLA leave without pay. Paragraph (4) adds a statement, not previously included in the FMLA regulations, indicating that an employee may request to use annual leave or sick leave without invoking family and medical leave, and, in that case, the agency exercises its normal authority with respect to approving or disapproving the timing of when the leave may be used. OPM is aware of misconceptions held by some that an employee must invoke FMLA for personal and family health situations for which they could just as easily request sick leave, thereby preserving their FMLA entitlement for any additional needs that may arise. Sick leave, under the circumstances specified by statute and regulation, is an employee entitlement; therefore, an agency generally may not deny an employee's request to take sick leave outside of FMLA for a sick leave purpose authorized at § 630.401. (In certain circumstances—for example, when the timing of a doctor's appointment is not a medical necessity—an agency may disapprove the timing of an employee's sick leave request and require the employee to reschedule.) An employee also has a right to take annual leave, subject to the right of the agency to schedule the time at which annual leave may be taken. Therefore, the agency has the right to deny the scheduling of an employee's annual leave requested outside of an FMLA request, but if the employee's scheduling of FMLA leave is approved, the employee's request to substitute annual leave for FMLA leave without pay may not be denied.

Section 630.1206(f) addresses an employee's obligation to generally give advance notice of the employee's election to substitute paid leave for FMLA unpaid leave. In other words, the general rule is that retroactive substitution is not allowed. However, paragraphs (f)(2) through (f)(4) do address some limited exceptions. Paragraph (f)(4) addresses the retroactive substitution of paid parental leave and links to § 630.1706, which allows retroactive substitution only if an employee is physically or mentally incapacitated. Under section 6382(d)(2)(F)(i), as added by FEPLA, there is a general requirement that an employee agree (in writing), before the commencement of paid parental leave, to perform 12 weeks of work after the use of paid parental leave concludes. Thus, the law anticipates that paid parental leave would be provided on a prospective basis after an employee elects to use the leave and enters into a work obligation agreement.

§ 630.1213—Records and Reports

Section 630.1213, dealing with records and reports in connection with use of FMLA leave, is revised to refer to FMLA leave under the entire subpart rather than refer solely to leave under § 630.1203(a), since a provision on leave to care for covered servicemembers has been added in § 630.1203(j). Also, since § 630.1206 has been revised, the reference to the substitution of paid leave under § 630.1206(b) is being changed to a more general reference to § 630.1206.

New Subpart Q in 5 CFR Part 630

§ 630.1701—Purpose, Applicability, and Agency Responsibilities

Section 630.1701(a) addresses the purpose of the new subpart Q.

Section 630.1701(b) states that subpart Q applies to employees to whom subpart L applies and also to employees who are covered by agency FMLA regulations issued under § 630.1201(b)(3)—for example, certain Department of Defense teachers or employees of certain nonappropriated fund instrumentalities. In the case of such employees, the subpart Q regulations will apply, but the agency may issue any necessary supplemental regulations.

Section 630.1701(c) specifies that agency heads are responsible for proper administration of subpart Q, including the responsibility of informing employees of their entitlements and obligations.

§ 630.1702—Definitions

Section 630.1702 provides that the definitions in the FMLA regulations in subpart L are applicable in subpart Q, to the extent those defined terms are used, except that, to the extent any definitions of terms have been further revised in § 630.1702(b), the provisions of that section shall apply for purposes of subpart Q. Section 630.1702 also provides definitions of additional terms used in subpart Q—*agency, child, birth or placement, FMLA unpaid leave, and paid parental leave*.

The definition of *paid parental leave* makes clear that paid parental leave is a type of leave that is used when an employee has a “parental” role. A parent who does not maintain a continuing parental role with respect to a newly born or placed child would not be eligible for paid parental leave once the parental role has ended.

§ 630.1703—Leave Entitlement

Section 630.1703 provides various rules related to the entitlement to paid parental leave.

Section 630.1703(a) states that an employee may elect to substitute available paid parental leave for any FMLA unpaid leave granted based on the occurrence of a birth or placement (for adoption or foster care).

Section 630.1703(b) states that the paid parental leave that is available for substitution is 12 administrative workweeks in connection with the birth or placement involved. In other words, an employee can receive up to 12 administrative workweeks of paid parental leave for each birth or placement event. The entitlement to paid parental leave is triggered by the actual occurrence of a birth or placement, which results in the employee having a parental role. Thus, paid parental leave must only be used after the birth or placement has occurred. Paid parental leave continues to be available only as long as the employee has a continuing parental role with respect to the newly born or placed child. Since paid parental leave is substituting for FMLA unpaid leave, use of paid parental leave is constrained by the use of FMLA unpaid leave, which is limited to 12 weeks in any 12-month FMLA period (as established under § 630.1203(c)).

The regulation explains that, with respect to FMLA leave under § 630.1203(a) (corresponding to 5 U.S.C. 6382(a)(1)) that is limited to a total of 12 weeks in any 12-month period, any use of FMLA unpaid leave for a purpose other than birth or placement may affect an employee's ability to use the full 12 weeks of paid parental leave during the 12-month period following a birth or placement. In other words, an employee will be able to use the full amount of paid parental leave only to the extent that there are 12 weeks of available FMLA unpaid leave granted based on birth or placement. For example, if an employee uses 6 consecutive weeks of FMLA unpaid leave based on the employee's own serious health condition, the employee could only use 6 weeks of FMLA unpaid leave based on birth or placement (for which paid parental leave could be substituted) during the 12-month period that began when the employee commenced using FMLA unpaid leave based on the employee's serious health condition.

We note that the 12-week entitlement to paid parental leave under 5 U.S.C. 6382(d)(2) is applied on a per employee basis without regard to movements between different agencies during the 12-month period following a birth or placement. As long as the employee is covered by the title 5 FMLA unpaid leave and paid parental leave provisions while serving in different agencies, the

employee would be limited to a total of 12 weeks of paid parental leave per qualifying birth or placement. However, if an employee has received paid parental leave benefits in connection with a given birth or placement under a different paid parental leave authority applicable to Federal employees (e.g., the paid parental leave benefit for legislative branch employees in 2 U.S.C. 1312), and moves to a position covered by the title 5 paid parental leave authority during the 12-month period following birth or placement, there is no basis for limiting or offsetting title 5 paid parental leave benefits based on receipt of leave benefits under another authority.

Section 630.1703(c) and (d) address how the entitlement of 12 administrative workweeks of paid parental leave is converted to hours or days, depending on the nature of an employee's scheduled tour of duty and whether leave is charged on an hourly or daily basis. For example, paragraph (c) gives an example of a regular full-time employee who has 80 hours in the biweekly scheduled tour of duty and who is charged leave on an hourly basis. For such an employee, 12 administrative workweeks translate into 480 hours. (12 weeks = 6 biweekly periods. 6 times 80 hours = 480 hours.) Paragraph (c) also addresses employees with part-time work schedules or uncommon tours. Paragraph (d) addresses employees who are charged leave on a daily basis. For example, for an employee who has 8 workdays each biweekly pay period, 12 administrative workweeks translate to 48 days (12 weeks = 6 biweekly periods. 8 days times 6 biweekly periods = 48 days.).

Section 630.1703(e) addresses how to recalculate an employee's unused balance of paid parental leave if there is a change in an employee's scheduled tour of duty during the 12-month period commencing on the date of the given birth or placement. For example, if a regular full-time employee has a balance of 120 hours of unused paid parental leave for a 12-month period that is in progress and then converts to a part-time schedule of 20 hours per week, the balance would be recalculated to be 60 hours. (The new part-time tour is 40 hours biweekly, compared to 80 for a regular full-time tour. 40/80 times 120 equals 60.)

Section 630.1703(f)(1) provides that an agency may not require an employee to use annual leave or sick leave to the employee's credit before allowing the employee to use paid parental leave, consistent with section 6382(d)(2)(C). Paragraph (f)(1) also states that an employee may request to use annual

leave or sick leave without invoking FMLA unpaid leave under subpart L. As discussed earlier in connection with § 630.1206(e), by requesting to use annual or sick leave without invoking FMLA leave, an employee can preserve entitlement to use FMLA unpaid leave at another time and to substitute paid parental leave for that FMLA unpaid leave. For example, an employee who is a birth mother has an entitlement to use sick leave for the post-birth recovery period. By using sick leave to cover the post-birth recovery period, the employee would preserve the ability to invoke FMLA leave and take an additional 12 weeks of paid parental leave at a later time (up to 1 year following birth), thus extending the time the employee can spend with the newly born child. An agency has more control over the scheduling of an employee's annual leave if it is requested independent of FMLA leave. However, if an employee invokes FMLA leave based on the birth or placement of a child, the employee would be entitled to use that FMLA leave for a continuous block of time following the birth or placement and then would be entitled to substitute annual leave for that block of time. (In contrast, FMLA leave based on the birth or placement of a child may not be taken intermittently unless the employee and the employing agency agree otherwise. See section 6382(b) and § 630.1205(a). We note that employees have a right to substitute paid parental leave for FMLA unpaid leave for birth/placement purposes. Thus, if an agency agrees to intermittent use of FMLA unpaid leave for birth/placement purposes, the agency is, in effect, agreeing to intermittent use of paid parental leave leave.)

Section 630.1703(f)(2) provides that paid parental leave may not be used *prior* to the birth or placement involved. This restriction applies even if an employee used FMLA unpaid leave for birth or placement purposes prior to the birth or placement event, as allowed under § 630.1203(d).

Section 630.1703(f)(3) states that an employee with a seasonal work schedule may not use paid parental leave during the off-season period designated by the agency—the period during which the employee is scheduled to be released from work and placed in nonpay status. In other words, paid parental leave cannot be used as a basis for extending a seasonal employee's work season. (For employees appointed under title 5, seasonal employment is addressed in 5 CFR 340.402.)

Section 630.1703(g) provides that, if an employee has any unused balance of

paid parental leave remaining at the end of the 12-month period following the birth or placement involved, the entitlement to the unused leave expires at that time. The unused leave may not be rolled over for use in a future period, nor may a payment be made to the employee for unused paid parental leave that has expired. Paid parental leave may not be considered annual leave for purposes of making a lump-sum payment for annual leave or for any other purpose. (See section 6382(d)(2)(D)(ii) and (iii).)

Section 630.1703(h) addresses an agency's authority to require documentation of leave entitlement and the submission of employee certifications. At an agency's request, an employee must provide the agency with appropriate documentation it deems necessary to establish that the employee's use of paid parental leave is directly connected to a birth or placement. Appropriate documentation could include, but is not limited to, a birth certificate or a document from an adoption or foster care agency regarding the placement. Also, an agency may require that an employee sign a certification attesting that the paid parental leave is being taken in connection with a birth or placement that has occurred. The employee may also be required to attest that the paid parental leave is being used for appropriate purposes, such as the birth mother's recovery from giving birth or to care for the child. (See § 630.1203(g) and (i)). This employee certification may contain a statement in which the employee acknowledges an understanding of the consequences of engaging in fraud by providing a false certification.

The effective date of an employee's election of paid parental leave may not be delayed because an employee has not provided requested certifications. However, the granting of paid parental leave will be considered to be conditional or provisional in nature, subject to the employee providing agency-required documentation or certification within required time frames. The required time frame is usually 15 calendar days from the date of an agency request (if any) for documentation. If it is not practicable for an employee to respond within the 15-day time frame, despite the employee's diligent, good faith efforts, the employee must provide the documentation or certification within a reasonable period of time, but no later than 30 calendar days after the date of the agency's original request. (These time frames are consistent with the documentation requirements for sick

leave in 5 CFR 630.405(b), the FMLA leave in 5 CFR 630.1208(h) and the disabled veteran leave in 5 CFR 630.1307(c).) If certain documentation desired by the agency is not readily available, an agency could require an employee to self-certify that the leave is being taken for a valid reason and to commit to providing the documentation as soon as practicable. If the employee does not provide the documentation, the agency could then make a request that triggers the 15-day clock.

If agency-requested documentation or certification is not timely submitted, the agency may invalidate the paid parental leave and convert the employee to an appropriate nonpay status, which would result in a salary overpayment debt owed to the agency. An employee may request that the debt be eliminated by applying annual leave or other appropriate types of paid time off to the employee's credit to the affected periods of time. If the agency determines that an employee fraudulently claimed an entitlement to paid parental leave, the agency may pursue an appropriate disciplinary action, up to and including removal from the Federal service.

§ 630.1704—Pay During Leave

Section 630.1704(a) states the principle that the pay an employee receives when using paid parental leave shall be the same pay the employee would receive if the employee were using annual leave. In other words, agency payroll systems will apply the same rules they apply in determining what pay continues during annual leave.

Section 630.1704(b) provides that paid parental leave is a type of leave that is counted in applying the 8-hour rule in 5 U.S.C. 5545(a) and 5 CFR 550.122(b) that determines whether night pay is payable during periods of leave. This is consistent with the treatment of annual leave.

Section 630.1704(c) provides that the pay received during paid parental leave may not include Sunday premium pay, consistent with the statutory bar in section 624 of the Treasury and General Government Appropriations Act, 1999 (Pub. L. 105–277, div. A, § 101(h), October 21, 1998).

§ 630.1705—Work Obligation

Section 630.1705(a) provides that an employee may not use paid parental leave unless the employee agrees (in writing), before the start of paid parental leave, to work for the applicable employing agency for not less than 12 weeks beginning on the first scheduled workday after such leave concludes. This means that paid parental leave may

not be provided to an employee unless the employee enters into such an agreement. (An exception to this rule is provided in cases where an employee is incapacitated and unable to enter into such agreement. See § 630.1706.)

Section 630.1705(b) provides rules for interpreting § 630.1705(a). The term “in writing” in connection with an employee agreement is defined to include an acceptable electronic signature. The term “work” means a period during which the employee is in duty status (*i.e.*, actually working), excluding any periods (paid or unpaid) of leave, time off, or other nonduty status. (Periods of paid time off include paid holidays on which an employee does not work. Periods of other nonduty status include such periods as a furlough or an absence without leave (AWOL).) Any periods of leave, time off, or other periods of nonduty status will extend how long it will take the employee to fulfill the 12-week work obligation. To satisfy the work obligation, the employee must complete 12 weeks of work regardless of how much leave he or she takes before satisfying the obligation.

The term “applicable employing agency” means the agency employing the employee at the time use of paid parental leave concludes. The time paid parental leave concludes is the date that is the workday on which an employee finishes using 12 administrative workweeks of paid parental leave during the 12-month period that began on the date of birth or placement. If the employee does not use 12 administrative workweeks of paid parental leave during the 12-month period that began on the date of birth or placement, the day that is the last workday on which an employee takes paid parental leave is considered to be the date the paid parental leave concludes.

Section 630.1705(c) provides instructions on how to convert the 12-week work obligation to hours for employees who are charged leave on an hourly basis (including fractions of an hour). The 12-week work obligation must be converted to hours based on the number of hours in the employee's scheduled tour of duty, consistent with the rules in § 630.1703(c). If an employee's scheduled tour of duty changes before the employee completes the 12-week work obligation, the agency must recalculate the balance of work hours owed, consistent with the rules in § 630.1703(e).

Section 630.1705(d) provides how to convert the 12-week work obligation to days for employees who are charged leave on a daily basis. The days

equivalent of 12 weeks must be derived based on the average number of workdays in the employee's established tour of duty over a biweekly pay period, consistent with the rules in § 630.1703(d).

Section 630.1705(e) provides that, as part of the written agreement described in § 630.1705(a), an employee must agree that, in the event the employee does not complete the 12-week work obligation, the employee will pay the reimbursement amount specified in 630.1705(f) unless the affected employing agency determines the reimbursement requirement will not be applied.

Section 630.1705(f) states the rules for applying the reimbursement requirement when an employee fails to fulfill the work obligation as stated in the employee's written agreement. Under the work obligation, an employee is required to return to work for 12 weeks after paid parental leave concludes. If the employee fails to return to work for 12 weeks, an agency may require a reimbursement equal in amount to the total amount of any Government contributions paid by the agency on behalf of the employee to maintain the employee's health insurance coverage under the Federal Employees Health Benefits Program established under 5 U.S.C. chapter 89 during the period(s) when paid parental leave was used. If an agency determines that reimbursement must be made, it must seek collection of the full amount. There is no authority for a partial waiver of the amount owed.

Since the statutory language about returning to work shows an intent that the employee be continuously employed by the applicable employing agency (*i.e.*, the agency employing the employee at the time use of paid parental leave concludes) while performing the required 12 weeks of work, the regulation also provides that a separation from that agency (excluding an intra-agency reassignment without a break in service) before completion of the required weeks of work will constitute failure to return to work for 12 weeks.

The determination to impose the reimbursement requirement is generally within an agency's sole and exclusive discretion. However, an agency may not impose the reimbursement requirement if the agency determines that the employee is unable to return to work for the required 12 weeks because of (1) the continuation, recurrence, or onset of serious health condition (including mental health) of the employee or the newly born or placed child that is related to birth or placement, or (2) any

other circumstance beyond the employee's control. In the case of a newly born or placed child, any serious health condition of the child will be deemed to be related to the applicable birth or placement.

We note that clauses (i) and (iii) of section 6382(d)(2)(F) speak of an employee being "unable to return to work" and section 6382(d)(2)(G)(i) speaks of an employee who "fails to return from paid leave." Given the express requirement in section 6382(d)(2)(F)(i) that an employee agree to work for the applicable employing agency for 12 weeks after paid parental leave concludes, we are interpreting the language referenced in the preceding sentence as referring to an employee who has not returned to work for the 12 weeks to which the employee committed in the agreement.

Section 630.1705(g) provides that when making a determination to forbear from requiring a reimbursement, an agency may require an employee to provide certification from a health care provider supporting the employee's claim that a serious health condition is causing the employee to be unable to return to work for the required 12 weeks. An agency may require additional examinations and certifications from other health care providers if it deems it necessary. Any such additional examinations will be at the agency's expense.

Section 630.1705(h) states the principles governing determinations that circumstances beyond the employee's control prevent the employee from completing the 12-week work obligation. (See § 630.1705(f)(ii).) These circumstances must be ones that truly compel an employee to not return to work with the employing agency. Circumstances that constitute a matter of employee preference or convenience, such as an employee choosing to stay home to care for a healthy newborn will not suffice.

Section 630.1705(i) provides how to apply the reimbursement requirement described in § 630.1705(f)(1) if more than one agency provided Government contributions on behalf of an employee for that employee's health insurance coverage during periods of paid parental leave. In those cases, the employing agency that employed the employee at the time use of paid parental leave concluded is responsible for informing any other affected agency of the employee's failure to complete the required 12 weeks of work. If an employee fails to complete the 12-week work obligation, any agency that provided Government contributions for health insurance during a period of paid

parental leave is responsible for determining whether the reimbursement requirement associated with a period of agency employment should be applied. The agency that employed the employee at the time paid parental leave concludes must first make its reimbursement determination and then inform any other affected agency of its determination.

Section 630.1705(j) provides that each agency is responsible for adopting its own set of policies governing when it will or will not apply the reimbursement requirement described in § 630.1705(f). A single agency-wide set of policies should be in place so that employees within an agency are treated consistently.

Section 630.1705(k) states an imposed reimbursement represents a debt owed to the affected agency and is subject to collection procedures under the Federal Claims Collection Standards in 31 CFR parts 900 through 904.

§ 630.1706—Cases of Employee Incapacitation

Section 630.1706 provides the application of paid parental leave in cases where an employee is incapacitated at the time the use of paid parental leave would be permissible. Paragraph (a) allows the employee to retroactively use paid parental leave. This provision allows for the retroactive election to use paid parental leave under FMLA if the agency determines that an otherwise eligible employee who could have made an election during a past period to substitute paid parental leave and enter a work obligation agreement was physically or mentally incapable of doing so during that past period. Upon this determination, the agency must allow the employee, when no longer incapacitated, to make an election to substitute paid parental leave for applicable FMLA unpaid leave. The employee must make this election within 5 workdays of returning to work. As part of such election, the employee must also sign a work obligation agreement.

Paragraph (b) allows an employee's personal representative to elect, on behalf of the employee, to substitute paid parental leave for applicable FMLA unpaid leave (*i.e.*, approved FMLA leave based on birth or placement of a child). If an agency determines that an otherwise eligible employee is physically or mentally incapable of making an election to substitute paid parental leave and entering into a work obligation agreement, the agency must, upon the request of a personal representative the agency finds acceptable, provide conditional

approval of substitution of paid parental leave for applicable FMLA unpaid leave under § 630.1703(a) on a prospective basis.

An employee covered by paragraph (b) who has been incapacitated would be required—within 5 workdays after the employee returns to work—to enter into a written agreement to (1) meet the work obligation described in § 630.1705 or (2) pay the required reimbursement (if determined to be applicable).

An employee who does not agree to enter into the required work obligation agreement will have any used paid parental leave cancelled and designated as invalid. The invalidated leave that was used based on the conditional approval during the employee's incapacitation must be converted to an unpaid absence(s) as "leave without pay" (LWOP). An employee can request to use other types of qualifying paid leave or other paid time off to the employee's credit to cover the LWOP period. If the employee does not elect to use other qualifying periods of paid time off for the LWOP period, the LWOP period represents a debt owed by the employee to which debt collection procedures apply.

§ 630.1707—Cases of Multiple Children Born or Placed in the Same Time Period

Section 630.1707 addresses the application of paid parental leave in cases in which an employee has multiple children newly born or placed in the same time period. If an employee has multiple children born or placed on the same day, that event will be treated as a single event triggering a single entitlement of up to 12 weeks of paid parental leave during the 12-month period following the event. If an employee has one or more children born or placed during the 12-month period following the date of an earlier birth or placement, each subsequent birth or placement event will result in a 12-month period commencing on the date of birth or placement with its own 12-week limit. Any use of paid parental leave during a given 12-month period will count toward that period's 12-week limit. Thus, when such 12-month periods overlap, any use of paid parental leave during the overlap will count toward each affected 12-month period's 12-week limit. The regulations provide an example.

§ 630.1708—Records and Reports

Section 630.1708(a) provides that an agency must maintain an accurate record of an employee's usage of paid parental leave.

Section 630.1708(b) provides that in agency data systems (including

timekeeping systems) and in data reports submitted to OPM, an agency must record usage of paid parental leave in the manner prescribed by the Office of Personnel Management.

Executive Order 13563 and Executive Order 12866

Executive Orders 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). The Office of Management and Budget has determined that this is an economically significant regulatory action. In accordance with the provisions of Executive Order 12866, this rule was reviewed by the Office of Management and Budget.

A. Statement of Need

OPM is issuing the rule to implement the Federal Employee Paid Leave Act. Currently, Federal employees must take unpaid parental leave unless they use their sick or annual leave during parental leave. This regulation will provide paid parental leave to parents of newly born or placed children in the Federal workforce, serving as a model for the rest of the country.

B. Number of Federal Employees and Economic Impact

This rule applies to Federal civilian employees and the agencies that employ them covered by FMLA provisions in title 5, United States Code. We estimate that approximately 2 million Federal civilian employees will be covered by the interim final rule based on coverage under title 5 FMLA provisions.

This estimate reflects coverage of most Executive Branch employees. Employees of certain Executive Branch agencies such as the U.S. Postal Service, the Postal Regulatory Commission, the Federal Reserve Board, the Federal Aviation Administration, and the Transportation Security Administration (TSA) are excluded, as those agencies are not covered by the title 5 FMLA provisions (except for TSA screener personnel, as discussed in this **SUPPLEMENTARY INFORMATION**). This coverage estimate includes approximately 95,000 employees of nonappropriated fund instrumentalities described in 5 U.S.C. 2105 (*i.e.*, exchanges and other entities that conduct activities for the comfort, pleasure, contentment, and mental and physical improvement of armed forces personnel) in the Department of Defense

and the Coast Guard who are covered by the title 5 FMLA provisions based on 5 U.S.C. 2105(c)(1)(E). The estimate excludes employees of the Executive Office of the President, the Executive Residence at the White House, and the official residence of the Vice President, as they are covered by FMLA regulations issued under 3 U.S.C. 412. (See also 3 U.S.C. 401(a)(2)–(4).) (Note: Under 3 U.S.C. 412(c), the regulations implementing the title 3 FMLA provisions may be consistent with the title 5 FMLA regulations.) The estimate excludes approximately 100,000–150,000 employees with temporary appointments or intermittent work schedules, as such employees are excluded from coverage under title 5 FMLA provisions.

The estimate includes approximately 26,000 Judicial Branch employees who are covered by title 5 FMLA provisions. The estimate excludes Legislative Branch employees, except for approximately 1,600 employees of the Government Publishing Office (GPO), as all other Legislative Branch employees are not covered by title 5 FMLA provisions.

While approximately 2 million employees will be covered by this interim final rule, eligibility depends on the occurrence of a birth of an employee's child or placement of a child with the employee for purposes of adoption or foster care. OPM identified annual birth rate data for mothers and fathers (by age group) in National Vital Statistics Reports published by the Centers for Disease Control and Prevention.¹

OPM then applied that data to Federal civilian employees by gender and by age group to derive estimates of annual birth events. For the population of approximately 1.9 million nonseasonal, full-time permanent Federal employees, OPM estimated that there would be about 51,000 annual birth events ($51,248 / 1,889,147 = 2.71$ percent occurrence rate). We note that a birth may be counted as two birth events if both parents are covered by this interim final rule. We also note that this rule may affect birth rates for Federal employees, and that many other factors unrelated to this rule may affect birth rates. For simplicity, we use this figure to estimate annual transfers associated with this rule.

We note that at least two Federal agencies, the Securities and Exchange Commission (SEC) and the Federal Deposit Insurance Corporation (FDIC)

¹ See https://www.cdc.gov/nchs/data/nvsr/nvsr66/nvsr66_01.pdf and https://www.cdc.gov/nchs/data/nvsr/nvsr68/nvsr68_13-508.pdf.

began providing 6 weeks of paid parental leave to their employees—in October 2019 for SEC and January 2020 for FDIC. These SEC and FDIC employees will be covered by the title 5 paid parental leave provisions once they take effect on October 1, 2020. As the employee population at these two agencies represents only about 0.5 percent of the total Federal workforce, estimates here are not adjusted for the fact that these employees have had a lesser paid parental leave benefit for a period of time. The estimates in this regulatory impact analysis are necessarily rough in nature and based on a number of simplifying assumptions, and this has a minor effect on estimates.

OPM used average salaries by gender and by age group to estimate the dollar value of salary, not including employer-paid benefits, for 12 weeks of paid parental leave in connection with a birth event. If each birth event resulted in 12 weeks of paid parental leave for an affected employee, OPM estimated that the total value of the salary paid during parental leave in a year would be approximately \$900 million. This equals about 0.54 percent of total basic payroll for the 1.9 million Federal employees in OPM's study population.

However, the 1.9 million employee population used to generate the \$900 million annual estimate count was based on nonseasonal, full-time permanent employees in the OPM-managed Governmentwide database and was not adjusted based on employee coverage under title 5 FMLA provisions. For example, it included roughly 100,000 FAA and TSA employees but excluded part-time and seasonal employees. In addition, some employees covered by title 5 FMLA provisions are not in the OPM database. However, the 1.9 million employee population included in this database can reasonably be viewed as representative of the 2.0 million employee population covered by title 5 FMLA provisions. Based on OPM data, the 2.0 million employee population includes approximately 50,000 part-time employees. If we assumed that 50,000 of the 100,000 employees between 1.9 million and 2.0 million were part-time employees who on average had a half-time work schedule, then we would adjust the \$900 million estimate to be \$935 million in terms of direct salary costs.

This rule also affects an employee following the occurrence placement of a child with the employee for purposes of adoption or foster care. OPM does not have data regarding the extent to which Federal employees have children placed with them for adoption or foster care. A

National Council for Adoption report stated the annual number of adoptions in the United States is about 110,000.² The Children's Bureau of the Department of Health and Human Services collects data on foster care in the United States. The Children's Bureau reported that approximately 263,000 children entered the foster care system in fiscal year (FY) 2018.³ That statistic does not account for children who may have multiple placements while continuously in the foster care system. The Children's Bureau also reported that about 62,000 of the children who left the foster care system (25 percent of the total) in FY 2018 were adopted. It also reported that, in 52 percent of such adoptions (about 32,000), the child was placed with a foster parent. Since the interim final paid parental leave regulations do not consider such an adoption to be a new placement triggering the right to use FMLA leave and paid parental leave, for the purpose of our estimates, those adoptions could be subtracted from the 110,000 annual count of adoptions. Rather than make that adjustment, OPM will assume that the number of placements of foster children already in the foster care system is roughly the same (32,000) so that the effects are offsetting.

If we assume there are annually 110,000 adoptions and 260,000 foster care placements, we have 370,000 total placements. This number can be compared to the number of persons in the United States in the age range of 18 to 64—an age range that roughly corresponds the age range for Federal Government employees. According to the July 2019 census data, the total U.S. population was 328,239,523. Of that total, 16 percent were 65 and older and another 22.4 percent were under 18, meaning that the remaining 61.6 percent, or 202,195,546, were in the 18–64 age range. If we divide 370,000 by 202 million, we derive 0.18 percent, which represents the percentage of U.S. adults ages 18–64 who will have an adoption or foster care placement in a given year. We will assume that the same percentage of Federal employees will have an adoption or foster care placement event in a given year. Applying that percentage (0.18 percent) to the 2 million Federal employees covered by the title 5 FMLA provisions, we estimate that these Federal employees will have 3,600 adoption or foster care placement events annually. In contrast, we estimated above that

these Federal employees will have about 51,000 birth events annually (2.71 percent). The combined event percentage would be 2.89 percent (2.71 + 0.18), which represents an increase of about 6.6 percent above the 2.71 percent factor that was used to generate the direct salary cost estimate of approximately \$935 million. Thus, we can apply that same 6.6 percent adjustment factor to derive a revised direct salary cost estimate of about \$995 million.

OPM also lacks data on Federal employees who might yield custody of a child for adoption or under a surrogacy arrangement at the time of birth, which would not generate a 12-week paid parental leave benefit under the interim final rule. For purposes of this analysis, OPM assumes these cases will not have a significant effect on the overall estimates.

C. Transfers

The payment of paid parental leave generates a “transfer”—a movement or redistribution of monetary payments from one group to another that does not affect total resources. The Government is transferring payments from the general public to Federal employees. For purposes of these estimates, we assume that the amount of service performed by Federal employees is not affected by this rule. That means that staff will perform the work that would have been performed by employees newly taking parental leave, and that new staff may need to be hired to complete this work. Employees may also receive additional payment in cases where they would have otherwise taken other categories of leave. This implies that total payments to Federal employees will increase, while total services provided by the Federal workforce will remain constant.

In the context of paid parental leave, there are a variety of types of shifts or transfers, depending on what would have otherwise happened if the employee had not received paid parental leave.

- If an employee would have otherwise used leave without pay for periods covered by paid parental leave, there is an immediate transfer from the Government to the employee receiving paid parental leave, but there is no need for other staff to work additional hours to maintain the level of Government service.

- If an employee would have otherwise used annual leave during periods covered by paid parental leave, the employee will have a higher balance of annual leave. The employee could use that annual leave at a later time. If

² <https://indd.adobe.com/view/4ae7a823-4140-4f27-961a-cd9f16a5f362>.

³ <https://www.acf.hhs.gov/sites/default/files/cb/afcarsreport26.pdf>.

so, that has the same effect as paid parental leave replacing work—but the effect is not immediate. The annual leave used at a later time will be in place of work hours; thus, to maintain the same level of service, an agency may need to hire additional staff. On the other hand, the use of paid parental leave instead of annual leave could cause an employee to have a higher annual leave balance at the time of separation from Federal service. In that case, there is no need to hire additional staff, but an agency would have to make a larger lump-sum payment of the unused annual-leave balance upon the employee leaving the Government. Alternatively, an employee with a higher balance of annual leave could hit the maximum amount of accrued annual leave (240 hours for most employees) that an employee can carry over into the next year. If so, excess unused annual leave hours would be lost—some of which might be connected to higher balances resulting from the employee's use of paid parental leave instead of annual leave. In that last scenario, to the extent that the lost excess leave could be viewed as resulting from paid parental leave, the employee would never use the leave and, thus, there would be no need to hire additional staff to cover loss productivity from the use of that leave. We lack data to estimate if and when, and the extent to which, annual leave lump-sum payments may be affected. We invite commenters to submit any available data regarding this matter. So, for those who would have otherwise used annual leave, the transfer could be delayed to a later point during the employee's Federal service or to the point of separation from Federal service, or could never occur due to the annual leave carry-over limit.

- If an employee would have otherwise used sick leave during period covered by paid parental leave, the availability of paid parental leave will cause the employee to have a higher sick leave balance. While we lack data, we believe that Federal employees, particularly birth mothers, use significant amounts of sick leave in connection with a birth event. While it is possible that some of the extra sick leave might be used later by an employee in lieu of leave without pay, we believe that the saved sick leave will generally be fully reflected in the employee's balance at the time of separation. For employees who retire with entitlement to an immediate annuity, unused sick leave is creditable service for the purpose of computing an employee's retirement annuity. So, for this type of shift, the transfer is less than

the value of the paid parental leave and is delayed until retirement—and applies only to those with entitlement to an immediate annuity. The Congressional Budget Office estimated that higher annuity payments due to increased sick leave balances at retirement (resulting from availability of paid parental leave) would increase direct spending by less than \$500,000 over the 2020–2029 period.⁴

- If an employee would otherwise not have taken leave, other staff will perform the work that would have been performed by that employee, and new staff may need to be hired to complete this work.

While we have identified scenarios in which the transfers could be delayed or even, in the sick leave scenario, not equal to the full value of the paid parental leave, we lack data to estimate the effects those scenarios will have on annual costs during the 5-year timeframe for this regulatory impact analysis.

Employees who, after use of paid parental leave concludes, do not return to duty and complete 12 weeks of work are subject to a possible reimbursement obligation that is based on the cost of agency contributions to health insurance premiums during the use of paid parental leave. However, the employing agency has considerable discretion in imposing the reimbursement requirement and is barred from imposing it in some cases. We expect that the number of employees who do not complete the required 12 weeks of work would be a small percentage. In light of those factors, we do not believe that the reimbursement requirement will have a significant impact of transfer estimates.

In order to estimate transfers, it is necessary to make assumptions about utilization. We lack data to assume that employees will not take full advantage of this paid parental leave. We are aware that there is some data that parental leave is not fully utilized—especially by males. However, the referenced examples of which we are aware do not involve full income replacement, as does the new paid parental leave for Federal employees. Until we have actual experience under the Federal paid parental leave program, we lack data to assert that employees will use less than the full amount of leave that is available. However, we note that the utilization rate substantially impacts transfer estimates.

We recognize that transfers include the cost of government-paid benefits as

well as for direct salary costs. These include contributions towards retirement and insurance, Thrift Savings Plan (TSP) contributions, Social Security and Medicare taxes, and paid leave and holidays—which would inflate the total compensation costs by about 50 percent above the estimated direct salary costs of \$995 million (*i.e.*, \$498 million in benefit costs).

As noted, we lack data to quantify many important aspects of the effects of this rule on payments to Federal staff. In particular, we lack data to forecast utilization of paid parental leave, and the extent to which paid parental leave will replace utilization of sick leave. Accordingly, at this time, we estimate that the value of transfers associated with paid parental leave, including salary and benefits, will be about \$1.49 billion (\$995 million salary and \$498 million benefits) per year before accounting for incomplete utilization of paid parental leave and shifts in leave utilization from sick leave to paid parental leave. We estimate that, after accounting for these factors, the rule will result in transfers of between 60 and 90 percent of this value. This implies annual transfers of between \$890 million and \$1.3 billion, with a mean estimate of \$1.1 billion. This represents under 1 percent of total basic payroll for Federal employees covered by the title 5 FMLA provisions. We request public comment on these estimates.

D. Costs

This interim final rule will affect the operations of over 120 Federal agencies—ranging from cabinet-level departments to small independent agencies. We estimate that this rule will require individuals employed by these agencies to spend time in order to update agency policies and procedures for parental leave, and to devote additional time to manage staffing following increased utilization of parental leave. For the purpose of this cost analysis, the assumed average salary rate of Federal employees performing this work will be the rate in 2020 for GS–14, step 5, from the Washington, DC, locality pay table (\$137,491 annual locality rate and \$65.88 hourly locality rate). We assume that the total dollar value of labor, which includes wages, benefits, and overhead, is equal to 200 percent of the wage rate, resulting in an assumed labor cost of \$131.76 per hour.

In order to comply with the regulatory changes in this interim final rule, affected agencies will need to review the rule and update their policies and procedures. We estimate that, in the first

⁴ <https://www.cbo.gov/system/files/2019-12/s1790paygosenate.pdf>.

year following publication of the final rule, this will require an average of 160 hours of work by employees with an average hourly cost of \$131.76. This would result in estimated costs in that first year of implementation of about \$21,000 per agency, and about \$2.5 million in total Governmentwide. In addition, agencies will face ongoing administrative costs (including the administrative costs of administering the program and hiring and training new staff to replace lost hours of work) as Federal employees utilize additional parental leave. We estimate that this will require an average of 520 hours of work per agency by employees with an average hourly cost of \$131.76 in each year following publication of the final rule. This would result in estimated annually recurring costs averaging about \$69,000 per agency and about \$8.2 million in total Governmentwide.

E. Benefits

As discussed previously, we estimate that this rule results in shifts in activity toward the care of young children by Federal employees, and away from other activities. We are unable to quantify the societal value of the benefits of paid parental leave and the societal value of activities foregone as a result of the rule. As a result, we are unable to quantify the net benefit of this shift in activity.

The benefits of increased parental care of newborn and newly placed children enabled by paid parental leave are significant and can be described in qualitative terms. First of all, more Federal employees will be able to spend significant time with newly born or placed children during the first year after birth or placement. Various studies have shown the positive impact of increasing bonding between parent and child. Paid parental leave is not just a benefit for Federal employees, but for American society as a whole. It is a significant benefit that the Federal Government is acting as a role model in providing paid parental leave to its employees. This could have a large impact on other employers, influencing them to offer similar benefits. In turn, parents around the country would be able to spend additional time bonding with children.

Various studies indicate that paid parental leave may improve the health of the birth mother and the child. Paid parental leave will allow parents to preserve annual and sick leave balances for future family needs. In general, in our society, women have traditionally borne greater responsibility for caring for children and sacrificing work careers. This paid parental leave benefit is gender neutral and also neutral

between the birth mother and the other parent. This may help change expectations that parents have regarding the role each will play in raising children. It is expected to result in fathers having more involvement in child care, which could provide significant societal benefits, such as stronger marriage and family relationships. We believe that this benefit may support greater income equality between men and women by reducing the length of interruptions in the woman's career—by making it easier to have a child and then return to work. Such a policy may also address women's declining labor force participation that has been dropping since 2000, which has potential to positively impact the U.S. economy.

While it is difficult to demonstrate cause and effect when it comes to adopting one new employee benefit, there are surveys and other indications that a family-friendly paid parental leave policy can help make an employer more attractive to job seekers, increase job satisfaction, increase employee morale and engagement, increase the likelihood of a birth mother returning to work, and reduce turnover (*i.e.*, increase retention). While some assert that paid parental leave will produce monetary benefits that offset gross transfers, we do not believe it is possible to attribute reductions in spending on recruitment efforts, training costs, and related effects to a single factor. This new benefit will likely improve the desirability of Federal employment, and likely increase the quality of Federal employees, leading to improved services for the general public. Reduced turnover can have a positive effect on agency productivity and reduce the burdens on other employees while reducing recruitment costs. At the same time, the use of paid parental leave may temporarily increase the burdens on other employees.

F. Regulatory Alternatives

For the most part, the paid parental leave benefit is established by statute. The amount of leave is set by statute at 12 weeks for each eligible employee. By statute, it applies equally to both parents. The statute requires that paid parental leave be provided via substitution for FMLA unpaid leave for purposes of birth and placement for adoption or foster care. The statute requires a fixed 12-week work obligation after paid parental leave concludes but allows agencies to decide whether to apply a reimbursement requirement (linked to Government contributions toward health insurance premiums), subject to specified

limitations. The statute requires that OPM “shall prescribe regulations necessary for administration” of the title 5 FMLA leave provisions, including the paid parental leave provisions (5 U.S.C. 6387).

In many cases, the OPM regulations are explanatory in nature. OPM regulations do fill in some policy gaps, but any regulatory decisions had a marginal impact on transfers, costs, and benefits. OPM considered alternatives with respect to the documentation that would be required from employees seeking paid parental leave. One option was to require documentation in all cases and to specify the necessary types of documentation in regulation (*e.g.*, birth certificate, adoption agency letter). The other option was to give the employing agency flexibility to determine what, if any, documentation would be required. Under this option, the regulation would give the employing agency authority to require submission of documentation and/or an employee certification when it felt it was necessary.

In considering these options, we weighed the burden on supervisors and employees versus the need to ensure that appropriated monies are properly used and to prevent fraud. We recognized that in some cases, a supervisor may have personal knowledge of an employee's situation and a paperwork requirement would be unnecessary. In general, we believe the risk of fraud is low—especially in birth cases. We determined that the regulations should not mandate documentation in all cases, but should give agencies, as a necessary tool, the authority to require submission of documentation and/or employee certifications. We also determined that the employing agency should be responsible for determining what documentation is sufficient proof of entitlement to paid parental leave.

G. List of Studies Considered

AEI-Brookings Working Group on Paid Family Leave, “Paid Family and Medical Leave: AN ISSUE WHOSE TIME HAS COME”—May 2017, https://www.brookings.edu/wp-content/uploads/2017/06/es_20170606_paidfamilyleave.pdf
AEI-Brookings Working Group on Paid Family Leave, “The AEI-Brookings Working Group Report on Paid Family and Medical Leave: CHARTING A PATH FORWARD”—September 2018, <https://www.aei.org/wp-content/uploads/2018/09/The-AEI-Brookings-Working-Group-Report-on-Paid-Family-and-Medical-Leave.pdf>

American Action Forum, “Analysis of AEI-Brookings Working Group Proposal on Paid Parental Leave”—June 2017, <https://www.americanactionforum.org/research/analysis-aei-brookings-working-group-proposal-paid-parental-leave/>

American Action Forum, “The Fiscal Implications of the FAMILY Act: How New Paid Leave Benefits Increase Leave-Taking and Drive Up Estimated Program Costs”—March 2019, <https://www.americanactionforum.org/research/the-fiscal-implications-of-the-family-act-how-new-paid-leave-benefits-increase-leave-taking-and-drive-up-estimated-program-costs/>

Institute for Women’s Policy Research, “Paid Parental Leave in the United States: What the data tell us about access, usage, and economic and health benefits”—January 23, 2014, <https://iwpr.org/wp-content/uploads/wpallimport/files/iwpr-export/publications/B334-Paid%20Parental%20Leave%20in%20the%20United%20States.pdf>

National Partnership for Women & Families, “Leading on Leave: Companies With New or Expanded Paid Leave Policies (2015–2019)”—August 2019, [https://www.nationalpartnership.org/our-work/resources/economic-justice/paid-leave/new-and-expanded-](https://www.nationalpartnership.org/our-work/resources/economic-justice/paid-leave/new-and-expanded-employer-paid-family-leave-policies.pdf)

[employer-paid-family-leave-policies.pdf](https://www.nationalpartnership.org/our-work/resources/economic-justice/paid-leave/new-and-expanded-employer-paid-family-leave-policies.pdf)

Pew Research Center, “Americans Widely Support Paid Family and Medical Leave, but Differ Over Specific Policies”—March 2017, <https://www.pewsocialtrends.org/2017/03/23/americans-widely-support-paid-family-and-medical-leave-but-differ-over-specific-policies/>

Urban Institute, “Paid Family Leave in the United States: Time for a New National Policy”—May 2017, https://www.urban.org/sites/default/files/publication/90201/paid_family_leave_0.pdf

H. Supporting Data Tables

TABLE 1a—PROJECTED BIRTH EVENTS FOR FEMALE FEDERAL EMPLOYEES BASED ON NATIONWIDE MATERNITY RATES

Age group	Number of Federal employees *	Nationwide maternity rates (%)	Projected number of female Federal employees with birth event
18–19	246	3.23	8
20–24	11,345	6.80	771
25–29	40,412	9.53	3,851
30–34	77,780	9.97	7,755
35–39	106,474	5.26	5,601
40–44	102,229	1.18	1,206
45–49	109,753	0.09	99
Total	448,239	19,291

Source of Federal employee counts: FedScope—July 2019; *nonseasonal full-time permanent employees.

Source of maternity rates: National Vital Statistics Reports: Volume 68, number 13, Births: Final Data for 2018 (11–27–19)—See Tables 2 or 5 for birth rates for mothers. Those tables do not show data for higher female age ranges. https://www.cdc.gov/nchs/data/nvsr/nvsr68/nvsr68_13-508.pdf.

TABLE 1b—PROJECTED BIRTH EVENTS FOR MALE FEDERAL EMPLOYEES BASED ON NATIONWIDE PATERNITY RATES

Age group	Number of Federal employees *	Nationwide paternity rates (%)	Projected number of male Federal employees with birth event
18–19	461	1.04	5
20–24	16,493	5.16	851
25–29	53,526	8.74	4,678
30–34	103,909	10.38	10,786
35–39	142,268	6.91	9,831
40–44	132,208	2.86	3,781
45–49	147,679	0.96	1,418
50–54	165,670	0.29	480
55+	317,653	0.04	127
Total	1,079,867	31,957

Source of Federal employee counts: FedScope—July 2019; *nonseasonal full-time permanent employees.

Source of paternity rates: National Vital Statistics Reports: Volume 66, number 1, Births: Final Data for 2015 (1–5–17)—see Table 17 for birth rates for fathers. https://www.cdc.gov/nchs/data/nvsr/nvsr66/nvsr66_01.pdf.

TABLE 2—AVERAGE SALARY FOR FEMALE AND MALE EMPLOYEES

Age group	Female average salary	Male average salary
18–19	\$32,808	\$36,196
20–24	46,172	49,799
25–29	59,505	61,333
30–34	73,703	74,974
35–39	82,216	84,045
40–44	86,048	89,418

TABLE 2—AVERAGE SALARY FOR FEMALE AND MALE EMPLOYEES—Continued

Age group	Female average salary	Male average salary
45–49	88,324	92,057
50–54		96,413
55+		99,732
Weighted average salary	73,070	77,979
Hourly rate	35.01	37.36

Source of Federal employee average salary by age group: FedScope—July 2019; nonseasonal full-time permanent employees.

Weighted average salary computed separately for females and males by multiplying number of projected births in age group (from Table 1a) by respective average salary, summing those products for each age group, and dividing that sum by the number of birth events (*i.e.*, weighted average weighted based on number of births by age group). Then derive average hourly rate by dividing weighted average salary by 2087.

TABLE 3—PROJECTED SALARY COST AND BIRTH EVENT PERCENTAGE

	Females	Males
Hourly rate	\$35.01	\$37.36
No. hours of leave (12 weeks)	480 hours	480 hours
Total cost by gender	\$324,181,397	\$573,078,490
Total Combined Cost (direct salary costs)	\$897,259,886	
Total annual birth events	51,248	
Total employees (all ages) *	1,889,147	
Percentage of all employees * having a birth event in a year	2.71%	

Source of number of Federal employees (all ages): FedScope—July 2019; * nonseasonal full-time permanent employees.

TABLE 4—PROJECTED SALARY COST FOR BIRTH AND PLACEMENTS

Total number of covered employees * (all ages)	2,000,000
Percentage of all employees * having a birth event in a year	2.71%
Total annual birth events	54,200
Percentage of all employees * having an adoption/foster care placement event in a year	0.18%
Total annual placement events	3,600
Combined percentage of all employees * have a birth or placement event	2.89%
Total annual birth/placement events	57,800
Total direct salary costs	\$995 million

Source of number of Federal employees (all ages): FedScope—July 2019 and other data sources for employees not in FedScope; * full-time and part-time permanent employees.

Executive Order 13771

This interim final rule is considered an Executive Order 13771 (82 FR 9339, February 3, 2017) regulatory action. We estimate that this rule generates \$5.9 million in annualized costs, in 2016 dollars, discounted at seven percent over a perpetual time horizon relative to 2016.

Regulatory Flexibility Act

I certify that this regulation will not have a significant economic impact on a substantial number of small entities because it will apply only to Federal agencies and employees.

Waiver of Proposed Rulemaking

OPM is issuing this rulemaking as an interim final rule and has determined that, under the Administrative Procedure Act (APA), 5 U.S.C. 553(b)(B), it would be impracticable and

contrary to the public interest to delay a final regulation until a public notice and comment process has been completed. For the same reasons, under the Civil Service Reform Act's parallel rulemaking provision, 5 U.S.C. 1103(b)(3), OPM is waiving general notice of proposed rulemaking because the interim rule is temporary in nature and necessary to be implemented expeditiously as a result of an emergency.

The conclusion of a public notice and comment period before the rule is finalized would be impracticable because it would impede due and timely execution of OPM's functions. Specifically, OPM issuing an interim final rule is required by events and circumstances beyond its control, which were not foreseen in time to comply with the usual notice and comment procedures. On December 20, 2019, the

Federal Employee Paid Leave Act (the Act) was enacted, in which Congress set the effective date for the new paid parental leave rules as October 1, 2020, just 9 months after enactment. This was insufficient time for the notice and comment rulemaking process because of the need for OPM to conduct a detailed regulatory impact analysis accounting for costs, benefits, and alternatives, and because the regulation requires significant changes to personnel processing and payroll systems at Federal agencies. To properly prepare for the congressionally-mandated effective date of the new rules on paid parental leave, agencies need this regulation to be promulgated with sufficient lead time to create internal policies and procedures, to modify their payroll systems, to retrain their human resources staff, and to provide effective notice to eligible employees.

In addition to the short window for preparing this rule, OPM has had to unexpectedly devote its pay and leave policy resources to coordinate Federal employee policies in response to the COVID-19 public health emergency during this time period, including implementing the Families First Coronavirus Response Act, Public Law 116-127 and the Coronavirus Aid, Relief, and Economic Security Act, Public Law 116-136, and advising agencies on the optimal use of pay, leave, and incentives to respond to the national emergency. As such, 9 months was an insufficient amount of time for OPM to publish a notice of proposed rulemaking seeking public comments and a final rule responding to comments with enough lead time for agencies to prepare for the October 1, 2020 deadline.

The conclusion of a public notice and comment period before the rule is finalized would be also be contrary to public interest, because it would result in serious damage to important interests. If OPM does not have regulations in place with sufficient lead time for over 120 Federal agencies to implement their policies and procedures, and payroll systems, eligible employees may not be able to claim their paid parental leave benefits on October 1, 2020. Likewise, ensuring that expectant parents have complete information about paid parental leave policies will allow them to prepare for taking paid parental leave. Thus, OPM has determined that the rule must be implemented expeditiously as a result of an emergency.

For these reasons, OPM has determined that the public notice and participation that the law ordinarily requires would, in this case, be impracticable and contrary to the public interest and that good cause exists for waiving proposed rulemaking and delaying its solicitation of comments from the public until after it issues an interim final rule. The interim final rule is temporary in nature, and OPM will promulgate a final rule as soon as practical after receiving public comments on the interim final rule.

Congressional Review Act (CRA)

This action is subject to the CRA, 5 U.S.C. 801 *et seq.*, and OPM will submit a rule report to each House of the Congress and to the Comptroller General of the United States. This action is a “major rule” as defined by 5 U.S.C. 804(2).

Paperwork Reduction Act Requirements

This rule does not impose any new reporting or record-keeping requirements subject to the Paperwork Reduction Act.

List of Subjects in 5 CFR Part 630

Government employees.

Office of Personnel Management.

Alexys Stanley,

Regulatory Affairs Analyst.

For the reasons stated in the preamble, OPM amends part 630 of title 5 of the Code of Federal Regulations as follows:

PART 630—ABSENCE AND LEAVE

- 1. Revise the authority citation for part 630 to read as follows:

Authority: 5 U.S.C. chapter 63 as follows: Subparts A through E issued under 5 U.S.C. 6133(a) (read with 5 U.S.C. 6129), 6303(e) and (f), 6304(d)(2), 6306(b), 6308(a), and 6311; subpart F issued under 5 U.S.C. 6305(a) and 6311 and E.O. 11228, 30 FR 7739, 3 CFR, 1974 Comp., p. 163; subpart G issued under 5 U.S.C. 6305(c) and 6311; subpart H issued under 5 U.S.C. 6133(a) (read with 5 U.S.C. 6129) and 6326(b); subpart I issued under 5 U.S.C. 6332, 6334(c), 6336(a)(1) and (d), and 6340; subpart J issued under 5 U.S.C. 6340, 6363, 6365(d), 6367(e), and 6373(a); subpart K issued under 5 U.S.C. 6391(g); subpart L issued under 5 U.S.C. 6383(f) and 6387; subpart M issued under sec. 2(d), Pub. L. 114-75, 129 Stat. 641 (5 U.S.C. 6329 note); subpart P issued under 5 U.S.C. 6329c(d); and subpart Q issued under 5 U.S.C. 6387.

Subpart L—Family and Medical Leave

- 2. Amend § 630.1201 as follows:
 - a. Revise the section heading;
 - b. Add a new sentence at the end of paragraph (a);
 - c. Revise paragraph (b)(1);
 - d. Amend paragraph (b)(3)(iii) by removing “Transportation” and adding “Homeland Security” in its place;
 - e. Amend paragraph (b)(4) by removing “Transportation” and adding “Homeland Security” in its place; and
 - f. Revise paragraph (c).

The revisions and addition read as follows:

§ 630.1201 Purpose, applicability, and agency responsibilities.

(a) * * * This subpart also provides the basis for determining the periods of unpaid leave for which paid parental leave may be substituted under subpart Q of this part, which must be read with this subpart to establish eligibility.

(b) *Applicability.* (1) Except as otherwise provided in paragraph (b)(2) of this section, this subpart applies to any employee who—

(i)(A) Is defined as an “employee” under 5 U.S.C. 6301(2); or

(B) Is an employee carrying out screening functions who is appointed under section 111(d) of Public Law 107-71 (49 U.S.C. 44935 note); and

(ii) Has completed at least 12 months of service (excluding any service as an employee identified in paragraph (b)(2) of this section) at any time as—

(A) An employee, as defined under 5 U.S.C. 6301(2);

(B) An employee of the Veterans Health Administration appointed under title 38, United States Code, in occupations listed in 38 U.S.C. 7421;

(C) A “teacher” or an individual holding a “teaching position,” as defined in section 901 of title 20, United States Code;

(D) An employee identified in section 2105(c) of title 5, United States Code, who is paid from nonappropriated funds;

(E) An employee carrying out screening functions who is appointed under section 111(d) of Public Law 107-71 (49 U.S.C. 44935 note); or

(F) An employee performing covered active duty (as defined in 5 U.S.C. 6381(7)(B)) that interrupts civilian service due to a qualifying call or order for deployment to a foreign country as a member of the National Guard or Reserves, to the extent that such active duty is not already creditable service under paragraphs (A) through (E) of this paragraph (b)(1)(ii).

* * * * *

(c) *Agency responsibilities.* The head of an agency having employees subject to this subpart is responsible for the proper administration of this subpart, including the responsibility of informing employees of their entitlements and obligations.

- 3. Amend § 630.1202 as follows:

- a. Revise the definition for “*Administrative workweek*”;
- b. Add a definition for “*Birth*”;
- c. Revise the definition for “*Family and medical leave*”;
- d. Revise the definition for “*Leave without pay*”;
- e. Add a definition for “*Placement*”;
- f. Revise the definitions for “*Reduced leave schedule*”;
- g. Remove the definitions for “*Regularly scheduled*,” and “*Regularly scheduled administrative workweek*”;
- h. Add a definition for “*Scheduled tour of duty*”; and
- i. Remove the definition for “*Tour of duty*”.

The revisions and additions read as follows:

§ 630.1202 Definitions.

* * * * *

Administrative workweek means the scheduled tour of duty within the workweek established by the agency for an employee under the definition of “administrative workweek” in 5 CFR 610.102.

* * * * *

Birth means the delivery of a living child. When the term “birth” is used in connection with the use of leave under this subpart before birth, it refers to an anticipated birth.

* * * * *

Family and medical leave means an employee’s entitlement to 12 administrative workweeks (or 26 administrative workweeks in the case of leave under § 630.1203(j)) of unpaid leave for certain family and medical needs, as prescribed under sections 6381 through 6387 of title 5, United States Code.

* * * * *

Leave without pay means an approved absence from duty in a nonpay status during an employee’s scheduled tour of duty.

* * * * *

Placement means a new placement of a son or daughter with an employee for adoption or foster care. For example, this excludes the adoption of a stepchild or a foster child who has already been a member of the employee’s household and has an existing parent-child relationship with an adopting parent. When the term “placement” is used in connection with the use of leave under this subpart before placement has occurred, it refers to a planned or anticipated placement.

Reduced leave schedule means a daily or weekly work schedule under which the usual number of hours actually worked during the employee’s scheduled tour of duty are reduced as a result of the increased use of leave.

Scheduled tour of duty means the regular work hours in an established full-time or part-time work schedule during which an employee is charged leave or time off when absent. A seasonal employee is not considered to have such a tour during off-season periods when the employee is scheduled to be released from work and placed in full-time nonpay status.

* * * * *

■ 4. Amend § 630.1203 as follows:

- a. Revise paragraph (a)(2);
- b. Amend paragraph (b) by removing “2 workdays” and adding “5 workdays” in its place;
- c. Revise paragraphs (d), (e), (f), and (g); and
- d. Add paragraphs (i) and (j).

The revisions and additions read as follows:

§ 630.1203 Leave entitlement.

(a) * * *

(2) The placement of a son or daughter with the employee for adoption or foster care and the care of such son or daughter.

* * * * *

(d)(1) The entitlement to leave under paragraphs (a)(1) and (2) of this section shall expire at the end of the 12-month period beginning on the date of birth or placement. Leave for a birth or placement must be concluded within this 12-month period.

(2)(i) Leave taken under paragraphs (a)(1) and (2) of this section, may begin prior to the actual date of birth or placement for adoption or foster care.

(ii) Use of leave under paragraph (a)(1) of this section before the date of birth is limited to situations in which an employee is using the leave—

(A) Because of the employee’s serious health condition related to the anticipated event of the employee giving birth to a son or daughter; or

(B) In order to care for the birth mother of the employee’s expected son or daughter in connection with the birth mother’s serious health condition related to pregnancy.

(iii) Use of leave under paragraph (a)(2) before the date of placement is limited to situations in which the employee must be absent to engage in activities necessary to allow an anticipated adoption or a foster care arrangement to proceed.

(e)(1) Family and medical leave under this subpart is available to full-time and part-time employees. The entitlement to a total of 12 administrative workweeks of leave in connection with leave granted under paragraph (a) of this section must be converted to hours or days, as provided in paragraphs (e)(2) and (e)(3) of this section. Leave under paragraph (a) allows an employee to be absent during the employee’s scheduled tour of duty established for leave charging purposes. Such leave is not applied to days designated as holidays and other nonworkdays when the employee would be excused from duty.

(2) For employees who are charged leave on an hourly basis (including fractions of an hour), the 12 administrative workweeks referenced in paragraph (a) of this section must be converted to hours based on the number of hours in the employee’s scheduled tour of duty (at the time the 12-month period of leave eligibility commences) subject to the following rules:

(i) For a regular full-time employee with 80 hours in the scheduled tour of duty over a biweekly pay period, the hours equivalent of 12 administrative workweeks is 480 hours.

(ii) For a full-time employee with an uncommon tour of duty (as defined in § 630.201 and described in § 630.210), the hours equivalent of 12 administrative workweeks is derived by multiplying 6 times the number of hours in the employee’s biweekly scheduled tour of duty (or 6 times the average hours if the biweekly tour hours vary over an established cycle). For example, if an employee has an uncommon tour consisting of six 24-hour shifts (144 hours) per biweekly pay period, the amount would be 864 hours.

(iii) For a part-time employee, the hours equivalent of 12 administrative workweeks is derived by multiplying 6 times the number of hours in the employee’s scheduled tour of duty over a biweekly pay period. For example, if an employee has a part-time scheduled tour of duty that consists of 40 hours in a biweekly pay period, the amount would be 240 hours.

(3) For employees who are charged leave on a daily basis, the days equivalent of 12 administrative workweeks must be derived based on the average number of workdays in the employee’s established tour of duty over a biweekly pay period. For example, if an employee had 8 workdays each biweekly pay period, the days equivalent of 12 administrative workweeks would be 48 days.

(f) If there is a change in an employee’s scheduled tour of duty during any 12-month period that commenced due to use of family and medical leave, and the employee has not used the full allotment of family and medical leave during such 12-month period, the remaining balance of family and medical leave must be recalculated based on the change in the number of average hours in the employee’s scheduled tour of duty. For example, if a regular full-time employee has a balance of 120 hours of unused family and medical leave for a 12-month period that is in progress and then converts to a part-time schedule of 20 hours per week, the balance would be recalculated to be 60 hours. (Since the old schedule was 80 hours biweekly or an average of 40 hours weekly, the new part-time tour is half of the former full-time tour. 40/80 times 120 equals 60.)

(g) Leave taken because of the birth of a son or daughter of the employee, as described in paragraph (a)(1) of this section, includes leave necessary for an employee who is the birth mother to recover from giving birth, or for an employee who is the other parent to care for the birth mother during her recovery period, even if the employee is not involved in caring for the son or

daughter during portions of that recovery period.

* * * * *

(i) Leave taken in order to care for a newly born or placed son or daughter, as described in paragraphs (a)(1) and (a)(2) of this section, generally refers to leave covering periods when the parent-employee is in the home with the child or is otherwise involved in spending time with the child (bonding). It may include short periods away from the child's physical presence to purchase supplies needed to care for the child (e.g., buying baby food, diapers, or other supplies). Leave based on the "care" language in paragraph (a)(1) of this section would not be appropriate if an employee is not engaged in activities directly connected to care of the child—for example, if the employee is physically located outside the local geographic area where the child is located.

(j)(1) For family and medical leave granted in connection with care of a covered servicemember under 5 U.S.C. 6382(a)(3) and (4), the leave entitlement is 26 administrative workweeks in a single 12-month period. This leave applies to an employee who is the spouse, son, daughter, parent, or next of kin of a covered servicemember and who provides care for the covered servicemember. In applying this leave, the definitions in 5 U.S.C. 6381(8) through (12) must be applied.

(2) The entitlement of 26 administrative workweeks of leave described in paragraph (j)(1) of this section must be converted to hours or days, consistent with the methodologies set forth in paragraph (e) of this section. Any recalculation of the unused leave entitlement due to a change in the employee's scheduled tour of duty must be made in a manner consistent with the methodology described in paragraph (f) of this section.

(3) If an employee receives leave under this paragraph (j) and leave under paragraph (a) of this section during the single 12-month period, the combined amount of leave in that period may not exceed 26 administrative workweeks. With respect to the single 12-month period, an employee who uses more than 14 weeks of leave under this paragraph (j) will not be able to use the full allotment of 12 administrative workweeks in connection with leave granted under paragraph (a) of this section. The leave granted under this paragraph (j) will not count against the employee's 12-week FMLA entitlement in any other 12-month period, as established under paragraph (a) of this section. For example, consider an

employee who invokes family and medical leave to care for a covered servicemember and uses 16 weeks of such leave starting on August 15, 2022. If the same employee gave birth to a child on October 7, 2022, the employee would be able to use only 10 weeks of family and medical leave under § 630.1203(a)(1) during the single 12-month period from August 15, 2022, to August 14, 2023, since there is a 26-week limit for that single 12-month period. That would also limit the employee to no more than 10 weeks of paid parental leave during that single 12-month period. However, the employee would be able to use family and medical leave under § 630.1203(a)(1) after August 14, 2023, and before the expiration of the 12-month period following the birth on October 6, 2023, and could substitute (to the extent possible) any remaining amount of the employee's 12 weeks of paid parental leave, or substitute annual leave or sick leave, if applicable.

(4) In addressing requests to use intermittent leave, or leave on a reduced leave schedule, in connection with leave under this paragraph (j), an agency is subject to the same rules that govern such requests for leave under paragraphs (a)(3) and (a)(4) of this section. (See 5 U.S.C. 6382(b) and § 630.1205.)

(5) Employees who seek to use leave under this paragraph (j) are subject to the same notification and scheduling requirements that apply to employees receiving leave under paragraph (a)(1) through (4) of this section in parallel circumstances. (See 5 U.S.C. 6382(e)(1) and (2) and § 630.1207.)

(6) An agency may require that a request for leave under this paragraph (j) be supported by a medical certification, as provided by 5 U.S.C. 6383(f).

■ 5. Revise § 630.1206 to read as follows:

§ 630.1206 Substitution of paid leave.

(a) *Leave without pay.* Except as otherwise provided in this section, family and medical leave taken under § 630.1203(a) must be leave without pay.

(b) *Leave connected to birth or placement.* (1) For family and medical leave taken under § 630.1203(a)(1) or (2) (corresponding to subparagraphs (A) and (B) of 5 U.S.C. 6382(a)(1), respectively), an employee may elect to substitute—

(i) Up to 12 administrative workweeks of paid parental leave in connection with the occurrence of a birth or placement, as provided in subpart Q of this part; and

(ii) Any annual or sick leave to the employee's credit for such family and medical leave not covered by paid parental leave.

(2) The annual or sick leave to the employee's credit under paragraph (b)(1)(ii) of this section consists of the following:

(i) Accrued or accumulated annual or sick leave under subchapter I of chapter 63 of title 5, United States Code (or equivalent annual or sick leave under another authority), without regard to the normal limitations on the use of sick leave;

(ii) Advanced annual or sick leave approved under the same terms and conditions that apply to any other agency employee who requests advanced annual or sick leave, except that the normal limitations on the use of sick leave are not applicable; and

(iii) Annual leave donated to an employee under the Voluntary Leave Transfer Program or the Voluntary Leave Bank Program, consistent with subparts I and J of this part, or equivalent donated annual leave under another authority.

(c) *Leave connected to serious health condition or exigency.* For family and medical leave taken under § 630.1203(a)(3), (4), or (5) (corresponding to subparagraphs (C), (D) and (E) of 5 U.S.C. 6382(a)(1), respectively), an employee may elect to substitute the following paid leave for any or all of the leave without pay:

(1) Accrued or accumulated annual or sick leave under subchapter I of chapter 63 of title 5, United States Code (or equivalent annual or sick leave under another authority), consistent with the law and regulations governing the granting and use of annual or sick leave (including the limitations on the purposes for which sick leave may be used under § 630.401(a) and the hours limitations in § 630.401(b) through (e));

(2) Advanced annual or sick leave approved under the same terms and conditions that apply to any other agency employee who requests advanced annual or sick leave; and

(3) Annual leave donated to an employee under the Voluntary Leave Transfer Program or the Voluntary Leave Bank Program, consistent with subparts I and J of this part, or equivalent donated annual leave under another authority.

(d) *Leave to care for a covered servicemember.* For family and medical leave taken under § 630.1203(j) (corresponding to 5 U.S.C. 6382(a)(3) and (4)), an employee may elect to substitute the annual and sick leave identified in paragraph (c) of this section, except that any sick leave

credited to the employee may be substituted without regard to any of the normally applicable limitations on the use of sick leave.

(e) *Employee entitlement to substitute.*

(1) An employee is entitled to elect whether or not to substitute paid leave for leave without pay under this subpart, as permitted in this section.

(2) An agency may not deny an employee's election to make a substitution permitted under this section.

(3) An agency may not require an employee to substitute paid leave for leave without pay.

(4) An employee may request to use annual leave or sick leave without invoking family and medical leave, and, in that case, the agency exercises its normal authority with respect to approving or disapproving the timing of when the leave may be used.

(f) *Notification by employee and retroactive substitution.* (1) An employee must notify the agency of the employee's election to substitute paid leave for leave without pay under this section prior to the date such paid leave commences (*i.e.*, no retroactive substitution), except as provided in paragraphs (f)(2) through (f)(4) of this section.

(2) An employee may retroactively substitute annual leave or sick leave for leave without pay granted under this subpart covering a past period of time, if the substitution is made in conjunction with the retroactive granting of leave without pay under § 630.1203(b).

(3) An employee may retroactively substitute transferred (donated) annual leave for leave without pay granted under this subpart in the circumstances covered by §§ 630.909(d) or 630.1009(d).

(4) An employee may retroactively substitute paid parental leave for applicable leave without pay granted under this subpart, as provided in § 630.1706(a) and subject to the requirements governing paid parental leave in subpart Q of this part. If the employee's leave without pay was not granted on a prospective basis under this subpart, the retroactive substitution of paid parental leave may not be made unless the leave without pay period has been retroactively designated as leave under this subpart, as allowed under § 630.1203(b).

■ 6. Revise § 630.1213(b)(3) to read as follows:

§ 630.1213 Records and reports.

* * * * *

(b) * * *

(3) The number of hours or days of leave taken under this subpart,

including any paid leave substituted for leave without pay under § 630.1206; and

* * * * *

■ 7. Add subpart Q to read as follows:

Subpart Q—Paid Parental Leave

Sec.

630.1701 Purpose, applicability, and agency responsibilities.

630.1702 Definitions.

630.1703 Leave entitlement.

630.1704 Pay during leave.

630.1705 Work obligation.

630.1706 Cases of employee incapacitation.

630.1707 Cases of multiple children born or placed in the same time period.

630.1708 Records and reports.

Subpart Q—Paid Parental Leave

§ 630.1701 Purpose, applicability, and agency responsibilities.

(a) *Purpose.* This subpart provides regulations to govern the granting of paid parental leave to covered employees. Since paid parental leave may only be substituted for unpaid leave granted following a birth or placement under specific provisions of the Family and Medical Leave Act in title 5, United States Code—specifically, section 6382(a)(1)(A) and (B) in 5 U.S.C. chapter 63, subchapter V—this subpart links to subpart L (Family and Medical Leave) of this part.

(b) *Applicability.* (1) Except as otherwise provided in this paragraph (b), this subpart applies to employees to whom subpart L of this part applies, as provided in § 630.1201(b).

(2) An agency head authorized to issue regulations on family and medical leave under 5 U.S.C. chapter 63, subchapter V, as provided in § 630.1201(b)(3), is authorized to issue any necessary supplemental regulations on paid parental leave, providing those supplemental regulations are consistent with the regulations in this subpart.

(3) This subpart applies to a birth or placement occurring on or after October 1, 2020. Paid parental leave may not be provided under this subpart for any period of time before October 1, 2020.

(c) *Agency responsibilities.* The head of an agency having employees covered by this subpart is responsible for the proper administration of this subpart, including the responsibility of informing employees of their entitlements and obligations.

§ 630.1702 Definitions.

(a) *Applicability of subpart L definitions.* The definitions of terms in § 630.1202 are applicable in this subpart to the extent the terms are used, except that, to the extent any definitions of terms have been further revised in

§ 630.1702(b), the provisions of that section shall apply for purposes of this subpart.

(b) *Other definitions.* In this subpart—

Agency means an Executive agency as defined in 5 U.S.C. 105, excluding the Government Accountability Office.

When the term “agency” is used in the context of an agency making determinations or taking actions, it means the agency head or management officials who are authorized (including by delegation) to make the given determination or take the given action.

Birth or placement means the birth of a son or daughter of a covered employee, or a new placement of a son or daughter with a covered employee for adoption or foster care, that is the basis for unpaid leave granted under § 630.1203(a)(1) or (2) (which correspond to 5 U.S.C. 6382(a)(1)(A) or (B), respectively). For the purpose of interpreting this definition, the terms *birth* and *placement* have the meanings given those terms in § 630.1202, except that paid parental leave may not be granted based on an anticipated birth or placement.

Child means a son or daughter as defined in § 630.1202 whose birth or placement is the basis for entitlement to paid parental leave.

FMLA unpaid leave means leave without pay granted under the Family and Medical Leave Act (FMLA) regulations in subpart L of this part.

Paid parental leave means paid time off from an employee's scheduled tour of duty that is authorized under 5 U.S.C. 6382(d)(2)(B)(i) and this subpart and that is granted to cover periods of time within the 12-month period commencing on the date of birth or placement to an employee who has a current parental role in connection with the child whose birth or placement was the basis for granting FMLA unpaid leave under § 630.1203(a)(1) or (2). This leave is not available to an employee who does not have a current parental role.

§ 630.1703 Leave entitlement.

(a) *Election.* An employee may elect to substitute available paid parental leave for any FMLA unpaid leave granted under § 630.1203(a)(1) or (2) (which correspond to 5 U.S.C. 6382(a)(1)(A) or (B), respectively) in connection with the occurrence of a birth or placement. (See § 630.1206(b).)

(b) *Available paid parental leave.* (1) The paid parental leave that is available for purposes of paragraph (a) of this section is 12 administrative workweeks in connection with the birth or placement involved. The entitlement to paid parental leave is triggered by the

occurrence of a birth or placement. The paid parental leave is considered to be available only if the employee has a continuing parental role with respect to the child whose birth or placement triggered the leave entitlement. The 12 administrative workweeks of paid parental leave may be used only during the 12-month period beginning on the date of the birth or placement involved.

(2) Since an employee may use only 12 weeks of FMLA unpaid leave in any 12-month period under § 630.1203(a), use of FMLA unpaid leave not associated with paid parental leave may affect an employee's ability to use the full 12 weeks of paid parental leave. Notwithstanding paragraph (b)(1) of this section, an employee will be able to use the full amount of paid parental leave only to the extent that there are 12 weeks of available FMLA unpaid leave granted under the birth or placement provisions in § 630.1203(a)(1) or (2) during the 12-month period commencing on the date of birth or placement. The availability of paid parental leave will depend on when the employee uses various types of FMLA unpaid leave relative to any 12-month period established under § 630.1203(c).

(c) *Conversion of weeks to hours.* For employees who are charged leave on an hourly basis (including fractions of an hour), the 12 administrative workweeks referenced in paragraph (b) of this section must be converted to hours based on the number of hours in the employee's scheduled tour of duty (as in effect on the date the employee begins a period of using paid parental leave) as follows:

(1) For a regular full-time employee with 80 hours in the scheduled tour of duty over a biweekly pay period, the hours equivalent of 12 administrative workweeks is 480 hours.

(2) For a full-time employee with an uncommon tour of duty (as defined in § 630.201 and described in § 630.210), the hours equivalent of 12 administrative workweeks is derived by multiplying 6 times the number of hours in the employee's biweekly scheduled tour of duty (or 6 times the average hours if the biweekly tour hours vary over an established cycle). For example, if an employee has an uncommon tour consisting of six 24-hours shifts (144 hours) per biweekly pay period, the amount would be 864 hours.

(3) For a part-time employee, the hours equivalent of 12 administrative workweeks is derived by multiplying 6 times the number of hours in the employee's scheduled tour of duty over a biweekly pay period. For example, if an employee has a part-time scheduled tour of duty that consists of 40 hours in

a biweekly pay period, the amount would be 240 hours.

(d) *Conversion of weeks to days.* For employees who are charged leave on a daily basis, the days equivalent of 12 administrative workweeks must be derived based on the average number of workdays in the employee's established tour of duty over a biweekly pay period. For example, if an employee had 8 workdays each biweekly pay period, the days equivalent of 12 administrative workweeks would be 48 days.

(e) *Change in tour.* If there is a change in an employee's scheduled tour of duty during the 12-month period commencing on the date of a given birth or placement, and the employee has not used the full allotment of paid parental leave during such 12-month period, the remaining balance of paid parental leave must be recalculated based on the change in the number of average hours in the employee's scheduled tour of duty. For example, if a regular full-time employee has a balance of 120 hours of unused paid parental leave for a 12-month period that is in progress and then converts to a part-time schedule of 20 hours per week, the balance would be recalculated to be 60 hours. (Since the old schedule was 80 hours biweekly or an average of 40 hours weekly, the new part-time tour is half of the former full-time tour. $40/80 \times 120$ equals 60.)

(f) *Leave usage.* (1) An agency may not require an employee to use annual leave or sick leave to the employee's credit as a condition to be met before the employee uses paid parental leave. An employee may request to use annual leave or sick leave without invoking FMLA unpaid leave under subpart L of this part, and, in that case, the agency exercises its normal authority with respect to approving or disapproving the timing of when the leave may be used.

(2) Paid parental leave may be used in connection with the occurrence of a birth or placement only during the 12-month period following birth or placement. (See § 630.1703(b).) Paid parental leave may not be used prior to the birth or placement involved even if the employee was granted FMLA unpaid leave under § 630.1203(a)(1) or (2) for periods prior to the birth or placement event, as allowed under § 630.1203(d).

(3) An employee with a seasonal work schedule may not use paid parental leave during the off-season period designated by the agency—the period during which the employee is scheduled to be released from work and placed in nonpay status.

(g) *Treatment of unused leave.* If an employee has any unused balance of

paid parental leave that remains at the end of the 12-month period following the birth or placement involved, the entitlement to the unused leave elapses at that time. No payment may be made for unused paid parental leave that has expired. Paid parental leave may not be considered annual leave for purposes of making a lump-sum payment for annual leave or for any other purpose.

(h) *Documentation of entitlement and employee certification.* (1) At the request of the employee's agency, an employee must provide the agency with appropriate documentation that shows that the employee's use of paid parental leave is directly connected to a birth or placement that has occurred. Appropriate documentation may include, but is not limited to, a birth certificate or a document from an adoption or foster care agency regarding the placement. An agency is responsible for determining what documentation is sufficient proof of entitlement.

(2) An agency may require that an employee sign a certification attesting that the paid parental leave is being taken in connection with a birth or placement. This employee certification may contain a statement in which the employee acknowledges an understanding of the consequences of providing a false certification (e.g., the possibility that the employing agency could pursue appropriate disciplinary action, up to and including removal from Federal Service, or make a referral to a Federal entity that investigates whether conduct constitutes a criminal violation).

(3) An employee must provide any documentation or certification required by the agency no later than 15 calendar days after the date the agency requests such documentation or certification. If it is not practicable under the particular circumstances for an employee to respond within the 15-day time frame, despite the employee's diligent, good faith efforts, the employee must provide the documentation or certification within a reasonable period of time under the circumstances involved, but no later than 30 calendar days after the date of the agency's original request.

(4) An agency may grant paid parental leave prior to receiving any requested documentation or certification under this paragraph (h) based on an employee's communications with a supervisor or management. Under these circumstances, the granting of paid parental leave is considered to be provisional, pending receipt of the requested documentation or certification.

(5) If the employee fails to provide the agency with the required documentation

or certification within the specified time period, the agency may determine that the employee is not entitled to paid parental leave and may—

(i) Allow the employee to request that the absence be charged to leave without pay, sick leave, annual leave, or other forms of paid time off, as appropriate; or

(ii) If the employee acted fraudulently, charge the employee as absent without leave (AWOL) and pursue any other appropriate action.

§ 630.1704 Pay during leave.

(a) The pay an employee receives when using paid parental leave shall be the same pay the employee would receive if the employee were using annual leave.

(b) Paid parental leave is a type of leave that is counted in applying the 8-hour rule in 5 CFR 550.122(b) that determines whether night pay is payable during periods of leave.

(c) The pay received during paid parental leave may not include Sunday premium pay. (See section 624 of the Treasury and General Government Appropriations Act, 1999, Pub. L. 105–277, div. A, § 101(h), 112 Stat. 2681–518 (Oct. 21, 1998).)

§ 630.1705 Work obligation.

(a) *Advance agreement.* An employee may not use paid parental leave in connection with a birth or placement unless the employee agrees (in writing), before the commencement of such leave, to work for the applicable employing agency for not less than 12 weeks beginning on the employee's first scheduled workday after such leave concludes. (See special rules governing cases of incapacitation in § 630.1706.)

(b) *Interpretation.* For the purpose of applying paragraph (a) of this section—

(1) The term “in writing” means an agreement with the employee's handwritten signature or an acceptable electronic signature, consistent with the requirements in 5 CFR 850.106, and also is deemed to include an agreement documented in an email or text message from the employee, as long as the employee, within 24 hours, supplies the required signature;

(2) The term “work” means a period during which the employee is in duty status, excluding any periods (paid or unpaid) of leave, time off (including holiday time off), or other nonduty status (including furlough or AWOL status). Such excluded periods will not count toward completion of the 12-week work obligation.

(3) The term “applicable employing agency” means the agency employing the employee at the time use of paid parental leave concludes; and

(4) The date paid parental leave concludes is—

(i) The workday on which an employee finishes using 12 administrative workweeks of paid parental leave during the 12-month period that began on the date of birth or placement; or

(ii) If the employee does not use 12 administrative workweeks of paid parental leave during the 12-month period that began on the date of birth or placement, the day that is the last workday on which an employee used paid parental leave.

(c) *Conversion of weeks to hours.* For employees who are charged leave on an hourly basis (including fractions of an hour), the 12-week work obligation must be converted to hours based on the number of hours in the employee's scheduled tour of duty, consistent with the rules in § 630.1703(c). If an employee's scheduled tour of duty changes before the employee completes the 12-week obligation, the agency must recalculate the balance of work hours owed, consistent with the rules in § 630.1703(e). An acceptable alternative approach is to express each period of work as a fraction or percentage of the average weekly scheduled tour of duty hours in the affected biweekly pay period and to sum those fractions or percentages until the 12-week obligation is completed.

(d) *Conversion of weeks to days.* For employees who are charged leave on a daily basis, the days equivalent of 12 weeks must be derived based on the average number of workdays in the employee's established tour of duty over a biweekly pay period, consistent with the rules in § 630.1703(d).

(e) *Agreement to make reimbursement when applicable.* In the written agreement described in paragraph (a) of this section, the employee must attest that, in the event the employee does not complete the 12-week work obligation, he or she agrees, pursuant to paragraph (f), to make reimbursement unless the affected employing agency (or agencies) determines (determine) that the reimbursement provision will not be applied.

(f) *Application of reimbursement requirement.* (1) If an employee fails to return for the required 12 weeks of work with the applicable employing agency after paid parental leave concludes (as described in paragraphs (a) and (b) of this section), an agency may require that the employee make a reimbursement equal to the total amount of any Government contributions paid by the agency on behalf of the employee to maintain the employee's health insurance coverage under the Federal

Employees Health Benefits Program established under 5 U.S.C. chapter 89 during the period(s) when paid parental leave was used. An employee who separates from the applicable employing agency before completing the required 12 weeks of work is considered to have failed to return to duty under this paragraph. For the purpose of the preceding sentence, an intra-agency reassignment without a break in service will not be considered a separation.

(2) The determination to impose the reimbursement requirement is at the agency's sole and exclusive discretion, except that an agency may not impose the requirement if, in the agency's judgment, the employee is unable to return to work for the required 12 weeks because of—

(i) The continuation, recurrence, or onset of a serious health condition (including mental health) of the employee or the child whose birth or placement was the basis for the paid parental leave, but, in the case of the employee's serious health condition, only if the condition is related to the applicable birth or placement; or

(ii) Any other circumstance beyond the employee's control, subject to paragraph (h) of this section.

(g) *Medical certification.* An agency's determination not to apply the reimbursement requirement may be conditioned upon the employee's supplying of a health care provider certification supporting the employee's claim that a serious health condition described in paragraph (f)(2)(i) is causing the employee to be unable to return to work for the required 12 weeks. In cases where an agency's determination regarding whether to apply the reimbursement requirement relies on a health condition that is not related to the applicable birth or placement or that applies to a person not covered by paragraph (f)(2)(i) of this section, the agency may also require a medical certification. An agency may require additional examinations and certification from other health care providers if it deems it necessary, but any such additional examinations must be at the agency's expense.

(h) *Circumstances beyond employee's control.* The circumstances beyond the employee's control referenced in paragraph (f)(2)(ii) of this section must be ones that truly preclude an employee from returning to work with the employing agency. Examples of situations beyond the employee's control include such situations as where a parent chooses to stay home because a child has a serious health condition or an employee moves because the employee's spouse is unexpectedly

transferred to a job location more than 75 miles from the employee's worksite. Matters of employee preference or convenience will not suffice. For example, a situation where an employee chooses not to return to work to stay home with a well, newborn child would not constitute a circumstance beyond the employee's control for purposes of this exception.

(i) *Multiple agencies involved.* If an employee does not complete the 12-week work obligation and if more than one agency provided Government contributions on behalf of an employee for that employee's health insurance coverage during a period of paid parental leave, each agency is responsible for making a determination regarding whether to apply the reimbursement requirement described in paragraph (f) of this section with respect to periods of paid parental leave during employment with the agency. The employing agency that employed the employee at the time use of paid parental leave concluded is responsible for informing any other affected agency of the employee's failure to complete the required 12 weeks of work and of its determination regarding application of the reimbursement requirement. Any other affected agency will make its own determination regarding application of the reimbursement requirement associated with agency employment.

(j) *Agency policies on applying the reimbursement requirement.* Each agency is responsible for adopting its own set of policies governing when it will or will not apply the reimbursement requirement described in paragraph (f) of this section. A single agency-wide set of policies should be in place so that employees within an agency are treated consistently.

(k) *Collection of reimbursement.* The reimbursement requirement described in paragraph (f) of this section, if imposed, is subject to collection as a debt owed to the affected agency. (See the Federal Claims Collection Standards in 31 CFR parts 900 through 904.)

§ 630.1706 Cases of employee incapacitation.

(a) If an agency determines that an otherwise eligible employee who could have made an election during a past period to substitute paid parental leave (as provided in § 630.1703) and enter a work obligation agreement (as described in § 630.1705) was physically or mentally incapable of doing so during that past period, the employee may, within 5 workdays of the employee's return to duty status, make an election to substitute paid parental leave for applicable FMLA unpaid leave under

§ 630.1703(a) on a retroactive basis. Such a retroactive election shall be effective on the date that such an election would have been effective if the employee had not been incapacitated at the time. Consistent with § 630.1206(f)(4), this retroactive election must be made in conjunction with a retroactive election under § 630.1203(b), if the FMLA unpaid leave was not already approved. As part of such election, the employee must agree (in writing, as described in § 630.1705(b)(1)) to meet the work obligation or pay the required reimbursement (if applicable) unless—

(1) Applying the work obligation and the associated reimbursement requirement is barred under § 630.1705(f)(2); or

(2) The agency later concludes under its policies established under § 630.1705(f)(1) that the circumstances support a determination to not apply the reimbursement requirement.

(b)(1) If an agency determines that an otherwise eligible employee is physically or mentally incapable of making an election to substitute paid parental leave (as provided in § 630.1703) and entering into a work obligation agreement (as described in § 630.1705), the agency must, upon the request of a personal representative of the employee whom the agency finds acceptable, provide conditional approval of substitution of paid parental leave for applicable FMLA unpaid leave under § 630.1703(a) on a prospective basis. The conditional approval is based on the presumption that the employee would have elected to substitute paid parental leave for the applicable FMLA unpaid leave and would have entered into the work obligation agreement if the employee had not been incapacitated. Within 5 workdays after returning to work, the employee must enter into a written agreement to meet the work obligation described in § 630.1705 or pay the required reimbursement (if applicable) unless—

(i) Applying the work obligation and the associated reimbursement requirement is barred under § 630.1705(f)(2); or

(ii) The agency later concludes under its policies established under § 630.1705(f)(1) that the circumstances support a determination to not apply the reimbursement requirement.

(2) If an employee covered by paragraph (b)(1) of this section declines to enter into the written agreement after being determined by the agency to no longer be incapacitated, the agency must cancel any portion of the 12 weeks of paid parental leave that has not been exhausted, and designate as invalid any

paid parental leave that was used based on the conditional approval. The time covered by the invalidated paid parental leave must be converted to leave without pay unless the employee requests that other paid leave or paid time off to the employee's credit be applied (as appropriate) in place of the invalidated paid parental leave. To the extent the employee has invalidated paid parental leave hours not replaced by other paid leave or paid time off, pay received for those hours is a debt to the employing agency and is subject to collection under the Federal Claims Collection Standards in 31 CFR parts 900 through 904.

§ 630.1707 Cases of multiple children born or placed in the same time period.

(a) If an employee has multiple children born or placed on the same day, the multiple-child birth/placement event is considered to be a single event that triggers a single entitlement of up to 12 weeks of paid parental leave under § 630.1703(b).

(b) If an employee has one or more children born or placed during the 12-month period following the date of an earlier birth or placement of a child of the employee, the provisions of this subpart shall be independently administered for each birth or placement event. Any paid parental leave substituted for FMLA unpaid leave during the 12-month period beginning on the date of a child's birth or placement shall count towards the 12-week limit on paid parental leave described in § 630.1703(b) applicable in connection with the birth or placement involved. The substitution of paid parental leave may count toward multiple 12-week limits to the extent that there are multiple ongoing 12-month periods beginning on the date of an applicable birth or placement, each of which encompasses the day on which the leave is used. Therefore, whenever paid parental leave is substituted during periods of time when separate 12-month periods (each beginning on a date of birth or placement) overlap, the paid parental leave will count toward each affected period's 12-week limit. For example, if an employee has a child born on June 1 and another child placed for adoption on October 1 of the same year, each event would generate entitlement to substitute up to 12 weeks of paid parental leave during the separate 12-month periods beginning on the date of the birth and on the date of the placement, respectively. Those two 12-month periods would be June 1–May 31 and October 1–September 30. The overlap period for these two 12-month periods would be October 1–May 31. If

the employee substitutes paid parental leave during that overlap period, that amount of paid parental leave would count towards both the 12-week limit associated with the birth event and the 12-week limit associated with the placement event.

§ 630.1708 Records and reports.

(a) *Record of usage of paid parental leave.* An agency must maintain an accurate record of an employee's usage of paid parental leave.

(b) *Reporting.* In agency data systems (including timekeeping systems) and in data reports submitted to OPM, an agency must record usage of paid parental leave in the manner prescribed by the Office of Personnel Management.

[FR Doc. 2020-14832 Filed 8-6-20; 4:15 pm]

BILLING CODE 6325-39-P

OFFICE OF PERSONNEL MANAGEMENT

5 CFR Part 630

RIN 3206-A004

Scheduling of Annual Leave by Employees Determined Necessary To Respond to Certain National Emergencies

AGENCY: Office of Personnel Management.

ACTION: Interim rule.

SUMMARY: The Office of Personnel Management is issuing interim regulations to assist agencies and employees responding to the National Emergency Concerning the Novel Coronavirus Disease (COVID-19) Outbreak and for future national emergencies. The regulations provide that employees who would forfeit annual leave in excess of the maximum annual leave allowable carryover because of their work to support the nation during a national emergency will have their excess annual leave deemed to have been scheduled in advance and subject to leave restoration.

DATES: The interim regulations are effective on August 10, 2020. Comments must be received on or before October 9, 2020.

ADDRESSES: You may submit comments, identified by docket number and/or Regulatory Information Number (RIN) and title, by the following method:

Federal Rulemaking Portal: <http://www.regulations.gov>. Follow the instructions for submitting comments.

All submissions received must include the agency name and docket number or RIN for this document. The general policy for comments and other

submissions from members of the public is to make these submissions available for public viewing at <http://www.regulations.gov> as they are received without change, including any personal identifiers or contact information.

FOR FURTHER INFORMATION CONTACT:

Doris Rippey by telephone at (202) 606-2858 or by email at pay-leave-policy@opm.gov.

SUPPLEMENTARY INFORMATION: On March 13, 2020, President Trump declared a “National Emergency Concerning the Novel Coronavirus Disease (COVID-19) Outbreak” (85 FR 15337 at <https://www.federalregister.gov/documents/2020/03/18/2020-05794/declaring-a-national-emergency-concerning-the-novel-coronavirus-disease-covid-19-outbreak>). Because of the unprecedented outbreak and spread of this virus and the efforts toward response and recovery, many Federal agencies and employees have been, and for the foreseeable future will continue to be, engaged in work vital to our nation and to the pandemic response. Under current rules, some of these employees will be unable to use sufficient annual leave to avoid exceeding the limit on annual leave that may be carried over into the next year. The Office of Personnel Management (OPM) is issuing interim regulations to assist such agencies and employees and to address any similar situations during future emergencies.

OPM issued CPM 2020-09 on June 18, 2020, to remind agencies and employees of the normally applicable rules for annual leave and various paid time off categories. We reminded agencies to work with their employees to ensure that they continue to take any annual leave or other paid time off before it expires. For further guidance on the normal applicable rules, agencies and employees may review the guidance at <https://www.chcoc.gov/content/annual-leave-and-other-paid-time-guidance>.

For most employees, the maximum annual leave that may be carried into the next leave year is 30 days (240 hours). Currently, an agency may restore annual leave that was forfeited due to an exigency of the public business or sickness of the employee only if the annual leave was scheduled in writing before the start of the third biweekly pay period prior to the end of the leave year (typically late November or early December). Any annual leave scheduled after that date will be forfeited if not used by the final day of the leave year.

The regulations provide that, once the agency head or designee has made appropriate determinations, employees

who would forfeit annual leave in excess of the maximum annual leave allowable carryover because of their work to support the nation during a national emergency will have their excess annual leave deemed to have been scheduled in advance and subject to leave restoration.

The procedures established by these interim regulations are similar to those established in previously rescinded 5 CFR 630.310 for employees whose services were deemed essential to the Year 2000 (Y2K) computer conversion and in current 5 CFR 630.311, for employees whose services were deemed essential to the emergency response in the aftermath of the September 11, 2001, terrorist attacks, which are being rescinded by this interim rule. These interim regulations differ from the previous regulations in that they allow this authority to be used not only for the current national emergency related to the COVID-19 outbreak, but also for certain future national emergencies for which OPM issues notification permitting use of this authority. These regulations allow agencies to respond quickly to the annual leave restoration needs of their employees who are responding to a national emergency.

Rescinding Regulations

OPM is rescinding 5 CFR 630.311, Scheduling of annual leave by employees determined necessary to respond to the “National Emergency by Reason of Certain Terrorist Attacks.” The regulations at 5 CFR 630.311 provided that the national emergency following the September 11, 2001 terrorist attacks was deemed to be an exigency of the public business for the purpose of restoring annual leave to any employee who forfeited annual leave under 5 U.S.C. 6304 because the agency determined the employee's services were required in response to that national emergency. The practical purpose of the regulations was to address the statutory and regulatory requirements for advanced scheduling of annual leave for leave restoration purposes.

The statute requires that, in order for annual leave to be eligible for restoration because of an exigency of the public business, it must have been scheduled in advance. (See 5 U.S.C. 6304(d)(1)(B).) The implementing regulations at 5 CFR 630.308(a) require annual leave to be scheduled in writing before the start of the third biweekly pay period prior to the end of the leave year in order to meet the statutory requirement for being “scheduled in advance” unless 5 CFR 630.308(b) applies.