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## OFFICE OF PERSONNEL MANAGEMENT

### 5 CFR Part 630

RIN 3206-AL91

#### Absence and Leave; Sick Leave

**AGENCY:** Office of Personnel Management.

**ACTION:** Final rule.

**SUMMARY:** The U.S. Office of Personnel Management is issuing final regulations on the use of sick leave and advanced sick leave for serious communicable diseases, including pandemic influenza when appropriate. We are also permitting employees to substitute up to 26 weeks of accrued or accumulated sick leave for unpaid Family and Medical Leave Act (FMLA) leave to care for a seriously injured or ill covered servicemember, as authorized under the National Defense Authorization Act for Fiscal Year 2008, including up to 30 days of advanced sick leave for this purpose. Finally, we are reorganizing the existing sick leave regulations to enhance reader understanding and administration of the program.

**DATES:** *Effective Date:* These regulations are effective on January 3, 2011.

**FOR FURTHER INFORMATION CONTACT:**

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**SUPPLEMENTARY INFORMATION:** The U.S. Office of Personnel Management (OPM) is issuing final regulations to address: (1) The use of sick leave for exposure to a communicable disease, (2) the purposes for and limitations on the use of advanced sick leave, and (3) the substitution of up to 26 weeks of sick leave for unpaid Family and Medical Leave Act (FMLA) leave to care for a seriously injured or ill covered servicemember. These changes are

incorporated into 5 CFR part 630, subpart D.

Please note that these final regulations are in response to only a portion of OPM's proposed regulations (74 FR 43064) issued on August 26, 2009, to implement section 585(b) of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2008 (Pub. L. 110-181, January 28, 2008) that amended the FMLA provisions in 5 U.S.C. 6381-6383 to provide that a Federal employee who is the spouse, son, daughter, parent, or next of kin of a covered servicemember with a serious injury or illness is entitled to up to a total of 26 administrative workweeks of unpaid FMLA leave during a single 12-month period to care for the covered servicemember. Comments received on the portion of the proposed rules at 5 CFR part 630, subpart L, will be addressed in a separate publication. The proposed regulations in their entirety are available at <http://edocket.access.gpo.gov/2009/E9-20610.htm>.

Subsequent to the publication of our proposed regulations issued on August 26, 2009, the NDAA for FY 2010 (Pub. L. 111-84, October 28, 2009) made additional amendments to the FMLA provisions in 5 U.S.C. 6381-6383. These amendments: (1) Provide a new entitlement to qualifying exigency leave for Federal employees covered by OPM's FMLA regulations under title II of the FMLA parallel to the entitlement provided to employees covered by the Department of Labor's (DOL's) FMLA regulations under title I of the FMLA, and (2) expand the coverage for the 26-week entitlement for family members to care for a covered servicemember undergoing medical treatment, recuperation, or therapy, for a serious injury or illness by amending the definitions of "covered servicemember" and "serious injury or illness." Incorporating these changes into OPM's FMLA regulations requires consultation with the Department of Defense and the Department of Veterans Affairs. Since 5 U.S.C. 6387 requires OPM to prescribe regulations consistent, to the extent appropriate, with the regulations prescribed by the Secretary of Labor to carry out title I of the FMLA, it will not be possible for OPM to issue regulations implementing the NDAA for FY 2008 and 2010 changes until DOL issues its final FMLA regulations implementing

the NDAA for FY 2010 FMLA amendments. Therefore, we have decided to separate the FMLA portion (subpart L) from the sick leave portion (subpart D) of the proposed regulations. This will allow OPM to expedite the final sick leave regulations, providing agencies and employees with additional flexibilities in planning for serious communicable diseases, including pandemic influenza when appropriate, by permitting the use of sick leave and advanced sick leave if the employee or his or her family member is exposed to a serious communicable disease that would jeopardize the health of others.

The 60-day comment period ended on October 26, 2009. A total of 12 comments were received addressing the changes to the sick leave regulations under 5 CFR part 630, subpart D, from five agencies, three labor organizations, two professional organizations, and two individuals. The overall comments were overwhelmingly positive and support the changes recommended to our sick leave regulations. The following responds to the comments received on our proposed regulation.

#### Use of Sick Leave for Exposure to a Communicable Disease

In our guidance "Human Resources Flexibilities Available to Assist Federal Employees During Emergencies" (CPM 2009-09, May 5, 2009), OPM reminded agencies of the policies and procedures developed in planning for a pandemic influenza and provided references to a substantial amount of information and advice on human resources (HR) rules and flexibilities available on OPM's Web site. See <http://www.chcoc.gov/Transmittals/TransmittalDetails.aspx?TransmittalID=2248>. During a pandemic influenza or other emergency situation, Federal agencies will be expected to achieve two equally important goals: (1) Protect the Federal workforce, and (2) ensure the continuity of operations. OPM's Web site contains significant guidance, developed in consultation with the Centers for Disease Control and Prevention (CDC), on keeping the Federal workforce healthy during a pandemic influenza by employing social distancing interventions (as warranted by the severity of the pandemic) such as telework, alternative work schedules, evacuation, and various leave flexibilities. In particular, supervisors

should encourage telework and alternative work schedules to help prevent the spread of flu in their workplace during a severe pandemic. This will allow employees to continue to work or function while limiting contact with others, help maintain continuity of operations, and help employees manage their health and their family's needs. Before approving a particular leave option, federal supervisors should review applicable policies set forth in collective bargaining agreements and agency-specific human resource guidance. See <http://www.opm.gov/pandemic/>. These final regulations provide another tool for agencies to use for social distancing purposes that will help protect the Federal workforce. The current sick leave regulations allow an employee to use sick leave if health authorities or a health care provider determine that the employee's presence on the job would jeopardize the health of others because of exposure to a communicable disease. The final regulations allow an employee to use sick leave to care for a family member who has been similarly exposed.

Two labor organizations, two professional organizations, and one individual were very supportive of the proposed change made to this portion of the regulations to allow an employee to use sick leave to care for a family member who has been exposed to a communicable disease when it has been determined by the health authorities having jurisdiction or by a health care provider that the family member's presence in the community would jeopardize the health of others because of the family member's exposure to a communicable disease. The two professional organizations strongly approved of the positive steps taken that make Federal sick leave as flexible as possible to deal with the threat of infectious disease. They also supported advancing sick leave to employees and allowing employees to use sick leave to care for family members who have been exposed to a communicable disease. A labor organization noted that these changes will help Federal employees protect themselves, their family members, and their co-workers from contracting and spreading a serious communicable disease.

#### *Definition of Communicable Disease*

The use of sick leave due to exposure to a communicable disease would be limited to circumstances where exposure alone would jeopardize the health of others and would only arise in cases of serious communicable diseases, such as communicable diseases where

Federal isolation and quarantine are authorized. Isolation means the separation of persons who have a specific infectious illness from those who are healthy and the restriction of their movement to stop the spread of that illness. Quarantine means the separation and restriction of movement of persons who, while not yet ill, have been exposed to an infectious agent and therefore may become infectious. As mentioned in the supplementary information accompanying the proposed regulations, the current consolidated list of communicable diseases for which Federal isolation and quarantine are authorized includes (as determined by the Secretary of Health and Human Services and published in Executive order): Cholera, diphtheria, infectious tuberculosis, plague, smallpox, yellow fever, viral hemorrhagic fevers, Severe Acute Respiratory Syndrome (SARS), and influenza that causes or has the potential to cause a pandemic. (See Executive Order 13295, as amended by Executive Order 13375, consistent with 42 U.S.C. 264(b).) This provides an illustrative, but not exhaustive, list of the types of serious communicable diseases where exposure alone would jeopardize the health of others, thereby allowing the use of sick leave for exposure to a communicable disease.

While the list of serious communicable diseases was not included in the text of the proposed regulations, OPM requested comments on whether additional changes to the regulatory text would help clarify the limited cases in which the situation would meet the threshold of communicable disease. We received responses from three agencies and two professional organizations. Generally, agencies requested that the list of communicable diseases provided in the supplementary information accompanying the proposed regulations be included in the regulations themselves. In contrast however, one labor organization and one professional organization did not believe additional regulatory language was necessary since the narrowness of the term *communicable disease* is evident from the determination that must be made by the health authorities or a health care provider that the employee or family member could jeopardize the health of others because of his or her exposure to a communicable disease. They believe we should maintain flexibility for new and emerging infectious diseases which may not yet be on the current list for which Federal isolation and quarantine are authorized. The labor organization stated that the proposed language would

preserve the necessary flexibility to adapt rapidly if new communicable diseases emerge.

While we understand the agencies' request for more information in the regulatory text, the CDC list of communicable diseases where Federal isolation and quarantine are authorized may be updated as vaccinations are developed or when influenza mutates into new strains that have the potential to cause a pandemic. The Administrative Procedures Act establishes rules for the regulatory process, which would mean that, if the list were included in the regulations, OPM would not be able to update the list of communicable diseases in a timeframe that is useful to our customers. For the reasons listed above, OPM is not adding this list to its regulations. As a result, when reviewing a request for sick leave for exposure to a communicable disease, we strongly encourage agencies to refer to CDC's Web site for the current list of communicable diseases for which Federal isolation and quarantine are authorized.

#### *Determinations of Communicable Disease—Pandemic Influenza*

Determinations of communicable disease are made by the CDC. While influenza that causes or has the potential to cause a pandemic may be on the list of serious communicable diseases for which Federal isolation and quarantine are authorized, influenza will not automatically meet the criteria of a communicable disease for sick leave purposes. Influenza that has the potential to cause a pandemic is very broad and can encompass many variations of the flu. However, to highlight the limited circumstances in which this new sick leave provision would apply, pandemic influenza would not meet the threshold of a serious communicable disease until the CDC has declared that exposure alone is enough to jeopardize the health of others. During a potential pandemic influenza, the CDC will assess the risk factors of the influenza, provide guidance to health authorities and health care providers on pandemic status, and recommend appropriate guidelines to prevent the spread of the influenza. OPM will work with the CDC to provide agencies and employees with ongoing information regarding the impact of the pandemic influenza on the health of the Federal workforce and the appropriate use of HR flexibilities to keep employees safe. While agencies have the discretion to administer their sick leave programs, they should await specific guidance from the appropriate

officials (e.g., CDC, OPM) to determine whether the use of sick leave is appropriate for exposure to a communicable disease. The use of sick leave for exposure to a communicable disease should be used only in very limited circumstances, and agencies should not grant sick leave for this purpose until they receive guidance from the appropriate officials.

For example, for the 2009–2010 H1N1 influenza season, the CDC has provided ongoing guidance designed to prevent the spread of the influenza in the workplace. Because there was no determination that exposure alone would jeopardize the health of others, the CDC advised that an employee could continue to go to work if a member of the employee's household had contracted 2009–2010 H1N1 influenza. OPM also issued workplace guidance entitled "Pandemic Influenza 2009: Additional Guidance" (CPM 2009–14, July 31, 2009) and collaborated with the CDC in issuing "Preparing for the Flu—A Communication Toolkit for the Federal Workforce." See documents at <http://www.chcoc.gov/Transmittals/TransmittalDetails.aspx?TransmittalID=2452> and [http://www.flu.gov/professional/federal/workplace/federal\\_toolkit.pdf](http://www.flu.gov/professional/federal/workplace/federal_toolkit.pdf), respectively. Following CDC guidance that exposure to 2009–2010 H1N1 influenza would not jeopardize the health of others, agencies should not have granted any employee exposed to H1N1 influenza sick leave for exposure to communicable disease. Should an influenza become more serious and require quarantine of exposed individuals, the CDC would issue guidance on the procedures to be followed. Based on that information, OPM would issue appropriate guidance to keep Federal employees safe while maintaining continuity of operations.

#### *Determinations of Communicable Disease—Non-Pandemic*

For examples of non-pandemic diseases that automatically meet the criteria of a serious communicable disease for sick leave purposes, agencies should refer to the CDC list of communicable diseases for which Federal isolation and quarantine are authorized. Excluding influenza that causes or has the potential to cause pandemic, for the reasons cited previously, the CDC has already determined that an individual's exposure to any of the other listed diseases would jeopardize the health of others. A health authority or health care provider can then advise that an employee or his or her family member has been exposed to a communicable

disease that would jeopardize the health of others. If the disease is not on the CDC list of communicable diseases for which Federal isolation and quarantine are authorized, and a health authority or health care provider has concerns that an employee's or employee's family member has been exposed to a communicable disease that could jeopardize the health of others at the workplace or in the community, the health authority or health care provider should contact CDC for evaluation of the risk factors and further recommendations.

#### *Health Authority or Health Care Provider*

One agency asked OPM to emphasize that a relevant health authority or health care provider must make a determination that the family member's presence in the community could put others' health at risk. We believe the proposed regulations at 5 CFR 630.401(a)(3)(iii) stating that sick leave is authorized when an employee "provides care for a family member \* \* \* (iii) who would, as determined by the health authorities having jurisdiction or by a health care provider, jeopardize the health of others by that family member's presence in the community because of exposure to a communicable disease" already addressed this issue. Therefore, we are making no changes in the final regulations.

Another agency asked for a definition of "health authorities." We do not believe adding a definition of health authorities to the regulations would be helpful. Communicable diseases can cover widespread geographic areas, but may also be localized in scattered outbreaks. The health authorities having jurisdiction may be different, depending on the area affected by the communicable disease. Guidance on a widespread communicable disease would be issued by the CDC. Scattered outbreaks of a communicable disease would be handled by Federal, State or local health authorities.

#### *Requirement for Medical Documentation*

One agency and one professional organization questioned the type of medical certification required to support a request for sick leave due to exposure to communicable disease, if any. Another agency asked if exposure to a communicable disease is to be treated as a serious health condition for purposes of medical documentation requirements. Another agency asked whether "one's personal physician stating the person is contagious" is all that is required to

grant sick leave to care for a family member who has been exposed to a communicable disease.

In a memorandum to Chief Human Capital Officers on January 29, 2010, (CPM–2010–02) at <http://www.chcoc.gov/Transmittals/TransmittalDetails.aspx?TransmittalID=2831>, OPM noted that if influenza becomes widespread in a given geographic area, the demands on medical providers and facilities would be great, and employees may have difficulty obtaining timely documentation to support their requests for use of sick leave. If that occurs, agencies should consider relaxing sick leave documentation requirements. OPM's regulations do not require medical certification when granting sick leave. See § 630.403 of the current regulations (redesignated as § 630.405 in these final regulations). Agencies have both the flexibility and the specific authority to administer their programs as circumstances dictate. Accordingly, OPM recommends relaxing any agency-imposed medical certification requirements for sickness or exposure to influenza during a pandemic influenza, and an employee should not be required to seek medical examination for the purpose of obtaining medical documentation for sick leave—agencies should monitor official announcements by Federal, State, or local public health authorities, and/or tribal governments related to exposure to pandemic influenza. OPM does recognize, however, that medical certification may remain necessary for employees on leave restriction. For exposure to a communicable disease other than pandemic influenza, agencies may follow their established sick leave policies.

One professional organization recommended that, during an outbreak of pandemic influenza or other communicable disease, agencies should be able to verify employees' conditions through call centers or other contingent operations that may be developed during a severe pandemic. OPM would consider this an acceptable form of communication that could be adopted by agencies.

#### *Requirement To Actively Provide Care for Family Member*

One labor organization questioned OPM's intent in specifying that an employee must be actively providing care for a family member when taking sick leave to care for a family member who has been exposed to a communicable disease. The organization wanted to know whether OPM intended to require that an

employee be the sole provider of care. In the example we cited in the Supplementary Information that accompanied the proposed regulations, the employee is providing care for a minor child who is not exhibiting any symptoms, but a determination has been made by the relevant health authorities or the health care provider that the child's presence at daycare or at school could jeopardize the health of others because of the child's exposure to that communicable disease. Since the employee would not be providing care for a sick family member, but one who is asymptomatic, the employee may request sick leave only if the exposed family member could not otherwise care for himself or herself (e.g., a minor child, or elderly relative). Although the employee does not need to be the sole provider of care, the employee must be providing care actively to the family member in order to invoke sick leave to care for the family member exposed to a communicable disease. In contrast, it would not be appropriate for the employee to invoke sick leave to care for an able-bodied spouse who has been exposed to a communicable disease, but is not exhibiting any symptoms, since the employee would not need to provide care actively to the spouse. If the exposed family member contracts the communicable disease and becomes ill, the employee is entitled to use up to 13 days of sick leave for general family care or up to 12 weeks for care of a family member with a serious health condition, depending on the severity of the illness.

#### *Definition of Family Member*

OPM received two requests to expand the definition of *family member* used for sick leave purposes. One labor organization mentioned that family units have evolved in modern times. A professional organization requested the inclusion of a primary guardian. Although these requests are outside the scope of these regulatory changes, we note that since the publication of these proposed regulations, the definition of *family member* for sick leave purposes found at § 630.201 has been expanded. On June 14, 2010, OPM issued final regulations (75 FR 33491) amending the definition of *family member* for sick leave purposes to now cover grandparents and grandchildren, same-sex and opposite domestic partners, step parents, step children, foster, guardianship, and other relationships. The final regulations are available at <http://www.gpo.gov/fdsys/pkg/FR-2010-06-14/pdf/2010-14252.pdf>.

#### *Employee's Return to Work*

One agency asked if an employee who has been exposed to a communicable disease will have to provide a release from a health care provider declaring the employee is healthy enough to return to work. Agencies cannot require a medical release form from the employee's physician unless the employee's position has specific medical standards or physical requirements, or unless it is covered by a medical evaluation program under § 339.301(b)(3). Most positions do not have established physical or medical requirements. If the employee's position requires a medical examination and the employee refuses the exam, he or she may be disciplined, up to and including removal from Federal service. However, since the current regulations at § 630.403(a) (redesignated as § 630.405(a) in these final regulations) provide that an agency may request administratively acceptable documentation to support an employee's request for sick leave, even for an employee whose position does not have an established physical or medical requirement, an agency could ask that the documentation include a date on which the employee's presence on the job would no longer jeopardize the health of others, i.e., the date on which the employee would be considered no longer contagious. Similar documentation could be required to support an employee's use of sick leave to care for a family member who has been exposed to a communicable disease showing the date on which the family member's presence in the community would no longer jeopardize the health of others.

#### *Request for Additional Sick Leave for Communicable Disease*

One individual, who supports the new rule, would like the Federal Government to provide up to 40 hours of additional paid sick leave to employees with "serious infectious illnesses." The commenter argues this new category of sick leave would be particularly helpful to employees who have no sick leave due to prior serious illness or maternity leave. This request is outside the scope of OPM's regulatory authority. A statutory change would be required to create such a new entitlement. However, under current authorities, employees without sick leave may invoke their FMLA entitlement (a serious infectious illness would likely qualify as a serious health condition) and may be granted annual leave, advanced sick leave, advanced annual leave, or leave without pay. If

they have exhausted their available paid leave, they could request donated leave under the voluntary leave transfer and/or leave bank programs.

#### *Federal Contractors*

Two professional organizations would like OPM to require that all Federal contractors be provided sick leave during public health emergencies. One of the organizations noted that OPM's proposed rules are intended to protect Federal workers, maintain continuity of operations, and minimize the cost and risk from an infectious disease outbreak, and that the same goals are true for contractors assigned to work in Federal agencies. The other stated that the public health and the health of Federal workers will not be protected by the proposed regulatory changes if the contract worker in the cubicle next to the Federal employee lacks paid sick time and is either forced to come to work sick or is forced to send a sick child to school. The professional organization further stated that, since the Federal Government contracts with outside businesses to run daycare centers in Federal Government buildings, workers at these centers should have access to paid sick time as Federal employees do—otherwise the health of the children in these centers may suffer. Dictating pay and leave policies for Federal contractors is outside the scope of OPM's authority. As contractors are increasingly relied upon to perform many essential functions of some agencies, agencies are encouraged to contact their acquisition professionals for advice and guidance on dealing with human resources management issues associated with contractors and contract workers.

#### *Privacy Concerns*

One labor organization requested that OPM consider the privacy of employees and the role of confidentiality in medical procedures for H1N1 influenza. OPM has always held that agencies must maintain strict privacy controls in handling medical certification for H1N1 influenza or any other sick leave request. Requirements for confidentiality of medical records are addressed through the Health Insurance Portability and Accountability Act of 1996 (HIPAA) Privacy Rule, at 45 CFR part 160 and subparts A and E of part 164, and are not addressed in the sick leave regulations.

#### *School Closures*

One professional organization would like to allow the use of accrued or advanced sick leave by an employee whose child's school is closed due to

communicable disease even when the child has not been exposed to the disease. OPM disagrees. There is no authority that would permit an employee to use sick leave to care for a child who is healthy or is kept at home to prevent exposure to a communicable disease. Leave requests due to school closures should be handled the way they would in non-pandemic influenza situations.

The fact that schools have closed due to a pandemic influenza or other serious communicable disease should not be the sole factor in determining the type of leave an employee may use. For example, when the school is closed and—

- The *child is healthy* and has not been exposed to a communicable disease, the employee may not take sick leave.

- The *child has been exposed* to a communicable disease *but is not sick*, the final regulations allow the employee to take up to 13 days of sick leave only if it has been determined that the child's presence in the community would jeopardize the health of others.

- The *child is sick*, due to a communicable disease or otherwise, the employee may use up to 13 days of sick leave to care for that child. If the child's illness rises to the level of a serious health condition, the employee may use up to 12 weeks of sick leave and may also invoke FMLA, which would provide up to an additional 12 weeks of unpaid leave (with substitution of annual or sick leave, according to the appropriate regulations).

In summary, an employee is not necessarily entitled to use sick leave just because the child's school has been closed to prevent exposure to a communicable disease (a commonly-used tool for social distancing) or for sanitation of the school building. In order for the employee to qualify to use sick leave to care for that child, there must be a determination that the child's exposure to the communicable disease would jeopardize the health of others. The Federal Government has other workplace flexibilities to assist an employee in situations where sick leave is not appropriate, including use of annual leave, telework, alternative work schedules, compensatory time off, advanced annual leave, or leave without pay.

#### *Contracting a Communicable Disease at Work*

One professional organization expressed concern that Federal employees who acquire a communicable disease during the course of their work should not be required to use their own

leave for their recovery and requested that OPM provide this flexibility and communicate this to Federal health care workers. They cited the hypothetical example of an employee of a Veterans Affairs hospital or of a workplace-based clinic who might become ill as a result of exposure to a patient or employee with the H1N1 virus. A new leave flexibility is not appropriate because a provision already exists for this situation. If an employee believes his or her illness resulted from a work-related incident, the employee can file a workers' compensation claim. Workers' compensation claims are administered by the U.S. Department of Labor, and each claim will be judged on its own merit.

#### *Opposition to Provision of Additional Leave*

One individual stated he was opposed to giving Federal employees additional leave, thereby expanding their benefits. The individual believed that, in addition to employees' existing leave benefits, OPM was proposing to "pay Federal employees for 30 days of sick time and also advance them 30 days if they get the flu." We can assure the commenter that these regulations provide no additional paid leave; they merely explain the circumstances under which employees can use their own accumulated and accrued sick leave. If an employee is advanced sick leave for any purpose cited in the regulations, it must be repaid. If the employee separates from Federal service with a negative leave balance, he or she will be required to refund the amount of indebtedness in accordance with § 630.209.

#### **Advanced Sick Leave**

Advanced sick leave is not an entitlement, but may be granted at the agency's discretion. In many cases, it may not have been an agency's practice to provide advanced sick leave for some of the purposes stated in the final regulations. These final regulations are intended to provide consistency throughout agencies as to the purposes and limitations of advanced sick leave. Overall, many commenters were supportive of the proposed changes made to this portion of the regulations that outline the amount of sick leave that may be advanced for various purposes. One labor organization strongly supported stating the amount of sick leave that may be advanced for various circumstances, especially welcoming the use of advanced sick leave to provide general care for a family member or to make arrangements necessitated by the death of a family

member, or to attend the funeral of a family member. Another labor organization noted that the proposed changes would help minimize situations where employees without available sick leave had to exhaust their annual leave balances or were forced to choose between coming to work sick or facing economic uncertainty. One agency approved of the reorganization of the regulatory text and specifically mentioned that the creation of the new section on advancing sick leave (redesignated "Advanced Sick Leave" in these final regulations) makes it easier to find this information in the regulations.

OPM did receive a few objections on both sides of the spectrum—some commenters objected to expanding the purposes for which advanced sick leave may be used, and some objected to limiting them. Two agencies opposed allowing any advanced sick leave unless the employee had a serious disability or ailment as stated in 5 U.S.C. 6307(d). They also questioned both OPM's interpretation of the law and our longstanding practice of permitting up to 13 days of advanced sick leave for general family care and bereavement purposes. The two agencies do not currently authorize advanced sick leave for these purposes. Another agency objected to placing any limitation on the amount of sick leave that may be advanced to an employee for his or her own medical, dental, or optical examination or treatment.

#### *OPM's Authority To Regulate Advanced Sick Leave*

Two agencies opposed allowing advanced sick leave unless the employee had a serious disability or ailment, and questioned whether permitting use of up to 13 days of advanced sick leave for general family care and bereavement purposes is permitted under the law. Section 6311 gives OPM the authority to prescribe regulations necessary for the administration of annual and sick leave programs, and OPM has the authority to regulate and provide guidelines on when it is appropriate to advance sick leave in accordance with 5 U.S.C. 6311. OPM has used its regulatory authority to administer the sick leave provisions on many occasions to define appropriate purposes and limitations for the use of sick leave (e.g., establishing 12 weeks of sick leave to care for a family member with a serious health condition, establishing 13 days of sick leave for general family care and bereavement, and permitting an agency to advance sick leave for general family care and bereavement). Enacted in 1994, the

Federal Employees Family Friendly Leave Act (Pub. L. 103-388, October 22, 1994) (FEFFLA) amended the law to provide for a 3-year trial period to expand the purposes for which sick leave may be used by an employee, and these purposes included family care and bereavement. The provisions of the FEFFLA expired on December 21, 1997. However, OPM used its broad regulatory authority under 5 U.S.C. 6311 to prescribe regulations permitting agencies to provide sick leave for the purposes of general family care and bereavement, and those regulations continued to be in effect after expiration of the FEFFLA. (See the memorandum to Directors of Personnel, CPM 97-13, on the "Use of Sick Leave for Family Care or Bereavement Purposes" at [http://www.opm.gov/oca/compmemo/1997\\_1996/cpm97-13.asp](http://www.opm.gov/oca/compmemo/1997_1996/cpm97-13.asp)). Thus, OPM used its permanent regulatory authority to issue regulations to permit an employee to use sick leave to make arrangements for or attend the funeral of a family member. The scope of OPM's regulatory authority also encompasses advancement of sick leave for these purposes.

We further note that this authority was also discussed in OPM's August 17, 2006, final sick leave regulations removing the requirement that an employee maintain an 80-hour sick leave balance in order to use the maximum amount of sick leave for general family care and bereavement purposes. (See 71 FR 47694, August 17, 2006.) In the supplementary information accompanying that final rule, OPM addressed an agency's request for information on the amounts of sick leave an agency may advance to an employee for general family care and bereavement purposes or to provide care for a family member with a serious health condition. In response, we added § 630.401(f) to clarify that an agency may advance a maximum of 30 days of sick leave when required by the exigencies of the situation for a serious disability or ailment of the employee or a family member or for purposes related to the adoption of a child. While our intent to allow an agency also to advance sick leave for general family care and bereavement purposes was expressed in the supplementary information accompanying those final regulations, the change was not reflected in the regulatory text. We are therefore addressing that oversight in these regulations.

One agency believed it is too generous to allow up to 104 hours (13 days) of advanced sick leave for an employee's own medical, dental or optical examination or treatment; to care for an

incapacitated family member or a family member receiving medical, dental or optical examination or treatment; to care for a family member exposed to a communicable disease; or to make arrangements necessitated by the death of a family member or to attend the funeral of a family member. The agency challenged OPM's rationale that allowing up to 104 hours of advanced sick leave for general family care and bereavement purposes "reinstates a longstanding practice," saying this has not been the practice at that agency. OPM reasserts that the final regulations are consistent with OPM's broad authority to regulate and provide guidelines on when it is appropriate to advance sick leave in accordance with 5 U.S.C. 6311. Within the guidelines established by OPM, an agency has the discretion to grant advanced sick leave. An agency is not required to grant advanced sick leave for general family care and bereavement or any other purpose under § 630.402 of this final rule, but is provided this flexibility to use for new employees and employees who have experienced personal hardships.

#### *104-Hour Limitation on Advanced Sick Leave*

One agency objected to placing any limitation on the amount of sick leave that may be advanced to an employee for his or her own medical, dental, or optical examination or treatment. The agency pointed out that the current regulations do not limit the amount of sick leave that an employee may use for his or her own medical, dental, or optical examination or treatment, and that it has been a longstanding practice that the amount of sick leave that could be advanced for these purposes was left to the discretion of the agency. The agency was concerned that limiting the amount of advanced sick leave for an employee's own medical, dental, or optical examination or treatment to 104 hours may have an adverse impact on a new employee, an employee with a chronic medical condition, or an employee experiencing a medical emergency that would require ongoing medical treatment.

While we agree that the amount of sick leave an agency may advance is within the discretion of the agency, we disagree that an agency should authorize more than 104 hours for an employee's routine medical care or appointments that are not related to a serious health condition. A full-time employee accrues 13 days of sick leave (104 hours) during the leave year. We believe that this is a sufficient amount of leave both for the employee's own

medical, dental, or optical examination or treatment and for providing general care for a family member. If the employee needs more than 104 hours of advanced sick leave because a condition requires treatment beyond routine care, the agency may grant up to a maximum of 240 hours of advanced sick leave for a serious health condition.

For example, an agency may authorize up to 13 days of advanced sick leave for an employee to actively provide care for a family member exposed to a communicable disease that may jeopardize the health of others. If the family member contracts the communicable disease and the employee requires more paid time off, the agency has the discretion to advance additional sick leave (up to 240 hours) for the employee to care for a family member with a serious health condition. Another example would be an employee who goes for routine dental examination and, as a result, is required to undergo extensive dental work that extends beyond the 13 days authorized for an employee's own dental examination or treatment. Because the employee experiences complications beyond routine care, likely rising to the level of a serious health condition, the agency may provide the employee with additional advanced sick leave of up to 240 hours because of incapacitation due to physical illness or because of the employee's own serious health condition.

#### *Negative Leave Balance at Time of Separation*

One agency believed that advanced sick leave would essentially provide an additional sick leave benefit, without any restrictions or limits for paying the leave back, other than not exceeding a negative 240-hour leave balance at any given time. To avoid having an employee separate from Federal service with a negative leave balance, supervisors must use their judgment in reviewing a request for advanced sick leave and may deny the request if not supported by administratively acceptable evidence or if the employee is unlikely to return to Federal service. Advanced sick leave is not an employee entitlement and is not a substitute for temporary or permanent disability retirement. An employee who has a medical emergency and has exhausted his or her available paid leave can also apply for donated annual leave under the voluntary leave transfer and/or leave bank programs. The donated annual leave can help an employee liquidate any indebtedness of advanced annual or sick leave prior to separation from Federal service.

### *Medical Documentation for Advanced Sick Leave*

One agency and one professional organization commented that there is no mention of medical documentation requirements for advanced sick leave. A request for advanced sick leave is essentially a request for sick leave, therefore, the medical documentation standards for granting of sick leave at current § 630.403 (redesignated as § 630.405 in these final regulations) apply. We are not making changes in the final regulations.

One labor organization mentioned that the regulations at § 630.401(a)(3)(i) and (ii) provide two circumstances under which advanced sick leave may be granted to care for a family member who is sick (the first for a family member incapacitated by a medical or mental condition, and the second for a family member with a serious health condition), but the amount of advanced sick leave authorized is different in the two cases. The organization suggested that the difference between the two cases should be made clearer and that the ending phrase should read, "with a serious health condition as defined in § 630.1202." Such a reference is not necessary, since *serious health condition* is already defined at § 630.201 and refers to the definition in § 630.1202.

### *Recourse for Denial of Advanced Sick Leave*

One professional organization requested an expedited mechanism for challenging the denial of advanced sick leave to care for a family member who has been exposed to or has contracted a communicable disease and that the employee should be allowed to use sick leave pending the outcome of the review. This process is handled through an agency's internal grievance procedures and is beyond the scope of our regulations. It is also important to remember that, although use of sick leave is an entitlement, by law, the advancement of sick leave is always at the discretion of the agency.

### **Substitution of Sick Leave for Unpaid FMLA Leave To Care for a Covered Servicemember**

This portion of the final regulations is in response to the portion of OPM's proposed regulations (74 FR 43064) issued on August 26, 2009, to implement section 585(b) of the NDAA for FY 2008 (Pub. L. 110-181, January 28, 2008). That law permits the substitution of up to 26 weeks of sick leave during a single 12-month period when an employee invokes the FMLA to provide care for a spouse, son, daughter, parent, or next of kin who is a covered servicemember with a serious injury or illness. *See* 5 U.S.C. 6382(d). Since the NDAA for FY 2008 went into effect on the date of enactment, and since nothing in section 565(b) of the NDAA for FY 2010, which also amends parts of the FMLA for Federal employees, changes the provisions regarding substitution of annual or sick leave for unpaid FMLA leave, we believe it is useful for OPM to address this portion of the NDAA for FY 2008 in these final regulations. Additional guidance on the NDAs for FY 2008 and FY 2010 can be found on OPM's Web site in CPM 2008-04, February 1, 2008, at <http://www.opm.gov/oca/compmemo/2008/2008-04.asp>, CPM 2009-26, December 29, 2009, at <http://www.chcoc.gov/Transmittals/TransmittalDetails.aspx?TransmittalID=2703>, and CPM 2010-06 at <http://www.chcoc.gov/Transmittals/TransmittalDetails.aspx?TransmittalID=2884>.

### *Interaction Between the Sick Leave and FMLA Entitlements*

In the comments received on the proposed regulations, one agency asked how sick leave which is substituted for unpaid FMLA leave to care for a covered servicemember will be categorized. The agency asked whether such leave will be considered regular sick leave or family-friendly sick leave (13 days of sick leave for general family care and bereavement or 12 weeks of sick leave for care of a family member with a serious health condition) and, if

considered family-friendly sick leave, how an employee's use of the 26 administrative workweeks of sick leave is affected by the limitations on family-friendly sick leave for general purposes or serious health conditions. The statutes authorizing the two entitlements are quite complex, and the response below is accordingly quite detailed in order to give agencies and employees as much guidance as practicable in administering and using the various paid and unpaid leave entitlements for treatment of illnesses or injuries of employees and the individuals for whom they may provide care.

Sick leave and FMLA leave are authorized under two separate sets of statutes, each with different entitlements and conditions, such as the categories of individuals for whom an employee may take leave to care, number of hours or weeks of leave allowed, and the rules on the substitution of paid leave for unpaid leave. An employee is entitled to use 13 days (104 hours) of sick leave for general family care and bereavement in accordance with § 630.401(a)(3)(i) and (4), and 12 weeks of sick leave to care for a family member with a serious health condition in accordance with § 630.401(a)(3)(ii). The basic 12-week FMLA entitlement to care for a family member with a serious health condition is found at 5 U.S.C. 6382(a)(1)(C) and § 630.1203(a)(3), and the 26-week FMLA entitlement to care for a covered servicemember is found at 5 U.S.C. 6382(a)(3).

Table 1 outlines the various sick leave and FMLA flexibilities available to an employee for purposes of caring for a family member and/or for a covered servicemember. To know which leave options are available, an employee must first determine the type of leave to which he or she is entitled based on the person for whom the leave is being taken. Table 1 provides useful information to help agencies and/or employees determine appropriate leave options.

TABLE 1—LEAVE FLEXIBILITIES AVAILABLE TO CARE FOR A FAMILY MEMBER AND/OR A COVERED SERVICEMEMBER

Entitlement	Amount and purpose	Individuals for whom leave may be taken
Sick Leave for General Family Care and Bereavement (5 CFR 630.401(a)(3)(i) and (4)).	13 days (104 hours) to: <ul style="list-style-type: none"> <li>• Provide care for a family member who is incapacitated by a medical or mental condition;</li> <li>• Attend to a family member receiving medical, dental, or optical examination or treatment; or</li> <li>• Make arrangements necessitated by the death of a family member or attend the funeral of a family member.</li> </ul>	May be taken for a family member.* “Family member” means the following relatives of the employee: <ol style="list-style-type: none"> <li>(1) Spouse, and parents thereof;</li> <li>(2) Sons and daughters, and spouses thereof;</li> <li>(3) Parents, and spouses thereof;</li> <li>(4) Brothers and sisters, and spouses thereof;</li> <li>(5) Grandparents and grandchildren, and spouses thereof;</li> <li>(6) Domestic partner and parents thereof, including domestic partners of any individual in paragraphs (2) through (5) of this definition; and</li> <li>(7) Any individual related by blood or affinity whose close association with the employee is the equivalent of a family relationship.</li> </ol>
Sick Leave for Serious Health Condition of Family Member (5 CFR 630.401(a)(3)(ii)).	12 weeks (480 hours) to care for a family member with a serious health condition.	* See definition of family member at 5 CFR 630.201(b) in the final regulations on Definitions of Family Member, Immediate Relative, and Related Terms (75 FR 33491, June 14, 2010), at <a href="http://www.gpo.gov/fdsys/pkg/FR-2010-06-14/pdf/2010-14252.pdf">http://www.gpo.gov/fdsys/pkg/FR-2010-06-14/pdf/2010-14252.pdf</a> .
Advanced Sick Leave (5 U.S.C. 6307(d)) .....	Up to 30 days (240 hours) of paid sick leave to care for a family member with a serious disability or ailment. (Agency discretion.)	For the care of a SPOUSE, SON, DAUGHTER, OR PARENT of the employee, if such spouse, son, daughter, or parent has a serious health condition. <b>(Note:</b> Son or daughter must be under 18, or over 18 but incapable of self-care because of a mental or physical disability.) <b>(See 5 CFR 630.1203(a)(3) and 630.1202).</b>
FMLA (Basic) to care for spouse, son, daughter, or parent with a serious health condition (5 U.S.C. 6382(a)(1)(C) and 5 CFR 630.1203(a)(3)).	12 weeks (480 hours) of unpaid leave during any 12-month period to care for a spouse, son, daughter, or parent with a serious health condition.	For the care of a SPOUSE, SON, DAUGHTER, OR PARENT of the employee, if such spouse, son, daughter, or parent has a serious health condition. <b>(Note:</b> Son or daughter must be under 18, or over 18 but incapable of self-care because of a mental or physical disability.) <b>(See 5 CFR 630.1203(a)(3) and 630.1202).</b>
FMLA to care for a covered servicemember (5 U.S.C. 6382(a)(3)).	26 weeks (1,040 hours) of unpaid leave during a single 12-month period to care for a covered servicemember with a serious injury or illness.	Available to an employee who is the SPOUSE, SON, DAUGHTER, PARENT, OR NEXT OF KIN OF A COVERED SERVICEMEMBER. NEXT OF KIN MEANS THE NEAREST BLOOD RELATIVE of that individual.

## Explanatory Information:

## 1. Leave To Care for Different Individuals Varies by Entitlement:

An employee may take leave to care for different individuals, depending on the applicable entitlement. For example, the definition of *family member* under the sick leave regulations is very broad and includes many more categories of individuals than the nuclear family. In contrast, the FMLA statute and regulations do not use the term “family member” at all; rather they specify specific individuals for whose care an employee may take FMLA leave. The individuals for whom an employee may take FMLA leave to provide care are slightly different depending on whether the leave is the basic 12-week entitlement for the eligible relatives shown in the second-to-last entry above, or the 26-week entitlement to care for a covered servicemember, as shown in the last entry above.

## 2. Sick Leave:

Under 5 U.S.C. 6307, an employee accrues 4 hours of paid sick leave per full biweekly pay period that may be accumulated without limitation. An employee has an entitlement to use his or her accumulated sick leave for self, family care or bereavement, and care of a family member with a serious health condition. No more than a combined total of 12 weeks of sick leave may be used by a full-time employee on a regular tour of duty for general family care, bereavement, or care of a family member with a serious health condition within a leave year. See 5 CFR 630.401(c). Because sick leave is a separate entitlement, an employee does not need to invoke FMLA to use the sick leave entitlement for general family care. Under 5 U.S.C. 6307(d), sick leave may be advanced up to 30 days for a serious disability or ailment, including for care of a family member with a serious disability or ailment. The advancement of sick leave is at the agency’s sole discretion, based upon the exigencies of the situation.

## 3. Basic FMLA Leave (12 Weeks of Unpaid Leave):



TABLE 1—LEAVE FLEXIBILITIES AVAILABLE TO CARE FOR A FAMILY MEMBER AND/OR A COVERED SERVICEMEMBER—  
Continued

Entitlement	Amount and purpose	Individuals for whom leave may be taken
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The Family and Medical Leave Act (FMLA) provisions are found at 5 U.S.C. 6381–6387 and provide a total of either 12 or 26 weeks of unpaid leave, as well as permit an employee to elect to substitute annual leave and/or sick leave, as appropriate, for the unpaid leave. Under the 12-week basic FMLA entitlement (for the birth of a son or daughter of the employee and in order to care for such son or daughter; for the placement of a son or daughter with the employee for adoption or foster care; for the employee to care for his or her spouse, son, daughter, or parent with a serious health condition; for a serious health condition that makes the employee unable to perform the functions of his or her position; for a qualifying exigency arising out of the fact that the spouse, son, daughter, or parent of the employee is on covered active duty or has been notified of an impending call or order to covered active duty in the Armed Forces), an employee can substitute annual or sick leave consistent with the laws and regulations for using annual and sick leave. Therefore, the employee can substitute only as much accumulated and accrued sick leave so that the cumulative amount of sick leave usage does not exceed 12 weeks of sick leave in a leave year.

**4. FMLA Leave To Care for a Covered Servicemember (26 Weeks of Unpaid Leave):**

In contrast to basic FMLA leave, there are no limitations on the amount of sick leave that may be substituted for unpaid FMLA leave to care for a covered servicemember, since the FMLA statute at 5 U.S.C. 6382(d) states that an employee may substitute “any of the employee’s accrued or accumulated annual or sick leave” for any part of the 26-week period of unpaid FMLA leave. Since the statute provides the authority to substitute any of the employee’s accrued or accumulated sick leave for any part of the 26-week period of unpaid FMLA leave, there are no limits to the amount of sick leave that can be substituted for unpaid FMLA leave to care for a covered servicemember.

*Examples of the Interaction Between Sick Leave and FMLA Leave*

*Example I: Interaction of 13 Days of Sick Leave for General Family Care and 12 Weeks of Sick Leave for a Serious Health Condition.* Under the authority for sick leave in §§ 630.401(a)(3)(i), 630.401(a)(4), and 630.401(b), an employee can use 13 days of sick leave each leave year for general family care or bereavement. Under § 630.401(a)(3)(ii) and (c), most Federal employees may use a total of up to 12 administrative workweeks of sick leave each leave year to care for a family member with a serious health condition. Under § 630.401(d), if an employee previously has used any portion of the 13 days of sick leave for general family care or bereavement purposes in a leave year, that amount must be subtracted from the 12-week entitlement. If an employee has already used 12 weeks of sick leave to care for a family member with a serious health condition, he or she cannot use an additional 13 days in the same leave year for general family care or bereavement.

*Example II: Interaction of Sick Leave With Basic FMLA Leave.* As referenced above, sick leave and FMLA are two separate entitlements. An employee has an entitlement to use his or her accrued and accumulated sick leave in addition to invoking FMLA. For example, if an employee takes 12 weeks of sick leave to care for a parent with a serious health condition and then invokes FMLA, the employee has exhausted his entitlement to sick leave to care for a family member with a serious health condition and cannot substitute any sick leave (but may substitute annual leave) for the 12 weeks of unpaid leave under FMLA. In summary, the employee providing care

for a family member is eligible to use a total of 12 weeks of sick leave and then 12 weeks of unpaid leave under FMLA, and may substitute any annual leave for the unpaid FMLA leave.

*Example III: Interaction of Sick Leave With FMLA Leave To Care for a Covered Servicemember.* In contrast to the amount of sick leave which may be substituted for unpaid FMLA leave for the 12-week basic FMLA entitlement, the legislation that authorized the 26 weeks of FMLA leave to care for a covered servicemember includes different provisions regarding the amount of paid leave which can be substituted for unpaid FMLA leave. Under 5 U.S.C. 6382(d), an employee may substitute any of the employee’s accrued or accumulated annual or sick leave for any part of the 26-week period of unpaid FMLA leave to care for a covered servicemember. There are no limitations on the substitution of sick leave as there are for basic FMLA leave. For example, an employee can use 12 weeks of sick leave to care for her son who has been injured in combat and then invoke FMLA leave to care for a covered servicemember and substitute another 26 weeks of sick leave for unpaid FMLA leave. The employee may also substitute annual leave, or request donated annual leave, advanced sick leave or advanced annual leave. In summary, an eligible employee who has the accumulated leave and meets the entitlement requirements for sick leave and FMLA leave to care for the covered servicemember can potentially take leave for up to 38 weeks (12 weeks of sick leave to care for a family member with a serious health condition and 26 weeks of leave to care for a covered servicemember).

*Example IV: Interaction of Basic FMLA Leave and FMLA Leave To Care for a Covered Servicemember.* In our proposed changes to 5 CFR part 630, subpart L (74 FR at 43069, August 26, 2009), we clarified in proposed § 630.1205(b)(1), consistent with DOL regulations, that any leave used under an employee’s 12-week basic FMLA entitlement prior to the first use of leave to care for a covered servicemember does not count towards the “single 12-month period” under § 630.1203(b). For example, on February 25, 2008, an employee invokes her entitlement to basic FMLA leave for the birth of her child. On April 17, 2008, in her 8th week of FMLA leave, she receives word that her husband was seriously injured in the line of duty while on active duty. On April 18, 2008, the employee invokes her entitlement to 26 weeks of FMLA leave to care for a covered servicemember to care for her husband. She is entitled to use up to 26 weeks of FMLA leave during a single 12-month period for this purpose, from April 18, 2008, to April 17, 2009. The time period during which she used basic FMLA leave, from February 25, 2008, to April 17, 2008, does not count toward her 26-week FMLA entitlement to care for a covered servicemember. We note that the employee is not required to invoke her 26-week FMLA leave entitlement immediately. She may delay invoking the 26-week FMLA entitlement until such time as she is needed to provide care for her husband. Once the employee invokes her 26-week FMLA entitlement and begins to care for her husband, the single 12-month period begins. In this example, the employee may choose to first exhaust her full 12-week basic FMLA entitlement for the

birth of a child, and then invoke the 26-week FMLA entitlement to care for a covered servicemember after her husband is released from the hospital and returns home.

*Example V: Importance of the Employee's Relationship With the "Person for Whom Leave May Be Taken."* Since an employee may take leave to care for different individuals depending on the applicable entitlement, it is important to pay close attention to the person for whom the employee is taking leave to care. If the person for whom the employee wishes to care does not meet the criteria set out in statute and regulation, the employee will not have the option of using this type of leave. For example, an employee's fiancé is seriously injured by a roadside bomb. The employing agency may decide, at its discretion, that the fiancé meets the definition of family member for sick leave purposes (based on the clause "any individual related by blood or affinity whose close association with the employee is the equivalent of a family relationship"); therefore, the employee is eligible to use up to 12 weeks of sick leave to care for her fiancé who has a serious health condition. However, this employee does not meet the FMLA definition of an individual who can use the 26-week entitlement to care for a covered servicemember, because coverage is limited to an employee who is the spouse, son, daughter, parent, or next of kin of the covered servicemember. In contrast, if the employee were married to the covered servicemember, she would be entitled to both sick leave and FMLA leave to care for a covered servicemember, as shown in table 1.

*Employee Must Invoke FMLA Leave To Care for a Covered Servicemember To Use the Maximum Amount of Sick Leave*

An agency wanted to know why, under proposed § 630.402(a)(1)(v), agencies may not advance sick leave to care for a covered service member unless the employee has invoked his or her FMLA entitlement to leave to care for a covered servicemember. The agency pointed out that an employee is not required to invoke his or her FMLA entitlement before using sick leave to care for a family member with a serious health condition, and it questioned why an employee is required to invoke his or her FMLA entitlement to care for a covered servicemember.

The proposed regulations do not require an employee to invoke the FMLA entitlement to be advanced sick leave. The proposed regulations at § 630.402(a)(1)(i)–(v) provide that an

agency may grant advanced sick leave in the amount of up to 240 hours to a full-time employee (i) who is incapacitated for the performance of his or her duties by physical or mental illness, injury, pregnancy, or childbirth; (ii) for a serious health condition of the employee or a family member; (iii) when the employee would, as determined by the health authorities having jurisdiction or by a health care provider, jeopardize the health of others by his or her presence on the job because of exposure to a communicable disease; (iv) for purposes relating to the adoption of a child; or (v) for the care of a covered servicemember with a serious injury or illness, provided the employee is exercising his or her entitlement under 5 U.S.C. 6382(a)(3). Although the care of a covered servicemember is only one circumstance that qualifies for the advancement of sick leave, it is the authority that will provide the greatest benefit to the employee.

As referenced in the leave flexibilities table, sick leave is limited to 12 weeks for an employee to care for a family member with a serious health condition. In order for the employee to use additional sick leave, he or she must invoke FMLA to care for a covered servicemember. For example, an employee uses 12 weeks of sick leave to care for her son who has been injured in the line of duty while on active duty and requests additional sick leave to continue to care for her son. At this point, the employee must invoke her FMLA entitlement to care for a covered servicemember to use additional sick leave. By invoking the entitlement, the employee may substitute up to 26 additional weeks of sick leave for unpaid leave under FMLA. If the employee has accumulated and accrued sick leave to cover only a part of the 26-week period, because she has invoked her FMLA entitlement to care for a covered servicemember, she can request advanced sick leave for up to 30 days.

**E.O. 12866, Regulatory Review**

This rule has been reviewed by the Office of Management and Budget in accordance with E.O. 12866.

**Regulatory Flexibility Act**

I certify these regulations would not have a significant economic impact on a substantial number of small entities because they would apply only to Federal agencies and employees.

**List of Subjects in 5 CFR Part 630**

Government employees.

U.S. Office of Personnel Management.

**John Berry,**  
Director.

■ Accordingly, OPM is amending 5 CFR part 630 as follows:

**PART 630—ABSENCE AND LEAVE**

■ 1. The authority citation for part 630 continues to read as follows:

**Authority:** 5 U.S.C. 6311; 630.205 also issued under Pub. L. 108–411, 118 Stat 2312; 630.301 also issued under Pub. L. 103–356, 108 Stat. 3410 and Pub. L. 108–411, 118 Stat 2312; 630.303 also issued under 5 U.S.C. 6133(a); 630.306 and 630.308 also issued under 5 U.S.C. 6304(d)(3), Pub. L. 102–484, 106 Stat. 2722, and Pub. L. 103–337, 108 Stat. 2663; subpart D also issued under Pub. L. 103–329, 108 Stat. 2423; 630.501 and subpart F also issued under E.O. 11228, 30 FR 7739, 3 CFR, 1974 Comp., p. 163; subpart G also issued under 5 U.S.C. 6305; subpart H also issued under 5 U.S.C. 6326; subpart I also issued under 5 U.S.C. 6332, Pub. L. 100–566, 102 Stat. 2834, and Pub. L. 103–103, 107 Stat. 1022; subpart J also issued under 5 U.S.C. 6362, Pub. L. 100–566, and Pub. L. 103–103; subpart K also issued under Pub. L. 105–18, 111 Stat. 158; subpart L also issued under 5 U.S.C. 6387 and Pub. L. 103–3, 107 Stat. 23; and subpart M also issued under 5 U.S.C. 6391 and Pub. L. 102–25, 105 Stat. 92.

**Subpart D—Sick Leave**

■ 2. In § 630.401, remove paragraph (f) and revise paragraphs (a)(3) and (b) to read as follows:

**§ 630.401 Granting sick leave.**

(a) \* \* \*

(3) Provides care for a family member—

(i) Who is incapacitated by a medical or mental condition or attends to a family member receiving medical, dental, or optical examination or treatment;

(ii) With a serious health condition; or

(iii) Who would, as determined by the health authorities having jurisdiction or by a health care provider, jeopardize the health of others by that family member's presence in the community because of exposure to a communicable disease;

\* \* \* \* \*

(b) The amount of sick leave granted to an employee during any leave year for the purposes described in paragraphs (a)(3)(i), (a)(3)(iii), and (a)(4) of this section may not exceed a total of 104 hours (or, for a part-time employee or an employee with an uncommon tour of duty, the number of hours of sick leave he or she normally accrues during a leave year).

\* \* \* \* \*

**§§ 630.402 through 630.406 [Redesignated as §§ 630.404 through 630.408].**

- 3a. Redesignate §§ 630.402 through 630.406 as §§ 630.404 through 630.408, respectively.
- 3b. Add new § 630.402 to read as follows:

**§ 630.402 Advanced sick leave.**

(a) At the beginning of a leave year or at any time thereafter when required by the exigencies of the situation, an agency may grant advanced sick leave in the amount of:

(1) Up to 240 hours to a full-time employee—

(i) Who is incapacitated for the performance of his or her duties by physical or mental illness, injury, pregnancy, or childbirth;

(ii) For a serious health condition of the employee or a family member;

(iii) When the employee would, as determined by the health authorities having jurisdiction or by a health care provider, jeopardize the health of others by his or her presence on the job because of exposure to a communicable disease;

(iv) For purposes relating to the adoption of a child; or

(v) For the care of a covered servicemember with a serious injury or illness, provided the employee is exercising his or her entitlement under 5 U.S.C. 6382(a)(3).

(2) Up to 104 hours to a full-time employee—

(i) When he or she receives medical, dental or optical examination or treatment;

(ii) To provide care for a family member who is incapacitated by a medical or mental condition or to attend to a family member receiving medical, dental, or optical examination or treatment;

(iii) To provide care for a family member who would, as determined by the health authorities having jurisdiction or by a health care provider, jeopardize the health of others by that family member's presence in the community because of exposure to a communicable disease; or

(iv) To make arrangements necessitated by the death of a family member or to attend the funeral of a family member.

(b) Two hundred forty hours is the maximum amount of advanced sick leave an employee may have to his or her credit at any one time. For a part-time employee (or an employee on an uncommon tour of duty), the maximum amount of sick leave an agency may advance must be prorated according to the number of hours in the employee's

regularly scheduled administrative workweek.

■ 3c. Add new § 630.403 to read as follows:

**§ 630.403 Substitution of sick leave for unpaid family and medical leave to care for a covered servicemember.**

The amount of accumulated and accrued sick leave an employee may substitute for unpaid family and medical leave under 5 U.S.C. 6382(a)(3) for leave to care for a covered servicemember may not exceed a total of 26 administrative workweeks in a single 12-month period (or, for a part-time employee or an employee with an uncommon tour of duty, an amount of sick leave equal to 26 times the average number of hours in his or her scheduled tour of duty each week).

■ 4. Revise paragraphs (b) and (c) of § 630.502 to read as follows:

**§ 630.502 Sick leave recredit.**

\* \* \* \* \*

(b) Except as provided in § 630.407 and in paragraph (c) of this section, an employee who has had a break in service is entitled to a recredit of sick leave (without regard to the date of his or her separation), if he or she returns to Federal employment on or after December 2, 1994, unless the sick leave was forfeited upon reemployment in the Federal Government before December 2, 1994.

(c) Except as provided in § 630.407, an employee of the government of the District of Columbia who was first employed by the government of the District of Columbia before October 1, 1987, and who has had a break in service is entitled to a recredit of sick leave (without regard to the date of his or her separation) if he or she returns to Federal employment on or after December 2, 1994, unless the sick leave was forfeited upon reemployment in the Federal Government before December 2, 1994.

\* \* \* \* \*

[FR Doc. 2010-30371 Filed 12-2-10; 8:45 am]

**BILLING CODE 6325-39-P**

**DEPARTMENT OF ENERGY****10 CFR Part 1010**

**RIN 1990-AA31**

**Conduct of Employees and Former Employees; Exemption From Post-Employment Restrictions for Communications Furnishing Scientific or Technological Information**

**AGENCY:** Office of the General Counsel, U.S. Department of Energy.

**ACTION:** Final rule.

**SUMMARY:** The Department of Energy (DOE) today publishes a final rule to establish procedures under which a former employee of the executive branch may obtain approval from DOE to make communications to DOE solely for the purpose of furnishing scientific or technological information during the period the former employee is subject to post-employment restrictions set forth in 18 U.S.C. 207(a), (c), and (d). The final rule also provides a definition of the term "scientific or technological information" that is consistent with the definition provided by the Office of Government Ethics (OGE) in its regulations and for which an exemption is provided by 18 U.S.C. 207(j)(5).

**DATES:** This rule is effective *January 3, 2011*.

**FOR FURTHER INFORMATION CONTACT:** Sue E. Wadel, Deputy Assistant General Counsel for General Law, U.S. Department of Energy, Office of the General Counsel, Mailstop GC-77, Room 6A-211, 1000 Independence Avenue, SW., Washington, DC 20585; (202) 586-1522 or [Sue.Wadel@hq.doe.gov](mailto:Sue.Wadel@hq.doe.gov).

**SUPPLEMENTARY INFORMATION:**

- I. Background
- II. Summary of Rule and Changes to Proposed Rule
- III. Regulatory Review

**I. Background**

On December 1, 2008, the Department of Energy published for comment a proposed rule revising 10 CFR Part 1010 to establish in a new subpart B procedures under which a former employee of the executive branch may obtain approval to make communications to DOE solely for the purpose of furnishing scientific or technological information during the period the former employee is subject to post-employment restrictions set forth in 18 U.S.C. 207(a), (c), and (d). The proposed rule also defined the term "scientific or technological information" used in 18 U.S.C. 207(j)(5) to provide former employees with guidance on the types of communications that would qualify for the exemption from otherwise applicable post-employment restrictions. See 73 FR 72748-72751 (December 1, 2008).

Pursuant to 18 U.S.C. 207(j)(5), former employees of the executive branch of the United States may make communications with an executive branch agency "solely for the purpose of furnishing scientific or technological information," notwithstanding the post-employment restrictions at 18 U.S.C.