OFFICE OF PERSONNEL MANAGEMENT

5 CFR Parts 630 and 752

RIN 3206–AN59

Administrative Leave, Investigative Leave, and Notice Leave

AGENCY: Office of Personnel Management.

ACTION: Final rule.

SUMMARY: The Office of Personnel Management is issuing a final rule on the acceptable uses and proper recording of administrative leave, investigative leave, and notice leave for covered Federal employees. The Administrative Leave Act of 2016 created these categories of statutorily authorized paid leave and set parameters for their use by Federal agencies. OPM prescribes this final rule to carry out the Act and guide agencies regarding these leave categories.

DATES:

Effective date: This final rule is effective on January 16, 2025.

Compliance date: Agencies must issue internal policies consistent with this rule and any applicable collective bargaining obligations no later than September 13, 2025.

FOR FURTHER INFORMATION CONTACT: For matters related to general administrative leave, Bryce Baker by email at *LeavePolicy@opm.gov* or by telephone at (202) 606–2858; for matters related to investigative leave or notice leave, Timothy Curry by email at *employeeaccountability@opm.gov* or by telephone at (202) 606–2930.

SUPPLEMENTARY INFORMATION:

I. Executive Summary

The Office of Personnel Management (OPM) is issuing a final rule regarding the administrative leave, investigative leave, and notice leave provisions of the Administrative Leave Act of 2016.[1] The Act added three new sections in title 5, U.S. Code, that provide for specific categories of paid leave and requirements that apply to each: section 6329a regarding administrative leave; section 6329b regarding investigative leave and notice leave; and section 6329c regarding weather and safety leave.[2]

The Act charged OPM with prescribing regulations to carry out sections 6329a, 6329b, and 6329c and guide agencies regarding these new leave categories no later than 270 calendar days after the Act's enactment on December 23, 2016, *i.e.,* by September 19, 2017. OPM published proposed regulations for all three sections on July 13, 2017,[3] and issued regulations implementing § 6329c, weather and safety leave, on April 10, 2018.[4]

OPM now prescribes a final rule regarding acceptable uses and proper recording of administrative leave to carry out section 6329a, as well as regulations regarding acceptable uses and proper recording of investigative leave and notice leave, baseline factors agencies must consider regarding investigative leave, and procedures for the approval and the extension of investigative leave to carry out section 6329b.

II. Background

Prior to passage of the Administrative Leave Act, there was no specific statutory authority for the use of administrative leave, which is an excused absence without loss of pay or charge to leave. Agencies granted paid excused absences (which they often called ''administrative leave'') to employees based on statutes, like 5 U.S.C. 301–302, that provide heads of agencies broad authority to manage their workforces.

While sections 301–302 do not expressly address excused absence and do not set parameters on its use, some direction on agency discretion to use the excused absence authority was provided in Comptroller General decisions and in past OPM guidance via governmentwide memorandums, handbooks, fact-sheets, and frequently asked questions.[5] In that guidance, OPM provided that the use of administrative leave should be limited to those circumstances in which the employee's absence is not specifically prohibited by law and satisfies one or more of the following criteria: (1) it is directly related to the agency's mission, (2) it is officially sponsored or sanctioned by the agency, (3) it will clearly enhance professional development or skills of the employee in the employee's current position, or (4) it is determined to be in the interest of the agency or of the Government as a whole.

In drafting the Administrative Leave Act, Congress considered an October 2014 report entitled ''Federal Paid Administrative Leave,'' prepared by the Government Accountability Office (GAO) at Congress' request.[6] GAO examined the paid administrative leave policies at five selected Federal agencies.[7] It reviewed practices in recording and reporting of paid administrative leave and described categories of purposes for which large amounts of paid administrative leave have been charged. GAO found that agency policies on administrative leave varied and that some employees were on administrative leave for long periods of time. These periods had significant cost implications. GAO found that the ''predominant reason'' for ''large amounts of administrative leave was personnel matters, which was cited as a reason for paid administrative leave at all five of [the] selected agencies.'' These personnel matters included ''investigations into alleged misconduct, criminal matters, or security concerns as well as settlement agreements, pending adverse actions due to inappropriate behavior, and interim relief.'' These matters concluded in a variety of ways, including ''removal, retirement, resignation, reinstatement of [the] employee, and settlement agreement[s].'' GAO also found variations in agencies' recording and reporting practices with respect to administrative leave and that there was no reliable data on the amount of administrative leave by type of use (*e.g.,* weather and safety reasons, personnel investigation reasons).

GAO concluded that ''Federal agencies have the discretion to grant paid administrative leave to employees to help manage their workforces when it is in their best interest to do so. This discretion is important in ensuring that employees are not placed in dangerous circumstances, have access to professional development opportunities, and are able to participate in civic activities during work hours,'' but that administrative leave should be managed effectively since it is a cost to the taxpayer. GAO made two recommendations: that OPM, in coordination with agencies, (1) develop guidance on which activities to enter, or

[1] Enacted under section 1138 of the National Defense Authorization Act for Fiscal Year 2017 (Pub. L. 114–328, 130 Stat. 2000, Dec. 23, 2016).

[2] In this preamble, references to statutory provisions in title 5, U.S. Code, will generally be referred to by section number without restating the title 5 reference (*e.g.,* section 6329a instead of 5 U.S.C. 6329a). Also, references to regulatory provisions in title 5, Code of Federal Regulations, will generally be referred to by section number without restating the title 5 reference (*e.g.,* § 630.1401 instead of 5 CFR 630.1401).

[3] 82 FR 32263.

[4] 83 FR 15291.

[5] *See, e.g.,* Off. of Pers. Mgmt., ''Fact Sheet: Administrative Leave,'' at *https://www.opm.gov/policy-data-oversight/pay-leave/leave-administration/fact-sheets/administrative-leave/.*

[6] *See* Gov't Accountability Off., ''Federal Paid Administrative Leave,'' Oct. 2014, at *https://www.gao.gov/assets/gao-15-79.pdf.*

[7] The five agencies GAO reviewed were the Departments of Defense, the Interior, and Veterans Affairs, the General Services Administration, and the U.S. Agency for International Development.

not enter, as paid administrative leave in agency time and attendance systems, and (2) provide updated and specific guidance to payroll service providers on which activities to report, or not report, to the paid administrative leave data element in the Enterprise Human Resources Integration database.

Congress extensively cited the GAO report in 2016 House and Senate committee reports regarding draft bills for Federal administrative leave.[8] Those committee reports also included background information on the development of the legislative text that eventually became the Administrative Leave Act. As discussed further, below, while Congress sought to address and better record all forms of paid administrative leave, its primary focus when enacting the Administrative Leave Act was on leave related to misconduct, performance, or other reasons prompting an investigation (as opposed to general administrative leave unrelated to an investigation).

In the sense of Congress provisions in section 1138(b) of the Administrative Leave Act, Congress expressed the need for legislation to address concerns that usage of administrative leave had sometimes exceeded reasonable amounts and resulted in significant costs to the Government. Congress wanted agencies to (1) use administrative leave sparingly and reasonably, (2) consider alternatives to use of administrative leave when employees are under investigation, and (3) act expeditiously to conclude investigations and either return the employee to duty or take an appropriate personnel action. Congress also wanted agencies to keep accurate records regarding the use of administrative leave for various purposes.

As explained in the ''Executive Summary,'' the Act added three new sections in title 5, U.S. Code, that provide for specific categories of paid leave and requirements that apply to each:

- Section 6329a regarding administrative leave;
- Section 6329b regarding investigative leave and notice leave; and
- Section 6329c regarding weather and safety leave.

The Act directed OPM to prescribe regulations to carry out these three sections and guide agencies regarding these new leave categories. Specifically, under section 6329a, OPM is required to prescribe regulations that provide guidance to agencies regarding (1) acceptable uses of administrative leave and (2) the proper recording of administrative leave and other leave authorized by law. Under section 6329b, OPM is required to prescribe regulations regarding (1) the acceptable uses of investigative leave and notice leave, (2) the proper recording of investigative leave and notice leave, (3) baseline factors that an agency must consider when making a determination that the continued presence of an employee in the workplace may pose a threat to the employee or others, result in the destruction of evidence relevant to an investigation, result in loss of or damage to Government property, or otherwise jeopardize legitimate Government interests, and (4) procedures and criteria for the approval of an extension of a period of investigative leave. And section 6329c required OPM to prescribe regulations regarding (1) the appropriate purposes for providing weather and safety leave and (2) the proper recording of weather and safety leave.

The Administrative Leave Act provided that OPM prescribe these regulations no later than 270 calendar days after its enactment on December 23, 2016—*i.e.,* by September 19, 2017. OPM published proposed regulations on July 13, 2017.[9] OPM proposed to add three new subparts to 5 CFR part 630 that correspond to the three new statutory sections in 5 U.S.C. chapter 63: subpart N, Administrative Leave (implementing section 6329a); subpart O, Investigative Leave and Notice Leave (implementing section 6329b); and subpart P, Weather and Safety Leave (implementing section 6329c).

The Act further directed that agencies ''revise and implement the internal policies of the agency,'' to meet the statutory requirements pertaining to administrative leave, investigative leave, and notice leave no later than 270 calendar days after the date on which OPM issues its regulations.[10] There was no similar agency implementation provision in the law governing weather and safety leave.

The 30-day comment period for the proposed regulations ended on August 14, 2017. After consideration of the comments received, and in recognition of the different implementation dates for the new leave categories under the Act, OPM determined that it would better serve agencies if the regulations at subpart P, Weather and Safety Leave, were issued first, separately from the regulations addressing the other leave categories. The regulations on weather and safety leave were published on April 10, 2018, and became effective on May 10, 2018. In that final rule, OPM stated it would delay enforcement of the reporting requirements for weather and safety leave pending this final rule (see 83 FR 15291); accordingly, agencies must begin reporting weather and safety leave not later than 270 days after the date of publication.

The effective date for these regulations addressing administrative leave (subpart N) and investigative and notice leave (subpart O) is 30 days after the date of publication and the compliance date is set as 270 days after the date of publication. This compliance date is consistent with the provisions in sections 6329a(c)(2) and 6329b(h)(2), which require that agencies revise and implement their internal policies consistent with the Act within 270 calendar days from the date OPM prescribes the regulations. That same effective and compliance dates apply to OPM's amendments to §§ 752.404(b)(3) and 752.604(b)(2), which are conforming amendments related to subpart O. Agencies are responsible for compliance with time limits provided for in the Act, these OPM regulations, and any related guidance.

III. Regulatory Amendments and Related Comments

A. Summary of Regulatory Changes

In this final rule, OPM is adding two new subparts to 5 CFR part 630 that correspond to new statutory sections in 5 U.S.C. chapter 63: subpart N, Administrative Leave (implementing 5 U.S.C. 6329a), and subpart O, Investigative Leave and Notice Leave (implementing 5 U.S.C. 6329b).

Administrative leave is permitted—at an agency's discretion but subject to statutory and regulatory requirements—when an agency determines that no other paid leave is available under other law. Under section 6329a(b)(1), an agency ''may place'' an employee on administrative leave for no more than 10 total workdays in any given calendar year.

Investigative leave and notice leave are permitted—at an agency's discretion but subject to statutory and regulatory requirements—when an agency determines that an employee must be removed from the workplace while under investigation or during a notice period (*i.e.,* the period beginning on the date the employee is provided a notice of proposed adverse action and ending on either (1) the effective date of the

[8] *See* House Report 114–520, (Aug. 25, 2016), accompanying H.R. 4359, at *https://www.govinfo.gov/content/pkg/CRPT-114hrpt520/html/CRPT-114hrpt520.htm;* Senate Report 114–292, (July 6, 2016), accompanying S. 2450, at *https://www.govinfo.gov/content/pkg/CRPT-114srpt292/html/CRPT-114srpt292.htm.*

[9] *See* 82 FR 32263.

[10] *See* 5 U.S.C. 6329a(c)(2), 6329b(h)(2).

adverse action or (2) the date the agency notifies the employee that no adverse action will be taken). These two types of leave may be used only when an authorized agency official determines, through evaluation of baseline factors, that the continued presence of the employee in the workplace may pose a threat to the employee or others, result in the destruction of evidence relevant to an investigation, result in loss of or damage to Government property, or otherwise jeopardize legitimate Government interests. Before using these two types of leave, agencies must consider options to avoid or minimize the use of paid leave, such as changing the employee's duties or work location. Use of investigative leave is subject to time limitations and special approvals for extensions.

Both the law and these regulations also address recordkeeping and reporting requirements with which agencies must comply. Agencies must keep separate records on each type of leave provided under the Act: administrative leave,[11] investigative leave, notice leave, and weather and safety leave.

OPM is also making several editorial changes from its proposed regulatory text. In § 630.1504(g), OPM has changed the reference to the Committee on Oversight and Government Reform to the Committee on Oversight and Accountability to reflect the change in the name of the relevant committee in the House of Representatives since the passage of the Act. OPM is also revising its proposed regulatory text to adopt gender neutral language. Finally, OPM is revising the Authority citations for part 752 to comply with 1 CFR part 21, subpart B, without substantive change.

B. Digest of Public Comments

OPM received 78 comments on the proposed regulations from agency representatives (18), unions (7), other organizations (6), and individuals (47).[12] In the next section, we address general or overarching comments on the proposed rule. In the sections that follow, we address comments related to specific proposals.

C. General Comments

Comment re Coding in Payroll System: Multiple commenters requested guidance about how the new types of leave should be coded in the payroll system to accurately account for and track the use of these new leave provisions. An agency questioned the need for a separate category for administrative leave used for investigative purposes and suggested coding such leave as investigative leave.

OPM response: The regulations specify that an agency must track the use of the new categories of leave using five categories: (1) administrative leave for investigative purposes (related to employee conduct, performance, or other reasons prompting an investigation), (2) administrative leave for other purposes, (3) investigative leave, (4) notice leave, and (5) weather and safety leave (published separately at 83 FR 15291).

The two categories related to investigations are necessary because the law bars use of investigative leave under section 6329b until the employee has reached the 10-workday annual limit for administrative leave for investigative purposes under section 6329a.[13] That means that agencies will use an initial period of administrative leave for investigative purposes unless and until that period is exhausted before the provisions of section 6329b apply. This is the reason the type of administrative leave must be separately tracked. The regulations do not address details regarding the coding of leave in agency payroll systems or in OPM's Government payroll databases. OPM will be providing payroll and shared service providers with instructions on how to properly code the various types of leave.

Comment re Leave Reporting: An organization expressed concern that the proposed regulations require agencies only to report on their use of administrative leave and not investigative leave or notice leave. The same organization also expressed concern that having reports prepared by the GAO submitted every 5 years is too infrequent. Instead, the organization stated that agencies should be required to maintain real-time, current tallies of all types of paid leave available on its public website, rather than ''buried in obscure, long, after-the-fact reports.''

OPM response: The commenter is incorrect that the regulations do not require reporting on the use of investigative leave and notice leave. The regulations at § 630.1506(c) require that data on usage of investigative leave and notice leave be included in data reports to OPM. Payroll providers submit payroll data to OPM every biweekly pay period. Thus, agencies and OPM will have greater visibility into administrative, investigative, and notice leave usage, which may be used to generate reports as necessary. The 5-year period for GAO's report is a statutory requirement, which OPM has no authority to change, nor does OPM have the authority to impose on GAO the obligation to submit additional reports to Congress.[14]

Comments re Existing Collective Bargaining Agreements: A union requested clarification that any OPM-issued ''guidance'' does not interfere with the union's bargaining rights or legal obligations in existing collective bargaining agreements. Also, an individual commented that excused absence provided under a negotiated collective bargaining agreement should be excluded from the limits in subpart N.

OPM Response: Statutory and regulatory requirements affect collective bargaining agreements in different ways. To the extent that existing agency collective bargaining agreements contain provisions that are inconsistent with the statutory provisions of the Administrative Leave Act (including sections 6329a, 6329b, or 6329c), the Act supersedes conflicting provisions in agency collective bargaining agreements as a matter of law. Regulations issued pursuant to the Administrative Leave Act, however, cannot nullify the terms of an existing collective bargaining agreement for the duration of the agreement. If an agency collective bargaining agreement is in effect before the date these regulations are prescribed,[15] then any provisions in the regulations (other than those restating statutory requirements which are immediately enforceable) that conflict with the agreement may be enforced only when the current term of the collective bargaining agreement expires (whether or not the agreement is

[11] As described below, this final rule provides for two subcategories of administrative leave: (1) administrative leave for investigative purposes (related to employee conduct or performance) and (2) administrative leave for all other purposes.

[12] OPM received an additional 13 comments that contained personally identifiable information and were removed from *regulations.gov* but OPM still considered them in conjunction with this final rule. Four of the total comments received were neither posted to the docket on *regulations.gov* nor considered in this final rule because they are irrelevant to issues discussed in the proposed rule.

[13] *See infra* Section IV.(B.) regarding OPM's interpretation that the annual 10 workday limitation in section 6329a of the Administrative Leave Act was meant to apply to management-initiated actions to ''place'' an employee on administrative leave, with or without the employee's consent, for the purpose of investigating an employee's conduct or performance that could lead to an adverse personnel action.

[14] *See* section 1138(d)(2) of Public Law 114–328 (5 U.S.C. 6329a (Editorial Notes)).

[15] *See* 5 U.S.C. 7116(a)(7) (explaining it shall be an unfair labor practice for an agency to ''enforce a rule or regulation . . . which is in conflict with any applicable collective bargaining agreement if the agreement was in effect before the date the rule or regulation was prescribed[.]'').

officially reopened for negotiations or is automatically renewed through a rollover provision). But agency collective bargaining agreements that take effect on or after the date these regulations are prescribed must comport with the requirements of this regulation. Any conflicting provisions will be unlawful and may not be enforced. To the extent that provisions in agency collective bargaining agreements are consistent with the Act and accompanying regulations, those provisions remain in effect unless and until the provisions are renegotiated.

Moreover, OPM will issue interpretative guidance relating to these regulations. Any collective bargaining provision reached after the date these regulations are prescribed that conflicts with the regulations would be unlawful and non-negotiable, and, if included in a collective bargaining agreement, unenforceable by the Federal Labor Relations Authority (FLRA or the Authority) or an arbitrator.

Comment re Disciplining Managers: An organization expressed concern that the proposed regulations would not prevent abuse in the form of excessive investigative leave and notice leave, since managers would not be held accountable in a meaningful way for inappropriate use of these types of leave—they do not subject managers who approve excessive leave to discipline and there is no ''down side'' for them in terms of adverse career consequences. The organization stated that such excessive leave affects both the taxpayer and the agency by allowing human resources to be wasted. The organization also expressed concern that excessive investigative leave damages the targeted employee's professional prospects and reputation. For instance, employees can be left in lengthy ''leave-limbos'' without due process protection where they are viewed by management as ''inconvenient, an irritant, or a political threat.''

OPM response: The statute governing investigative leave (section 6329b) established various accountability mechanisms to prevent use of investigative leave beyond specified limits and controls. Those mechanisms include standards on appropriate usage (supplemented by regulations), time limits, approval levels, reports to Congress, recordkeeping, and GAO reviews. OPM notes that, as required by law, these regulations deal with the granting of leave and do not regulate agency decisions regarding investigations or adverse actions.

Although the Administrative Leave Act did not establish time limits for notice leave, notice leave may be used only when an agency has issued a notice of proposed adverse action. Also, agencies must keep records regarding the use of notice leave and those records are subject to review by Congress, OPM, GAO, and other oversight or adjudicative bodies. Data on the use of notice leave can reveal any excessive use that warrants additional scrutiny.

Finally, the regulations are not intended to be a substitute for agencies' own compliance and remedial efforts relating to potential program abuse. But OPM notes that due process protections would not apply to an employee in a paid status because there would be no deprivation of property while on investigative leave or notice leave.

Comment re OPM's Oversight of Agency Practices: An organization commented that OPM's proposed regulations would not place responsibility on OPM to police agency practices with respect to investigative leave and notice leave but would, instead, allow agencies to police themselves. The organization stated that the regulations make no provision for ensuring that agencies establish necessary agency rules or that agency rules are consistent with OPM regulations. The organization suggested that OPM exercise oversight over agency practices.

OPM response: As described above, the Administrative Leave Act authorized OPM to issue regulations dealing with the appropriate uses and proper recording of the new types of leave. Although OPM has a general oversight function, Congress imposed no specific obligation on OPM to monitor or police agency practices with respect to the Act. OPM will take steps, however, to enforce the rules to the extent permitted by resources and consistent with other significant priorities. OPM can and will intervene, for example, if it becomes aware that an agency is not complying with the law and regulations for which OPM is responsible. At the same time, each agency, along with its Inspectors General, is responsible for evaluating agency personnel programs and the actions of its managers. The Act also gave GAO a specific responsibility to evaluate agencies' implementation of investigative leave and notice leave every 5 years.

Comment re Required Hours While Teleworking: One commenter noted the telework-related provisions in the proposed regulations and expressed concern that Federal employees were not performing required hours of work while teleworking.

OPM response: The Telework Enhancement Act of 2010, which built on earlier enactments, specifies roles, responsibilities, and expectations for all Federal executive agencies regarding telework policies, employee eligibility and participation, program implementation, and reporting. Under that statute, each agency is responsible for monitoring whether employees are performing required hours of work while teleworking. These regulations merely recognize the option of telework under authority of 5 U.S.C. chapter 65 and explain how telework relates to the new types of leave.

D. Comments Related to Specific Regulatory Amendments

OPM discusses the regulatory changes to part 630 before turning to conforming changes to part 752.

Amendment to § 630.206(a)

Comment: Three unions, one professional association, and an individual objected to the removal of the provision at § 630.206(a) that agencies traditionally used to excuse employee absences of less than 1 hour. The union and the professional association said there are valid reasons for employee tardiness for which administrative leave should be granted. The union also mentioned the hardship on employees with children in daycare. The union said that agencies should continue to have their current discretion to grant excused absence in any such circumstances. A second union added that it was unfortunate that OPM believes it necessary to remove this provision without any firm data indicating some type of adverse impact. A third union expressed concern about the second approval level now required and believed that removal of the provision is outside the scope of what Congress intended to address with the legislation. The professional association and an individual objected to the change because of the administrative burden. An agency asked if this removes a supervisor's authority to grant 59 minutes of excused absence. Another agency asked if the removal of the provision meant that the authority was now under the new administrative leave regulations. An individual suggested that the administrative leave regulations allow for use of a 59-minute rule without second-level management approval (*e.g.,* to deal with employees who arrive late).

OPM response: The new OPM regulation is not eliminating the possibility of an agency granting administrative leave in appropriate circumstances when an employee arrives late but is simply clarifying the authority under which the agency is

authorizing such administrative leave. There was never clear authority to grant excused absence for leave less than one hour under annual and sick leave statutes. As we explained in the preamble of the proposed rule, § 630.206(a) was not an authority for creating a type of paid time off, but merely recognized the existence of agency authority to provide brief periods of excused absence under Comptroller General decisions. Now that OPM has authority to regulate the use of administrative leave under section 6329a, it is appropriate for this application of administrative leave to be covered under these new regulations.

Since section 6329a is now the exclusive authority for administrative leave for employees covered by title 5, U.S. Code, any excused absence for tardiness should be documented as administrative leave and included in agency reports so that, among other reasons described in this preamble, Congress has complete information about administrative leave. Agencies have discretion under the section 6329a authority to continue to grant administrative leave for these brief periods, if determined to be appropriate.

The preferred action is to continue allowing employees to adjust their stop time under a flexible work schedule within the flexible time bands established by the agency or to use annual or other appropriate leave. OPM recognizes, however, that there may be occasions when an agency believes administrative leave is appropriate. Subject to the principles and prohibitions in § 630.1403, agencies have considerable discretion in granting such administrative leave.

As described further below, these regulations only require a second level of approval to grant administrative leave if an agency head or authorized delegee has not adopted policies that allow first-line supervisors to grant a specified amount of administrative leave in a specifically defined circumstance.

Regarding the administrative burden concern, agencies must account for all hours within an employee's tour of duty, regardless of whether the employee is at work, on leave or leave without pay, using compensatory time off or credit hours, or is absent for any other reason. A decision not to provide administrative leave for absences under 1 hour simply requires application of normal procedures.

Subpart N—Administrative Leave

Section 630.1401—Purpose and Applicability

Comment: One agency asked if the Administrative Leave Act replaced agency authority under 5 U.S.C. 301–302 or if agencies still retain authority to grant administrative leave on matters not addressed in the regulations. An individual asked whether the Administrative Leave Act eliminated, superseded, or replaced the authority in sections 301–302. The individual noted that the limits imposed by the Act would nullify existing collective bargaining agreement provisions on the granting of administrative leave and that agencies may want to continue to use the sections 301–302 authority to preserve those provisions.

OPM response: The statutory language of the Act does not specifically address agencies' preexisting authority in sections 301–302. Section 301 provides in pertinent part that the ''head of an Executive department . . . may prescribe regulations for the government of his department, [and] the conduct of its employees . . . .'' Section 302 authorizes an agency head to delegate the authority ''to take final action on matters pertaining to the employment, direction, and general administration of personnel under his [or her] agency.'' OPM does not regulate agencies' management authority under sections 301–302 (or other statutes that grant agencies similar management authority to grant particular types of leave), so in this final rule OPM does not opine as to what agencies can or cannot do under sections 301–302.

It is OPM's view, however, that section 6329a is the exclusive administrative leave authority for employees covered by title 5, U.S. Code. Section 6329a of the Act defines ''administrative leave'' as leave without loss of or reduction in (1) pay; (2) leave to which an employee is otherwise entitled under law; or (3) credit time for time or service; and ''*that is not authorized under any other provision of law*.'' [Emphasis supplied]. Investigative leave and notice leave are similarly defined, except that investigative leave may only be approved for an employee who is the subject of an investigation (section 6329b(a)(7)), and notice leave may only be approved for an employee who is in a notice period (section 6329b(a)(8)).

The Administrative Leave Act in section 6329a(c)(1) states that the ''Director . . . shall prescribe regulations to carry out this section; and prescribe regulations that provide guidance to agencies regarding acceptable agency uses of administrative leave and the proper recording of administrative leave and other leave authorized by law.'' Under section 6329b(h)(1) of the Act, the ''Director shall prescribe regulations to carry out this section, including guidance to agencies regarding acceptable purposes for the use of investigative leave and notice leave.'' This subsection also provides that OPM shall regulate ''the proper recording'' of investigative leave and notice leave, ''and other leave authorized by law.'' Section 6329c(d) provides similar language regarding appropriate purposes for, and proper recording of, weather and safety leave.

Thus, the Act gives OPM authority to regulate regarding acceptable purposes for using administrative leave, investigative leave, notice leave, and weather and safety leave, and requires OPM to regulate the ''proper recording'' of those types of leave, as well as other leave authorized by law.

As noted above, the specific issue of the continued vitality of other excused absences under sections 301–302 (*i.e.,* other excused absences not defined as a type of administrative leave under the Act) is beyond the scope of these regulations, and we do not address their use in this final rule.

Agencies should be mindful, though, that any such grants may also be subject to internal and external oversight, including scrutiny by the agency Office of the Inspector General, GAO, and Congress, and agencies may have to justify any extraneous uses.

Comment: The individual also asked whether the Act currently impacts collective bargaining agreements and agency policies or if the impact will occur when agencies implement their policies in 270 days.

OPM response: The provisions of the Administrative Leave Act supersede any conflicting provisions in agency policies or a collective bargaining agreement. Once this regulation is prescribed, any new collective bargaining agreement must be consistent with the regulation. Any conflicting provisions in a pre-existing collective bargaining agreement will prevail over regulatory requirements only until such time as the current term of the collective bargaining agreement expires (whether or not the agreement is officially reopened for negotiations or is automatically renewed through a rollover provision). As provided in the Act, agencies must ''revise and implement the internal policies of the agency'' no later than 270 days after related regulations are prescribed so that those policies

conform with the law and regulations.[16] There is no similar delayed agency implementation provision governing weather and safety leave, and thus the weather and safety leave regulations were implemented 30 days after the April 10, 2018, publication date.

Comment: One individual commented that the statutory authority at section 6329a(d) conflicts with the statutory authority at 38 U.S.C. 7421 and asked how OPM would reconcile the two. The same individual asked how 38 U.S.C. 717 applied to proposed §§ 630.1404(a) and 630.1504(a).

OPM response: Chapter 74 of title 38, U.S. Code, applies to personnel of the Veterans Health Administration (VHA), a component of the Department of Veterans Affairs. The statute at 38 U.S.C. 7421 applies exclusively to VHA physicians, dentists, podiatrists, optometrists, registered nurses, physician assistants, expanded-duty dental auxiliaries, and chiropractors. While these employees are, by default, covered by title 5, U.S. Code, leave provisions (since they are ''employees'' under 5 U.S.C. 2105), the Department of Veterans Affairs (VA) may, generally, use the section 7421 authority to exclude them from title 5, U.S. Code, leave provisions and to create alternative leave rules for them. However, in each of the sections 6329a, 6329b, and 6329c, there are provisions requiring VA to apply those sections ''notwithstanding'' the section 7421 authority.[17] The Administrative Leave Act provisions, therefore, apply to VHA employees notwithstanding the section 7421 authority to prescribe leave benefits.

The statute at 38 U.S.C. 717 was enacted via Public Law 114–315, title V, section 503(a)(1) on December 16, 2016, while the Administrative Leave Act was enacted a few days later on December 23, 2016. Under section 717, the Secretary of the VA may not place any covered individual (*i.e.,* those subject to an investigation or who are facing disciplinary action) on administrative leave, or any other type of paid non-duty status without charge to leave, for more than a total of 14 days during any 365-day period.[18] Section 717 also authorizes the Secretary of VA to waive the 14-day limit if the Secretary notifies Congress of the reasons for an extension. That VA employees are covered under a VA-specific administrative leave limitation does not except them from coverage under the Administrative Leave Act. We note that VA employees are covered under the Administrative Leave Act's definition of ''agency'' under sections 6329a(a)(2)(B), 6329b(a)(1)(B), and 6329c(a)(1)(B). Both laws can be applied simultaneously.

Comment: Nine individuals opposed the application of the administrative leave regulations, and particularly the 10-workday calendar year limit, to VA employees. These individuals cited several activities for which they maintained VA granted excused absences in the past, including research, teaching, training, medical education and certification, attending conferences and scientific meetings, travel to other VA stations or Federal agencies for support or educational purposes, conducting grant reviews or serving on panels at other agencies, reporting on VA research findings and models to stakeholders and professional societies, and sabbaticals. The individuals felt that the regulations would seriously impair VA patient care, education, and research efforts and would negatively affect recruitment and retention.

OPM response: Congress specifically provided in the Administrative Leave Act that section 6329a ''shall apply'' to an employee covered by 38 U.S.C. 7421(b), ''notwithstanding subsection (a) of section 7421.'' Through this enactment, Congress required VA employees covered by leave programs established under section 7421(a) to be subject to section 6329a. While these VA employees are covered by the statute, as explained later in this preamble, the annual 10-workday period only applies to administrative leave for investigative purposes. Also, many of the activities cited by the commenters might more appropriately be classified as ''on-duty'' time, which does not require the granting of administrative leave. For instance, if VA determines that research, teaching, grant reviews or other support activities are components of an employee's duties and are justified under agency appropriations, these activities would not require the granting of administrative leave. Likewise, administrative leave is not needed for training, conferences, and meetings that are authorized under sections 4109 and 4110 and the regulations at § 410.404.

However, administrative leave is generally not appropriate for sabbaticals that would provide paid time off for lengthy periods of time. When Congress has sought to allow certain Federal employees to take sabbaticals, it has provided specific authority via legislation.[19] We note that VA may consider whether it can provide sabbaticals under its section 7421 authority to establish ''conditions of employment.'' VA may also consider whether certain sabbaticals qualify as special work assignments rather than as ''leave'' (as can be done with certain assignments made under 5 U.S.C. 3371–3376).

Comment: One commenter believed that VA activities for which excused absence had been granted in the past would no longer qualify because proposed § 630.1403(a)(3) limits the duration of administrative leave to ''not more than 1 workday.''

OPM response: OPM's final rule does not bar leave longer than 1 workday. While § 630.1403(a)(3) states that administrative leave ''is appropriately used for brief or short periods of time—usually for not more than 1 workday'' it specifies that ''[a]n incidence of administrative leave lasting more than 1 workday may be approved when determined to be appropriate by an agency.''

Section 630.1402—Definitions

Comment: The preamble discussion on the proposed § 630.1402 stated that the 5 days of excused absence for employees returning from active military duty granted by the Presidential memorandum of November 14, 2003, is not considered administrative leave. One commenter asked if this meant that the 5 days would no longer be granted or if the 5 days now belong to a separate leave category.

OPM response: The 5 days of excused absence for employees returning from active military duty is authorized by a Presidential directive. As noted in the

[16] *See* sections 6329a(c)(2) and 6329b(h)(2). In the proposed rule, OPM stated that, for the final rule, OPM intended to specify that the regulations for subparts N and O (dealing with administrative leave and investigative/notice leave, respectively) ''will take effect 270 days after publication by specifying a separate 'implementation date.''' 82 FR 33263, 33264.To be clear, the effective date of this final rule is 30 days after publication and the date by which agencies must revise and implement their internal policies to meet the requirements of the Administrative Leave Act and these regulations is 270 days from the date these regulations are published.

[17] *See* sections 6329a(d), 6329b(i), and 6329c(e).

[18] Notably, the 14-day annual limitation on the number of days the VA may ''place'' an employee on administrative leave or other paid non-duty status in 38 U.S.C. 717, enacted days before the Administrative Leave Act, applies only to VA employees who are subject to an investigation to determine whether they should be subject to any disciplinary action under title 38 or title 5 or against whom any disciplinary action is proposed or initiated under title 38 or title 5. *See* 38 U.S.C. 717(c). This further supports OPM's reading that the 10-day annual period in section 6329a(b)(1), limiting the number of days an agency ''may place'' an employee on administrative leave under the Administrative Leave Act was meant to apply to agency-directed administrative leave for investigative purposes, as explained below.

[19] *See, e.g.,* 5 U.S.C. 3151(a)(7), 3396(c); 50 U.S.C. 3610(a)(1)(G).

definition of *administrative leave* in § 630.1402, administrative leave does not encompass leave authorized by Presidential directives. The President is acting under the President's authority under the Constitution; thus, excused absence provided by Presidential directive is leave that is authorized under another provision of law and is excluded from the statutory definition of *administrative leave* in section 6329a(a)(1). Also, section 6329a limits only actions by agencies, not actions by the President. Thus, the 5 days of excused absence authorized by the Presidential memorandum is not administrative leave under section 6329(a)(1) and, as such, these regulations do not affect this entitlement.

Comment: An agency requested clarification on the proper use of administrative leave authorized by Congress or Presidential directive, which the agency said appears inconsistent with the regulatory provision at § 630.1403(a)(2) that administrative leave be granted sparingly. The agency also requested that OPM expressly address other potential uses of administrative leave to aid agencies that will need to renegotiate labor agreements in light of the statutory 10-workday calendar year limit in section 6329a.

OPM response: The definition of *administrative leave* in § 630.1402 excludes paid leave authorized by statutes other than section 6329a and by Presidential directives issued under the President's authority. Therefore, the treatment of leave authorized by other statutes and Presidential directives is excluded from these subpart N regulations.

Comment: One agency said that in sections of the proposed rule, OPM used the term *administrative leave* to refer to investigative leave, notice leave, and weather and safety leave. The agency recommended that OPM redefine *administrative leave* to exclude these other types of leave.

OPM response: Following review of the proposed rule, OPM did not find any instances where the term was used incorrectly. The definition of *administrative leave* in § 630.1402 clearly provides that it applies only to leave authorized under section 6329a and subpart N.

Comment: Three agencies and an individual asked about other paid leave in relation to the regulations—specifically, court leave, bone marrow and organ donation leave, funeral leave, disabled veteran leave, and the 4 hours of excused absence for preventive health screenings for employees with low sick leave balances under Presidential Memorandum of January 4, 2001. Commenters asked whether these types of leave were subject to the 10-workday annual limit under section 6329a.

OPM response: Leave entitlements authorized under other statutes or Presidential directives are not subject to section 6329a and subpart N, so they are not considered administrative leave. Also, as explained below, the 10-day annual limit in section 6329a applies to administrative leave for investigative purposes, not the types of leaves identified in the comments above.

Comment: An agency recommended adding a definition for ''excused absence.''

OPM response: The Act did not define ''excused absence'' and the regulations refer to ''excused absence'' only in the definition of *Presidential directive,* the meaning of which is self-evident. Therefore, OPM is not adding this definition as we do not consider it to be necessary.

Comment: One agency recommended that the definition of *agency* conform to the definition of *agency* in the annual and sick leave regulations.

OPM response: The term *agency* has differing definitions in five other subparts of 5 CFR part 630. Accordingly, OPM has defined *agency* in § 630.1402 based on the statutory definition at section 6329a(a)(2). The definition of ''agency'' specified in the Act must be applied in these regulations. OPM has also clarified the meaning of the term *agency* in the context of describing an authorized agency official empowered to make a determination and take action.

Section 630.1403—Principles and Prohibitions

Comment: One agency commented that the regulations governing agency use of administrative leave are too restrictive and that, without a statutory basis, they specifically target collective bargaining agreements as well as administrative leave used for the benefit of a labor organization. A union objected to the general principles set out in § 630.1403(a)(1), which the union said OPM based on unspecified past OPM policy and guidance and unnamed Comptroller General decisions.

OPM response: The regulations establish parameters for the granting of administrative leave in accordance with appropriations laws and for differentiating administrative leave from on-duty time and other authorized paid absences. The proposed rule at § 630.1403(a)(1) established three criteria where administrative leave is allowed: (1) the absence is directly related to the agency's mission, (2) the absence is officially sponsored or sanctioned by the agency, or (3) the absence is in the interest of the agency or of the Government as a whole. The proposed regulations reflected basic principles consistent with the sense of Congress section of the Administrative Leave Act, which references precedent by the Comptroller General and OPM guidance.[20] There are numerous Comptroller General decisions on administrative leave and excused absence.[21] OPM policy guidance on administrative leave is provided in reference materials by OPM[22] and historically in the former Federal Personnel Manual. The list of allowable criteria in the proposed § 630.1403(a)(1) largely mirrored OPM's longstanding guidance regarding the appropriate uses of administrative leave. OPM's guidance, however, includes a fourth category that was *excluded* from the proposed rule: ''The absence will clearly enhance the professional development or skills of the employee in the employee's current position.'' OPM has decided to add this criterion to the list of allowable uses of administrative leave in the final rule. Its inclusion allows agencies to act consistent with OPM's longstanding guidance and provides the flexibility with which agencies are familiar. OPM will be updating its guidance materials on administrative leave to reflect these regulations.

Comment: Two agencies, three unions, and a professional association commented on the provision at § 630.1403(a)(4) that prohibits agencies from establishing administrative leave as an ongoing or recurring entitlement. One agency said that the provision appeared to be aimed at banning all collective bargaining agreement language that provides for the granting of administrative leave in specified circumstances. Another agency asked if the provision prohibited agency policy from addressing administrative leave for blood donations and voting. Two unions objected on the basis that an employee who qualifies for the administrative leave should receive it regardless of whether the provision of the leave is recurring. One union said that this provision was not needed because birthdays and the day after a Thursday holiday could be listed as a specific prohibited use under paragraph (b) of the section. The union also felt that

[20] *See* section 1138(b)(1) of the Act.

[21] *See e.g.,* Comptroller General decision B 156287, February 5, 1975, at *http://www.gao.gov/products/452029#mt=e-report.* Comptroller General decisions may be found at *http://www.gao.gov/search?advanced=1.*

[22] *See infra* note 5.

requiring leave to be granted on an ad hoc basis would lead to uneven application. The professional association noted that, in its experience, administrative leave for recurring events, like birthdays and in conjunction with holidays, has not been granted to employees with any frequency. In addition, it said that § 630.1403(a)(4) as it pertains to administrative leave in conjunction with holidays is erroneous, in that these are generally granted under the administrative dismissal authority at 5 CFR part 610, subpart C. The association also believed that this section was contrary to the authority of the President to close the Federal government by executive order.

OPM response: The proposed regulations at § 630.1403(a)(4) were not intended to bar recurring use of administrative leave; the intent was to bar establishing a recurring use as an *entitlement.* The plain language of the Act makes clear that the approval of administrative leave is at the agency's discretion, and that such leave is not an entitlement of the employee.[23] OPM's intent was to ensure that agencies retain control of administrative leave and are always able to grant or deny use of such leave based on mission needs. Otherwise, the authority could be used in a manner never contemplated by Congress—to create new open-ended entitlements to ''holidays'' or new types of paid leave entitlements with no agency discretion—an area over which Congress has traditionally asserted control.[24]

OPM appreciates these comments and clarifies that this provision does not prohibit agencies from providing administrative leave on an ad hoc basis or limited basis for a recurring activity that otherwise meets one of the acceptable use criteria. For example, agencies may establish in policy, approved by the agency head, that authorized agency officials may make ad hoc determinations to grant administrative leave for a specified activity (*e.g.,* blood donations or voting). Such a policy might provide that a first-level supervisor can grant, on an ad hoc basis, up to 4 hours of administrative leave to an employee to donate blood in an agency-sponsored drive after determining that such leave is appropriate.

OPM has revised the regulatory language to ensure that it conveys the intended purpose—namely, that (1) administrative leave is not an entitlement, and an agency retains the discretion to grant or not grant administrative leave in any circumstance based on agency judgments regarding mission needs, (2) generally, administrative leave should be granted on an ad hoc, event-specific, or time-limited basis, and (3) there is no categorical prohibition on administrative leave being granted for a recurring event, but rather that it cannot be a recurring entitlement that eliminates agency discretion.

The regulatory language in § 630.1403(a)(4), moreover, does not include separate requirements for recurring events like employee birthdays or holidays. In the preamble to the proposed regulations, OPM stated that agencies should not provide administrative leave for employees' birthdays or the day following a Thursday holiday as a recurring entitlement (that is, with no agency discretion to consider mission needs). As explained above, OPM is clarifying in these regulations that agencies may not use administrative leave to establish recurring entitlements that eliminate agency discretion over granting the leave.

A commenter expressed the view that § 630.1403(a)(4) was contrary to the authority of the President to close the Federal Government by executive order. The President may establish a special holiday under 5 U.S.C. 6103(b). Such a holiday is not a use of administrative leave and is not governed by section 6329a or these regulations.[25]

A commenter also misunderstands the application 5 CFR part 610, subpart C, which applies only to a very small segment of Federal employees paid at daily, hourly, or piecework rates who could not otherwise receive paid time off received by most employees (*e.g.,* on a holiday). It cannot be used as an authority to grant administrative dismissals to other employees.[26]

Comment: Two agencies and a union asked for OPM to clarify whether administrative leave is used for union official time. One agency felt that the regulations specifically targeted administrative leave used for the benefit of a labor organization.

OPM response: Union official time granted pursuant to 5 U.S.C. 7131 is a specific type of work time during which the employee otherwise would be performing the duties of the employee's assigned position, for which grants of administrative leave would not be necessary or appropriate. By definition, *administrative leave* does not include activities that qualify as hours of work (§ 630.1402). Under section 7131, official time is treated as work time for which employees receive basic pay. Section 7131(a) and (c) authorize official time for specific representational purposes. Section 7131(b) prohibits official time for internal union business. And section 7131(d) provides authority for an agency and exclusive representative to negotiate official time for any other matter covered by 5 U.S.C. chapter 71 and which they agree to be reasonable, necessary, and in the public interest. Finally, payroll systems already have separate payroll codes for the various categories of official time, which are not impacted by these regulations. Therefore, agencies have sufficient authority to provide official time for use by representatives of a labor organization.

Finally, these regulations do not target any particular use or use by any group. Rather, they are designed to comply with statutory requirements and to implement Congress' intent as to what comprises the acceptable uses of administrative leave.

Comment: One agency and two individuals were concerned with the impact of the regulations on settlement agreements. The agency noted that it made extended administrative leave substitutions on timekeeping records pursuant to orders, settlements, and agency decisions. One individual stated that excused absence under a third-party settlement agreement should be excluded from the limits under subpart N.

OPM response: As a general principle, settlements must comport with applicable law and regulation. They may not include provisions that provide aspects of relief that the agency is not free to grant under applicable law. If an agency determines, on a prospective basis, that it is appropriate to use administrative leave under section 6329a as part of a settlement agreement, such use will be subject to its statutory conditions and regulatory requirements. If other statutory authorities are relied on to grant paid nonduty status on a prospective basis as part of a settlement agreement, then the paid nonduty status is not considered to be administrative leave under section 6329a.

A retroactive period of paid nonduty status may be provided under the Back Pay Act (section 5596) or under a settlement under that law. Such a period of paid nonduty status does not

[23] *See* section 6329a(b)(1), stating that an agency ''may'' approve administrative leave.

[24] Congress has the authority to establish recurring entitlements to paid time off in law (*e.g.,* paid holidays under chapter 61 or various types of paid leave under chapter 63), and, thus, the creation of new recurring paid time off entitlements should be reserved to Congress.

[25] *See* the definition of administrative leave under § 630.1402.

[26] *See also* section 6104.

constitute administrative leave under section 6329a since it is not ''leave'' and is authorized by operation of another law. Retroactive salary payments to cover a period of erroneous separation are a correction of an erroneous personnel action that is authorized under the back pay law. These payments would be included under the definition of ''pay, allowances, and differentials'' in § 550.803 (pay, leave, and other monetary employment benefits to which an employee is entitled by statute or regulation). They are payments for nonwork periods authorized by the back pay law, not a use of discretionary administrative leave, and should not be designated as administrative leave in timekeeping records.

Comment: One individual commenter argued that agencies should not grant administrative leave prior to a holiday.

OPM response: Administrative leave is an agency discretionary authority; therefore, each agency makes determinations regarding when and for what purposes (including as a goodwill gesture to address employee morale) it provides administrative leave. The regulations at § 630.1403 set out certain principles and prohibitions on use of administrative leave but do not otherwise restrict agencies from exercising their discretionary authority in granting this leave. OPM is adding a new paragraph (6) in § 630.1403(a) that lists factors agencies are required to consider as they develop policies and make case-specific decisions regarding the use of administrative leave. Consideration of these factors, in combination with guiding principles, will help agencies exercise their discretion with respect to administrative leave in a prudent manner.

Comment: Two unions opposed the provision at proposed § 630.1403(a)(3) that states administrative leave is appropriately used for brief or short periods of time. One of the unions stated that the duration should be at the agency's discretion or as provided under negotiated policies. Both unions recommended that OPM remove the provision so as not to mislead agencies on Congressional intent.

OPM response: The ''Sense of Congress'' provisions at section 1138(b)(2) of the Administrative Leave Act explicitly state that ''administrative leave should be used sparingly.'' At section 1138(b)(1)(A), Congress recognized the ''established precedent of the Comptroller General'' and ''guidance provided by the Office of Personnel Management'' as having provided appropriate and reasonable standards for Governmentwide administrative leave policy. Numerous Comptroller General decisions have held that administrative leave should be granted only for brief periods of time. This has been OPM's longstanding policy as reflected in its historical guidance and its public fact sheet on administrative leave. OPM notes that while § 630.1403(a)(3) states that administrative leave is appropriately used for brief periods of time, it also permits agencies the ability to approve longer periods when appropriate, at their discretion. This caveat is described further, below, with regard to agency-specific policies established by the head of an agency.

Comment: An individual recommended that employees be permitted to use administrative leave for voluntary community service.

OPM response: OPM does not believe that the proposed § 630.1403(b)(4) would have barred administrative leave for voluntary community service. It provided that such administrative leave was permitted if it was officially sponsored or sanctioned by the head of the agency based on the agency's mission or Governmentwide interests, which ties these provisions with the general principles in § 630.1401(a)(1). As explained previously, however, OPM will include a fourth category to the general principles in § 630.1403(a)(1) that was excluded from the proposed rule: the absence will clearly enhance the professional development or skills of the employee in the employee's current position. The inclusion is consistent with OPM's longstanding guidance. OPM also is not adopting the proposed prohibition in § 630.1403(b)(4), since it is unnecessary; the requirements to satisfy one or more of the general principles in § 630.1401(a)(1) and to operate under approved agency policies is sufficient to prevent inappropriate use of administrative leave in community service situations.

Comment: Another individual commented that the regulations should discuss scenarios where administrative leave is not needed because employees are considered to be on duty time. A second commenter recommended that OPM add guidance that sets parameters on the granting of administrative leave for holiday parties, employee recognition days, and similar infrequent social events. A union commented that OPM should note that on-duty activities such as award ceremonies and training can be voluntary in nature.

OPM response: Certain activities occurring during an employee's work hours are generally considered on-duty events for which administrative leave does not apply. These include agency-sponsored events (*e.g.,* award ceremonies), employee human resources matters, management-approved team-building activities (*e.g.,* holiday social gatherings), and training, conferences, and meetings that are authorized under sections 4109 and 4110 and the regulations at § 410.404. At the agency's discretion, attendance at these on-duty activities can be voluntary. Other activities, although they occur during employee work hours, are generally not considered on-duty activities. For example, activities related to employee wellness and health generally are not considered as duty time; however, longstanding policy reflected in Comptroller General decisions is that the agency interest in employee health justifies use of brief periods of administrative leave for these activities. Agencies will retain discretion in determining whether certain activities are on-duty events for purposes of implementing the Administrative Leave Act and this final rule.

Comment: A union believed that dual status employees should receive administrative leave for required military medical examinations and the diagnosis and treatment of medical conditions caused or aggravated by military service.

OPM response: If the employing agency determines that this is an appropriate use under the general principles at § 630.1403(a), it has the discretion to grant administrative leave.

Comment: One agency stated that the administrative leave definition should exclude leave for Federal employees stationed overseas when they observe foreign holidays. The same agency asked whether administrative leave may still be provided for rest and recuperation (R&R).

OPM response: OPM has no authority under laws it administers to authorize paid time off for local holidays in foreign areas beyond the holidays provided under section 6103. An agency may, however, use the administrative leave authority in section 6329a if it determines the circumstances comply with the OPM regulations. For example, under § 630.1403(a)(4) in this final rule, an agency must retain the discretion to grant or not grant administrative leave in any particular circumstance based on agency judgments regarding mission needs. An agency cannot, therefore, create a paid holiday in a foreign area as an absolute entitlement. We expect that agencies with employees in foreign areas will determine whether to grant administrative leave in connection with a foreign holiday to some or all employees on a case-by-case basis. If

there is a safety-related basis for the time off, use of weather and safety leave may be appropriate. Agencies may also continue to provide administrative leave for R&R if the employing agency determines that this is an appropriate use under the general principles at § 630.1403(a).

Comment: Three agencies and a union sought clarification on physical fitness activities during duty hours. One of the agencies and the union recommended that physical fitness be classified as an on-duty activity and not require the granting of administrative leave. One agency asked if long-term physical fitness activities would be prohibited as a recurring activity under § 630.1403(a)(4). Two of the agencies were concerned that the limitation on administrative leave would have a negative effect on wellness programs, with one agency stating that the limitation would significantly affect participation in agency-sanctioned and administered physical fitness activities. The same agency also requested that OPM clarify the application of this rulemaking on employees who have physical fitness requirements in connection to their position; *i.e.,* military technicians of the Reserves and National Guard who must maintain military membership as a condition of employment of their civilian position. The union recommended that these dual status employees be authorized to engage in voluntary physical training as official hours of work.

OPM response: Agencies, at their discretion, may permit employees with job-related fitness requirements (such as law enforcement officers) to participate in physical fitness programs while on duty. For other employees, physical fitness activities should normally be performed outside of duty hours unless an employee is using annual leave. When covered by a flexible work schedule, an employee may be able to shift work hours to create mid-tour breaks during which physical fitness activities may be performed. If an agency determines it is appropriate to provide administrative leave for brief periods of physical fitness activities for a limited time, it may grant such administrative leave on an ad hoc basis.

The Comptroller General has found that ''official duty time'' for physical fitness activities is appropriate only for employees covered by a mandatory physical fitness program due to the strenuous nature of the position.[27] That decision indicated that administrative leave was inappropriate for other employees in the absence of supporting guidance from OPM. OPM later issued guidance to recognize that short periods of excused absence (by definition, not ''duty'' time) could be provided to employees in positions without mandatory physical fitness requirements.[28] All administrative leave granted under section 6329a, including that which is granted for fitness programs, would have to be recorded and reported, as described below.

Comment: An agency asked if the regulations will impact the 24 hours an agency grants for a Permanent Change of Station (PCS). The agency also asked if the 10-workday limit impacts administrative leave granted to new hires as a relocation incentive.

OPM response: Employees on approved house-hunting trips under chapter 302, subpart C, of the Federal Travel Regulations are in duty status and do not require administrative leave.[29] Also, as explained below, the 10-workday limit in section 6329a does not apply to this type of leave.

Comment: One union requested that OPM eliminate the requirement in proposed § 630.1403(a)(5)(i) that administrative leave be permitted under policies established by the head of the agency and instead require only that administrative leave be permitted under ''written agency policies.'' The union said that the definition of *head of the agency* is unclear and overly restrictive, noting its application to Department of Defense subordinate departments.

OPM response: OPM does not consider the definition of *head of the agency* in § 630.1402 to be unclear. *Agency* is defined in that section as meaning an Executive agency as defined at 5 U.S.C. 105. Under the statute, *Executive agency* means an ''Executive department, a Government corporation, and an independent establishment.'' The Executive departments are set out at 5 U.S.C. 101 and include the DoD. Therefore, under the regulations, administrative leave policies for subordinate departments under the DoD, or any other agency, must remain within the discretion of the agency and must be established (or approved) by the head of the agency to help prevent abuse and to address Congressional concerns about inappropriate use of administrative leave. Agency heads are directly accountable for agency administrative leave policies. This regulation does not mandate how specific the agency top-level policy is and does not preclude subordinate organizations from making more specific policies under a delegation of authority. Those agency head policies may include general principles as well as specific rules. An agency head may delegate authority to lower-level officials to establish more specific policies if they are consistent with the agency head's overarching policies. To assist agencies in developing appropriate policies on use of administrative leave, OPM is adding a new paragraph (6) in § 630.1403(a) that lists factors agencies are required to consider.

Comment: Five agencies, a union, and an individual expressed concerns with proposed § 630.1403(a)(5)(ii), which provides that a determination to grant administrative leave for an absence must be reviewed and approved by an agency official higher than the official making the determination (unless there is no higher-level official). The agencies felt that this requirement diminished the authority of first-level supervisors, who they believed should be able to grant administrative leave for specific situations, such as blood donations or for occasions where less than an hour is needed. Two agencies and the union said a second level of review should not be needed where administrative leave is provided under agency policy. One agency believed the second level of review to be an administrative burden and recommended that heads of agencies have the authority to delegate further, such as to the heads of installations. Another agency said that the requirement would be time consuming for second-level officials, particularly for routine events. The union expressed concern that the second level of approval would cause administrative delays to the detriment of the employee, especially when the second-level official is not in the same building or there is a time zone difference. The union also said it was unaware of any evidence showing administrative leave abuse not related to investigations and concluded that the requirement for second-level review was unnecessary and inefficient. The individual suggested allowing agencies to determine the appropriate procedures and level of review.

OPM response: As explained above, agencies may establish policies, approved by the head of the agency (or the agency head's delegee), that provide specific circumstances (blood drives, voting, etc.) in which supervisors may grant a stated amount of administrative leave to employees without the need for

[27] *See e.g.,* Comptroller General decision B–218840, Sept. 6, 1985, 64 Comp. Gen. 835 at *http://www.gao.gov/products/438969#mt=e-report.*

[28] *See e.g.,* subchapter 11 of FPM Chapter 630, Sept. 23, 1991, and FPM Letters 792–15, April 14, 1986, and 792–23, June 25, 1992.

[29] *See* 41 CFR 302–5.17 and Comptroller General decision B–203196, Feb. 3, 1982.

second-level review. OPM is revising the regulations to make clear that second-level approval is not necessary when a specific type of use and amount of administrative leave is permitted under agency head policies or supplemental policies issued by agency officials with specific delegated authority. At the same time, to support prudent use of administrative leave, OPM is adding a new paragraph (6) in § 630.1403(a) that lists factors agencies must consider in developing policies on use of administrative leave.

Comment: An agency asked what the intent is for the prohibition on administrative leave use for personal benefits in proposed § 630.1403(b)(2) and whether it precluded agencies from providing administrative leave for other purposes.

OPM response: The proposed § 630.1403(b)(2) would have barred administrative leave to participate in an event for the employee's personal benefit or the benefit of an outside organization; however, there was an exception to the bar based on a determination that the employee's participation would satisfy one or more of the general principles in § 630.1401(a)(1). As explained above, however, OPM is adding a fourth category to § 630.1403(a)(1) that is excluded from the proposed rule: the absence will clearly enhance the professional development or skills of the employee in the employee's current position. We are therefore not adopting the proposed prohibition in § 630.1403(b)(2), since it is unnecessary and arguably inconsistent with the additional acceptable use in § 630.1403(a)(1). The requirement to satisfy one or more of the general principles in § 630.1401(a)(1) and to operate under approved agency policies is sufficient to prevent inappropriate use of administrative leave in situations that provide a personal benefit to an employee or benefit an outside organization.

Comment: One agency objected to the prohibition in proposed § 630.1403(b)(3) against granting administrative leave to recognize the performance or contributions of employees. The agency felt that this provision limited an agency's ability to recognize its high performers in a cost-effective manner.

OPM response: The provision at proposed § 630.1403(b)(3) prohibits an agency from granting administrative leave as a reward to employees but does not limit the agency's ability to grant time off as a reward under other legal authority. As OPM noted in the preamble of the proposed rule, the proper personnel authorities for recognizing the performance or contributions of employees are cash awards and time-off awards (*e.g.,* under section 4502(e) and 5 CFR 451.104).

Comment: Another agency commented that the regulations will necessitate a change in the timekeeping for 10-month faculty at an academy as their two non-working months were recorded as administrative leave.

OPM response: OPM agrees; these employees are in an off-duty paid status, not on administrative leave. The agency will need to work with its payroll provider for the appropriate coding under the timekeeping system.

Section 630.1404—Calendar Year Limitation

Comment: A union asked for clarification on whether the calendar year for purposes of applying the 10-workday limit for placement on administrative leave is January 1 to December 31 or is 12 consecutive months from any day during the year. Two agencies recommended that, for consistency, administrative leave be tracked by the year used for other leave purposes. An individual said that all other leave (except military leave) is based on the leave year and that using a calendar year for administrative leave would be difficult. The individual recommended using the leave year or payroll calendar year. The same individual asked if a period of administrative leave that continues into another year counts toward the 10-workday limit for the new year. Another individual asked that OPM consider using a rolling year instead of a calendar year. Another commenter suggested that OPM's proposed rule, applying the 10-workday limitation to all administrative leave was incorrect and that it should only apply to administrative leave for investigative purposes.

OPM response: First, OPM agrees that the 10-workday limitation in section 6329a of the Administrative Leave Act does not apply to general uses of administrative leave, but instead was meant to apply to management-initiated actions to ''place'' an employee on administrative leave, with or without the employee's consent, for the purpose of investigating an employee's conduct, performance, or other reasons prompting an investigation that could lead to an adverse personnel outcome. OPM is therefore modifying this aspect of its proposed rule.

Section 6329a states that: ''During any calendar year, an agency may place an employee in administrative leave for a period of not more than a total of 10 work days.'' [30] The language—''an agency may place''—suggests that the action to put the employee in administrative leave status is initiated and controlled by management, with or without the employee's consent. Indeed, this is the same language that Congress used to describe an employee being in investigative leave or notice leave.[31] It is plainly not the language that Congress used throughout 5 U.S.C. chapter 63 to describe other types of leave. Instead, chapter 63 uses the more obvious ''grant,'' and it does so with respect to multiple types of leave.[32] Also, there is a direct connection to the 10-workday annual limit in the law governing investigative leave in section 6329b. Section 6329b(b)(3)(A) bars use of investigative leave until the ''expiration of the 10 workday period described in section 6329a(b)(1).'' This connection supports the conclusion that the 10-workday annual limit was intended to cover the same investigations as those described in section 6329b, not more general uses of administrative leave.

Moreover, interpreting the 10-workday annual limit as applicable to more general uses of administrative leave could lead to illogical results. Take, for example, an employee who in January is placed on 10 days of administrative leave for investigatory purposes. After those 10 days, the agency determines that there is no need to place the employee on investigative leave and the employee returns to her normal work status. If the 10-day annual limitation applies to general uses of administrative leave, then, for the remainder of the year, the employee would never be able to use administrative leave—not for voting, or a blood drive, or a COVID vaccine, or any other plainly acceptable and appropriate use—because the employee had already been placed on administrative leave for investigatory purposes. OPM does not believe that Congress intended such a nonsensical result.

This understanding of the 10-workday limitation on administrative leave—that

[30] Section 6329a(b)(1) (emphasis added).

[31] Section 6329b(b)(1) (''An agency may . . . place an employee in investigative leave if the employee is the subject of an investigation; [or] notice leave if the employee is in a notice period.); Section 6329b(b)(2) (''An agency may place an employee in [investigative leave or notice leave] only if the agency has [identifying conditions]'').

[32] *See, e.g.,* section 6302(d) (''The annual leave . . . may be granted at any time during the year''); section 6305 (''After 24 months of continuous service . . . an employee may be granted 24 months [of home leave]); section 6310 (''The head of the agency concerned may grant leave of absence . . . to alien employees''); section 6323 (''[Military leave] granted . . . shall not exceed 22 work days.'').

it only applies to agency-directed placement on administrative leave for investigative purposes—not only is firmly grounded in the statutory text and structure but is also consistent with and supported by the legislative history. The House and Senate Reports indicate that the Administrative Leave Act was primarily created in response to concerns about abuse related to disciplinary proceedings. Both Reports heavily cite the 2014 GAO report specifically focused on these types of abuses. The main impetus for the Act was to address (1) inconsistent use of administrative leave among agencies and excessive use of administrative leave while conducting misconduct and disciplinary proceedings and (2) inconsistent recordkeeping which made oversight of administrative leave difficult.

The legislative history evolved over time but remained focused on administrative leave relating to employee performance, conduct, and other reasons that would prompt an investigation.

The House Report stated that H.R. 4359 ''creates a standard process for the use of administrative leave in cases of misconduct and poor performance, which will help curb the overuse of administrative leave within the federal government.'' It explained that, under the bill, Federal employees could not be placed on administrative leave for more than 14 days during any year for misconduct or poor performance. The House bill's ''rules of construction'' emphasized this point, saying ''nothing in the amendment shall be construed to . . . limit the number of days that an employee may be placed on administrative leave, or any other paid non-duty status without charge to leave, for reasons unrelated to misconduct or performance.''

The Senate Report on S. 2450 cited OPM administrative leave guidance, including the four acceptable factors for granting administrative leave, but did so as background and was not critical of this guidance or the factors. The Senate bill's time cap focused on limiting an agency from placing an employee on administrative leave for a period of more than 5 *consecutive* days and addressed sections 301–302, but only to say that the authority could not be used to get around this consecutive-day limitation. It also stated that agencies should not circumvent the consecutive-day cap by putting an employee on leave, taking them off, and putting them back on again. Ultimately, the language regarding the 5-day consecutive period and the reference to sections 301–302 did not make it into the final statutory language of the Administrative Leave Act. But the Senate bill's 5-day (consecutive) cap was focused on investigation-related administrative leave.

The structure of the statutory language in section 6329a—''During any calendar year, an agency may place an employee in administrative leave for a period of not more than a total of 10 work days''—resembles the language in the Senate bill: ''An agency may place an employee in administrative leave for a period of not more than 5 consecutive days.'' As explained further, below, section 6329b(b)(3) references this 10-day period, stating ''Upon the expiration of the 10 work day period described in section 6329a(b)(1) with respect to an employee, and if an agency determines that an extended investigation of the employee is necessary, the agency may place the employee in investigative leave for a period of not more than 30 work days.'' The Senate bill, S. 2450, regarding ''investigative leave and notice leave'' proposed a similar clause relating to investigative leave titled ''Duration of leave,'' which states that, ''Subject to extensions of a period of investigative leave for which an employee may be eligible . . ., the initial placement of an employee in investigative leave shall be for a period not longer than 10 days.'' Under S. 2450, if additional time was necessary after the ''initial placement,'' the employee could then be placed on extended investigative leave. This parallel structure further supports the position that the 10-day period in section 6329a was meant to apply to administrative leave for investigative purposes and that, at the expiration of that ''initial placement,'' if necessary, the employee would be placed on a period of investigative leave.

In sum, the best reading of the relevant 10-day provision, based on the text, structure, and legislative history, is that it applies only to agency-directed placement on administrative leave for investigative purposes, including prior to placement on investigative leave, but excluding placement on general administrative leave related to other allowable uses. Accordingly, we are revising the proposed regulations in §§ 630.1404 and 630.1504(a). As part of the revisions, we are clarifying that the bar in section 6329b(b)(3)(A)—under which investigative leave may not be used unless the 10-workday annual limit has first been met—applies only to the placement of an employee on an *initial period* of investigative leave. The bar does not apply to an extension of investigative leave under section 6329b(c) (regulated in § 630.1504(f)) or a further extension of investigative leave under section 6329b(d) (regulated in § 630.1504(g)). Thus, for example, if a particular investigation of an employee begins in one calendar year and is extended or further extended in the next calendar year, there is no requirement to use 10 workdays of administrative leave for investigative purposes before approving an extension in the next calendar year.

Section 6329a(b)(1) also requires that the ''calendar year'' be used for this purpose, which in common usage is January 1 to December 31. OPM does not believe that any other period was intended by Congress. Because OPM has determined that the 10-workday annual limit applies only to administrative leave for investigative purpose, such administrative leave counts only against the 10-workday limit in the year it is used. For example, a six-day continuous period (excluding non-workdays) of administrative leave split evenly over the end of 2024 and the beginning of 2025 would have 3 days applied to each year's limit.

Comment: Three agencies, one union, and one individual opposed the requirement in proposed § 630.1404(a) that administrative leave used in different agencies must be aggregated so that an employee can be placed on administrative leave for no more than 10 workdays across agencies. One agency and the union said that the requirement to aggregate is not contained in the law. The union believed that, if Congressional intent was that this leave should be aggregated, the law would have stated the requirement differently. The union said that Congress clearly wrote the law to cover only an individual agency. One agency commented that the regulation imposes an unnecessary reporting and tracking requirement. Another agency said the requirement places an administrative burden on the new agency. A third agency noted that employees who reached their administrative leave limit because of an investigation, even though cleared, could not be granted administrative leave at the new agency. The individual believed that OPM's interpretation places an undue restriction on agencies that hire an individual who already reached the 10-day cap at the individual's former agency.

OPM response: As explained above, OPM reads section 6329a(b)(1) as applying the 10-workday annual limit only to administrative leave in which an employee is placed for investigative purposes. Because of this determination, OPM agrees that the annual limit applies on a per-agency basis.

Otherwise, the result would not track the intent of Congress and the purpose of the statute, as it would mean that one agency may place an employee on 10 days of leave pending an investigation; but, if the employee moves to another agency, then the second agency would not have the 10 days available within the same calendar year if needed. The 10-workday annual limit was intended to allow an agency to remove an employee from the workplace in the initial stages of an investigation without having to invoke the additional procedures in section 6329b. The annual count should therefore reset when an employee moves to another Federal agency. OPM is revising § 630.1404 to make clear that the 10-workday annual limit separately is applied to each agency that employs the employee during a calendar year. OPM is not adopting proposed paragraphs (c) through (e) of § 630.1404, since those paragraphs were based on the prior interpretation that the 10-workday annual limit applied to all types of administrative leave. Also, OPM is not adopting proposed § 630.1407, which would have imposed special recordkeeping and reporting requirements for employees who transferred or separated from an agency so that a gaining agency employing the employee in the same calendar year would be able to apply the 10-workday annual limit on administrative leave. With OPM's revised reading of the 10-workday limit and its application to employees transferring agencies within a calendar year, this section is no longer applicable.

Comment: An individual asked, in relation to the conversion of days to hours in proposed § 630.1404(b), how to determine the limit if part-time employees change their schedule in the middle of a period of administrative leave. The commenter also asked how to calculate the limitation if the change is retroactive.

OPM response: Under this final rule, the 10-workday annual limit applies only to administrative leave for investigative purposes. While that narrows the affected population of employees, there remains a need to address the calculation of days for employees in that population who have part-time or uncommon tours of duty. The proposed regulations on the 10-workday annual limit did address such employees but did not address the scenario of an employee switching to a different type of work schedule during the calendar year. OPM is adding a new paragraph (b)(4) in § 630.1404 to provide a methodology for addressing this scenario. In general, the methodology requires converting hours of administrative leave for employees on part-time or uncommon tours of duty to their equivalent value for an employee on a full-time tour. Then the actual hours of administrative leave used as a full-time employee and the converted hours of administrative leave used as a part-time or uncommon tour employee can be summed together and the resulting sum would be applied against the 80-hour limit for full-time employees. This can be done on a retroactive basis, where the result could mean that the employee's placement on administrative leave for investigative purposes has met or exceeded the limitation and any additional leave for investigative purposes would have to comply with the requirements of section 6329b.

OPM is also adding a new paragraph (j)(4) in § 630.1504 (dealing with the 30-workday and 70-workday limits associated with investigative leave) to address the same scenario of changing work schedules by incorporating the same methodology used in § 630.1404(b)(4).

Comment: Two unions, four agencies, and two individuals opposed the requirement in proposed § 630.1404(d) that agencies must first exhaust an employee's 10-workday limit on administrative leave before placing the employee on investigative leave. One union commented that there is no requirement in the Administrative Leave Act to first exhaust the limit on administrative leave. Both unions and two agencies noted that an employee placed on investigative leave, even though cleared during the investigation, could no longer be granted administrative leave for the remainder of the calendar year. An individual similarly thought the requirement was unfair. Another individual said there was no explanation for why administrative leave must be exhausted before investigative leave is used but not before notice leave is used. An agency said that the requirement is confusing, will be difficult to administer, and has no added value.

Additionally, a professional association said that the Act only specifies a 10-day cap on administrative leave with regard to investigative leave. The association believed the imposition of a 10-day cap on all administrative leave by the regulations would inhibit meetings between agency leaders and professional associations. Another agency asked that OPM clarify how it is not enforced leave when an agency is required to place an employee in nonpay status when the 10-workday cap is exhausted and the employee is not able to work or use leave during new administrative leave events.

OPM response: Section 6329a(b)(1) of the Administrative Leave Act specifies that an agency may not ''place'' an employee on administrative leave for more than 10 workdays per calendar year. Section 6329b(b)(3)(A) expressly requires that the 10-workday period of administrative leave be exhausted before an employee can be placed in investigative leave. (There is no similar requirement regarding notice leave.) In OPM's proposed regulations, we interpreted the 10-workday annual limit in section 6329a as applying to all types of administrative leave. Based on comments received and further analysis, we have revised our reading of this section, as explained elsewhere in this preamble. These regulations provide that the 10-workday annual limit applies only to administrative leave in which an employee is placed for purposes of an investigation of an employee's conduct, performance, or other reasons prompting an investigation. We conclude that the purpose of the 10-workday annual limit is to allow an agency to commence an investigation expeditiously without the additional requirements that follow in section 6329b. This revised reading addresses various concerns raised by the commenters. For example, and as explained above, this revised reading avoids situations where employees placed on administrative leave and later cleared of any wrongdoing following an investigation are deemed nevertheless to have exhausted their available annual allotment of administrative leave.

Comment: An agency stated that the requirement to place an employee in a leave without pay (LWOP) status may be appealed by the employee as a ''constructive suspension'' if the employee did not request it.

OPM response: As explained above, OPM has revised its interpretation of section 6329a to clarify that the 10-workday annual limit only applies to administrative leave for investigative purposes. This change should address the agency's concern regarding scenarios that could lead to LWOP status, since such a status will not be triggered by the effects of these regulations. *Comment:* An agency asked if there is an exception to the 10-workday limitation that would allow employees more time to participate in Employee Assistance Program (EAP) services.

OPM response: As explained above, OPM has revised its interpretation of section 6329a to clarify that the 10-workday annual limit applies only to administrative leave for investigative

purposes. An employee's participation in EAP services would be at the agency's discretion based on the Administrative Leave Act, these regulations, the agency's policies, and any other authorities or guidance relating to administrative leave.

Section 630.1406—Records and Reporting

Comment: Three agencies commented that ample time is needed to modify time and attendance systems because of the new reporting requirements. A fourth agency said that WebTA will need to be revised to include the new categories of leave. One of the agencies said that the systems should have the capability for alerts when leave limits are exceeded. An individual asked if the reporting will be in hours rather than days.

OPM response: OPM is working with agency payroll and shared service providers to prepare for the modification of current recordkeeping systems to accommodate the new data reporting requirements. As provided by the statute, agencies have 270 calendar days from the date of publication of these regulations to make the necessary changes in their recordkeeping and reporting systems. Agencies should communicate any needs for special functionality, such as alerts, to their payroll and shared service providers. Reporting of administrative leave will be by hours (or fractional increments of hours) used, not days of use.

Comment: One agency recommended eliminating the reporting of administrative leave that is used for investigative purposes, noting the extra burden involved and arguing that the law does not require reporting this category of leave.

OPM response: Section 6329a(c)(1)(B)(ii) requires OPM to regulate the proper recording of administrative leave. There is no exclusion for administrative leave used for investigative purposes. It is important to identify this specific usage, just as it is important to track how the other types of leave under the Act are used, especially since this type of administrative leave counts towards the 10-workday annual limit in section 6329a. OPM also anticipates Congressional interest in data on leave used specifically for investigative purposes separate from data on administrative leave used for general purposes. Therefore, we are not removing the requirement for the reporting of administrative leave used for investigative purposes.

Comment: The same agency recommended that OPM create two new timekeeping codes—one for back pay to preclude it from being recorded as administrative leave, and another for weather and safety leave to preclude individual agencies from developing their own specific code.

OPM response: OPM does not set the timekeeping codes used by agencies and therefore does not create these codes. Payroll and shared service providers specify the timekeeping codes to be used by their client agencies. In terms of data reporting to OPM's central payroll data system, OPM will establish data categories for the new types of leave established under the Administrative Leave Act. OPM established a payroll data category for weather and safety leave in 2018. OPM anticipates establishing a catch-all data category for paid time off granted under any authority that is not covered by any other specific payroll data category. OPM also may consider establishing data categories for other types of paid time off.

Comment: Two unions raised concerns about the protection of employees' rights under the Privacy Act (section 552a) with respect to agency records and reports on the use of administrative leave. The unions were concerned about the possible inappropriate dissemination of recorded details regarding the purpose of the leave (*e.g.,* medical concerns) or other sensitive information. They indicated a need for additional instructions for agencies to protect employees from inadvertent or improper disclosures. One of the unions recommended that OPM provide more detailed instructions in § 630.1406 regarding the reporting requirements.

OPM response: Any records an agency keeps on the use of administrative leave are subject to regular Privacy Act requirements. Section 630.1406 requires that usage of administrative leave under section 6329a and subpart N be recorded and reported using two subcategories: (1) administrative leave used for investigative purposes and (2) administrative leave for all other purposes. Section 630.1406 does not require the recording or reporting of additional details regarding why administrative leave was granted. However, section 1138(d)(2) of the Administrative Leave Act requires GAO provide reports to Congress every 5 years that evaluate the use of the section 6329a authority to grant administrative leave. Therefore, it is conceivable that GAO could seek additional information to the extent it is available in agency records.

Section 630.1407—Separation or Transfer

Comment: Four agencies commented on the certification and transmittal of administrative leave records for transferring employees. One agency stated that the new procedural requirements represent a significant administrative burden for agency compliance. The agency requested clarification on the manner of certification required and recommended that ample time be provided for agencies to make changes to their automated systems. The agency also recommended that OPM change the word ''one'' in the first sentence to ''each.'' Another agency asked if OPM will update Standard Form 1150 (Record of Leave Data) to accommodate the data reporting. Two other agencies expressed concern about the ability to transfer administrative leave records without modifications to the current system.

OPM response: OPM is not adopting the proposed § 630.1407, which had required transmittal of administrative leave records for transferring or separating employees. This change was made because OPM is clarifying that the 10-workday annual limit in section 6329a resets if an employee is transferred to a new agency.

Comment: An individual asked how the gaining agency will know the number of administrative leave days that have been used, especially for part-time employees, if the reporting is in hours. The individual also asked about situations where a part-time employee transfers to a full-time position with another agency or a full-time employee transfers to a part-time position and more hours are used under the full-time position than the part-time position allows.

OPM response: Administrative leave, like other forms of leave, must necessarily be used and recorded in increments of hours (or appropriate fractions of an hour). Thus, OPM's regulations provide that administrative leave must be converted to hours, considering whether the employee had a full-time, part-time, or uncommon tour of duty (§ 630.1404(b)). The proposed regulations did not address the scenario of an employee changing the type of work schedule during a calendar year, but OPM is adding a provision in the issued regulations to address this scenario. (See the new paragraph (4) in § 630.1404(b).) Because the regulations apply the 10-workday annual limit only to administrative leave for investigative purposes, the need to track hours vis-a-vis the limit

and to convert hours for employees with part-time and uncommon tours of duty is confined to uses of administrative leave for investigative purposes. We note, as described above, that the 10-workday annual limit in section 6329a resets if an employee is transferred to a new agency.

Subpart O—Investigative Leave and Notice Leave

General Comments

Comment: An agency observed that the proposed regulations did not address how to handle active investigation cases that are ongoing at the time the subpart O regulations become effective. The agency requested guidance regarding whether employees in ongoing cases on the implementation date would (1) be placed in an initial period of 30 workdays of investigative leave or (2) be placed first on administrative leave until the 10-workday limit is exhausted and then on investigative leave.

OPM response: An agency must revise and implement its internal policies to comply with subparts N and O within 270 days after publication of these regulations. Afterwards, use of administrative leave for investigative purposes must comply with these regulations by, first, exhausting the use of administrative leave under subpart N, followed by placing the employee on investigative leave under subpart O. The agency should not count any time an employee spent in an administrative leave status, even for investigative purposes, prior to it revising and implementing its internal policies towards the limitations established in these regulations.

Comment: An individual presented a scenario in which an employee who holds a non-critical sensitive position loses clearance eligibility and files an appeal over such loss. There are no non-critical sensitive positions in which to place the employee pending adjudication of the employee's appeal, and since an indefinite suspension is not permissible on grounds of clearance suspension, the commenter asked how this situation would fit under the proposed rules. An agency commented that the proposed regulations do not adequately address situations in which an employee's security clearance has been revoked or suspended and they are unable to perform work without proper security clearance. Employees are therefore placed on administrative leave in adherence with adjudicative requirements and to secure information pending final determination of their appeal of the revocation or suspension. The agency stated that the proposed regulations need to provide additional clarity regarding ''alternative use of administrative leave.''

OPM response: If an *investigation* is being conducted by an *investigative entity* (as those terms are defined under § 630.1502), in connection with the suspension or revocation of a security clearance, or an appeal from such an action, and the agency completes the required determinations of § 630.1503(b), then the agency may place the employee on administrative leave for investigative purposes until the 10-workday annual limit is exhausted, and then on investigative leave. The commenter's reference to ''alternative use of administrative leave'' appears to refer to what the statute calls investigative leave. Based on this comment, OPM will further amend the regulatory definition of the term *investigation* at § 630.1502 to make clear that periods of time during which an appeal of a security clearance revocation or suspension is pending should be considered part of an *investigation* within the meaning of this regulatory framework. Notice leave would not be applicable until such time as the employee receives notice of a proposed adverse action. To clarify that investigative leave may only be used when an investigation is being conducted by a person or persons meeting the definition of the term *investigative entity,* OPM is amending the definition of the term *investigation* to specifically refer to ''an inquiry by an investigative entity.'' Separately, under this hypothetical example, an agency may seek an indefinite suspension pending a final determination once it preliminarily determines to suspend or revoke an employee's access, or eligibility for access, to classified information, in the absence of contrary provisions found in an internal agency policy or collective bargaining agreement. Investigative leave under this scenario, therefore, is not the only available option.

Comment: An agency commented that the proposed regulations should include an additional category of leave that allows an agency to use excused absence from duty when a petition for review is pending before the Merit Systems Protection Board (MSPB or Board). Currently, if an Administrative Judge reverses or mitigates a removal action, an agency is required to place the employee back in a pay status even if the decision is appealed to the full Board for review. The agency concluded that, under the proposed regulations, an agency would be limited to using the 10 workdays of general administrative leave under subpart N and then be required to return the employee to a duty status. The agency believes that this is problematic since the employee does not meet the criteria for investigative leave or notice leave, yet it would continue to be in the best interest of the government not to have this employee in a duty status.

OPM response: By definition, the term *administrative leave* excludes leave that is authorized under any other provision of law (section 6329a(a)(1)(B) and § 630.1402). The agency comment is describing a situation in which an Administrative Judge is providing interim relief by restoring a separated employee to employment status pending the outcome of a petition for review, as authorized under section 7701(b)(2)(A)(ii)(II) and 7701(b)(2)(B). Under those statutory provisions, the agency may determine that the return or presence of the employee at the place of employment would be unduly disruptive to the work environment. If so, the employee is entitled to receive pay while in nonduty status during that interim period as if in duty status. Since another law authorizes pay for this type of nonduty status, it would not be appropriate to use administrative leave.

Comment: An agency asked if investigative leave counts when considering an excessive absence charge.

OPM response: Charges and penalties for attendance-related matters are outside the scope of this regulation. OPM notes, though, that in this scenario, the employee would be placed on investigative leave by action of an agency so we would not generally consider it appropriate to include investigative leave as a basis for an excessive absence charge. Additionally, it would not be appropriate to place an employee on investigative leave pending a potential adverse action if the employee is already absent from duty and, therefore, in a leave status.

Comment: An agency asked if OPM will issue guidance or provide further clarification on actions that take place during the investigative process—specifically, whether it is appropriate to include time preparing the investigative report and recommendations as a part of the investigative process.

OPM response: An agency may appropriately include time spent preparing an investigative report (including recommended actions) as part of the investigation period and thus continue investigative leave during that time. Similarly, as discussed in OPM's response to a comment concerning the definition of the term *notice period* and its potential impact on settlement

agreement negotiations, an agency may appropriately keep an employee in investigation status and investigative leave status while it is deciding whether to propose and/or preparing a notice of proposed adverse action. Based on these observations, OPM has amended the definition of the term *investigation* to include time spent preparing an investigative report and recommendation(s).

Section 630.1502—Definitions

Comment: An agency commented that the definition of the term *investigation* is overbroad and subjective. The agency stated that ''an investigation is defined as alleged misconduct that could result in adverse action.'' The agency further stated that it is unclear why the definition only refers to adverse actions and that the language is contradictory because there is a subsequent reference to disciplinary action.

OPM response: The term *investigation* encompasses a variety of inquiries that could eventually result in an adverse action as well as internal probes expressly focused on whether to commence an adverse action. Those actions could include, for example, an internal probe to determine the appropriateness of continued eligibility for access to classified information, or eligibility for logical or physical access to agency systems and facilities, as well as inquiries by the agency's Inspector General, the Office of Special Counsel, or the Attorney General—focused on their areas of jurisdiction—that could eventually produce information eventually leading to an action that is adverse to the employee. OPM has modified the definition of investigation in this final rule to remove the reference to disciplinary action. Finally, the modified language used to define the term *investigation* allows for an agency to fact-find and examine under a variety of circumstances and situations.

Comment: An agency requested clarification on the meaning of certain terms within the definition of *investigation:* specifically, ''similar authority,'' ''other matters that could lead to disciplinary action,'' and ''disciplinary action.'' The agency believes these terms are key to the scope of the new investigative leave provisions and, therefore, important to clarify.

OPM response: The phrase ''or similar authority'' in the definition of *investigation* refers to those agencies that operate under a different statutory authority that is equivalent to 5 U.S.C. chapter 75. Those agencies take adverse actions (or their equivalents) under authorities similar to 5 CFR part 752. The phrase ''other matters that could lead to disciplinary action'' may include a variety of circumstances and is intentionally broad to allow for agency discretion in such situations. The term ''disciplinary action'' in the proposed rule refers to an agency's administrative action taken to address an employee's misconduct. Nevertheless, OPM has revised the definition of ''investigation'' to eliminate the term ''disciplinary action'' and clarify that the regulation is intended to cover all types of matters that could lead to outcomes adverse to the employee—not only adverse actions taken under chapter 75 or similar authority.

Comment: An agency suggested the words ''logical'' access be changed to ''logistical'' access, with respect to the definition of the term *investigation.*

OPM response: The term ''logical access'' comes from Homeland Security Presidential Directive–12 (HSPD–12), dated August 27, 2004, and is used with respect to use of information systems.[33] It is the correct terminology in this context.

Comment: A union referenced the proposed regulatory definition of the term *investigation*—specifically, the third prong, ''other matters that could lead to disciplinary action.'' It asked if, in situations related to the investigation of an Equal Employment Opportunity (EEO) complaint, management could use the third prong of the definition of *investigation* to retaliate against the employee for filing an EEO complaint. The union stated that there should be explicit language that would not easily allow management to consider an employee who has filed an EEO complaint to be ''under investigation'' and be placed on investigative leave.

OPM response: The definition of *investigation* adequately describes the scope of the matters that may result in an inquiry by an investigative entity and the specific requested language is unnecessary. An employee's EEO complaint may result in an EEO investigation; however, that employee is not ''under investigation'' as a result of filing a complaint. Filing an EEO complaint is a protected right under existing statutes and there are existing laws to protect an employee from reprisal. Accordingly, this regulation does not consider the mere filing of an EEO complaint to be an action that could bring the employee under investigation, require the use of investigative leave, and lead to an adverse action.

Comment: An agency questioned whether the term *investigative entity* includes agency attorneys under the category ''other agency representatives.''

OPM response: The definition of the term *investigative entity* provides examples of what may be considered an internal investigative unit. It is not intended to be an exhaustive list. For example, agency counsel could be considered part of an investigative unit as an agency representative if they serve in that capacity.

Comment: An agency commented that the definition of *investigative entity* should be expanded to include external investigative units of any agency outside the agency granting investigative leave that have a role in the investigation of an employee. Agencies or investigative units outside the initial agency conducting the inquiry may be responsible for delays, including civil, criminal, or judicial proceedings that are not controlled by, or the responsibility of, the investigating agency. The agency asserted that these delays would require additional requests and approval of investigative leave beyond the initial period of 30 workdays and subsequent extensions of 30 workdays not to exceed the 90-day limit. The agency recommended that definition of *investigative entity* be amended as follows: ''(1) An external federal, international, state, or local investigative authority or internal investigative unit of an agency granting investigative leave under this subpart, which may be composed of one or more persons, such as supervisors, managers, human resources practitioners, personnel security staff, workplace violence prevention team members, or other agency representatives; . . . .''

OPM response: Section 6329b(a)(6) defines the term *investigative entity* as a limited, enumerated list of entities within the federal government. Because the Act already defines *investigative entity* in a restrictive way, OPM has determined not to expand upon this language to include ''external'' authorities not countenanced under the statute.

Comment: An agency commented that the proposed definition of the term *notice period* may inhibit the ability to use notice leave in circumstances where the parties engage in negotiation of a resignation/retirement agreement, after investigative leave but prior to the agency proposing an adverse action. The agency stated that, under the proposed regulation, agencies could not place an employee on notice leave (prior to

[33] *See* HSPD–12, ¶ 12 (''As promptly as possible . . . the heads of executive department and agencies shall, to the maximum extent practicable, require the use of identification by Federal employees and contractors that meets the Standard in gaining . . . logical access to Federally controlled information systems.'').

proposing removal) and that this may eliminate or adversely impact the ability of the parties to engage in settlement negotiations (*e.g.,* regarding resignation/retirement) or at least create a gap in coverage in some circumstances while an agreement is being negotiated.

OPM response: The agency is correct in stating that use of notice leave is restricted to the notice period. The regulation is consistent with the Act, which expressly requires that the notice period begin on the date an employee is provided notice of a proposed adverse action (section 6329b(a)(9)). Until the notice of proposed adverse action is issued to the employee, that employee will remain in investigation status, and if the criteria are met, the employee will be in an investigative leave status as well. Thus, an agency can avoid any gap and provide for consecutive use of the two types of leave, as appropriate.

Comment: An agency commented that proposed §§ 630.1502 and 630.1505(b) both discuss the limits on the length of notice leave, but there is ambiguity because the term ''duration'' does not appear within the definition of *notice period* in § 630.1502. The agency suggested amending the definition of *notice period* so that it reads, ''*Notice period* means a period, the duration of which begins on the date . . .''

OPM response: OPM does not view these sections as being ambiguous. Section 630.1502 establishes that the notice period begins on the date on which an employee is provided notice, as required by law, of a proposed adverse action against the employee and ends on the effective date of the adverse action or on the date on which the agency notifies the employee that no adverse action will be taken. This period of time is the duration of the notice period. Section 630.1505(b) establishes that the placement of an employee on notice leave shall be for a period not longer than the duration of the notice period.

Comment: A union recommended that the definition of *participating in a telework program* in proposed § 630.1502 be expanded to allow employees who are eligible to participate in a telework program, but not currently participating in such a program, to elect to voluntarily telework in lieu of being placed on investigative leave, subject to agency approval. The union stated this would be consistent with the statutory goals of limiting the amount of time that an employee who is under investigation is in a leave status and not performing work for the agency.

OPM response: OPM's regulations in § 630.1503(c) set how an agency can ''require'' telework for employees who are currently (or very recently) ''participating in a telework program.'' [34] OPM has determined that it would not be appropriate to require telework by employees who are not currently (or very recently) participating in a telework program since they would lack a voluntarily established telework arrangement. There is, therefore, no need to amend the definition of *participating in a telework program* to allow voluntary telework, since the term is used in subpart O only in connection with telework ''required'' by the agency. Voluntary telework is an option an agency may consider. If an employee who has not been participating in a telework program is willing to voluntarily begin such participation to avoid being placed on investigative leave, and if the agency concludes that permitting telework in these circumstances would not pose a threat to the employee or others, result in the destruction of evidence relevant to an investigation, result in loss of or damage to Government property, or otherwise jeopardize legitimate Government interests, there is no regulatory bar and no need for a special authority. It is a way of keeping the employee in duty status through telework duties, which is consistent with § 630.1503(b)(2)(i). Once an employee begins to voluntarily participate in a telework program, the employee would be a current participant and thereafter could be ''required'' to telework in lieu of investigative leave.

§ 630.1503(a), (b), and (e)—Authority and Requirements for Investigative Leave and Notice Leave; Baseline Factors

Comment: An agency stated that part of the intent of notice/investigative leave is to protect the public from harm and that OPM needs to be more specific as to whether this refers to co-workers or any person in the public located anywhere, as this is a condition agency management must consider in making a leave determination.

OPM response: OPM believes that the language of the regulation is sufficiently clear. Section 630.1503(e) states that, in making a determination regarding the criteria listed under paragraph (b)(1) of that section, an agency must consider, in part, whether the employee will pose an unacceptable risk to the life, safety, or health of employees, contractors, vendors or visitors to a Federal facility.

Comment: An agency asked who is an ''authorized agency official,'' for determining investigative leave and notice leave.

OPM response: For notice leave and the initial placement on investigative leave, the agency head has discretion to determine who constitutes an authorized agency official.[35] For extensions of investigative leave, approval levels are set in statute and the regulations.[36]

Comment: An agency commented it is unclear whether second-level approval is required for investigative leave and notice leave.

OPM response: Section 630.1403(a)(5)(ii) in this final rule requires that general administrative leave under subpart N be ''reviewed and approved by an official of the agency who is (or is acting) at a higher level than the official making the determination'' if the specific type of use and amount of leave for that use has not been authorized under established agency policy, but this requirement is not applicable to investigative leave and notice leave under subpart O. Additionally, while incremental extensions of investigative leave under § 630.1504(f)(1) are permitted only if approved by the Chief Human Capital Officer (CHCO) of an agency, or the designee of the CHCO (or, in the case of an employee of an Office of the Inspector General, the Inspector General or designee), there is no such requirement for notice leave because extensions are not applicable to notice leave. Thus, agencies have the discretion to establish the appropriate authority level for granting notice leave within their organizations, without regard to the regulatory requirements imposed for general administrative leave and extensions of investigative leave.

Comment: Two agencies were concerned that agencies would be required to take an employee off investigative leave during the period between completion of an investigation and issuance of a notice of proposed adverse action. One agency stated that requiring an employee to come back to work during this period would defeat the intent of the law and would run counter to the determination that placed the employee on investigative leave in the first place. The other agency noted that it is only after an investigation has been completed that an adverse action is usually considered and, depending on the complexity of the case, it takes time

[34] The condition for current or recent participation is found in § 630.1503(c)(1)(iii), not in the definition in § 630.1502.

[35] *See* § 630.1502 definition of *agency* in the context of describing who can make determinations and take actions.

[36] *See* section 6329b(c) and (d) and § 630.1504(f) and (g).

to prepare a proposed adverse action. The same agency pointed to the proposed regulation in § 630.1504(h), which stated: ''An agency may not further extend a period of investigative leave on or after the date that is 30 calendar days after the completion of the investigation of the employee by an investigative entity,'' suggesting there could be a gap in leave.

OPM response: It is true that notice leave may not commence until the employee has received a notice of proposed adverse action. The law does not establish any particular cut-off event for investigative leave; however, and, so long as the agency is still engaged in the process of considering the evidence, framing potential charges, and assessing whether any additional investigation is required, the agency may reasonably regard the investigation as not yet concluded. As described above, an agency can avoid any gap in leave by providing for consecutive use of the two types of leave, as appropriate. An agency may keep an employee in investigation status and covered by investigative leave until it issues a notice of proposed adverse action. The regulation § 630.1504(h) referenced in one of the agencies' comments does not prevent an agency from considering necessary work on a planned notice of adverse action to be part of the period of investigation. In any event, § 630.1504(h) applies only to ''further'' extensions of investigative leave under § 630.1504(g).[37] OPM is clarifying this in the issued regulations.

Comment: An agency referenced the preamble of the proposed regulations related to § 630.1503(a)(2)(i), which stated, ''Agencies should be mindful, however, of any internal procedures related to the preparation and approval of adverse action before it is issued.'' The agency commented that agencies should also be mindful of collective bargaining provisions since compliance with such provisions is required under chapter 71.

OPM response: OPM agrees that agencies should also be mindful of relevant, enforceable collective bargaining provisions but notes that, while some procedures and arrangements related to adverse actions are negotiable, the right to discipline is reserved to agency management by 5 U.S.C. 7106.

Comment: An agency indicated that proposed § 630.1503(b) requires a ''determination'' to initially place an employee on investigative leave or notice leave but does not clarify whether this determination must be made in writing or identify who makes the determination.

OPM response: The proposed regulations did not directly address these points. The initial determination to place an employee on investigative leave or notice leave will be made by the appropriate agency official at the agency's discretion and after the agency has made the required determinations. However, any extensions of investigative leave must be approved by certain designated officials based on a written determination. Based on the comment, OPM is revising § 630.1503(b) to explicitly require a written determination to support the initial decision to place an employee on investigative leave or notice leave. This is consistent with the recordkeeping requirements in § 630.1506, which requires that an agency maintain an accurate record of the placement of an employee on investigative leave or notice leave.

Comment: An agency stated that the word ''threat'' in proposed § 630.1503(b)(1)(i) either needs to be defined or changed to ''a disruption to the workplace.'' Without this definition, the agency contends that its managers will revert to the analysis in *Metz* v. *Department of the Treasury,* 780 F.2d 1001 (Fed. Cir. 1986) (directing MSPB adjudicators to consider the listener's reactions, the listener's apprehension of harm, the speaker's intent, any conditional nature of the statements, and the attendant circumstances in sustaining adverse actions based upon threats). The agency asserted that not all workplace disruptions rise to the level of threat or imminent threat and believes that the language in the proposed rule would limit management's flexibility in removing employees from the workplace pending completion of an inquiry or investigation.

OPM response: We understand the concern, although *Metz* dealt with oral or written threats as the bases for the underlying adverse action, and the court's analysis was limited to that specific scenario. The Act, in contrast, uses the word ''threat'' to mean a broader variety of risks the employee could pose toward agency people, information, facilities, and information systems if the employee were permitted to continue to have access to the workplace or agency systems during the pendency of the employee's investigation. Thus, the word is used differently than in *Metz.*

Consideration of this comment, however, has caused us to make revisions. The statute, especially the fourth category of potential harms, authorizes an agency to determine whether the employee's presence is consistent with a legitimate Government interest. This provision is similar to the undue-disruption determination regarding interim relief in section 7701(b)(2)(A), which is unreviewable.[38] Accordingly, we have added language to the proposed regulation at § 630.1503(a) to make clear that all determinations made under section 6329b are within the authority of the agency.

Comment: A commenter stated that proposed § 630.1503(b)(1)(ii) is too narrow and the regulation should be broadened to address obstruction, rather than just destruction of evidence, because destroying evidence is only one way that an employee could obstruct, or attempt to obstruct, an investigation.

OPM response: The language in § 630.1503(b)(1)(ii) is the exact language used in the Act. The language does not preclude obstruction as part of the determination, especially since the fourth category under the statutory requirements is broad, asking whether the continued presence of the employee in the workplace during the investigation or while in the notice period may ''otherwise jeopardize legitimate Government interests.'' Accordingly, the requested revision is unnecessary.

Comment: An agency referenced proposed § 630.1503(b)(2)(i) which sets the option, in lieu of investigative or notice leave, of keeping an employee in a duty status by assigning the employee to duties in which the employee does not pose a threat. The agency noted that, while not stated in the proposed regulation, the preamble of the proposed rule stated, ''The duties should be at the same grade level as the employee's current position.'' The agency stated that they may not have duties available at the same grade level as the employee's current position, but they may have duties available at a lower-grade level and it would be preferable to have the employee perform duties that further the agency's mission, rather than placing the employee on administrative or investigative leave.

OPM response: OPM agrees that, while employees should generally be assigned duties at the same grade level as the employee's current position, it may not always be possible. Such inability does not prevent the agency from assigning the employee to other duties under § 630.1503(b)(2)(i) particularly when such duties are temporary in nature as contemplated in this scenario.

[37] *See* also section 6329b(d)(1) and (3).

[38] *See King* v. *Jerome,* 42 F.3d 1371 (Fed. Cir. 1994).

Comment: Two unions referenced proposed § 630.1503(b)(2)(ii), which is related to the voluntary use of other forms of paid or unpaid time off in lieu of investigative leave or notice leave. The unions stated that this provision should be clarified so that agencies do not overtly or implicitly encourage employees to use their other forms of leave. The unions further stated that OPM should require agencies to notify employees that the use of other forms of leave in lieu of investigative leave is strictly voluntary and that the employee has the right to use paid investigative leave instead.

OPM response: Consistent with section 6329b(b)(2)(B)(ii), § 630.1503(b)(2)(ii) sets the option of ''allowing'' an employee to voluntarily take leave (paid or unpaid) or other forms of paid time off, as appropriate under the rules governing each category of leave or paid time off. An employee who is under investigation or in a notice period may elect to take annual leave, sick leave (as appropriate), restored annual leave, or any leave earned under subchapter I of chapter 63, U.S. Code. The employee may also elect to use other paid time off to remain in a pay status, such as compensatory time off earned through overtime work, compensatory time off for travel, and credit hours under a flexible work schedule, as appropriate. An employee may elect to take leave or other paid time off for which the employee is eligible on an intermittent basis, as appropriate, during a period of investigative leave or notice leave. As stated in the preamble of the proposed regulations, ''Agencies may not require employees to take accrued leave or other time off as a substitute for investigative leave or notice leave.'' Section 630.1503(d)(1) provides that an employee on investigative leave or notice leave must be prepared to report to work at any time during the employee's regularly scheduled tour of duty or must obtain approval of the appropriate leave to eliminate the possible obligation to report to work if the employee will be unable to report promptly if called. Because of this requirement, it may be advantageous for an employee to voluntarily request to use leave or time off in place of investigative leave or notice leave if they may be unavailable to report to work. Because § 630.1503(b)(2)(ii) makes clear that use of other leave or time off is voluntary, OPM is making no change to the provision.

Comment: An individual stated that the proposed § 630.1503(b)(2)(ii) and (b)(3) are unclear and at odds with OPM's explanation of them in the preamble to the proposed rule. The individual asserted that the proposed regulations specify that, to place an employee in investigative leave or notice leave, agencies must consider allowing employees to voluntarily take leave and determine that this option would ''not be appropriate,'' but that the regulation contains no explanation of circumstances when it would not be appropriate to allow an employee to voluntarily take leave during an investigation or notice period. The individual argued that this could lead to inconsistent implementation and confusion among Federal agencies. The individual further stated that, if appropriateness is measured solely by the rules governing each category of leave or paid time off, an agency could potentially never determine to place an employee in investigative leave or notice leave as long as the employee had a positive balance of leave or other paid time off that could be used during an investigation or notice period. The individual believes OPM should clarify these provisions in the regulations and its explanation to give agencies clearer guidance regarding the circumstances under which it would not be appropriate to allow an employee to voluntarily take leave in lieu of investigative leave or notice leave.

OPM response: OPM disagrees and considers the regulations to be clear as written. Section 630.1503(b)(2)(ii) states that an agency can ''allow'' the employee to ''voluntarily'' take leave (paid or unpaid) or paid time off, as appropriate under the rules governing each category of leave or paid time off. The language ''as appropriate under the rules governing each category of leave or paid time off'' refers to the permissible uses of the various types of leave. For example, under § 630.1503(b)(2)(ii), it would not be appropriate to allow an employee to voluntarily take sick leave to avoid reporting for duty, when directed, during a period of investigative leave or notice leave, unless the leave was otherwise a permissible use of sick leave. Accordingly, when the agency makes its determination under § 630.1503(b)(3) as to whether any of the options under § 630.1503(b)(2) are appropriate, the agency will find that § 630.1503(b)(2)(ii) is not an available option if the agency denies the employee's leave request. Conversely, if an employee requests leave that is appropriate under the rules governing that category of leave, then the agency will determine, under § 630.1503(b)(3), that there is an appropriate option. Section 630.1503(d)(1) requires that an employee on investigative leave or notice leave be prepared to report to work at any time during the employee's regularly scheduled tour of duty or obtain approval of another form of leave, as appropriate, if the employee will be unable to report promptly if called.

Comment: With respect to proposed § 630.1503(b)(2)(ii), two agencies asserted that it is unrealistic to assume an employee would elect to take other forms of paid leave in lieu of administrative leave. However, if an employee is on administrative leave, it would be reasonable to *require* the employee to substitute more appropriate leave types if the employee becomes ill, wishes to invoke annual leave to take a trip, etc. The agencies recommended a modification to the provision such that, while on administrative leave, an employee is required to substitute with other paid leave where appropriate. The agencies believed this change would allow agencies to record an employee's time more accurately.

OPM response: The agencies' concern is already addressed within the regulation. Section 630.1503(d) allows the employee to request annual or sick leave (as appropriate) while on investigative or notice leave because the employee must be prepared to report to work at any time during the employee's regularly scheduled tour of duty. If the employee anticipates a possible inability to report promptly, the employee must obtain approval of another form of leave in advance of the date or dates that the employee will be unavailable.

Comment: Two agencies referenced use-or-lose leave and its relationship with proposed § 630.1503(b)(2)(ii). The agencies noted that this section does not address a situation when an employee is on investigative leave or notice leave and has (or will have) an annual leave balance in excess of the maximum carryover of 240 hours (for non SES-employees). The agencies asked whether an agency can require employees who are in a ''use-or-lose'' status to use their annual leave, or if restored leave should be granted.

OPM response: The procedures and requirements for restoration of annual leave are not impacted by this rule. Being placed on investigative leave or notice leave does not relieve an employee of the responsibility to schedule annual leave that would otherwise be forfeited. If the employee fails to request and schedule the use of annual leave that would otherwise be forfeited, the agency cannot restore it to the employee. If the agency denies such

a timely request, the agency is required to restore the annual leave.

Comment: Two agencies asserted that the OPM proposed rule sets an almost unattainable standard by requiring that an agency establish that an employee ''will'' (as opposed to ''may reasonably'') pose a risk of harm to others and/or Government property to justify placing the employee on investigative leave or notice leave. The agencies stated that ''reasonable'' concern should be sufficient to invoke investigative leave or notice leave. One agency objected to language in the proposed regulations stating that ''The agency may not arbitrarily place individuals on investigative leave or notice leave based upon fear of a future risk without engaging in an individualized assessment that establishes that there is a significant risk of substantial harm that cannot be eliminated or reduced by other means,'' and argued that this assessment and high standard would create a less safe working environment for civil servants, which was not the intent of Congress. The agency suggested that the factors do not consider situations where an employee's presence in the workplace is not a threat to safety but would be disruptive and the agency should not have to reach the threshold of threats of harm for an employee to be removed from the workplace. The agency believed that requiring an agency to ''establish that there is a significant risk of substantial harm'' hampers the ability of that agency to continue everyday operations uninterrupted.

OPM response: OPM agrees that requiring a showing of a ''significant risk'' would set an inappropriately high standard. Neither the Act nor the regulatory text establishes such a standard though. Under § 630.1503(b), an agency may place an employee on investigative leave or notice leave when it determines that the continued presence of the employee ''may'' (1) pose a threat to the employee or others, (2) result in the destruction of evidence relevant to an investigation, (3) result in loss of or damage to Government property, or (4) otherwise jeopardize legitimate Government interests. The baseline factors set out at § 630.1503(e) guide the § 630.1503(b) determination—each factor must be considered when determining whether an employee should be placed on investigative leave or notice leave. As noted in the proposed regulations, ''agencies should exercise independent, reasonable judgment in evaluating each particular situation,'' [39] including the discretion and responsibility to assess and determine what constitutes ''other impacts of the employee's continued presence in the workplace detrimental to legitimate Government interests'' under § 630.1503(e)(3). An agency has discretion to determine that an individual poses an unacceptable risk to the life, safety, health, or privacy interests of others and/or Government property, which is sufficient to invoke investigative leave or notice leave. We have revised the regulation accordingly.

Comment: An agency noted that the baseline factors include an evaluation of the duration of the risk; the nature and severity of the potential harm; how likely it is that the potential harm will occur; and how imminent the potential harm is. The agency believes that these are difficult factors to evaluate and urges OPM to provide examples or further explanation regarding these factors. The commenter also requested OPM explain how agencies' policies regarding workplace violence would impact any individual assessment.

OPM response: The baseline factors in § 630.1503(e) are to be used as a starting point when determining whether an employee should be placed on investigative leave or notice leave. OPM expects agencies to exercise independent, reasonable judgment in evaluating each particular situation. The baseline factors, while a required consideration, are meant to be applied to the specifics of each individual situation. Agencies should review their workplace violence policies to determine how they interact with the requirements of the new regulations.

Comment: A union referenced the baseline factors in proposed § 630.1503(e), specifically (e)(1), ''the nature and severity of the employee's exhibited or alleged behavior'' and asked if this would apply to employee posts on social media.

OPM response: As previously noted, the baseline factors in § 630.1503(e) are a starting point in determining whether an employee should be placed on investigative leave or notice leave. Each baseline factor must be considered. OPM expects agencies to exercise independent, reasonable judgment in evaluating each situation, and agencies should consult with their human resources office or their general counsel's office, or both, to the extent appropriate, before placing an employee on investigative leave or notice leave. An employee's social media activity, either by itself or in conjunction with other information, may prompt an evaluation under the baseline factors.

Comment: An individual stated that the baseline factor at proposed § 630.1503(e)(3)(ii), regarding risk to the Government's physical assets or information systems, should be amended to include intangible assets, such as rights in intellectual property.

OPM response: The examples of legitimate Government interests in § 630.1503(e)(3) are not a comprehensive list. An agency may consider other legitimate Government interests, including any intellectual property rights the Government might possess as well.

Comment: An agency stated that there might be due process concerns when an employee's access to government computers and/or systems is terminated or suspended. The agency questioned how the agency would allow the employee access to electronic data for the purposes of ''defending him/herself'' if an action were taken against the employee.

OPM response: This comment is outside the scope of this regulation. The procedural requirements for taking an adverse or performance-based action are not impacted by this rule.

Section 630.1503(c)—Required Telework

Comment: An agency asserted that proposed § 630.1503(c) establishes that telework is an alternative to investigative leave but omits any reference to notice leave. The agency sought clarification regarding whether telework is an option during notice leave.

OPM response: Section 630.1503(c) pertains to an agency's authority to ''require'' an employee in an investigation status to telework. The Administrative Leave Act added section 6502(c) in the telework law.[40] The section expressly authorizes agencies to require an employee to telework in lieu of investigative leave. Section 6329b includes agency requirements for reporting on employees required to telework under section 6502(c). But while section 6502(c) deals with required telework as an alternative to investigative leave, there is no similar provision providing for required telework in lieu of notice leave. However, there is no prohibition on an employee teleworking, consistent with an agency's internal policy, in lieu of notice leave, if the agency determines that is appropriate. OPM does not believe further clarification is necessary in the regulatory text.

Comment: Two agencies observed that section 6502(c) seems to require an agency to place an employee on investigative leave before the agency

[39] 82 FR 32268.

[40] *See* 5 U.S.C. 6502(c).

may require telework. One agency contended that an employee on investigative leave cannot be teleworking at the same time, which section 6502(c) seems to suggest is possible. The other agency contended that OPM regulations were not consistent with section 6502(c)—that employees should be placed on investigative leave before an agency can require telework. In addition, a union was concerned that an employee performing required telework in lieu of investigative leave would be considered, inaccurately, to be on investigative leave. The union recommended adding an express statement in the regulations that placement in a telework status does not constitute investigative leave status.

OPM response: OPM agrees with one agency's conclusion that, by definition, an employee in a required telework status is in a work status, not an investigative leave status. Since ''work'' does not constitute ''leave,'' OPM is not adding a statement to that effect, as recommended by the union, because it is unnecessary. Also, in this rulemaking, OPM interprets section 6502(c) to mean that telework may be required only when the employee would satisfy the legal conditions for investigative leave under section 6329b and would *otherwise* be placed on such leave.[41] If an employee should be placed on investigative leave following the required 10-workday period in section 6329a, it would not make sense to require a de minimis period of investigative leave before required telework can begin. The key point is that an agency may not require telework under section 6502(c) unless the employee would be placed on investigative leave but for the telework.

Comment: An agency and an individual questioned OPM's authority to direct an employee to telework in lieu of investigative leave, since telework has always been voluntary. The agency raised concerns that an employee's home may not always be available for business purposes—*e.g.,* a spouse needs to use the home office or children are at home on certain days.

OPM response: As described above, the Administrative Leave Act added section 6502(c) in the telework law in 2016. It expressly authorizes agencies to require an employee to telework in lieu of investigative leave. Consistent with section 6502(c), § 630.1503(c)(2) provides that any voluntary telework agreement must be superseded as necessary to comply with an agency's action to require telework. OPM is exercising its regulatory authority in a manner consistent with the authority granted pursuant to the Act.

Agency telework policies will govern whether telework is appropriate in specific circumstances. OPM notes that agencies can change their telework policies and make special exceptions to policies for employees who are required to telework under section 6502(c).

Comment: An agency recommended that OPM clarify in the regulations that agencies have discretion to require telework in lieu of investigative leave and to specify the duration and location of that telework assignment (*e.g.,* home versus agency telework center). The agency stated this clarification would stem potential litigation under collective bargaining agreements and provisions relating to voluntary telework under the regular telework law. The agency noted a parallel example of an OPM regulation in § 531.605(d)(4) giving agencies discretion to determine an employee's official worksite.

OPM response: OPM agrees with the agency recommendation. Section 6502(c) authorizes agencies to ''require'' telework based on agency determinations.[42] The authority to require telework necessarily includes an obligation to specify the duration and location of the telework assignment. Accordingly, OPM is revising the regulation at § 630.1503(c) to clarify that the agency determination to require telework (including all related conditions and requirements), like the other determinations under these regulations, are to be made at the agency's discretion. Furthermore, since required telework is in lieu of placement in an investigative leave status, OPM is revising these regulations to require agencies to provide the employee with a written explanation regarding the required telework, similar to the explanation provided to employees when placed on investigative leave in paragraph (c) of section 630.1504.

Comment: An individual commented that proposed § 630.1503(c)(2) is unnecessarily duplicative of § 630.1503(c)(1)(ii).

OPM response: Paragraph (c)(1)(ii) of § 630.1503 is a brief restatement of the statutory requirements of section 6502(c)(2), whereas paragraph (c)(2) explains the meaning of ''eligible to telework'' as used in paragraph (c)(1)(ii). To avoid redundancy, OPM has shortened paragraph (c)(1)(ii) to state only the statutory requirement that an employee be eligible to telework with paragraph (c)(2) providing additional details regarding eligibility and agency implementation.

Comment: An agency noted that most agency telework policies terminate or suspend participation for employees with either a conduct or performance issue, which the agency viewed as conflicting with the proposed regulation providing for telework as a possible alternative to investigative leave. The agency contended that OPM would need to carve out an exception to such agency telework policies. Two other agencies expressed concern that telework would be seen as a reward for misconduct and would likely produce no benefit for the agency. The two agencies acknowledged that agencies would not be required to use the telework option but were concerned that there would be pressure to allow telework in these instances. The two agencies stated that telework should not be allowed unless employees have a fully successful performance rating, a good conduct record, and are not a potential threat to agency facilities or personnel. An individual commenter raised similar concerns about allowing employees with performance, conduct, or behavioral problems to telework, contrary to normal agency policies.

OPM response: While the Administrative Leave Act requires agencies to consider certain options before approving use of investigative leave (see section 6329b(b)(2)), the Act does not require agencies to consider the telework option (see section 6502(c)). An agency has discretion in deciding whether it will require telework by an employee who would otherwise be placed in investigative leave, subject to the conditions set forth in law and regulation. As stated in § 630.1503(c)(1)(ii), telework may be required only if the employee is eligible to telework under the conditions set forth in section 6502(a) and (b)(4)—*e.g.,* an employee is not eligible if the employee has been officially disciplined for certain reasons, such as for viewing pornography on a Government computer. As further stated in § 630.1503(c)(1)(i), before an agency requires telework, it must determine that it would not pose certain risks to Government personnel, property, or other interests. After applying the above-described conditions, the agency still has the discretion to not require telework if it determines it would be inappropriate.[43] Given the degree of agency discretion, OPM does not believe the regulations would conflict with agencies' existing telework policies. OPM notes that, although the use of

[41] *See* § 630.1503(c)(1).

[42] *See* the language ''the agency determines'' in section 6502(c)(1) and (3).

[43] *See* § 630.1503(c)(1)(iv).

telework is not subject to the approval and reporting accountability measures in place for use of investigative leave, agencies should continue to manage telework and hold employees accountable for productive work based on their experience in administering telework programs.

Comment: Two agencies questioned whether agencies are responsible for providing equipment necessary for an employee to telework when required in lieu of investigative leave. One agency noted that the preamble to the proposed regulations stated that an agency must provide employees who are required to telework in lieu of investigative leave with appropriate equipment. The other agency asked about funding the employee's internet capability at home. Both agencies raised the possibility of legal issues associated with requiring employees to telework at home when they must consume personal resources to conduct Government business. One agency also asked if OPM would be issuing updated telework guidance in conjunction with this final rule.

OPM response: Congress provided specific legal authority in section 6502(c) for agencies to require telework in lieu of investigative leave. Since telework will be required only for employees who are current (or recent) [44] telework program participants, it is anticipated that any mandatory telework would be consistent with and would apply the terms of the employee's regular telework arrangement and that, as a condition of teleworking, employees would have already satisfied all eligibility criteria, including procuring necessary equipment. Any issues related to agency obligations to spend funds to support telework in an employee's home are outside the scope of these regulations. OPM will consider whether updating its existing telework guidance and leave guidance is necessary.

Comment: An agency objected to proposed § 630.1503(c)(1)(iii), which provides that telework may be required only for an employee who has been participating in a telework program during some portion of the 30-day period immediately preceding the commencement of investigative leave (or the commencement of required telework in lieu of such leave). The agency stated that management should be given greater flexibility to require telework by changing the regulation to either (1) have no time requirement (*i.e.,* require past participation at any time) or (2) extend the time requirement from 30 days to 180 days. The agency maintained that the law does not require that an employee must have been participating in a telework program prior to being placed in one in lieu of investigative leave.

OPM response: As OPM stated in the preamble for the proposed regulations,[45] this condition limiting telework in lieu of investigative leave only for employees who are current (or recent) telework program participants was based on OPM's understanding of Congressional intent. Section 6502(c) references the eligibility conditions in section 6502(b), which applies to ''participation'' in a telework program. This language indicates that Congress intended to allow agencies to require telework of employees who were already telework program participants. The 30-day time period was adopted, in part, as a protection against an employee cancelling participation in a telework program shortly before the agency would require telework. OPM considers this to be a sufficient period of time to accomplish that objective.

Comment: A union objected to the proposed § 630.1503(c)(3), which states an agency may place an employee in absent without leave status if an employee who is required to telework under § 630.1503(c)(1) is absent from telework duty without approval (*i.e.,* AWOL). An agency also raised concerns about the possibility of placing an employee on AWOL status. The union was concerned that an agency might incorrectly determine that an employee on telework duty was absent from work after a brief absence from the telework site or failure to respond immediately to an inquiry from the employer. For example, a supervisor might call the employee on telework duty when the employee is teleworking from outside the home or unable to immediately take the call and make the inaccurate assumption that the employee is absent from telework duty. The union added this risk is compounded by an employee's flexibility in determining a telework location.

OPM response: This regulation states that an agency ''may'' place an employee in AWOL status if the employee is absent from telework duty without approval, consistent with agency policies. Before placing an employee in AWOL status, the supervisor must follow normal agency policies to determine if the employee is absent without approval. The regulation does not change these protocols. Agencies are also responsible for ensuring that telework agreements clearly identify expectations, including what constitutes an approved telework location. OPM is therefore not changing this provision.

Comment: An agency understood that some employees not currently eligible for telework could be required to telework in lieu of investigative leave. The agency asked if there would be legislative updates to the telework law or in OPM guidance on teleworkers.

OPM response: The regulations provide that telework may be required only for an employee who is ''participating in a telework program,'' as defined in § 630.1502, during some portion of the 30-day period immediately preceding the commencement of required telework.[46] Also, an employee may be required to telework only if he/she is eligible to telework under section 6502(a) and (b)(4).[47] The employee must therefore be telework-eligible under the agency's normal telework policies and must be a current or recent telework program participant. The new section 6502(c) that authorizes required telework in lieu of investigative leave is itself a legislative update. Forecasting any additional legislative updates is beyond the scope of these regulations; however, these regulations do not require any further legislative updates. OPM will consider whether updating its existing telework guidance and leave guidance is necessary.

Section 630.1503(d)—Reassessment and Return to Duty

Comment: Regarding proposed § 630.1503(d)(1) and (d)(4), two agencies asked for the specific time frame in which an employee would be expected to ''report promptly'' if an agency requires the employee to return to duty. A third agency asked OPM to consider adding ''normally within 2 hours,'' or include a reasonable standard that would address what is meant by a ''prompt'' return to work. The agency opined that the additional language would lead to less confusion between managers and employees in determining whether an employee has returned to duty ''promptly.''

OPM response: Agencies are responsible for establishing reporting requirements and communicating expectations to employees when they are notified of placement on investigative leave or notice leave, including what is meant by ''report promptly,'' as this could vary depending

[44] See following comment and response for an explanation of the qualification that telework participation be current or recent.

[45] 82 FR at 32270.

[46] *See* § 630.1503(c)(1)(iii).

[47] *See* § 630.1503(c)(1)(ii).

on an agency's and employee's particular situation.

Comment: An individual stated that proposed §§ 630.1503(d)(1) and (d)(4) are substantially similar regarding the employee's obligation to be available at any time and request leave if unavailable and recommended edits for brevity and combining the sections.

OPM response: OPM agrees that there is some redundancy between paragraphs (d)(1) and (d)(4). In this final rule, the paragraphs are revised to address that redundancy.

Comment: An agency recommended that proposed § 630.1503(d)(4), providing that an employee who is placed on investigative leave or notice leave must be available to report promptly to an approved duty location, should allow reporting at the start of the next business day to be considered ''prompt'' reporting. The agency asserted that it may be impossible for an employee to physically report to work on the same day the employee is instructed to do so, given mass transit schedules and other limitations on commuting over which the employee may have no control. The agency asserted that, at a minimum, the employee should be permitted to take leave (even if not requested in advance) for the remainder of that day and report to work without penalty at the start of the employee's tour of duty on the next business day.

OPM response: Agencies are responsible for establishing reporting requirements and communicating expectations to employees when they are notified of placement on investigative leave or notice leave, including what is meant by ''report promptly,'' as this could vary depending on an agency's and employee's particular situation.

Section 630.1504(b)—Duration of Investigative Leave

Comment: A union recommended that OPM revise the language in proposed § 630.1504(b) to clarify that any interruptions in investigative leave would extend the amount of investigative leave available by the number of days of interruption. The union asked if, in the case of an employee whose initial 30-day period of investigative leave is scheduled to end on July 15, but who opted to take 2 days of sick leave in the first week of July, the period of investigative leave would be extended until July 17.

OPM response: Technically, the period of investigative leave is not extended by interruptions but the calendar date on which the employee will have been placed on 30 workdays of investigative leave may need to be adjusted if there are any interruptions in investigative leave. The duration of investigative leave is based on the number of ''workdays'' on which an employee is *on investigative leave.* If a period of investigative leave is interrupted, the employee is not on investigative leave during the interruption, and those days would not count against the 30-workday limit. Because investigative leave may be charged solely on regular workdays, any paid holidays, for example, would also interrupt investigative leave (see references to ''workdays'' in § 630.1504). OPM will also emphasize this point in its supporting guidance.

Comment: An agency asked if there is a limit to the hours of investigative leave that can be authorized.

OPM response: There is no statutory limit; however, agencies must comply with the requirements for approving extensions (§ 630.1504(f)) and further extensions (§ 630.1504(g)), both of which may be made in increments of up to 30 workdays.

Comment: An agency stated that, under the proposed regulations, agencies can extend the investigative leave and notice leave periods in 30-workday intervals, up to 90 workdays, and may extend the period beyond 90 workdays where appropriate. The agency believed that these ''open-ended extensions'' are tantamount to unscheduled paid vacation for employees suspected of misconduct and can, in some instances, be viewed as disciplinary actions under chapter 75 without due process. The agency proposed that the investigative leave and/or notice leave periods be limited to 60 days with no extensions. The agency further proposed that the CHCO be given the authority to delegate their authority to grant or deny extensions.

OPM response: First, the agency is incorrect in its interpretation that notice leave has extensions. Extensions are only applicable to investigative leave. Additionally, the authority to allow extensions of investigative leave beyond a total of 60 workdays is specifically authorized by statute. The extensions to investigative leave are, by definition, not open-ended, and are neither ''unscheduled paid vacation'' (because the employee must be ready to return to work at any time), nor a punishment (as the employee continues to be compensated). The extensions are meant to further protect the Government from harm to people, data, systems, and facilities while the investigation is completed. Once the maximum number of extensions is reached under § 630.1504(f)(2), further extensions require a report to Congress (*see* § 630.1504(g)). Accordingly, OPM will not adopt the agency's proposal that investigative leave and/or notice leave be limited to 60 workdays. Regarding the agency's proposal that the regulations authorize agency CHCOs to delegate their authority for granting or denying extensions, the Act and rule already specify that incremental extensions of investigative leave are permitted only if approved by the CHCO of an agency or the CHCO's designee. There is no need to delegate authority to deny a request for an extension, since extensions of investigative leave will not occur without a positive approval.

Comment: A union referenced the preamble of the proposed § 630.1504 which stated that ''[a]gencies are expected to expeditiously work to resolve investigations'' (82 FR 32270). The union asserted that this language does not appear in the text of the proposed regulations and stated that it is important to include such language in the regulations because many agencies do not give investigations the appropriate level of urgency.

OPM response: In section 1138(b) of the Act, Congress indicated that usage of administrative leave had, in Congress's view, exceeded reasonable amounts and resulted in significant costs to the Government. Congress stated that agencies should (1) use administrative leave sparingly and reasonably, (2) consider alternatives to use of administrative leave when addressing personnel issues (*e.g.,* employees are under investigation), and (3) act expeditiously to conclude investigations and either return the employee to duty or take an appropriate personnel action. Thus, agencies are expected, by statute, to conclude investigations expeditiously and to take appropriate action afterwards. We note, however, that some investigations covered by the Act are controlled by an entity outside the employing agency, *see* 5 U.S.C. 6329b(a)(6), and that other investigations within the agency's control may pose issues that require evidence that takes time to gather. Neither the statute nor the regulations, therefore, impose a time limit on the duration of an investigation but they do institute accountability measures on the use of investigative leave, which will encourage expeditious and appropriate resolution where the agency controls the investigation.

Section 630.1504(c)—Written Explanation to Employee Regarding Placement on Investigative Leave

Comment: Regarding the written notice to an employee under proposed

§ 630.1504(c), advising them that they are being placed on investigative leave, an agency requested clarification as to the information required and the information within the discretion of the agencies to include through implementing policy. The agency also requested clarification regarding whether an agency must include a notice of appeal rights in a notice where the employee is placed on investigative leave for 70 workdays or more, since that is deemed to be a ''personnel action'' under the prohibited personnel practices provisions.

OPM response: Section 630.1504(c) states that, if an agency places an employee on investigative leave, the agency must provide written explanation that (1) describes the limitations of the leave placement, including the duration of leave; (2) includes notice that, at the conclusion of the period of investigative leave, the agency must take an action under paragraph (d) of this section; and (3) includes notice that placement on investigative leave for 70 workdays or more is considered a ''personnel action'' under the prohibited personnel practices provisions at 5 U.S.C. 2302(b)(8)–(9). These required items must be included in the written notice to the employee. Inclusion of anything beyond these items is at an agency's discretion.

Comment: An association recommended that the written determinations for investigative leave and notice leave detail the agency's rationale for imposing the leave to assist a potential review by the MSPB, the Office of Special Counsel, and others. Specifically, the association requested an amendment to proposed §§ 630.1504(c) and 630.1505(c) that agencies must, within the written explanation of leave to the employee, ''explain the rationale for the agency's determinations that the employee must be removed from the workplace based on the criteria in § 630.1503(b)(1) and that the options in § 630.1503(b)(2) are not appropriate.''

OPM response: Nothing precludes an agency from establishing a policy for such a practice. OPM declines to mandate such a requirement through regulation because, in some instances, prematurely disclosing certain information could negatively affect the integrity of the investigation.

Comment: An agency noted that section 6329b(b)(4)(A) provides for a written ''explanation'' of whether the employee was placed on investigative leave or notice leave and that the statute then details in the requirements of the explanation. The agency stated that the proposed rule suggests a greater agency burden regarding this explanation than what is required under the statute and suggested amending proposed § 630.1504(c) to include the words ''consisting of'' instead of ''must include.'' The agency also suggested amending proposed § 630.1505(c) in the same manner.

OPM response: The additional requirement that OPM added with respect to the written explanation was to notify the employee of the 70-workday threshold for treating placement on investigative leave as a ''personnel action'' under the prohibited personnel practices provisions in 5 U.S.C. 2302(b)(8)–(9). OPM determined that notice to the employee of this treatment was important since it was provided under the Act (section 6329b(g)). The other regulatory requirements for the written explanation for an employee placed on notice leave are consistent with statutory requirements. OPM merely clarified that the notice period defined the limitation on notice leave. OPM is making no changes based on these comments.

Comment: An individual stated it was unclear if the written explanation is required if an employee is placed on 10 days of administrative leave for investigative purposes.

OPM response: The written explanation required under § 630.1504(c) applies only when an employee is placed on investigative leave under section 6329b and subpart O. An employee cannot be placed on such investigative leave until the employee has reached the 10-workday annual limit on administrative leave for investigative purposes under section 6329a and subpart N.[48] Administrative leave for investigative purposes is not ''investigative leave'' that requires a written explanation. The regulations are clear in this regard, so OPM will make no changes based on this comment.

Section 630.1504(d)—Agency Actions Related to Investigative Leave

Comment: An agency and a union commented regarding proposed § 630.1504(d), which provides that not later than the day after the last day of an initial or extended period of investigative leave, an agency must take one of the following actions: return the employee to duty, take one or more of the actions under § 630.1503(b)(2), propose or initiate an adverse action against the employee, or extend the period of investigative leave. The agency noted that, pursuant to § 630.1505(a), notice leave cannot be initiated until *after* a notice of proposed adverse action is issued. The agency stated that § 630.1504(d) presumably requires an agency to leave the employee on investigative leave after the inquiry is completed to cover the employee's absence from the workplace during the process of reviewing the investigation and drafting any adverse action. The union asked if it is OPM's position that the agency should continue to carry an employee on investigative leave during the agency's various processes related to labor/employee relations, so long as the agency still believes the employee is a threat to the agency/systems/personnel/general public. The union stated that OPM should clarify if it would be proper for an agency to use investigative leave while it continues the labor/employee relations process after an investigation has been completed but before an adverse action has been proposed.

OPM response: It is correct that notice leave would not commence until the employee has received a notice of a proposed adverse action. As noted in the discussion of general comments with respect to the definition of ''investigation,'' OPM considers the investigation to include a variety of activities associated with the fact-finding stage, such as preparation of a report and/or recommendation(s). The investigation would also include settlement negotiations that could lead to a recommendation. In short, the investigation includes all of the steps leading to the agency's decision regarding whether to issue a notice of proposed action. If an agency is planning to issue a notice of proposed adverse action based on its investigation, the period of investigation may be viewed as not completed until the agency issues the notice. Thus, an agency can avoid any gap and provide for consecutive use of the two types of leave, where appropriate.

Section 630.1504(f)—Extensions of Investigative Leave

Comment: An agency recommended deleting the requirement that any extension of the initial 30 workdays of investigative leave must be approved by the CHCO or designee. The agency argued that this elevates the approval level too high within the chain of command unnecessarily. The agency believed that extensions of investigative leave should be approved by local commanders/directors.

OPM response: The requirement that extensions of investigative leave be approved by the CHCO or designee is a statutory requirement under section

[48] *See* section 6329b(b)(3)(A) and § 630.1504(a)(1).

6329b(c). OPM notes, though, that neither the Act nor final rule specify the appropriate level to which this function can be delegated and agency CHCOs have the discretion to make such a determination.

Comment: A union recommended that proposed § 630.1504(f)(3) be revised to include language included on page 32271 of the proposed regulations indicating that: (1) requests for extensions of investigative leave should be used sparingly, (2) approving officials should act in a timely manner on such extensions, and (3) agencies should not submit automatic requests for extension. The union also suggested that OPM clarify that the approving official (CHCO or designee) be required to consult *directly* with the investigator who is conducting the investigation, rather than the investigator's supervisor or some other person not closely familiar with the investigation.

OPM response: Since the statute and regulations establish a process for approving extensions in 30-workday increments, the referenced language does not need to be included in the regulatory text. The process compels timely action and requires the approving official to make a written determination that use of investigative leave is warranted with each extension (§ 630.1504(f)(3)(i)). This process also discourages ''automatic'' requests for extensions and promotes sparing but necessary use of investigative leave. The statutory and regulatory requirements to report on use of investigative leave also address these issues. With respect to the union's suggestion that an approving official consult directly with the investigator conducting the investigation, the regulatory language ''after consulting with the investigator responsible for conducting the investigation'' (§ 630.1504(f)(3)(ii)) is clear on its face, and is the exact language used in the statute (*see* section 6329b(c)(1)). OPM is making no changes based on these comments.

Section 630.1504(g)—Further Extensions of Investigative Leave

Comment: An agency recommended adding the word ''However'' at the start of the second sentence in proposed § 630.1504(g), regarding further extensions of investigative leave after an employee has reached the maximum number of extensions of investigative leave under paragraph (f)(2), to make clear that the first sentence is subject to the second sentence.

OPM response: OPM agrees and is revising § 630.1504(g) accordingly.

Comment: An agency noted that rare circumstances may require that an employee be removed from the workplace for more than 90 days and asked what the process would be for an extension of investigative leave in these situations, specifically, if the request would go to OPM. Further, the agency asked if there will be leniency for the ''crime provision.'' The agency stated that, while indefinite suspensions are an option, they are frequently not supported by the MSPB because the employee is only charged and not found guilty.

OPM response: Requests under § 630.1504(g) do not go to OPM. The so-called ''crime provision'' to which the agency refers is in chapter 75 of title 5, U.S. Code. It allows an agency to shorten the notice period of an adverse action where there is reasonable belief that the employee has committed a crime for which a sentence of imprisonment may be imposed.[49] The crime provision found at section 7513(b)(1) and § 752.404(d)(1) is applicable to notice leave under § 630.1503(b)(2)(iv) but not investigative leave. While notice leave is not subject to a time limit (other than the length of the notice period), notice requirements applicable to the particular action continue to apply.

Comment: A union expressed concern that agencies might ''tweak'' an investigation, such as by treating it as a new and different investigation, to circumvent the Congressional reporting requirements associated with further extensions of investigative leave under § 630.1504(g). The union recommended that OPM add a regulatory provision to bar such activity.

OPM response: OPM does not consider it is necessary to add a regulatory provision stating that agencies may not act inappropriately in administering investigative leave. OPM notes that there are various accountability and transparency measures built into the law and regulations, including written approvals by specified officials, recordkeeping requirements, reporting requirements, and GAO reviews. It is also possible for an employee to become subject to new investigations regarding separate matters, and it is not practical to establish precise rules regarding when an investigation should be treated as an entirely new or separate investigation for purposes of the investigative leave law and regulations. Agency officials are authorized to exercise their best judgment in the conduct of investigations and the approval of investigative leave.

[49] 5 U.S.C. 7513(b)(1).

Comment: Two agencies recommended that OPM clarify the reporting requirements regarding employees who are required to telework in lieu of investigative leave, as regulated in § 630.1504(g)(5), reflecting the statutory reporting requirement to Congress in section 6329b(d)(1)(E) regarding employees required to telework, triggered when an agency is approving a ''further'' extension of investigative leave under section 6329b(d). Both agencies noted that an employee is not on investigative leave while performing required telework and found it confusing that a further extension of investigative leave was being approved for an employee in required telework status under section 6502(c). Both agencies asked whether the report to Congress including information on telework referred to cases where the employee was teleworking at some point during an investigation and investigative leave.

OPM response: As explained above, an employee in required telework status is in work status, not investigative leave status. However, section 6502(c) states that an agency may require telework ''if an agency places an employee in investigative leave.'' In drafting the regulations, OPM interpreted this to mean that telework may be required only when the employee would *otherwise* be placed on investigative leave.[50] OPM has concluded that this interpretation reflects the best reading of the statute because a literal reading would have the effect of authorizing agencies to compel the performance of regular work notwithstanding an employee being in a defined leave status, which would be unworkable. In requiring reporting to Congress on telework for an employee who is being approved for a ''further'' extension of investigative leave, OPM believes that Congress did not intend to count required telework time as if it were investigative leave time. The purpose of the approval requirements and conditions associated with the initial and further extensions of investigative leave is to gather information and control the use of paid time off, not work time. OPM notes that it is possible that an employee would telework intermittently and thus have a mix of investigative leave and telework hours over an investigation period. The reporting requirements in section 6329b(d)(1)(E) and § 630.1504(g)(5) mean that an agency must report to Congress on the use of required

[50] *See* § 630.1503(c); see also discussion of this issue in our responses to comments on § 630.1503(c).

telework for the employee in question during the entire period of investigation prior to the further extension of investigative leave. OPM is revising § 630.1504(g)(5) to clarify this point.

Section 630.1504(i)—Possible Prohibited Personnel Action

Comment: With regard to proposed § 630.1504(i), an individual questioned whether 10 days of administrative leave for investigative purposes would be counted towards the 70-workday threshold that allows placement in investigative leave to be considered a ''personnel action'' under the prohibited personnel practices provisions at section 2302(b)(8)–(9).

OPM response: As explained above, an employee must be placed on 10 days of administrative leave for investigative purposes before an employee can be placed on investigative leave. Until and unless that period of administrative leave is exhausted, such leave is not investigative leave under section 6329b and does not count toward the 70-workday threshold in section 6329b(g) and § 630.1504(i).

Comment: An agency requested clarification regarding which entity would review an employee's claim that placement in investigative leave for 70 workdays or more qualified as a ''personnel action'' under the prohibited personnel practices provisions. The agency said that this information was needed because the regulations require that agencies include information about the 70-workday threshold in the initial notice to the employee regarding placement on investigative leave.

OPM response: Section 630.1504(c)(3) requires that agencies include information about the 70-workday threshold under § 630.1504(i) as part of the written explanation to an employee placed on investigative leave. Placement on investigative leave is not an adverse action and does not establish an independent basis for filing a complaint with the U.S. Office of Special Counsel (OSC) or an action directly appealable to the MSPB. Similarly, the regulatory provision does not create a mechanism for independent review for employees who are placed on investigative leave for 70 workdays or more. Rather, the provision permits OSC to determine that the *personnel action* required to nonfrivolously allege reprisal is satisfied if an employee has been on investigative leave for 70 or more workdays, and alleges reprisal based on protected disclosures (section 2302(b)(8)) or activity (section 2302(b)(9)). Further, because placement on investigative leave is not a personnel action directly appealable to the MSPB, employees must seek corrective action with OSC before filing an individual right of action appeal to the MSPB (section 1221). OPM plans to provide agencies with guidance regarding the language agencies should use in written explanations with respect to the 70-workday threshold.

Comment: An organization argued that proposed § 630.1504(i) was ''puzzling'' and largely ineffectual. It questioned why the 70-workday threshold applied only to investigative leave. The organization stated that the provision was ineffectual because, in the absence of an independent whistleblower claim, OSC would not have jurisdiction to act. For an employee subjected to excessive investigative leave because, for example, the employee was politically inconvenient or doing legitimate work that is potentially embarrassing to agency management, this provision offers no protection. The organization noted, though, that retaliatory investigations are already a prohibited personnel practice under the provision covering ''any other significant change in duties, responsibilities, or working conditions'' (section 2302(a)(2)(xi)).

OPM response: Section 630.1504(i) repeats the statutory language in section 6329b(g). The effect of the law is that the action to place an employee on investigative leave shall be considered a personnel action that could trigger application of prohibited personnel practices provisions in section 2302(b)(8) and (9) (which include prohibitions against retaliatory personnel actions) once the employee has been placed on investigative leave for 70 workdays or more.

Section 630.1505—Administration of Notice Leave

Comment: Fourteen commenters, including two agency representatives, expressed concern about an employee remaining in the workplace after receiving a notice of proposed removal if retaining the individual in the workplace created an unnecessary risk of workplace violence. They also expressed concern that allowing an employee to continue to report to the workplace after receiving a notice of proposed removal would otherwise be disruptive, unproductive, a waste of taxpayer dollars, or of no benefit to the agency. Twelve individual commenters and one agency maintained that proposed § 630.1505 should be revised to state that whenever an agency proposes the removal of an employee, it shall, or normally will, place the employee on notice leave.

OPM response: These regulations are based on statutory requirements. In accordance with statute, § 630.1503(b)(1) provides that notice leave may be used *only* when the agency makes the required determination, after consideration of the baseline factors identified in § 630.1503(e), that the employee must be removed from the workplace during a notice period to protect agency facilities or systems, the Federal workforce, or the public from harm. If, after consideration of the baseline factors and the consideration of other options, the agency determines that the continued presence of the employee in the workplace while in a notice period meets one or more of the criteria listed in § 630.1503(b)(1), the agency may place the employee on notice leave. Nothing in the regulation requires agencies to keep employees in the workplace if an agency determines, pursuant to these baseline factors, that an employee presents a workplace violence threat. Notice leave is approved at the agency's discretion (subject to statutory and regulatory requirements)—it does not create a new entitlement. We note that all the commenters suggested limiting the regulation to the context of an employee's removal or termination from Federal service. However, the statute, and therefore this regulation, does not make a distinction among the types of adverse actions. The procedural requirements will be applied consistently to all adverse actions.

Comment: Eleven commenters, including one agency representative, recommended that the regulatory language include a directive that the authority for approving notice leave be delegated to the lowest reasonable level within the agency so that frontline managers are empowered to protect the Federal workplace once an employee's removal has been proposed. An individual suggested that, because extensions of investigative leave have specific requirements for levels of approval, the level of approval for initial placement on administrative leave and investigative leave should likewise be clarified in the regulation.

OPM response: This regulation does not prohibit agencies from delegating the authority for approving notice leave to the lowest reasonable level within the agency. Although there are required approval levels regarding administrative leave (§§ 630.1402 (definition of ''agency'') and 630.1403), and extensions of investigative leave (§ 630.1504(f) and (g)), there are no such requirements regarding notice leave. Agencies have the discretion to establish the appropriate authority level

for granting notice leave within their organizations.

Comment: Six individuals referenced the Civil Service Reform Act of 1978 and Congressional intent regarding the notice period for employees who have received a notice of proposed removal, and one individual asserted that the proposed regulations are detrimental to the efficiency of the service, a key component of the disciplinary system.

OPM response: These comments are outside the scope of these regulations because Congress has imposed these requirements in the Administrative Leave Act notwithstanding the provisions of the Civil Service Reform Act. Nonetheless, we do not see an inconsistency. The relevant portion of the Civil Service Reform Act, implemented in § 752.404(b)(3), states: ''Under ordinary circumstances, an employee whose removal or suspension, including indefinite suspension, has been proposed will remain in a duty status in his or her regular position during the advance notice period. In those rare circumstances where the agency determines that the employee's continued presence in the workplace during the notice period may pose a threat to the employee or others, result in loss of or damage to Government property, or otherwise jeopardize legitimate Government interests, the agency may elect one or a combination of the following alternatives: . . . (iv) Placing the employee in a paid, nonduty status for such time as necessary to effect the action.'' The regulation in § 630.1503 does not supersede or conflict with this regulation. Rather it identifies baseline factors that the agency must consider in making this determination. Regarding the assertion that the proposed regulations are detrimental to the efficiency of the service, OPM disagrees and notes that the Act requires an agency to make this formal determination before it may place the employee on notice leave. We also note that the efficiency of the service remains the standard applied in any underlying adverse action proceedings (§§ 752.202 and 752.403). The duty or leave status of the employee during the notice period of an adverse action is irrelevant to whether the efficiency of the service standard has been met for purposes of an adverse action.

Comment: Ten individuals stated that the proposed regulations are overly bureaucratic, narrowly written, or otherwise make it exceedingly difficult to take an employee out of the workplace pending a decision on a notice of proposed adverse action. Some of the individuals asserted that the proposed regulations will result in managers being reluctant to take action against poor performance or employees who have engaged in misconduct.

OPM response: The regulations in § 630.1503 are based on statutory requirements. In accordance with statute, § 630.1503(b)(1) provides that notice leave may be used *only* when the agency makes the required determination, using the baseline factors identified in § 630.1503(e), that the employee must be removed from the workplace during a notice period to protect agency facilities or systems, the Federal workforce, or the public from harm. These regulations have been written in accordance with the requirements of the law.

Comment: An association commented that the proposed regulations, as they relate to notice leave, will not carry out the intent of Congress because there are no limitations to curb the ''ongoing abuses'' of leave. While the association acknowledged that a period of notice leave ends on the effective date of the adverse action or on the date on which the agency notifies the employee that no adverse action will be taken, the association argued that ''unlimited'' notice leave would allow agencies to issue an ''unjustifiable removal proposal followed by imposing indefinite leave'' allowing the agency to ''disappear the targeted employee without an ounce of due process or procedural protection.'' The association stated that the proposed regulations on notice leave rely upon ''agency self-policing.''

OPM response: This comment is outside the scope of these regulations. OPM notes, though, that the statutory provisions in chapter 75, and the procedural requirements for proposing and taking an adverse action against an employee regulated in part 752, do not require a decision within a specified period of time. The provisions of the Act and this final rule do not change the procedural requirements in part 752. Further, placement of employees on paid leave does not deprive them of a property interest so the due process is not implicated. The regulations in subpart O are in accordance with the requirements of law and reflect the intent of Congress. Additionally, § 630.1506 requires that an agency maintain an accurate record of the placement of an employee on investigative leave or notice leave, including the reasons for the authorization of notice leave (including the alleged employee action(s) that necessitated the issuance of a notice of a proposed adverse action), the basis for the determination made under § 630.1503(b)(1), an explanation why an action under § 630.1503(b)(2) was not appropriate, the length of the period of notice leave, and the amount of salary paid to the employee during the period of leave. An agency must make these records available upon request to any committee of jurisdiction, to OPM, to GAO, and as otherwise required by law. Agencies must also provide information to the GAO, which is required under section 1138(d)(2) of Public Law 114–328 to submit reports to specified Congressional committees on a 5-year cycle. Accordingly, there are mechanisms to ensure agency accountability for placing employees on notice leave.

Comment: An agency stated that proposed 630.1505(a) refers to notice leave upon a proposed adverse action but other provisions also refer to ''disciplinary actions.'' The agency argued that a distinction between adverse actions and disciplinary actions is not drawn in the underlying statute or regulations concerning adverse actions.

OPM response: By law, notice leave is linked to issuance of a notice of proposed adverse action (section 6329b(a)(8)). The regulatory definition of the term *investigation,* which is used in conjunction with investigative leave, encompasses the investigation of matters that could lead to appealable adverse actions or to non-appealable adverse actions, which we described as ''disciplinary actions'' (§ 630.1502) in the NPRM. To clarify, OPM is adopting a definition of *investigation* at § 630.1502 that specifies that the regulation is intended to cover a variety of inquiries that could result in any type of action adverse to the employee and removes the phrase ''disciplinary actions.''

Comment: An agency referenced proposed § 630.1505(b) which states, ''The placement of an employee on notice leave shall be for a period *not longer than the duration of the notice period.*'' (Emphasis added by the commenter). The agency interpreted this to mean that the notice period was limited to 30 days. The agency argued that they routinely arrange for short extensions to the notice period to accommodate requests from employees' counsel, to arrange for settlement agreements, or facilitate retirement/resignation effective dates, and that there is no provision for extending the notice period in the proposed regulations.

OPM response: This final rule does not limit a notice period to 30 days. As stated in § 630.1502, *notice period* means ''a period beginning on the date on which an employee is provided

notice, as required under law, of a proposed adverse action against the employee and ending—(1) On the effective date of the adverse action; or (2) On the date on which the agency notifies the employee that no adverse action will be taken.'' Because there is no such limit, there is no need (or provision) for extension of the notice period. In fact, 5 U.S.C. chapter 75 and 5 CFR part 752 establish a floor, not a ceiling, for the notice period relating to an adverse action.

Comment: An agency noted that there were no proposed regulations on extensions of an employee's notice period and asked if an unlimited amount of time could be granted. The agency also asked if the 70-workday threshold in § 630.1504(i) applied to the notice period.

OPM response: Section 6329b did not establish approval and reporting requirements for extensions of notice leave. Notice leave may be granted only during the ''notice period,'' as defined in § 630.1502. As explained above, the notice period ends on (1) the effective date of an adverse action or (2) the date on which the agency notifies the employee that no adverse action will be taken. Consistent with section 6329b(g), the 70-workday threshold in § 630.1504(i) applies only to investigative leave (*i.e.,* only workdays of investigative leave count towards this threshold).

Section 630.1506—Records and Reporting

Comment: An agency recommended that proposed § 630.1506 be revised to clarify the length of time records need to be maintained.

OPM response: The recordkeeping requirements in § 630.1506 are based on the statutory requirements in section 6329b(f), which did not specify a length of time for maintaining these specific records. In this final rule, OPM is specifying a minimum retention period of 6 years for records on investigative leave and notice leave at § 630.1506(b)(3). We are also specifying a minimum retention period of 6 years for records on administrative leave under subpart N at § 630.1406(b).

Comment: Three unions referenced the requirement in proposed § 630.1506(b)(2), that any action to make a record available regarding use of investigative leave or notice leave is subject to other applicable laws, Executive orders, and regulations governing the dissemination of sensitive information related to national security, foreign relations, or law enforcement matters. The unions asserted that the Privacy Act (section 552a) should be included in the list of statutes to which the leave records under discussion are subject so that agencies are cognizant of their obligations in this area.

OPM response: OPM agrees that the Privacy Act (section 552a) is an ''applicable law'' under the provision and that disclosures of sensitive information are subject to that Act but do not believe it is necessary to provide a list of applicable laws in the regulatory text. We note, also, that a general exemption from the Privacy Act applies to the disclosure of information to Congress or GAO (section 552a(b)(9)–(10)), which are two of the entities to which agencies must make records on investigative leave and notice leave available (§ 630.1506(b)).

Comment: Two unions expressed concern that agencies might record sensitive information regarding the reasons why an employee was placed on investigative leave and that this information might be released inappropriately within or outside the agency because of the recordkeeping requirements in § 630.1506. The unions were particularly concerned that there would be a written record of investigative leave even if an employee is found to be innocent following an investigation.

OPM response: The recordkeeping requirements in § 630.1506 are based on statutory requirements in section 6329b(f). Congress made no allowance in the Administrative Leave Act for deleting records on investigative leave when the investigation of an employee does not lead to a disciplinary or adverse action. However, agencies are subject to the applicable laws and rules governing the handling of sensitive information and personnel records, including the Privacy Act (section 552a). Section 630.1506(b)(2) specifically states that agencies are subject to laws, Executive orders, and regulations governing the handling of sensitive information related to national security, foreign relations, or law enforcement matters. If issues arise about the handling of sensitive information, the relevant agency should consult with agency counsel. OPM may choose to address the matter in guidance.

Comment: An individual recommended deleting proposed § 630.1506(a)(9), which provides that agencies must keep records on ''any additional information OPM may require.'' A union stated that any additional requirements should be specified in the regulation.

OPM response: OPM disagrees with this recommendation. Under section 6329b(f)(1), Congress indicated that agencies must retain records regarding investigative leave and notice leave and included specific items for retention. However, the list of items is not exhaustive (see section 6329b(f)(1)—''including'' certain items for retention). This language indicates that Congress anticipated the possibility of additional information being kept in the records. While OPM has not identified additional information that is needed at this time, OPM may require additional information under § 630.1506(a)(9) pursuant to its authority under Civil Service Rules V and X (5 CFR parts 5 and 10) to protect or promote the efficiency of the Government and the integrity of the competitive service and to ensure consistent application of the merit system principles.[51]

Subpart O—Miscellaneous Comments

Comment: An agency asked if employees on investigative leave and/or notice leave are subject to ''monitoring & calling.'' The agency stated that it is their practice to require an employee to be available for contact by phone during any period of administrative leave in conjunction with an investigation or notice period. The agency requested that this matter be addressed in the regulations.

OPM response: Matters such as this are within the agency's discretion to address within their implementing policy on investigative leave and notice leave. As addressed in § 630.1503(d), an employee on investigative leave or notice leave must be prepared to report promptly to work.

Comment: An agency asserted that, if an employee continues performing the same/similar duties while required to telework, it could negatively impact the agency's claim to have a ''lack of confidence/trust'' in the employee, which is a critical ''Douglas'' factor in adverse action cases.

OPM response: Section 630.1503(c) describes the alternative of an agency requiring an employee to telework in lieu of being placed on investigative leave. While the law requires agencies to consider certain options before approving use of investigative leave (section 6329b(b)(2)), the law does not require agencies to consider the telework option (section 6502(c)). An agency has discretion in deciding whether it will require telework by an employee who would otherwise be placed in investigative leave, subject to the conditions set forth in law and regulation. As stated in

[51] *See, e.g.,* §§ 351.803(c)(3) and 550.1615(e)(1)(viii) and (2)(viii) for OPM's use of this authority in other contexts.

§ 630.1503(c)(1)(i), before an agency requires telework, it must determine that it would not pose certain risks to Government personnel, property, or other interests. After applying these conditions, the agency still has the discretion to not require telework if it determines it would be inappropriate (§ 630.1503(c)(1)(iv)).

Comment: An association stated that restrictions of the type included in the proposed rule will help avoid unnecessary stigmatization of employees facing proposed adverse actions. The association supports allowing notice leave to continue as long as needed to allow for a thorough review and reasoned decision regarding a proposed adverse action and opposes artificial limits on the notice period. The association supported the approach of limiting notice leave to chapter 75 adverse actions and cited language from the preamble of the proposed regulations, which stated, ''An employee who has not received an advance notice of proposed adverse action under 5 CFR chapter [sic] 752 may not be provided notice leave'' (82 FR 32267). The association requested that OPM explicitly incorporate that restriction into § 630.1503. The association believed that the policy reasons governing legitimate use of notice leave, as listed in § 630.1503(b)(1)(i)–(iv), in practice apply only to chapter 75 adverse actions, and that the types of situations where actions that could be adverse in a more generic sense can be proposed under other legal authorities (*e.g.,* chapter 43 performance actions and part 731 suitability actions) would rarely meet the requirements of § 630.1503(b)(1)(i)–(iv). The association stated that, to avoid possible redundancy between proposed § 630.1503(a)(2)(i) and § 630.1503(a)(2)(ii), and to effectuate the policy goals, the two provisions should be consolidated and revised. Specifically, the association suggested that proposed § 630.1503(a)(2) should be revised in relevant part to read as follows: ''(2) Notice leave: (i) If the agency proposes or initiates an adverse action against the employee under 5 CFR part 752 or directly analogous misconduct-based adverse action authorities; and (ii) The agency determines that the employee continues to meet one or more of the criteria described in paragraph (b)(1) of this section.'' To make clear that reference to part 752 is not exclusive, OPM amends the definition of *Investigation* at § 630.1502 to include an ''employee's compliance with or adherence to security requirements including eligibility to hold a position that is national security sensitive under E.O. 13467, eligibility for access to classified information under E.O. 12968, as amended, and standards issued by the Office of the Director of National Intelligence (ODNI).''

OPM response: OPM declines to make the suggested change. Although we recognize that ''adverse action'' can be a term of art, referring to actions pursuant to chapter 75, the part of the preamble quoted by the association goes on to state, ''Section 630.1503(a)(2)(ii) authorizes notice leave, following a placement of an employee on investigative leave, which may be provided after the last day of the period of investigative leave if the agency proposes an adverse action against the employee under 5 CFR [part] 752 *or similar authority.*'' OPM notes that neither the statute nor the regulation limits notice leave to adverse actions taken under the procedures of chapter 75. Rather, coverage extends to other actions taken under other authorities that can result in outcomes adverse to the employee—such as removal, demotion, or suspension—following a period of notice. The sentence in the proposed rule referring to part 752 was also intended to cover actions under these other authorities. To make clear that reference to part 752 is not exclusive, OPM amends the definition of *Investigation* at 630.1502 to include an ''employee's compliance with or adherence to security requirements including eligibility to hold a position that is national security sensitive under E.O. 13467, eligibility for access to classified information under E.O. 12968, as amended, and standards issued by the Office of the Director of National Intelligence (ODNI).'' As to the issue of redundancy between § 630.1503(a)(2)(i) and § 630.1503(a)(2)(ii), the regulations parallel the statutory language in section 6329b(b)(1). The provisions in section 6329b(b)(1)(C) and § 630.1503(a)(2)(ii) clarify the circumstances under which notice leave may immediately follow investigative leave.

Comment: An agency asked how investigative leave will affect the use of indefinite suspensions. The agency asked if investigative leave should replace indefinite suspensions as a tool available to agencies where there is cause to believe a crime has been committed for which imprisonment may be imposed. The agency believed part 752 requires clarification regarding investigative leave, use of indefinite suspensions, and the impact of the crime provision. The agency stated that the use of administrative leave is limited to 10 days and asked if agencies are also limited to 10 days for investigative leave. Additionally, the agency asked about time limitations and approval requirements for extensions related to investigative leave and notice leave.

OPM response: OPM does not agree that the use of indefinite suspensions and the crime provision are impacted by this rule. Agencies may still use existing authorities to levy indefinite suspensions and utilize the crime provision to shorten the advance notice period. Also, the question of whether an agency should use investigative leave in lieu of imposing an indefinite suspension runs contrary to the intent of the Administrative Leave Act. Congress expressed concern over the use of extensive paid, non-duty time as a substitute for taking appropriate disciplinary action. To use investigative leave in such a manner, as questioned by the agency, would not find support in the law or these regulations.

Additionally, the application of administrative leave for 10 workdays is covered in § 630.1604(a). The duration of investigative leave is addressed in this rule at § 630.1504(b), and extensions and further extensions of investigative leave are addressed in § 630.1504(f) and (g), respectively. Unlike investigative leave, there are no extensions regarding notice leave as the duration can be as long as the notice period. The requirements and duration of notice leave are addressed in this rule at § 630.1505.

Amendments to §§ 752.404(b)(3) and 752.604(b)(2)

Comment: An agency asked whether OPM plans to amend its chapter 75 regulations (either separately or with these regulations) to provide more detail regarding notice periods and extensions relating to investigative leave. A different agency stated that the use of investigative leave and notice leave impacts OPM's regulations found in part 752, which relate to disciplinary and adverse actions, and asked if OPM plans to amend §§ 752.404 and 752.604. The agency asserted that, unless these sections are amended, there will be two separate parts of the CFR in conflict.

OPM response: To conform part 752 to the notice leave provisions in section 6329b and subpart O, OPM will amend the related regulations in §§ 752.404 and 752.604. Specifically, we will revise §§ 752.404(b)(3)(iv) and 752.604(b)(2)(iv) to explain that an agency may place an employee in notice leave status for no longer than the duration of the notice period if the criteria in § 630.1503(b) are met.

We note that investigative leave is inapplicable to part 752 as the adverse action regulations relate to procedures that occur after an agency's investigation is complete. Further, OPM does not agree that our amendments to part 630 conflict with part 752. The adverse action regulations at §§ 752.404(b)(3)(iv) and 752.604(b)(2)(iv) refer to placing employees in ''paid, nonduty status'' during a notice period. This paid, nonduty status would be approved in the form of notice leave under subpart O.

Miscellaneous Comments Regarding § 251.202(a)(3)

Comment: Two management associations expressed general support for the proposed regulations but questioned how the regulations would affect an OPM regulation in part 251 dealing with use of excused absence for employees who attend meetings of a professional association from which an agency could derive some benefits (§ 251.202(a)(3)). In particular, the associations expressed concern that any administrative leave granted under the new subpart N for such meetings would be subject to the 10-workday calendar year limitation. One association asserted that the Administrative Leave Act specified a 10-day limit only for investigative leave. Both associations stated that the new regulation is not in line with the intent of the Act and could have an unintended consequence of limiting the ability for professional associations to meet with their respective agency leaders. The associations requested that OPM revise the regulations to exclude time in professional management association meetings from counting towards the 10-workday calendar year limit on administrative leave. The management associations also questioned how the proposed regulations would affect other subsections of part 251, such as § 251.202(a)(2), the provision authorizing pay to employees who attend professional organization meetings when such attendance is for the purpose of employee development or directly concerned with agency functions or activities and the agency can derive benefits from employee attendance at such meetings.

OPM response: First, as explained above, the 10-workday annual limit in section 6329a applies to administrative leave for investigative purposes so it would not apply to the meetings at issue in these comments.

In response to the other parts of this comment, OPM analyzed the part 251 regulation cited by the management associations and related laws. Section 251.202(a)(2) states that, using the authority in sections 4109 and 4110, as implemented by OPM regulations in part 410, an agency may pay expenses of employees to attend professional organization ''meetings'' when such attendance is ''for the purpose of employee development or directly concerned with agency functions or activities and the agency can derive benefits from employee attendance at such meetings.'' This paragraph (a)(2) does not expressly address whether an agency may provide an employee with the employee's regular pay during such attendance—*i.e.,* treat the time as compensable work time. However, the referenced section 4109 in the training law authorizes agencies to pay all or a part of an employee's pay (except overtime, holiday, or night differential pay) for a period of ''training under this chapter'' (*i.e.,* chapter 41).[52] Note that this is separate from the authority to pay for necessary training expenses under section 4109(a)(2). The referenced section 4110 is a special authority in the training law permitting agencies to pay for travel expenses for ''meetings'' that are ''concerned with the functions or activities for which the appropriation is made or which will contribute to improved conduct, supervision, or management of the functions or activities.'' Section 410.404 of OPM's training regulations specifically addresses attendance at a ''conference'' as a ''developmental assignment'' under section 4110 and describes how conference attendance can meet the definition of ''training'' in section 4101. Former Federal Personnel Manual (FPM) guidance addressed section 4110 and spoke of ''authorizing attendance at meetings without charge to leave,'' but did not specifically refer to use of excused absence or administrative leave.[53]

OPM understands that some agencies have adopted policies under which administrative leave has been used to provide pay during employees' attendance at meetings of the type that are covered by section 4110. However, OPM concludes that the authority in section 4109(a)(1) to provide all or a part of an employee's pay during a period of training under chapter 41 applies to the special category of ''training'' associated with attendance at meetings covered by section 4110. In other words, time spent attending meetings covered by section 4110 may be treated as the equivalent of regular work time—not administrative leave—to the extent an agency uses the authority in section 4109(a)(1) to provide pay for the meeting time. OPM notes that, even if an agency decides not to pay travel expenses for a meeting covered by section 4110, it would still be a covered meeting for purposes of providing pay under section 4109(a)(1). Administrative leave would be an issue only if a meeting or conference was determined not to meet the requirements under section 4110 or if an agency decided not to provide pay for the meeting time under section 4109(a)(1).[54]

OPM did not propose any regulatory changes regarding part 251 and does not believe that any changes are necessary at this time.

V. Regulatory Analysis

A. Statement of Need

OPM is issuing this final rule to implement the administrative leave, investigative leave, and notice leave provisions of the Administrative Leave Act of 2016. The Act created these new categories of paid leave in chapter 63 of title 5, U.S. Code, specifically at section 6329a regarding administrative leave and at section 6329b regarding investigative leave and notice leave. The Act directed OPM to prescribe implementing regulations to carry out these sections including by providing guidance to agencies regarding acceptable uses for and proper recording of these leave categories.

As explained above in the ''Background'' section, in drafting the Administrative Leave Act, Congress considered an October 2014 report entitled ''Federal Paid Administrative Leave,'' prepared by the GAO.[55] GAO found that agency policies on administrative leave varied and that some employees were on administrative leave for long periods of time, which had significant cost implications. GAO concluded that ''Federal agencies have the discretion to grant paid administrative leave to employees to help manage their workforces when it is in their best interest to do so,'' but that administrative leave should be managed effectively since it is a cost to the taxpayer. Congress extensively cited the GAO report and its findings in 2016 House and Senate committee reports on

[52] *See* section 4109(a)(1).

[53] *See* subchapter 8 of FPM chapter 410.

[54] OPM also notes that, for FLSA-nonexempt employees, training time must be treated as compensable hours of work if the training time meets the hours-of-work conditions in either title 5 or the FLSA. *See* 5 CFR 410.402, 551.401(f)–(g), and 551.423.

[55] *See* Gov't Accountability Off., ''Federal Paid Administrative Leave,'' Oct. 2014, at *https://www.gao.gov/assets/gao-15-79.pdf.*

draft bills that eventually became the Administrative Leave Act.[56]

In the sense of Congress provisions in section 1138(b) of the Act, Congress reiterated the need for legislation to address concerns that usage of administrative leave had sometimes exceeded reasonable amounts and resulted in significant costs to the Government. Congress wanted agencies to (1) use administrative leave sparingly and reasonably, (2) consider alternatives to use of administrative leave when employees are under investigation, and (3) act expeditiously to conclude investigations and either return the employee to duty or take an appropriate personnel action. Congress also wanted agencies to keep accurate records regarding the use of these leave categories.

This rulemaking is necessary for OPM to meet its obligations under the Administrative Leave Act to carry out sections 6329a and 6329b. OPM is therefore prescribing acceptable uses and proper recording of administrative leave, as well as regulations regarding acceptable uses, proper recording, reporting, baseline factors agencies must consider, and procedures for the approval and the extensions of investigative leave and notice leave. Without this rulemaking, OPM would not meet its statutory obligations under the Act and agencies would lack the necessary guidance regarding how to meet their own obligations under the Act.

In addition to the statutory charge, it is OPM's policy that paid leave should be effectively managed and it believes this final rule accomplishes this while addressing Congress' concerns that led to the enactment of the Administrative Leave Act. OPM also does this while preserving agency discretion to tailor policies to their workforces and without unduly burdening those Federal agencies.

B. Consideration of Regulatory Alternatives

As explained in the previous section, the changes reflected in OPM's regulations for administrative leave, investigative leave, and notice leave are required by statute and reflect OPM's policies regarding paid leave. OPM did not have the option to not regulate—the Act requires OPM to prescribe regulations to carry out sections 6329a and 6329b and guide agencies regarding these new leave categories. We have prescribed regulations that accomplish this while striving to limit the burden placed on agencies.

This final rule establishes requirements regarding (1) the acceptable uses of administrative, investigative, and notice leave, (2) the proper recording of administrative, investigative, and notice leave, (3) baseline factors that an agency must consider when making a determination that investigative or notice leave should be used because the continued presence of an employee in the workplace may pose a threat to the employee or others, result in the destruction of evidence relevant to an investigation, result in loss of or damage to Government property, or otherwise jeopardize legitimate Government interests, and (4) procedures and criteria for the approval of an extension of an investigative leave period. Additionally, the rulemaking provides the procedure for reassessing an employee's return to duty, at the discretion of the agency. The regulations also set forth reporting requirements as an additional agency responsibility.

Regarding administrative leave under section 6329a, OPM chose to prescribe regulations at subpart N that track policies and procedures familiar to agencies rather than impose novel factors and criteria. OPM considered the possibility of identifying specific situations in which use of administrative leave would be prohibited even when use of administrative leave in those situations would be allowed based on the general principles in the regulations. Ultimately, we determined that it was generally not practical or desirable to prescribe a long list of specific prohibited uses. Thus, this final rule preserves broad discretion under a set of guiding principles under which agency heads have operated for many years, which allows them to consider all facts and circumstances of any given situation rather than applying inflexible requirements. We have added a list of decision factors in § 630.1403(a)(6) to help agencies in making policy and approval decisions regarding administrative leave.

Regarding investigative leave and notice leave under section 6329b, the focus of the 2014 GAO report and of Congress when it enacted the Administrative Leave Act, OPM chose to prescribe regulations that track the requirements in the statutory language in section 6329b. Unlike administrative leave in section 6329a, Congress outlined detailed requirements on the appropriate use of investigative leave and notice leave in section 6329b. Since Congress provided these comprehensive requirements, OPM has concluded additional factors or criteria are not necessary regarding the use of investigative and notice leave. To the extent any remaining matters are not addressed in this final rule, OPM believes it is appropriate for each agency to exercise their discretion to develop policies appropriate for their unique missions and requirements.

Finally, commenters suggested several revisions and alternatives to the proposed regulations. While addressing them in this final rule, OPM determined that some of them were beyond the scope of this rulemaking or not within OPM's rulemaking authority, whereas others were within the scope and OPM's rulemaking authority. The reasons OPM decided to adopt or not adopt changes proposed by commenters to specific regulatory provisions are explained above in the section on ''Regulatory Amendments and Related Comments.''

C. Impact

This rulemaking conforms OPM's regulations to the statutory requirements for administrative leave, investigative leave, and notice leave, and prescribes the proper uses of these leave categories and the recordkeeping and reporting requirements with which agencies must comply across the Federal Government.

With respect to administrative leave under section 6329a, the issued regulations are consistent with longstanding policies and practices. The general principles in § 630.1403(a) are the same general principles found in longstanding OPM guidance on administrative leave.[57] We do not expect that overall agency use of administrative leave will change in ways unfamiliar to agencies. In some cases, since the principles now have a regulatory basis and usage reporting will be required, agencies may act more prudently in approving some uses of administrative leave. The requirement for agencies to adopt formal policies (starting with the agency head) and to record and report on uses of administrative leave will impose new administrative burdens but will improve transparency and accountability.

These regulations also outline the required determinations that an agency must conduct, in its discretion, to place an employee on investigative leave or notice leave, under section 6329b, and requirements for the duration of that leave. After consideration of the

[56] *See* House Report 114–520, (Aug. 25, 2016), accompanying H.R. 4359, at *https://www.govinfo.gov/content/pkg/CRPT-114hrpt520/html/CRPT-114hrpt520.htm;* Senate Report 114–292, (July 6, 2016), accompanying S. 2450, at *https://www.govinfo.gov/content/pkg/CRPT-114srpt292/html/CRPT-114srpt292.htm.*

[57] *See* OPM fact sheet at *https://www.opm.gov/policy-data-oversight/pay-leave/leave-administration/fact-sheets/administrative-leave/.*

baseline factors set out at § 630.1503(e) the agency is required to determine that the continued presence of the employee in the workplace during an investigation of the employee or while the employee is in a notice period, as applicable, may pose a threat or otherwise jeopardize Government interests as enumerated in the regulations. Before using investigative leave or notice leave, an agency must consider and determine that the options described in the regulations are inappropriate. The options are: assignment of the employee to duties in which the employee no longer poses a threat, allowing the employee to voluntarily take leave or paid time off, carrying the employee in absent without leave status if the employee is absent from duty without approval; and, for an employee subject to a notice period, curtailing the notice period if there is reasonable cause to believe the employee has committed a crime for which a sentence of imprisonment may be imposed. We believe that agencies have the requisite knowledge, skills, and resources to make these assessments and determinations, which are similar to evaluations agencies currently must use in other contexts. For example, pursuant to § 752.404, agencies currently assess whether an employee should remain in a duty status, be allowed to use leave, or be placed in a paid, non-duty status during a notice period. OPM believes that assessments for placing an employee on investigative leave or notice leave and for any extensions of investigative leave will be minimally burdensome on agencies.

This final rule also requires agencies to make the same type of assessments about an employee's work status that they make now and, therefore, does not require significant investment in new tools or resources. This final rule provides that an employee may be returned to duty at any time if the agency reassesses its determination to place the employee on investigative leave or notice leave, or to require the employee to telework in lieu of placing the employee investigative leave. An employee on investigative leave or notice leave must also be prepared to report promptly to work. The regulations stipulate these decisions are at the discretion of the agency. Agencies make similar assessments now and, therefore, we do not view these regulations as requiring significant new tools or resources.

Finally, this final rule will enable the Federal Government to track these leave categories more accurately. Agencies must keep separate records on these leave categories. Agencies and payroll service providers currently have systems for recording and tracking leave usage that will need to be updated to account for the new leave categories. This new, more reliable data will better inform any further efforts by Congress, OPM, or agencies to modify these leave requirements and policies. The ongoing burden should be minimal when this final rule is effective, and the procedures are adopted at each agency.

The 2014 GAO report found various issues with the available data on use of administrative leave. In some cases, agencies were reporting holiday paid time off under the Administrative Leave-General category. GAO also identified instances where agencies incorrectly recorded duty time or another type of paid leave in the catchall administrative leave category. Based on available payroll data, after excluding holiday paid time off, GAO found that the average value of the administrative leave was less than 0.61 percent of the total basic salary costs. That would equate to an average of about 1.6 days of leave per year per employee. Today 0.61 percent of total basic salary costs for all full-time and part-time Federal employees in the OPM Governmentwide database would be roughly $1.4 billion for one year, including the cost of weather and safety leave.[58] Even in the absence of reliable payroll data regarding administrative leave, investigative leave, and notice leave, we believe it is reasonable to conclude that usage of these leave categories will change since the regulations detail their acceptable uses and proper reporting, limit the use of investigative leave, and prescribe and give effect to significant accountability and transparency measures built into the Administrative Leave Act, including written approvals by specified agency officials, recordkeeping requirements, reporting requirements, and GAO reviews.

D. Costs

For purposes of conducting a regulatory analysis, costs are measured against a no-action baseline—*i.e.,* the new costs generated by a regulation compared to the absence of the regulation. In the absence of this regulation, agencies would continue granting and recording paid time off in the way the 2014 GAO report and Congress deemed in need of reform. The Administrative Leave Act provided specific statutory authority for types of leave that have been granted under other authorities for many years. The law and regulations will now require application of new administrative requirements and procedures, new recordkeeping and reporting requirements, and the drafting of new agency policy and procedures documents (including authority delegations) that implement the new requirements.

Agencies will incur some administrative costs to implement the requirements of this final rule. The rule will affect the operations of approximately 120 Federal agencies, ranging from cabinet-level departments to small independent agencies. To comply with these regulatory changes, the affected agencies will need to update their policies, procedures, and data systems, including timekeeping systems within 270 days of the publication. For this cost analysis, the assumed average salary rate of Federal employees performing this work is the 2024 rate for GS–14, step 5, from the Washington, DC, locality pay table ($157,982 annual locality rate and $75.70 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 $151.40 per hour. We estimate that, in the first 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 $151.40. This would result in estimated costs in the first year of implementation of about $24,224 per agency, and about $2.9 million in total Governmentwide. In subsequent years, the administrative costs associated with this rule will be folded into agencies' routine costs for leave administration.

Because this rule creates three new leave categories, the total estimated costs of these leave categories, per year, provide information about the no-action baseline from which the costs of this rule can be compared.

Before estimating the costs of administrative leave, investigative leave, and notice leave, it is important to note that OPM made several assumptions and considered certain limitations in these calculations. When administrative leave under subpart N is used for investigative purposes, the agency must exhaust the 10-workday limit before using investigative leave under the new subpart O. Therefore, for this cost analysis OPM assumes that the full 10 workdays will be used. Moreover, because OPM's regulations allow the consecutive use of administrative leave for investigative purposes, investigative

[58] At the time of the GAO study, the catchall administrative leave category included leave that is now covered by the weather and safety leave authority.

leave, and notice leave, we assume use of all three leave categories leading up to the adverse actions in this cost estimate. We understand that there will be instances when an employee is placed on investigative leave and no adverse action results from the investigation. However, we think it is instructive to consider the potential cost of consecutive use of administrative, investigative, and notice leave.

While OPM does not have reliable data that agencies have used administrative leave for every case that could result in an adverse action, we are assuming that agencies will use administrative leave for investigative purposes under subpart N and investigative leave under subpart O for all adverse actions taken in this cost analysis for the purpose of calculating the potential scope of expenses. OPM assumes that agencies will try to limit use of investigative leave to 30 workdays, as envisioned by § 630.1504(b). OPM understands that agencies may decide to use alternatives to investigative leave such as placing the employee on telework or a detail or relocating the employee temporarily to a different worksite. Also, we accept that there are other factors that could lead to shorter and longer periods of investigative leave. Employees may resign, retire, or transfer to another Federal agency after an investigation begins, which could shorten an investigation. Further, there may be delays in the investigative process, such as difficulty contacting witnesses, that lengthen an investigative period.

As for notice leave, the estimates in this regulatory impact analysis are also difficult to quantify and based on some assumptions. OPM does not have data regarding the length of notice periods. We assume that agencies will use the full 30-calendar day advance notice period minimally required for appealable adverse actions taken under 5 CFR part 752, subpart D. Also, if the agency proposes an employee's removal or if the charged misconduct is egregious in nature, it is reasonable to assume that the agency will move expeditiously to bring the action to closure at the end of the 30-calendar day advance notice period. For non-appealable adverse actions, OPM assumes a one-calendar day advance notice period, as minimally required by 5 CFR part 752, subpart B. Neither the Administrative Leave Act nor this final rule limit notice leave to adverse actions taken under the procedures of chapter 75. Thus, we understand that an agency may take an adverse action under an authority that allows for a different advance notice period. We also accept that an agency policy or collective bargaining agreement may require a longer minimum notice period for non-appealable adverse actions. As noted for investigative leave, there are other factors that could impact the duration of notice leave.

For the cost estimate of these three leave categories, as described in the previous section, OPM considered GAO data to estimate annual costs of $1.4 billion.[59] Even before this final rule, Federal employees used, and agencies put employees on, paid leave called ''administrative leave.'' But this rule now gives effect to ''administrative leave'' under the Administrative Leave Act and other leave categories described herein. OPM believes it would be beneficial to also isolate the estimated costs of more specific categories of paid leave described in this final rule, namely, administrative leave for investigative purposes, investigative leave, and notice leave. OPM did this by looking at the average number of adverse actions over a recent 3-year period at one cabinet-level agency and at one agency in each of the large, medium, and small independent categories. OPM used average 2024 salaries for the Washington, DC, locality pay area for multiple grade levels (GS–14, step 5; GS–11, step 5; and GS–7, step 5) to estimate the dollar value of investigative and notice leave for full-time General Schedule (GS) employees. We acknowledge that there are non-GS pay systems covered by title 5, U.S. Code, and that some employees subjected to investigative and notice leave may not have full-time work schedules.

For a cabinet-level agency, OPM estimates an average of 1,490 adverse actions per year, at a cost of $24,011,261 in administrative and investigative leave for 40 workdays and $4,933,262 in notice leave for 30 calendar days. For a large independent agency, we estimate an average of 452 adverse actions per year with $7,286,065 in administrative and investigative leave costs and $1,447,070 in notice leave costs. For a medium independent agency, OPM estimates an average of four adverse actions per year with $64,431 in administrative and investigative leave costs and $9,665 in notice leave costs. For a small independent agency, we estimate an average of one adverse action per year with $16,108 in administrative and investigative leave costs and $805 in notice leave costs.

OPM estimates the annual Governmentwide cost for administrative leave for investigative purposes and investigative leave to be $31.4 million and for notice leave to be $6.4 million—a total of $37.8 million per year. As noted above, there may be wide variations from agency to agency in the duration of notice periods for non-appealable actions.

This rule also provides that, pursuant to section 6329b(g), placement on investigative leave for 70 workdays or more is considered a ''personnel action'' in applying the prohibited personnel practices (PPP) provisions at section 2302(b)(8)–(9). In its fiscal year 2023 annual report to Congress, OSC reported that it received 3,101 PPP cases.[60] Note that OSC also reported that the number of PPP complaints received in FY 2023 reflected a reduction from pre-COVID–19 levels. OSC stated that it expects complaint levels to return to pre-pandemic levels, which was approximately an average of nearly 4,000 new PPP complaints per year from FY2016 to FY2020. OPM anticipates that the addition of placement on investigative leave for 70 workdays or more as a personnel action will generate new PPP complaints. We have concluded that an estimate of a 1% increase over pre-pandemic PPP complaint levels is reasonable. That is, we estimate approximately 40 new PPP claims per year based on placement on investigative leave for 70 workdays or more. We expect that the majority of investigations will not require use of 70 workdays or more of investigative leave, and of that limited number, only a minimal number of cases will result in a PPP complaint. The regulations at part 630, subpart O, provide significant guardrails on the use of investigative leave such that agencies will be compelled to use alternatives to investigative leave or meet a high threshold for an extension of investigative leave beyond the initial 30 days. OSC's FY 2023 annual report stated that the average cost for an agency to resolve a PPP was $6,728.[61] Given our estimate of 40 new PPP complaints, we estimate that the Governmentwide average increase is $269,120.

Regarding the impact of this final rule on the estimated costs of the three leave categories, OPM cannot quantify such an impact with great specificity because

[59] This total includes weather and safety leave now governed by section 6329c and OPM regulations.

[60] U.S. Office of Special Counsel, ''Annual Report to Congress for Fiscal Year 2023,'' p. 15, *https://www.osc.gov/Documents/Resources/Congressional%20Matters/Annual%20Reports%20to%20Congress/FY%202023%20Annual%20Report%20to%20Congress.pdf.*

[61] *Id.*

it will largely depend on the specific revisions and implementations that agencies will perform to meet the requirements of the Administrative Leave Act and this final rule, including those relating to granting administrative leave and placing employees into these leave statuses, as well as the number of individuals subject to administrative leave for investigative purposes (under section 6329a and subpart N of these regulations) and investigative leave and notice leave under (section 6329b and subpart O of these regulations). And while there are many variables that make these costs difficult to quantify, it is reasonable to conclude that the usage of administrative leave, investigative leave, and notice leave will change, for the reasons mentioned above regarding the impact of this final rule.

E. Benefits

This rulemaking promotes accountability and Governmentwide consistency and clarity in the use and recording of administrative leave, investigative leave, and notice leave. Although OPM has previously provided guidance on the proper use of administrative leave, agencies will now have the benefit of codified parameters for these new leave categories. The establishment of baseline factors that agencies must consider as well as procedures for the approval and the extensions of investigative leave will engender consistency in how agencies use and track such leave. These provisions will also help agencies, OPM, Congress, and other stakeholders monitor whether supervisors use these types of leave appropriately and sparingly.

VI. Procedural Issues and Regulatory Review

A. Severability

OPM has determined that this rule implements and is fully consistent with governing law. However, in the event any provision of this rule, an amendment or revision made by this rule, or the application of such provision or amendment or revision to any person or circumstance, is held to be invalid or unenforceable by its terms, the remainder of this rule, the amendments or revisions made by this rule, and the application of the provisions of such rule to any person or circumstance shall not be affected and shall be construed so as to give them the maximum effect permitted by law. It is OPM's intent that each and every provision of this regulation be severable from each other provision to the maximum extent allowed by law.

For example, if a court were to invalidate any portions of this final rule imposing requirements on agencies before putting employees on investigative leave, the other portions of the rule—including the portions regarding notice leave—would independently remain workable and valuable. In implementing the provisions of the Administrative Leave Act, OPM will comply with all applicable legal requirements.

B. Regulatory Review

OPM has examined the impact of this rulemaking as required by Executive Orders 12866 (Sept. 30, 1993), as supplemented by Executive Order 13563 (Jan. 18, 2011) and amended by Executive Order 14094 (Apr. 6, 2023), which 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). A regulatory impact analysis must be prepared for certain rules with effects of $200 million or more in any one year. This rulemaking does not reach that threshold but has otherwise been designated as a ''significant regulatory action'' under section 3(f) of Executive Order 12866, as amended by Executive Order 14094.

C. Regulatory Flexibility Act

The Acting Director of the Office of Personnel Management certifies that this rulemaking will not have a significant economic impact on a substantial number of small entities because the rule will apply only to Federal agencies and employees.

D. Executive Order 13132, Federalism

This regulation will not have substantial direct effects on the States, on the relationship between the National Government and the States, or on distribution of power and responsibilities among the various levels of government. Therefore, in accordance with Executive Order 13132 (Aug. 10, 1999), it is determined that this final rule does not have sufficient federalism implications to warrant preparation of a Federalism Assessment.

E. Executive Order 12988, Civil Justice Reform

This regulation meets the applicable standards set forth in section 3(a) and (b)(2) of Executive Order 12988 (Feb. 7, 1996).

F. Unfunded Mandates Reform Act of 1995

Section 202 of the Unfunded Mandates Reform Act of 1995 (UMRA) requires that agencies assess anticipated costs and benefits before issuing any rule that would impose spending costs on State, local, or tribal governments in the aggregate, or on the private sector, in any 1 year of $100 million in 1995 dollars, updated annually for inflation. That threshold is currently approximately $183 million. This rulemaking will not result in the expenditure by State, local, or tribal governments, in the aggregate, or by the private sector, in excess of the threshold. Thus, no written assessment of unfunded mandates is required.

G. Congressional Review Act

OMB's Office of Information and Regulatory Affairs has determined this rule does not satisfy the criteria listed in 5 U.S.C. 804(2).

H. Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35)

This regulatory action will not impose any reporting or recordkeeping requirements under the Paperwork Reduction Act.

List of Subjects in 5 CFR Parts 630 and 752

Government employees.

Office of Personnel Management.

Stephen Hickman,

Federal Register Liaison.

For the reasons stated in the preamble, OPM amends 5 CFR parts 630 and 752 as follows:

PART 630—ABSENCE AND LEAVE

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

Authority: 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), 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 N issued under 5 U.S.C. 6329a(c); subpart O issued under 5 U.S.C. 6329b(h); and subpart P issued under 5 U.S.C. 6329c(d).

Subpart B—Definitions and General Provisions for Annual and Sick Leave

§ 630.206 [Amended]

■ 2. In § 630.206, remove the second sentence in paragraph (a).

■ 3. Add subpart N to read as follows:

Subpart N—Administrative Leave

Sec.
630.1401 Purpose and applicability.
630.1402 Definitions.
630.1403 Principles and prohibitions.
630.1404 Calendar year limitation.
630.1405 Administration of administrative leave.
630.1406 Records and reporting.

§ 630.1401 Purpose and applicability.

(a) This subpart implements 5 U.S.C. 6329a, which allows an agency to provide a separate type of paid leave, on a limited basis, for general purposes not covered by other types of leave authorized by other provisions of law. Section 6329a(c) authorizes OPM to prescribe regulations to carry out the statutory provisions on administrative leave, including regulations on the appropriate uses and the proper recording of this leave.

(b) This subpart applies to an employee as defined in 5 U.S.C. 2105 who is employed in an agency, but does not apply to an intermittent employee who, by definition, does not have an established regular tour of duty during the administrative workweek.

(c) As provided in 5 U.S.C. 6329a(d), this subpart applies to employees described in subsection (b) of 38 U.S.C. 7421, notwithstanding subsection (a) of that section.

§ 630.1402 Definitions.

In this subpart:

Administrative leave means paid leave authorized at the discretion of an agency under 5 U.S.C. 6329a (and not authorized under any other provision of statute or Presidential directive) to cover periods within an employee's tour of duty established for leave purposes when the employee is not engaged in activities that qualify as official hours of work, which is provided without loss of or reduction in—

(1) Pay;

(2) Leave to which an employee is otherwise entitled under law; or

(3) Credit for time or service.

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, where applicable) to make the given determination or take the given action.

Employee means an individual who is covered by this subpart, as described in § 630.1401(b) and (c).

Head of the agency means the head of an agency or a designated representative of such agency head who is an agency headquarters-level official reporting directly to the agency head or a deputy agency head and who is the sole such representative for the entire agency.

OPM means the Office of Personnel Management.

Presidential directive means an Executive order, Presidential memorandum, or official written statement by the President in which the President specifically directs agency heads to provide employees with a paid excused absence under a specified set of conditions. This excludes a Presidential action that merely encourages agency heads to use an agency head authority (*e.g.,* section 6329a) to grant a paid excused absence under specified conditions or that leaves the amount of excused absence to be granted in specified conditions subject to agency head discretion.

§ 630.1403 Principles and prohibitions.

(a) *General principles.* In granting administrative leave, an agency must adhere to the following general principles:

(1) Administrative leave may be granted (subject to the requirements of this section) only when—

(i) The absence is directly related to the agency's mission;

(ii) The absence is officially sponsored or sanctioned by the agency;

(iii) The absence will clearly enhance the professional development or skills of the employee in the employee's current position; or

(iv) The absence is in the interest of the agency or of the Government as a whole.

(2) Administrative leave is not an entitlement, but is an authority, entrusted to the discretion of the agency, that should be used sparingly, consistent with the sense of Congress expressed in section 1138(b)(2) of Public Law 114–328.

(3) Administrative leave is appropriately used for brief or short periods of time—usually for not more than 1 workday. An incidence of administrative leave lasting more than 1 workday may be approved when determined to be appropriate by an agency.

(4) An agency must retain the discretion to grant or not grant administrative leave in any circumstance based on agency judgments regarding mission needs. Generally, administrative leave should be granted on an ad hoc, event-specific, or time-limited basis. If an agency determines that it will generally grant administrative leave under a specific set of circumstances that may recur (*e.g.,* blood donations, voting-related activities), that determination must allow the agency to not grant administrative leave due to mission needs.

(5) A determination that an absence satisfies one of the conditions in paragraph (a)(1) of this section must be—

(i) Permitted under written agency policies (established by the head of the agency or by other agency officials under a specific delegation of authority); or

(ii) Reviewed and approved by an official of the agency who is (or is acting) at a higher level than the official making the determination, if the specific type of use and amount of leave for that use has not been authorized under established written policy as described in paragraph (i) of this paragraph (a)(5).

(6) In developing agency policies regarding the appropriate uses and corresponding amounts of administrative leave and in approving specific incidents of administrative leave where the particular use was not specifically authorized in agency policies, authorized agency officials must consider the following factors:

(i) The regulations in this subpart;

(ii) The effect on productivity and the agency's ability to meet mission needs;

(iii) Current Administration policies that identify Governmentwide interests;

(iv) The strength of the justification for using appropriated funds for the administrative leave in question;

(v) Equitable treatment of similarly situated employees; and

(vi) The degree of delegation that is appropriate for various uses of administrative leave. (b) *Specific prohibited uses.* An agency may not grant administrative leave—

(1) To mark the memory of a deceased former Federal official (see also 5 U.S.C. 6105); or

(2) As a reward to recognize the performance or contributions of an employee or group of employees (*i.e.,* in lieu of a cash award or a time-off award).

§ 630.1404 Calendar year limitation.

(a) *General.* Under 5 U.S.C. 6329a(b), during any calendar year, an agency may place an employee on administrative leave for no more than 10 workdays. In this context, the term

''place'' refers to a management-initiated action to put an employee in administrative leave status, with or without the employee's consent, for the purpose of conducting an investigation (as defined in § 630.1502). The 10-workday annual limit does not apply to administrative leave for other purposes. After an employee has been placed on administrative leave in connection with such an investigation for 10 workdays, the agency may place the employee on investigative leave under subpart O of this part, if necessary (see 5 U.S.C. 6329b(b)(3)(A) and § 630.1504(a)(1)). This calendar year limitation applies separately to each agency that may employ an employee during the year. Use by different agencies is not aggregated.

(b) *Conversion to a limitation on hours.* This 10-workday calendar year limitation is converted to an aggregate limit on hours, taking into account the different workdays that can apply to employees under different work schedules, as follows:

(1) For a full-time employee (including an employee on a regular 40-hour basic workweek or a flexible or compressed work schedule under 5 U.S.C. chapter 61, subchapter II, but excluding an employee on an uncommon tour of duty), the calendar year limitation is 80 hours;

(2) For a full-time employee with an uncommon tour of duty under § 630.210, the calendar year limitation is equal to the number of hours in the biweekly uncommon tour of duty (or the average biweekly hours for uncommon tours for which the biweekly hours vary over an established cycle);

(3) For a part-time employee, the calendar year limit is prorated based on the number of hours in the officially scheduled part-time tour of duty established for purposes of charging leave when absent (*e.g.,* for a part-time employee who has an officially scheduled half-time tour of 40 hours in a biweekly pay period, the calendar year limitation is 40 hours, which is half of the 80-hour limitation for full-time employees);

(4) For an employee who has more than one type of work schedule in effect during different parts of a calendar year, the calendar year limit on hours of administrative leave must be applied by—

(i) Converting hours of administrative leave used under a part-time schedule by multiplying such hours by the ratio of 80 divided by the number of hours in the officially scheduled biweekly part-time tour of duty established for purposes of charging leave when absent;

(ii) Converting hours of administrative leave used under a biweekly uncommon tour of duty under § 630.210 (or the average biweekly hours for uncommon tours for which the biweekly hours vary over an established cycle) by multiplying such hours by the ratio of 80 divided by the number of hours in the uncommon tour of duty;

(iii) Summing the hours of administrative leave used for each period of time under a different type of work schedule, using actual hours for full-time tours and converted hours for part-time and uncommon tours, as determined under paragraphs (b)(4)(i) and (ii) of this section; and

(iv) Applying the sum derived under paragraph (b)(4)(iii) of this section against an 80-hour standard for purposes of the 10-workday limit.

§ 630.1405 Administration of administrative leave.

(a) An agency must use the same minimum charge increments for administrative leave as it does for annual and sick leave under § 630.206.

(b) Employees may be granted administrative leave only for hours within the tour of duty established for purposes of charging annual and sick leave when absent. For full-time employees, that tour is the 40-hour basic workweek as defined in 5 CFR 610.102, the basic work requirement established for employees on a flexible or compressed work schedule as defined in 5 U.S.C. 6121(3), or an uncommon tour of duty under § 630.210.

(c) Agencies authorize, and may require, the use of administrative leave by an employee or a category of employees. Employees do not have an entitlement to receive administrative leave, nor do they have a right to refuse administrative leave when the agency requires its use.

§ 630.1406 Records and reporting.

(a) *Record of usage of administrative leave.* An agency must maintain an accurate record of an employee's usage of administrative leave by recording leave in one of the following subcategories, as applicable in the case at hand:

(1) Administrative leave used for the purposes of an investigation (as described in § 630.1404(a)); or

(2) Administrative leave used for all other purposes.

(b) *Minimum retention period.* An agency must retain the records described in paragraph (a) of this section for a minimum of 6 years from the date the leave was used.

(c) *Reporting.* (1) In agency data systems (including timekeeping systems) and in data reports submitted to OPM, an agency must record administrative leave under section 6329a and this subpart as categories of leave separate from other types of leave. Leave under section 6329a and this subpart must be recorded as either administrative leave used for the purposes of an investigation (as described in § 630.1404(a)) or administrative leave used for all other purposes, as applicable.

(2) Agencies must provide information to the Government Accountability Office as that office is required to submit reports to specified Congressional committees under section 1138(d)(2) of Public Law 114–328 on a 5-year cycle.

■ 4. Add subpart O to read as follows:

Subpart O—Investigative Leave and Notice Leave

Sec.

§ 630.1501 Purpose and applicability.

(a) This subpart implements 5 U.S.C. 6329b, which allows an agency to provide separate types of paid leave for employees who are the subject of an investigation or in a notice period. OPM has authority to prescribe implementing regulations under 5 U.S.C. 6329b(h)(1).

(b) This subpart applies to an employee as defined in 5 U.S.C. 2105 who is employed in an agency, excluding—

(1) An Inspector General; or

(2) An intermittent employee who, by definition, does not have an established regular tour of duty during the administrative workweek.

(c) As provided in 5 U.S.C. 6329b(i), this subpart applies to employees described in subsection (b) of 38 U.S.C. 7421, notwithstanding subsection (a) of that section.

§ 630.1502 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.

Chief Human Capital Officer or CHCO means the Chief Human Capital Officer

of an agency designated or appointed under 5 U.S.C 1401, or the equivalent.

Committee of jurisdiction means, with respect to an agency, each committee of the Senate or House of Representatives with jurisdiction over the agency.

Employee means an individual who is covered by this subpart, as described in § 630.1501(b) and (c).

Investigation means an inquiry by an investigative entity regarding an employee involving such matters as: (1) an employee's alleged misconduct that could result in an adverse action as described in 5 CFR part 752 or similar authority or other matters that could lead to outcomes adverse to the employee; and (2) an employee's compliance with or adherence to security requirements. An *investigation* includes:

(1) An inquiry by an investigative entity regarding an employee involving security concerns, including whether the employee should retain eligibility to hold a position that is national security sensitive under E.O. 13467, as amended, and standards issued by the Office of the Director of National Intelligence (ODNI) regarding eligibility for access to classified information under E.O. 12968, as amended, and standards issued by ODNI; or eligibility for logical or physical access to agency facilities and systems under the standards established by Homeland Security Presidential Directive (HSPD) 12 and guidance issued pursuant to that directive;

(2) The period of time during which an appeal of a security clearance suspension or revocation is pending; and

(3) Preparation of an investigative report and recommendation(s) related to the subject of the investigation.

Investigative entity means—

(1) An internal investigative unit of an agency granting investigative leave under this subpart, which may be composed of one or more persons, such as supervisors, managers, human resources practitioners, personnel security office staff, workplace violence prevention team members, or other agency representatives;

(2) The Office of Inspector General of an agency granting investigative leave under this subpart;

(3) The Attorney General; or

(4) The Office of Special Counsel.

Investigative leave means leave in which an employee who is the subject of an investigation is placed, as authorized under 5 U.S.C. 6329b (and not authorized under any other provision of law), and which is provided without loss of or reduction in—

(1) Pay;

(2) Leave to which an employee is otherwise entitled under law; or

(3) Credit for time or service.

Notice leave means leave in which an employee who is in a notice period is placed, as authorized under 5 U.S.C. 6329b (and not authorized under any other provision of law), and which is provided without loss of or reduction in—

(1) Pay;

(2) Leave to which an employee is otherwise entitled under law; or

(3) Credit for time or service.

Notice period means a period beginning on the date on which an employee is provided notice, as required under law, of a proposed adverse action against the employee and ending—

(1) On the effective date of the adverse action; or

(2) On the date on which the agency notifies the employee that no adverse action will be taken.

OPM means the Office of Personnel Management.

Participating in a telework program means an employee is eligible to telework and has an established arrangement with the employee's agency under which the employee is approved to participate in the agency telework program, including on a routine or situational basis. Such an employee who teleworks on a situational basis is considered to be continuously participating in a telework program even if there are extended periods during which the employee does not perform telework.

Telework site means a location where an employee is authorized to perform telework, as described in 5 U.S.C. chapter 65, such as an employee's home.

§ 630.1503 Authority and requirements for investigative leave and notice leave.

(a) *Authority.* An agency may, in accordance with paragraph (b) of this section, and in its discretion, place an employee on—

(1) Investigative leave, if the employee is the subject of an investigation; or

(2) Notice leave—

(i) If the employee is in a notice period; or

(ii) Following a placement on investigative leave if, not later than the day after the last day of the period of investigative leave—

(A) The agency proposes or initiates an adverse action against the employee; and

(B) The agency determines that the employee continues to meet one or more of the criteria described in paragraph (b)(1) of this section.

(b) *Required determinations.* An agency may place an employee on investigative leave or notice leave only if the agency has made a written determination documenting that the agency has—

(1) Determined, after consideration of the baseline factors specified in paragraph (e) of this section, that the continued presence of the employee in the workplace during an investigation of the employee or while the employee is in a notice period, as applicable, may—

(i) Pose a threat to the employee or others;

(ii) Result in the destruction of evidence relevant to an investigation;

(iii) Result in loss of or damage to Government property; or

(iv) Otherwise jeopardize legitimate Government interests; and

(2) Considered the following options (or a combination thereof):

(i) Keeping the employee in a duty status by assigning the employee to duties in which the employee no longer poses a threat, as described in paragraphs (b)(1)(i) through (iv) of this section;

(ii) Allowing the employee to voluntarily take leave (paid or unpaid) or paid time off, as appropriate under the rules governing each category of leave or paid time off;

(iii) Carrying the employee in absent without leave status, if the employee is absent from duty without approval; and

(iv) For an employee subject to a notice period, curtailing the notice period if there is reasonable cause to believe the employee has committed a crime for which a sentence of imprisonment may be imposed, consistent with 5 CFR 752.404(d)(1); and

(3) Determined that none of the options under paragraph (b)(2) of this section is appropriate.

(c) *Telework alternative for investigative leave.* (1) If an agency would otherwise place an employee on investigative leave, the agency may require the employee to perform, at a telework site, duties similar to the duties that the employee normally performs if—

(i) The agency determines that such a requirement, at a telework site, would not pose a threat, as described in paragraphs (b)(1)(i) through (iv) of this section;

(ii) The employee is eligible to telework; as set forth in paragraph (c)(2);

(iii) The employee has been participating in a telework program under the agency telework policy during some portion of the 30-day period immediately preceding the

commencement of investigative leave (or the commencement of required telework in lieu of such leave under paragraph (c) of this section, if earlier); and

(iv) The agency determines that teleworking would be appropriate.

(2) For purposes of paragraph (c)(1) of this section, an employee is considered to be eligible to telework if the agency determines the employee is eligible to telework under agency telework policies described in 5 U.S.C. 6502(a) and is not barred from teleworking under the eligibility conditions described in 5 U.S.C. 6502(b)(4). Any telework agreement established under 5 U.S.C. 6502(b)(2) must be superseded as necessary to comply with an agency's action to require telework under 5 U.S.C. 6502(c) and paragraph (c)(1) of this section.

(3) If an employee who is required to telework under paragraph (c)(1) of this section is absent from telework duty without the required approval, an agency may place the employee in absent without leave status, consistent with agency policies.

(4) The agency decision to require telework under this paragraph (c), as well as the supporting agency determinations and any conditions or requirements governing the required telework (*e.g.,* the telework assignment's duration or location), are to be put into effect at the agency's discretion, subject to the requirements of this paragraph (c).

(5) If an agency requires telework in lieu of placement on investigative leave, the agency must provide the employee with a written explanation regarding the required telework in lieu of placement on investigative leave. The written explanation must include the following:

(i) The agency's determination under paragraph (c)(1) of this section; and,

(ii) A description of the limitations of the required telework, including the expected duration of telework.

(d) *Reassessment and return to duty.* (1) An employee may be returned to duty at any time if the agency reassesses its determination to place the employee on investigative leave or notice leave. An employee on investigative leave or notice leave must be prepared to report promptly to work as provided in paragraph (d)(4) of this section. These decisions are at the discretion of the agency.

(2) For an employee on investigative leave, an agency may reassess its determination that the employee must be removed from the workplace based on the criteria in paragraph (b)(1) of this section and may reassess its determination that the options in paragraph (b)(2) of this section are not appropriate. An agency may reassess its previous determination to require or not require telework under paragraph (c) of this section. These decisions are at the discretion of the agency.

(3) For an employee on notice leave, an agency may reassess its determination that the employee must be removed from the regular worksite based on the criteria in paragraph (b)(1) of this section and may reassess its determination that the options in paragraph (b)(2) of this section are not appropriate. These decisions are at the discretion of the agency.

(4) When an employee is placed on investigative leave or notice leave, the employee must be available to report promptly at a time during the employee's regularly scheduled tour of duty and to an approved duty location, if directed by the employee's agency. Any failure to so report may result in the employee being recorded as absent without leave, which can be the basis for disciplinary action. An employee who anticipates being unavailable to report promptly must request leave or paid time off in advance, as provided under paragraph (b)(2)(ii) of this section, to avoid being recorded as absent without leave.

(e) *Baseline factors.* In making a determination regarding the criteria listed under paragraph (b)(1) of this section, an agency must consider the following baseline factors:

(1) The nature and severity of the employee's exhibited or alleged behavior;

(2) The nature of the agency's or employee's work and the ability of the agency to accomplish its mission; and

(3) Other impacts of the employee's continued presence in the workplace detrimental to legitimate Government interests, including whether the employee poses an unacceptable risk to—

(i) The life, safety, or health of employees, contractors, vendors or visitors to a Federal facility;

(ii) The Government's physical assets or information systems;

(iii) Personal property;

(iv) Records, including classified, privileged, proprietary, financial or medical records; or

(v) The privacy of the individuals whose data the Government holds in its systems.

(f) *Minimum charge.* An agency must use the same minimum charge increments for investigative leave and notice leave as it does for annual and sick leave under § 630.206.

(g) *Tour of duty.* Employees may be granted investigative leave or notice leave only for hours within the tour of duty established for purposes of charging annual and sick leave when absent. For full-time employees, that tour is the 40-hour basic workweek as defined in 5 CFR 610.102, the basic work requirement established for employees on a flexible or compressed work schedule as defined in 5 U.S.C. 6121(3), or an uncommon tour of duty under § 630.210.

§ 630.1504 Administration of investigative leave.

(a) *Commencement.* An initial period of investigative leave may not be commenced until—

(1) The employee's use of administrative leave for investigative purposes under subpart N of this part has reached the 10-workday calendar year limitation described in 5 U.S.C. 6329a(b)(1) and § 630.1404, as converted to hours under § 630.1404(b); and

(2) The agency determines that further investigation of the employee is necessary.

(b) *Duration.* The agency may place the employee on investigative leave for an initial period of not more than 30 workdays per investigation. An employee may be placed on investigative leave intermittently—that is, a period of investigative leave may be interrupted by—

(1) On-duty service performed under § 630.1503(b)(2)(i) or (c);

(2) Leave or paid time off in lieu of such service under § 630.1503(b)(2)(ii); or

(3) Absence without leave under § 630.1503(b)(2)(iii).

(c) *Written explanation of leave.* If an agency places an employee on investigative leave, the agency must provide the employee with a written explanation regarding the placement of the employee on investigative leave. The written explanation must include—

(1) A description of the limitations of the leave placement, including the duration of leave;

(2) Notice that, at the conclusion of the period of investigative leave, the agency must take an action under paragraph (d) of this section; and

(3) Notice that placement on investigative leave for 70 workdays or more is considered a ''personnel action'' for purposes of the Office of Special Counsel's authority to act, in applying the prohibited personnel practices provisions at 5 U.S.C. 2302(b)(8)–(9) (see paragraph (i) of this section).

(d) *Agency action.* Not later than the day after the last day of an initial or extended period of investigative leave, an agency must—

(1) Return the employee to regular duty status;

(2) Take one or more of the actions under § 630.1503(b)(2);

(3) Propose or initiate an adverse action against the employee as provided under law; or

(4) Extend the period of investigative leave if permitted under paragraphs (f) and (g) of this section.

(e) *Continued investigation.* Investigation of an employee may continue after the expiration of the initial period of investigative leave under paragraph (b) of this section. Investigation of an employee may continue even if the employee is returned to regular duty status and is no longer on investigative leave.

(f) *Extension of investigative leave*—(1) *Increments.* If an investigation is not concluded at the time the expiration of the initial period under paragraph (b) of this section has elapsed, an agency may extend the period of investigative leave using increments of up to 30 workdays for each extension when approved as described in paragraph (f)(3) of this section. The amount of investigative leave used under the final extension may be less than 30 workdays, as appropriate.

(2) *Maximum number of extensions.* Except as provided in paragraph (g) of this section, the total period of extended investigative leave (*i.e.,* in addition to the initial period of investigative leave) may not exceed 90 workdays (*e.g.,* 3 incremental extensions of 30 workdays). This 90-day limit applies to extensions of investigative leave associated with a single initial period of investigative leave.

(3) *Approval of extensions.* (i) An incremental extension under paragraph (f)(1) of this section is permitted only if the agency makes a written determination reaffirming that the employee must be removed from the workplace based on the criteria in § 630.1503(b)(1) and that the options in § 630.1503(b)(2) are not appropriate.

(ii) Except as provided by paragraph (f)(3)(iii) of this section, an incremental extension under paragraph (f)(1) of this section is permitted only if approved by the CHCO of an agency, or the designee of the CHCO, after consulting with the investigator responsible for conducting the investigation of the employee.

(iii) In the case of an employee of an Office of Inspector General, an incremental extension under paragraph (f)(1) of this section is permitted only if approved (after consulting with the investigator responsible for conducting the investigation of the employee) by—

(A) The Inspector General or the designee of the Inspector General, rather than the CHCO or the designee of the CHCO; or

(B) An official of the agency designated by the head of the agency within which the Office of Inspector General is located, if the Inspector General requests the agency head make such a designation.

(4) *Designation guidance.* In delegating authority to a designated official to approve an incremental extension as described in paragraph (f)(3) of this section, a CHCO must consider the designation guidance issued by the CHCO Council under 5 U.S.C. 6329b(c)(3), except that, in the case of approvals for an employee of an Office of Inspector General, an Inspector General must consider the designation guidance issued by the Council of the Inspectors General on Integrity and Efficiency under 5 U.S.C. 6329b(c)(4)(B).

(g) *Further extension of investigative leave.* An official authorized under paragraph (f)(3) of this section to approve an incremental extension under paragraph (f)(1) of this section may approve further incremental extensions of 30 workdays (*i.e.,* each extension is individually approved for up to 30 workdays) under this paragraph after an employee has reached the maximum number of extensions of investigative leave under paragraph (f)(2) of this section. However, an agency may further extend a period of investigative leave only if the agency makes a written determination reaffirming that the employee must be removed from the workplace based on the criteria in § 630.1503(b)(1) and that the options in § 630.1503(b)(2) are not appropriate. Not later than 5 business days after granting each further extension, the agency must submit (subject to § 630.1506(b)) to the Committee on Homeland Security and Governmental Affairs of the Senate and the Committee on Oversight and Accountability of the House of Representatives, along with any other committees of jurisdiction, a report containing—

(1) The title, position, office or agency subcomponent, job series, pay grade, and salary of the employee;

(2) A description of the duties of the employee;

(3) The reason the employee was placed on investigative leave;

(4) An explanation as to why the employee meets the criteria described in § 630.1503(b)(1)(i) through (iv) and why the agency is not able to temporarily reassign the duties of the employee or detail the employee to another position within the agency;

(5) In the case of an employee who was required to telework under 5 U.S.C. 6502(c) at any time during the period of investigation prior to the further extension of investigative leave, the reasons that the agency required the employee to telework under that subsection and the duration of the teleworking requirement;

(6) The status of the investigation of the employee;

(7) A certification to the agency by an investigative entity stating that additional time is needed to complete the investigation of the employee and providing an estimate of the amount of time that is necessary to complete the investigation of the employee; and

(8) In the case of a completed investigation of the employee, the results of the investigation and the reason that the employee remains on investigative leave.

(h) *Completed investigation.* An agency may not further extend a period of investigative leave under paragraph (g) of this section on or after the date that is 30 calendar days after the completion of the investigation of the employee by an investigative entity.

(i) *Possible prohibited personnel action.* For purposes of 5 U.S.C. chapter 12, subchapter II, and section 1221, placement on investigative leave under this subpart for a period of 70 workdays or more shall be considered a personnel action for purposes of the Office of Special Counsel in applying the prohibited personnel practices provisions at 5 U.S.C. 2302(b)(8) or (9).

(j) *Conversion of workdays to hours.* In applying this section, the limitations based on workdays (*i.e.,* the 30-workday increments in paragraphs (b), (f), and (g) of this section and the 70-workday limit in paragraph (i) of this section) must be converted to hours, taking into account the different workdays that can apply to employees under different work schedules, as follows:

(1) For a full-time employee (including an employee on a regular 40-hour basic workweek or a flexible or compressed work schedule under 5 U.S.C. chapter 61, subchapter II, but excluding an employee on an uncommon tour of duty), the 30-workday increment is converted to 240 hours and the 70-workday limit is converted to 560 hours.

(2) For a full-time employee with an uncommon tour of duty under § 630.210, the 30-workday increment is converted to three times the number of hours in the biweekly uncommon tour of duty (or the average biweekly hours for uncommon tours for which the biweekly hours vary over an established cycle), and the 70-workday limit is converted to a number of hours derived by multiplying the hours equivalent of 30 workdays (for a given uncommon tour) times the ratio of 70 divided by 30.

(3) For a part-time employee, the calendar year limit is prorated based on the number of hours in the officially scheduled part-time tour of duty established for purposes of charging leave when absent (*e.g.,* for a part-time employee who has an officially scheduled half-time tour of 40 hours in a biweekly pay period, the 30-workday increment is converted to 120 hours, which is half of 240 hours (the 30-workday increment for full-time employees)).

(4) For an employee who has more than one type of work schedule while on investigative leave, the 30-workday and 70-workday limits must be applied by—

(i) Converting hours of investigative leave used under a part-time schedule by multiplying such hours by the ratio of 80 divided by the number of hours in the officially scheduled biweekly part-time tour of duty established for purposes of charging leave when absent;

(ii) Converting hours of investigative leave used under a biweekly uncommon tour of duty under § 630.210 (or the average biweekly hours for uncommon tours for which the biweekly hours vary over an established cycle) by multiplying such hours by the ratio of 80 divided by the number of hours in the uncommon tour of duty;

(iii) Summing the hours of investigative leave used for each period of time under a different type of work schedule, using actual hours for full-time tours and converted hours for part-time and uncommon tours, as determined under paragraphs (j)(4)(i) and (ii) of this section; and

(iv) Applying the sum derived under paragraph (j)(4)(iii) of this section against a 240-hour standard for purposes of the 30-workday limit and against a 560-hour standard for the purposes of the 70-workday limit.

§ 630.1505 Administration of notice leave.

(a) *Commencement.* Notice leave may commence only after an employee has received written notice of a proposed adverse action. There is no requirement that the employee exhaust 10 workdays of administrative leave under 5 U.S.C. 6329a(b) and § 630.1404 before the employee may be placed on notice leave.

(b) *Duration.* Placement of an employee on notice leave shall be for a period not longer than the duration of the notice period.

(c) *Written explanation of leave.* If an agency places an employee on notice leave, the agency must provide the employee with a written explanation regarding the placement of the employee on notice leave. The written explanation must provide information on the employee's notice period and include a statement that the notice leave will be provided only during the notice period.

§ 630.1506 Records and reporting.

(a) *Record of placement on leave.* An agency must maintain an accurate record of the placement of an employee on investigative leave or notice leave by the agency, including—

(1) The reasons for initial authorization of the investigative leave or notice leave, including the alleged action(s) of the employee that required investigation or issuance of a notice of a proposed adverse action;

(2) The basis for the determination made under § 630.1503(b)(1);

(3) An explanation of why an action under § 630.1503(b)(2) was not appropriate;

(4) The length of the period of investigative leave or notice leave;

(5) The amount of salary paid to the employee during the period of leave;

(6) The reasons for authorizing the leave, and if an extension of investigative leave was granted, the recommendation made by an investigator as part of the consultation required under § 630.1504(f)(3);

(7) Whether the employee was required to telework under § 630.1503(c) during the period of the investigation, including the reasons for requiring or not requiring the employee to telework;

(8) The action taken by the agency at the end of the period of leave, including, if applicable, the granting of any extension of a period of investigative leave under § 630.1504(f) or (g); and

(9) Any additional information OPM may require.

(b) *Availability of records.* (1) An agency must make a record kept under paragraph (a) of this section available upon request—

(i) To any committee of jurisdiction;

(ii) To OPM;

(iii) To the Government Accountability Office; and

(iv) As otherwise required by law.

(2) Notwithstanding paragraph (b)(1) of this section and § 630.1504(g), the requirement that an agency make records and information on use of investigative leave or notice leave available to various entities is subject to applicable laws, Executive orders, and regulations governing the dissemination of sensitive information related to national security, foreign relations, or law enforcement matters (*e.g.,* 50 U.S.C. 3024(i), (j), and (m) and Executive Orders 12968 and 13526).

(3) An agency must retain the records described in paragraph (a) of this section for a minimum of 6 years from the date the leave was used.

(c) *Reporting.*

(1) In agency data systems and in data reports submitted to OPM, an agency must record investigative leave and notice leave under 5 U.S.C. 6329b and this subpart as categories of leave separate from other types of leave. Leave under 5 U.S.C. 6329b and this subpart must be recorded as either investigative leave or notice leave, as applicable.

(2) Agencies must provide information to the Government Accountability Office as that office is required to submit reports to specified Congressional committees under section 1138(d)(2) of Public Law 114–328 on a 5-year cycle.

PART 752—ADVERSE ACTIONS

■ 5. The authority citation for part 752 is revised to read as follows:

Authority: 5 U.S.C. 6329b, 7504, 7514, and 7543; Sec. 1097, Pub. L. 115–91, 131 Stat. 1621.

Subpart D—Regulatory Requirements for Removal, Suspension for More Than 14 Days, Reduction in Grade or Pay, or Furlough for 30 Days or Less

■ 6. Revise § 752.404(b)(3)(iv) to read as follows:

§ 752.404 Procedures

* * * * *

(b) * * *

(3) * * *

(iv) Placing the employee in a notice leave status for a period not to exceed the duration of the notice period, provided that the criteria set forth in § 630.1503(b) of this title are met.

* * * * *

Subpart F—Regulatory Requirements for Taking Adverse Action Under the Senior Executive Service

■ 7. Revise § 752.604(b)(2)(iv) to read as follows:

§ 752.604 Procedures

* * * * *

(b) * * *

(2) * * *

(iv) Placing the employee in a notice leave status for a period not to exceed the duration of the notice period, provided that the criteria set forth in § 630.1503(b) of this title are met.

* * * * *

[FR Doc. 2024–29139 Filed 12–16–24; 8:45 am]

BILLING CODE 6325–39–P