

104TH CONGRESS
2^D SESSION

S. RES. 242

To provide for the approval of final regulations that are applicable to the Senate and the employees of the Senate, and that were issued by the Office of Compliance on January 22, 1996, and for other purposes.

IN THE SENATE OF THE UNITED STATES

APRIL 15, 1996

Mr. WARNER submitted the following resolution; which was considered and agreed to

RESOLUTION

To provide for the approval of final regulations that are applicable to the Senate and the employees of the Senate, and that were issued by the Office of Compliance on January 22, 1996, and for other purposes.

- 1 *Resolved*, That the following regulations issued by the
- 2 Office of Compliance on January 22, 1996 are hereby ap-
- 3 proved as follows:

PART 825—FAMILY AND MEDICAL LEAVE

825.1 Purpose and scope.

825.2 [Reserved].

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825.102 When are the FMLA and the CAA effective for covered employees and employing offices?

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1 PART 825—FAMILY AND MEDICAL LEAVE

2 **§825.1 Purpose and scope**

- 3 (a) Section 202 of the Congressional Accountability
 4 Act (CAA) (2 U.S.C. 1312) applies the rights and protec-
 5 tions of sections 101 through 105 of the Family and Medi-
 6 cal Leave Act of 1993 (FMLA) (29 U.S.C. 2611–2615)
 7 to covered employees. (The term “covered employee” is de-
 8 fined in section 101(3) of the CAA (2 U.S.C. 1301(3)).
 9 See §825.800 of these regulations for that definition.)

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

3 (b) These regulations are issued by the Board of Di-
4 rectors, Office of Compliance, pursuant to sections 202(d)
5 and 304 of the CAA, which direct the Board to promul-
6 gate regulations implementing section 202 that are “the
7 same as substantive regulations promulgated by the Sec-
8 retary of Labor to implement the statutory provisions re-
9 ferred to in subsection (a) [of section 202 of the CAA]
10 except insofar as the Board may determine, for good cause
11 shown . . . that a modification of such regulations would
12 be more effective for the implementation of the rights and
13 protections under this section”. The regulations issued by
14 the Board herein are on all matters for which section 202
15 of the CAA requires regulations to be issued. Specifically,
16 it is the Board’s considered judgment, based on the infor-
17 mation available to it at the time of the promulgation of
18 these regulations, that, with the exception of regulations
19 adopted and set forth herein, there are no other “sub-
20 stantive regulations promulgated by the Secretary of
21 Labor to implement the statutory provisions referred to
22 in subsection (a) [of section 202 of the CAA]”.

23 (c) In promulgating these regulations, the Board has
24 made certain technical and nomenclature changes to the
25 regulations as promulgated by the Secretary. Such

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

10 **§825.2 [Reserved]**

11 SUBPART A—WHAT IS THE FAMILY AND MEDICAL
12 LEAVE ACT, AND TO WHOM DOES IT APPLY UNDER
13 THE CONGRESSIONAL ACCOUNTABILITY ACT?

14 **§825.100 What is the Family and Medical Leave Act?**

15 (a) The Family and Medical Leave Act of 1993
16 (FMLA), as made applicable by the Congressional Ac-
17 countability Act (CAA), allows “eligible” employees of an
18 employing office to take job-protected, unpaid leave, or to
19 substitute appropriate paid leave if the employee has
20 earned or accrued it, for up to a total of 12 workweeks
21 in any 12 months because of the birth of a child and to
22 care for the newborn child, because of the placement of
23 a child with the employee for adoption or foster care, be-
24 cause the employee is needed to care for a family member
25 (child, spouse, or parent) with a serious health condition,

1 or because the employee's own serious health condition
2 makes the employee unable to perform the functions of
3 his or her job (see § 825.306(b)(4)). In certain cases, this
4 leave may be taken on an intermittent basis rather than
5 all at once, or the employee may work a part-time sched-
6 ule.

7 (b) An employee on FMLA leave is also entitled to
8 have health benefits maintained while on leave as if the
9 employee had continued to work instead of taking the
10 leave. If an employee was paying all or part of the pre-
11 mium payments prior to leave, the employee would con-
12 tinue to pay his or her share during the leave period. The
13 employing office or a disbursing or other financial office
14 of the Senate may recover its share only if the employee
15 does not return to work for a reason other than the serious
16 health condition of the employee or the employee's imme-
17 diate family member, or another reason beyond the em-
18 ployee's control.

19 (c) An employee generally has a right to return to
20 the same position or an equivalent position with equivalent
21 pay, benefits and working conditions at the conclusion of
22 the leave. The taking of FMLA leave cannot result in the
23 loss of any benefit that accrued prior to the start of the
24 leave.

1 (d) The employing office has a right to 30 days ad-
2 vance notice from the employee where practicable. In addi-
3 tion, the employing office may require an employee to sub-
4 mit certification from a health care provider to substan-
5 tiate that the leave is due to the serious health condition
6 of the employee or the employee's immediate family mem-
7 ber. Failure to comply with these requirements may result
8 in a delay in the start of FMLA leave. Pursuant to a uni-
9 formly applied policy, the employing office may also re-
10 quire that an employee present a certification of fitness
11 to return to work when the absence was caused by the
12 employee's serious health condition (see § 825.311(c)).
13 The employing office may delay restoring the employee to
14 employment without such certificate relating to the health
15 condition which caused the employee's absence.

16 **§ 825.101 What is the purpose of the FMLA?**

17 (a) FMLA is intended to allow employees to balance
18 their work and family life by taking reasonable unpaid
19 leave for medical reasons, for the birth or adoption of a
20 child, and for the care of a child, spouse, or parent who
21 has a serious health condition. The FMLA is intended to
22 balance the demands of the workplace with the needs of
23 families, to promote the stability and economic security
24 of families, and to promote national interests in preserving
25 family integrity. It was intended that the FMLA accom-

1 plish these purposes in a manner that accommodates the
2 legitimate interests of employers, and in a manner consist-
3 ent with the Equal Protection Clause of the Fourteenth
4 Amendment in minimizing the potential for employment
5 discrimination on the basis of sex, while promoting equal
6 employment opportunity for men and women.

7 (b) The enactment of FMLA was predicated on two
8 fundamental concerns “the needs of the American
9 workforce, and the development of high-performance orga-
10 nizations”. Increasingly, America’s children and elderly
11 are dependent upon family members who must spend long
12 hours at work. When a family emergency arises, requiring
13 workers to attend to seriously-ill children or parents, or
14 to newly-born or adopted infants, or even to their own seri-
15 ous illness, workers need reassurance that they will not
16 be asked to choose between continuing their employment,
17 and meeting their personal and family obligations or tend-
18 ing to vital needs at home.

19 (c) The FMLA is both intended and expected to bene-
20 fit employers as well as their employees. A direct correla-
21 tion exists between stability in the family and productivity
22 in the workplace. FMLA will encourage the development
23 of high-performance organizations. When workers can
24 count on durable links to their workplace they are able
25 to make their own full commitments to their jobs. The

1 record of hearings on family and medical leave indicate
2 the powerful productive advantages of stable workplace re-
3 lationships, and the comparatively small costs of guaran-
4 teeing that those relationships will not be dissolved while
5 workers attend to pressing family health obligations or
6 their own serious illness.

7 **§825.102 When are the FMLA and the CAA effective**
8 **for covered employees and employing of-**
9 **fices?**

10 (a) The rights and protection of sections 101 through
11 105 of the FMLA have applied to certain Senate employ-
12 ees and certain employing offices of the Senate since Au-
13 gust 5, 1993 (see section 501 of FMLA).

14 (b) The rights and protection of sections 101 through
15 105 of the FMLA have applied to any employee in an em-
16 ployment position and any employment authority of the
17 House of Representatives since August 5, 1993 (see sec-
18 tion 502 of FMLA).

19 (c) The rights and protections of sections 101
20 through 105 of the FMLA have applied to certain employ-
21 ing offices and covered employees other than those re-
22 ferred to in paragraphs (a) and (b) of this section for cer-
23 tain periods since August 5, 1993 (see, e.g., title V of the
24 FMLA, sections 501 and 502).

1 (d) The provisions of section 202 of the CAA that
2 apply rights and protections of the FMLA to covered em-
3 ployees are effective on January 23, 1996.

4 (e) The period prior to the effective date of the appli-
5 cation of FMLA rights and protections under the CAA
6 must be considered in determining employee eligibility.

7 **§825.103 How does the FMLA, as made applicable**
8 **by the CAA, affect leave in progress on,**
9 **or taken before, the effective date of the**
10 **CAA?**

11 (a) An eligible employee's right to take FMLA leave
12 began on the date that the rights and protections of the
13 FMLA first went into effect for the employing office and
14 employee (see § 825.102(a)). Any leave taken prior to the
15 date on which the rights and protections of the FMLA
16 first became effective for the employing office from which
17 the leave was taken may not be counted for purposes of
18 the FMLA as made applicable by the CAA. If leave quali-
19 fying as FMLA leave was underway prior to the effective
20 date of the FMLA for the employing office from which
21 the leave was taken and continued after the FMLA's effec-
22 tive date for that office, only that portion of leave taken
23 on or after the FMLA's effective date may be counted
24 against the employee's leave entitlement under the FMLA,
25 as made applicable by the CAA.

1 (b) If an employing office-approved leave is underway
2 when the application of the FMLA by the CAA takes ef-
3 fect, no further notice would be required of the employee
4 unless the employee requests an extension of the leave.
5 For leave which commenced on the effective date or short-
6 ly thereafter, such notice must have been given which was
7 practicable, considering the foreseeability of the need for
8 leave and the effective date.

9 (c) Starting on January 23, 1996, an employee is en-
10 titled to FMLA leave under these regulations if the reason
11 for the leave is qualifying under the FMLA, as made ap-
12 plicable by the CAA, even if the event occasioning the need
13 for leave (e.g., the birth of a child) occurred before such
14 date (so long as any other requirements are satisfied).

15 **§825.104 What employing offices are covered by the**
16 **FMLA, as made applicable by the CAA?**

17 (a) The FMLA, as made applicable by the CAA, cov-
18 ers all employing offices. As used in the CAA, the term
19 “employing office” means—

20 (1) the personal office of a Member of the
21 House of Representatives or of a Senator;

22 (2) a committee of the House of Representa-
23 tives or the Senate or a joint committee;

24 (3) any other office headed by a person with
25 the final authority to appoint, hire, discharge, and

1 set the terms, conditions, or privileges of the employ-
2 ment of an employee of the House of Representa-
3 tives or the Senate; or

4 (4) the Capitol Guide Board, the Capitol Police
5 Board, the Congressional Budget Office, the Office
6 of the Architect of the Capitol, the Office of the At-
7 tending Physician, the Office of Compliance, and the
8 Office of Technology Assessment.

9 (b) [Reserved]

10 (c) Separate entities will be deemed to be parts of
11 a single employer for purposes of the FMLA, as made ap-
12 plicable by the CAA, if they meet the “integrated em-
13 ployer” test. A determination of whether or not separate
14 entities are an integrated employer is not determined by
15 the application of any single criterion, but rather the en-
16 tire relationship is to be reviewed in its totality. Factors
17 considered in determining whether two or more entities
18 are an integrated employer include:

19 (i) Common management;

20 (ii) Interrelation between operations;

21 (iii) Centralized control of labor relations; and

22 (iv) Degree of common financial control.

1 **§ 825.105 [Reserved]**

2 **§ 825.106 How is “joint employment” treated under**
3 **the FMLA as made applicable by the**
4 **CAA?**

5 (a) Where two or more employing offices exercise
6 some control over the work or working conditions of the
7 employee, the employing offices may be joint employers
8 under FMLA, as made applicable by the CAA. Where the
9 employee performs work which simultaneously benefits
10 two or more employing offices, or works for two or more
11 employing offices at different times during the workweek,
12 a joint employment relationship generally will be consid-
13 ered to exist in situations such as:

14 (1) Where there is an arrangement between em-
15 ploying offices to share an employee’s services or to
16 interchange employees;

17 (2) Where one employing office acts directly or
18 indirectly in the interest of the other employing of-
19 fice in relation to the employee; or

20 (3) Where the employing offices are not com-
21 pletely disassociated with respect to the employee’s
22 employment and may be deemed to share control of
23 the employee, directly or indirectly, because one em-
24 ploying office controls, is controlled by, or is under
25 common control with the other employing office.

1 (b) A determination of whether or not a joint employ-
2 ment relationship exists is not determined by the applica-
3 tion of any single criterion, but rather the entire relation-
4 ship is to be viewed in its totality. For example, joint em-
5 ployment will ordinarily be found to exist when—

6 (1) an employee, who is employed by an em-
7 ploying office other than the personal office of a
8 Member of the House of Representatives or of a
9 Senator, is under the actual direction and control of
10 the Member of the House of Representatives or Sen-
11 ator; or

12 (2) two or more employing offices employ an in-
13 dividual to work on common issues or other matters
14 for both or all of them.

15 (c) When employing offices employ a covered em-
16 ployee jointly, they may designate one of themselves to be
17 the primary employing office, and the other or others to
18 be the secondary employing office(s). Such a designation
19 shall be made by written notice to the covered employee.

20 (d) If an employing office is designated a primary em-
21 ploying office pursuant to paragraph (c) of this section,
22 only that employing office is responsible for giving re-
23 quired notices to the covered employee, providing FMLA
24 leave, and maintenance of health benefits. Job restoration
25 is the primary responsibility of the primary employing of-

1 fice, and the secondary employing office(s) may, subject
2 to the limitations in § 825.216, be responsible for accept-
3 ing the employee returning from FMLA leave.

4 (e) If employing offices employ an employee jointly,
5 but fail to designate a primary employing office pursuant
6 to paragraph (c) of this section, then all of these employ-
7 ing offices shall be jointly and severally liable for giving
8 required notices to the employee, for providing FMLA
9 leave, for assuring that health benefits are maintained,
10 and for job restoration. The employee may give notice of
11 need for FMLA leave, as described in §§ 825.302 and
12 825.303, to whichever of these employing offices the em-
13 ployee chooses. If the employee makes a written request
14 for restoration to one of these employing offices, that em-
15 ploying office shall be primarily responsible for job res-
16 toration, and the other employing office(s) may, subject
17 to the limitations in § 825.216, be responsible for accept-
18 ing the employee returning from FMLA leave.

19 **§ 825.107 [Reserved]**

20 **§ 825.108 [Reserved]**

21 **§ 825.109 [Reserved]**

22 **§ 825.110 Which employees are “eligible” to take**
23 **FMLA leave under these regulations?**

24 (a) An “eligible employee” under these regulations
25 means a covered employee who has been employed in any

1 employing office for 12 months and for at least 1,250
2 hours of employment during the previous 12 months.

3 (b) The 12 months an employee must have been em-
4 ployed by any employing office need not be consecutive
5 months. If an employee worked for two or more employing
6 offices sequentially, the time worked will be aggregated to
7 determine whether it equals 12 months. If an employee
8 is maintained on the payroll for any part of a week, includ-
9 ing any periods of paid or unpaid leave (sick, vacation)
10 during which other benefits or compensation are provided
11 by the employer (e.g., workers' compensation, group
12 health plan benefits, etc.), the week counts as a week of
13 employment. For purposes of determining whether inter-
14 mittent/occasional/casual employment qualifies as "at
15 least 12 months", 52 weeks is deemed to be equal to 12
16 months.

17 (c) If an employee was employed by two or more em-
18 ploying offices, either sequentially or concurrently, the
19 hours of service will be aggregated to determine whether
20 the minimum of 1,250 hours has been reached. Whether
21 an employee has worked the minimum 1,250 hours of
22 service is determined according to the principles estab-
23 lished under the Fair Labor Standards Act (FLSA), as
24 applied by section 203 of the CAA (2 U.S.C. 1313), for
25 determining compensable hours of work. The determining

1 factor is the number of hours an employee has worked
2 for one or more employing offices. The determination is
3 not limited by methods of record-keeping, or by compensa-
4 tion agreements that do not accurately reflect all of the
5 hours an employee has worked for or been in service to
6 the employing office. Any accurate accounting of actual
7 hours worked may be used. For this purpose, full-time
8 teachers (see § 825.800 for definition) of an elementary
9 or secondary school system, or institution of higher edu-
10 cation, or other educational establishment or institution
11 are deemed to meet the 1,250 hour test. An employing
12 office must be able to clearly demonstrate that such an
13 employee did not work 1,250 hours during the previous
14 12 months in order to claim that the employee is not “eli-
15 gible” for FMLA leave.

16 (d) The determinations of whether an employee has
17 worked for any employing office for at least 1,250 hours
18 in the previous 12 months and has been employed by any
19 employing office for a total of at least 12 months must
20 be made as of the date leave commences. The “previous
21 12 months” means the 12 months immediately preceding
22 the commencement of the leave. If an employee notifies
23 the employing office of need for FMLA leave before the
24 employee meets these eligibility criteria, the employing of-
25 fice must either confirm the employee’s eligibility based

1 upon a projection that the employee will be eligible on the
2 date leave would commence or must advise the employee
3 when the eligibility requirement is met. If the employing
4 office confirms eligibility at the time the notice for leave
5 is received, the employing office may not subsequently
6 challenge the employee's eligibility. In the latter case, if
7 the employing office does not advise the employee whether
8 the employee is eligible as soon as practicable (i.e., two
9 business days absent extenuating circumstances) after the
10 date employee eligibility is determined, the employee will
11 have satisfied the notice requirements and the notice of
12 leave is considered current and outstanding until the em-
13 ploying office does advise. If the employing office fails to
14 advise the employee whether the employee is eligible prior
15 to the date the requested leave is to commence, the em-
16 ployee will be deemed eligible. The employing office may
17 not, then, deny the leave. Where the employee does not
18 give notice of the need for leave more than two business
19 days prior to commencing leave, the employee will be
20 deemed to be eligible if the employing office fails to advise
21 the employee that the employee is not eligible within two
22 business days of receiving the employee's notice.

23 (e) The period prior to the effective date of the appli-
24 cation of FMLA rights and protections under the CAA
25 must be considered in determining employee's eligibility.

1 (f) [Reserved]

2 **§ 825.111 [Reserved]**

3 **§ 825.112 Under what kinds of circumstances are em-**
4 **ploying offices required to grant family**
5 **or medical leave?**

6 (a) Employing offices are required to grant leave to
7 eligible employees:

8 (1) For birth of a son or daughter, and to care
9 for the newborn child;

10 (2) For placement with the employee of a son
11 or daughter for adoption or foster care;

12 (3) To care for the employee's spouse, son,
13 daughter, or parent with a serious health condition;
14 and

15 (4) Because of a serious health condition that
16 makes the employee unable to perform the functions
17 of the employee's job.

18 (b) The right to take leave under FMLA as made
19 applicable by the CAA applies equally to male and female
20 employees. A father, as well as a mother, can take family
21 leave for the birth, placement for adoption or foster care
22 of a child.

23 (c) Circumstances may require that FMLA leave
24 begin before the actual date of birth of a child. An expect-
25 ant mother may take FMLA leave pursuant to paragraph

1 (a)(4) of this section before the birth of the child for pre-
2 natal care or if her condition makes her unable to work.

3 (d) Employing offices are required to grant FMLA
4 leave pursuant to paragraph (a)(2) of this section before
5 the actual placement or adoption of a child if an absence
6 from work is required for the placement for adoption or
7 foster care to proceed. For example, the employee may be
8 required to attend counseling sessions, appear in court,
9 consult with his or her attorney or the doctor(s) represent-
10 ing the birth parent, or submit to a physical examination.
11 The source of an adopted child (e.g., whether from a li-
12 censed placement agency or otherwise) is not a factor in
13 determining eligibility for leave for this purpose.

14 (e) Foster care is 24-hour care for children in substi-
15 tution for, and away from, their parents or guardian. Such
16 placement is made by or with the agreement of the State
17 as a result of a voluntary agreement between the parent
18 or guardian that the child be removed from the home, or
19 pursuant to a judicial determination of the necessity for
20 foster care, and involves agreement between the State and
21 foster family that the foster family will take care of the
22 child. Although foster care may be with relatives of the
23 child, State action is involved in the removal of the child
24 from parental custody.

1 (f) In situations where the employer/employee rela-
2 tionship has been interrupted, such as an employee who
3 has been on layoff, the employee must be recalled or other-
4 wise be re-employed before being eligible for FMLA leave.
5 Under such circumstances, an eligible employee is imme-
6 diately entitled to further FMLA leave for a qualifying
7 reason.

8 (g) FMLA leave is available for treatment for sub-
9 stance abuse provided the conditions of § 825.114 are met.
10 However, treatment for substance abuse does not prevent
11 an employing office from taking employment action
12 against an employee. The employing office may not take
13 action against the employee because the employee has ex-
14 ercised his or her right to take FMLA leave for treatment.
15 However, if the employing office has an established policy,
16 applied in a non-discriminatory manner that has been
17 communicated to all employees, that provides under cer-
18 tain circumstances an employee may be terminated for
19 substance abuse, pursuant to that policy the employee may
20 be terminated whether or not the employee is presently
21 taking FMLA leave. An employee may also take FMLA
22 leave to care for an immediate family member who is re-
23 ceiving treatment for substance abuse. The employing of-
24 fice may not take action against an employee who is pro-

1 viding care for an immediate family member receiving
2 treatment for substance abuse.

3 **§825.113 What do “spouse”, “parent”, and “son or**
4 **daughter” mean for purposes of an em-**
5 **ployee qualifying to take FMLA leave?**

6 (a) Spouse means a husband or wife as defined or
7 recognized under State law for purposes of marriage in
8 the State where the employee resides, including common
9 law marriage in States where it is recognized.

10 (b) Parent means a biological parent or an individual
11 who stands or stood in loco parentis to an employee when
12 the employee was a son or daughter as defined in (c)
13 below. This term does not include parents “in law”.

14 (c) Son or daughter means a biological, adopted, or
15 foster child, a stepchild, a legal ward, or a child of a per-
16 son standing in loco parentis, who is either under age 18,
17 or age 18 or older and “incapable of self-care because of
18 a mental or physical disability”.

19 (1) “Incapable of self-care” means that the in-
20 dividual requires active assistance or supervision to
21 provide daily self-care in three or more of the “ac-
22 tivities of daily living” (ADLs) or “instrumental ac-
23 tivities of daily living” (IADLs). Activities of daily
24 living include adaptive activities such as caring ap-
25 propriately for one’s grooming and hygiene, bathing,

1 dressing and eating. Instrumental activities of daily
2 living include cooking, cleaning, shopping, taking
3 public transportation, paying bills, maintaining a
4 residence, using telephones and directories, using a
5 post office, etc.

6 (2) “Physical or mental disability” means a
7 physical or mental impairment that substantially
8 limits one or more of the major life activities of an
9 individual. See the Americans with Disabilities Act
10 (ADA), as made applicable by section 201(a)(3) of
11 the CAA (2 U.S.C. 1311(a)(3)).

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

18 (d) For purposes of confirmation of family relation-
19 ship, the employing office may require the employee giving
20 notice of the need for leave to provide reasonable docu-
21 mentation or statement of family relationship. This docu-
22 mentation may take the form of a simple statement from
23 the employee, or a child’s birth certificate, a court docu-
24 ment, etc. The employing office is entitled to examine doc-
25 umentation such as a birth certificate, etc., but the em-

1 ployee is entitled to the return of the official document
2 submitted for this purpose.

3 **§825.114 What is a “serious health condition” enti-**
4 **tling an employee to FMLA leave?**

5 (a) For purposes of FMLA, “serious health condi-
6 tion” entitling an employee to FMLA leave means an ill-
7 ness, injury, impairment, or physical or mental condition
8 that involves:

9 (1) Inpatient care (i.e., an overnight stay) in a
10 hospital, hospice, or residential medical care facility,
11 including any period of incapacity (for purposes of
12 this section, defined to mean inability to work, at-
13 tend school or perform other regular daily activities
14 due to the serious health condition, treatment there-
15 for, or recovery therefrom), or any subsequent treat-
16 ment in connection with such inpatient care; or

17 (2) Continuing treatment by a health care pro-
18 vider. A serious health condition involving continuing
19 treatment by a health care provider includes any one
20 or more of the following:

21 (i) A period of incapacity (i.e., inability to
22 work, attend school or perform other regular
23 daily activities due to the serious health condi-
24 tion, treatment therefor, or recovery therefrom)
25 of more than three consecutive calendar days,

1 and any subsequent treatment or period of in-
2 capacity relating to the same condition, that
3 also involves:

4 (A) Treatment two or more times by
5 a health care provider, by a nurse or physi-
6 cian's assistant under direct supervision of
7 a health care provider, or by a provider of
8 health care services (e.g., physical thera-
9 pist) under orders of, or on referral by, a
10 health care provider; or

11 (B) Treatment by a health care pro-
12 vider on at least one occasion which results
13 in a regimen of continuing treatment
14 under the supervision of the health care
15 provider.

16 (ii) Any period of incapacity due to preg-
17 nancy, or for prenatal care.

18 (iii) Any period of incapacity or treatment
19 for such incapacity due to a chronic serious
20 health condition. A chronic serious health condi-
21 tion is one which:

22 (A) Requires periodic visits for treat-
23 ment by a health care provider, or by a
24 nurse or physician's assistant under direct
25 supervision of a health care provider;

1 (B) Continues over an extended pe-
2 riod of time (including recurring episodes
3 of a single underlying condition); and

4 (C) May cause episodic rather than a
5 continuing period of incapacity (e.g., asth-
6 ma, diabetes, epilepsy, etc.).

7 (iv) A period of incapacity which is perma-
8 nent or long-term due to a condition for which
9 treatment may not be effective. The employee
10 or family member must be under the continuing
11 supervision of, but need not be receiving active
12 treatment by, a health care provider. Examples
13 include Alzheimer's, a severe stroke, or the ter-
14 minal stages of a disease.

15 (v) Any period of absence to receive mul-
16 tiple treatments (including any period of recov-
17 ery therefrom) by a health care provider or by
18 a provider of health care services under orders
19 of, or on referral by, a health care provider, ei-
20 ther for restorative surgery after an accident or
21 other injury, or for a condition that would likely
22 result in a period of incapacity of more than
23 three consecutive calendar days in the absence
24 of medical intervention or treatment, such as
25 cancer (chemotherapy, radiation, etc.), severe

1 arthritis (physical therapy), kidney disease (di-
2 alysis).

3 (b) Treatment for purposes of paragraph (a) of this
4 section includes (but is not limited to) examinations to de-
5 termine if a serious health condition exists and evaluations
6 of the condition. Treatment does not include routine phys-
7 ical examinations, eye examinations, or dental examina-
8 tions. Under paragraph (a)(2)(i)(B), a regimen of continu-
9 ing treatment includes, for example, a course of prescrip-
10 tion medication (e.g., an antibiotic) or therapy requiring
11 special equipment to resolve or alleviate the health condi-
12 tion (e.g., oxygen). A regimen of continuing treatment
13 that includes the taking of over-the-counter medications
14 such as aspirin, antihistamines, or salves; or bed-rest,
15 drinking fluids, exercise, and other similar activities that
16 can be initiated without a visit to a health care provider,
17 is not, by itself, sufficient to constitute a regimen of con-
18 tinuing treatment for purposes of FMLA leave.

19 (c) Conditions for which cosmetic treatments are ad-
20 ministered (such as most treatments for acne or plastic
21 surgery) are not “serious health conditions” unless inpa-
22 tient hospital care is required or unless complications de-
23 velop. Ordinarily, unless complications arise, the common
24 cold, the flu, ear aches, upset stomach, minor ulcers, head-
25 aches other than migraine, routine dental or orthodontia

1 problems, periodontal disease, etc., are examples of condi-
2 tions that do not meet the definition of a serious health
3 condition and do not qualify for FMLA leave. Restorative
4 dental or plastic surgery after an injury or removal of can-
5 cerous growths are serious health conditions provided all
6 the other conditions of this regulation are met. Mental ill-
7 ness resulting from stress or allergies may be serious
8 health conditions, but only if all the conditions of this sec-
9 tion are met.

10 (d) Substance abuse may be a serious health condi-
11 tion if the conditions of this section are met. However,
12 FMLA leave may only be taken for treatment for sub-
13 stance abuse by a health care provider or by a provider
14 of health care services on referral by a health care pro-
15 vider. On the other hand, absence because of the employ-
16 ee's use of the substance, rather than for treatment, does
17 not qualify for FMLA leave.

18 (e) Absences attributable to incapacity under para-
19 graphs (a)(2) (ii) or (iii) qualify for FMLA leave even
20 though the employee or the immediate family member does
21 not receive treatment from a health care provider during
22 the absence, and even if the absence does not last more
23 than three days. For example, an employee with asthma
24 may be unable to report for work due to the onset of an
25 asthma attack or because the employee's health care pro-

1 vider has advised the employee to stay home when the pol-
2 len count exceeds a certain level. An employee who is preg-
3 nant may be unable to report to work because of severe
4 morning sickness.

5 **§ 825.115 What does it mean that “the employee is un-**
6 **able to perform the functions of the posi-**
7 **tion of the employee”?**

8 An employee is “unable to perform the functions of
9 the position” where the health care provider finds that the
10 employee is unable to work at all or is unable to perform
11 any one of the essential functions of the employee’s posi-
12 tion within the meaning of the Americans with Disabilities
13 Act (ADA), as made applicable by section 201(a)(3) of
14 the CAA (2 U.S.C. 1311(a)(3)). An employee who must
15 be absent from work to receive medical treatment for a
16 serious health condition is considered to be unable to per-
17 form the essential functions of the position during the ab-
18 sence for treatment. An employing office has the option,
19 in requiring certification from a health care provider, to
20 provide a statement of the essential functions of the em-
21 ployee’s position for the health care provider to review.
22 For purposes of FMLA, the essential functions of the em-
23 ployee’s position are to be determined with reference to
24 the position the employee held at the time notice is given
25 or leave commenced, whichever is earlier.

1 **§825.116 What does it mean that an employee is**
2 **“needed to care for” a family member?**

3 (a) The medical certification provision that an em-
4 ployee is “needed to care for” a family member encom-
5 passes both physical and psychological care. It includes
6 situations where, for example, because of a serious health
7 condition, the family member is unable to care for his or
8 her own basic medical, hygienic, or nutritional needs or
9 safety, or is unable to transport himself or herself to the
10 doctor, etc. The term also includes providing psychological
11 comfort and reassurance which would be beneficial to a
12 child, spouse or parent with a serious health condition who
13 is receiving inpatient or home care.

14 (b) The term also includes situations where the em-
15 ployee may be needed to fill in for others who are caring
16 for the family member, or to make arrangements for
17 changes in care, such as transfer to a nursing home.

18 (c) An employee’s intermittent leave or a reduced
19 leave schedule necessary to care for a family member in-
20 cludes not only a situation where the family member’s con-
21 dition itself is intermittent, but also where the employee
22 is only needed intermittently “such as where other care
23 is normally available, or care responsibilities are shared
24 with another member of the family or a third party.

1 **§825.117 For an employee seeking intermittent**
2 **FMLA leave or leave on a reduced leave**
3 **schedule, what is meant by “the medical**
4 **necessity for” such leave?**

5 For intermittent leave or leave on a reduced leave
6 schedule, there must be a medical need for leave (as distin-
7 guished from voluntary treatments and procedures) and
8 it must be that such medical need can be best accommo-
9 dated through an intermittent or reduced leave schedule.
10 The treatment regimen and other information described
11 in the certification of a serious health condition (see
12 §825.306) meets the requirement for certification of the
13 medical necessity of intermittent leave or leave on a re-
14 duced leave schedule. Employees needing intermittent
15 FMLA leave or leave on a reduced leave schedule must
16 attempt to schedule their leave so as not to disrupt the
17 employing office’s operations. In addition, an employing
18 office may assign an employee to an alternative position
19 with equivalent pay and benefits that better accommodates
20 the employee’s intermittent or reduced leave schedule.

21 **§825.118 What is a “health care provider”?**

22 (a)(1) The term “health care provider” means:

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

1 (ii) Any other person determined by the Office
2 of Compliance to be capable of providing health care
3 services.

4 (2) In making a determination referred to in subpara-
5 graph (1)(ii), and absent good cause shown to do other-
6 wise, the Office of Compliance will follow any determina-
7 tion made by the Secretary of Labor (under section
8 101(6)(B) of the FMLA, 29 U.S.C. 2611(6)(B)) that a
9 person is capable of providing health care services, pro-
10 vided the Secretary's determination was not made at the
11 request of a person who was then a covered employee.

12 (b) Others "capable of providing health care services"
13 include only:

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

21 (2) Nurse practitioners, nurse-midwives and
22 clinical social workers who are authorized to practice
23 under State law and who are performing within the
24 scope of their practice as defined under State law;

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

13 (4) Any health care provider from whom an em-
14 ploying office or the employing office's group health
15 plan's benefits manager will accept certification of
16 the existence of a serious health condition to sub-
17 stantiate a claim for benefits; and

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

24 (c) The phrase "authorized to practice in the State"
25 as used in this section means that the provider must be

1 authorized to diagnose and treat physical or mental health
2 conditions without supervision by a doctor or other health
3 care provider.

4 SUBPART B—WHAT LEAVE IS AN EMPLOYEE ENTITLED
5 TO TAKE UNDER THE FAMILY AND MEDICAL
6 LEAVE ACT, AS MADE APPLICABLE BY THE CON-
7 GRESSIONAL ACCOUNTABILITY ACT?

8 **§ 825.200 How much leave may an employee take?**

9 (a) An eligible employee's FMLA leave entitlement
10 is limited to a total of 12 workweeks of leave during any
11 12-month period for any one, or more, of the following
12 reasons:

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

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

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

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

24 (b) An employing office is permitted to choose any
25 one of the following methods for determining the "12-

1 month period” in which the 12 weeks of leave entitlement
2 occurs:

3 (1) The calendar year;

4 (2) Any fixed 12-month “leave year”, such as
5 a fiscal year or a year starting on an employee’s
6 “anniversary” date;

7 (3) The 12-month period measured forward
8 from the date any employee’s first FMLA leave be-
9 gins; or

10 (4) A “rolling” 12-month period measured
11 backward from the date an employee uses any
12 FMLA leave (except that such measure may not ex-
13 tend back before the date on which the application
14 of FMLA rights and protections first becomes effec-
15 tive for the employing office; see § 825.102).

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

1 after completion of any previous 12-month period. Under
2 the method in paragraph (b)(4) of this section, the “roll-
3 ing” 12-month period, each time an employee takes
4 FMLA leave the remaining leave entitlement would be any
5 balance of the 12 weeks which has not been used during
6 the immediately preceding 12 months. For example, if an
7 employee has taken eight weeks of leave during the past
8 12 months, an additional four weeks of leave could be
9 taken. If an employee used four weeks beginning February
10 1, 1997, four weeks beginning June 1, 1997, and four
11 weeks beginning December 1, 1997, the employee would
12 not be entitled to any additional leave until February 1,
13 1998. However, beginning on February 1, 1998, the em-
14 ployee would be entitled to four weeks of leave, on June
15 1 the employee would be entitled to an additional four
16 weeks, etc.

17 (d)(1) Employing offices will be allowed to choose any
18 one of the alternatives in paragraph (b) of this section
19 provided the alternative chosen is applied consistently and
20 uniformly to all employees. An employing office wishing
21 to change to another alternative is required to give at least
22 60 days notice to all employees, and the transition must
23 take place in such a way that the employees retain the
24 full benefit of 12 weeks of leave under whichever method
25 affords the greatest benefit to the employee. Under no cir-

1 cumstances may a new method be implemented in order
2 to avoid the CAA's FMLA leave requirements.

3 (2) [Reserved]

4 (e) If an employing office fails to select one of the
5 options in paragraph (b) of this section for measuring the
6 12-month period, the option that provides the most bene-
7 ficial outcome for the employee will be used. The employ-
8 ing office may subsequently select an option only by pro-
9 viding the 60-day notice to all employees of the option the
10 employing office intends to implement. During the run-
11 ning of the 60-day period any other employee who needs
12 FMLA leave may use the option providing the most bene-
13 ficial outcome to that employee. At the conclusion of the
14 60-day period the employing office may implement the se-
15 lected option.

16 (f) For purposes of determining the amount of leave
17 used by an employee, the fact that a holiday may occur
18 within the week taken as FMLA leave has no effect; the
19 week is counted as a week of FMLA leave. However, if
20 for some reason the employing office's activity has tempo-
21 rarily ceased and employees generally are not expected to
22 report for work for one or more weeks (e.g., a school clos-
23 ing two weeks for the Christmas/New Year holiday or the
24 summer vacation or an employing office closing the office
25 for repairs), the days the employing office's activities have

1 ceased do not count against the employee's FMLA leave
2 entitlement. Methods for determining an employee's 12-
3 week leave entitlement are also described in § 825.205.

4 (g)(1) If employing offices jointly employ an em-
5 ployee, and if they designate a primary employer pursuant
6 to § 825.106(c), the primary employer may choose any one
7 of the alternatives in paragraph (b) of this section for
8 measuring the 12-month period, provided that the alter-
9 native chosen is applied consistently and uniformly to all
10 employees of the primary employer including the jointly
11 employed employee.

12 (2) If employing offices fail to designated a primary
13 employer pursuant to § 825.106(c), an employee jointly
14 employed by the employing offices may, by so notifying
15 one of the employing offices, select that employing office
16 to be the primary employer of the employee for purposes
17 of the application of paragraphs (d) and (e) of this section.

18 **§ 825.201 If leave is taken for the birth of a child, or**
19 **for placement of a child for adoption or**
20 **foster care, when must the leave be con-**
21 **cluded?**

22 An employee's entitlement to leave for a birth or
23 placement for adoption or foster care expires at the end
24 of the 12-month period beginning on the date of the birth
25 or placement, unless the employing office permits leave to

1 be taken for a longer period. Any such FMLA leave must
2 be concluded within this one-year period.

3 **§825.202 How much leave may a husband and wife**
4 **take if they are employed by the same**
5 **employing office?**

6 (a) A husband and wife who are eligible for FMLA
7 leave and are employed by the same employing office may
8 be limited to a combined total of 12 weeks of leave during
9 any 12-month period if the leave is taken—

10 (1) for birth of the employee's son or daughter
11 or to care for the child after birth;

12 (2) for placement of a son or daughter with the
13 employee for adoption or foster care, or to care for
14 the child after placement; or

15 (3) to care for the employee's parent with a se-
16 rious health condition.

17 (b) This limitation on the total weeks of leave applies
18 to leave taken for the reasons specified in paragraph (a)
19 of this section as long as a husband and wife are employed
20 by the "same employing office". It would apply, for exam-
21 ple, even though the spouses are employed at two different
22 work sites of an employing office. On the other hand, if
23 one spouse is ineligible for FMLA leave, the other spouse
24 would be entitled to a full 12 weeks of FMLA leave.

1 (c) Where the husband and wife both use a portion
2 of the total 12-week FMLA leave entitlement for one of
3 the purposes in paragraph (a) of this section, the husband
4 and wife would each be entitled to the difference between
5 the amount he or she has taken individually and 12 weeks
6 for FMLA leave for a purpose other than those contained
7 in paragraph (a) of this section. For example, if each
8 spouse took 6 weeks of leave to care for a healthy, new-
9 born child, each could use an additional 6 weeks due to
10 his or her own serious health condition or to care for a
11 child with a serious health condition.

12 **§825.203 Does FMLA leave have to be taken all at**
13 **once, or can it be taken in parts?**

14 (a) FMLA leave may be taken “intermittently or on
15 a reduced leave schedule” under certain circumstances.
16 Intermittent leave is FMLA leave taken in separate blocks
17 of time due to a single qualifying reason. A reduced leave
18 schedule is a leave schedule that reduces an employee’s
19 usual number of working hours per workweek, or hours
20 per workday. A reduced leave schedule is a change in the
21 employee’s schedule for a period of time, normally from
22 full-time to part-time.

23 (b) When leave is taken after the birth or placement
24 of a child for adoption or foster care, an employee may
25 take leave intermittently or on a reduced leave schedule

1 only if the employing office agrees. Such a schedule reduc-
2 tion might occur, for example, where an employee, with
3 the employing office's agreement, works part-time after
4 the birth of a child, or takes leave in several segments.
5 The employing office's agreement is not required, however,
6 for leave during which the mother has a serious health
7 condition in connection with the birth of her child or if
8 the newborn child has a serious health condition.

9 (c) Leave may be taken intermittently or on a re-
10 duced leave schedule when medically necessary for planned
11 and/or unanticipated medical treatment of a related seri-
12 ous health condition by or under the supervision of a
13 health care provider, or for recovery from treatment or
14 recovery from a serious health condition. It may also be
15 taken to provide care or psychological comfort to an imme-
16 diate family member with a serious health condition.

17 (1) Intermittent leave may be taken for a seri-
18 ous health condition which requires treatment by a
19 health care provider periodically, rather than for one
20 continuous period of time, and may include leave of
21 periods from an hour or more to several weeks. Ex-
22 amples of intermittent leave would include leave
23 taken on an occasional basis for medical appoint-
24 ments, or leave taken several days at a time spread
25 over a period of six months, such as for chemo-

1 therapy. A pregnant employee may take leave inter-
2 mittently for prenatal examinations or for her own
3 condition, such as for periods of severe morning
4 sickness. An example of an employee taking leave on
5 a reduced leave schedule is an employee who is re-
6 covering from a serious health condition and is not
7 strong enough to work a full-time schedule.

8 (2) Intermittent or reduced schedule leave may
9 be taken for absences where the employee or family
10 member is incapacitated or unable to perform the
11 essential functions of the position because of a
12 chronic serious health condition even if he or she
13 does not receive treatment by a health care provider.

14 (d) There is no limit on the size of an increment of
15 leave when an employee takes intermittent leave or leave
16 on a reduced leave schedule. However, an employing office
17 may limit leave increments to the shortest period of time
18 that the employing office's payroll system uses to account
19 for absences or use of leave, provided it is one hour or
20 less. For example, an employee might take two hours off
21 for a medical appointment, or might work a reduced day
22 of four hours over a period of several weeks while
23 recuperating from an illness. An employee may not be re-
24 quired to take more FMLA leave than necessary to ad-

1 dress the circumstance that precipitated the need for the
2 leave, except as provided in §§ 825.601 and 825.602.

3 **§825.204 May an employing office transfer an em-**
4 **ployee to an “alternative position” in**
5 **order to accommodate intermittent leave**
6 **or a reduced leave schedule?**

7 (a) If an employee needs intermittent leave or leave
8 on a reduced leave schedule that is foreseeable based on
9 planned medical treatment for the employee or a family
10 member, including during a period of recovery from a seri-
11 ous health condition, or if the employing office agrees to
12 permit intermittent or reduced schedule leave for the birth
13 of a child or for placement of a child for adoption or foster
14 care, the employing office may require the employee to
15 transfer temporarily, during the period the intermittent or
16 reduced leave schedule is required, to an available alter-
17 native position for which the employee is qualified and
18 which better accommodates recurring periods of leave than
19 does the employee’s regular position. See § 825.601 for
20 special rules applicable to instructional employees of
21 schools.

22 (b) Transfer to an alternative position may require
23 compliance with any applicable collective bargaining agree-
24 ment and any applicable law (such as the Americans with
25 Disabilities Act, as made applicable by the CAA). Transfer

1 to an alternative position may include altering an existing
2 job to better accommodate the employee's need for inter-
3 mittent or reduced leave.

4 (c) The alternative position must have equivalent pay
5 and benefits. An alternative position for these purposes
6 does not have to have equivalent duties. The employing
7 office may increase the pay and benefits of an existing
8 alternative position, so as to make them equivalent to the
9 pay and benefits of the employee's regular job. The em-
10 ploying office may also transfer the employee to a part-
11 time job with the same hourly rate of pay and benefits,
12 provided the employee is not required to take more leave
13 than is medically necessary. For example, an employee de-
14 siring to take leave in increments of four hours per day
15 could be transferred to a half-time job, or could remain
16 in the employee's same job on a part-time schedule, paying
17 the same hourly rate as the employee's previous job and
18 enjoying the same benefits. The employing office may not
19 eliminate benefits which otherwise would not be provided
20 to part-time employees; however, an employing office may
21 proportionately reduce benefits such as vacation leave
22 where an employing office's normal practice is to base
23 such benefits on the number of hours worked.

24 (d) An employing office may not transfer the em-
25 ployee to an alternative position in order to discourage the

1 employee from taking leave or otherwise work a hardship
2 on the employee. For example, a white collar employee
3 may not be assigned to perform laborer's work; an em-
4 ployee working the day shift may not be reassigned to the
5 graveyard shift; an employee working in the headquarters
6 facility may not be reassigned to a branch a significant
7 distance away from the employee's normal job location.
8 Any such attempt on the part of the employing office to
9 make such a transfer will be held to be contrary to the
10 prohibited-acts provisions of the FMLA, as made applica-
11 ble by the CAA.

12 (e) When an employee who is taking leave intermit-
13 tently or on a reduced leave schedule and has been trans-
14 ferred to an alternative position no longer needs to con-
15 tinue on leave and is able to return to full-time work, the
16 employee must be placed in the same or equivalent job
17 as the job he/she left when the leave commenced. An em-
18 ployee may not be required to take more leave than nec-
19 essary to address the circumstance that precipitated the
20 need for leave.

1 **§825.205 How does one determine the amount of**
2 **leave used where an employee takes**
3 **leave intermittently or on a reduced**
4 **leave schedule?**

5 (a) If an employee takes leave on an intermittent or
6 reduced leave schedule, only the amount of leave actually
7 taken may be counted toward the 12 weeks of leave to
8 which an employee is entitled. For example, if an employee
9 who normally works five days a week takes off one day,
10 the employee would use $\frac{1}{5}$ of a week of FMLA leave. Simi-
11 larly, if a full-time employee who normally works 8-hour
12 days works 4-hour days under a reduced leave schedule,
13 the employee would use $\frac{1}{2}$ week of FMLA leave each
14 week.

15 (b) Where an employee normally works a part-time
16 schedule or variable hours, the amount of leave to which
17 an employee is entitled is determined on a pro rata or pro-
18 portional basis by comparing the new schedule with the
19 employee's normal schedule. For example, if an employee
20 who normally works 30 hours per week works only 20
21 hours a week under a reduced leave schedule, the employ-
22 ee's ten hours of leave would constitute one-third of a week
23 of FMLA leave for each week the employee works the re-
24 duced leave schedule.

25 (c) If an employing office has made a permanent or
26 long-term change in the employee's schedule (for reasons

1 other than FMLA, and prior to the notice of need for
2 FMLA leave), the hours worked under the new schedule
3 are to be used for making this calculation.

4 (d) If an employee's schedule varies from week to
5 week, a weekly average of the hours worked over the 12
6 weeks prior to the beginning of the leave period would be
7 used for calculating the employee's normal workweek.

8 **§825.206 May an employing office deduct hourly**
9 **amounts from an employee's salary, when**
10 **providing unpaid leave under FMLA, as**
11 **made applicable by the CAA, without af-**
12 **fecting the employee's qualification for**
13 **exemption as an executive, administra-**
14 **tive, or professional employee, or when**
15 **utilizing the fluctuating workweek meth-**
16 **od for payment of overtime, under the**
17 **Fair Labor Standards Act?**

18 (a) Leave taken under FMLA, as made applicable by
19 the CAA, may be unpaid. If an employee is otherwise ex-
20 empt from minimum wage and overtime requirements of
21 the Fair Labor Standards Act (FLSA), as made applica-
22 ble by the CAA, as a salaried executive, administrative,
23 or professional employee (under regulations issued by the
24 Board, at part 541), providing unpaid FMLA-qualifying
25 leave to such an employee will not cause the employee to

1 lose the FLSA exemption. This means that under regula-
2 tions currently in effect, where an employee meets the
3 specified duties test, is paid on a salary basis, and is paid
4 a salary of at least the amount specified in the regulations,
5 the employing office may make deductions from the em-
6 ployee's salary for any hours taken as intermittent or re-
7 duced FMLA leave within a workweek, without affecting
8 the exempt status of the employee. The fact that an em-
9 ploying office provides FMLA leave, whether paid or un-
10 paid, or maintains any records regarding FMLA leave, will
11 not be relevant to the determination whether an employee
12 is exempt within the meaning of the Board's regulations
13 at part 541.

14 (b) For an employee paid in accordance with a fluc-
15 tuating workweek method of payment for overtime, where
16 permitted by section 203 of the CAA (2 U.S.C. 1313),
17 the employing office, during the period in which intermit-
18 tent or reduced schedule FMLA leave is scheduled to be
19 taken, may compensate an employee on an hourly basis
20 and pay only for the hours the employee works, including
21 time and one-half the employee's regular rate for overtime
22 hours. The change to payment on an hourly basis would
23 include the entire period during which the employee is tak-
24 ing intermittent leave, including weeks in which no leave
25 is taken. The hourly rate shall be determined by dividing

1 the employee's weekly salary by the employee's normal or
2 average schedule of hours worked during weeks in which
3 FMLA leave is not being taken. If an employing office
4 chooses to follow this exception from the fluctuating work-
5 week method of payment, the employing office must do
6 so uniformly, with respect to all employees paid on a fluc-
7 tuating workweek basis for whom FMLA leave is taken
8 on an intermittent or reduced leave schedule basis. If an
9 employing office does not elect to convert the employee's
10 compensation to hourly pay, no deduction may be taken
11 for FMLA leave absences. Once the need for intermittent
12 or reduced scheduled leave is over, the employee may be
13 restored to payment on a fluctuating workweek basis.

14 (c) This special exception to the "salary basis" re-
15 quirements of the FLSA exemption or fluctuating work-
16 week payment requirements applies only to employees of
17 employing offices who are eligible for FMLA leave, and
18 to leave which qualifies as (one of the four types of)
19 FMLA leave. Hourly or other deductions which are not
20 in accordance with the Board's regulations at part 541
21 or with a permissible fluctuating workweek method of pay-
22 ment for overtime may not be taken, for example, where
23 the employee has not worked long enough to be eligible
24 for FMLA leave without potentially affecting the employ-
25 ee's eligibility for exemption. Nor may deductions which

1 are not permitted by the Board's regulations at part 541
2 or by a permissible fluctuating workweek method of pay-
3 ment for overtime be taken from such an employee's salary
4 for any leave which does not qualify as FMLA leave, for
5 example, deductions from an employee's pay for leave re-
6 quired under an employing office's policy or practice for
7 a reason which does not qualify as FMLA leave, e.g., leave
8 to care for a grandparent or for a medical condition which
9 does not qualify as a serious health condition; or for leave
10 which is more generous than provided by FMLA as made
11 applicable by the CAA, such as leave in excess of 12 weeks
12 in a year. The employing office may comply with the em-
13 ploying office's own policy/practice under these cir-
14 cumstances and maintain the employee's eligibility for ex-
15 emption or for the fluctuating workweek method of pay
16 by not taking hourly deductions from the employee's pay,
17 in accordance with FLSA requirements, or may take such
18 deductions, treating the employee as an "hourly" employee
19 and pay overtime premium pay for hours worked over 40
20 in a workweek.

21 **§ 825.207 Is FMLA leave paid or unpaid?**

22 (a) Generally, FMLA leave is unpaid. However, under
23 the circumstances described in this section, FMLA, as
24 made applicable by the CAA, permits an eligible employee
25 to choose to substitute paid leave for FMLA leave. If an

1 employee does not choose to substitute accrued paid leave,
2 the employing office may require the employee to sub-
3 stitute accrued paid leave for FMLA leave.

4 (b) Where an employee has earned or accrued paid
5 vacation, personal or family leave, that paid leave may be
6 substituted for all or part of any (otherwise) unpaid
7 FMLA leave relating to birth, placement of a child for
8 adoption or foster care, or care for a spouse, child or par-
9 ent who has a serious health condition. The term “family
10 leave” as used in FMLA refers to paid leave provided by
11 the employing office covering the particular circumstances
12 for which the employee seeks leave for either the birth of
13 a child and to care for such child, placement of a child
14 for adoption or foster care, or care for a spouse, child or
15 parent with a serious health condition. For example, if the
16 employing office’s leave plan allows use of family leave to
17 care for a child but not for a parent, the employing office
18 is not required to allow accrued family leave to be sub-
19 stituted for FMLA leave used to care for a parent.

20 (c) Substitution of paid accrued vacation, personal,
21 or medical/sick leave may be made for any (otherwise) un-
22 paid FMLA leave needed to care for a family member or
23 the employee’s own serious health condition. Substitution
24 of paid sick/medical leave may be elected to the extent the
25 circumstances meet the employing office’s usual require-

1 ments for the use of sick/medical leave. An employing of-
2 fice is not required to allow substitution of paid sick or
3 medical leave for unpaid FMLA leave “in any situation”
4 where the employing office’s uniform policy would not nor-
5 mally allow such paid leave. An employee, therefore, has
6 a right to substitute paid medical/sick leave to care for
7 a seriously ill family member only if the employing office’s
8 leave plan allows paid leave to be used for that purpose.
9 Similarly, an employee does not have a right to substitute
10 paid medical/sick leave for a serious health condition
11 which is not covered by the employing office’s leave plan.

12 (d)(1) Disability leave for the birth of a child would
13 be considered FMLA leave for a serious health condition
14 and counted in the 12 weeks of leave permitted under
15 FMLA as made applicable by the CAA. Because the leave
16 pursuant to a temporary disability benefit plan is not un-
17 paid, the provision for substitution of paid leave is inap-
18 plicable. However, the employing office may designate the
19 leave as FMLA leave and count the leave as running con-
20 currently for purposes of both the benefit plan and the
21 FMLA leave entitlement. If the requirements to qualify
22 for payments pursuant to the employing office’s temporary
23 disability plan are more stringent than those of FMLA
24 as made applicable by the CAA, the employee must meet
25 the more stringent requirements of the plan, or may

1 choose not to meet the requirements of the plan and in-
2 stead receive no payments from the plan and use unpaid
3 FMLA leave or substitute available accrued paid leave.

4 (2) The FMLA as made applicable by the CAA pro-
5 vides that a serious health condition may result from in-
6 jury to the employee “on or off” the job. If the employing
7 office designates the leave as FMLA leave in accordance
8 with § 825.208, the employee’s FMLA 12-week leave enti-
9 tlement may run concurrently with a workers’ compensa-
10 tion absence when the injury is one that meets the criteria
11 for a serious health condition. As the workers’ compensa-
12 tion absence is not unpaid leave, the provision for substi-
13 tution of the employee’s accrued paid leave is not applica-
14 ble. However, if the health care provider treating the em-
15 ployee for the workers’ compensation injury certifies the
16 employee is able to return to a “light duty job” but is
17 unable to return to the same or equivalent job, the em-
18 ployee may decline the employing office’s offer of a “light
19 duty job”. As a result the employee may lose workers’
20 compensation payments, but is entitled to remain on un-
21 paid FMLA leave until the 12-week entitlement is ex-
22 hausted. As of the date workers’ compensation benefits
23 cease, the substitution provision becomes applicable and
24 either the employee may elect or the employing office may
25 require the use of accrued paid leave. See also §§

1 825.210(f), 825.216(d), 825.220(d), 825.307(a)(1) and
2 825.702(d) (1) and (2) regarding the relationship between
3 workers' compensation absences and FMLA leave.

4 (e) Paid vacation or personal leave, including leave
5 earned or accrued under plans allowing "paid time off",
6 may be substituted, at either the employee's or the em-
7 ploying office's option, for any qualified FMLA leave. No
8 limitations may be placed by the employing office on sub-
9 stitution of paid vacation or personal leave for these pur-
10 poses.

11 (f) If neither the employee nor the employing office
12 elects to substitute paid leave for unpaid FMLA leave
13 under the above conditions and circumstances, the em-
14 ployee will remain entitled to all the paid leave which is
15 earned or accrued under the terms of the employing of-
16 fice's plan.

17 (g) If an employee uses paid leave under cir-
18 cumstances which do not qualify as FMLA leave, the leave
19 will not count against the 12 weeks of FMLA leave to
20 which the employee is entitled. For example, paid sick
21 leave used for a medical condition which is not a serious
22 health condition does not count against the 12 weeks of
23 FMLA leave entitlement.

24 (h) When an employee or employing office elects to
25 substitute paid leave (of any type) for unpaid FMLA leave

1 under circumstances permitted by these regulations, and
2 the employing office's procedural requirements for taking
3 that kind of leave are less stringent than the requirements
4 of FMLA as made applicable by the CAA (e.g., notice or
5 certification requirements), only the less stringent require-
6 ments may be imposed. An employee who complies with
7 an employing office's less stringent leave plan require-
8 ments in such cases may not have leave for an FMLA
9 purpose delayed or denied on the grounds that the em-
10 ployee has not complied with stricter requirements of
11 FMLA as made applicable by the CAA. However, where
12 accrued paid vacation or personal leave is substituted for
13 unpaid FMLA leave for a serious health condition, an em-
14 ployee may be required to comply with any less stringent
15 medical certification requirements of the employing of-
16 fice's sick leave program. See §§ 825.302(g), 825.305(e)
17 and 825.306(c).

18 (i) Compensatory time off, if any is authorized under
19 applicable law, is not a form of accrued paid leave that
20 an employing office may require the employee to substitute
21 for unpaid FMLA leave. The employee may request to use
22 his/her balance of compensatory time for an FMLA rea-
23 son. If the employing office permits the accrual of compen-
24 satory time to be used in compliance with applicable Board
25 regulations, the absence which is paid from the employee's

1 accrued compensatory time “account” may not be counted
2 against the employee’s FMLA leave entitlement.

3 **§825.208 Under what circumstances may an employ-**
4 **ing office designate leave, paid or unpaid,**
5 **as FMLA leave and, as a result, enable**
6 **leave to be counted against the employ-**
7 **ee’s total FMLA leave entitlement?**

8 (a) In all circumstances, it is the employing office’s
9 responsibility to designate leave, paid or unpaid, as
10 FMLA-qualifying, and to give notice of the designation to
11 the employee as provided in this section. In the case of
12 intermittent leave or leave on a reduced schedule, only one
13 such notice is required unless the circumstances regarding
14 the leave have changed. The employing office’s designation
15 decision must be based only on information received from
16 the employee or the employee’s spokesperson (e.g., if the
17 employee is incapacitated, the employee’s spouse, adult
18 child, parent, doctor, etc., may provide notice to the em-
19 ploying office of the need to take FMLA leave). In any
20 circumstance where the employing office does not have
21 sufficient information about the reason for an employee’s
22 use of paid leave, the employing office should inquire fur-
23 ther of the employee or the spokesperson to ascertain
24 whether the paid leave is potentially FMLA-qualifying.

1 (1) An employee giving notice of the need for
2 unpaid FMLA leave must explain the reasons for
3 the needed leave so as to allow the employing office
4 to determine that the leave qualifies under the
5 FMLA, as made applicable by the CAA. If the em-
6 ployee fails to explain the reasons, leave may be de-
7 nied. In many cases, in explaining the reasons for a
8 request to use paid leave, especially when the need
9 for the leave was unexpected or unforeseen, an em-
10 ployee will provide sufficient information for the em-
11 ploying office to designate the paid leave as FMLA
12 leave. An employee using accrued paid leave, espe-
13 cially vacation or personal leave, may in some cases
14 not spontaneously explain the reasons or their plans
15 for using their accrued leave.

16 (2) As noted in § 825.302(c), an employee giv-
17 ing notice of the need for unpaid FMLA leave does
18 not need to expressly assert rights under the FMLA
19 as made applicable by the CAA or even mention the
20 FMLA to meet his or her obligation to provide no-
21 tice, though the employee would need to state a
22 qualifying reason for the needed leave. An employee
23 requesting or notifying the employing office of an in-
24 tent to use accrued paid leave, even if for a purpose
25 covered by FMLA, would not need to assert such

1 right either. However, if an employee requesting to
2 use paid leave for an FMLA-qualifying purpose does
3 not explain the reason for the leave—consistent with
4 the employing office’s established policy or prac-
5 tice—and the employing office denies the employee’s
6 request, the employee will need to provide sufficient
7 information to establish an FMLA-qualifying reason
8 for the needed leave so that the employing office is
9 aware of the employee’s entitlement (i.e., that the
10 leave may not be denied) and, then, may designate
11 that the paid leave be appropriately counted against
12 (substituted for) the employee’s 12-week entitlement.
13 Similarly, an employee using accrued paid vacation
14 leave who seeks an extension of unpaid leave for an
15 FMLA-qualifying purpose will need to state the rea-
16 son. If this is due to an event which occurred during
17 the period of paid leave, the employing office may
18 count the leave used after the FMLA-qualifying
19 event against the employee’s 12-week entitlement.

20 (b)(1) Once the employing office has acquired knowl-
21 edge that the leave is being taken for an FMLA required
22 reason, the employing office must promptly (within two
23 business days absent extenuating circumstances) notify
24 the employee that the paid leave is designated and will
25 be counted as FMLA leave. If there is a dispute between

1 an employing office and an employee as to whether paid
2 leave qualifies as FMLA leave, it should be resolved
3 through discussions between the employee and the employ-
4 ing office. Such discussions and the decision must be docu-
5 mented.

6 (2) The employing office's notice to the employee that
7 the leave has been designated as FMLA leave may be oral-
8 ly or in writing. If the notice is oral, it shall be confirmed
9 in writing, no later than the following payday (unless the
10 payday is less than one week after the oral notice, in which
11 case the notice must be no later than the subsequent pay-
12 day). The written notice may be in any form, including
13 a notation on the employee's pay stub.

14 (c) If the employing office requires paid leave to be
15 substituted for unpaid leave, or that paid leave taken
16 under an existing leave plan be counted as FMLA leave,
17 this decision must be made by the employing office within
18 two business days of the time the employee gives notice
19 of the need for leave, or, where the employing office does
20 not initially have sufficient information to make a deter-
21 mination, when the employing office determines that the
22 leave qualifies as FMLA leave if this happens later. The
23 employing office's designation must be made before the
24 leave starts, unless the employing office does not have suf-
25 ficient information as to the employee's reason for taking

1 the leave until after the leave commenced. If the employing
2 office has the requisite knowledge to make a determination
3 that the paid leave is for an FMLA reason at the time
4 the employee either gives notice of the need for leave or
5 commences leave and fails to designate the leave as FMLA
6 leave (and so notify the employee in accordance with para-
7 graph (b)), the employing office may not designate leave
8 as FMLA leave retroactively, and may designate only pro-
9 spectively as of the date of notification to the employee
10 of the designation. In such circumstances, the employee
11 is subject to the full protections of the FMLA, as made
12 applicable by the CAA, but none of the absence preceding
13 the notice to the employee of the designation may be
14 counted against the employee's 12-week FMLA leave enti-
15 tlement.

16 (d) If the employing office learns that leave is for an
17 FMLA purpose after leave has begun, such as when an
18 employee gives notice of the need for an extension of the
19 paid leave with unpaid FMLA leave, the entire or some
20 portion of the paid leave period may be retroactively
21 counted as FMLA leave, to the extent that the leave period
22 qualified as FMLA leave. For example, an employee is
23 granted two weeks paid vacation leave for a skiing trip.
24 In mid-week of the second week, the employee contacts
25 the employing office for an extension of leave as unpaid

1 leave and advises that at the beginning of the second week
2 of paid vacation leave the employee suffered a severe acci-
3 dent requiring hospitalization. The employing office may
4 notify the employee that both the extension and the second
5 week of paid vacation leave (from the date of the injury)
6 is designated as FMLA leave. On the other hand, when
7 the employee takes sick leave that turns into a serious
8 health condition (e.g., bronchitis that turns into bronchial
9 pneumonia) and the employee gives notice of the need for
10 an extension of leave, the entire period of the serious
11 health condition may be counted as FMLA leave.

12 (e) Employing offices may not designate leave as
13 FMLA leave after the employee has returned to work with
14 two exceptions:

15 (1) If the employee was absent for an FMLA
16 reason and the employing office did not learn the
17 reason for the absence until the employee's return
18 (e.g., where the employee was absent for only a brief
19 period), the employing office may, upon the employ-
20 ee's return to work, promptly (within two business
21 days of the employee's return to work) designate the
22 leave retroactively with appropriate notice to the em-
23 ployee. If leave is taken for an FMLA reason but
24 the employing office was not aware of the reason,
25 and the employee desires that the leave be counted

1 as FMLA leave, the employee must notify the em-
2 ploying office within two business days of returning
3 to work of the reason for the leave. In the absence
4 of such timely notification by the employee, the em-
5 ployee may not subsequently assert FMLA protec-
6 tions for the absence.

7 (2) If the employing office knows the reason for
8 the leave but has not been able to confirm that the
9 leave qualifies under FMLA, or where the employing
10 office has requested medical certification which has
11 not yet been received or the parties are in the proc-
12 ess of obtaining a second or third medical opinion,
13 the employing office should make a preliminary des-
14 ignation, and so notify the employee, at the time
15 leave begins, or as soon as the reason for the leave
16 becomes known. Upon receipt of the requisite infor-
17 mation from the employee or of the medical certifi-
18 cation which confirms the leave is for an FMLA rea-
19 son, the preliminary designation becomes final. If
20 the medical certifications fail to confirm that the
21 reason for the absence was an FMLA reason, the
22 employing office must withdraw the designation
23 (with written notice to the employee).

24 (f) If, before beginning employment with an employ-
25 ing office, an employee had been employed by another em-

1 plying office, the subsequent employing office may count
2 against the employee's FMLA leave entitlement FMLA
3 leave taken from the prior employing office, except that,
4 if the FMLA leave began after the effective date of these
5 regulations (or if the FMLA leave was subject to other
6 applicable requirement under which the employing office
7 was to have designated the leave as FMLA leave), the
8 prior employing office must have properly designated the
9 leave as FMLA under these regulations or other applicable
10 requirement.

11 **§825.209 Is an employee entitled to benefits while**
12 **using FMLA leave?**

13 (a) During any FMLA leave, the employing office
14 must maintain the employee's coverage under the Federal
15 Employees Health Benefits Program or any group health
16 plan (as defined in the Internal Revenue Code of 1986
17 at 26 U.S.C. 5000(b)(1)) on the same conditions as cov-
18 erage would have been provided if the employee had been
19 continuously employed during the entire leave period. All
20 employing offices are subject to the requirements of the
21 FMLA, as made applicable by the CAA, to maintain
22 health coverage. The definition of "group health plan" is
23 set forth in § 825.800. For purposes of FMLA, the term
24 "group health plan" shall not include an insurance pro-

1 gram providing health coverage under which employees
2 purchase individual policies from insurers provided that—

3 (1) no contributions are made by the employing
4 office;

5 (2) participation in the program is completely
6 voluntary for employees;

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

12 (4) the employing office receives no consider-
13 ation in the form of cash or otherwise in connection
14 with the program, other than reasonable compensa-
15 tion, excluding any profit, for administrative services
16 actually rendered in connection with payroll deduc-
17 tion; and

18 (5) the premium charged with respect to such
19 coverage does not increase in the event the employ-
20 ment relationship terminates.

21 (b) The same group health plan benefits provided to
22 an employee prior to taking FMLA leave must be main-
23 tained during the FMLA leave. For example, if family
24 member coverage is provided to an employee, family mem-
25 ber coverage must be maintained during the FMLA leave.

1 Similarly, benefit coverage during FMLA leave for medical
2 care, surgical care, hospital care, dental care, eye care,
3 mental health counseling, substance abuse treatment, etc.,
4 must be maintained during leave if provided in an employ-
5 ing office's group health plan, including a supplement to
6 a group health plan, whether or not provided through a
7 flexible spending account or other component of a cafe-
8 teria plan.

9 (c) If an employing office provides a new health plan
10 or benefits or changes health benefits or plans while an
11 employee is on FMLA leave, the employee is entitled to
12 the new or changed plan/benefits to the same extent as
13 if the employee were not on leave. For example, if an em-
14 ploying office changes a group health plan so that dental
15 care becomes covered under the plan, an employee on
16 FMLA leave must be given the same opportunity as other
17 employees to receive (or obtain) the dental care coverage.
18 Any other plan changes (e.g., in coverage, premiums,
19 deductibles, etc.) which apply to all employees of the
20 workforce would also apply to an employee on FMLA
21 leave.

22 (d) Notice of any opportunity to change plans or ben-
23 efits must also be given to an employee on FMLA leave.
24 If the group health plan permits an employee to change
25 from single to family coverage upon the birth of a child

1 or otherwise add new family members, such a change in
2 benefits must be made available while an employee is on
3 FMLA leave. If the employee requests the changed cov-
4 erage it must be provided by the employing office.

5 (e) An employee may choose not to retain group
6 health plan coverage during FMLA leave. However, when
7 an employee returns from leave, the employee is entitled
8 to be reinstated on the same terms as prior to taking the
9 leave, including family or dependent coverages, without
10 any qualifying period, physical examination, exclusion of
11 pre-existing conditions, etc. See § 825.212(c).

12 (f) Except as required by the Consolidated Omnibus
13 Budget Reconciliation Act of 1986 (COBRA) or 5 U.S.C.
14 8905a, whichever is applicable, and for “key” employees
15 (as discussed below), an employing office’s obligation to
16 maintain health benefits during leave (and to restore the
17 employee to the same or equivalent employment) under
18 FMLA ceases if and when the employment relationship
19 would have terminated if the employee had not taken
20 FMLA leave (e.g., if the employee’s position is eliminated
21 as part of a nondiscriminatory reduction in force and the
22 employee would not have been transferred to another posi-
23 tion); an employee informs the employing office of his or
24 her intent not to return from leave (including before start-
25 ing the leave if the employing office is so informed before

1 the leave starts); or the employee fails to return from leave
2 or continues on leave after exhausting his or her FMLA
3 leave entitlement in the 12-month period.

4 (g) If a “key employee” (see § 825.218) does not re-
5 turn from leave when notified by the employing office that
6 substantial or grievous economic injury will result from
7 his or her reinstatement, the employee’s entitlement to
8 group health plan benefits continues unless and until the
9 employee advises the employing office that the employee
10 does not desire restoration to employment at the end of
11 the leave period, or FMLA leave entitlement is exhausted,
12 or reinstatement is actually denied.

13 (h) An employee’s entitlement to benefits other than
14 group health benefits during a period of FMLA leave (e.g.,
15 holiday pay) is to be determined by the employing office’s
16 established policy for providing such benefits when the em-
17 ployee is on other forms of leave (paid or unpaid, as appro-
18 priate).

19 **§825.210 How may employees on FMLA leave pay**
20 **their share of group health benefit pre-**
21 **miums?**

22 (a) Group health plan benefits must be maintained
23 on the same basis as coverage would have been provided
24 if the employee had been continuously employed during
25 the FMLA leave period. Therefore, any share of group

1 health plan premiums which had been paid by the em-
2 ployee prior to FMLA leave must continue to be paid by
3 the employee during the FMLA leave period. If premiums
4 are raised or lowered, the employee would be required to
5 pay the new premium rates. Maintenance of health insur-
6 ance policies which are not a part of the employing office's
7 group health plan, as described in §825.209(a), are the
8 sole responsibility of the employee. The employee and the
9 insurer should make necessary arrangements for payment
10 of premiums during periods of unpaid FMLA leave.

11 (b) If the FMLA leave is substituted paid leave, the
12 employee's share of premiums must be paid by the method
13 normally used during any paid leave, presumably as a pay-
14 roll deduction.

15 (c) If FMLA leave is unpaid, the employing office has
16 a number of options for obtaining payment from the em-
17 ployee. The employing office may require that payment be
18 made to the employing office or to the insurance carrier,
19 but no additional charge may be added to the employee's
20 premium payment for administrative expenses. The em-
21 ploying office may require employees to pay their share
22 of premium payments in any of the following ways:

23 (1) Payment would be due at the same time as
24 it would be made if by payroll deduction;

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

4 (3) Payment would be prepaid pursuant to a
5 cafeteria plan at the employee's option;

6 (4) The employing office's existing rules for
7 payment by employees on "leave without pay" would
8 be followed, provided that such rules do not require
9 prepayment (i.e., prior to the commencement of the
10 leave) of the premiums that will become due during
11 a period of unpaid FMLA leave or payment of high-
12 er premiums than if the employee had continued to
13 work instead of taking leave; or

14 (5) Another system voluntarily agreed to be-
15 tween the employing office and the employee, which
16 may include prepayment of premiums (e.g., through
17 increased payroll deductions when the need for the
18 FMLA leave is foreseeable).

19 (d) The employing office must provide the employee
20 with advance written notice of the terms and conditions
21 under which these payments must be made. (See
22 §825.301.)

23 (e) An employing office may not require more of an
24 employee using FMLA leave than the employing office re-
25 quires of other employees on "leave without pay".

1 (f) An employee who is receiving payments as a result
2 of a workers' compensation injury must make arrange-
3 ments with the employing office for payment of group
4 health plan benefits when simultaneously taking unpaid
5 FMLA leave. See paragraph (c) of this section and
6 § 825.207(d)(2).

7 **§ 825.211 What special health benefits maintenance**
8 **rules apply to multi-employer health**
9 **plans?**

10 (a) A multi-employer health plan is a plan to which
11 more than one employer is required to contribute, and
12 which is maintained pursuant to one or more collective
13 bargaining agreements between employee organization(s)
14 and the employers.

15 (b) An employing office under a multi-employer plan
16 must continue to make contributions on behalf of an em-
17 ployee using FMLA leave as though the employee had
18 been continuously employed, unless the plan contains an
19 explicit FMLA provision for maintaining coverage such as
20 through pooled contributions by all employers party to the
21 plan.

22 (c) During the duration of an employee's FMLA
23 leave, coverage by the group health plan, and benefits pro-
24 vided pursuant to the plan, must be maintained at the

1 level of coverage and benefits which were applicable to the
2 employee at the time FMLA leave commenced.

3 (d) An employee using FMLA leave cannot be re-
4 quired to use “banked” hours or pay a greater premium
5 than the employee would have been required to pay if the
6 employee had been continuously employed.

7 (e) As provided in § 825.209(f), group health plan
8 coverage must be maintained for an employee on FMLA
9 leave until:

10 (1) the employee’s FMLA leave entitlement is
11 exhausted;

12 (2) the employing office can show that the em-
13 ployee would have been laid off and the employment
14 relationship terminated; or

15 (3) the employee provides unequivocal notice of
16 intent not to return to work.

17 **§ 825.212 What are the consequences of an employee’s**
18 **failure to make timely health plan pre-**
19 **mium payments?**

20 (a)(1) In the absence of an established employing of-
21 fice policy providing a longer grace period, an employing
22 office’s obligations to maintain health insurance coverage
23 cease under FMLA if an employee’s premium payment is
24 more than 30 days late. In order to drop the coverage for
25 an employee whose premium payment is late, the employ-

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

16 (2) An employing office has no obligation regarding
17 the maintenance of a health insurance policy which is not
18 a “group health plan”. See § 825.209(a).

19 (3) All other obligations of an employing office under
20 FMLA would continue; for example, the employing office
21 continues to have an obligation to reinstate an employee
22 upon return from leave.

23 (b) The employing office may recover the employee’s
24 share of any premium payments missed by the employee
25 for any FMLA leave period during which the employing

1 office maintains health coverage by paying the employee's
2 share after the premium payment is missed.

3 (c) If coverage lapses because an employee has not
4 made required premium payments, upon the employee's
5 return from FMLA leave the employing office must still
6 restore the employee to coverage/benefits equivalent to
7 those the employee would have had if leave had not been
8 taken and the premium payment(s) had not been missed,
9 including family or dependent coverage. See § 825.215(d)
10 (1)–(5). In such case, an employee may not be required
11 to meet any qualification requirements imposed by the
12 plan, including any new preexisting condition waiting pe-
13 riod, to wait for an open season, or to pass a medical ex-
14 amination to obtain reinstatement of coverage.

15 **§ 825.213 May an employing office recover costs it in-**
16 **curred for maintaining “group health**
17 **plan” or other non-health benefits cov-**
18 **erage during FMLA leave?**

19 (a) In addition to the circumstances discussed in
20 § 825.212(b), the share of health plan premiums paid by
21 or on behalf of the employing office during a period of
22 unpaid FMLA leave may be recovered from an employee
23 if the employee fails to return to work after the employee's
24 FMLA leave entitlement has been exhausted or expires,
25 unless the reason the employee does not return is due to:

1 (1) The continuation, recurrence, or onset of a
2 serious health condition of the employee or the em-
3 ployee’s family member which would otherwise enti-
4 tle the employee to leave under FMLA;

5 (2) Other circumstances beyond the employee’s
6 control. Examples of “other circumstances beyond
7 the employee’s control” are necessarily broad. They
8 include such situations as where a parent chooses to
9 stay home with a newborn child who has a serious
10 health condition; an employee’s spouse is unexpect-
11 edly transferred to a job location more than 75 miles
12 from the employee’s worksite; a relative or individual
13 other than an immediate family member has a seri-
14 ous health condition and the employee is needed to
15 provide care; the employee is laid off while on leave;
16 or, the employee is a “key employee” who decides
17 not to return to work upon being notified of the em-
18 ploying office’s intention to deny restoration because
19 of substantial and grievous economic injury to the
20 employing office’s operations and is not reinstated
21 by the employing office. Other circumstances beyond
22 the employee’s control would not include a situation
23 where an employee desires to remain with a parent
24 in a distant city even though the parent no longer
25 requires the employee’s care, or a parent chooses not

1 to return to work to stay home with a well, newborn
2 child; or

3 (3) When an employee fails to return to work
4 because of the continuation, recurrence, or onset of
5 a serious health condition, thereby precluding the
6 employing office from recovering its (share of)
7 health benefit premium payments made on the em-
8 ployee's behalf during a period of unpaid FMLA
9 leave, the employing office may require medical cer-
10 tification of the employee's or the family member's
11 serious health condition. Such certification is not re-
12 quired unless requested by the employing office. The
13 employee is required to provide medical certification
14 in a timely manner which, for purposes of this sec-
15 tion, is within 30 days from the date of the employ-
16 ing office's request. For purposes of medical certifi-
17 cation, the employee may use the optional form de-
18 veloped for this purpose (see § 825.306(a) and Ap-
19 pendix B of this part). If the employing office re-
20 quests medical certification and the employee does
21 not provide such certification in a timely manner
22 (within 30 days), or the reason for not returning to
23 work does not meet the test of other circumstances
24 beyond the employee's control, the employing office
25 may recover 100 percent of the health benefit pre-

1 miums it paid during the period of unpaid FMLA
2 leave.

3 (b) Under some circumstances an employing office
4 may elect to maintain other benefits, e.g., life insurance,
5 disability insurance, etc., by paying the employee's (share
6 of) premiums during periods of unpaid FMLA leave. For
7 example, to ensure the employing office can meet its re-
8 sponsibilities to provide equivalent benefits to the em-
9 ployee upon return from unpaid FMLA leave, it may be
10 necessary that premiums be paid continuously to avoid a
11 lapse of coverage. If the employing office elects to main-
12 tain such benefits during the leave, at the conclusion of
13 leave, the employing office is entitled to recover only the
14 costs incurred for paying the employee's share of any pre-
15 miums whether or not the employee returns to work.

16 (c) An employee who returns to work for at least 30
17 calendar days is considered to have "returned" to work.
18 An employee who transfers directly from taking FMLA
19 leave to retirement, or who retires during the first 30 days
20 after the employee returns to work, is deemed to have re-
21 turned to work.

22 (d) When an employee elects or an employing office
23 requires paid leave to be substituted for FMLA leave, the
24 employing office may not recover its (share of) health in-
25 surance or other non-health benefit premiums for any pe-

1 riod of FMLA leave covered by paid leave. Because paid
2 leave provided under a plan covering temporary disabilities
3 (including workers' compensation) is not unpaid, recovery
4 of health insurance premiums does not apply to such paid
5 leave.

6 (e) The amount that self-insured employing offices
7 may recover is limited to only the employing office's share
8 of allowable "premiums" as would be calculated under
9 COBRA, excluding the 2 percent fee for administrative
10 costs.

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

1 may initiate legal action against the employee to recover
2 such costs.

3 **§ 825.214 What are an employee's rights on returning**
4 **to work from FMLA leave?**

5 (a) On return from FMLA leave, an employee is enti-
6 tled to be returned to the same position the employee held
7 when leave commenced, or to an equivalent position with
8 equivalent benefits, pay, and other terms and conditions
9 of employment. An employee is entitled to such reinstatement
10 even if the employee has been replaced or his or her
11 position has been restructured to accommodate the em-
12 ployee's absence. See also § 825.106(e) for the obligations
13 of employing offices that are joint employing offices.

14 (b) If the employee is unable to perform an essential
15 function of the position because of a physical or mental
16 condition, including the continuation of a serious health
17 condition, the employee has no right to restoration to an-
18 other position under the FMLA. However, the employing
19 office's obligations may be governed by the Americans
20 with Disabilities Act (ADA), as made applicable by the
21 CAA. See § 825.702.

22 **§ 825.215 What is an equivalent position?**

23 (a) An equivalent position is one that is virtually
24 identical to the employee's former position in terms of pay,
25 benefits and working conditions, including privileges, per-

1 quisites and status. It must involve the same or substan-
2 tially similar duties and responsibilities, which must entail
3 substantially equivalent skill, effort, responsibility, and au-
4 thority.

5 (b) If an employee is no longer qualified for the posi-
6 tion because of the employee's inability to attend a nec-
7 essary course, renew a license, fly a minimum number of
8 hours, etc., as a result of the leave, the employee shall
9 be given a reasonable opportunity to fulfill those condi-
10 tions upon return to work.

11 (c) Equivalent Pay:

12 (1) An employee is entitled to any unconditional
13 pay increases which may have occurred during the
14 FMLA leave period, such as cost of living increases.
15 Pay increases conditioned upon seniority, length of
16 service, or work performed would not have to be
17 granted unless it is the employing office's policy or
18 practice to do so with respect to other employees on
19 "leave without pay". In such case, any pay increase
20 would be granted based on the employee's seniority,
21 length of service, work performed, etc., excluding the
22 period of unpaid FMLA leave. An employee is enti-
23 tled to be restored to a position with the same or
24 equivalent pay premiums, such as a shift differen-
25 tial. If an employee departed from a position averag-

1 ing ten hours of overtime (and corresponding over-
2 time pay) each week, an employee is ordinarily enti-
3 tled to such a position on return from FMLA leave.

4 (2) Many employing offices pay bonuses in dif-
5 ferent forms to employees for job-related perform-
6 ance such as for perfect attendance, safety (absence
7 of injuries or accidents on the job) and exceeding
8 production goals. Bonuses for perfect attendance
9 and safety do not require performance by the em-
10 ployee but rather contemplate the absence of occur-
11 rences. To the extent an employee who takes FMLA
12 leave had met all the requirements for either or both
13 of these bonuses before FMLA leave began, the em-
14 ployee is entitled to continue this entitlement upon
15 return from FMLA leave, that is, the employee may
16 not be disqualified for the bonus(es) for the taking
17 of FMLA leave. See § 825.220 (b) and (c). A month-
18 ly production bonus, on the other hand, does require
19 performance by the employee. If the employee is on
20 FMLA leave during any part of the period for which
21 the bonus is computed, the employee is entitled to
22 the same consideration for the bonus as other em-
23 ployees on paid or unpaid leave (as appropriate). See
24 paragraph (d)(2) of this section.

1 (d) Equivalent Benefits. “Benefits” include all bene-
2 fits provided or made available to employees by an employ-
3 ing office, including group life insurance, health insurance,
4 disability insurance, sick leave, annual leave, educational
5 benefits, and pensions, regardless of whether such benefits
6 are provided by a practice or written policy of an employ-
7 ing office through an employee benefit plan.

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

1 ance and other benefits programs in order to restore
2 employees to equivalent benefits upon return from
3 FMLA leave, make arrangements for continued pay-
4 ment of costs to maintain such benefits during un-
5 paid FMLA leave, or pay these costs subject to re-
6 covery from the employee on return from leave. See
7 § 825.213(b).

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

15 (3) If, while on unpaid FMLA leave, an em-
16 ployee desires to continue life insurance, disability
17 insurance, or other types of benefits for which he or
18 she typically pays, the employing office is required
19 to follow established policies or practices for continu-
20 ing such benefits for other instances of leave without
21 pay. If the employing office has no established pol-
22 icy, the employee and the employing office are en-
23 couraged to agree upon arrangements before FMLA
24 leave begins.

1 (4) With respect to pension and other retire-
2 ment plans, any period of unpaid FMLA leave shall
3 not be treated as or counted toward a break in serv-
4 ice for purposes of vesting and eligibility to partici-
5 pate. Also, if the plan requires an employee to be
6 employed on a specific date in order to be credited
7 with a year of service for vesting, contributions or
8 participation purposes, an employee on unpaid
9 FMLA leave on that date shall be deemed to have
10 been employed on that date. However, unpaid
11 FMLA leave periods need not be treated as credited
12 service for purposes of benefit accrual, vesting and
13 eligibility to participate.

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

1 leave, the benefit is lost. (In this regard, § 825.209
2 addresses health benefits.)

3 (e) Equivalent Terms and Conditions of Employment.

4 An equivalent position must have substantially similar du-
5 ties, conditions, responsibilities, privileges and status as
6 the employee's original position.

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

20 (2) The employee is ordinarily entitled to return
21 to the same shift or the same or an equivalent work
22 schedule.

23 (3) The employee must have the same or an
24 equivalent opportunity for bonuses and other similar
25 discretionary and non-discretionary payments.

1 (4) FMLA does not prohibit an employing of-
2 fice from accommodating an employee's request to
3 be restored to a different shift, schedule, or position
4 which better suits the employee's personal needs on
5 return from leave, or to offer a promotion to a bet-
6 ter position. However, an employee cannot be in-
7 duced by the employing office to accept a different
8 position against the employee's wishes.

9 (f) The requirement that an employee be restored to
10 the same or equivalent job with the same or equivalent
11 pay, benefits, and terms and conditions of employment
12 does not extend to de minimis or intangible, unmeasurable
13 aspects of the job. However, restoration to a job slated
14 for lay-off, when the employee's original position is not,
15 would not meet the requirements of an equivalent position.

16 **§825.216 Are there any limitations on an employing**
17 **office's obligation to reinstate an em-**
18 **ployee?**

19 (a) An employee has no greater right to reinstate-
20 ment or to other benefits and conditions of employment
21 than if the employee had been continuously employed dur-
22 ing the FMLA leave period. An employing office must be
23 able to show that an employee would not otherwise have
24 been employed at the time reinstatement is requested in
25 order to deny restoration to employment. For example:

1 (1) If an employee is laid off during the course
2 of taking FMLA leave and employment is termi-
3 nated, the employing office's responsibility to con-
4 tinue FMLA leave, maintain group health plan bene-
5 fits and restore the employee ceases at the time the
6 employee is laid off, provided the employing office
7 has no continuing obligations under a collective bar-
8 gaining agreement or otherwise. An employing office
9 would have the burden of proving that an employee
10 would have been laid off during the FMLA leave pe-
11 riod and, therefore, would not be entitled to restora-
12 tion.

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

21 (b) If an employee was hired for a specific term or
22 only to perform work on a discrete project, the employing
23 office has no obligation to restore the employee if the em-
24 ployment term or project is over and the employing office

1 would not otherwise have continued to employ the em-
2 ployee.

3 (c) In addition to the circumstances explained above,
4 an employing office may deny job restoration to salaried
5 eligible employees (“key employees”, as defined in para-
6 graph (c) of § 825.217) if such denial is necessary to pre-
7 vent substantial and grievous economic injury to the oper-
8 ations of the employing office; or may delay restoration
9 to an employee who fails to provide a fitness for duty cer-
10 tificate to return to work under the conditions described
11 in § 825.310.

12 (d) If the employee has been on a workers’ compensa-
13 tion absence during which FMLA leave has been taken
14 concurrently, and after 12 weeks of FMLA leave the em-
15 ployee is unable to return to work, the employee no longer
16 has the protections of FMLA and must look to the work-
17 ers’ compensation statute or ADA, as made applicable by
18 the CAA, for any relief or protections.

19 **§ 825.217 What is a “key employee”?**

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

24 (b) The term “salaried” means paid on a salary basis,
25 within the meaning of the Board’s regulations at part 541,

1 implementing section 203 of the CAA (2 U.S.C. 1313) (re-
2 garding employees who may qualify as exempt from the
3 minimum wage and overtime requirements of the FLSA,
4 as made applicable by the CAA, as executive, administra-
5 tive, and professional employees).

6 (c) A “key employee” must be “among the highest
7 paid 10 percent” of all the employees “both salaried and
8 non-salaried, eligible and ineligible “who are employed by
9 the employing office within 75 miles of the worksite”:

10 (1) In determining which employees are among
11 the highest paid 10 percent, year-to-date earnings
12 are divided by weeks worked by the employee (in-
13 cluding weeks in which paid leave was taken). Earn-
14 ings include wages, premium pay, incentive pay, and
15 non-discretionary and discretionary bonuses. Earn-
16 ings do not include incentives whose value is deter-
17 mined at some future date, e.g., benefits or per-
18 quisites.

19 (2) The determination of whether a salaried
20 employee is among the highest paid 10 percent shall
21 be made at the time the employee gives notice of the
22 need for leave. No more than 10 percent of the em-
23 ploying office’s employees within 75 miles of the
24 worksite may be “key employees”.

1 **§825.218 What does “substantial and grievous eco-**
2 **conomic injury” mean?**

3 (a) In order to deny restoration to a key employee,
4 an employing office must determine that the restoration
5 of the employee to employment will cause “substantial and
6 grievous economic injury” to the operations of the employ-
7 ing office, not whether the absence of the employee will
8 cause such substantial and grievous injury.

9 (b) An employing office may take into account its
10 ability to replace on a temporary basis (or temporarily do
11 without) the employee on FMLA leave. If permanent re-
12 placement is unavoidable, the cost of then reinstating the
13 employee can be considered in evaluating whether substan-
14 tial and grievous economic injury will occur from restora-
15 tion; in other words, the effect on the operations of the
16 employing office of reinstating the employee in an equiva-
17 lent position.

18 (c) A precise test cannot be set for the level of hard-
19 ship or injury to the employing office which must be sus-
20 tained. If the reinstatement of a “key employee” threatens
21 the economic viability of the employing office, that would
22 constitute “substantial and grievous economic injury”. A
23 lesser injury which causes substantial, long-term economic
24 injury would also be sufficient. Minor inconveniences and
25 costs that the employing office would experience in the

1 normal course would certainly not constitute “substantial
2 and grievous economic injury”.

3 (d) FMLA’s “substantial and grievous economic in-
4 jury” standard is different from and more stringent than
5 the “undue hardship” test under the ADA (see, also
6 § 825.702).

7 **§ 825.219 What are the rights of a key employee?**

8 (a) An employing office which believes that reinstatement
9 may be denied to a key employee, must give written
10 notice to the employee at the time the employee gives notice
11 of the need for FMLA leave (or when FMLA leave
12 commences, if earlier) that he or she qualifies as a key
13 employee. At the same time, the employing office must
14 also fully inform the employee of the potential consequences
15 with respect to reinstatement and maintenance
16 of health benefits if the employing office should determine
17 that substantial and grievous economic injury to the employing
18 office’s operations will result if the employee is reinstated
19 from FMLA leave. If such notice cannot be given
20 immediately because of the need to determine whether the
21 employee is a key employee, it shall be given as soon as
22 practicable after being notified of a need for leave (or the
23 commencement of leave, if earlier). It is expected that in
24 most circumstances there will be no desire that an employee
25 be denied restoration after FMLA leave and, there-

1 fore, there would be no need to provide such notice. How-
2 ever, an employing office who fails to provide such timely
3 notice will lose its right to deny restoration even if sub-
4 stantial and grievous economic injury will result from rein-
5 statement.

6 (b) As soon as an employing office makes a good faith
7 determination, based on the facts available, that substan-
8 tial and grievous economic injury to its operations will re-
9 sult if a key employee who has given notice of the need
10 for FMLA leave or is using FMLA leave is reinstated, the
11 employing office shall notify the employee in writing of
12 its determination, that it cannot deny FMLA leave, and
13 that it intends to deny restoration to employment on com-
14 pletion of the FMLA leave. It is anticipated that an em-
15 ploying office will ordinarily be able to give such notice
16 prior to the employee starting leave. The employing office
17 must serve this notice either in person or by certified mail.
18 This notice must explain the basis for the employing of-
19 fice's finding that substantial and grievous economic in-
20 jury will result, and, if leave has commenced, must provide
21 the employee a reasonable time in which to return to work,
22 taking into account the circumstances, such as the length
23 of the leave and the urgency of the need for the employee
24 to return.

1 (c) If an employee on leave does not return to work
2 in response to the employing office's notification of intent
3 to deny restoration, the employee continues to be entitled
4 to maintenance of health benefits and the employing office
5 may not recover its cost of health benefit premiums. A
6 key employee's rights under FMLA continue unless and
7 until either the employee gives notice that he or she no
8 longer wishes to return to work, or the employing office
9 actually denies reinstatement at the conclusion of the leave
10 period.

11 (d) After notice to an employee has been given that
12 substantial and grievous economic injury will result if the
13 employee is reinstated to employment, an employee is still
14 entitled to request reinstatement at the end of the leave
15 period even if the employee did not return to work in re-
16 sponse to the employing office's notice. The employing of-
17 fice must then again determine whether there will be sub-
18 stantial and grievous economic injury from reinstatement,
19 based on the facts at that time. If it is determined that
20 substantial and grievous economic injury will result, the
21 employing office shall notify the employee in writing (in
22 person or by certified mail) of the denial of restoration.

1 **§825.220 How are employees protected who request**
2 **leave or otherwise assert FMLA rights?**

3 (a) The FMLA, as made applicable by the CAA, pro-
4 hibits interference with an employee's rights under the
5 law, and with legal proceedings or inquiries relating to an
6 employee's rights. More specifically, the law contains the
7 following employee protections:

8 (1) An employing office is prohibited from
9 interfering with, restraining, or denying the exercise
10 of (or attempts to exercise) any rights provided by
11 the FMLA as made applicable by the CAA.

12 (2) An employing office is prohibited from dis-
13 charging or in any other way discriminating against
14 any covered employee (whether or not an eligible em-
15 ployee) for opposing or complaining about any un-
16 lawful practice under the FMLA as made applicable
17 by the CAA.

18 (3) All employing offices are prohibited from
19 discharging or in any other way discriminating
20 against any covered employee (whether or not an eli-
21 gible employee) because that covered employee has—

22 (i) Filed any charge, or has instituted (or
23 caused to be instituted) any proceeding under
24 or related to the FMLA, as made applicable by
25 the CAA;

1 (ii) Given, or is about to give, any informa-
2 tion in connection with an inquiry or proceeding
3 relating to a right under the FMLA, as made
4 applicable by the CAA;

5 (iii) Testified, or is about to testify, in any
6 inquiry or proceeding relating to a right under
7 the FMLA, as made applicable by the CAA.

8 (b) Any violations of the FMLA, as made applicable
9 by the CAA, or of these regulations constitute interfering
10 with, restraining, or denying the exercise of rights pro-
11 vided by the FMLA as made applicable by the CAA.
12 “Interfering with” the exercise of an employee’s rights
13 would include, for example, not only refusing to authorize
14 FMLA leave, but discouraging an employee from using
15 such leave. It would also include manipulation by an em-
16 ploying office to avoid responsibilities under FMLA, for
17 example—

18 (1) [Reserved];

19 (2) changing the essential functions of the job
20 in order to preclude the taking of leave;

21 (3) reducing hours available to work in order to
22 avoid employee eligibility.

23 (c) An employing office is prohibited from discrimi-
24 nating against employees or prospective employees who
25 have used FMLA leave. For example, if an employee on

1 leave without pay would otherwise be entitled to full bene-
2 fits (other than health benefits), the same benefits would
3 be required to be provided to an employee on unpaid
4 FMLA leave. By the same token, employing offices cannot
5 use the taking of FMLA leave as a negative factor in em-
6 ployment actions, such as hiring, promotions or discipli-
7 nary actions; nor can FMLA leave be counted under “no
8 fault” attendance policies.

9 (d) Employees cannot waive, nor may employing of-
10 fices induce employees to waive, their rights under FMLA.
11 For example, employees (or their collective bargaining rep-
12 resentatives) cannot “trade off” the right to take FMLA
13 leave against some other benefit offered by the employing
14 office. This does not prevent an employee’s voluntary and
15 uncoerced acceptance (not as a condition of employment)
16 of a “light duty” assignment while recovering from a seri-
17 ous health condition (see § 825.702(d)). In such a cir-
18 cumstance the employee’s right to restoration to the same
19 or an equivalent position is available until 12 weeks have
20 passed within the 12-month period, including all FMLA
21 leave taken and the period of “light duty”.

22 (e) Covered employees, and not merely eligible em-
23 ployees, are protected from retaliation for opposing (e.g.,
24 file a complaint about) any practice which is unlawful
25 under the FMLA, as made applicable by the CAA. They

1 are similarly protected if they oppose any practice which
2 they reasonably believe to be a violation of the FMLA,
3 as made applicable by the CAA or regulations.

4 SUBPART C—HOW DO EMPLOYEES LEARN OF THEIR
5 RIGHTS AND OBLIGATIONS UNDER THE FMLA, AS
6 MADE APPLICABLE BY THE CAA, AND WHAT CAN
7 AN EMPLOYING OFFICE REQUIRE OF AN EM-
8 PLOYEE?

9 **§825.300 [Reserved]**

10 **§825.301 What notices to employees are required of**
11 **employing offices under the FMLA as**
12 **made applicable by the CAA?**

13 (a)(1) If an employing office has any eligible employ-
14 ees and has any written guidance to employees concerning
15 employee benefits or leave rights, such as in an employee
16 handbook, information concerning both entitlements and
17 employee obligations under the FMLA, as made applicable
18 by the CAA, must be included in the handbook or other
19 document. For example, if an employing office provides
20 an employee handbook to all employees that describes the
21 employing office's policies regarding leave, wages, attend-
22 ance, and similar matters, the handbook must incorporate
23 information on FMLA rights and responsibilities and the
24 employing office's policies regarding the FMLA, as made
25 applicable by the CAA. Informational publications describ-

1 ing the provisions of the FMLA as made applicable by
2 the CAA are available from the Office of Compliance and
3 may be incorporated in such employing office handbooks
4 or written policies.

5 (2) If such an employing office does not have written
6 policies, manuals, or handbooks describing employee bene-
7 fits and leave provisions, the employing office shall provide
8 written guidance to an employee concerning all the em-
9 ployee's rights and obligations under the FMLA as made
10 applicable by the CAA. This notice shall be provided to
11 employees each time notice is given pursuant to paragraph
12 (b), and in accordance with the provisions of that para-
13 graph. Employing offices may duplicate and provide the
14 employee a copy of the FMLA Fact Sheet available from
15 the Office of Compliance to provide such guidance.

16 (b)(1) The employing office shall also provide the em-
17 ployee with written notice detailing the specific expecta-
18 tions and obligations of the employee and explaining any
19 consequences of a failure to meet these obligations. The
20 written notice must be provided to the employee in a lan-
21 guage in which the employee is literate. Such specific no-
22 tice must include, as appropriate—

23 (i) that the leave will be counted against the
24 employee's annual FMLA leave entitlement (see
25 § 825.208);

1 (ii) any requirements for the employee to fur-
2 nish medical certification of a serious health condi-
3 tion and the consequences of failing to do so (see
4 § 825.305);

5 (iii) the employee’s right to substitute paid
6 leave and whether the employing office will require
7 the substitution of paid leave, and the conditions re-
8 lated to any substitution;

9 (iv) any requirement for the employee to make
10 any premium payments to maintain health benefits
11 and the arrangements for making such payments
12 (see § 825.210), and the possible consequences of
13 failure to make such payments on a timely basis
14 (i.e., the circumstances under which coverage may
15 lapse);

16 (v) any requirement for the employee to present
17 a fitness-for-duty certificate to be restored to em-
18 ployment (see § 825.310);

19 (vi) the employee’s status as a “key employee”
20 and the potential consequence that restoration may
21 be denied following FMLA leave, explaining the con-
22 ditions required for such denial (see § 825.218);

23 (vii) the employee’s right to restoration to the
24 same or an equivalent job upon return from leave
25 (see §§ 825.214 and 825.604); and

1 (viii) the employee's potential liability for pay-
2 ment of health insurance premiums paid by the em-
3 ploying office during the employee's unpaid FMLA
4 leave if the employee fails to return to work after
5 taking FMLA leave (see § 825.213).

6 (2) The specific notice may include other informa-
7 tion—e.g., whether the employing office will require peri-
8 odic reports of the employee's status and intent to return
9 to work, but is not required to do so. A prototype notice
10 is contained in Appendix D of this part, or may be ob-
11 tained from the Office of Compliance, which employing of-
12 fices may adapt for their use to meet these specific notice
13 requirements.

14 (c) Except as provided in this subparagraph, the writ-
15 ten notice required by paragraph (b) (and by subpara-
16 graph (a)(2) where applicable) must be provided to the
17 employee no less often than the first time in each six-
18 month period that an employee gives notice of the need
19 for FMLA leave (if FMLA leave is taken during the six-
20 month period). The notice shall be given within a reason-
21 able time after notice of the need for leave is given by
22 the employee—within one or two business days if feasible.
23 If leave has already begun, the notice should be mailed
24 to the employee's address of record.

1 (1) If the specific information provided by the
2 notice changes with respect to a subsequent period
3 of FMLA leave during the six-month period, the em-
4 ploying office shall, within one or two business days
5 of receipt of the employee’s notice of need for leave,
6 provide written notice referencing the prior notice
7 and setting forth any of the information in subpara-
8 graph (b) which has changed. For example, if the
9 initial leave period were paid leave and the subse-
10 quent leave period would be unpaid leave, the em-
11 ploying office may need to give notice of the ar-
12 rangements for making premium payments.

13 (2)(i) Except as provided in subparagraph (ii),
14 if the employing office is requiring medical certifi-
15 cation or a “fitness-for-duty” report, written notice
16 of the requirement shall be given with respect to
17 each employee notice of a need for leave.

18 (ii) Subsequent written notification shall not be
19 required if the initial notice in the six-month period
20 and the employing office handbook or other written
21 documents (if any) describing the employing office’s
22 leave policies, clearly provided that certification or a
23 “fitness-for-duty” report would be required (e.g., by
24 stating that certification would be required in all
25 cases, by stating that certification would be required

1 in all cases in which leave of more than a specified
2 number of days is taken, or by stating that a “fit-
3 ness-for-duty” report would be required in all cases
4 for back injuries for employees in a certain occupa-
5 tion). Where subsequent written notice is not re-
6 quired, at least oral notice shall be provided. (See
7 § 825.305(a).)

8 (d) Employing offices are also expected to respon-
9 sively answer questions from employees concerning their
10 rights and responsibilities under the FMLA as made appli-
11 cable under the CAA.

12 (e) Employing offices furnishing FMLA-required no-
13 tices to sensory impaired individuals must also comply
14 with all applicable requirements under law.

15 (f) If an employing office fails to provide notice in
16 accordance with the provisions of this section, the employ-
17 ing office may not take action against an employee for
18 failure to comply with any provision required to be set
19 forth in the notice.

20 **§ 825.302 What notice does an employee have to give**
21 **an employing office when the need for**
22 **FMLA leave is foreseeable?**

23 (a) An employee must provide the employing office
24 at least 30 days advance notice before FMLA leave is to
25 begin if the need for the leave is foreseeable based on an

1 expected birth, placement for adoption or foster care, or
2 planned medical treatment for a serious health condition
3 of the employee or of a family member. If 30 days notice
4 is not practicable, such as because of a lack of knowledge
5 of approximately when leave will be required to begin, a
6 change in circumstances, or a medical emergency, notice
7 must be given as soon as practicable. For example, an em-
8 ployee's health condition may require leave to commence
9 earlier than anticipated before the birth of a child. Simi-
10 larly, little opportunity for notice may be given before
11 placement for adoption. Whether the leave is to be contin-
12 uous or is to be taken intermittently or on a reduced
13 schedule basis, notice need only be given one time, but
14 the employee shall advise the employing office as soon as
15 practicable if dates of scheduled leave change or are ex-
16 tended, or were initially unknown.

17 (b) "As soon as practicable" means as soon as both
18 possible and practical, taking into account all of the facts
19 and circumstances in the individual case. For foreseeable
20 leave where it is not possible to give as much as 30 days
21 notice, "as soon as practicable" ordinarily would mean at
22 least verbal notification to the employing office within one
23 or two business days of when the need for leave becomes
24 known to the employee.

1 (c) An employee shall provide at least verbal notice
2 sufficient to make the employing office aware that the em-
3 ployee needs FMLA-qualifying leave, and the anticipated
4 timing and duration of the leave. The employee need not
5 expressly assert rights under the FMLA as made applica-
6 ble by the CAA, or even mention the FMLA, but may only
7 state that leave is needed for an expected birth or adop-
8 tion, for example. The employing office should inquire fur-
9 ther of the employee if it is necessary to have more infor-
10 mation about whether FMLA leave is being sought by the
11 employee, and obtain the necessary details of the leave to
12 be taken. In the case of medical conditions, the employing
13 office may find it necessary to inquire further to determine
14 if the leave is because of a serious health condition and
15 may request medical certification to support the need for
16 such leave (see § 825.305).

17 (d) An employing office may also require an employee
18 to comply with the employing office's usual and customary
19 notice and procedural requirements for requesting leave.
20 For example, an employing office may require that written
21 notice set forth the reasons for the requested leave, the
22 anticipated duration of the leave, and the anticipated start
23 of the leave. However, failure to follow such internal em-
24 ploying office procedures will not permit an employing of-

1 fice to disallow or delay an employee's taking FMLA leave
2 if the employee gives timely verbal or other notice.

3 (e) When planning medical treatment, the employee
4 must consult with the employing office and make a reason-
5 able effort to schedule the leave so as not to disrupt un-
6 duly the employing office's operations, subject to the ap-
7 proval of the health care provider. Employees are ordi-
8 narily expected to consult with their employing offices
9 prior to the scheduling of treatment in order to work out
10 a treatment schedule which best suits the needs of both
11 the employing office and the employee. If an employee who
12 provides notice of the need to take FMLA leave on an
13 intermittent basis for planned medical treatment neglects
14 to consult with the employing office to make a reasonable
15 attempt to arrange the schedule of treatments so as not
16 to unduly disrupt the employing office's operations, the
17 employing office may initiate discussions with the em-
18 ployee and require the employee to attempt to make such
19 arrangements, subject to the approval of the health care
20 provider.

21 (f) In the case of intermittent leave or leave on a re-
22 duced leave schedule which is medically necessary, an em-
23 ployee shall advise the employing office, upon request, of
24 the reasons why the intermittent/reduced leave schedule
25 is necessary and of the schedule for treatment, if applica-

1 ble. The employee and employing office shall attempt to
2 work out a schedule which meets the employee's needs
3 without unduly disrupting the employing office's oper-
4 ations, subject to the approval of the health care provider.

5 (g) An employing office may waive employees' FMLA
6 notice requirements. In addition, an employing office may
7 not require compliance with stricter FMLA notice require-
8 ments where the provisions of a collective bargaining
9 agreement or applicable leave plan allow less advance no-
10 tice to the employing office. For example, if an employee
11 (or employing office) elects to substitute paid vacation
12 leave for unpaid FMLA leave (see § 825.207), and the em-
13 ploying office's paid vacation leave plan imposes no prior
14 notification requirements for taking such vacation leave,
15 no advance notice may be required for the FMLA leave
16 taken in these circumstances. On the other hand, FMLA
17 notice requirements would apply to a period of unpaid
18 FMLA leave, unless the employing office imposes lesser
19 notice requirements on employees taking leave without
20 pay.

1 **§825.303 What are the requirements for an em-**
2 **ployee to furnish notice to an employing**
3 **office where the need for FMLA leave is**
4 **not foreseeable?**

5 (a) When the approximate timing of the need for
6 leave is not foreseeable, an employee should give notice
7 to the employing office of the need for FMLA leave as
8 soon as practicable under the facts and circumstances of
9 the particular case. It is expected that an employee will
10 give notice to the employing office within no more than
11 one or two working days of learning of the need for leave,
12 except in extraordinary circumstances where such notice
13 is not feasible. In the case of a medical emergency requir-
14 ing leave because of an employee's own serious health con-
15 dition or to care for a family member with a serious health
16 condition, written advance notice pursuant to an employ-
17 ing office's internal rules and procedures may not be re-
18 quired when FMLA leave is involved.

19 (b) The employee should provide notice to the em-
20 ploying office either in person or by telephone, telegraph,
21 facsimile ("fax") machine or other electronic means. No-
22 tice may be given by the employee's spokesperson (e.g.,
23 spouse, adult family member or other responsible party)
24 if the employee is unable to do so personally. The employee
25 need not expressly assert rights under the FMLA, as made
26 applicable by the CAA, or even mention the FMLA, but

1 may only state that leave is needed. The employing office
2 will be expected to obtain any additional required informa-
3 tion through informal means. The employee or spokes-
4 person will be expected to provide more information when
5 it can readily be accomplished as a practical matter, tak-
6 ing into consideration the exigencies of the situation.

7 **§825.304 What recourse do employing offices have if**
8 **employees fail to provide the required**
9 **notice?**

10 (a) An employing office may waive employees' FMLA
11 notice obligations or the employing office's own internal
12 rules on leave notice requirements.

13 (b) If an employee fails to give 30 days notice for
14 foreseeable leave with no reasonable excuse for the delay,
15 the employing office may delay the taking of FMLA leave
16 until at least 30 days after the date the employee provides
17 notice to the employing office of the need for FMLA leave.

18 (c) In all cases, in order for the onset of an employ-
19 ee's FMLA leave to be delayed due to lack of required
20 notice, it must be clear that the employee had actual no-
21 tice of the FMLA notice requirements. This condition
22 would be satisfied by the employing office's proper post-
23 ing, at the worksite where the employee is employed, of
24 the information regarding the FMLA provided (pursuant
25 to section 301(h)(2) of the CAA, 2 U.S.C. 1381(h)(2))

1 by the Office of Compliance to the employing office in a
2 manner suitable for posting. Furthermore, the need for
3 leave and the approximate date leave would be taken must
4 have been clearly foreseeable to the employee 30 days in
5 advance of the leave. For example, knowledge that an em-
6 ployee would receive a telephone call about the availability
7 of a child for adoption at some unknown point in the fu-
8 ture would not be sufficient.

9 **§825.305 When must an employee provide medical**
10 **certification to support FMLA leave?**

11 (a) An employing office may require that an employ-
12 ee's leave to care for the employee's seriously ill spouse,
13 son, daughter, or parent, or due to the employee's own
14 serious health condition that makes the employee unable
15 to perform one or more of the essential functions of the
16 employee's position, be supported by a certification issued
17 by the health care provider of the employee or the employ-
18 ee's ill family member. An employing office must give no-
19 tice of a requirement for medical certification each time
20 a certification is required; such notice must be written no-
21 tice whenever required by § 825.301. An employing office's
22 oral request to an employee to furnish any subsequent
23 medical certification is sufficient.

24 (b) When the leave is foreseeable and at least 30 days
25 notice has been provided, the employee should provide the

1 medical certification before the leave begins. When this is
2 not possible, the employee must provide the requested cer-
3 tification to the employing office within the time frame
4 requested by the employing office (which must allow at
5 least 15 calendar days after the employing office's re-
6 quest), unless it is not practicable under the particular cir-
7 cumstances to do so despite the employee's diligent, good
8 faith efforts.

9 (c) In most cases, the employing office should request
10 that an employee furnish certification from a health care
11 provider at the time the employee gives notice of the need
12 for leave or within two business days thereafter, or, in the
13 case of unforeseen leave, within two business days after
14 the leave commences. The employing office may request
15 certification at some later date if the employing office later
16 has reason to question the appropriateness of the leave
17 or its duration.

18 (d) At the time the employing office requests certifi-
19 cation, the employing office must also advise an employee
20 of the anticipated consequences of an employee's failure
21 to provide adequate certification. The employing office
22 shall advise an employee whenever the employing office
23 finds a certification incomplete, and provide the employee
24 a reasonable opportunity to cure any such deficiency.

1 (e) If the employing office's sick or medical leave plan
2 imposes medical certification requirements that are less
3 stringent than the certification requirements of these reg-
4 ulations, and the employee or employing office elects to
5 substitute paid sick, vacation, personal or family leave for
6 unpaid FMLA leave where authorized (see § 825.207),
7 only the employing office's less stringent sick leave certifi-
8 cation requirements may be imposed.

9 **§ 825.306 How much information may be required in**
10 **medical certifications of a serious health**
11 **condition?**

12 (a) The Office of Compliance has made available an
13 optional form ("Certification of Physician or Practi-
14 tioner") for employees' (or their family members') use in
15 obtaining medical certification, including second and third
16 opinions, from health care providers that meets FMLA's
17 certification requirements. (See Appendix B to these regu-
18 lations.) This optional form reflects certification require-
19 ments so as to permit the health care provider to furnish
20 appropriate medical information within his or her knowl-
21 edge.

22 (b) The Certification of Physician or Practitioner
23 form is modeled closely on Form WH-380, as revised,
24 which was developed by the Department of Labor (see 29
25 C.F.R. Part 825, Appendix B). The employing office may

1 use the Office of Compliance’s form, or Form WH-380,
2 as revised, or another form containing the same basic in-
3 formation; however, no additional information may be re-
4 quired. In all instances the information on the form must
5 relate only to the serious health condition for which the
6 current need for leave exists. The form identifies the
7 health care provider and type of medical practice (includ-
8 ing pertinent specialization, if any), makes maximum use
9 of checklist entries for ease in completing the form, and
10 contains required entries for:

11 (1) A certification as to which part of the defi-
12 nition of “serious health condition” (see § 825.114),
13 if any, applies to the patient’s condition, and the
14 medical facts which support the certification, includ-
15 ing a brief statement as to how the medical facts
16 meet the criteria of the definition.

17 (2)(i) The approximate date the serious health
18 condition commenced, and its probable duration, in-
19 cluding the probable duration of the patient’s
20 present incapacity (defined to mean inability to
21 work, attend school or perform other regular daily
22 activities due to the serious health condition, treat-
23 ment therefor, or recovery therefrom) if different.

24 (ii) Whether it will be necessary for the em-
25 ployee to take leave intermittently or to work on a

1 reduced leave schedule basis (i.e., part-time) as a re-
2 sult of the serious health condition (see § 825.117
3 and § 825.203), and if so, the probable duration of
4 such schedule.

5 (iii) If the condition is pregnancy or a chronic
6 condition within the meaning of § 825.114(a)(2)(iii),
7 whether the patient is presently incapacitated and
8 the likely duration and frequency of episodes of inca-
9 pacity.

10 (3)(i)(A) If additional treatments will be re-
11 quired for the condition, an estimate of the probable
12 number of such treatments.

13 (B) If the patient's incapacity will be intermit-
14 tent, or will require a reduced leave schedule, an es-
15 timate of the probable number and interval between
16 such treatments, actual or estimated dates of treat-
17 ment if known, and period required for recovery if
18 any.

19 (ii) If any of the treatments referred to in sub-
20 paragraph (i) will be provided by another provider of
21 health services (e.g., physical therapist), the nature
22 of the treatments.

23 (iii) If a regimen of continuing treatment by the
24 patient is required under the supervision of the

1 health care provider, a general description of the
2 regimen (see § 825.114(b)).

3 (4) If medical leave is required for the employ-
4 ee's absence from work because of the employee's
5 own condition (including absences due to pregnancy
6 or a chronic condition), whether the employee—

7 (i) is unable to perform work of any kind;

8 (ii) is unable to perform any one or more
9 of the essential functions of the employee's posi-
10 tion, including a statement of the essential
11 functions the employee is unable to perform
12 (see § 825.115), based on either information
13 provided on a statement from the employing of-
14 fice of the essential functions of the position or,
15 if not provided, discussion with the employee
16 about the employee's job functions; or

17 (iii) must be absent from work for treat-
18 ment.

19 (5)(i) If leave is required to care for a family
20 member of the employee with a serious health condi-
21 tion, whether the patient requires assistance for
22 basic medical or personal needs or safety, or for
23 transportation; or if not, whether the employee's
24 presence to provide psychological comfort would be
25 beneficial to the patient or assist in the patient's re-

1 covery. The employee is required to indicate on the
2 form the care he or she will provide and an estimate
3 of the time period.

4 (ii) If the employee's family member will need
5 care only intermittently or on a reduced leave sched-
6 ule basis (i.e., part-time), the probable duration of
7 the need.

8 (c) If the employing office's sick or medical leave plan
9 requires less information to be furnished in medical certifi-
10 cations than the certification requirements of these regula-
11 tions, and the employee or employing office elects to sub-
12 stitute paid sick, vacation, personal or family leave for un-
13 paid FMLA leave where authorized (see § 825.207), only
14 the employing office's lesser sick leave certification re-
15 quirements may be imposed.

16 **§ 825.307 What may an employing office do if it ques-**
17 **tions the adequacy of a medical certifi-**
18 **cation?**

19 (a) If an employee submits a complete certification
20 signed by the health care provider, the employing office
21 may not request additional information from the employ-
22 ee's health care provider. However, a health care provider
23 representing the employing office may contact the employ-
24 ee's health care provider, with the employee's permission,

1 for purposes of clarification and authenticity of the medi-
2 cal certification.

3 (1) If an employee is on FMLA leave running
4 concurrently with a workers' compensation absence,
5 and the provisions of the workers' compensation
6 statute permit the employing office or the employing
7 office's representative to have direct contact with the
8 employee's workers' compensation health care pro-
9 vider, the employing office may follow the workers'
10 compensation provisions.

11 (2) An employing office that has reason to
12 doubt the validity of a medical certification may re-
13 quire the employee to obtain a second opinion at the
14 employing office's expense. Pending receipt of the
15 second (or third) medical opinion, the employee is
16 provisionally entitled to the benefits of the FMLA as
17 made applicable by the CAA, including maintenance
18 of group health benefits. If the certifications do not
19 ultimately establish the employee's entitlement to
20 FMLA leave, the leave shall not be designated as
21 FMLA leave and may be treated as paid or unpaid
22 leave under the employing office's established leave
23 policies. The employing office is permitted to des-
24 ignate the health care provider to furnish the second
25 opinion, but the selected health care provider may

1 not be employed on a regular basis by the employing
2 office. See also paragraphs (e) and (f) of this sec-
3 tion.

4 (b) The employing office may not regularly contract
5 with or otherwise regularly utilize the services of the
6 health care provider furnishing the second opinion unless
7 the employing office is located in an area where access
8 to health care is extremely limited (e.g., a rural area where
9 no more than one or two doctors practice in the relevant
10 specialty in the vicinity).

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

1 refuses to agree to see a doctor in the specialty in question
2 may be failing to act in good faith. On the other hand,
3 an employing office that refuses to agree to any doctor
4 on a list of specialists in the appropriate field provided
5 by the employee and whom the employee has not pre-
6 viously consulted may be failing to act in good faith.

7 (d) The employing office is required to provide the
8 employee with a copy of the second and third medical opin-
9 ions, where applicable, upon request by the employee. Re-
10 quested copies are to be provided within two business days
11 unless extenuating circumstances prevent such action.

12 (e) If the employing office requires the employee to
13 obtain either a second or third opinion the employing of-
14 fice must reimburse an employee or family member for
15 any reasonable “out of pocket” travel expenses incurred
16 to obtain the second and third medical opinions. The em-
17 ploying office may not require the employee or family
18 member to travel outside normal commuting distance for
19 purposes of obtaining the second or third medical opinions
20 except in very unusual circumstances.

21 (f) In circumstances when the employee or a family
22 member is visiting in another country, or a family member
23 resides in a another country, and a serious health condi-
24 tion develops, the employing office shall accept a medical

1 certification as well as second and third opinions from a
2 health care provider who practices in that country.

3 **§ 825.308 Under what circumstances may an employ-**
4 **ing office request subsequent recertifi-**
5 **cations of medical conditions?**

6 (a) For pregnancy, chronic, or permanent/long-term
7 conditions under continuing supervision of a health care
8 provider (as defined in § 825.114(a)(2) (ii), (iii) or (iv)),
9 an employing office may request recertification no more
10 often than every 30 days and only in connection with an
11 absence by the employee, unless:

12 (1) Circumstances described by the previous
13 certification have changed significantly (e.g., the du-
14 ration or frequency of absences, the severity of the
15 condition, complications); or

16 (2) The employing office receives information
17 that casts doubt upon the employee's stated reason
18 for the absence.

19 (b)(1) If the minimum duration of the period of inca-
20 pacity specified on a certification furnished by the health
21 care provider is more than 30 days, the employing office
22 may not request recertification until that minimum dura-
23 tion has passed unless one of the conditions set forth in
24 paragraph (c) (1), (2) or (3) of this section is met.

1 (2) For FMLA leave taken intermittently or on a re-
2 duced leave schedule basis, the employing office may not
3 request recertification in less than the minimum period
4 specified on the certification as necessary for such leave
5 (including treatment) unless one of the conditions set
6 forth in paragraph (c) (1), (2) or (3) of this section is
7 met.

8 (c) For circumstances not covered by paragraphs (a)
9 or (b) of this section, an employing office may request re-
10 certification at any reasonable interval, but not more often
11 than every 30 days, unless:

12 (1) The employee requests an extension of
13 leave;

14 (2) Circumstances described by the previous
15 certification have changed significantly (e.g., the du-
16 ration of the illness, the nature of the illness, com-
17 plications); or

18 (3) The employing office receives information
19 that casts doubt upon the continuing validity of the
20 certification.

21 (d) The employee must provide the requested recer-
22 tification to the employing office within the time frame
23 requested by the employing office (which must allow at
24 least 15 calendar days after the employing office's re-
25 quest), unless it is not practicable under the particular cir-

1 cumstances to do so despite the employee's diligent, good
2 faith efforts.

3 (e) Any recertification requested by the employing of-
4 fice shall be at the employee's expense unless the employ-
5 ing office provides otherwise. No second or third opinion
6 on recertification may be required.

7 **§825.309 What notice may an employing office re-**
8 **quire regarding an employee's intent to**
9 **return to work?**

10 (a) An employing office may require an employee on
11 FMLA leave to report periodically on the employee's sta-
12 tus and intent to return to work. The employing office's
13 policy regarding such reports may not be discriminatory
14 and must take into account all of the relevant facts and
15 circumstances related to the individual employee's leave
16 situation.

17 (b) If an employee gives unequivocal notice of intent
18 not to return to work, the employing office's obligations
19 under FMLA, as made applicable by the CAA, to maintain
20 health benefits (subject to requirements of COBRA or 5
21 U.S.C. 8905a, whichever is applicable) and to restore the
22 employee cease. However, these obligations continue if an
23 employee indicates he or she may be unable to return to
24 work but expresses a continuing desire to do so.

1 (c) It may be necessary for an employee to take more
2 leave than originally anticipated. Conversely, an employee
3 may discover after beginning leave that the circumstances
4 have changed and the amount of leave originally antici-
5 pated is no longer necessary. An employee may not be re-
6 quired to take more FMLA leave than necessary to resolve
7 the circumstance that precipitated the need for leave. In
8 both of these situations, the employing office may require
9 that the employee provide the employing office reasonable
10 notice (i.e., within two business days) of the changed cir-
11 cumstances where foreseeable. The employing office may
12 also obtain information on such changed circumstances
13 through requested status reports.

14 **§825.310 Under what circumstances may an employ-**
15 **ing office require that an employee sub-**
16 **mit a medical certification that the em-**
17 **ployee is able (or unable) to return to**
18 **work (i.e., a “fitness-for-duty” report)?**

19 (a) As a condition of restoring an employee whose
20 FMLA leave was occasioned by the employee’s own serious
21 health condition that made the employee unable to per-
22 form the employee’s job, an employing office may have a
23 uniformly-applied policy or practice that requires all simi-
24 larly-situated employees (i.e., same occupation, same seri-
25 ous health condition) who take leave for such conditions

1 to obtain and present certification from the employee's
2 health care provider that the employee is able to resume
3 work.

4 (b) If the terms of a collective bargaining agreement
5 govern an employee's return to work, those provisions
6 shall be applied. Similarly, requirements under the Ameri-
7 cans with Disabilities Act (ADA), as made applicable by
8 the CAA, that any return-to-work physical be job-related
9 and consistent with business necessity apply. For example,
10 an attorney could not be required to submit to a medical
11 examination or inquiry just because her leg had been am-
12 putated. The essential functions of an attorney's job do
13 not require use of both legs; therefore such an inquiry
14 would not be job related. An employing office may require
15 a warehouse laborer, whose back impairment affects the
16 ability to lift, to be examined by an orthopedist, but may
17 not require this employee to submit to an HIV test where
18 the test is not related to either the essential functions of
19 his/her job or to his/her impairment.

20 (c) An employing office may seek fitness-for-duty cer-
21 tification only with regard to the particular health condi-
22 tion that caused the employee's need for FMLA leave. The
23 certification itself need only be a simple statement of an
24 employee's ability to return to work. A health care pro-
25 vider employed by the employing office may contact the

1 employee's health care provider with the employee's per-
2 mission, for purposes of clarification of the employee's fit-
3 ness to return to work. No additional information may be
4 acquired, and clarification may be requested only for the
5 serious health condition for which FMLA leave was taken.
6 The employing office may not delay the employee's return
7 to work while contact with the health care provider is
8 being made.

9 (d) The cost of the certification shall be borne by the
10 employee and the employee is not entitled to be paid for
11 the time or travel costs spent in acquiring the certification.

12 (e) The notice that employing offices are required to
13 give to each employee giving notice of the need for FMLA
14 leave regarding their FMLA rights and obligations as
15 made applicable by the CAA (see § 825.301) shall advise
16 the employee if the employing office will require fitness-
17 for-duty certification to return to work. If the employing
18 office has a handbook explaining employment policies and
19 benefits, the handbook should explain the employing of-
20 fice's general policy regarding any requirement for fitness-
21 for-duty certification to return to work. Specific notice
22 shall also be given to any employee from whom fitness-
23 for-duty certification will be required either at the time
24 notice of the need for leave is given or immediately after
25 leave commences and the employing office is advised of

1 the medical circumstances requiring the leave, unless the
2 employee's condition changes from one that did not pre-
3 viously require certification pursuant to the employing of-
4 fice's practice or policy. No second or third fitness-for-
5 duty certification may be required.

6 (f) An employing office may delay restoration to em-
7 ployment until an employee submits a required fitness-for-
8 duty certification unless the employing office has failed to
9 provide the notices required in paragraph (e) of this sec-
10 tion.

11 (g) An employing office is not entitled to certification
12 of fitness to return to duty when the employee takes inter-
13 mittent leave as described in § 825.203.

14 (h) When an employee is unable to return to work
15 after FMLA leave because of the continuation, recurrence,
16 or onset of the employee's or family member's serious
17 health condition, thereby preventing the employing office
18 from recovering its share of health benefit premium pay-
19 ments made on the employee's behalf during a period of
20 unpaid FMLA leave, the employing office may require
21 medical certification of the employee's or the family mem-
22 ber's serious health condition. (See § 825.213(a)(3).) The
23 cost of the certification shall be borne by the employee
24 and the employee is not entitled to be paid for the time
25 or travel costs spent in acquiring the certification.

1 **§825.311 What happens if an employee fails to satisfy**
2 **the medical certification and/or recertifi-**
3 **cation requirements?**

4 (a) In the case of foreseeable leave, an employing of-
5 fice may delay the taking of FMLA leave to an employee
6 who fails to provide timely certification after being re-
7 quested by the employing office to furnish such certifi-
8 cation (i.e., within 15 calendar days, if practicable), until
9 the required certification is provided.

10 (b) When the need for leave is not foreseeable, or in
11 the case of recertification, an employee must provide cer-
12 tification (or recertification) within the time frame re-
13 quested by the employing office (which must allow at least
14 15 days after the employing office's request) or as soon
15 as reasonably possible under the particular facts and cir-
16 cumstances. In the case of a medical emergency, it may
17 not be practicable for an employee to provide the required
18 certification within 15 calendar days. If an employee fails
19 to provide a medical certification within a reasonable time
20 under the pertinent circumstances, the employing office
21 may delay the employee's continuation of FMLA leave. If
22 the employee never produces the certification, the leave is
23 not FMLA leave.

24 (c) When requested by the employing office pursuant
25 to a uniformly applied policy for similarly-situated employ-
26 ees, the employee must provide medical certification at the

1 time the employee seeks reinstatement at the end of
2 FMLA leave taken for the employee's serious health condi-
3 tion, that the employee is fit for duty and able to return
4 to work (see § 825.310(a)) if the employing office has pro-
5 vided the required notice (see § 825.301(c)); the employing
6 office may delay restoration until the certification is pro-
7 vided. In this situation, unless the employee provides ei-
8 ther a fitness-for-duty certification or a new medical cer-
9 tification for a serious health condition at the time FMLA
10 leave is concluded, the employee may be terminated. See
11 also § 825.213(a)(3).

12 **§ 825.312 Under what circumstances may an employ-**
13 **ing office refuse to provide FMLA leave**
14 **or reinstatement to eligible employees?**

15 (a) If an employee fails to give timely advance notice
16 when the need for FMLA leave is foreseeable, the employ-
17 ing office may delay the taking of FMLA leave until 30
18 days after the date the employee provides notice to the
19 employing office of the need for FMLA leave. (See
20 § 825.302.)

21 (b) If an employee fails to provide in a timely manner
22 a requested medical certification to substantiate the need
23 for FMLA leave due to a serious health condition, an em-
24 ploying office may delay continuation of FMLA leave until
25 an employee submits the certificate. (See §§ 825.305 and

1 825.311.) If the employee never produces the certification,
2 the leave is not FMLA leave.

3 (c) If an employee fails to provide a requested fitness-
4 for-duty certification to return to work, an employing of-
5 fice may delay restoration until the employee submits the
6 certificate. (See §§ 825.310 and 825.311.)

7 (d) An employee has no greater right to reinstate-
8 ment or to other benefits and conditions of employment
9 than if the employee had been continuously employed dur-
10 ing the FMLA leave period. Thus, an employee's rights
11 to continued leave, maintenance of health benefits, and
12 restoration cease under FMLA, as made applicable by the
13 CAA, if and when the employment relationship terminates
14 (e.g., layoff), unless that relationship continues, for exam-
15 ple, by the employee remaining on paid FMLA leave. If
16 the employee is recalled or otherwise re-employed, an eligi-
17 ble employee is immediately entitled to further FMLA
18 leave for an FMLA-qualifying reason. An employing office
19 must be able to show, when an employee requests restora-
20 tion, that the employee would not otherwise have been em-
21 ployed if leave had not been taken in order to deny res-
22 toration to employment. (See § 825.216.)

23 (e) An employing office may require an employee on
24 FMLA leave to report periodically on the employee's sta-
25 tus and intention to return to work. (See § 825.309.) If

1 an employee unequivocally advises the employing office ei-
2 ther before or during the taking of leave that the employee
3 does not intend to return to work, and the employment
4 relationship is terminated, the employee's entitlement to
5 continued leave, maintenance of health benefits, and res-
6 toration ceases unless the employment relationship contin-
7 ues, for example, by the employee remaining on paid leave.
8 An employee may not be required to take more leave than
9 necessary to address the circumstances for which leave
10 was taken. If the employee is able to return to work earlier
11 than anticipated, the employee shall provide the employing
12 office two business days notice where feasible; the employ-
13 ing office is required to restore the employee once such
14 notice is given, or where such prior notice was not feasible.

15 (f) An employing office may deny restoration to em-
16 ployment, but not the taking of FMLA leave and the
17 maintenance of health benefits, to an eligible employee
18 only under the terms of the "key employee" exemption.
19 Denial of reinstatement must be necessary to prevent
20 "substantial and grievous economic injury" to the employ-
21 ing office's operations. The employing office must notify
22 the employee of the employee's status as a "key employee"
23 and of the employing office's intent to deny reinstatement
24 on that basis when the employing office makes these deter-
25 minations. If leave has started, the employee must be

1 given a reasonable opportunity to return to work after
2 being so notified. (See § 825.219.)

3 (g) An employee who fraudulently obtains FMLA
4 leave from an employing office is not protected by job res-
5 toration or maintenance of health benefits provisions of
6 the FMLA as made applicable by the CAA.

7 (h) If the employing office has a uniformly-applied
8 policy governing outside or supplemental employment,
9 such a policy may continue to apply to an employee while
10 on FMLA leave. An employing office which does not have
11 such a policy may not deny benefits to which an employee
12 is entitled under FMLA as made applicable by the CAA
13 on this basis unless the FMLA leave was fraudulently ob-
14 tained as in paragraph (g) of this section.

15 SUBPART D—WHAT ENFORCEMENT MECHANISMS DOES
16 THE CAA PROVIDE?

17 **§ 825.400 What can employees do who believe that**
18 **their rights under the FMLA as made ap-**
19 **plicable by the CAA have been violated?**

20 (a) To commence a proceeding, a covered employee
21 alleging a violation of the rights and protections of the
22 FMLA made applicable by the CAA must request counsel-
23 ing by the Office of Compliance not later than 180 days
24 after the date of the alleged violation. If a covered em-

1 ployee misses this deadline, the covered employee will be
2 unable to obtain a remedy under the CAA.

3 (b) The following procedures are available under title
4 IV of the CAA for covered employees who believe that
5 their rights under FMLA as made applicable by the CAA
6 have been violated—

7 (1) counseling;

8 (2) mediation; and

9 (3) election of either—

10 (A) a formal complaint, filed with the Of-
11 fice of Compliance, and a hearing before a hear-
12 ing officer, subject to review by the Board of
13 Directors of the Office of Compliance, and judi-
14 cial review in the United States Court of Ap-
15 peals for the Federal Circuit; or

16 (B) a civil action in a district court of the
17 United States.

18 (c) Regulations of the Office of Compliance describ-
19 ing and governing these procedures are found at [proposed
20 rules can be found at 141 Cong. Rec. S17012 (November
21 14, 1995)].

1 **§ 825.401 [Reserved]**

2 **§ 825.402 [Reserved]**

3 **§ 825.403 [Reserved]**

4 **§ 825.404 [Reserved]**

5 SUBPART E—[RESERVED]

6 SUBPART F—WHAT SPECIAL RULES APPLY TO

7 EMPLOYEES OF SCHOOLS?

8 **§ 825.600 To whom do the special rules apply?**

9 (a) Certain special rules apply to employees of “local
10 educational agencies”, including public school boards and
11 elementary schools under their jurisdiction, and private el-
12 ementary and secondary schools. The special rules do not
13 apply to other kinds of educational institutions, such as
14 colleges and universities, trade schools, and preschools.

15 (b) Educational institutions are covered by FMLA as
16 made applicable by the CAA (and these special rules). The
17 usual requirements for employees to be “eligible” apply.

18 (c) The special rules affect the taking of intermittent
19 leave or leave on a reduced leave schedule, or leave near
20 the end of an academic term (semester), by instructional
21 employees. “Instructional employees” are those whose
22 principal function is to teach and instruct students in a
23 class, a small group, or an individual setting. This term
24 includes not only teachers, but also athletic coaches, driv-
25 ing instructors, and special education assistants such as
26 signers for the hearing impaired. It does not include, and

1 the special rules do not apply to, teacher assistants or
2 aides who do not have as their principal job actual teach-
3 ing or instructing, nor does it include auxiliary personnel
4 such as counselors, psychologists, or curriculum special-
5 ists. It also does not include cafeteria workers, mainte-
6 nance workers, or bus drivers.

7 (d) Special rules which apply to restoration to an
8 equivalent position apply to all employees of local edu-
9 cational agencies.

10 **§825.601 What limitations apply to the taking of**
11 **intermittent leave or leave on a reduced**
12 **leave schedule?**

13 (a) Leave taken for a period that ends with the school
14 year and begins the next semester is leave taken consecu-
15 tively rather than intermittently. The period during the
16 summer vacation when the employee would not have been
17 required to report for duty is not counted against the em-
18 ployee's FMLA leave entitlement. An instructional em-
19 ployee who is on FMLA leave at the end of the school
20 year must be provided with any benefits over the summer
21 vacation that employees would normally receive if they had
22 been working at the end of the school year.

23 (1) If an eligible instructional employee needs
24 intermittent leave or leave on a reduced leave sched-
25 ular to care for a family member, or for the employ-

1 ee's own serious health condition, which is foresee-
2 able based on planned medical treatment, and the
3 employee would be on leave for more than 20 per-
4 cent of the total number of working days over the
5 period the leave would extend, the employing office
6 may require the employee to choose either to:

7 (i) Take leave for a period or periods of a
8 particular duration, not greater than the dura-
9 tion of the planned treatment; or

10 (ii) Transfer temporarily to an available al-
11 ternative position for which the employee is
12 qualified, which has equivalent pay and benefits
13 and which better accommodates recurring peri-
14 ods of leave than does the employee's regular
15 position.

16 (2) These rules apply only to a leave involving
17 more than 20 percent of the working days during
18 the period over which the leave extends. For exam-
19 ple, if an instructional employee who normally works
20 five days each week needs to take two days of
21 FMLA leave per week over a period of several
22 weeks, the special rules would apply. Employees tak-
23 ing leave which constitutes 20 percent or less of the
24 working days during the leave period would not be
25 subject to transfer to an alternative position. "Peri-

1 ods of a particular duration” means a block, or
2 blocks, of time beginning no earlier than the first
3 day for which leave is needed and ending no later
4 than the last day on which leave is needed, and may
5 include one uninterrupted period of leave.

6 (b) If an instructional employee does not give re-
7 quired notice of foreseeable FMLA leave (see § 825.302)
8 to be taken intermittently or on a reduced leave schedule,
9 the employing office may require the employee to take
10 leave of a particular duration, or to transfer temporarily
11 to an alternative position. Alternatively, the employing of-
12 fice may require the employee to delay the taking of leave
13 until the notice provision is met. See § 825.207(h).

14 **§ 825.602 What limitations apply to the taking of**
15 **leave near the end of an academic term?**

16 (a) There are also different rules for instructional
17 employees who begin leave more than five weeks before
18 the end of a term, less than five weeks before the end
19 of a term, and less than three weeks before the end of
20 a term. Regular rules apply except in circumstances when:

21 (1) An instructional employee begins leave more
22 than five weeks before the end of a term. The em-
23 ploying office may require the employee to continue
24 taking leave until the end of the term if—

1 (i) the leave will last at least three weeks,
2 and

3 (ii) the employee would return to work
4 during the three-week period before the end of
5 the term.

6 (2) The employee begins leave for a purpose
7 other than the employee's own serious health condi-
8 tion during the five-week period before the end of a
9 term. The employing office may require the em-
10 ployee to continue taking leave until the end of the
11 term if—

12 (i) the leave will last more than two weeks,
13 and

14 (ii) the employee would return to work
15 during the two-week period before the end of
16 the term.

17 (3) The employee begins leave for a purpose
18 other than the employee's own serious health condi-
19 tion during the three-week period before the end of
20 a term, and the leave will last more than five work-
21 ing days. The employing office may require the em-
22 ployee to continue taking leave until the end of the
23 term.

24 (b) For purposes of these provisions, "academic
25 term" means the school semester, which typically ends

1 near the end of the calendar year and the end of spring
2 each school year. In no case may a school have more than
3 two academic terms or semesters each year for purposes
4 of FMLA as made applicable by the CAA. An example
5 of leave falling within these provisions would be where an
6 employee plans two weeks of leave to care for a family
7 member which will begin three weeks before the end of
8 the term. In that situation, the employing office could re-
9 quire the employee to stay out on leave until the end of
10 the term.

11 **§825.603 Is all leave taken during “periods of a par-**
12 **ticular duration” counted against the**
13 **FMLA leave entitlement?**

14 (a) If an employee chooses to take leave for “periods
15 of a particular duration” in the case of intermittent or
16 reduced schedule leave, the entire period of leave taken
17 will count as FMLA leave.

18 (b) In the case of an employee who is required to
19 take leave until the end of an academic term, only the
20 period of leave until the employee is ready and able to
21 return to work shall be charged against the employee’s
22 FMLA leave entitlement. The employing office has the op-
23 tion not to require the employee to stay on leave until the
24 end of the school term. Therefore, any additional leave re-
25 quired by the employing office to the end of the school

1 term is not counted as FMLA leave; however, the employ-
2 ing office shall be required to maintain the employee's
3 group health insurance and restore the employee to the
4 same or equivalent job including other benefits at the con-
5 clusion of the leave.

6 **§825.604 What special rules apply to restoration to**
7 **“an equivalent position”?**

8 The determination of how an employee is to be re-
9 stored to “an equivalent position” upon return from
10 FMLA leave will be made on the basis of “established
11 school board policies and practices, private school policies
12 and practices, and collective bargaining agreements”. The
13 “established policies” and collective bargaining agree-
14 ments used as a basis for restoration must be in writing,
15 must be made known to the employee prior to the taking
16 of FMLA leave, and must clearly explain the employee's
17 restoration rights upon return from leave. Any established
18 policy which is used as the basis for restoration of an em-
19 ployee to “an equivalent position” must provide substan-
20 tially the same protections as provided in the FMLA, as
21 made applicable by the CAA, for reinstated employees. See
22 §825.215. In other words, the policy or collective bargain-
23 ing agreement must provide for restoration to an “equiva-
24 lent position” with equivalent employment benefits, pay,
25 and other terms and conditions of employment. For exam-

1 ple, an employee may not be restored to a position requir-
2 ing additional licensure or certification.

3 SUBPART G—HOW DO OTHER LAWS, EMPLOYING OF-
4 FICE PRACTICES, AND COLLECTIVE BARGAINING
5 AGREEMENTS AFFECT EMPLOYEE RIGHTS UNDER
6 THE FMLA AS MADE APPLICABLE BY THE CAA?

7 **§825.700 What if an employing office provides more**
8 **generous benefits than required by FMLA**
9 **as made applicable by the CAA?**

10 (a) An employing office must observe any employ-
11 ment benefit program or plan that provides greater family
12 or medical leave rights to employees than the rights estab-
13 lished by the FMLA. Conversely, the rights established by
14 the FMLA, as made applicable by the CAA, may not be
15 diminished by any employment benefit program or plan.
16 For example, a provision of a collective bargaining agree-
17 ment (CBA) which provides for reinstatement to a position
18 that is not equivalent because of seniority (e.g., provides
19 lesser pay) is superseded by FMLA. If an employing office
20 provides greater unpaid family leave rights than are af-
21 forded by FMLA, the employing office is not required to
22 extend additional rights afforded by FMLA, such as main-
23 tenance of health benefits (other than through COBRA
24 or 5 U.S.C. 8905a, whichever is applicable), to the addi-
25 tional leave period not covered by FMLA. If an employee

1 takes paid or unpaid leave and the employing office does
2 not designate the leave as FMLA leave, the leave taken
3 does not count against an employee's FMLA entitlement.

4 (b) Nothing in the FMLA, as made applicable by the
5 CAA, prevents an employing office from amending existing
6 leave and employee benefit programs, provided they com-
7 ply with FMLA as made applicable by the CAA. However,
8 nothing in the FMLA, as made applicable by the CAA,
9 is intended to discourage employing offices from adopting
10 or retaining more generous leave policies.

11 (c) [Reserved]

12 **§825.701 [Reserved]**

13 **§825.702 How does FMLA affect anti-discrimination**
14 **laws as applied by section 201 of the**
15 **CAA?**

16 (a) Nothing in FMLA modifies or affects any applica-
17 ble law prohibiting discrimination on the basis of race, re-
18 ligion, color, national origin, sex, age, or disability (e.g.,
19 title VII of the Civil Rights Act of 1964, as amended by
20 the Pregnancy Discrimination Act), as made applicable by
21 the CAA. FMLA's legislative history explains that FMLA
22 is "not intended to modify or affect the Rehabilitation Act
23 of 1973, as amended, the regulations concerning employ-
24 ment which have been promulgated pursuant to that stat-
25 ute, or the Americans with Disabilities Act of 1990, or

1 the regulations issued under that Act. Thus, the leave pro-
2 visions of the [FMLA] are wholly distinct from the reason-
3 able accommodation obligations of employers covered
4 under the [ADA] * * * or the Federal government itself.
5 The purpose of the FMLA is to make leave available to
6 eligible employees and employing offices within its cov-
7 erage, and not to limit already existing rights and protec-
8 tion”. S. Rep. No. 3, 103d Cong., 1st Sess. 38 (1993).
9 An employing office must therefore provide leave under
10 whichever statutory provision provides the greater rights
11 to employees.

12 (b) If an employee is a qualified individual with a dis-
13 ability within the meaning of the Americans with Disabil-
14 ities Act (ADA), the employing office must make reason-
15 able accommodations, etc., barring undue hardship, in ac-
16 cordance with the ADA. At the same time, the employing
17 office must afford an employee his or her FMLA rights.
18 ADA’s “disability” and FMLA’s “serious health condi-
19 tion” are different concepts, and must be analyzed sepa-
20 rately. FMLA entitles eligible employees to 12 weeks of
21 leave in any 12-month period, whereas the ADA allows
22 an indeterminate amount of leave, barring undue hard-
23 ship, as a reasonable accommodation. FMLA requires em-
24 ploying offices to maintain employees’ group health plan
25 coverage during FMLA leave on the same conditions as

1 coverage would have been provided if the employee had
2 been continuously employed during the leave period,
3 whereas ADA does not require maintenance of health in-
4 surance unless other employees receive health insurance
5 during leave under the same circumstances.

6 (c)(1) A reasonable accommodation under the ADA
7 might be accomplished by providing an individual with a
8 disability with a part-time job with no health benefits, as-
9 suming the employing office did not ordinarily provide
10 health insurance for part-time employees. However,
11 FMLA would permit an employee to work a reduced leave
12 schedule until the equivalent of 12 workweeks of leave
13 were used, with group health benefits maintained during
14 this period. FMLA permits an employing office to tempo-
15 rarily transfer an employee who is taking leave intermit-
16 tently or on a reduced leave schedule to an alternative po-
17 sition, whereas the ADA allows an accommodation of reas-
18 signment to an equivalent, vacant position only if the em-
19 ployee cannot perform the essential functions of the em-
20 ployee's present position and an accommodation is not
21 possible in the employee's present position, or an accom-
22 modation in the employee's present position would cause
23 an undue hardship. The examples in the following para-
24 graphs of this section demonstrate how the two laws would

1 interact with respect to a qualified individual with a dis-
2 ability.

3 (2) A qualified individual with a disability who is also
4 an “eligible employee” entitled to FMLA leave requests
5 10 weeks of medical leave as a reasonable accommodation,
6 which the employing office grants because it is not an
7 undue hardship. The employing office advises the em-
8 ployee that the 10 weeks of leave is also being designated
9 as FMLA leave and will count towards the employee’s
10 FMLA leave entitlement. This designation does not pre-
11 vent the parties from also treating the leave as a reason-
12 able accommodation and reinstating the employee into the
13 same job, as required by the ADA, rather than an equiva-
14 lent position under FMLA, if that is the greater right
15 available to the employee. At the same time, the employee
16 would be entitled under FMLA to have the employing of-
17 fice maintain group health plan coverage during the leave,
18 as that requirement provides the greater right to the em-
19 ployee.

20 (3) If the same employee needed to work part-time
21 (a reduced leave schedule) after returning to his or her
22 same job, the employee would still be entitled under
23 FMLA to have group health plan coverage maintained for
24 the remainder of the two-week equivalent of FMLA leave
25 entitlement, notwithstanding an employing office policy

1 that part-time employees do not receive health insurance.
2 This employee would be entitled under the ADA to reason-
3 able accommodations to enable the employee to perform
4 the essential functions of the part-time position. In addi-
5 tion, because the employee is working a part-time schedule
6 as a reasonable accommodation, the employee would be
7 shielded from FMLA's provision for temporary assign-
8 ment to a different alternative position. Once the employee
9 has exhausted his or her remaining FMLA leave entitle-
10 ment while working the reduced (part-time) schedule, if
11 the employee is a qualified individual with a disability, and
12 if the employee is unable to return to the same full-time
13 position at that time, the employee might continue to work
14 part-time as a reasonable accommodation, barring undue
15 hardship; the employee would then be entitled to only
16 those employment benefits ordinarily provided by the em-
17 ploying office to part-time employees.

18 (4) At the end of the FMLA leave entitlement, an
19 employing office is required under FMLA to reinstate the
20 employee in the same or an equivalent position, with equiv-
21 alent pay and benefits, to that which the employee held
22 when leave commenced. The employing office's FMLA ob-
23 ligations would be satisfied if the employing office offered
24 the employee an equivalent full-time position. If the em-
25 ployee were unable to perform the essential functions of

1 that equivalent position even with reasonable accommoda-
2 tion, because of a disability, the ADA may require the em-
3 ploying office to make a reasonable accommodation at that
4 time by allowing the employee to work part-time or by re-
5 assigning the employee to a vacant position, barring undue
6 hardship.

7 (d)(1) If FMLA entitles an employee to leave, an em-
8 ploying office may not, in lieu of FMLA leave entitlement,
9 require an employee to take a job with a reasonable ac-
10 commodation. However, ADA may require that an employ-
11 ing office offer an employee the opportunity to take such
12 a position. An employing office may not change the essen-
13 tial functions of the job in order to deny FMLA leave.
14 See § 825.220(b).

15 (2) An employee may be on a workers' compensation
16 absence due to an on-the-job injury or illness which also
17 qualifies as a serious health condition under FMLA. The
18 workers' compensation absence and FMLA leave may run
19 concurrently (subject to proper notice and designation by
20 the employing office). At some point the health care pro-
21 vider providing medical care pursuant to the workers'
22 compensation injury may certify the employee is able to
23 return to work in a "light duty" position. If the employing
24 office offers such a position, the employee is permitted but
25 not required to accept the position (see § 825.220(d)). As

1 a result, the employee may no longer qualify for payments
2 from the workers' compensation benefit plan, but the em-
3 ployee is entitled to continue on unpaid FMLA leave either
4 until the employee is able to return to the same or equiva-
5 lent job the employee left or until the 12-week FMLA
6 leave entitlement is exhausted. See § 825.207(d)(2). If the
7 employee returning from the workers' compensation injury
8 is a qualified individual with a disability, he or she will
9 have rights under the ADA.

10 (e) If an employing office requires certifications of
11 an employee's fitness for duty to return to work, as per-
12 mitted by FMLA under a uniform policy, it must comply
13 with the ADA requirement that a fitness for duty physical
14 be job-related and consistent with business necessity.

15 (f) Under title VII of the Civil Rights Act of 1964,
16 as amended by the Pregnancy Discrimination Act, and as
17 made applicable by the CAA, an employing office should
18 provide the same benefits for women who are pregnant
19 as the employing office provides to other employees with
20 short-term disabilities. Because title VII does not require
21 employees to be employed for a certain period of time to
22 be protected, an employee employed for less than 12
23 months by any employing office (and, therefore, not an
24 "eligible" employee under FMLA, as made applicable by
25 the CAA) may not be denied maternity leave if the employ-

1 ing office normally provides short-term disability benefits
2 to employees with the same tenure who are experiencing
3 other short-term disabilities.

4 (g) For further information on Federal anti-discrimi-
5 nation laws applied by section 201 of the CAA (2 U.S.C.
6 1311), including title VII, the Rehabilitation Act, and the
7 ADA, individuals are encouraged to contact the Office of
8 Compliance.

9 SUBPART H—DEFINITIONS

10 **§ 825.800 Definitions.**

11 For purposes of this part:

12 ADA means the Americans With Disabilities Act (42
13 U.S.C. 12101 et seq.).

14 CAA means the Congressional Accountability Act of
15 1995 (Pub. Law 104–1, 109 Stat. 3, 2 U.S.C. 1301 et
16 seq.).

17 COBRA means the continuation coverage require-
18 ments of title X of the Consolidated Omnibus Budget Rec-
19 onciliation Act of 1986 (Pub. Law 99–272, title X, section
20 10002; 100 Stat. 227; as amended; 29 U.S.C. 1161–
21 1168).

22 Continuing treatment means: A serious health condi-
23 tion involving continuing treatment by a health care pro-
24 vider includes any one or more of the following:

1 (1) A period of incapacity (i.e., inability to
2 work, attend school or perform other regular daily
3 activities due to the serious health condition, treat-
4 ment therefor, or recovery therefrom) of more than
5 three consecutive calendar days, and any subsequent
6 treatment or period of incapacity relating to the
7 same condition, that also involves:

8 (i) Treatment two or more times by a
9 health care provider, by a nurse or physician's
10 assistant under direct supervision of a health
11 care provider, or by a provider of health care
12 services (e.g., physical therapist) under orders
13 of, or on referral by, a health care provider; or

14 (ii) Treatment by a health care provider on
15 at least one occasion which results in a regimen
16 of continuing treatment under the supervision
17 of the health care provider.

18 (2) Any period of incapacity due to pregnancy,
19 or for prenatal care.

20 (3) Any period of incapacity or treatment for
21 such incapacity due to a chronic serious health con-
22 dition. A chronic serious health condition is one
23 which:

24 (i) Requires periodic visits for treatment
25 by a health care provider, or by a nurse or phy-

1 sician's assistant under direct supervision of a
2 health care provider;

3 (ii) Continues over an extended period of
4 time (including recurring episodes of a single
5 underlying condition); and

6 (iii) May cause episodic rather than a con-
7 tinuing period of incapacity (e.g., asthma, dia-
8 betes, epilepsy, etc.).

9 (4) A period of incapacity which is permanent
10 or long-term due to a condition for which treatment
11 may not be effective. The employee or family mem-
12 ber must be under the continuing supervision of, but
13 need not be receiving active treatment by, a health
14 care provider. Examples include Alzheimer's, a se-
15 vere stroke, or the terminal stages of a disease.

16 (5) Any period of absence to receive multiple
17 treatments (including any period of recovery there-
18 from) by a health care provider or by a provider of
19 health care services under orders of, or on referral
20 by, a health care provider, either for restorative sur-
21 gery after an accident or other injury, or for a con-
22 dition that would likely result in a period of incapac-
23 ity of more than three consecutive calendar days in
24 the absence of medical intervention or treatment,
25 such as cancer (chemotherapy, radiation, etc.), se-

1 vere arthritis (physical therapy), kidney disease (di-
2 alysis).

3 Covered employee—The term “covered employee”, as
4 defined in the CAA, means any employee of—(1) the
5 House of Representatives; (2) the Senate; (3) the Capitol
6 Guide Service; (4) the Capitol Police; (5) the Congres-
7 sional Budget Office; (6) the Office of the Architect of
8 the Capitol; (7) the Office of the Attending Physician; (8)
9 the Office of Compliance; or (9) the Office of Technology
10 Assessment.

11 Eligible employee—The term “eligible employee”, as
12 defined in the CAA, means a covered employee who has
13 been employed in any employing office for 12 months and
14 for at least 1,250 hours of employment during the pre-
15 vious 12 months.

16 Employ means to suffer or permit to work.

17 Employee means an employee as defined in the CAA
18 and includes an applicant for employment and a former
19 employee.

20 Employee employed in an instructional capacity: See
21 Teacher.

22 Employee of the Capitol Police—The term “employee
23 of the Capitol Police” includes any member or officer of
24 the Capitol Police.

1 Employee of the House of Representatives—The
2 term “employee of the House of Representatives” includes
3 an individual occupying a position the pay for which is
4 disbursed by the Clerk of the House of Representatives,
5 or another official designated by the House of Representa-
6 tives, or any employment position in an entity that is paid
7 with funds derived from the clerk-hire allowance of the
8 House of Representatives but not any such individual em-
9 ployed by any entity listed in subparagraphs (3) through
10 (9) under “covered employee” above.

11 Employee of the Office of the Architect of the Cap-
12 itol—The term “employee of the Office of the Architect
13 of the Capitol” includes any employee of the Office of the
14 Architect of the Capitol, the Botanic Garden, or the Sen-
15 ate Restaurants.

16 Employee of the Senate—The term “employee of the
17 Senate” includes any employee whose pay is disbursed by
18 the Secretary of the Senate, but not any such individual
19 employed by any entity listed in subparagraphs (3)
20 through (9) under “covered employee” above.

21 Employing Office—The term “employing office”, as
22 defined in the CAA, means—

23 (1) the personal office of a Member of the
24 House of Representatives or of a Senator;

1 (2) a committee of the House of Representa-
2 tives or the Senate or a joint committee;

3 (3) any other office headed by a person with
4 the final authority to appoint, hire, discharge, and
5 set the terms, conditions, or privileges of the employ-
6 ment of an employee of the House of Representa-
7 tives or the Senate; or

8 (4) the Capitol Guide Board, the Capitol Police
9 Board, the Congressional Budget Office, the Office of
10 the Architect of the Capitol, the Office of the At-
11 tending Physician, the Office of Compliance, and the
12 Office of Technology Assessment.

13 Employment benefits means all benefits provided or
14 made available to employees by an employing office, in-
15 cluding group life insurance, health insurance, disability
16 insurance, sick leave, annual leave, educational benefits,
17 and pensions, regardless of whether such benefits are pro-
18 vided by a practice or written policy of an employing office
19 or through an employee benefit plan. The term does not
20 include non-employment related obligations paid by em-
21 ployees through voluntary deductions such as supple-
22 mental insurance coverage. (See § 825.209(a)).

23 FLSA means the Fair Labor Standards Act (29
24 U.S.C. 201 et seq.).

1 FMLA means the Family and Medical Leave Act of
2 1993, Public Law 103-3 (February 5, 1993), 107 Stat.
3 6 (29 U.S.C. 2601 et seq.).

4 Group health plan means the Federal Employees
5 Health Benefits Program and any other plan of, or con-
6 tributed to by, an employing office (including a self-in-
7 sured plan) to provide health care (directly or otherwise)
8 to the employing office's employees, former employees, or
9 the families of such employees or former employees. For
10 purposes of FMLA, as made applicable by the CAA, the
11 term "group health plan" shall not include an insurance
12 program providing health coverage under which employees
13 purchase individual policies from insurers provided that—

14 (1) no contributions are made by the employing
15 office;

16 (2) participation in the program is completely
17 voluntary for employees;

18 (3) the sole functions of the employing office
19 with respect to the program are, without endorsing
20 the program, to permit the insurer to publicize the
21 program to employees, to collect premiums through
22 payroll deductions and to remit them to the insurer;

23 (4) the employing office receives no consider-
24 ation in the form of cash or otherwise in connection
25 with the program, other than reasonable compensa-

1 tion, excluding any profit, for administrative services
2 actually rendered in connection with payroll deduc-
3 tion; and

4 (5) the premium charged with respect to such
5 coverage does not increase in the event the employ-
6 ment relationship terminates.

7 Health care provider means:

8 (1) A doctor of medicine or osteopathy who is
9 authorized to practice medicine or surgery by the
10 State in which the doctor practices; or

11 (2) Podiatrists, dentists, clinical psychologists,
12 optometrists, and chiropractors (limited to treatment
13 consisting of manual manipulation of the spine to
14 correct a subluxation as demonstrated by X-ray to
15 exist) authorized to practice in the State and per-
16 forming within the scope of their practice as defined
17 under State law; and

18 (3) Nurse practitioners, nurse-midwives and
19 clinical social workers who are authorized to practice
20 under State law and who are performing within the
21 scope of their practice as defined under State law;
22 and

23 (4) Christian Science practitioners listed with
24 the First Church of Christ, Scientist in Boston,
25 Massachusetts.

1 (5) Any health care provider from whom an em-
2 ploying office or a group health plan's benefits man-
3 ager will accept certification of the existence of a se-
4 rious health condition to substantiate a claim for
5 benefits.

6 (6) A health care provider as defined above who
7 practices in a country other than the United States,
8 who is licensed to practice in accordance with the
9 laws and regulations of that country.

10 “Incapable of self-care” means that the individual re-
11 quires active assistance or supervision to provide daily
12 self-care in several of the “activities of daily living”
13 (ADLs) or “instrumental activities of daily living”
14 (IADLs). Activities of daily living include adaptive activi-
15 ties such as caring appropriately for one's grooming and
16 hygiene, bathing, dressing and eating. Instrumental activi-
17 ties of daily living include cooking, cleaning, shopping,
18 taking public transportation, paying bills, maintaining a
19 residence, using telephones and directories, using a post
20 office, etc.

21 Instructional employee: See Teacher.

22 Intermittent leave means leave taken in separate peri-
23 ods of time due to a single illness or injury, rather than
24 for one continuous period of time, and may include leave
25 of periods from an hour or more to several weeks. Exam-

1 ples of intermittent leave would include leave taken on an
2 occasional basis for medical appointments, or leave taken
3 several days at a time spread over a period of six months,
4 such as for chemotherapy.

5 Mental disability: See Physical or mental disability.

6 Office of Compliance means the independent office
7 established in the legislative branch under section 301 of
8 the CAA (2 U.S.C. 1381).

9 Parent means the biological parent of an employee
10 or an individual who stands or stood in loco parentis to
11 an employee when the employee was a child.

12 Physical or mental disability means a physical or
13 mental impairment that substantially limits one or more
14 of the major life activities of an individual. See the Ameri-
15 cans with Disabilities Act (ADA), as made applicable by
16 section 201(a)(3) of the CAA (2 U.S.C. 1311(a)(3)).

17 Reduced leave schedule means a leave schedule that
18 reduces the usual number of hours per workweek, or hours
19 per workday, of an employee.

20 Secretary means the Secretary of Labor or author-
21 ized representative.

22 Serious health condition entitling an employee to
23 FMLA leave means:

24 (1) An illness, injury, impairment, or physical
25 or mental condition that involves:

1 (i) Inpatient care (i.e., an overnight stay)
2 in a hospital, hospice, or residential medical
3 care facility, including any period of incapacity
4 (for purposes of this section, defined to mean
5 inability to work, attend school or perform
6 other regular daily activities due to the serious
7 health condition, treatment therefor, or recovery
8 therefrom), or any subsequent treatment in
9 connection with such inpatient care; or

10 (ii) Continuing treatment by a health care
11 provider. A serious health condition involving
12 continuing treatment by a health care provider
13 includes:

14 (A) A period of incapacity (i.e., inabil-
15 ity to work, attend school or perform other
16 regular daily activities due to the serious
17 health condition, treatment therefor, or re-
18 covery therefrom) of more than three con-
19 secutive calendar days, including any sub-
20 sequent treatment or period of incapacity
21 relating to the same condition, that also in-
22 volves:

23 (1) Treatment two or more times
24 by a health care provider, by a nurse
25 or physician's assistant under direct

1 supervision of a health care provider,
2 or by a provider of health care serv-
3 ices (e.g., physical therapist) under
4 orders of, or on referral by, a health
5 care provider; or

6 (2) Treatment by a health care
7 provider on at least one occasion
8 which results in a regimen of continu-
9 ing treatment under the supervision of
10 the health care provider.

11 (B) Any period of incapacity due to
12 pregnancy, or for prenatal care.

13 (C) Any period of incapacity or treat-
14 ment for such incapacity due to a chronic
15 serious health condition. A chronic serious
16 health condition is one which:

17 (1) Requires periodic visits for
18 treatment by a health care provider,
19 or by a nurse or physician's assistant
20 under direct supervision of a health
21 care provider;

22 (2) Continues over an extended
23 period of time (including recurring
24 episodes of a single underlying condi-
25 tion); and

1 (3) May cause episodic rather
2 than a continuing period of incapacity
3 (e.g., asthma, diabetes, epilepsy, etc.).

4 (D) A period of incapacity which is
5 permanent or long-term due to a condition
6 for which treatment may not be effective.
7 The employee or family member must be
8 under the continuing supervision of, but
9 need not be receiving active treatment by,
10 a health care provider. Examples include
11 Alzheimer's, a severe stroke, or the termi-
12 nal stages of a disease.

13 (E) Any period of absence to receive
14 multiple treatments (including any period
15 of recovery therefrom) by a health care
16 provider or by a provider of health care
17 services under orders of, or on referral by,
18 a health care provider, either for restora-
19 tive surgery after an accident or other in-
20 jury, or for a condition that would likely
21 result in a period of incapacity of more
22 than three consecutive calendar days in the
23 absence of medical intervention or treat-
24 ment, such as cancer (chemotherapy, radi-

1 ation, etc.), severe arthritis (physical ther-
2 apy), kidney disease (dialysis).

3 (2) Treatment for purposes of paragraph (1) of
4 this definition includes (but is not limited to) exami-
5 nations to determine if a serious health condition ex-
6 ists and evaluations of the condition. Treatment
7 does not include routine physical examinations, eye
8 examinations, or dental examinations. Under para-
9 graph (1)(ii)(A)(2) of this definition, a regimen of
10 continuing treatment includes, for example, a course
11 of prescription medication (e.g., an antibiotic) or
12 therapy requiring special equipment to resolve or al-
13 leviate the health condition (e.g., oxygen). A regimen
14 of continuing treatment that includes the taking of
15 over-the-counter medications such as aspirin, anti-
16 histamines, or salves; or bed-rest, drinking fluids, ex-
17 ercise, and other similar activities that can be initi-
18 ated without a visit to a health care provider, is not,
19 by itself, sufficient to constitute a regimen of con-
20 tinuing treatment for purposes of FMLA leave.

21 (3) Conditions for which cosmetic treatments
22 are administered (such as most treatments for acne
23 or plastic surgery) are not “serious health condi-
24 tions” unless inpatient hospital care is required or
25 unless complications develop. Ordinarily, unless com-

1 plications arise, the common cold, the flu, ear aches,
2 upset stomach, minor ulcers, headaches other than
3 migraine, routine dental or orthodontia problems,
4 periodontal disease, etc., are examples of conditions
5 that do not meet the definition of a serious health
6 condition and do not qualify for FMLA leave. Re-
7 storative dental or plastic surgery after an injury or
8 removal of cancerous growths are serious health con-
9 ditions provided all the other conditions of this regu-
10 lation are met. Mental illness resulting from stress
11 or allergies may be serious health conditions, but
12 only if all the conditions of this section are met.

13 (4) Substance abuse may be a serious health
14 condition if the conditions of this section are met.
15 However, FMLA leave may only be taken for treat-
16 ment for substance abuse by a health care provider
17 or by a provider of health care services on referral
18 by a health care provider. On the other hand, ab-
19 sence because of the employee's use of the sub-
20 stance, rather than for treatment, does not qualify
21 for FMLA leave.

22 (5) Absences attributable to incapacity under
23 paragraphs (1)(ii) (B) or (C) of this definition qual-
24 ify for FMLA leave even though the employee or the
25 immediate family member does not receive treatment

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

10 Son or daughter means a biological, adopted, or fos-
11 ter child, a stepchild, a legal ward, or a child of a person
12 standing in loco parentis, who is under 18 years of age
13 or 18 years of age or older and incapable of self-care be-
14 cause of a mental or physical disability.

15 Spouse means a husband or wife as defined or recog-
16 nized under State law for purposes of marriage in the
17 State where the employee resides, including common law
18 marriage in States where it is recognized.

19 State means any State of the United States or the
20 District of Columbia or any Territory or possession of the
21 United States.

22 Teacher (or employee employed in an instructional
23 capacity, or instructional employee) means an employee
24 employed principally in an instructional capacity by an
25 educational agency or school whose principal function is

1 to teach and instruct students in a class, a small group,
2 or an individual setting, and includes athletic coaches,
3 driving instructors, and special education assistants such
4 as signers for the hearing impaired. The term does not
5 include teacher assistants or aides who do not have as
6 their principal function actual teaching or instructing, nor
7 auxiliary personnel such as counselors, psychologists, cur-
8 riculum specialists, cafeteria workers, maintenance work-
9 ers, bus drivers, or other primarily noninstructional em-
10 ployees.

11 APPENDIX A TO PART 825—[RESERVED]

12 APPENDIX B TO PART 825—CERTIFICATION OF

13 PHYSICIAN OR PRACTITIONER

CERTIFICATION OF HEALTH CARE PROVIDER

(FAMILY AND MEDICAL LEAVE ACT OF 1993 AS MADE APPLICABLE BY THE
CONGRESSIONAL ACCOUNTABILITY ACT OF 1995)

- 1. Employee's Name:
- 2. Patient's Name (if different from employee):
- 3. The attached sheet describes what is meant by a "serious health condition" under the Family and Medical Leave Act as made applicable by the Congressional Accountability Act. Does the patient's condition¹ qualify under any of the categories described? If so, please check the applicable category.

(1) _____

(2) _____

(3) _____

(4) _____

(5) _____

(6) _____, or

None of the above _____

- 4. Describe the medical facts which support your certification, including a brief statement as to how the medical facts meet the criteria of one of these categories:

5.a. State the approximate date the condition commenced, and the probable duration of the condition (and also the probable duration of the patient's present incapacity² if different):

b. Will it be necessary for the employee to take work only intermittently or to work on a less than full schedule as a result of the condition (including for treatment described in Item 6 below)? _____

If yes, give probable duration:

c. If the condition is a chronic condition (condition #4) or pregnancy, state whether the patient is presently incapacitated² and the likely duration and frequency of episodes of incapacity²:

6.a. If additional treatments will be required for the condition, provide an estimate of the probable number of such treatments:

If the patient will be absent from work or other daily activities because of treatment on an intermittent or part-time basis, also provide an estimate of the probable number and interval between such treatments, actual or estimated dates of treatment if known, and period required for recovery if any:

b. If any of these treatments will be provided by another provider of health services (e.g., physical therapist), please state the nature of the treatments:

c. If a regimen of continuing treatment by the patient is required under your supervision, provide a general description of such regimen (e.g., prescription drugs, physical therapy requiring special equipment):

7.a. If medical leave is required for the employee's absence from work because of the employee's own condition (including absences due to pregnancy or a chronic condition), is the employee unable to perform work of any kind? _____

b. If able to perform some work, is the employee unable to perform any one or more of the essential functions of the employee's job (the employee or the employer should supply you with information about the essential job functions)? _____ If yes, please list the essential functions the employee is unable to perform: _____

c. If neither a. nor b. applies, is it necessary for the employee to be absent from work for treatment? _____

8.a. If leave is required to care for a family member of the employee with a serious health condition, does the patient require assistance for basic medical or personal needs or safety, or for transportation? _____

b. If no, would the employee's presence to provide psychological comfort be beneficial to the patient or assist in the patient's recovery? _____

c. If the patient will need care only intermittently or on a part-time basis, please indicate the probable duration of this need:

(Signature of Health Care Provider)

(Type of Practice)

(Address)

(Telephone number)

To be completed by the employee needing family leave to care for a family member:

State the care you will provide and an estimate of the period during which care will be provided, including a schedule if leave is to be taken intermittently or if it will be necessary for you to work less than a full schedule:

(Employee signature)

(Date)

A “Serious Health Condition” means an illness, injury, impairment, or physical or mental condition that involves one of the following:

1. Hospital Care.—Inpatient care (i.e., an overnight stay) in a hospital, hospice, or residential medical care facility, including any period of incapacity¹ or subsequent treatment in connection with or consequent to such inpatient care.
2. Absence Plus Treatment.—A period of incapacity² of more than three consecutive calendar days (including any subsequent treatment or period of incapacity² relating to the same condition), that also involves:
 - (1) Treatment³ two or more times by a health care provider, by a nurse or physician’s assistant under direct supervision of a health care provider, or by a provider of health care services (e.g., physical therapist) under orders of, or on referral by, a health care provider; or
 - (2) Treatment by a health care provider on at least one occasion which results in a regimen of continuing treatment⁴ under the supervision of the health care provider.
3. Pregnancy.—Any period of incapacity due to pregnancy, or for prenatal care.
4. Chronic Conditions Requiring Treatments.—A chronic condition which:
 - (1) Requires periodic visits for treatment by a health care provider, or by a nurse or physician’s assistant under direct supervision of a health care provider;
 - (2) Continues over an extended period of time (including recurring episodes of a single underlying condition); and
 - (3) May cause episodic rather than a continuing period of incapacity² (e.g., asthma, diabetes, epilepsy, etc.).
5. Permanent/Long-term Conditions Requiring Supervision.—A period of incapacity² which is permanent or long-term due to a condition for which treatment may not be effective. The employee or family member must be under the continuing supervision of, but need not be receiving active treatment by, a health care provider. Examples include Alzheimer’s, a severe stroke, or the terminal stages of a disease.
6. Multiple Treatments (Non-Chronic Conditions).—Any period of absence to receive multiple treatments (including any period of recovery therefrom) by a health care provider or by a provider of health care services under orders of, or on referral by, a health care provider, either for restorative surgery after an accident or other injury, or for a condition that would likely result in a period of incapacity² of more than three consecutive calendar days in the absence of medical intervention or treatment, such as cancer (chemotherapy, radiation, etc.), severe arthritis (physical therapy), kidney disease (dialysis).

FOOTNOTES

¹ Here and elsewhere on this form, the information sought relates only to the condition for which the employee is taking FMLA leave.

² “Incapacity”, for purposes of FMLA as made applicable by the CAA, is defined to mean inability to work, attend school or perform other regular daily activities due to the serious health condition, treatment therefore, or recovery therefrom.

³ Treatment includes examinations to determine if a serious health condition exists and evaluations of the condition. Treatment does not include routine physical examinations, eye examinations, or dental examinations.

⁴ A regimen of continuing treatment includes, for example, a course of prescription medication (e.g., an antibiotic) or therapy requiring special equipment to resolve or alleviate the health condition. A regimen of treatment does not include the taking of over-the-counter medications such as aspirin, antihistamines, or salves; or bed-rest, drinking fluids, exercise, and other similar activities that can be initiated without a visit to a health care provider.

1 APPENDIX C TO PART 825—[RESERVED]
2 APPENDIX D TO PART 825—PROTOTYPE NOTICE: EM-
3 PLOYING OFFICE RESPONSE TO EMPLOYEE RE-
4 QUEST FOR FAMILY AND MEDICAL LEAVE

EMPLOYING OFFICE RESPONSE TO EMPLOYEE REQUEST FOR FAMILY OR
MEDICAL LEAVE

(OPTIONAL USE FORM—SEE § 825.301(B)(1) OF THE REGULATIONS OF THE
OFFICE OF COMPLIANCE)

(FAMILY AND MEDICAL LEAVE ACT OF 1993, AS MADE APPLICABLE BY THE
CONGRESSIONAL ACCOUNTABILITY ACT OF 1995)

(Date)

To: _____
(Employee's name)

From: _____
(Name of appropriate employing office representative)

Subject: Request for Family/Medical Leave

On _____, (date) you notified us of your need to take family/medical leave due
to:

(Date)

The birth of your child, or the placement of a child with you for adoption or
foster care; or

A serious health condition that makes you unable to perform the essential func-
tions of your job; or

A serious health condition affecting your spouse, child, parent, for which you are
needed to provide care.

You notified us that you need this leave beginning on _____ (date) and that you
expect leave to continue until on or about _____ (date).

Except as explained below, you have a right under the FMLA, as made applicable
by the CAA, for up to 12 weeks of unpaid leave in a 12-month period for the reasons
listed above. Also, your health benefits must be maintained during any period of un-
paid leave under the same conditions as if you continued to work, and you must be
reinstated to the same or an equivalent job with the same pay, benefits, and terms
and conditions of employment on your return from leave. If you do not return to work
following FMLA leave for a reason other than: (1) the continuation, recurrence, or
onset of a serious health condition which would entitle you to FMLA leave; or (2)
other circumstances beyond your control, you may be required to reimburse us for
our share of health insurance premiums paid on your behalf during your FMLA leave.

This is to inform you that: (check appropriate boxes; explain where indicated)

1. You are eligible not eligible for leave under the FMLA as made applica-
ble by the CAA.

2. The requested leave will will not be counted against your annual FMLA
leave entitlement.

3. You will will not be required to furnish medical certification of a serious health condition. If required, you must furnish certification by _____ (insert date) (must be at least 15 days after you are notified of this requirement) or we may delay the commencement of your leave until the certification is submitted.

4. You may elect to substitute accrued paid leave for unpaid FMLA leave. We will will not require that you substitute accrued paid leave for unpaid FMLA leave. If paid leave will be used the following conditions will apply: (Explain)

5(a). If you normally pay a portion of the premiums for your health insurance, these payments will continue during the period of FMLA leave. Arrangements for payment have been discussed with you and it is agreed that you will make premium payments as follows: (Set forth dates, e.g., the 10th of each month, or pay periods, etc. that specifically cover the agreement with the employee.).

(b). You have a minimum 30-day (or, indicate longer period, if applicable) grace period in which to make premium payments. If payment is not made timely, your group health insurance may be cancelled: *Provided*, That we notify you in writing at least 15 days before the date that your health coverage will lapse, or, at our option, we may pay your share of the premiums during FMLA leave, and recover these payments from you upon your return to work. We will will not pay your share of health insurance premiums while you are on leave.

(c). We will will not do the same with other benefits (e.g., life insurance, disability insurance, etc.) while you are on FMLA leave. If we do pay your premiums for other benefits, when you return from leave you will will not be expected to reimburse us for the payments made on your behalf.

6. You will will not be required to present a fitness-for-duty certificate prior to being restored to employment. If such certification is required but not received, your return to work may be delayed until the certification is provided.

7(a). You are are not a “key employee” as described in § 825.218 of the Office of Compliance’s FMLA regulations. If you are a “key employee”, restoration to employment may be denied following FMLA leave on the grounds that such restoration will cause substantial and grievous economic injury to us.

(b). We have have not determined that restoring you to employment at the conclusion of FMLA leave will cause substantial and grievous economic harm to us. (Explain (a) and/or (b) below. See § 825.219 of the Office of Compliance’s FMLA regulations.)

8. While on leave, you will will not be required to furnish us with periodic reports every _____ (indicate interval of periodic reports, as appropriate for the particular leave situation) of your status and intent to return to work (see § 825.309 of the Office of Compliance’s FMLA regulations). If the circumstances of your leave change and you are able to return to work earlier than the date indicated on the reverse side of this form, you will will not be required to notify us at least two work days prior to the date you intend to report for work.

9. You will will not be required to furnish recertification relating to a serious health condition. (Explain below, if necessary, including the interval between certifications as prescribed in § 825.308 of the Office of Compliance’s FMLA regulations.)

1 **Subtitle A—Regulations Relating to**
 2 **the Senate and Its Employing**
 3 **Offices—S Series**

4 **CHAPTER III—REGULATIONS RELATING**
 5 **TO THE RIGHTS AND PROTECTIONS**
 6 **UNDER THE FAIR LABOR STANDARDS**
 7 **ACT OF 1938**

8 PART S501—GENERAL PROVISIONS

Sec.

S501.00 Corresponding section table of the FLSA regulations of the Labor Department and the CAA regulations of the Office of Compliance.

S501.101 Purpose and scope.

S501.102 Definitions.

S501.103 Coverage.

S501.104 Administrative authority.

S501.105 Effect of Interpretations of the Labor Department.

S501.106 Application of the Portal-to-Portal Act of 1947.

S501.107 [Reserved]

9 **§S501.00 Corresponding section table of the FLSA**
 10 **regulations of the Labor Department and**
 11 **the CAA regulations of the Office of Com-**
 12 **pliance.**

13 The following table lists the parts of the Secretary
 14 of Labor Regulations at Title 29 of the Code of Federal
 15 Regulations under the FLSA with the corresponding parts
 16 of the Office of Compliance (OC) Regulations under sec-
 17 tion 203 of the CAA:

<i>Secretary of Labor regulations</i>	<i>OC regulations</i>
Part 531 Wage payments under the Fair Labor Standards Act of 1938	Part S531
Part 541 Defining and delimiting the terms “bona fide executive”, “administrative”, and “professional” employees ...	Part S541

<i>Secretary of Labor regulations</i>	<i>OC regulations</i>
Part 547 Requirements of a “Bona fide thrift or savings plan”	Part S547
Part 553 Application of the FLSA to employees of public agencies	Part S553
Part 570 Child labor	Part S570

1 SUBPART A—MATTERS OF GENERAL APPLICABILITY

2 **§S501.101 Purpose and scope.**

3 (a) Section 203 of the Congressional Accountability
 4 Act (CAA) provides that the rights and protections of sub-
 5 sections (a)(1) and (d) of section 6, section 7, and section
 6 12(c) of the Fair Labor Standards Act of 1938 (FLSA)
 7 (29 U.S.C. §§ 206 (a)(1) and (d), 207, 212(c)) shall apply
 8 to covered employees of the legislative branch of the Fed-
 9 eral Government. Section 301 of the CAA creates the Of-
 10 fice of Compliance as an independent office in the legisla-
 11 tive branch for enforcing the rights and protections of the
 12 FLSA, as applied by the CAA.

13 (b) The FLSA as applied by the CAA provides for
 14 minimum standards for both wages and overtime entitle-
 15 ments, and delineates administrative procedures by which
 16 covered worktime must be compensated. Included also in
 17 the FLSA are provisions related to child labor, equal pay,
 18 and portal-to-portal activities. In addition, the FLSA ex-
 19 empts specified employees or groups of employees from the
 20 application of certain of its provisions.

21 (c) This chapter contains the substantive regulations
 22 with respect to the FLSA that the Board of Directors of

1 the Office of Compliance has adopted pursuant to sections
2 203(c) and 304 of the CAA, which require that the Board
3 promulgate regulations that are “the same as substantive
4 regulations promulgated by the Secretary of Labor to im-
5 plement the statutory provisions referred to in subsection
6 (a) [of § 203 of the CAA] except insofar as the Board may
7 determine, for good cause shown . . . that a modification
8 of such regulations would be more effective for the imple-
9 mentation of the rights and protections under this sec-
10 tion”.

11 (d) These regulations are issued by the Board of Di-
12 rectors, Office of Compliance, pursuant to sections 203(c)
13 and 304 of the CAA, which directs the Board to promul-
14 gate regulations implementing section 203 that are “the
15 same as substantive regulations promulgated by the Sec-
16 retary of Labor to implement the statutory provisions re-
17 ferred to in subsection (a) [of section 203 of the CAA]
18 except insofar as the Board may determine, for good cause
19 shown . . . that a modification of such regulations would
20 be more effective for the implementation of the rights and
21 protections under this section”. The regulations issued by
22 the Board herein are on all matters for which section 203
23 of the CAA requires regulations to be issued. Specifically,
24 it is the Board’s considered judgment, based on the infor-
25 mation available to it at the time of the promulgation of

1 these regulations, that, with the exception of regulations
2 adopted and set forth herein, there are no other “sub-
3 stantive regulations promulgated by the Secretary of
4 Labor to implement the statutory provisions referred to
5 in subsection (a) [of section 203 of the CAA]”.

6 (e) In promulgating these regulations, the Board has
7 made certain technical and nomenclature changes to the
8 regulations as promulgated by the Secretary. Such
9 changes are intended to make the provisions adopted ac-
10 cord more naturally to situations in the legislative branch.
11 However, by making these changes, the Board does not
12 intend a substantive difference between these regulations
13 and those of the Secretary from which they are derived.
14 Moreover, such changes, in and of themselves, are not in-
15 tended to constitute an interpretation of the regulation or
16 of the statutory provisions of the CAA upon which they
17 are based.

18 **§S501.102 Definitions.**

19 For purposes of this chapter:

20 (a) CAA means the Congressional Accountabil-
21 ity Act of 1995 (P.L. 104-1, 109 Stat. 3, 2 U.S.C.
22 §§ 1301-1438).

23 (b) FLSA or Act means the Fair Labor Stand-
24 ards Act of 1938, as amended (29 U.S.C. § 201 et

1 seq.), as applied by section 203 of the CAA to cov-
2 ered employees and employing offices.

3 (c) Covered employee means any employee of
4 the Senate, including an applicant for employment
5 and a former employee, but shall not include an in-
6 tern.

7 (d) Employee of the Senate includes any em-
8 ployee whose pay is disbursed by the Secretary of
9 the Senate, but not any such individual employed by
10 (1) the Capitol Guide Service; (2) the Capitol Police;
11 (3) the Congressional Budget Office; (4) the Office
12 of the Architect of the Capitol; (5) the Office of the
13 Attending Physician; (6) the Office of Compliance;
14 or (7) the Office of Technology Assessment.

15 (e) Employing office and employer mean (1) the
16 personal office of a Senator; (2) a committee of the
17 Senate or a joint committee; or (3) any other office
18 headed by a person with the final authority to ap-
19 point, hire, discharge, and set the terms, conditions,
20 or privileges of the employment of an employee of
21 the Senate.

22 (f) Board means the Board of Directors of the
23 Office of Compliance.

24 (g) Office means the Office of Compliance.

1 (h) Intern is an individual who (a) is perform-
2 ing services in an employing office as part of a dem-
3 onstrated educational plan, and (b) is appointed on
4 a temporary basis for a period not to exceed 12
5 months: *Provided*, That if an intern is appointed for
6 a period shorter than 12 months, the intern may be
7 reappointed for additional periods as long as the
8 total length of the internship does not exceed 12
9 months: *Provided further*, That an intern for pur-
10 poses of section 203(a)(2) of the CAA also includes
11 an individual who is a senior citizen appointed under
12 S. Res. 219 (May 5, 1978, as amended by S. Res.
13 96, April 9, 1991), but does not include volunteers,
14 fellows or pages.

15 **§S501.103 Coverage.**

16 The coverage of section 203 of the CAA extends to
17 any covered employee of an employing office without re-
18 gard to whether the covered employee is engaged in com-
19 merce or the production of goods for interstate commerce
20 and without regard to size, number of employees, amount
21 of business transacted, or other measure.

22 **§S501.104 Administrative authority.**

23 (a) The Office of Compliance is authorized to admin-
24 ister the provisions of section 203 of the Act with respect
25 to any covered employee or covered employer.

1 (b) The Board is authorized to promulgate sub-
2 stantive regulations in accordance with the provisions of
3 sections 203(c) and 304 of the CAA.

4 **§S501.105 Effect of Interpretation of the Depart-**
5 **ment of Labor.**

6 (a) In administering the FLSA, the Wage and Hour
7 Division of the Department of Labor has issued not only
8 substantive regulations but also interpretative bulletins.
9 Substantive regulations represent an exercise of statutory-
10 delegated lawmaking authority from the legislative branch
11 to an administrative agency. Generally, they are proposed
12 in accordance with the notice-and-comment procedures of
13 the Administrative Procedure Act (APA), 5 U.S.C. § 553.
14 Once promulgated, such regulations are considered to have
15 the force and effect of law, unless set aside upon judicial
16 review as arbitrary, capricious, an abuse of discretion, or
17 otherwise not in accordance with law. See *Batterton v.*
18 *Francis*, 432 U.S. 416, 425 n.9 (1977). See also 29 CFR
19 § 790.17(b) (1994). Unlike substantive regulations, inter-
20 pretative statements, including bulletins and other releases
21 of the Wage and Hour Division, are not issued pursuant
22 to the provisions of the APA and may not have the force
23 and effect of law. Rather, they may only constitute official
24 interpretations of the Department of Labor with respect
25 to the meaning and application of the minimum wage,

1 maximum hour, and overtime pay requirements of the
2 FLSA. See 29 C.F.R. § 790.17(c) (citing Final Report of
3 the Attorney General’s Committee on Administrative Pro-
4 cedure, Senate Document No. 8, 77th Cong., 1st Sess.,
5 at p. 27 (1941)). The purpose of such statements is to
6 make available in one place the interpretations of the
7 FLSA which will guide the Secretary of Labor and the
8 Wage and Hour Administrator in the performance of their
9 duties unless and until they are otherwise directed by au-
10 thoritative decisions of the courts or conclude, upon reex-
11 amination of an interpretation, that it is incorrect. The
12 Supreme Court has observed: “[T]he rulings, interpreta-
13 tions and opinions of the Administrator under this Act,
14 while not controlling upon the courts by reason of their
15 authority, do constitute a body of experience and informed
16 judgment to which courts and litigants may properly re-
17 sort for guidance. The weight of such a judgment in a
18 particular case will depend upon the thoroughness evident
19 in the consideration, the validity of its reasoning, its con-
20 sistency with earlier and later pronouncements, and all
21 those factors which give it power to persuade, if lacking
22 power to control”, *Skidmore v. Swift*, 323 U.S. 134, 140
23 (1944).

24 (b) Section 203(c) of the CAA provides that the sub-
25 stantive regulations implementing section 203 of the CAA

1 shall be “the same as substantive regulations promulgated
2 by the Secretary of Labor” except where the Board finds,
3 for good cause shown, that a modification would more ef-
4 fectively implement the rights and protections established
5 by the FLSA. Thus, the CAA by its terms does not man-
6 date that the Board adopt the interpretative statements
7 of the Department of Labor or its Wage and Hour Divi-
8 sion. The Board is thus not adopting such statements as
9 part of its substantive regulations.

10 **§S501.106 Application of the Portal-to-Portal Act of**
11 **1947.**

12 (a) Consistent with section 225 of the CAA, the Por-
13 tal-to-Portal Act (PPA), 29 U.S.C. §§ 216 and 251 et
14 seq., is applicable in defining and delimiting the rights and
15 protections of the FLSA that are prescribed by the CAA.
16 Section 10 of the PPA, 29 U.S.C. § 259, provides in perti-
17 nent part: “[N]o employer shall be subject to any liability
18 or punishment for or on account of the failure of the em-
19 ployer to pay minimum wages or overtime compensation
20 under the Fair Labor Standards Act of 1938, as amended,
21 . . . if he pleads and proves that the act of omission com-
22 plained of was in good faith in conformity with and reli-
23 ance on any written administrative regulation, order, rul-
24 ing, approval or interpretation of [the Administrator of
25 the Wage and Hour Division of the Department of Labor]

1 . . . or any administrative practice or enforcement policy
 2 of such agency with respect to the class of employers to
 3 which he belonged. Such a defense, if established shall be
 4 a bar to the action or proceeding, notwithstanding that
 5 after such act or omission, such administrative regulation,
 6 order, ruling, approval, interpretation, practice or enforce-
 7 ment policy is modified or rescinded or is determined by
 8 judicial authority to be invalid or of no legal effect”.

9 (b) In defending any action or proceeding based on
 10 any act or omission arising out of section 203 of the CAA,
 11 an employing office may satisfy the standards set forth
 12 in subsection (a) by pleading and proving good faith reli-
 13 ance upon any written administrative regulation, order,
 14 ruling, approval or interpretation, of the Administrator of
 15 the Wage and Hour Division of the Department of Labor:
 16 *Provided*, That such regulation, order, ruling approval or
 17 interpretation had not been superseded at the time or reli-
 18 ance by any regulation, order, decision, or ruling of the
 19 Board or the courts.

20 **§S501.107 [Reserved].**

21 PART S531—WAGE PAYMENTS UNDER THE
 22 FAIR LABOR STANDARDS ACT OF 1938

SUBPART A—PRELIMINARY MATTERS

Sec.

S531.00 Corresponding section table of the FLSA regulations of the Labor
 Department and the CAA regulations of the Office of Compli-
 ance.

S531.1 Definitions.

S531.2 Purpose and scope.

SUBPART B—DETERMINATIONS OF “REASONABLE COSTS”; EFFECTS OF COLLECTIVE BARGAINING AGREEMENTS

S531.3 General determinations of “reasonable cost”.

S531.6 Effects of collective bargaining agreements.

1 SUBPART A—PRELIMINARY MATTERS

2 **§S531.00 Corresponding section table of the FLSA**
 3 **regulations of the Labor Department and**
 4 **the CAA regulations of the Office of Com-**
 5 **pliance.**

6 The following table lists the sections of the Secretary
 7 of Labor Regulations at Title 29 of the Code of Federal
 8 Regulations under the FLSA with the corresponding sec-
 9 tions of the Office of Compliance (OC) Regulations under
 10 section 203 of the CAA:

<i>Secretary of Labor Regulations</i>	<i>OC Regulations</i>
531.1 Definitions	S531.1
531.2 Purpose and scope	S531.2
531.3 General determinations of “reasonable cost”	S531.3
531.6 Effects of collective bargaining agreements	S531.6

11 **§S531.1 Definitions.**

12 (a) Administrator means the Administrator of the
 13 Wage and Hour Division or his authorized representative.
 14 The Secretary of Labor has delegated to the Adminis-
 15 trator the functions vested in him under section 3(m) of
 16 the Act.

17 (b) Act means the Fair Labor Standards Act of 1938,
 18 as amended.

1 **§S531.2 Purpose and scope.**

2 (a) Section 3(m) of the Act defines the term “wage”
3 to include the “reasonable cost”, as determined by the
4 Secretary of Labor, to an employer of furnishing any em-
5 ployee with board, lodging, or other facilities, if such
6 board, lodging, or other facilities are customarily fur-
7 nished by the employer to his employees. In addition, sec-
8 tion 3(m) gives the Secretary authority to determine the
9 “fair value” of such facilities on the basis of average cost
10 to the employer or to groups of employers similarly situ-
11 ated, on average value to groups of employees, or other
12 appropriate measures of “fair value”. Whenever so deter-
13 mined and when applicable and pertinent, the “fair value”
14 of the facilities involved shall be includable as part of
15 “wages” instead of the actual measure of the costs of
16 those facilities. The section provides, however, the cost of
17 board, lodging, or other facilities shall not be included as
18 part of “wages” if excluded therefrom by a bona fide col-
19 lective bargaining agreement. Section 3(m) also provides
20 a method for determining the wage of a tipped employee.

21 (b) This part 531 contains any determinations made
22 as to the “reasonable cost” and “fair value” of board,
23 lodging, or other facilities have general application.

1 SUBPART B—DETERMINATIONS OF “REASONABLE
2 COST” AND “FAIR VALUE”; EFFECTS OF COLLEC-
3 TIVE BARGAINING AGREEMENTS

4 **§S531.3 General determinations of “reasonable
5 cost”.**

6 (a) The term “reasonable cost” as used in section
7 3(m) of the Act is hereby determined to be not more than
8 the actual cost to the employer of the board, lodging, or
9 other facilities customarily furnished by him to his employ-
10 ees.

11 (b) Reasonable cost does not include a profit to the
12 employer or to any affiliated person.

13 (c) The reasonable cost to the employer of furnishing
14 the employee with board, lodging, or other facilities (in-
15 cluding housing) is the cost of operation and maintenance
16 including adequate depreciation plus a reasonable allow-
17 ance (not more than 5½ percent) for interest on the de-
18 preciated amount of capital invested by the employer: *Pro-*
19 *vided*, That if the total so computed is more than the fair
20 rental value (or the fair price of the commodities or facili-
21 ties offered for sale), the fair rental value (or the fair price
22 of the commodities or facilities offered for sale) shall be
23 the reasonable cost. The cost of operation and mainte-
24 nance, the rate of depreciation, and the depreciated
25 amount of capital invested by the employer shall be those

1 arrived at under good accounting practices. As used in this
2 paragraph, the term good accounting practices does not
3 include accounting practices which have been rejected by
4 the Internal Revenue Service for tax purposes, and the
5 term depreciation includes obsolescence.

6 (d)(1) The cost of furnishing “facilities” found by the
7 Administrator to be primarily for the benefit or conven-
8 ience of the employer will not be recognized as reasonable
9 and may not therefore be included in computing wages.

10 (2) The following is a list of facilities found by the
11 Administrator to be primarily for the benefit of conven-
12 ience of the employer. The list is intended to be illustrative
13 rather than exclusive: (i) Tools of the trade and other ma-
14 terials and services incidental to carrying on the employ-
15 er’s business; (ii) the cost of any construction by and for
16 the employer; (iii) the cost of uniforms and of their laun-
17 dering, where the nature of the business requires the em-
18 ployee to wear a uniform.

19 **§S531.6 Effects of collective bargaining agreements.**

20 (a) The cost of board, lodging, or other facilities shall
21 not be included as part of the wage paid to any employee
22 to the extent it is excluded therefrom under the terms of
23 a bona fide collective bargaining agreement applicable to
24 the particular employee.

1 (b) A collective bargaining agreement shall be deemed
 2 to be “bona fide” when pursuant to the provisions of sec-
 3 tion 7(b)(1) or 7(b)(2) of the FLSA it is made with the
 4 certified representative of the employees under the provi-
 5 sions of the CAA.

6 PART S541—DEFINING AND DELIMITING THE
 7 TERMS “BONA FIDE EXECUTIVE”, “ADMIN-
 8 ISTRATIVE”, OR “PROFESSIONAL” CAPAC-
 9 ITY (INCLUDING ANY EMPLOYEE EM-
 10 PLOYED IN THE CAPACITY OF ACADEMIC
 11 ADMINISTRATIVE PERSONNEL OR TEACH-
 12 ER IN SECONDARY SCHOOL)

13 SUBPART A—GENERAL REGULATIONS

Sec.

S541.00 Corresponding section table of the FLSA regulations of the Labor De-
 partment and the CAA regulations of the Office of Compliance.

S541.01 Application of the exemptions of section 13(a)(1) of the FLSA.

S541.1 Executive.

S541.2 Administrative.

S541.3 Professional.

S541.5b Equal pay provisions of section 6(d) of the FLSA as applied by the
 CAA extend to executive, administrative, and professional em-
 ployees.

S541.5d Special provisions applicable to employees of public agencies.

14 **§S541.00 Corresponding section table of the FLSA**
 15 **regulations of the Labor Department and**
 16 **the CAA regulations of the Office of Com-**
 17 **pliance.**

18 The following table lists the sections of the Secretary
 19 of Labor Regulations at Title 29 of the Code of Federal
 20 Regulations under the FLSA with the corresponding sec-

1 tions of the Office of Compliance (OC) Regulations under
 2 section 203 of the CAA:

<i>Secretary of Labor Regulations</i>	<i>OC Regulations</i>
541.1 Executive	S541.1
541.2 Administrative	S541.2
541.3 Professional	S541.3
541.5b Equal pay provisions of section 6(d) of the FLSA apply to executive, administrative, and professional employ- ees	S541.5b
541.5d Special provisions applicable to employees of public agencies	S541.5d

3 **§S541.01 Application of the exemptions of section**
 4 **13(a)(1) of the FLSA**

5 (a) Section 13(a)(1) of the FLSA, which provides
 6 certain exemptions for employees employed in a bona fide
 7 executive, administrative, or professional capacity (includ-
 8 ing any employee employed in a capacity of academic ad-
 9 ministrative personnel or teacher in a secondary school),
 10 applies to covered employees by virtue of section 225(f)(1)
 11 of the CAA.

12 (b) The substantive regulations set forth in this part
 13 are promulgated under the authority of sections 203(c)
 14 and 304 of the CAA, which require that such regulations
 15 be the same as the substantive regulations promulgated
 16 by the Secretary of Labor except where the Board deter-
 17 mines for good cause shown that modifications would be
 18 more effective for the implementation of the rights and
 19 protections under § 203.

1 **§S541.1 Executive**

2 The term employee employed in a bona fide executive
3 * * * capacity in section 13(a)(1) of the FSLA as applied
4 by the CAA shall mean any employee:

5 (a) Whose primary duty consists of the management
6 of an employing office in which he is employed or of a
7 customarily recognized department or subdivision thereof;
8 and

9 (b) Who customarily and regularly directs the work
10 of two or more other employees therein; and

11 (c) Who has the authority to hire or fire other em-
12 ployees or whose suggestions and recommendations as to
13 the hiring or firing and as to the advancement and pro-
14 motion or any other change of status of other employees
15 will be given particular weight; and

16 (d) Who customarily and regularly exercises discre-
17 tionary powers; and

18 (e) Who does not devote more than 20 percent, or,
19 in the case of an employee of a retail or service establish-
20 ment who does not devote as much as 40 percent, of his
21 hours of work in the workweek to activities which are not
22 directly and closely related to the performance of the work
23 described in paragraphs (a) through (d) of this section:
24 *Provided*, That this paragraph shall not apply in the case
25 of an employee who is in sole charge of an independent

1 establishment or a physically separated branch establish-
2 ment; and

3 (f) Who is compensated for his services on a salary
4 basis at a rate of not less than \$155 per week, exclusive
5 of board, lodging or other facilities: *Provided*, That an em-
6 ployee who is compensated on a salary basis at a rate of
7 not less than \$250 per week, exclusive of board, lodging
8 or other facilities, and whose primary duty consists of the
9 management of the employing office in which the employee
10 is employed or of a customarily recognized department or
11 subdivision thereof, and includes the customary and regu-
12 lar direction of work of two or more other employees there-
13 in, shall be deemed to meet all the requirements of this
14 section

15 **§S541.2 Administrative**

16 The term employee employed in a bona fide * * *
17 administrative * * * capacity in section 13(a)(1) of the
18 FLSA as applied by the CAA shall mean any employee:

19 (a) Whose primary duty consists of either:

20 (1) The performance of office or nonmanual
21 work directly related to management policies or gen-
22 eral operations of his employer or his employer's
23 customers, or

24 (2) The performance of functions in the admin-
25 istration of a school system, or educational establish-

1 ment or institution, or of a department or subdivi-
2 sion thereof, in work directly related to the academic
3 instruction or training carried on therein; and

4 (b) Who customarily and regularly exercises discre-
5 tion and independent judgment; and

6 (c)(1) Who regularly and directly assists the head of
7 an employing office, or an employee employed in a bona
8 fide executive or administrative capacity (as such terms
9 are defined in the regulations of this subpart), or

10 (2) Who performs under only general supervision
11 work along specialized or technical lines requiring special
12 training, experience, or knowledge, or

13 (3) Who executes under only general supervision spe-
14 cial assignments and tasks; and

15 (d) Who does not devote more than 20 percent, or,
16 in the case of an employee of a retail or service establish-
17 ment who does not devote as much as 40 percent, of his
18 hours worked in the workweek to activities which are not
19 directly and closely related to the performance of the work
20 described in paragraphs (a) through (c) of this section;
21 and

22 (e)(1) Who is compensated for his services on a salary
23 or fee basis at a rate of not less than \$155 per week, exclu-
24 sive of board, lodging or other facilities, or

1 (2) Who, in the case of academic administrative per-
2 sonnel, is compensated for services as required by para-
3 graph (e)(1) of this section, or on a salary basis which
4 is at least equal to the entrance salary for teachers in the
5 school system, educational establishment or institution by
6 which employed: *Provided*, That an employee who is com-
7 pensated on a salary or fee basis at a rate of not less than
8 \$250 per week, exclusive of board, lodging or other facili-
9 ties, and whose primary duty consists of the performance
10 of work described in paragraph (a) of this section, which
11 includes work requiring the exercise of discretion and inde-
12 pendent judgment, shall be deemed to meet all the require-
13 ments of this section.

14 **§S541.3 Professional**

15 The term employee employed in a bona fide * * *
16 professional capacity in section 13(a)(1) of the FLSA as
17 applied by the CAA shall mean any employee:

18 (a) Whose primary duty consists of the performance
19 of:

20 (1) Work requiring knowledge of an advance
21 type in a field of science or learning customarily ac-
22 quired by a prolonged course of specialized intellec-
23 tual instruction and study, as distinguished from a
24 general academic education and from an apprentice-

1 ship, and from training in the performance of rou-
2 tine mental, manual, or physical processes, or

3 (2) Work that is original and creative in a rec-
4 ognized field of artistic endeavor (as opposed to
5 work which can be produced by a person endowed
6 with general manual or intellectual ability and train-
7 ing), and the result of which depends primarily on
8 the invention, imagination, or talent of the employee,
9 or

10 (3) Teaching, tutoring, instructing, or lecturing
11 in the activity of imparting knowledge and who is
12 employed and engaged in this activity as a teacher
13 in the school system, educational establishment or
14 institution by which employed, or

15 (4) Work that requires theoretical and practical
16 application of highly-specialized knowledge in com-
17 puter systems analysis, programming, and software
18 engineering, and who is employed and engaged in
19 these activities as a computer systems analyst, com-
20 puter programmer, software engineer, or other simi-
21 larly skilled worker in the computer software field;
22 and

23 (b) Whose work requires the consistent exercise of
24 discretion and judgment in its performance; and

1 (c) Whose work is predominantly intellectual and var-
2 ied in character (as opposed to routine mental, manual,
3 mechanical, or physical work) and is of such character
4 that the output produced or the result accomplished can-
5 not be standardized in relation to a given period of time;
6 and

7 (d) Who does not devote more than 20 percent of his
8 hours worked in the workweek to activities which are not
9 an essential part of and necessarily incident to the work
10 described in paragraphs (a) through (c) of this section;
11 and

12 (e) Who is compensated for services on a salary or
13 fee basis at a rate of not less than \$170 per week, exclu-
14 sive of board, lodging or other facilities: *Provided*, That
15 this paragraph shall not apply in the case of an employee
16 who is the holder of a valid license or certificate permitting
17 the practice of law or medicine or any of their branches
18 and who is actually engaged in the practice thereof, nor
19 in the case of an employee who is the holder of the req-
20 uisite academic degree for the general practice of medicine
21 and is engaged in an internship or resident program pur-
22 suant to the practice of medicine or any of its branches,
23 nor in the case of an employee employed and engaged as
24 a teacher as provided in paragraph (a)(3) of this section:
25 *Provided further*, That an employee who is compensated

1 on a salary or fee basis at a rate of not less than \$250
2 per week, exclusive of board, lodging or other facilities,
3 and whose primary duty consists of the performance either
4 of work described in paragraph (a)(1), (3), or (4) of this
5 section, which includes work requiring the consistent exer-
6 cise of discretion and judgment, or of work requiring in-
7 vention, imagination, or talent in a recognized field of ar-
8 tistic endeavor, shall be deemed to meet all of the require-
9 ments of this section: *Provided further*, That the salary
10 or fee requirements of this paragraph shall not apply to
11 an employee engaged in computer-related work within the
12 scope of paragraph (a)(4) of this section and who is com-
13 pensated on an hourly basis at a rate in excess of 6½
14 times the minimum wage provided by section 6 of the
15 FLSA as applied by the CAA.

16 **§S541.5b Equal pay provisions of section 6(d) of the**
17 **FLSA as applied by the CAA extend to ex-**
18 **ecutive, administrative, and professional**
19 **employees**

20 The FLSA, as amended and as applied by the CAA,
21 includes within the protection of the equal pay provisions
22 those employees exempt from the minimum wage and
23 overtime pay provisions as bona fide executive, administra-
24 tive, and professional employees (including any employee
25 employed in the capacity of academic administrative per-

1 sonnel or teacher in elementary or secondary schools)
2 under section 13(a)(1) of the FLSA. Thus, for example,
3 where an exempt administrative employee and another em-
4 ployee of the employing office are performing substantially
5 “equal work”, the sex discrimination prohibitions of sec-
6 tion 6(d) are applicable with respect to any wage differen-
7 tial between those two employees.

8 **§S541.5d Special provisions applicable to employ-**
9 **ees of public agencies**

10 (a) An employee of a public agency who otherwise
11 meets the requirement of being paid on a salary basis shall
12 not be disqualified from exemption under section S541.1,
13 S541.2, or S541.3 on the basis that such employee is paid
14 according to a pay system established by statute, ordi-
15 nance, or regulation, or by a policy for practice established
16 pursuant to principles of public accountability, under
17 which the employee accrues personal leave and sick leave
18 and which requires the public agency employee’s pay to
19 be reduced or such employee to be placed on leave without
20 pay for absences for personal reasons or because of illness
21 or injury of less than one workday when accrued leave is
22 not used by an employee because—

23 (1) permission for its use has not been sought
24 or has been sought and denied;

25 (2) accrued leave has been exhausted; or

1 (3) the employee chooses to use leave without
2 pay.

3 (b) Deductions from the pay for an employee of a
4 public agency for absences due to a budget-required fur-
5 lough shall not disqualify the employee from being paid
6 “on a salary basis” except in the workweek in which the
7 furlough occurs and for which the employee’s pay is ac-
8 cordingly reduced.

9 PART S547—REQUIREMENTS OF A “BONA FIDE
10 THRIFT OR SAVINGS PLAN”

Sec.

S547.00 Corresponding section table of the FLSA regulations of the Labor
Department and the CAA regulations of the Office of Compli-
ance.

S547.0 Scope and effect of part.

S547.1 Essential requirements of qualifications.

S547.2 Disqualifying provisions.

11 **§S547.00 Corresponding section table of the FLSA**
12 **regulations of the Labor Department and**
13 **the CAA regulations of the Office of Com-**
14 **pliance**

15 The following table lists the sections of the Secretary
16 of Labor Regulations under the FLSA with the cor-
17 responding sections of the Office of Compliance (OC) Reg-
18 ulations under section 203 of the CAA:

<i>Secretary of Labor Regulations</i>	<i>OC Regulations</i>
547.0 Scope and effect of part	S547.0
547.1 Essential requirements of qualifications	S547.1
547.2 Disqualifying provisions	S547.2

1 **§S547.0 Scope and effect of part**

2 (a) The regulations in this part set forth the require-
3 ments of a “bona fide thrift or savings plan” under section
4 7(3)(e)(b) of the Fair Labor Standards Act of 1938, as
5 amended (FLSA), as applied by the CAA. In determining
6 the total remuneration for employment which section 7(e)
7 of the FLSA requires to be included in the regular rate
8 at which an employee is employed, it is not necessary to
9 include any sums paid to or on behalf of such employee,
10 in recognition of services performed by him during a given
11 period, which are paid pursuant to a bona fide thrift or
12 savings plan meeting the requirements set forth herein.
13 In the formulation of these regulations due regard has
14 been given to the factors and standards set forth in section
15 7(e)(3)(b) of the Act.

16 (b) Where a thrift or savings plan is combined in a
17 single program (whether in one or more documents) with
18 a plan or trust for providing old age, retirement, life, acci-
19 dent or health insurance or similar benefits for employees,
20 contributions made by the employer pursuant to such
21 thrift or savings plan may be excluded from the regular
22 rate if the plan meets the requirements of the regulation
23 in this part and the contributions made for the other pur-
24 poses may be excluded from the regular rate if they meet
25 the tests set forth in regulations.

1 **§S547.1 Essential requirements for qualifications**

2 (a) A “bona fide thrift or savings plan” for the pur-
3 pose of section 7(e)(3)(b) of the FLSA as applied by the
4 CAA is required to meet all the standards set forth in
5 paragraphs (b) through (f) of this section and must not
6 contain the disqualifying provisions set forth in §S547.2.

7 (b) The thrift or savings plan constitutes a definite
8 program or arrangement in writing, adopted by the em-
9 ployer or by contract as a result of collective bargaining
10 and communicated or made available to the employees,
11 which is established and maintained, in good faith, for the
12 purpose of encouraging voluntary thrift or savings by em-
13 ployees by providing an incentive to employees to accumu-
14 late regularly and retain cash savings for a reasonable pe-
15 riod of time or to save through the regular purchase of
16 public or private securities.

17 (c) The plan specifically shall set forth the category
18 or categories of employees participating and the basis of
19 their eligibility. Eligibility may not be based on such fac-
20 tors as hours of work, production, or efficiency of the em-
21 ployees: *Provided, however,* That hours of work may be
22 used to determine eligibility of part-time or casual employ-
23 ees.

24 (d) The amount any employee may save under the
25 plan shall be specified in the plan or determined in accord-
26 ance with a definite formula specified in the plan, which

1 formula may be based on one or more factors such as the
2 straight-time earnings or total earnings, base rate of pay,
3 or length of service of the employee.

4 (e) The employer's total contribution in any year may
5 not exceed 15 percent of the participating employees' total
6 earnings during that year. In addition, the employer's
7 total contribution in any year may not exceed the total
8 amount saved or invested by the participating employees
9 during that year.

10 (f) The employer's contributions shall be apportioned
11 among the individual employees in accordance with a defi-
12 nite formula or method of calculation specified in the plan,
13 which formula or method of calculation is based on the
14 amount saved or the length of time the individual em-
15 ployee retains his savings or investment in the plan: *Pro-*
16 *vided*, That no employee's share determined in accordance
17 with the plan may be diminished because of any other re-
18 muneration received by him.

19 **§S547.2 Disqualifying provisions**

20 (a) No employee's participation in the plan shall be
21 on other than a voluntary basis.

22 (b) No employee's wages or salary shall be dependent
23 upon or influenced by the existence of such thrift or sav-
24 ings plan or the employer's contributions thereto.

1 (c) The amounts any employee may save under the
 2 plan, or the amounts paid by the employer under the plan
 3 may not be based upon the employee's hours of work, pro-
 4 duction or efficiency.

5 PART S553—OVERTIME COMPENSATION: PAR-
 6 TIAL EXEMPTION FOR EMPLOYEES EN-
 7 GAGED IN LAW ENFORCEMENT AND FIRE
 8 PROTECTION; OVERTIME AND COMPEN-
 9 SATORY TIME-OFF FOR EMPLOYEES
 10 WHOSE WORK SCHEDULE DIRECTLY DE-
 11 PENDS UPON THE SCHEDULE OF THE
 12 HOUSE INTRODUCTION

Sec.

S553.00 Corresponding section table of the FLSA regulations of the Labor
 Department and the CAA regulations of the Office of Compli-
 ance.

S553.1 Definitions

S553.2 Purpose and scope

SUBPART C—PARTIAL EXEMPTION FOR EMPLOYEES ENGAGED IN LAW
 ENFORCEMENT AND FIRE PROTECTION

S553.201 Statutory provisions: section 7(k).

S553.202 Limitations.

S553.211 Law enforcement activities.

S553.212 Twenty percent limitation on nonexempt work.

S553.213 Public agency employees engaged in both fire protection and law en-
 forcement activities.

S553.214 Trainees.

S553.215 Ambulance and rescue service employees.

S553.216 Other exemptions.

S553.220 "Tour of duty" defined.

S553.221 Compensable hours of work.

S553.222 Sleep time.

S553.223 Meal time.

S553.224 "Work period" defined.

S553.225 Early relief.

S553.226 Training time.

S553.227 Outside employment.

S553.230 Maximum hours standard for work periods of 7 to 28 days—section
 7(k).

- S553.231 Compensatory time off.
- S553.232 Overtime pay requirements.
- S553.233 “Regular rate” defined.

SUBPART D—COMPENSATORY TIME-OFF FOR OVERTIME EARNED BY EMPLOYEES WHOSE WORK SCHEDULE DIRECTLY DEPENDS UPON THE SCHEDULE OF THE HOUSE

- S553.301 Definiton of “directly depends”.
- S553.302 Overtime compensation and compensatory time off for an employee whose work schedule directly depends upon the schedule of the House.
- S553.303 Using compensatory time off.
- S553.304 Payment of overtime compensation for accrued compensatory time off as of termination of service.

1 INTRODUCTION

2 **§S553.00 Corresponding section table of the FLSA**
 3 **regulations of the Labor Department and**
 4 **the CAA regulations of the Office of Com-**
 5 **pliance**

6 The following table lists the sections of the Secretary
 7 of Labor Regulations under the FLSA with the cor-
 8 responding sections of the Office of Compliance (OC) Reg-
 9 ulations under section 203 of the CAA:

<i>Secretary of Labor Regulations</i>	<i>OC Regulations</i>
553.1 Definitions	S553.1
553.2 Purpose and scope	S553.2
553.201 Statutory provisions: section 7(k)	S553.201
553.202 Limitations	S553.202
553.211 Law enforcement activities	S553.211
553.212 Twenty percent limitation on nonexempt work	S553.212
553.213 Public agency employees engaged in both fire protection and law enforcement activities	S553.213
553.214 Trainees	S553.214
553.215 Ambulance and rescue service employees	S553.215
553.216 Other exemptions	S553.216
553.220 “Tour of duty” defined	S553.220
553.221 Compensable hours of work	S553.221
553.222 Sleep time	S553.222
553.223 Meal time	S553.223
553.224 “Work period” defined	S553.224
553.225 Early relief	S553.225
553.226 Training time	S553.226
553.227 Outside employment	S553.227

<i>Secretary of Labor Regulations</i>	<i>OC Regulations</i>
553.230 Maximum hours standard for work periods of 7 to 28 days—section 7(k)	S553.230
553.231 Compensatory time off	S553.231
553.232 Overtime pay requirements	S553.232
553.233 “Regular rate” defined	S553.233

1 INTRODUCTION

2 **§S553.1 Definitions**

3 (a) Act or FLSA means the Fair Labor Standards
 4 Act of 1938, as amended (52 Stat. 1060, as amended; 29
 5 U.S.C. 201–219), as applied by the CAA.

6 (b) 1985 Amendments means the Fair Labor Stand-
 7 ards Act Amendments of 1985 (Pub. L. 99–150).

8 (c) Public agency means an employing office as the
 9 term is defined in § 501.102 of this chapter, including the
 10 Capitol Police.

11 (d) Section 7(k) means the provisions of § 7(k) of the
 12 FLSA as applied to covered employees and employing of-
 13 fices by § 203 of the CAA.

14 **§S553.2 Purpose and scope**

15 The purpose of part S553 is to adopt with appro-
 16 priate modifications the regulations of the Secretary of
 17 Labor to carry out those provisions of the FLSA relating
 18 to public agency employees as they are applied to covered
 19 employees and employing offices of the CAA. In particu-
 20 lar, these regulations apply section 7(k) as it relates to
 21 fire protection and law enforcement employees of public
 22 agencies.

1 SUBPART C—PARTIAL EXEMPTION FOR EMPLOYEES
2 ENGAGED IN LAW ENFORCEMENT AND FIRE PRO-
3 TECTION

4 **§S553.201 Statutory provisions: section 7(k)**

5 Section 7(k) of the Act provides a partial overtime
6 pay exemption for fire protection and law enforcement
7 personnel (including security personnel in correctional in-
8 stitutions) who are employed by public agencies on a work
9 period basis. This section of the Act formerly permitted
10 public agencies to pay overtime compensation to such em-
11 ployees in work periods of 28 consecutive days only after
12 216 hours of work. As further set forth in §S553.230 of
13 this part, the 216-hour standard has been replaced, pursu-
14 ant to the study mandated by the statute, by 212 hours
15 for fire protection employees and 171 hours for law en-
16 forcement employees. In the case of such employees who
17 have a work period of at least 7 but less than 28 consecu-
18 tive days, overtime compensation is required when the
19 ratio of the number of hours worked to the number of
20 days in the work period exceeds the ratio of 212 (or 171)
21 hours to 28 days.

22 **§S553.202 Limitations**

23 The application of §7(k), by its terms, is limited to
24 public agencies, and does not apply to any private organi-
25 zation engaged in furnishing fire protection or law enforce-

1 ment services. This is so even if the services are provided
2 under contract with a public agency.

3 EXEMPTION REQUIREMENTS

4 **§S553.211 Law enforcement activities**

5 (a) As used in § 7(k) of the Act, the term “any em-
6 ployee . . . in law enforcement activities” refers to any
7 employee (1) who is a uniformed or plainclothed member
8 of a body of officers and subordinates who are empowered
9 by law to enforce laws designed to maintain public peace
10 and order and to protect both life and property from acci-
11 dental or willful injury, and to prevent and detect crimes,
12 (2) who has the power to arrest, and (3) who is presently
13 undergoing or has undergone or will undergo on-the-job
14 training and/or a course of instruction and study which
15 typically includes physical training, self-defense, firearm
16 proficiency, criminal and civil law principles, investigative
17 and law enforcement techniques, community relations,
18 medical aid and ethics.

19 (b) Employees who meet these tests are considered
20 to be engaged in law enforcement activities regardless of
21 their rank, or of their status as “trainee”, “probationary”,
22 or “permanent”, and regardless of their assignment to du-
23 ties incidental to the performance of their law enforcement
24 activities such as equipment maintenance, and lecturing,
25 or to support activities of the type described in paragraph
26 (g) of this section, whether or not such assignment is for

1 training or familiarization purposes, or for reasons of ill-
2 ness, injury or infirmity. The term would also include res-
3 cue and ambulance service personnel if such personnel
4 form an integral part of the public agency's law enforce-
5 ment activities. See section S553.215.

6 (c) Typically, employees engaged in law enforcement
7 activities include police who are regularly employed and
8 paid as such. Other agency employees with duties not spe-
9 cifically mentioned may, depending upon the particular
10 facts and pertinent statutory provisions in that jurisdic-
11 tion, meet the three tests described above. If so, they will
12 also qualify as law enforcement officers. Such employees
13 might include, for example, any law enforcement employee
14 within the legislative branch concerned with keeping public
15 peace and order and protecting life and property.

16 (d) Employees who do not meet each of the three
17 tests described above are not engaged in "law enforcement
18 activities" as that term is used in section 7(k). Employees
19 who normally would not meet each of these tests include:

- 20 (1) Building inspectors (other than those de-
21 fined in section S553.213(a)),
- 22 (2) Health inspectors,
- 23 (3) Sanitarians,

1 (4) Civilian traffic employees who direct vehicu-
2 lar and pedestrian traffic at specified intersections
3 or other control points,

4 (5) Civilian parking checkers who patrol as-
5 signed areas for the purpose of discovering parking
6 violations and issuing appropriate warnings or ap-
7 pearance notices,

8 (6) Wage and hour compliance officers,

9 (7) Equal employment opportunity compliance
10 officers, and

11 (8) Building guards whose primary duty is to
12 protect the lives and property of persons within the
13 limited area of the building.

14 (e) The term “any employee in law enforcement ac-
15 tivities” also includes, by express reference, “security per-
16 sonnel in correctional institutions”. Typically, such facili-
17 ties may include precinct house lockups. Employees of cor-
18 rectional institutions who qualify as security personnel for
19 purposes of the section 7(k) exemption are those who have
20 responsibility for controlling and maintaining custody of
21 inmates and of safeguarding them from other inmates or
22 for supervising such functions, regardless of whether their
23 duties are performed inside the correctional institution or
24 outside the institution. These employees are considered to
25 be engaged in law enforcement activities regardless of

1 their rank or of their status as “trainee”, “probationary”,
2 or “permanent”, and regardless of their assignment to du-
3 ties incidental to the performance of their law enforcement
4 activities, or to support activities of the type described in
5 paragraph (f) of this section, whether or not such assign-
6 ment is for training or familiarization purposes or for rea-
7 sons of illness, injury or infirmity.

8 (f) Not included in the term “employee in law en-
9 forcement activities” are the so-called “civilian” employees
10 of law enforcement agencies or correctional institutions
11 who engage in such support activities as those performed
12 by dispatcher, radio operators, apparatus and equipment
13 maintenance and repair workers, janitors, clerks and ste-
14 nographers. Nor does the term include employees in cor-
15 rectional institutions who engage in building repair and
16 maintenance, culinary services, teaching, or in psycho-
17 logical, medical and paramedical services. This is so even
18 though such employees may, when assigned to correctional
19 institutions, come into regular contact with the inmates
20 in the performance of their duties.

21 **§S553.212 Twenty percent limitation on nonexempt**
22 **work**

23 (a) Employees engaged in fire protection or law en-
24 forcement activities as described in sections S553.210 and
25 S553.211, may also engage in some nonexempt work

1 which is not performed as an incident to or in conjunction
2 with their fire protection or law enforcement activities.
3 For example, firefighters who work for forest conservation
4 agencies may, during slack times, plant trees and perform
5 other conservation activities unrelated to their firefighting
6 duties. The performance of such nonexempt work will not
7 defeat the § 7(k) exemption unless it exceeds 20 percent
8 of the total hours worked by that employee during the
9 workweek or applicable work period. A person who spends
10 more than 20 percent of his/her working time in non-
11 exempt activities is not considered to be an employee en-
12 gaged in fire protection or law enforcement activities for
13 purposes of this part.

14 (b) Public agency fire protection and law enforcement
15 personnel may, at their own option, undertake employ-
16 ment for the same employer on an occasional or sporadic
17 and part-time basis in a different capacity from their regu-
18 lar employment. The performance of such work does not
19 affect the application of the § 7(k) exemption with respect
20 to the regular employment. In addition, the hours of work
21 in the different capacity need not be counted as hours
22 worked for overtime purposes on the regular job, nor are
23 such hours counted in determining the 20 percent toler-
24 ance for nonexempt work discussed in paragraph (a) of
25 this section.

1 **§S553.213 Public agency employees engaged in both**
2 **fire protection and law enforcement ac-**
3 **tivities**

4 (a) Some public agencies have employees (often called
5 “public safety officers”) who engage in both fire protection
6 and law enforcement activities, depending on the agency
7 needs at the time. This dual assignment would not defeat
8 the section 7(k) exemption: *Provided*, That each of the ac-
9 tivities performed meets the appropriate tests set forth in
10 sections S553.210 and S553.211. This is so regardless of
11 how the employee’s time is divided between the two activi-
12 ties. However, all time spent in nonexempt activities by
13 public safety officers within the work period, whether per-
14 formed in connection with fire protection or law enforce-
15 ment functions, or with neither, must be combined for pur-
16 poses of the 20 percent limitation on nonexempt work dis-
17 cussed in section S553.212.

18 (b) As specified in section S553.230, the maximum
19 hours standards under section 7(k) are different for em-
20 ployees engaged in fire protection and for employees en-
21 gaged in law enforcement. For those employees who per-
22 form both fire protection and law enforcement activities,
23 the applicable standard is the one which applies to the
24 activity in which the employee spends the majority of work
25 time during the work period.

1 §S553.214 Trainees

2 The attendance at a bona fide fire or police academy
3 or other training facility, when required by the employing
4 agency, constitutes engagement in activities under section
5 7(k) only when the employee meets all the applicable tests
6 described in section S553.210 or section S553.211 (except
7 for the power of arrest for law enforcement personnel),
8 as the case may be. If the applicable tests are met, then
9 basic training or advanced training is considered inciden-
10 tal to, and part of, the employee's fire protection or law
11 enforcement activities.

12 §S553.215 Ambulance and rescue service employees

13 Ambulance and rescue service employees of a public
14 agency other than a fire protection or law enforcement
15 agency may be treated as employees engaged in fire pro-
16 tection or law enforcement activities of the type con-
17 templated by § 7(k) if their services are substantially relat-
18 ed to firefighting or law enforcement activities in that (1)
19 the ambulance and rescue service employees have received
20 training in the rescue of fire, crime, and accident victims
21 or firefighters or law enforcement personnel injured in the
22 performance of their respective, duties, and (2) the ambu-
23 lance and rescue service employees are regularly dis-
24 patched to fires, crime scenes, riots, natural disasters and
25 accidents. As provided in section S553.213(b), where em-
26 ployees perform both fire protection and law enforcement

1 activities, the applicable standard is the one which applies
2 to the activity in which the employee spends the majority
3 of work time during the work period.

4 **§S553.216 Other exemptions**

5 Although the 1974 Amendments to the FLSA as ap-
6 plied by the CAA provide special exemptions for employees
7 of public agencies engaged in fire protection and law en-
8 forcement activities, such workers may also be subject to
9 other exemptions in the Act, and public agencies may
10 claim such other applicable exemptions in lieu of § 7(k).
11 For example, section 13(a)(1) as applied by the CAA pro-
12 vides a complete minimum wage and overtime pay exemp-
13 tion for any employee employed in a bona fide executive,
14 administrative, or professional capacity, as those terms
15 are defined and delimited in Part S541. The section
16 13(a)(1) exemption can be claimed for any fire protection
17 or law enforcement employee who meets all of the tests
18 specified in Part S541 relating to duties, responsibilities,
19 and salary. Thus, high ranking police officials who are en-
20 gaged in law enforcement activities, may also, depending
21 on the facts, qualify for the section 13(a)(1) exemption
22 as “executive” employees. Similarly, certain criminal in-
23 vestigative agents may qualify as “administrative” em-
24 ployees under section 13(a)(1).

1 TOUR OF DUTY AND COMPENSABLE HOURS OF WORK
2 RULES

3 **§S553.220 “Tour of duty” defined**

4 (a) The term “tour of duty” is a unique concept ap-
5 plicable only to employees for whom the section 7(k) ex-
6 emption is claimed. This term, as used in section 7(k),
7 means the period of time during which an employee is con-
8 sidered to be on duty for purposes of determining compen-
9 sable hours. It may be a scheduled or unscheduled period.
10 Such periods include “shifts” assigned to employees often
11 days in advance of the performance of the work. Scheduled
12 periods also include time spent in work outside the “shift”
13 which the public agency employer assigns. For example,
14 a police officer may be assigned to crowd control during
15 a parade or other special event outside of his or her shift.

16 (b) Unscheduled periods include time spent in court
17 by police officers, time spent handling emergency situa-
18 tions, and time spent working after a shift to complete
19 an assignment. Such time must be included in the compen-
20 sable tour of duty even though the specific work performed
21 may not have been assigned in advance.

22 (c) The tour of duty does not include time spent
23 working for a separate and independent employer in cer-
24 tain types of special details as provided in section
25 S553.227.

1 §S553.221 Compensable hours of work

2 (a) The rules under the FLSA as applied by the CAA
3 on compensable hours of work are applicable to employees
4 for whom the section 7(k) exemption is claimed. Special
5 rules for sleep time (section S553.222) apply to both law
6 enforcement and firefighting employees for whom the sec-
7 tion 7(k) exemption is claimed. Also, special rules for meal
8 time apply in the case of firefighters (section S553.223).

9 (b) Compensable hours of work generally include all
10 of the time during which an employee is on duty on the
11 employer's premises or at a prescribed workplace, as well
12 as all other time during which the employee is suffered
13 or permitted to work for the employer. Such time includes
14 all pre-shift and post-shift activities which are an integral
15 part of the employee's principal activity or which are close-
16 ly related to the performance of the principal activity, such
17 as attending roll call, writing up and completing tickets
18 or reports, and washing and re-racking fire hoses.

19 (c) Time spent away from the employer's premises
20 under conditions that are so circumscribed that they re-
21 strict the employee from effectively using the time for per-
22 sonal pursuits also constitutes compensable hours of work.
23 For example, where a police station must be evacuated be-
24 cause of an electrical failure and the employees are ex-
25 pected to remain in the vicinity and return to work after
26 the emergency has passed, the entire time spent away

1 from the premises is compensable. The employees in this
2 example cannot use the time for their personal pursuits.

3 (d) An employee who is not required to remain on
4 the employer's premises but is merely required to leave
5 word at home or with company officials where he or she
6 may be reached is not working while on call. Time spent
7 at home on call may or may not be compensable depending
8 on whether the restrictions placed on the employee pre-
9 clude using the time for personal pursuits. Where, for ex-
10 ample, a firefighter has returned home after the shift, with
11 the understanding that he or she is expected to return to
12 work in the event of an emergency in the night, such time
13 spent at home is normally not compensable. On the other
14 hand, where the conditions placed on the employee's activi-
15 ties are so restrictive that the employee cannot use the
16 time effectively for personal pursuits, such time spent on
17 call is compensable.

18 (e) Normal home to work travel is not compensable,
19 even where the employee is expected to report to work at
20 a location away from the location of the employer's prem-
21 ises.

22 (f) A police officer, who has completed his or her tour
23 of duty and who is given a patrol car to drive home and
24 use on personal business, is not working during the travel
25 time even where the radio must be left on so that the offi-

1 cer can respond to emergency calls. Of course, the time
2 spent in responding to such calls is compensable.

3 **§S553.222 Sleep time**

4 (a) Where a public agency elects to pay overtime com-
5 pensation to firefighters and/or law enforcement personnel
6 in accordance with section 7(a)(1) of the Act, the public
7 agency may exclude sleep time from hours worked if all
8 the conditions for the exclusion of such time are met.

9 (b) Where the employer has elected to use the section
10 7(k) exemption, sleep time cannot be excluded from the
11 compensable hours of work where—

12 (1) the employee is on a tour of duty of less
13 than 24 hours, and

14 (2) the employee is on a tour of duty of exactly
15 24 hours.

16 (c) Sleep time can be excluded from compensable
17 hours of work, however, in the case of police officers or
18 firefighters who are on a tour of duty of more than 24
19 hours, but only if there is an expressed or implied agree-
20 ment between the employer and the employees to exclude
21 such time. In the absence of such an agreement, the sleep
22 time is compensable. In no event shall the time excluded
23 as sleep time exceed 8 hours in a 24-hour period. If the
24 sleep time is interrupted by a call to duty, the interruption
25 must be counted as hours worked. If the sleep period is

1 interrupted to such an extent that the employee cannot
2 get a reasonable night's sleep (which, for enforcement pur-
3 poses means at least 5 hours), the entire time must be
4 counted as hours of work.

5 **§S553.223 Meal time**

6 (a) If a public agency elects to pay overtime com-
7 pensation to firefighters and law enforcement personnel
8 in accordance with section 7(a)(1) of the Act, the public
9 agency may exclude meal time from hours worked if all
10 the statutory tests for the exclusion of such time are met.

11 (b) If a public agency elects to use the section 7(k)
12 exemption, the public agency may, in the case of law en-
13 forcement personnel, exclude meal time from hours worked
14 on tours of duty of 24 hours or less: *Provided*, That the
15 employee is completely relieved from duty during the meal
16 period, and all the other statutory tests for the exclusion
17 of such time are met. On the other hand, where law en-
18 forcement personnel are required to remain on call in bar-
19 racks or similar quarters, or are engaged in extended sur-
20 veillance activities (e.g., stakeouts), they are not consid-
21 ered to be completely relieved from duty, and any such
22 meal periods would be compensable.

23 (c) With respect to firefighters employed under sec-
24 tion 7(k), who are confined to a duty station, the legisla-
25 tive history of the Act indicates congressional intent to

1 mandate a departure from the usual FLSA “hours of
2 work” rules and adoption of an overtime standard keyed
3 to the unique concept of “tour of duty” under which fire-
4 fighters are employed. Where the public agency elects to
5 use the section 7(k) exemption for firefighters, meal time
6 cannot be excluded from the compensable hours of work
7 where (1) the firefighter is on a tour of duty of less than
8 24 hours, and (2) where the firefighter is on a tour of
9 duty of exactly 24 hours.

10 (d) In the case of police officers or firefighters who
11 are on a tour of duty of more than 24 hours, meal time
12 may be excluded from compensable hours of work provided
13 that the statutory tests for exclusion of such hours are
14 met.

15 **§S553.224 “Work period” defined**

16 (a) As used in section 7(k), the term “work period”
17 refers to any established and regularly recurring period
18 of work which, under the terms of the Act and legislative
19 history, cannot be less than 7 consecutive days nor more
20 than 28 consecutive days. Except for this limitation, the
21 work period can be of any length, and it need not coincide
22 with the duty cycle or pay period or with a particular day
23 of the week or hour of the day. Once the beginning and
24 ending time of an employee’s work period is established,
25 however, it remains fixed regardless of how many hours

1 are worked within the period. The beginning and ending
2 of the work period may be changed: *Provided*, That the
3 change is intended to be permanent and is not designed
4 to evade the overtime compensation requirements of the
5 Act.

6 (b) An employer may have one work period applicable
7 to all employees, or different work periods for different
8 employees or groups of employees.

9 **§S553.225 Early relief**

10 It is a common practice among employees engaged
11 in fire protection activities to relieve employees on the pre-
12 vious shift prior to the scheduled starting time. Such early
13 relief time may occur pursuant to employee agreement, ei-
14 ther expressed or implied. This practice will not have the
15 effect of increasing the number of compensable hours of
16 work for employees employed under section 7(k) where it
17 is voluntary on the part of the employees and does not
18 result, over a period of time, in their failure to receive
19 proper compensation for all hours actually worked. On the
20 other hand, if the practice is required by the employer,
21 the time involved must be added to the employee's tour
22 of duty and treated as compensable hours of work.

23 **§S553.226 Training time**

24 (a) The general rules for determining the compen-
25 sability of training time under the FLSA apply to employ-

1 ees engaged in law enforcement or fire protection activi-
2 ties.

3 (b) While time spent in attending training required
4 by an employer is normally considered compensable hours
5 of work, following are situations where time spent by em-
6 ployees in required training is considered to be non-
7 compensable:

8 (1) Attendance outside of regular working
9 hours at specialized or follow-up training, which is
10 required by law for certification of public and private
11 sector employees within a particular governmental
12 jurisdiction (e.g., certification of public and private
13 emergency rescue workers), does not constitute com-
14 pensable hours of work for public employees within
15 that jurisdiction and subordinate jurisdictions.

16 (2) Attendance outside of regular working
17 hours at specialized or follow-up training, which is
18 required for certification of employees of a govern-
19 mental jurisdiction by law of a higher level of Gov-
20 ernment, does not constitute compensable hours of
21 work.

22 (3) Time spent in the training described in
23 paragraphs (b) (1) or (2) of this section is not com-
24 pensable, even if all or part of the costs of the train-
25 ing is borne by the employer.

1 (c) Police officers or firefighters, who are in attend-
2 ance at a police or fire academy or other training facility,
3 are not considered to be on duty during those times when
4 they are not in class or at a training session, if they are
5 free to use such time for personal pursuits. Such free time
6 is not compensable.

7 **§S553.227 Outside employment**

8 (a) Section 7(p)(1) makes special provision for fire
9 protection and law enforcement employees of public agen-
10 cies who, at their own option, perform special duty work
11 in fire protection, law enforcement or related activities for
12 a separate and independent employer (public or private)
13 during their off-duty hours. The hours of work for the sep-
14 arate and independent employer are not combined with the
15 hours worked for the primary public agency employer for
16 purposes of overtime compensation.

17 (b) Section 7(p)(1) applies to such outside employ-
18 ment provided (1) the special detail work is performed
19 solely at the employee's option, and (2) the two employers
20 are in fact separate and independent.

21 (c) Whether two employers are, in fact, separate and
22 independent can only be determined on a case-by-case
23 basis.

24 (d) The primary employer may facilitate the employ-
25 ment or affect the conditions of employment of such em-

1 ployees. For example, a police department may maintain
2 a roster of officers who wish to perform such work. The
3 department may also select the officers for special details
4 from a list of those wishing to participate, negotiate their
5 pay, and retain a fee for administrative expenses. The de-
6 partment may require that the separate and independent
7 employer pay the fee for such services directly to the de-
8 partment, and establish procedures for the officers to re-
9 ceive their pay for the special details through the agency's
10 payroll system. Finally, the department may require that
11 the officers observe their normal standards of conduct dur-
12 ing such details and take disciplinary action against those
13 who fail to do so.

14 (e) Section 7(p)(1) applies to special details even
15 where a State law or local ordinance requires that such
16 work be performed and that only law enforcement or fire
17 protection employees of a public agency in the same juris-
18 diction perform the work. For example, a city ordinance
19 may require the presence of city police officers at a con-
20 vention center during concerts or sports events. If the offi-
21 cers perform such work at their own option, the hours of
22 work need not be combined with the hours of work for
23 their primary employer in computing overtime compensa-
24 tion.

1 (f) The principles in paragraphs (d) and (e) of this
2 section with respect to special details of public agency fire
3 protection and law enforcement employees under section
4 7(p)(1) are exceptions to the usual rules on joint employ-
5 ment set forth in part 791 of this title.

6 (g) Where an employee is directed by the public agen-
7 cy to perform work for a second employer, section 7(p)(1)
8 does not apply. Thus, assignments of police officers out-
9 side of their normal work hours to perform crowd control
10 at a parade, where the assignments are not solely at the
11 option of the officers, would not qualify as special details
12 subject to this exception. This would be true even if the
13 parade organizers reimburse the public agency for provid-
14 ing such services.

15 (h) Section 7(p)(1) does not prevent a public agency
16 from prohibiting or restricting outside employment by its
17 employees.

18 OVERTIME COMPENSATION RULES

19 **§S553.230 Maximum hours standards for work peri-**
20 **ods of 7 to 28 days—section 7(k)**

21 (a) For those employees engaged in fire protection
22 activities who have a work period of at least 7 but less
23 than 28 consecutive days, no overtime compensation is re-
24 quired under section 7(k) until the number of hours
25 worked exceeds the number of hours which bears the same

1 relationship to 212 as the number of days in the work
 2 period bears to 28.

3 (b) For those employees engaged in law enforcement
 4 activities (including security personnel in correctional in-
 5 stitutions) who have a work period of at least 7 but less
 6 than 28 consecutive days, no overtime compensation is re-
 7 quired under section 7(k) until the number of hours
 8 worked exceeds the number of hours which bears the same
 9 relationship to 171 as the number of days in the work
 10 period bears to 28.

11 (c) The ratio of 212 hours to 28 days for employees
 12 engaged in fire protection activities is 7.57 hours per day
 13 (rounded) and the ratio of 171 hours to 28 days for em-
 14 ployees engaged in law enforcement activities is 6.11 hours
 15 per day (rounded). Accordingly, overtime compensation (in
 16 premium pay or compensatory time) is required for all
 17 hours worked in excess of the following maximum hours
 18 standards (rounded to the nearest whole hour):

Work period (days)	Maximum hours stand-ards	
	Fire protec-tion	Law en-forcement
28	212	171
27	204	165
26	197	159
25	189	153
24	182	147
23	174	141
22	167	134
21	159	128
20	151	122
19	144	116
18	136	110

Work period (days)	Maximum hours standards	
	Fire protection	Law enforcement
17	129	104
16	121	98
15	114	92
14	106	86
13	98	79
12	91	73
11	83	67
10	76	61
9	68	55
8	61	49
7	53	43

1 §S553.231 Compensatory time off

2 (a) Law enforcement and fire protection employees
3 who are subject to the section 7(k) exemption may receive
4 compensatory time off in lieu of overtime pay for hours
5 worked in excess of the maximum for their work period
6 as set forth in section S553.230.

7 (b) Section 7(k) permits public agencies to balance
8 the hours of work over an entire work period for law en-
9 forcement and fire protection employees. For example, if
10 a firefighter's work period is 28 consecutive days, and he
11 or she works 80 hours in each of the first two weeks, but
12 only 52 hours in the third week, and does not work in
13 the fourth week, no overtime compensation (in cash wages
14 or compensatory time) would be required since the total
15 hours worked do not exceed 212 for the work period. If
16 the same firefighter had a work period of only 14 days,
17 overtime compensation or compensatory time off would be

1 due for 54 hours (160 minus 106 hours) in the first 14
2 day work period.

3 **§S553.232 Overtime pay requirements**

4 If a public agency pays employees subject to section
5 7(k) for overtime hours worked in cash wages rather than
6 compensatory time off, such wages must be paid at one
7 and one-half times the employees' regular rates of pay.

8 **§S553.233 "Regular rate" defined**

9 The statutory rules for computing an employee's
10 "regular rate", for purposes of the Act's overtime pay re-
11 quirements are applicable to employees for whom the sec-
12 tion 7(k) exemption is claimed when overtime compensa-
13 tion is provided in cash wages.

14 SUBPART D—COMPENSATORY TIME-OFF FOR OVERTIME
15 EARNED BY EMPLOYEES WHOSE WORK SCHEDULE
16 DIRECTLY DEPENDS UPON THE SCHEDULE OF THE
17 SENATE

18 **§S553.301 Definition of "directly depends"**

19 For the purposes of this Part, a covered employee's
20 work schedule "directly depends" on the schedule of the
21 Senate only if the eligible employee performs work that
22 directly supports the conduct of legislative or other busi-
23 ness in the chamber and works hours that regularly
24 change in response to the schedule of the House and the
25 Senate.

1 **§S553.302 Overtime compensation and compen-**
2 **satory time off for an employee whose**
3 **work schedule directly depends upon the**
4 **schedule of the Senate**

5 No employing office shall be deemed to have violated
6 section 203(a)(1) of the CAA, which applies the protec-
7 tions of section 7(a) of the Fair Labor Standards Act
8 (“FLSA”) to covered employees and employing office, by
9 employing any employee for a workweek in excess of the
10 maximum workweek applicable to such employee under
11 section 7(a) of the FLSA where the employee’s work
12 schedule directly depends on the schedule of the Senate
13 within the meaning of §S553.301, and: (a) the employee
14 is compensated at the rate of time-and-a-half in pay for
15 all hours in excess of 40 and up to 60 hours in a work-
16 week, and (b) the employee is compensated at the rate
17 of time-and-a-half in either pay or in time off for all hours
18 in excess of 60 hours in a workweek.

19 **§S553.303 Using compensatory time off**

20 An employee who has accrued compensatory time off
21 under §S553.302, upon his or her request, shall be per-
22 mitted by the employing office to use such time within
23 a reasonable period after making the request, unless the
24 employing office makes a bona fide determination that the
25 needs of the operations of the office do not allow the tak-
26 ing of compensatory time off at the time of the request.

1 An employee may renew the request at a subsequent time.
 2 An employing office may also, upon reasonable notice, re-
 3 quire an employee to use accrued compensatory time-off.

4 **§S553.304 Payment of overtime compensation for**
 5 **accrued compensatory time off as of ter-**
 6 **mination of service**

7 An employee who has accrued compensatory time au-
 8 thorized by this regulation shall, upon termination of em-
 9 ployment, be paid for the unused compensatory time at
 10 the rate earned by the employee at the time the employee
 11 receives such payment.

12 PART S570—CHILD LABOR REGULATIONS

SUBPART A—GENERAL

Sec.

S570.00 Corresponding section table of the FLSA regulations of the Labor
 Department and the CAA regulations of the Office of Compli-
 ance.

S570.1 Definitions.

S570.2 Minimum age standards.

SUBPART C—EMPLOYMENT OF MINORS BETWEEN 14 AND 16 YEARS OF
 AGE (CHILD LABOR REG. 3)

S570.31 Determination.

S570.32 Effect of this subpart.

S570.33 Occupations.

S570.35 Periods and conditions of employment.

1 (d) [Reserved]

2 (e) [Reserved]

3 (f) Secretary or Secretary of Labor means the Sec-
4 retary of Labor, United States Department of Labor, or
5 his authorized representative.

6 (g) Wage and Hour Division means the Wage and
7 Hour Division, Employment Standards Administration,
8 United States Department of Labor.

9 (h) Administrator means the Administrator of the
10 Wage and Hour Division or his authorized representative.

11 **§S570.2 Minimum age standards**

12 (a) All occupations except in agriculture. (1) The Act,
13 in section 3(1), sets a general 16-year minimum age which
14 applies to all employment subject to its child labor provi-
15 sions in any occupation other than in agriculture, with the
16 following exceptions:

17 (i) The Act authorizes the Secretary of Labor
18 to provide by regulation or by order that the employ-
19 ment of employees between the ages of 14 and 16
20 years in occupations other than manufacturing and
21 mining shall not be deemed to constitute oppressive
22 child labor, if and to the extent that the Secretary
23 of Labor determines that such employment is con-
24 fined to periods which will not interfere with their
25 schooling and to conditions which will not interfere

1 with their health and well-being (see subpart C of
2 this part); and

3 (ii) The Act sets an 18-year minimum age with
4 respect to employment in any occupation found and
5 declared by the Secretary of Labor to be particularly
6 hazardous for the employment of minors of such age
7 or detrimental to their health or well-being.

8 (2) The Act exempts from its minimum age require-
9 ments the employment by a parent of his own child, or
10 by a person standing in place of a parent of a child in
11 his custody, except in occupations to which the 18-year
12 age minimum applies and in manufacturing and mining
13 occupations.

14 SUBPART B—[RESERVED]

15 SUBPART C—EMPLOYMENT OF MINORS BETWEEN 14
16 AND 16 YEARS OF AGE (CHILD LABOR REG. 3)

17 **§S570.31 Determination**

18 The employment of minors between 14 and 16 years
19 of age in the occupations, for the periods, and under the
20 conditions hereafter specified does not interfere with their
21 schooling or with their health and well-being and shall not
22 be deemed to be oppressive child labor.

23 **§S570.32 Effect of this subpart**

24 In all occupations covered by this subpart the employ-
25 ment (including suffering or permitting to work) by an

1 employer of minor employees between 14 and 16 years of
2 age for the periods and under the conditions specified in
3 § S570.35 shall not be deemed to be oppressive child labor
4 within the meaning of the Fair Labor Standards Act of
5 1938.

6 **§S570.33 Occupations**

7 This subpart shall apply to all occupations other than
8 the following:

9 (a) Manufacturing, mining, or processing occupa-
10 tions, including occupations requiring the performance of
11 any duties in work rooms or work places where goods are
12 manufactured, mined, or otherwise processed;

13 (b) Occupations which involve the operation or tend-
14 ing of hoisting apparatus or of any power-driven machin-
15 ery other than office machines;

16 (c) The operation of motor vehicles or service as help-
17 ers on such vehicles;

18 (d) Public messenger service;

19 (e) Occupations which the Secretary of Labor may,
20 pursuant to section 3(1) of the Fair Labor Standards Act
21 and Reorganization Plan No. 2, issued pursuant to the
22 Reorganization Act of 1945, find and declare to be haz-
23 ardous for the employment of minors between 16 and 18
24 years of age or detrimental to their health or well-being;

25 (f) Occupations in connection with:

- 1 (1) Transportation of persons or property by
2 rail, highway, air, water, pipeline, or other means;
- 3 (2) Warehousing and storage;
- 4 (3) Communications and public utilities;
- 5 (4) Construction (including demolition and re-
6 pair); except such office (including ticket office)
7 work, or sales work, in connection with paragraphs
8 (f) (1), (2), (3), and (4) of this section, as does not
9 involve the performance of any duties on trains,
10 motor vehicles, aircraft, vessels, or other media of
11 transportation or at the actual site of construction
12 operations.

13 **§S570.35 Periods and conditions of employment**

14 (a) Except as provided in paragraph (b) of this sec-
15 tion, employment in any of the occupations to which this
16 subpart is applicable shall be confined to the following pe-
17 riods:

- 18 (1) Outside school hours;
- 19 (2) Not more than 40 hours in any 1 week
20 when school is not in session;
- 21 (3) Not more than 18 hours in any 1 week
22 when school is in session;
- 23 (4) Not more than 8 hours in any 1 day when
24 school is not in session;

1 (5) Not more than 3 hours in any 1 day when
2 school is in session;

3 (6) Between 7 a.m. and 7 p.m. in any 1 day,
4 except during the summer (June 1 through Labor
5 Day) when the evening hour will be 9 p.m.

6 APPLICATION OF RIGHTS AND PROTECTIONS
7 OF THE EMPLOYEE POLYGRAPH PROTEC-
8 TION ACT OF 1988

SUBPART A—GENERAL

Sec.

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SUBPART E—[RESERVED]

- 1.40 [Reserved]

1 SUBPART A—GENERAL

2 **SEC. 1.1 PURPOSE AND SCOPE.**

3 Enacted into law on January 23, 1995, the Congres-
4 sional Accountability Act (“CAA”) directly applies the
5 rights and protections of eleven Federal labor and employ-
6 ment law statutes to covered employees and employing of-
7 fices within the legislative branch. Section 204(a) of the
8 CAA, 2 U.S.C. § 1314(a) provides that no employing office
9 may require any covered employee (including a covered
10 employee who does not work in that employing office) to
11 take a lie detector test where such test would be prohibited
12 if required by an employer under paragraphs (1), (2) or
13 (3) of section 3 of the Employee Polygraph Protection Act
14 of 1988 (EPPA), 29 U.S.C. § 2002 (1), (2) or (3). The
15 purpose of this Part is to set forth the regulations to carry
16 out the provisions of section 204 of the CAA.

17 Subpart A contains the provisions generally applica-
18 ble to covered employers, including the requirements relat-
19 ing to the prohibitions on lie detector use. Subpart B sets
20 forth rules regarding the statutory exemptions from appli-
21 cation of section 204 of the CAA. Subpart C sets forth
22 the restrictions on polygraph usage under such exemp-
23 tions. Subpart D sets forth the rules on recordkeeping and
24 the disclosure of polygraph test information.

1 **SEC. 1.2 DEFINITIONS.**

2 For purposes of this part:

3 (a) Act or CAA means the Congressional Account-
4 ability Act of 1995 (P.L. 104-1, 109 Stat. 3, 2 U.S.C.
5 §§ 1301-1438).

6 (b) EPPA means the Employee Polygraph Protection
7 Act of 1988 (Pub. L. 100-347, 102 Stat. 646, 29 U.S.C.
8 §§ 2001-2009) as applied to covered employees and em-
9 ploying offices by section 204 of the CAA.

10 (c) The term covered employee means any employee
11 of (1) the House of Representatives; (2) the Senate; (3)
12 the Capitol Guide Service; (4) the Congressional Budget
13 Office; (5) the Office of the Architect of the Capitol; (6)
14 the Office of the Attending Physician; (7) the Office of
15 Compliance; or (8) the Office of Technology Assessment.

16 (d) The term employee includes an applicant for em-
17 ployment and a former employee.

18 (e) The term employee of the Office of the Architect
19 of the Capitol includes any employee of the Office of the
20 Architect of the Capitol, the Botanic Gardens, or the Sen-
21 ate Restaurants.

22 (f) The term employee of the Capitol Police includes
23 any member or officer of the Capitol Police.

24 (g) The term employee of the House of Representa-
25 tives includes an individual occupying a position the pay
26 for which is disbursed by the Clerk of the House of Rep-

1 representatives, or another official designated by the House
2 of Representatives, or any employment position in an en-
3 tity that is paid with funds derived from the clerk-hire
4 allowance of the House of Representatives but not any
5 such individual employed by any entity listed in subpara-
6 graphs (3) through (8) of paragraph (c) above.

7 (h) The term employee of the Senate includes any
8 employee whose pay is disbursed by the Secretary of the
9 Senate, but not any such individual employed by any en-
10 tity listed in subparagraphs (3) through (8) of paragraph
11 (c) above.

12 (i) The term employing office means (1) the personal
13 office of a Member of the House of Representatives or of
14 a Senator; (2) a committee of the House of Representa-
15 tives or the Senate or a joint committee; (3) any other
16 office headed by a person with the final authority to ap-
17 point, hire, discharge, and set the terms, conditions, or
18 privileges of the employment of an employee of the House
19 of Representatives or the Senate; or (4) the Capitol Guide
20 Board, the Congressional Budget Office, the Office of the
21 Architect of the Capitol, the Office of the Attending Physi-
22 cian, the Office of Compliance, and the Office of Tech-
23 nology Assessment. The term employing office includes
24 any person acting directly or indirectly in the interest of
25 an employing office in relation to an employee or prospec-

1 tive employee. A polygraph examiner either employed for
2 or whose services are retained for the sole purpose of ad-
3 ministering polygraph tests ordinarily would not be
4 deemed an employing office with respect to the examinees.
5 Any reference to “employer” in these regulations includes
6 employing offices.

7 (j)(1) The term lie detector means a polygraph,
8 deceptograph, voice stress analyzer, psychological stress
9 evaluator, or any other similar device (whether mechanical
10 or electrical) that is used, or the results of which are used,
11 for the purpose of rendering a diagnostic opinion regard-
12 ing the honesty or dishonesty of an individual. Voice stress
13 analyzers, or psychological stress evaluators, include any
14 systems that utilize voice stress analysis, whether or not
15 an opinion on honesty or dishonesty is specifically ren-
16 dered.

17 (2) The term lie detector does not include medical
18 tests used to determine the presence or absence of con-
19 trolled substances or alcohol in bodily fluids. Also not in-
20 cluded in the definition of lie detector are written or oral
21 tests commonly referred to as “honesty” or “paper and
22 pencil” tests, machine-scored or otherwise; and graphology
23 tests commonly referred to as handwriting tests.

24 (k) The term polygraph means an instrument that—

1 (1) records continuously, visually, permanently,
2 and simultaneously changes in cardiovascular, res-
3 piratory, and electrodermal patterns as minimum in-
4 strumentation standards; and

5 (2) is used, or the results of which are used, for
6 the purpose of rendering a diagnostic opinion re-
7 garding the honesty or dishonesty of an individual.

8 (l) Board means the Board of Directors of the Office
9 of Compliance.

10 (m) Office means the Office of Compliance.

11 **SEC. 1.3 COVERAGE.**

12 The coverage of section 204 of the Act extends to
13 any “covered employee” or “covered employing office”
14 without regard to the number of employees or the employ-
15 ing office’s effect on interstate commerce.

16 **SEC. 1.4 PROHIBITIONS ON LIE DETECTOR USE.**

17 (a) Section 204 of the CAA provides that, subject to
18 the exemptions of the EPPA incorporated into the CAA
19 under section 225(f) of the CAA, as set forth in section
20 1.10 through 1.12 of this Part, employing offices are pro-
21 hibited from:

22 (1) Requiring, requesting, suggesting or caus-
23 ing, directly or indirectly, any covered employee or
24 prospective employee to take or submit to a lie de-
25 tector test;

1 (2) Using, accepting, or inquiring about the re-
2 sults of a lie detector test of any covered employee
3 or prospective employee; and

4 (3) Discharging, disciplining, discriminating
5 against, denying employment or promotion, or
6 threatening any covered employee or prospective em-
7 ployee to take such action for refusal or failure to
8 take or submit to such test, or on the basis of the
9 results of a test.

10 The above prohibitions apply irrespective of whether
11 the covered employee referred to in paragraphs (1), (2)
12 or (3), above, works in that employing office.

13 (b) An employing office that reports a theft or other
14 incident involving economic loss to police or other law en-
15 forcement authorities is not engaged in conduct subject
16 to the prohibitions under paragraph (a) of this section if,
17 during the normal course of a subsequent investigation,
18 such authorities deem it necessary to administer a poly-
19 graph test to a covered employee(s) suspected of involve-
20 ment in the reported incident. Employing offices that co-
21 operate with police authorities during the course of their
22 investigations into criminal misconduct are likewise not
23 deemed engaged in prohibitive conduct: *Provided*, That
24 such cooperation is passive in nature. For example, it is
25 not uncommon for police authorities to request employees

1 suspected of theft or criminal activity to submit to a poly-
2 graph test during the employee's tour of duty since, as
3 a general rule, suspect employees are often difficult to lo-
4 cate away from their place of employment. Allowing a test
5 on the employing office's premises, releasing a covered em-
6 ployee during working hours to take a test at police head-
7 quarters, and other similar types of cooperation at the re-
8 quest of the police authorities would not be construed as
9 "requiring, requesting, suggesting, or causing, directly or
10 indirectly, any covered employee * * * to take or submit
11 to a lie detector test". Cooperation of this type must be
12 distinguished from actual participation in the testing of
13 employees suspected of wrongdoing, either through the ad-
14 ministration of a test by the employing office at the re-
15 quest or direction of police authorities, or through reim-
16 bursement by the employing office of tests administered
17 by police authorities to employees. In some communities,
18 it may be a practice of police authorities to request testing
19 by employing offices of employees before a police investiga-
20 tion is initiated on a reported incident. In other commu-
21 nities, police examiners are available to covered employing
22 offices, on a cost reimbursement basis, to conduct tests
23 on employees suspected by an employing office of wrong-
24 doing. All such conduct on the part of employing offices

1 is deemed within the prohibitions of section 204 of the
2 CAA.

3 (c) The receipt by an employing office of information
4 from a polygraph test administered by police authorities
5 pursuant to an investigation is prohibited by section 3(2)
6 of the EPPA. (See paragraph (a)(2) of this section.)

7 (d) The simulated use of a polygraph instrument so
8 as to lead an individual to believe that an actual test is
9 being or may be performed (e.g., to elicit confessions or
10 admissions of guilt) constitutes conduct prohibited by
11 paragraph (a) of this section. Such use includes the con-
12 nection of a covered employee or prospective employee to
13 the instrument without any intention of a diagnostic pur-
14 pose, the placement of the instrument in a room used for
15 interrogation unconnected to the covered employee or pro-
16 spective employee, or the mere suggestion that the instru-
17 ment may be used during the course of the interview.

18 (e) The Capitol Police may not require a covered em-
19 ployee not employed by the Capitol Police to take a lie
20 detector test (on its own initiative or at the request of
21 another employing office) except where the Capitol Police
22 administers such lie detector test as part of an “ongoing
23 investigation” by the Capitol Police. For the purpose of
24 this subsection, the definition of “ongoing investigation”
25 contained in section 1.12(b) shall apply.

1 **SEC. 1.5 EFFECT ON OTHER LAWS OR AGREEMENTS.**

2 (a) Section 204 of the CAA does not preempt any
3 otherwise applicable provision of Federal law or any rule
4 or regulation of the House or Senate or any negotiated
5 collective bargaining agreement that prohibits lie detector
6 tests or is more restrictive with respect to the use of lie
7 detector tests.

8 (b)(1) This provision applies to all aspects of the use
9 of lie detector tests, including procedural safeguards, the
10 use of test results, the rights and remedies provided
11 examinees, and the rights, remedies, and responsibilities
12 of examiners and employing offices.

13 (2) For example, a collective bargaining agreement
14 that provides greater protection to an examinee would
15 apply in addition to the protection provided in section 204
16 of the CAA.

17 **SEC. 1.6 NOTICE OF PROTECTION.**

18 Pursuant to section 301(h) of the CAA, the Office
19 shall prepare, in a manner suitable for posting, a notice
20 explaining the provisions of section 204 of the CAA. Cop-
21 ies of such notice may be obtained from the Office of Com-
22 pliance.

23 **SEC. 1.7 AUTHORITY OF THE BOARD.**

24 Pursuant to sections 204 and 304 of the CAA, the
25 Board is authorized to issue regulations to implement the
26 rights and protections of the EPPA. Section 204(c) directs

1 the Board to promulgate regulations implementing section
2 204 that are “the same as substantive regulations promul-
3 gated by the Secretary of Labor to implement the statu-
4 tory provisions referred to in subsections (a) and (b) [of
5 section 204 of the CAA] except insofar as the Board may
6 determine, for good cause shown . . . that a modification
7 of such regulations would be more effective for the imple-
8 mentation of the rights and protections under this sec-
9 tion”. The regulations issued by the Board herein are on
10 all matters for which section 204 of the CAA requires a
11 regulation to be issued. Specifically, it is the Board’s con-
12 sidered judgment, based on the information available to
13 it at the time of promulgation of these regulations, that,
14 with the exception of the regulations adopted and set forth
15 herein, there are no other “substantive regulations pro-
16 mulgated by the Secretary of Labor to implement the stat-
17 utory provisions referred to in subsections (a) and (b) [of
18 section 204 of the CAA]”.

19 In promulgating these regulations, the Board has
20 made certain technical and nomenclature changes to the
21 regulations as promulgated by the Secretary. Such
22 changes are intended to make the provisions adopted ac-
23 cord more naturally to situations in the legislative branch.
24 However, by making these changes, the Board does not
25 intend a substantive difference between these regulations

1 and those of the Secretary from which they are derived.
2 Moreover such changes, in and of themselves, are not in-
3 tended to constitute an interpretation of the regulation or
4 of the statutory provisions of the CAA upon which they
5 are based.

6 **SEC. 1.8 EMPLOYMENT RELATIONSHIP.**

7 Subject to the exemptions incorporated into the CAA
8 by section 225(f), section 204 applies the prohibitions on
9 the use of lie detectors by employing offices with respect
10 to covered employees irrespective of whether a covered em-
11 ployee works in that employing office. Sections 101 (3),
12 (4) and 204 of the CAA also apply EPPA prohibitions
13 against discrimination to applicants for employment and
14 former employees of a covered employing office. For exam-
15 ple, an employee may quit rather than take a lie detector
16 test. The employing office cannot discriminate or threaten
17 to discriminate in any manner against that person (such
18 as by providing bad references in the future) because of
19 that person's refusal to be tested. Similarly, an employing
20 office cannot discriminate or threaten to discriminate in
21 any manner against that person because that person files
22 a complaint, institutes a proceeding, testifies in a proceed-
23 ing, or exercises any right under section 204 of the CAA.
24 (See section 207 of the CAA.)

1 (c) Section 7(b)(2)(A) of the EPPA, incorporated
2 into the CAA under section 225(f) of the CAA, provides
3 that nothing in the EPPA shall be construed to prohibit
4 the administration of any lie detector test by the Federal
5 Government, in the performance of any intelligence or
6 counterintelligence function of the National Security
7 Agency, the Defense Intelligence Agency, or the Central
8 Intelligence Agency, to any individual employed by, as-
9 signed to, or detailed to any such agency; or any expert
10 or consultant under contract to any such agency; or any
11 employee of a contractor to such agency; or any individual
12 applying for a position in any such agency; or any individ-
13 ual assigned to a space where sensitive cryptologic infor-
14 mation is produced, processed, or stored for any such
15 agency.

16 (d) Section 7(b)(2)(B) of the EPPA, incorporated
17 into the CAA under section 225(f) of the CAA, provides
18 that nothing in the EPPA shall be construed to prohibit
19 the administration of any lie detector test by the Federal
20 Government, in the performance of any intelligence or
21 counterintelligence function, to any covered employee
22 whose duties involve access to information that has been
23 classified at the level of top secret or designated as being
24 within a special access program under section 4.2 (a) of
25 Executive Order 12356 (or a successor Executive order).

1 (c) Counterintelligence for purposes of the above
2 paragraphs means information gathered and activities
3 conducted to protect against espionage and other clandes-
4 tine intelligence activities, sabotage, terrorist activities, or
5 assassinations conducted for or on behalf of foreign gov-
6 ernments, or foreign or domestic organizations or persons.

7 (d) Lie detector tests of persons described in the
8 above paragraphs will be administered in accordance with
9 applicable Department of Defense directives and regula-
10 tions, or other regulations and directives governing the use
11 of such tests by the United States Government, as applica-
12 ble.

13 **SEC. 1.12 EXEMPTION FOR EMPLOYING OFFICES CON-**
14 **DUCTING INVESTIGATIONS OF ECONOMIC**
15 **LOSS OR INJURY.**

16 (a) Section 7(d) of the EPPA, incorporated into the
17 CAA under section 225(f) of the CAA, provides a limited
18 exemption from the general prohibition on lie detector use
19 for employers conducting ongoing investigations of eco-
20 nomic loss or injury to the employer's business. An em-
21 ploying office may request an employee, subject to the con-
22 ditions set forth in sections 8 and 10 of the EPPA and
23 sections 1.20, 1.22, 1.23, 1.24, 1.25, 1.26 and 1.35 of this
24 part, to submit to a polygraph test, but no other type of
25 lie detector test, only if—

1 (1) The test is administered in connection with
2 an ongoing investigation involving economic loss or
3 injury to the employing office's operations, such as
4 theft, embezzlement, misappropriation or an act of
5 unlawful industrial espionage or sabotage;

6 (2) The employee had access to the property
7 that is the subject of the investigation;

8 (3) The employing office has a reasonable sus-
9 picion that the employee was involved in the incident
10 or activity under investigation;

11 (4) The employing office provides the examinee
12 with a statement, in a language understood by the
13 examinee, prior to the test which fully explains with
14 particularity the specific incident or activity being
15 investigated and the basis for testing particular em-
16 ployees and which contains, at a minimum:

17 (i) An identification with particularity of
18 the specific economic loss or injury to the oper-
19 ations of the employing office;

20 (ii) A description of the employee's access
21 to the property that is the subject of the inves-
22 tigation;

23 (iii) A description in detail of the basis of
24 the employing office's reasonable suspicion that

1 the employee was involved in the incident or ac-
2 tivity under investigation; and

3 (iv) Signature of a person (other than a
4 polygraph examiner) authorized to legally bind
5 the employing office; and

6 (5) The employing office retains a copy of the
7 statement and proof of service described in para-
8 graph (a)(4) of this section for at least 3 years.

9 (b) For the exemption to apply, the condition of an
10 “ongoing investigation” must be met. As used in section
11 7(d) of the EPPA, the ongoing investigation must be of
12 a specific incident or activity. Thus, for example, an em-
13 ploying office may not request that an employee or em-
14 ployees submit to a polygraph test in an effort to deter-
15 mine whether or not any thefts have occurred. Such ran-
16 dom testing by an employing office is precluded by the
17 EPPA. Further, because the exemption is limited to a spe-
18 cific incident or activity, an employing office is precluded
19 from using the exemption in situations where the so-called
20 “ongoing investigation” is continuous. For example, the
21 fact that items are frequently missing would not be a suffi-
22 cient basis, standing alone, for administering a polygraph
23 test. Even if the employing office can establish that unusu-
24 ally high amounts of property are missing in a given
25 month, this, in and of itself, would not be a sufficient basis

1 to meet the specific incident requirement. On the other
2 hand, polygraph testing in response to missing property
3 would be permitted where additional evidence is obtained
4 through subsequent investigation of specific items missing
5 through intentional wrongdoing, and a reasonable sus-
6 picion that the employee to be polygraphed was involved
7 in the incident under investigation. Administering a poly-
8 graph test in circumstances where the missing property
9 is merely unspecified, statistical shortages, without identi-
10 fication of a specific incident or activity that produced the
11 missing property and a “reasonable suspicion that the em-
12 ployee was involved”, would amount to little more than
13 a fishing expedition and is prohibited by the EPPA as ap-
14 plied to covered employees and employing offices by the
15 CAA.

16 (c)(1)(i) The terms economic loss or injury to the em-
17 ploying office’s operations include both direct and indirect
18 economic loss or injury.

19 (ii) Direct loss or injury includes losses or injuries
20 resulting from theft, embezzlement, misappropriation, es-
21 pionage or sabotage. These examples, cited in the EPPA,
22 are intended to be illustrative and not exhaustive. Another
23 specific incident which would constitute direct economic
24 loss or injury is the misappropriation of confidential or
25 trade secret information.

1 (iii) Indirect loss or injury includes the use of an em-
2 ploying office's operations to commit a crime, such as
3 check-kiting or money laundering. In such cases, the ongo-
4 ing investigation must be limited to criminal activity that
5 has already occurred, and to use of the employing office's
6 operations (and not simply the use of the premises) for
7 such activity. For example, the use of an employing of-
8 fice's vehicles, warehouses, computers or equipment to
9 smuggle or facilitate the importing of illegal substances
10 constitutes an indirect loss or injury to the employing of-
11 fice's business operations. Conversely, the mere fact that
12 an illegal act occurs on the employing office's premises
13 (such as a drug transaction that takes place in the employ-
14 ing office's parking lot or rest room) does not constitute
15 an indirect economic loss or injury to the employing office.

16 (iv) Indirect loss or injury also includes theft or in-
17 jury to property of another for which the employing office
18 exercises fiduciary, managerial or security responsibility,
19 or where the office has custody of the property (but not
20 property of other offices to which the employees have ac-
21 cess by virtue of the employment relationship). For exam-
22 ple, if a maintenance employee of the manager of an
23 apartment building steals jewelry from a tenant's apart-
24 ment, the theft results in an indirect economic loss or in-
25 jury to the employer because of the manager's manage-

1 ment responsibility with respect to the tenant's apartment.
2 A messenger on a delivery of confidential business reports
3 for a client firm who steals the reports causes an indirect
4 economic loss or injury to the messenger service because
5 the messenger service is custodian of the client firm's re-
6 ports, and therefore is responsible for their security. Simi-
7 larly, the theft of property protected by a security service
8 employer is considered an economic loss or injury to that
9 employer.

10 (v) A theft or injury to a client firm does not con-
11 stitute an indirect loss or injury to an employing office
12 unless that employing office has custody of, or manage-
13 ment, or security responsibility for, the property of the
14 client that was lost or stolen or injured. For example, a
15 cleaning contractor has no responsibility for the money at
16 a client bank. If money is stolen from the bank by one
17 of the cleaning contractor's employees, the cleaning con-
18 tractor does not suffer an indirect loss or injury.

19 (vi) Indirect loss or injury does not include loss or
20 injury which is merely threatened or potential, e.g., a
21 threatened or potential loss of an advantageous business
22 relationship.

23 (2) Economic losses or injuries which are the result
24 of unintentional or lawful conduct would not serve as a
25 basis for the administration of a polygraph test. Thus, ap-

1 parently unintentional losses or injuries stemming from
2 truck, car, workplace, or other similar type accidents or
3 routine inventory or cash register shortages would not
4 meet the economic loss or injury requirement. Any eco-
5 nomic loss incident to lawful union or employee activity
6 also would not satisfy this requirement.

7 (3) It is the operations of the employing office which
8 must suffer the economic loss or injury. Thus, a theft com-
9 mitted by one employee against another employee of the
10 same employing office would not satisfy the requirement.

11 (d) While nothing in the EPPA as applied by the
12 CAA prohibits the use of medical tests to determine the
13 presence of controlled substances or alcohol in bodily
14 fluids, the section 7(d) exemption of the EPPA does not
15 permit the use of a polygraph test to learn whether an
16 employee has used drugs or alcohol, even where such pos-
17 sible use may have contributed to an economic loss to the
18 employing office (e.g., an accident involving an employing
19 office's vehicle).

20 (e) Section 7(d)(2) of the EPPA provides that, as a
21 condition for the use of the exemption, the employee must
22 have had access to the property that is the subject of the
23 investigation.

24 (1) The word access, as used in section 7(d)(2),
25 refers to the opportunity which an employee had to

1 cause, or to aid or abet in causing, the specific eco-
2 nomic loss or injury under investigation. The term
3 “access”, thus, includes more than direct or physical
4 contact during the course of employment. For exam-
5 ple, as a general matter, all employees working in or
6 with authority to enter a property storage area have
7 “access” to unsecured property in the area. All em-
8 ployees with the combination to a safe have “access”
9 to the property in a locked safe. Employees also
10 have “access” who have the ability to divert posses-
11 sion or otherwise affect the disposition of the prop-
12 erty that is the subject of investigation. For exam-
13 ple, a bookkeeper in a jewelry store with access to
14 inventory records may aid or abet a clerk who steals
15 an expensive watch by removing the watch from the
16 employing office’s inventory records. In such a situa-
17 tion, it is clear that the bookkeeper effectively has
18 “access” to the property that is the subject of the
19 investigation.

20 (2) As used in section 7(d)(2), property refers
21 to specifically identifiable property, but also includes
22 such things of value as security codes and computer
23 data, and proprietary, financial or technical informa-
24 tion, such as trade secrets, which by its availability

1 to competitors or others would cause economic harm
2 to the employing office.

3 (f)(1) As used in section 7(d)(3), the term reasonable
4 suspicion refers to an observable, articulable basis in fact
5 which indicates that a particular employee was involved
6 in, or responsible for, an economic loss. Access in the sense
7 of possible or potential opportunity, standing alone, does
8 not constitute a basis for “reasonable suspicion”. Informa-
9 tion from a co-worker, or an employee’s behavior, de-
10 meanor, or conduct may be factors in the basis for reason-
11 able suspicion. Likewise, inconsistencies between facts,
12 claims, or statements that surface during an investigation
13 can serve as a sufficient basis for reasonable suspicion.
14 While access or opportunity, standing alone, does not con-
15 stitute a basis for reasonable suspicion, the totality of cir-
16 cumstances surrounding the access or opportunity (such
17 as its unauthorized or unusual nature or the fact that ac-
18 cess was limited to a single individual) may constitute a
19 factor in determining whether there is a reasonable sus-
20 picion.

21 (2) For example, in an investigation of a theft of an
22 expensive piece of jewelry, an employee authorized to open
23 the establishment’s safe no earlier than 9 a.m., in order
24 to place the jewelry in a window display case, is observed
25 opening the safe at 7:30 a.m. In such a situation, the

1 opening of the safe by the employee one and one-half
2 hours prior to the specified time may serve as the basis
3 for reasonable suspicion. On the other hand, in the exam-
4 ple given, if the employee is asked to bring the piece of
5 jewelry to his or her office at 7:30 a.m., and the employee
6 then opened the safe and reported the jewelry missing,
7 such access, standing alone, would not constitute a basis
8 for reasonable suspicion that the employee was involved
9 in the incident unless access to the safe was limited solely
10 to the employee. If no one other than the employee pos-
11 sessed the combination to the safe, and all other possible
12 explanations for the loss are ruled out, such as a break-
13 in, a basis for reasonable suspicion may be formulated
14 based on sole access by one employee.

15 (3) The employing office has the burden of establish-
16 ing that the specific individual or individuals to be tested
17 are “reasonably suspected” of involvement in the specific
18 economic loss or injury for the requirement in section
19 7(d)(3) of the EPPA to be met.

20 (g)(1) As discussed in paragraph (a)(4) of this sec-
21 tion, section 7(d)(4) of the EPPA sets forth what informa-
22 tion, at a minimum, must be provided to an employee if
23 the employing office wishes to claim the exemption.

24 (2) The statement required under paragraph (a)(4)
25 of this section must be received by the employee at least

1 48 hours, excluding weekend days and holidays, prior to
2 the time of the examination. The statement must set forth
3 the time and date of receipt by the employee and be veri-
4 fied by the employee's signature. This will provide the em-
5 ployee with adequate pre-test notice of the specific inci-
6 dent or activity being investigated and afford the employee
7 sufficient time prior to the test to obtain and consult with
8 legal counsel or an employee representative.

9 (3) The statement to be provided to the employee
10 must set forth with particularity the specific incident or
11 activity being investigated and the basis for testing par-
12 ticular employees. Section 7(d)(4)(A) of the EPPA re-
13 quires specificity beyond the mere assertion of general
14 statements regarding economic loss, employee access, and
15 reasonable suspicion. For example, an employing office's
16 assertion that an expensive watch was stolen, and that the
17 employee had access to the watch and is therefore a sus-
18 pect, would not meet the "with particularity" criterion. If
19 the basis for an employing office's requesting an employee
20 (or employees) to take a polygraph test is not articulated
21 with particularity, and reduced to writing, then the stand-
22 ard is not met. The identity of a co-worker or other indi-
23 vidual providing information used to establish reasonable
24 suspicion need not be revealed in the statement.

1 (4) It is further required that the statement provided
2 to the examinee be signed by the employing office, or an
3 employee or other representative of the employing office
4 with authority to legally bind the employing office. The
5 person signing the statement must not be a polygraph ex-
6 aminer unless the examiner is acting solely in the capacity
7 of an employing office with respect to his or her own em-
8 ployees and does not conduct the examination. The stand-
9 ard would not be met, and the exemption would not apply
10 if the person signing the statement is not authorized to
11 legally bind the employing office.

12 (h) Polygraph tests administered pursuant to this ex-
13 emption are subject to the limitations set forth in sections
14 8 and 10 of the EPPA, as discussed in sections 1.20, 1.22,
15 1.23, 1.24, 1.25, 1.26, and 1.35 of this part. As provided
16 in these sections, the exemption will apply only if certain
17 requirements are met. Failure to satisfy any of the speci-
18 fied requirements nullifies the statutory authority for poly-
19 graph test administration and may subject the employing
20 office to remedial actions, as provided for in section 6(c)
21 of the EPPA.

1 **SEC. 1.13 EXEMPTION OF EMPLOYING OFFICES AUTHOR-**
2 **IZED TO MANUFACTURE, DISTRIBUTE, OR**
3 **DISPENSE CONTROLLED SUBSTANCES.**

4 (a) Section 7(f) of the EPPA, incorporated into the
5 CAA by section 225(f) of the CAA, provides an exemption
6 from the EPPA's general prohibition regarding the use
7 of polygraph tests for employers authorized to manufac-
8 ture, distribute, or dispense a controlled substance listed
9 in schedule I, II, III, or IV of section 202 of the Controlled
10 Substances Act (21 U.S.C. § 812). This exemption permits
11 the administration of polygraph tests, subject to the condi-
12 tions set forth in sections 8 and 10 of the EPPA and sec-
13 tions 1.21, 1.22, 1.23, 1.24, 1.25, 1.26, and 1.35 of this
14 part, to:

15 (1) A prospective employee who would have di-
16 rect access to the manufacture, storage, distribution,
17 or sale of any such controlled substance; or

18 (2) A current employee if the following condi-
19 tions are met:

20 (i) The test is administered in connection
21 with an ongoing investigation of criminal or
22 other misconduct involving, or potentially in-
23 volving, loss or injury to the manufacture, dis-
24 tribution, or dispensing of any such controlled
25 substance by such employing office; and

1 (ii) The employee had access to the person
2 or property that is the subject of the investiga-
3 tion.

4 (b)(1) The terms manufacture, distribute, distribu-
5 tion, dispense, storage, and sale, for the purposes of this
6 exemption, are construed within the meaning of the Con-
7 trolled Substances Act (21 U.S.C. § 812 et seq.), as ad-
8 ministered by the Drug Enforcement Administration
9 (DEA), United States Department of Justice.

10 (2) The exemption in section 7(f) of the EPPA ap-
11 plies only to employing offices that are authorized by DEA
12 to manufacture, distribute, or dispense a controlled sub-
13 stance. Section 202 of the Controlled Substances Act (21
14 U.S.C. § 812) requires every person who manufactures,
15 distributes, or dispenses any controlled substance to reg-
16 ister with the Attorney General (i.e., with DEA). Common
17 or contract carriers and warehouses whose possession of
18 the controlled substance is in the usual course of their
19 business or employment are not required to register.
20 Truck drivers and warehouse employees of the persons or
21 entities registered with DEA and authorized to manufac-
22 ture, distribute, or dispense controlled substances, are
23 within the scope of the exemption where they have direct
24 access or access to the controlled substances, as discussed
25 below.

1 (c) In order for a polygraph examination to be per-
2 formed, section 7(f) of the Act requires that a prospective
3 employee have “direct access” to the controlled
4 substance(s) manufactured, dispensed, or distributed by
5 the employing office. Where a current employee is to be
6 tested as a part of an ongoing investigation, section 7(f)
7 requires that the employee have “access” to the person
8 or property that is the subject of the investigation.

9 (1) A prospective employee would have “direct
10 access” if the position being applied for has respon-
11 sibilities which include contact with or which affect
12 the disposition of a controlled substance, including
13 participation in the process of obtaining, dispensing,
14 or otherwise distributing a controlled substance.
15 This includes contact or direct involvement in the
16 manufacture, storage, testing, distribution, sale or
17 dispensing of a controlled substance and may in-
18 clude, for example, packaging, repackaging, order-
19 ing, licensing, shipping, receiving, taking inventory,
20 providing security, prescribing, and handling of a
21 controlled substance. A prospective employee would
22 have “direct access” if the described job duties
23 would give such person access to the products in
24 question, whether such employee would be in phys-
25 ical proximity to controlled substances or engaged in

1 activity which would permit the employee to divert
2 such substances to his or her possession.

3 (2) A current employee would have “access”
4 within the meaning of section 7(f) if the employee
5 had access to the specific person or property which
6 is the subject of the on-going investigation, as dis-
7 cussed in section 1.12(e) of this part. Thus, to test
8 a current employee, the employee need not have had
9 “direct” access to the controlled substance, but may
10 have had only infrequent, random, or opportunistic
11 access. Such access would be sufficient to test the
12 employee if the employee could have caused, or could
13 have aided or abetted in causing, the loss of the spe-
14 cific property which is the subject of the investiga-
15 tion. For example, a maintenance worker in a drug
16 warehouse, whose job duties include the cleaning of
17 areas where the controlled substances which are the
18 subject of the investigation were present, but whose
19 job duties do not include the handling of controlled
20 substances, would be deemed to have “access”, but
21 normally not “direct access”, to the controlled sub-
22 stances. On the other hand, a drug warehouse truck
23 loader, whose job duties include the handling of out-
24 going shipment orders which contain controlled sub-
25 stances, would have “direct access” to such con-

1 trolled substances. A pharmacy department in a su-
2 permarket is another common situation which is use-
3 ful in illustrating the distinction between “direct ac-
4 cess” and “access”. Store personnel receiving phar-
5 maceutical orders, i.e., the pharmacist, pharmacy in-
6 tern, and other such employees working in the phar-
7 macy department, would ordinarily have “direct ac-
8 cess” to controlled substances. Other store personnel
9 whose job duties and responsibilities do not include
10 the handling of controlled substances but who had
11 occasion to enter the pharmacy department where
12 the controlled substances which are the subject of
13 the investigation were stored, such as maintenance
14 personnel or pharmacy cashiers, would have “ac-
15 cess”. Certain other store personnel whose job duties
16 do not permit or require entrance into the pharmacy
17 department for any reason, such as produce or meat
18 clerks, checkout cashiers, or baggers, would not ordi-
19 narily have “access”. However, any current em-
20 ployee, regardless of described job duties, may be
21 polygraphed if the employing office’s investigation of
22 criminal or other misconduct discloses that such em-
23 ployee in fact took action to obtain “access” to the
24 person or property that is the subject of the inves-
25 tigation—e.g., by actually entering the drug storage

1 area in violation of company rules. In the case of
2 “direct access”, the prospective employee’s access to
3 controlled substances would be as a part of the man-
4 ufacturing, dispensing or distribution process, while
5 a current employee’s “access” to the controlled sub-
6 stances which are the subject of the investigation
7 need only be opportunistic.

8 (d) The term prospective employee, for the purposes
9 of this section, includes a current employee who presently
10 holds a position which does not entail direct access to con-
11 trolled substances, and therefore is outside the scope of
12 the exemption’s provisions for preemployment polygraph
13 testing, provided the employee has applied for and is being
14 considered for transfer or promotion to another position
15 which entails such direct access. For example, an office
16 secretary may apply for promotion to a position in the
17 vault or cage areas of a drug warehouse, where controlled
18 substances are kept. In such a situation, the current em-
19 ployee would be deemed a “prospective employee” for the
20 purposes of this exemption, and thus could be subject to
21 preemployment polygraph screening, prior to such a
22 change in position. However, any adverse action which is
23 based in part on a polygraph test against a current em-
24 ployee who is considered a “prospective employee” for pur-
25 poses of this section may be taken only with respect to

1 the prospective position and may not affect the employee's
2 employment in the current position.

3 (e) Section 7(f) of the EPPA, as applied by the CAA,
4 makes no specific reference to a requirement that employ-
5 ing offices provide current employees with a written state-
6 ment prior to polygraph testing. Thus, employing offices
7 to whom this exemption is available are not required to
8 furnish a written statement such as that specified in sec-
9 tion 7(d) of the EPPA and section 1.12(a)(4) of this part.

10 (f) For the section 7(f) exemption to apply, the poly-
11 graph testing of current employees must be administered
12 in connection with an ongoing investigation of criminal or
13 other misconduct involving, or potentially involving, loss
14 or injury to the manufacture, distribution, or dispensing
15 of any such controlled substance by such employing office.

16 (1) Current employees may only be adminis-
17 tered polygraph tests in connection with an ongoing
18 investigation of criminal or other misconduct, relat-
19 ing to a specific incident or activity, or potential in-
20 cident or activity. Thus, an employing office is pre-
21 cluded from using the exemption in connection with
22 continuing investigations or on a random basis to
23 determine if thefts are occurring. However, unlike
24 the exemption in section 7(d) of the EPPA for em-
25 ploying offices conducting ongoing investigations of

1 economic loss or injury, the section 7(f) exemption
2 includes ongoing investigations of misconduct involv-
3 ing potential drug losses. Nor does the latter exemp-
4 tion include the requirement for “reasonable sus-
5 picion” contained in the section 7(d) exemption.
6 Thus, a drug store operator is permitted to poly-
7 graph all current employees who have access to a
8 controlled substance stolen from the inventory, or
9 where there is evidence that such a theft is planned.
10 Polygraph testing based on an inventory shortage of
11 the drug during a particular accounting period
12 would not be permitted unless there is extrinsic evi-
13 dence of misconduct.

14 (2) In addition, the test must be administered
15 in connection with loss or injury, or potential loss or
16 injury, to the manufacture, distribution, or dispens-
17 ing of a controlled substance.

18 (i) Retail drugstores and wholesale drug
19 warehouses typically carry inventory of so-called
20 health and beauty aids, cosmetics, over-the-
21 counter drugs, and a variety of other similar
22 products, in addition to their product lines of
23 controlled drugs. The noncontrolled products
24 usually constitute the majority of such firms’
25 sales volumes. An economic loss or injury relat-

1 ed to such noncontrolled substances would not
2 constitute a basis of applicability of the section
3 7(f) exemption. For example, an investigation
4 into the theft of a gross of cosmetic products
5 could not be a basis for polygraph testing under
6 section 7(f), but the theft of a container of val-
7 ium could be.

8 (ii) Polygraph testing, with respect to an
9 ongoing investigation concerning products other
10 than controlled substances might be initiated
11 under section 7(d) of the EPPA and section
12 1.12 of this part. However, the exemption in
13 section 7(f) of the EPPA and this section is
14 limited solely to losses or injury associated with
15 controlled substances.

16 (g) Polygraph tests administered pursuant to this ex-
17 emption are subject to the limitations set forth in sections
18 8 and 10 of the EPPA, as discussed in sections 1.21, 1.22,
19 1.23, 1.24, 1.25, 1.26, and 1.35 of this part. As provided
20 in these sections, the exemption will apply only if certain
21 requirements are met. Failure to satisfy any of the speci-
22 fied requirements nullifies the statutory authority for poly-
23 graph test administration and may subject the employing
24 office to the remedies authorized in section 204 of the
25 CAA. The administration of such tests is also subject to

1 (2) Admissions or statements made by an em-
2 ployee before, during or following a polygraph exam-
3 ination.

4 (c) Analysis of a polygraph test chart or refusal to
5 take a polygraph test may not serve as a basis for adverse
6 employment action, even with additional supporting evi-
7 dence, unless the employing office observes all the require-
8 ments of sections 7(d) and 8(b) of the EPPA, as applied
9 by the CAA and described in sections 1.12, 1.22, 1.23,
10 1.24 and 1.25 of this part.

11 **SEC. 1.21 ADVERSE EMPLOYMENT ACTION UNDER CON-**
12 **TROLLED SUBSTANCE EXEMPTION.**

13 (a) Section 8(a)(2) of the EPPA provides that the
14 controlled substance exemption in section 7(f) of the
15 EPPA and section 1.13 of this part shall not apply if an
16 employing office discharges, disciplines, denies employ-
17 ment or promotion, or otherwise discriminates in any man-
18 ner against a current employee or prospective employee
19 based solely on the analysis of a polygraph test chart or
20 the refusal to take a polygraph test.

21 (b) Analysis of a polygraph test chart or refusal to
22 take a polygraph test may serve as one basis for adverse
23 employment actions of the type described in paragraph (a)
24 of this section: *Provided*, That the adverse action was also
25 based on another bona fide reason, with supporting evi-

1 dence therefor. For example, traditional factors such as
2 prior employment experience, education, job performance,
3 etc. may be used as a basis for employment decisions. Em-
4 ployment decisions based on admissions or statements
5 made by an employee or prospective employee before, dur-
6 ing or following a polygraph examination may, likewise,
7 serve as a basis for such decisions.

8 (c) Analysis of a polygraph test chart or the refusal
9 to take a polygraph test may not serve as a basis for ad-
10 verse employment action, even with another legitimate
11 basis for such action, unless the employing office observes
12 all the requirements of section 7(f) of the EPPA, as ap-
13 propriate, and section 8(b) of the EPPA, as described in
14 sections 1.13, 1.22, 1.23, 1.24 and 1.25 of this part.

15 **SEC. 1.22 RIGHTS OF EXAMINEE—GENERAL.**

16 (a) Pursuant to section 8(b) of the EPPA, the limited
17 exemption in section 7(d) of the EPPA for ongoing inves-
18 tigation (described in sections 1.12 and 1.13 of this part)
19 shall not apply unless all of the requirements set forth in
20 this section and sections 1.23 through 1.25 of this part
21 are met.

22 (b) During all phases of the polygraph testing the
23 person being examined has the following rights:

24 (1) The examinee may terminate the test at any
25 time.

1 (2) The examinee may not be asked any ques-
2 tions in a degrading or unnecessarily intrusive man-
3 ner.

4 (3) The examinee may not be asked any ques-
5 tions dealing with:

6 (i) Religious beliefs or affiliations;

7 (ii) Beliefs or opinions regarding racial
8 matters;

9 (iii) Political beliefs or affiliations;

10 (iv) Sexual preferences or behavior; or

11 (v) Beliefs, affiliations, opinions, or lawful
12 activities concerning unions or labor organiza-
13 tions.

14 (4) The examinee may not be subjected to a
15 test when there is sufficient written evidence by a
16 physician that the examinee is suffering from any
17 medical or psychological condition or undergoing any
18 treatment that might cause abnormal responses dur-
19 ing the actual testing phase. “Sufficient written evi-
20 dence” shall constitute, at a minimum, a statement
21 by a physician specifically describing the examinee’s
22 medical or psychological condition or treatment and
23 the basis for the physician’s opinion that the condi-
24 tion or treatment might result in such abnormal re-
25 sponses.

1 (5) An employee or prospective employee who
2 exercises the right to terminate the test, or who for
3 medical reasons with sufficient supporting evidence
4 is not administered the test, shall be subject to ad-
5 verse employment action only on the same basis as
6 one who refuses to take a polygraph test, as de-
7 scribed in sections 1.20 and 1.21 of this part.

8 (c) Any polygraph examination shall consist of one
9 or more pretest phases, actual testing phases, and post-
10 test phases, which must be conducted in accordance with
11 the rights of examinees described in sections 1.23 through
12 1.25 of this part.

13 **SEC. 1.23 RIGHTS OF EXAMINEE—PRETEST PHASE.**

14 (a) The pretest phase consists of the questioning and
15 other preparation of the prospective examinee before the
16 actual use of the polygraph instrument. During the initial
17 pretest phase, the examinee must be:

18 (1) Provided with written notice, in a language
19 understood by the examinee, as to when and where
20 the examination will take place and that the exam-
21 inee has the right to consult with counsel or an em-
22 ployee representative before each phase of the test.
23 Such notice shall be received by the examinee at
24 least forty-eight hours, excluding weekend days and
25 holidays, before the time of the examination, except

1 that a prospective employee may, at the employee's
2 option, give written consent to administration of a
3 test anytime within 48 hours but no earlier than 24
4 hours after receipt of the written notice. The written
5 notice or proof of service must set forth the time
6 and date of receipt by the employee or prospective
7 employee and be verified by his or her signature.
8 The purpose of this requirement is to provide a suf-
9 ficient opportunity prior to the examination for the
10 examinee to consult with counsel or an employee
11 representative. Provision shall also be made for a
12 convenient place on the premises where the examina-
13 tion will take place at which the examinee may con-
14 sult privately with an attorney or an employee rep-
15 resentative before each phase of the test. The attor-
16 ney or representative may be excluded from the
17 room where the examination is administered during
18 the actual testing phase.

19 (2) Informed orally and in writing of the nature
20 and characteristics of the polygraph instrument and
21 examination, including an explanation of the phys-
22 ical operation of the polygraph instrument and the
23 procedure used during the examination.

24 (3) Provided with a written notice prior to the
25 testing phase, in a language understood by the ex-

1 aminee, which shall be read to and signed by the ex-
2 aminee. Use of Appendix A to this part, if properly
3 completed, will constitute compliance with the con-
4 tents of the notice requirement of this paragraph. If
5 a format other than in Appendix A is used, it must
6 contain at least the following information:

7 (i) Whether or not the polygraph examina-
8 tion area contains a two-way mirror, a camera,
9 or other device through which the examinee
10 may be observed;

11 (ii) Whether or not any other device, such
12 as those used in conversation or recording will
13 be used during the examination;

14 (iii) That both the examinee and the em-
15 ploying office have the right, with the other's
16 knowledge, to make a recording of the entire
17 examination;

18 (iv) That the examinee has the right to
19 terminate the test at any time;

20 (v) That the examinee has the right, and
21 will be given the opportunity, to review all ques-
22 tions to be asked during the test;

23 (vi) That the examinee may not be asked
24 questions in a manner which degrades, or need-
25 lessly intrudes;

1 (vii) That the examinee may not be asked
2 any questions concerning religious beliefs or
3 opinions; beliefs regarding racial matters; politi-
4 cal beliefs or affiliations; matters relating to
5 sexual behavior; beliefs, affiliations, opinions, or
6 lawful activities regarding unions or labor orga-
7 nizations;

8 (viii) That the test may not be conducted
9 if there is sufficient written evidence by a physi-
10 cian that the examinee is suffering from a med-
11 ical or psychological condition or undergoing
12 treatment that might cause abnormal responses
13 during the examination;

14 (ix) That the test is not and cannot be re-
15 quired as a condition of employment;

16 (x) That the employing office may not dis-
17 charge, dismiss, discipline, deny employment or
18 promotion, or otherwise discriminate against
19 the examinee based on the analysis of a poly-
20 graph test, or based on the examinee's refusal
21 to take such a test, without additional evidence
22 which would support such action;

23 (xi)(A) In connection with an ongoing in-
24 vestigation, that the additional evidence re-
25 quired for the employing office to take adverse

1 action against the examinee, including termi-
2 nation, may be evidence that the examinee had
3 access to the property that is the subject of the
4 investigation, together with evidence supporting
5 the employing office's reasonable suspicion that
6 the examinee was involved in the incident or ac-
7 tivity under investigation;

8 (B) That any statement made by the ex-
9 aminee before or during the test may serve as
10 additional supporting evidence for an adverse
11 employment action, as described in paragraph
12 (a)(3)(x) of this section, and that any admis-
13 sion of criminal conduct by the examinee may
14 be transmitted to an appropriate Government
15 law enforcement agency;

16 (xii) That information acquired from a
17 polygraph test may be disclosed by the exam-
18 iner or by the employing office only:

19 (A) To the examinee or any other per-
20 son specifically designated in writing by
21 the examinee to receive such information;

22 (B) To the employing office that re-
23 quested the test;

1 (C) To a court, governmental agency,
2 arbitrator, or mediator pursuant to a court
3 order;

4 (D) By the employing office, to an ap-
5 propriate governmental agency without a
6 court order where, and only insofar as, the
7 information disclosed is an admission of
8 criminal conduct;

9 (xiii) That if any of the examinee's rights
10 or protections under the law are violated, the
11 examinee has the right to take action against
12 the employing office under sections 401–404 of
13 the CAA. Employing offices that violate this
14 law are liable to the affected examinee, who
15 may recover such legal or equitable relief as
16 may be appropriate, including, but not limited
17 to, employment, reinstatement, and promotion,
18 payment of lost wages and benefits, and reason-
19 able costs, including attorney's fees;

20 (xiv) That the examinee has the right to
21 obtain and consult with legal counsel or other
22 representative before each phase of the test, al-
23 though the legal counsel or representative may
24 be excluded from the room where the test is ad-
25 ministered during the actual testing phase.

1 (xv) That the employee's rights under the
2 CAA may not be waived, either voluntarily or
3 involuntarily, by contract or otherwise, except
4 as part of a written settlement to a pending ac-
5 tion or complaint under the CAA, agreed to and
6 signed by the parties.

7 (b) During the initial or any subsequent pretest
8 phases, the examinee must be given the opportunity, prior
9 to the actual testing phase, to review all questions in writ-
10 ing that the examiner will ask during each testing phase.
11 Such questions may be presented at any point in time
12 prior to the testing phase.

13 **SEC. 1.24 RIGHTS OF EXAMINEE—ACTUAL TESTING**
14 **PHASE.**

15 (a) The actual testing phase refers to that time dur-
16 ing which the examiner administers the examination by
17 using a polygraph instrument with respect to the examinee
18 and then analyzes the charts derived from the test.
19 Throughout the actual testing phase, the examiner shall
20 not ask any question that was not presented in writing
21 for review prior to the testing phase. An examiner may,
22 however, recess the testing phase and return to the pre-
23 test phase to review additional relevant questions with the
24 examinee. In the case of an ongoing investigation, the ex-
25 aminer shall ensure that all relevant questions (as distin-

1 guished from technical baseline questions) pertain to the
2 investigation.

3 (b) No testing period subject to the provisions of the
4 Act shall be less than ninety minutes in length. Such “test
5 period” begins at the time that the examiner begins in-
6 forming the examinee of the nature and characteristics of
7 the examination and the instruments involved, as pre-
8 scribed in section 8(b)(2)(B) of the EPPA and section
9 1.23(a)(2) of this part, and ends when the examiner com-
10 pletes the review of the test results with the examinee as
11 provided in section 1.25 of this part. The ninety-minute
12 minimum duration shall not apply if the examinee volun-
13 tarily acts to terminate the test before the completion
14 thereof, in which event the examiner may not render an
15 opinion regarding the employee’s truthfulness.

16 **SEC. 1.25 RIGHTS OF EXAMINEE—POST-TEST PHASE.**

17 (a) The post-test phase refers to any questioning or
18 other communication with the examinee following the use
19 of the polygraph instrument, including review of the re-
20 sults of the test with the examinee. Before any adverse
21 employment action, the employing office must:

22 (1) Further interview the examinee on the basis
23 of the test results; and

24 (2) Give to the examinee a written copy of any
25 opinions or conclusions rendered in response to the

1 test, as well as the questions asked during the test,
2 with the corresponding charted responses. The term
3 “corresponding charted responses” refers to copies
4 of the entire examination charts recording the em-
5 ployee’s physiological responses, and not just the ex-
6 aminer’s written report which describes the
7 examinee’s responses to the questions as “charted”
8 by the instrument.

9 **SEC. 1.26 QUALIFICATIONS OF AND REQUIREMENTS FOR**
10 **EXAMINERS.**

11 (a) Section 8 (b) and (c) of the EPPA provides that
12 the limited exemption in section 7(d) of the EPPA for on-
13 going investigations shall not apply unless the person con-
14 ducting the polygraph examination meets specified quali-
15 fications and requirements.

16 (b) An examiner must meet the following qualifica-
17 tions:

18 (1) Have a valid current license, if required by
19 the State in which the test is to be conducted; and

20 (2) Carry a minimum bond of \$50,000 provided
21 by a surety incorporated under the laws of the Unit-
22 ed States or of any State, which may under those
23 laws guarantee the fidelity of persons holding posi-
24 tions of trust, or carry an equivalent amount of pro-
25 fessional liability coverage.

1 (c) An examiner must also, with respect to examinees
2 identified by the employing office pursuant to section
3 1.30(c) of this part:

4 (1) Observe all rights of examinees, as set out
5 in sections 1.22, 1.23, 1.24, and 1.25 of this part;

6 (2) Administer no more than five polygraph ex-
7 aminations in any one calendar day on which a test
8 or tests subject to the provisions of EPPA are ad-
9 ministered, not counting those instances where an
10 examinee voluntarily terminates an examination
11 prior to the actual testing phase;

12 (3) Administer no polygraph examination sub-
13 ject to the provisions of the EPPA which is less than
14 ninety minutes in duration, as described in section
15 1.24(b) of this part; and

16 (4) Render any opinion or conclusion regarding
17 truthfulness or deception in writing. Such opinion or
18 conclusion must be based solely on the polygraph
19 test results. The written report shall not contain any
20 information other than admissions, information, case
21 facts, and interpretation of the charts relevant to the
22 stated purpose of the polygraph test and shall not
23 include any recommendation concerning the employ-
24 ment of the examinee.

1 (5) Maintain all opinions, reports, charts, writ-
2 ten questions, lists, and other records relating to the
3 test, including, statements signed by examinees ad-
4 vising them of rights under the CAA (as described
5 in section 1.23(a)(3) of this part) and any electronic
6 recordings of examinations, for at least three years
7 from the date of the administration of the test. (See
8 section 1.30 of this part for recordkeeping require-
9 ments.)

10 SUBPART D—RECORDKEEPING AND DISCLOSURE

11 REQUIREMENTS

12 **SEC. 1.30 RECORDS TO BE PRESERVED FOR 3 YEARS.**

13 (a) The following records shall be kept for a mini-
14 mum period of three years from the date the polygraph
15 examination is conducted (or from the date the examina-
16 tion is requested if no examination is conducted):

17 (1) Each employing office that requests an em-
18 ployee to submit to a polygraph examination in con-
19 nection with an ongoing investigation involving eco-
20 nomic loss or injury shall retain a copy of the state-
21 ment that sets forth the specific incident or activity
22 under investigation and the basis for testing that
23 particular covered employee, as required by section
24 7(d)(4) of the EPPA and described in 1.12(a)(4) of
25 this part.

1 (2) Each examiner retained to administer ex-
2 aminations pursuant to any of the exemptions under
3 section 7 (d), (e) or (f) of the EPPA (described in
4 sections 1.12 and 1.13 of this part) shall maintain
5 all opinions, reports, charts, written questions, lists,
6 and other records relating to polygraph tests of such
7 persons.

8 **SEC. 1.35 DISCLOSURE OF TEST INFORMATION.**

9 This section prohibits the unauthorized disclosure of
10 any information obtained during a polygraph test by any
11 person, other than the examinee, directly or indirectly, ex-
12 cept as follows:

13 (a) A polygraph examiner or an employing office
14 (other than an employing office exempt under section 7
15 (a) or (b) of the EPPA (described in sections 1.10 and
16 1.11 of this part)) may disclose information acquired from
17 a polygraph test only to:

18 (1) The examinee or an individual specifically
19 designated in writing by the examinee to receive
20 such information;

21 (2) The employing office that requested the
22 polygraph test pursuant to the provisions of the
23 EPPA (including management personnel of the em-
24 ploying office where the disclosure is relevant to the
25 carrying out of their job responsibilities);

1 Board of Directors of the Office of Compliance (sections
2 1.22, 1.23, 1.24, and 1.25), require that you be given the
3 following information before taking a polygraph examina-
4 tion:

1. (a) The polygraph examination area [does] [does not] contain a two-way mirror, a camera, or other device through which you may be observed.
(b) Another device, such as those used in conversation or recording [will] [will not] be used during the examination.
(c) Both you and the employing office have the right, with the other's knowledge, to record electronically the entire examination.
2. (a) You have the right to terminate the test at any time.
(b) You have the right, and will be given the opportunity, to review all questions to be asked during the test.
(c) You may not be asked questions in a manner which degrades, or needlessly intrudes.
(d) You may not be asked any questions concerning: Religious beliefs or opinions; beliefs regarding racial matters; political beliefs or affiliations; matters relating to sexual preference or behavior; beliefs, affiliations, opinions, or lawful activities regarding unions or labor organizations.
(e) The test may not be conducted if there is sufficient written evidence by a physician that you are suffering from a medical or psychological condition or undergoing treatment that might cause abnormal responses during the examination.
(f) You have the right to consult with legal counsel or other representative before each phase of the test, although the legal counsel or other representative may be excluded from the room where the test is administered during the actual testing phase.
3. (a) The test is not and cannot be required as a condition of employment.
(b) The employing office may not discharge, dismiss, discipline, deny employment or promotion, or otherwise discriminate against you based on the analysis of a polygraph test, or based on your refusal to take such a test without additional evidence which would support such action.
(c)(1) In connection with an ongoing investigation, the additional evidence required for an employing office to take adverse action against you, including termination, may be (A) evidence that you had access to the property that is the subject of the investigation, together with (B) the evidence supporting the employing office's reasonable suspicion that you were involved in the incident or activity under investigation.
(2) Any statement made by you before or during the test may serve as additional supporting evidence for an adverse employment action, as described in 3(b) above, and any admission of criminal conduct by you may be transmitted to an appropriate Government law enforcement agency.
4. (a) Information acquired from a polygraph test may be disclosed by the examiner or by the employing office only:
 - (1) To you or any other person specifically designated in writing by you to receive such information;
 - (2) To the employing office that requested the test;

(3) To a court, governmental agency, arbitrator, or mediator that obtains a court order.

(b) Information acquired from a polygraph test may be disclosed by the employing office to an appropriate governmental agency without a court order where, and only insofar as, the information disclosed is an admission of criminal conduct.

5. If any of your rights or protections under the law are violated, you have the right to take action against the employing office by filing a request for counseling with the Office of Compliance under section 402 of the Congressional Accountability Act. Employing offices that violate this law are liable to the affected examinee, who may recover such legal or equitable relief as may be appropriate, including, but not limited to, employment, reinstatement, and promotion, payment of lost wages and benefits, and reasonable costs, including attorney’s fees.

6. Your rights under the CAA may not be waived, either voluntarily or involuntarily, by contract or otherwise, except as part of a written settlement to a pending action or complaint under the CAA, and agreed to and signed by the parties.

I acknowledge that I have received a copy of the above notice, and that it has been read to me.

(Date)

(Signature)

1 APPLICATION OF RIGHTS AND PROTECTIONS
 2 OF THE WORKER ADJUSTMENT RETRAIN-
 3 ING AND NOTIFICATION ACT OF 1988 (IM-
 4 PLEMENTING SECTION 204 OF THE CAA)

- Sec.
- 639.1 Purpose and scope.
- 639.2 What does WARN require?
- 639.3 Definitions.
- 639.4 Who must give notice?
- 639.5 When must notice be given?
- 639.6 Who must receive notice?
- 639.7 What must the notice contain?
- 639.8 How is the notice served?
- 639.9 When may notice be given less than 60 days in advance?
- 639.10 When may notice be extended?
- 639.11 [Reserved].

5 **§ 639.1 Purpose and scope**

6 (a) PURPOSE OF WARN AS APPLIED BY THE
 7 CAA.—Section 205 of the Congressional Accountability
 8 Act, Public Law 104–1 (“CAA”), provides protection to

1 covered employees and their families by requiring employ-
2 ing offices to provide notification 60 calendar days in ad-
3 vance of office closings and mass layoffs within the mean-
4 ing of section 3 of the Worker Adjustment and Retraining
5 Notification Act of 1988, 29 U.S.C. § 2102. Advance no-
6 tice provides workers and their families some transition
7 time to adjust to the prospective loss of employment, to
8 seek and obtain alternative jobs and, if necessary, to enter
9 skill training or retraining that will allow these workers
10 to successfully compete in the job market. As used in these
11 regulations, WARN shall refer to the provisions of WARN
12 applied to covered employing offices by section 205 of the
13 CAA.

14 (b) SCOPE OF THESE REGULATIONS.—These regula-
15 tions are issued by the Board of Directors, Office of Com-
16 pliance, pursuant to sections 205(c) and 304 of the CAA,
17 which directs the Board to promulgate regulations imple-
18 menting section 205 that are “the same as substantive
19 regulations promulgated by the Secretary of Labor to im-
20 plement the statutory provisions referred to in subsection
21 (a) [of section 205 of the CAA] except insofar as the
22 Board may determine, for good cause shown . . . that a
23 modification of such regulations would be more effective
24 for the implementation of the rights and protections under
25 this section”. The regulations issued by the Board herein

1 are on all matters for which section 205 of the CAA re-
2 quires a regulation to be issued. Specifically, it is the
3 Board's considered judgment, based on the information
4 available to it at the time of promulgation of these regula-
5 tions, that, with the exception of regulations adopted and
6 set forth herein, there are no other "substantive regula-
7 tions promulgated by the Secretary of Labor to implement
8 the statutory provisions referred to in subsection (a) [of
9 section 205 of the CAA]".

10 In promulgating these regulations, the Board has
11 made certain technical and nomenclature changes to the
12 regulations as promulgated by the Secretary. Such
13 changes are intended to make the provisions adopted ac-
14 cord more naturally to situations in the legislative branch.
15 However, by making these changes, the Board does not
16 intend a substantive difference between these sections and
17 those of the Secretary from which they are derived. More-
18 over, such changes, in and of themselves, are not intended
19 to constitute an interpretation of the regulation or of the
20 statutory provisions of the CAA upon which they are
21 based.

22 These regulations establish basic definitions and rules
23 for giving notice, implementing the provisions of WARN.
24 The objective of these regulations is to establish clear prin-
25 ciples and broad guidelines which can be applied in specific

1 circumstances. However, it is recognized that rulemaking
2 cannot address the multitude of employing office-specific
3 situations in which advance notice will be given.

4 (c) NOTICE IN AMBIGUOUS SITUATIONS.—It is
5 civically desirable and it would appear to be good business
6 practice for an employing office to provide advance notice,
7 where reasonably possible, to its workers or unions when
8 terminating a significant number of employees. The Office
9 encourages employing offices to give notice in such cir-
10 cumstances.

11 (d) WARN NOT TO SUPERSEDE OTHER LAWS AND
12 CONTRACTS.—The provisions of WARN do not supersede
13 any otherwise applicable laws or collective bargaining
14 agreements that provide for additional notice or additional
15 rights and remedies. If such law or agreement provides
16 for a longer notice period, WARN notice shall run concur-
17 rently with that additional notice period. Collective bar-
18 gaining agreements may be used to clarify or amplify the
19 terms and conditions of WARN, but may not reduce
20 WARN rights.

21 **§ 639.2 What does WARN require?**

22 WARN requires employing offices that are planning
23 an office closing or a mass layoff to give affected employ-
24 ees at least 60 days' notice of such an employment action.
25 While the 60-day period is the minimum for advance no-

1 tice, this provision is not intended to discourage employing
2 offices from voluntarily providing longer periods of ad-
3 vance notice. Not all office closings and layoffs are subject
4 to WARN, and certain employment thresholds must be
5 reached before WARN applies. WARN sets out specific
6 exemptions, and provides for a reduction in the notifica-
7 tion period in particular circumstances. Remedies author-
8 ized under section 205 of the CAA may be assessed
9 against employing offices that violate WARN require-
10 ments.

11 **§ 639.3 Definitions**

12 (a) EMPLOYING OFFICE.—(1) The term “employing
13 office” means any of the entities listed in section 101(9)
14 of the CAA, 2 U.S.C. § 1301(9) that employs—

15 (i) 100 or more employees, excluding part-time
16 employees; or

17 (ii) employs 100 or more employees, including
18 part-time employees, who in the aggregate work at
19 least 4,000 hours per week, exclusive of overtime.

20 Workers on temporary layoff or on leave who have a rea-
21 sonable expectation of recall are counted as employees. An
22 employee has a “reasonable expectation of recall” when
23 he/she understands, through notification or through com-
24 mon practice, that his/her employment with the employing

1 office has been temporarily interrupted and that he/she
2 will be recalled to the same or to a similar job.

3 (2) Workers, other than part-time workers, who are
4 exempt from notice under section 4 of WARN, are none-
5 theless counted as employees for purposes of determining
6 coverage as an employing office.

7 (3) An employing office may have one or more sites
8 of employment under common control.

9 (b) OFFICE CLOSING.—The term “office closing”
10 means the permanent or temporary shutdown of a “single
11 site of employment”, or one or more “facilities or operat-
12 ing units” within a single site of employment, if the shut-
13 down results in an “employment loss” during any 30-day
14 period at the single site of employment for 50 or more
15 employees, excluding any part-time employees. An employ-
16 ment action that results in the effective cessation of the
17 work performed by a unit, even if a few employees remain,
18 is a shutdown. A “temporary shutdown” triggers the no-
19 tice requirement only if there are a sufficient number of
20 terminations, layoffs exceeding 6 months, or reductions in
21 hours of work as specified under the definition of “employ-
22 ment loss”.

23 (c) MASS LAYOFF.—(1) The term “mass layoff”
24 means a reduction in force which first, is not the result
25 of an office closing, and second, results in an employment

1 loss at the single site of employment during any 30-day
2 period for:

3 (i) At least 33 percent of the active employees,
4 excluding part-time employees, and

5 (ii) At least 50 employees, excluding part-time
6 employees.

7 Where 500 or more employees (excluding part-time em-
8 ployees) are affected, the 33 percent requirement does not
9 apply, and notice is required if the other criteria are met.
10 Office closings involve employment loss which results from
11 the shutdown of one or more distinct units within a single
12 site or the entire site. A mass layoff involves employment
13 loss, regardless of whether one or more units are shut
14 down at the site.

15 (2) Workers, other than part-time workers, who are
16 exempt from notice under section 4 of WARN are none-
17 theless counted as employees for purposes of determining
18 coverage as an office closing or mass layoff. For example,
19 if an employing office closes a temporary project on which
20 10 permanent and 40 temporary workers are employed,
21 a covered office closing has occurred although only 10
22 workers are entitled to notice.

23 (d) REPRESENTATIVE.—The term “representative”
24 means an exclusive representative of employees within the
25 meaning of 5 U.S.C. §§ 7101 et seq., as applied to covered

1 employees and employing offices by section 220 of the
2 CAA, 2 U.S.C. § 1351.

3 (e) AFFECTED EMPLOYEES.—The term “affected
4 employees” means employees who may reasonably be ex-
5 pected to experience an employment loss as a consequence
6 of a proposed office closing or mass layoff by their employ-
7 ing office. This includes individually identifiable employees
8 who will likely lose their jobs because of bumping rights
9 or other factors, to the extent that such individual workers
10 reasonably can be identified at the time notice is required
11 to be given. The term affected employees includes manage-
12 rial and supervisory employees. Consultant or contract
13 employees who have a separate employment relationship
14 with another employing office or employer and are paid
15 by that other employing office or employer, or who are
16 self-employed, are not “affected employees” of the oper-
17 ations to which they are assigned. In addition, for pur-
18 poses of determining whether coverage thresholds are met,
19 either incumbent workers in jobs being eliminated or, if
20 known 60 days in advance, the actual employees who suf-
21 fer an employment loss may be counted.

22 (f) EMPLOYMENT LOSS.—(1) The term employment
23 loss means (i) an employment termination, other than a
24 discharge for cause, voluntary departure, or retirement,
25 (ii) a layoff exceeding 6 months, or (iii) a reduction in

1 hours of work of individual employees of more than 50
2 percent during each month of any 6-month period.

3 (2) Where a termination or a layoff (see paragraphs
4 (f)(1) (i) and (ii) of this section) is involved, an employ-
5 ment loss does not occur when an employee is reassigned
6 or transferred to employing office-sponsored programs,
7 such as retraining or job search activities, as long as the
8 reassignment does not constitute a constructive discharge
9 or other involuntary termination.

10 (3) An employee is not considered to have experienced
11 an employment loss if the closing or layoff is the result
12 of the relocation or consolidation of part or all of the em-
13 ploying office's operations and, prior to the closing or lay-
14 off—

15 (i) The employing office offers to transfer the
16 employee to a different site of employment within a
17 reasonable commuting distance with no more than a
18 6-month break in employment, or

19 (ii) The employing office offers to transfer the
20 employee to any other site of employment regardless
21 of distance with no more than a 6-month break in
22 employment, and the employee accepts within 30
23 days of the offer or of the closing or layoff, which-
24 ever is later.

1 (4) A “relocation or consolidation” of part or all of
2 an employing office’s operations, for purposes of para-
3 graph § 639.3(f)(3), means that some definable operations
4 are transferred to a different site of employment and that
5 transfer results in an office closing or mass layoff.

6 (g) PART-TIME EMPLOYEE.—The term “part-time”
7 employee means an employee who is employed for an aver-
8 age of fewer than 20 hours per week or who has been em-
9 ployed for fewer than 6 of the 12 months preceding the
10 date on which notice is required, including workers who
11 work full-time. This term may include workers who would
12 traditionally be understood as “seasonal” employees. The
13 period to be used for calculating whether a worker has
14 worked “an average of fewer than 20 hours per week” is
15 the shorter of the actual time the worker has been em-
16 ployed or the most recent 90 days.

17 (h) SINGLE SITE OF EMPLOYMENT.—(1) A single
18 site of employment can refer to either a single location
19 or a group of contiguous locations. Separate facilities
20 across the street from one another may be considered a
21 single site of employment.

22 (2) There may be several single sites of employment
23 within a single building, such as an office building, if sepa-
24 rate employing offices conduct activities within such a
25 building. For example, an office building housing 50 dif-

1 ferent employing offices will contain 50 single sites of em-
2 ployment. The offices of each employing office will be its
3 single site of employment.

4 (3) Separate buildings or areas which are not directly
5 connected or in immediate proximity may be considered
6 a single site of employment if they are in reasonable geo-
7 graphic proximity, used for the same purpose, and share
8 the same staff and equipment.

9 (4) Non-contiguous sites in the same geographic area
10 which do not share the same staff or operational purpose
11 should not be considered a single site.

12 (5) Contiguous buildings operated by the same em-
13 ploying office which have separate management and have
14 separate workforces are considered separate single sites of
15 employment.

16 (6) For workers whose primary duties require travel
17 from point to point, who are outstationed, or whose pri-
18 mary duties involve work outside any of the employing of-
19 fice's regular employment sites (e.g., railroad workers, bus
20 drivers, salespersons), the single site of employment to
21 which they are assigned as their home base, from which
22 their work is assigned, or to which they report will be the
23 single site in which they are covered for WARN purposes.

24 (7) Foreign sites of employment are not covered
25 under WARN. United States workers at such sites are

1 counted to determine whether an employing office is cov-
2 ered as an employing office under § 639.3(a).

3 (8) The term “single site of employment” may also
4 apply to truly unusual organizational situations where the
5 above criteria do not reasonably apply. The application of
6 this definition with the intent to evade the purpose of
7 WARN to provide notice is not acceptable.

8 (i) FACILITY OR OPERATING UNIT.—The term “facil-
9 ity” refers to a building or buildings. The term “operating
10 unit” refers to an organizationally or operationally distinct
11 product, operation, or specific work function within or
12 across facilities at the single site.

13 **§ 639.4 Who must give notice?**

14 Section 205(a)(1) of the CAA states that “[n]o em-
15 ploying office shall be closed or a mass layoff ordered with-
16 in the meaning of section 3 of [WARN] until the end of
17 a 60-day period after the employing office serves written
18 notice of such prospective closing or layoff . . . ”. There-
19 fore, an employing office that is anticipating carrying out
20 an office closing or mass layoff is required to give notice
21 to affected employees or their representative(s). (See defi-
22 nitions in § 639.3 of this part.)

23 (a) It is the responsibility of the employing office to
24 decide the most appropriate person within the employing
25 office’s organization to prepare and deliver the notice to

1 affected employees or their representative(s). In most in-
2 stances, this may be the local site office manager, the local
3 personnel director or a labor relations officer.

4 (b) An employing office that has previously an-
5 nounced and carried out a short-term layoff (6 months
6 or less) which is being extended beyond 6 months due to
7 circumstances not reasonably foreseeable at the time of
8 the initial layoff is required to give notice when it becomes
9 reasonably foreseeable that the extension is required. A
10 layoff extending beyond 6 months from the date the layoff
11 commenced for any other reason shall be treated as an
12 employment loss from the date of its commencement.

13 (c) In the case of the privatization or sale of part
14 or all of an employing office's operations, the employing
15 office is responsible for providing notice of any office clos-
16 ing or mass layoff which takes place up to and including
17 the effective date (time) of the privatization or sale, and
18 the contractor or buyer is responsible for providing any
19 required notice of any office closing or mass layoff that
20 takes place thereafter.

21 (1) If the employing office is made aware of
22 any definite plans on the part of the buyer or con-
23 tractor to carry out an office closing or mass layoff
24 within 60 days of purchase, the employing office
25 may give notice to affected employees as an agent of

1 the buyer or contractor, if so empowered. If the em-
2 ploying office does not give notice, the buyer or con-
3 tractor is, nevertheless, responsible to give notice. If
4 the employing office gives notice as the agent of the
5 buyer or contractor, the responsibility for notice still
6 remains with the buyer or contractor.

7 (2) It may be prudent for the buyer or contrac-
8 tor and employing office to determine the impacts of
9 the privatization or sale on workers, and to arrange
10 between them for advance notice to be given to af-
11 fected employees or their representative(s), if a mass
12 layoff or office closing is planned.

13 **§ 639.5 When must notice be given?**

14 (a) GENERAL RULE.—(1) With certain exceptions
15 discussed in paragraphs (b) and (c) of this section and
16 in § 639.9 of this part, notice must be given at least 60
17 calendar days prior to any planned office closing or mass
18 layoff, as defined in these regulations. When all employees
19 are not terminated on the same date, the date of the first
20 individual termination within the statutory 30-day or 90-
21 day period triggers the 60-day notice requirement. A
22 worker's last day of employment is considered the date
23 of that worker's layoff. The first and each subsequent
24 group of terminees are entitled to a full 60 days' notice.

1 In order for an employing office to decide whether issuing
2 notice is required, the employing office should—

3 (i) look ahead 30 days and behind 30 days to
4 determine whether employment actions both taken
5 and planned will, in the aggregate for any 30-day
6 period, reach the minimum numbers for an office
7 closing or a mass layoff and thus trigger the notice
8 requirement; and

9 (ii) look ahead 90 days and behind 90 days to
10 determine whether employment actions both taken
11 and planned each of which separately is not of suffi-
12 cient size to trigger WARN coverage will, in the ag-
13 gregate for any 90-day period, reach the minimum
14 numbers for an office closing or a mass layoff and
15 thus trigger the notice requirement. An employing
16 office is not, however, required under section 3(d) to
17 give notice if the employing office demonstrates that
18 the separate employment losses are the result of sep-
19 arate and distinct actions and causes, and are not
20 an attempt to evade the requirements of WARN.

21 (2) The point in time at which the number of employ-
22 ees is to be measured for the purpose of determining cov-
23 erage is the date the first notice is required to be given.
24 If this “snapshot” of the number of employees employed
25 on that date is clearly unrepresentative of the ordinary

1 or average employment level, then a more representative
2 number can be used to determine coverage. Examples of
3 unrepresentative employment levels include cases when the
4 level is near the peak or trough of an employment cycle
5 or when large upward or downward shifts in the number
6 of employees occur around the time notice is to be given.
7 A more representative number may be an average number
8 of employees over a recent period of time or the number
9 of employees on an alternative date which is more rep-
10 resentative of normal employment levels. Alternative meth-
11 ods cannot be used to evade the purpose of WARN, and
12 should only be used in unusual circumstances.

13 (b) TRANSFERS.—(1) Notice is not required in cer-
14 tain cases involving transfers, as described under the defi-
15 nition of “employment loss” at § 639.3(f) of this part.

16 (2) An offer of reassignment to a different site of em-
17 ployment should not be deemed to be a “transfer” if the
18 new job constitutes a constructive discharge.

19 (3) The meaning of the term “reasonable commuting
20 distance” will vary with local conditions. In determining
21 what is a “reasonable commuting distance”, consideration
22 should be given to the following factors: geographic acces-
23 sibility of the place of work, the quality of the roads, cus-
24 tomarily available transportation, and the usual travel
25 time.

1 (4) In cases where the transfer is beyond reasonable
2 commuting distance, the employing office may become lia-
3 ble for failure to give notice if an offer to transfer is not
4 accepted within 30 days of the offer or of the closing or
5 layoff (whichever is later). Depending upon when the offer
6 of transfer was made by the employing office, the normal
7 60-day notice period may have expired and the office clos-
8 ing or mass layoff may have occurred. An employing office
9 is, therefore, well advised to provide 60-day advance notice
10 as part of the transfer offer.

11 (c) TEMPORARY EMPLOYMENT.—(1) No notice is re-
12 quired if the closing is of a temporary facility, or if the
13 closing or layoff is the result of the completion of a par-
14 ticular project or undertaking, and the affected employees
15 were hired with the understanding that their employment
16 was limited to the duration of the facility or the project
17 or undertaking.

18 (2) Employees must clearly understand at the time
19 of hire that their employment is temporary. When such
20 understandings exist will be determined by reference to
21 employment contracts, collective bargaining agreements,
22 or employment practices of other employing offices or a
23 locality, but the burden of proof will lie with the employing
24 office to show that the temporary nature of the project
25 or facility was clearly communicated should questions

1 arise regarding the temporary employment understand-
2 ings.

3 **§ 639.6 Who must receive notice?**

4 Section 3(a) of WARN provides for notice to each
5 representative of the affected employees as of the time no-
6 tice is required to be given or, if there is no such rep-
7 resentative at that time, to each affected employee.

8 (a) REPRESENTATIVE(S) OF AFFECTED EMPLOY-
9 EES.—Written notice is to be served upon the chief elected
10 officer of the exclusive representative(s) or bargaining
11 agent(s) of affected employees at the time of the notice.
12 If this person is not the same as the officer of the local
13 union(s) representing affected employees, it is rec-
14 ommended that a copy also be given to the local union
15 official(s).

16 (b) AFFECTED EMPLOYEES.—Notice is required to
17 be given to employees who may reasonably be expected to
18 experience an employment loss. This includes employees
19 who will likely lose their jobs because of bumping rights
20 or other factors, to the extent that such workers can be
21 identified at the time notice is required to be given. If,
22 at the time notice is required to be given, the employing
23 office cannot identify the employee who may reasonably
24 be expected to experience an employment loss due to the
25 elimination of a particular position, the employing office

1 must provide notice to the incumbent in that position.
2 While part-time employees are not counted in determining
3 whether office closing or mass layoff thresholds are
4 reached, such workers are due notice.

5 **§639.7 What must the notice contain?**

6 (a) NOTICE MUST BE SPECIFIC.—(1) All notice must
7 be specific.

8 (2) Where voluntary notice has been given more than
9 60 days in advance, but does not contain all of the re-
10 quired elements set out in this section, the employing of-
11 fice must ensure that all of the information required by
12 this section is provided in writing to the parties listed in
13 §639.6 at least 60 days in advance of a covered employ-
14 ment action.

15 (3) Notice may be given conditional upon the occur-
16 rence or nonoccurrence of an event only when the event
17 is definite and the consequences of its occurrence or non-
18 occurrence will necessarily, in the normal course of oper-
19 ations, lead to a covered office closing or mass layoff less
20 than 60 days after the event. The notice must contain
21 each of the elements set out in this section.

22 (4) The information provided in the notice shall be
23 based on the best information available to the employing
24 office at the time the notice is served. It is not the intent
25 of the regulations that errors in the information provided

1 in a notice that occur because events subsequently change
2 or that are minor, inadvertent errors are to be the basis
3 for finding a violation of WARN.

4 (b) DEFINITION.—As used in this section, the term
5 “date” refers to a specific date or to a 14-day period dur-
6 ing which a separation or separations are expected to
7 occur. If separations are planned according to a schedule,
8 the schedule should indicate the specific dates on which
9 or the beginning date of each 14-day period during which
10 any separations are expected to occur. Where a 14-day
11 period is used, notice must be given at least 60 days in
12 advance of the first day of the period.

13 (c) NOTICE.—Notice to each representative of af-
14 fected employees is to contain:

15 (1) The name and address of the employment
16 site where the office closing or mass layoff will
17 occur, and the name and telephone number of an
18 employing office official to contact for further infor-
19 mation;

20 (2) A statement as to whether the planned ac-
21 tion is expected to be permanent or temporary and,
22 if the entire office is to be closed, a statement to
23 that effect;

24 (3) The expected date of the first separation
25 and the anticipated schedule for making separations;

1 (4) The job titles of positions to be affected and
2 the names of the workers currently holding affected
3 jobs.

4 The notice may include additional information useful to
5 the employees such as information on available dislocated
6 worker assistance, and, if the planned action is expected
7 to be temporary, the estimated duration, if known.

8 (d) EMPLOYEES NOT REPRESENTED.—Notice to
9 each affected employee who does not have a representative
10 is to be written in language understandable to the employ-
11 ees and is to contain:

12 (1) A statement as to whether the planned ac-
13 tion is expected to be permanent or temporary and,
14 if the entire office is to be closed, a statement to
15 that effect;

16 (2) The expected date when the office closing or
17 mass layoff will commence and the expected date
18 when the individual employee will be separated;

19 (3) An indication whether or not bumping
20 rights exist;

21 (4) The name and telephone number of an em-
22 ploying office official to contact for further informa-
23 tion.

24 The notice may include additional information useful to
25 the employees such as information on available dislocated

1 worker assistance, and, if the planned action is expected
2 to be temporary, the estimated duration, if known.

3 **§ 639.8 How is the notice served?**

4 Any reasonable method of delivery to the parties list-
5 ed under § 639.6 of this part which is designed to ensure
6 receipt of notice of at least 60 days before separation is
7 acceptable (e.g., first class mail, personal delivery with op-
8 tional signed receipt). In the case of notification directly
9 to affected employees, insertion of notice into pay envel-
10 opes is another viable option. A ticketed notice, i.e.,
11 preprinted notice regularly included in each employee's
12 pay check or pay envelope, does not meet the requirements
13 of WARN.

14 **§ 639.9 When may notice be given less than 60 days**
15 **in advance?**

16 Section 3(b) of WARN, as applied by section 205 of
17 the CAA, sets forth two conditions under which the notifi-
18 cation period may be reduced to less than 60 days. The
19 employing office bears the burden of proof that conditions
20 for the exceptions have been met. If one of the exceptions
21 is applicable, the employing office must give as much no-
22 tice as is practicable to the union and non-represented em-
23 ployees and this may, in some circumstances, be notice
24 after the fact. The employing office must, at the time no-
25 tice actually is given, provide a brief statement of the rea-

1 son for reducing the notice period, in addition to the other
2 elements set out in § 639.7.

3 (a) The “unforeseeable business circumstances” ex-
4 ception under section 3(b)(2)(A) of WARN, as applied
5 under the CAA, applies to office closings and mass layoffs
6 caused by circumstances that were not reasonably foresee-
7 able at the time that 60-day notice would have been re-
8 quired.

9 (1) An important indicator of a circumstance
10 that is not reasonably foreseeable is that the cir-
11 cumstance is caused by some sudden, dramatic, and
12 unexpected action or condition outside the employing
13 office’s control.

14 (2) The test for determining when cir-
15 cumstances are not reasonably foreseeable focuses
16 on an employing office’s business judgment. The em-
17 ploying office must exercise such reasonable business
18 judgment as would a similarly situated employing of-
19 fice in predicting the demands of its operations. The
20 employing office is not required, however, to accu-
21 rately predict general economic conditions that also
22 may affect its operations.

23 (b) The “natural disaster” exception in section
24 3(b)(2)(B) of WARN applies to office closings and mass
25 layoffs due to any form of a natural disaster.

1 (1) Floods, earthquakes, droughts, storms, tidal
2 waves or tsunamis and similar effects of nature are
3 natural disasters under this provision.

4 (2) To qualify for this exception, an employing
5 office must be able to demonstrate that its office
6 closing or mass layoff is a direct result of a natural
7 disaster.

8 (3) While a disaster may preclude full or any
9 advance notice, such notice as is practicable, con-
10 taining as much of the information required in
11 § 639.7 as is available in the circumstances of the
12 disaster still must be given, whether in advance or
13 after the fact of an employment loss caused by a
14 natural disaster.

15 (4) Where an office closing or mass layoff oc-
16 curs as an indirect result of a natural disaster, the
17 exception does not apply but the “unforeseeable
18 business circumstance” exception described in para-
19 graph (a) of this section may be applicable.

20 **§ 639.10 When may notice be extended?**

21 Additional notice is required when the date or sched-
22 ule of dates of a planned office closing or mass layoff is
23 extended beyond the date or the ending date of any 14-
24 day period announced in the original notice as follows:

1 (a) If the postponement is for less than 60 days, the
2 additional notice should be given as soon as possible to
3 the parties identified in § 639.6 and should include ref-
4 erence to the earlier notice, the date (or 14-day period)
5 to which the planned action is postponed, and the reasons
6 for the postponement. The notice should be given in a
7 manner which will provide the information to all affected
8 employees.

9 (b) If the postponement is for 60 days or more, the
10 additional notice should be treated as new notice subject
11 to the provisions of §§ 639.5, 639.6 and 639.7 of this part.
12 Rolling notice, in the sense of routine periodic notice,
13 given whether or not an office closing or mass layoff is
14 impending, and with the intent to evade the purpose of
15 the Act rather than give specific notice as required by
16 WARN, is not acceptable.

17 **§ 639.11 [Reserved]**

