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Senate

The Senate met at 9:30 a.m. and was called to order by the President pro tempore (Mr. HATCH).

PRAYER

The Chaplain, Dr. Barry C. Black, offered the following prayer:

Let us pray.

We lift our hearts toward Your throne, O God, and bless Your Holy Name. You are great and worthy of our praise and thanksgiving. You have given us this great Nation as a heritage, and we are depending on Your providence to sustain us.

Prosper the labors of our lawmakers as they put their trust in You. In Your loving kindness, bring them a productive harvest from the seeds they have planted and watered on good soil. Keep them from accepting the belief that it is not possible to get things done, as You remind them that all things are possible to those who believe. Though they walk in the midst of trouble, revive and refresh them.

We pray in Your great Name. Amen.

PLEDGE OF ALLEGIANCE

The President pro tempore led the Pledge of Allegiance, as follows:

I pledge allegiance to the Flag of the United States of America, and to the Republic for which it stands, one nation under God, indivisible, with liberty and justice for all.

RECOGNITION OF THE MAJORITY LEADER

The PRESIDENT pro tempore. The majority leader is recognized.

FIGHTING TERRORISM

Mr. MCCONNELL. Mr. President, we learned yesterday that our allies in Jordan were victims of a terrorist attack. The vehicle-borne IED killed Jordanian soldiers and police officers. Although ISIL is not taking credit for the attack, the tactics were certainly similar to those frequently employed by ISIL. Last week, the terrorist that ISIL called a soldier of the caliphate took 49 lives as he proudly proclaimed his allegiance to that group. Days later, the CIA Director delivered a sobering analysis of ISIL's strength and capabilities.

''[Our] efforts have not reduced the group's terrorism capability and global reach,'' he said. ''[As] we have seen in Orlando, San Bernardino and elsewhere, ISIL is attempting to inspire attacks by sympathizers . . . [and it is] training and attempting to deploy operatives for further attacks.''

These are the facts—facts that the Director of Central Intelligence did not deliver lightly.

They are certainly worrying.

They remind us that this vile, hate-filled terrorist group is going to keep bringing tragedies to our doorstep until it is defeated where it trains, operates, and prepares—places like Iraq and Syria.

So we have a choice.

We can focus on defeating ISIL or we can focus on partisan politics.

Some of our colleagues may think this is all some game. We have seen the ridiculous tweets and the bizarre one-liners about guns and terrorists. I believe this is a serious moment that calls for serious solutions.

So I would ask every Senator to consider this statement from one of our Democratic colleagues just last week: ''Why have this job, one of the most powerful jobs in the world,'' he asked, ''if we are not going to exercise it to try to protect Americans from harm?''

This is the point I am making. He may have meant these words in a different context, but the reality is this: We all know that the principal way to prevent more ISIL-inspired and ISIL-directed heartbreak is to actually defeat ISIL. It is not an easy task. It doesn't always make for snappy one-liners. Not only is it going to take time, but it is going to take all of our efforts. But that is why our constituents sent us here.

Here is what we need from President Obama: Lead a serious campaign to defeat ISIL.

Here is what we need from each other: Work towards serious solutions to fight terror beyond our borders and serious counterterror tools to prevent attacks within our borders.

We will have opportunities to take positive steps forward as we resume consideration of the legislation before us.

This bill will give the FBI and law enforcement more resources to track down and defuse terrorist threats. Funding is only one piece of the larger puzzle, however. The FBI and law enforcement also need smart, targeted tools to help stop terrorist attacks before they happen in the first place.

We will have the opportunity to consider more good ideas this morning as part of the McCain amendment. One of these good ideas—ECTR reform—will allow law enforcement to connect the dots of terrorist communications in order to disrupt their plans. The inability to connect the dots has been one of the problems the FBI has had in identifying homegrown terrorists like the one in Orlando. The FBI Director calls this smart, targeted reform, ''enormously helpful'' and recently identified it as a top legislative priority. It will not allow for the collection of any content, nor will it infringe on civil liberties or civil rights. What it will do is give law enforcement a critical helping hand in the midst of ISIL's sophisticated Internet campaign to direct and inspire attacks right here in our communities. Given all we know about ISIL and its ability to radicalize people on the Internet, doesn't that just make good sense?

Here is another idea that makes sense: the McCain amendment's lone-wolf provision.

ISIL's spokesman recently issued a call for lone-wolf attacks against the

● This "bullet" symbol identifies statements or insertions which are not spoken by a Member of the Senate on the floor.

West during Ramadan. Its followers heard the call last Sunday in Orlando, last Monday in France, and days later in Belgium—a near miss in what appears to be an ISIL-directed attack planning. We need to better address this threat of lone-wolf terrorists. That means providing law enforcement with the tools and the certainty necessary to do so. That is what the lone-wolf provision will provide. It is an idea that has passed Congress before. Now we can enact it into law on an enduring basis as a part of the McCain amendment. Unfortunately, threats from lone-wolf attacks are not going away. The legal authority to help prevent them should not go away, either.

Smart, targeted counterterrorism ideas like these were Republican priorities well before the terrorist attack in Orlando. They continue to be at the forefront of our efforts now. We also remain focused on doing what we can to help this President and the next one take down ISIL.

These kinds of ideas should be all of our priorities moving forward—for Republicans, for Democrats, and for the President of the United States.

We can spend our time redacting and reacting, or we can acknowledge the threats before us and work to prevent more ISIL-fueled atrocities.

RECOGNITION OF THE MINORITY LEADER

The PRESIDING OFFICER (Mr. PAUL). The Democratic leader is recognized.

ISIS

Mr. REID. Mr. President, I ask unanimous consent to have printed in the RECORD a 1-page document prepared by our ranking member on the Committee on Homeland Security and Governmental Affairs at the conclusion of my statement.

Mr. President, my friend the Republican leader talks about President Obama not doing enough to fight ISIL. What we see in the RECORD is the document prepared by Senator CARPER that outlines the progress that has been made. Is it enough? Of course not, but it is pretty significant in our fight against ISIS or ISIL, whatever you want to call them.

I don't know what the Republican leader wants. Does he want another invasion of Iraq, ground troops? Does he want us to invade Syria? Those are the two countries he named. Our last invasion of Iraq didn't work out too well. We have had about 500,000 Iraqis killed. They are dead now as a result of that invasion.

The number in Syria is reaching about 300,000. Millions of them have been displaced because of that last invasion of Iraq. The whole Middle East is destabilized. Is that what the Republican leader wants? Does he want another invasion? Which country? Both of them? How many troops—100,000, 150,000? What does he want? Be more specific. What does he want done that isn't being done?

There being no objection, the material was ordered to be printed in the RECORD, as follows:

UPDATE ON PROGRESS MADE AGAINST ISIS

Since the height of ISIS's power, U.S. and coalition forces have recaptured 47 percent of the land ISIS once held in Iraq.

ISIS has also lost 20 percent of the land it once held in Syria.

Ramadi and Tikrit were key victories for the U.S. backed Iraqi forces.

Last Friday, Iraqi forces captured the city center of Fallujah and are now working to clear out the last few pockets of resistance in that key Anbar town.

As we speak, Kurdish, Iraqi and Syrian Democratic forces—backed by U.S. special forces—are making preparations to retake ISIS's key strongholds in Mosul and Raqqa.

We've killed 25,000 ISIS fighters and more than 120 key ISIS leaders.

We've cut ISIS funds by up to one-third.

We've drastically slowed the flow of foreign recruits from a high of about 2,000 a month in 2014 to 200 a month today.

The same goes for those young Americans who have sought to travel to join ISIS abroad. One year ago, about 10 Americans per month were leaving to join ISIS. Now that number is about one a month.

At home, the FBI is cracking down on recruits as well. Over the past two years, the FBI has arrested 88 individuals on ISIS related charges.

GUN VIOLENCE

Mr. REID. Mr. President, I am encouraged by the dialogue on gun safety that is taking place in the Senate now. Democrats and Republicans are working together to find solutions to protect Americans from gun violence. The obvious first step is to keep guns and explosives out of the hands of suspected terrorists and criminals. That is why it is imperative that the Senate call up legislation to get a vote.

The amendment from the senior Senator from Maine has bipartisan support and, at the very least, is a step in the right direction. The State of Maine has a reputation for bipartisanship. I can remember when President Obama was first elected, when we did the American Recovery Act—the stimulus. We had 57 or 58 Democratic Senators. I needed help in order to get that passed. Where did I look first? The State of Maine, Senator COLLINS and Senator Snowe. They always came through. The reason we were able to pass the Recovery Act is because of the State of Maine's senatorial representation.

So it should be no surprise to anyone that the senior Senator from Maine is working on a bipartisan basis, and while her legislation at this stage, in my mind, is not perfect, it is a step in the right direction.

I am concerned with the Collins amendment for a number of reasons, and the Justice Department also has concerns. They are worried about provisions within the legislation. But as we speak, bipartisan discussions continue to resolve these matters.

But there is no question that the Senate should vote on legislation that keeps guns away from suspected terrorists. So I appreciate the good work of Senator COLLINS.

Of course, it wouldn't be fair to talk about the State of Maine without talking about ANGUS KING—what a terrific Senator. The State of Maine should be so proud of this guy, as I know they are, based on his record as having been elected as Governor and other things in the State of Maine.

I know the National Rifle Association is whipping its followers into a frenzy about this legislation—the Collins bipartisan legislation. They are going crazy about it. That is disappointing but not surprising.

Almost every American agrees that suspected terrorists should not be able to purchase firearms and explosives. The Republican leader should ignore the desperate pleas from the NRA and bring Senator COLLINS' amendment to the floor for a vote.

ZIKA VIRUS

Mr. REID. Mr. President, on another subject, when we have voted on the Collins amendment, we must turn our attention to another critically important matter—addressing the Zika public health crisis.

The American people have been waiting since February for Republicans to respond in regard to this serious, serious threat from Zika caused by mosquito bites. For centuries, mosquitoes have been wreaking havoc on people, but never, ever in the past have there been any reports of mosquitoes carrying a virus or anything else that causes birth defects.

The American people have been waiting since February for Republicans to respond to the threat from Zika. It has been four months to the day since President Obama sent an emergency appropriations request to Congress for $1.9 billion to fight Zika, and $1.9 billion was the specific figure requested by researchers, public health experts, and doctors. There is even more needed now that 120 days have passed and have exposed even more dangers from Zika.

While this Republican Congress has done nothing to provide the necessary funding, the threat from Zika continues to grow larger every day.

According to the latest statistics from the Centers for Disease Control and Prevention on how Zika is affecting the United States—listen to these numbers because they are stunning, and in a few days they will be changed even more. Nearly 2,200 Americans have been affected by the Zika virus, and 423 pregnant women have tested positive for the virus. Tragically, six pregnancies in Zika-infected women have already resulted in severe birth defects. Of these 423 pregnant women, how many more women are going to have babies born with these extreme challenges? It is awful what this virus does to a lot of babies.

In the past we have responded to public health emergencies with the urgency they deserve. When the Nation

faced the Ebola crisis, we responded. When the avian flu crisis hit, we responded quickly with emergency funding. We have done the same with tornadoes, hurricanes, floods, earthquakes, and fires, but the Republicans aren't doing that. I don't know; I don't understand this. It is an emergency. Zika is an emergency. It is devastating. Republicans should treat it as such and work with Democrats to fully respond to this. They should do it now; they should have done it months ago.

It is stunning and sad that instead of responding responsibly to this Nation's emergency in a bipartisan way, the Republicans have retreated behind closed doors and are negotiating Zika funding among themselves. There is a conference going on, but nothing is happening. The Republicans over in the House are playing around with something they are going to send us. We know; we have been there. It is going to come here. The Republicans in the House will then decide to go home, and the Democrats will have to go with them, and they will be gone. So we will be jammed sometime next week, and the Republican leader will say: Listen, we have to do this. The House is gone. We can't change anything. Well, that is wrong. They should not turn this general public health emergency into a partisan game, syphoning money from Ebola or cutting the Affordable Care Act as we heard they are doing over in the House. That is a dangerous break from our commitment to address emergencies we are funding.

We should respond to this crisis and respond now. We know what we need to send the President—at least $1.9 billion—and it is an emergency. It is no different, as I have said, than a flood or a fire or those other emergencies I mentioned. For every moment the Republicans delay in responding to the Zika virus, we endanger more Americans.

Mr. President, there are a number of people on the floor. I would ask the Chair to announce the business of the day.

RESERVATION OF LEADER TIME

The PRESIDING OFFICER. Under the previous order, the leadership time is reserved.

COMMERCE, JUSTICE, SCIENCE, AND RELATED AGENCIES APPROPRIATIONS ACT, 2016

The PRESIDING OFFICER. Under the previous order, the Senate will resume consideration of H.R. 2578, which the clerk will report.

The legislative clerk read as follows:

A bill (H.R. 2578) making appropriations for the Departments of Commerce and Justice, Science, and Related Agencies for the fiscal year ending September 30, 2016, and for other purposes.

Pending:

Shelby/Mikulski amendment No. 4685, in the nature of a substitute.

McConnell (for McCain) amendment No. 4787 (to amendment No. 4685), to amend section 2709 of title 18, United States Code, to clarify that the Government may obtain a specified set of electronic communication transactional records under that section, and to make permanent the authority for individual terrorists to be treated as agents of foreign powers under the Foreign Intelligence Surveillance Act of 1978.

McConnell motion to recommit the bill to the Committee on Appropriations for a period of 14 days.

The PRESIDING OFFICER. Under the previous order, the time until the cloture vote will be equally divided between the managers or their designees.

The Senator from Illinois.

Mr. DURBIN. Mr. President, I rise to speak as in morning business.

ZIKA VIRUS

Mr. President, the statement just made by the Senate Democratic leader on the Zika challenge to the United States is well documented. What is well documented is that the President of the United States came to Congress 4 months ago and said: We are facing a public health threat. Do something.

For 4 months the Republican-led Congress has done nothing. Meanwhile, the mosquitoes carrying this deadly virus are on the march.

This is a report from the New York Times from last week which I ask unanimous consent to have printed in the RECORD in its entirety.

There being no objection, the material was ordered to be printed in the RECORD, as follows:

[From the New York Times, June 17, 2016]

U.S. OFFICIALS ARE SURPRISED BY ZIKA RATE IN PUERTO RICO

(By Catherine Saint Louis)

Roughly 1 percent of recent blood donors in Puerto Rico showed signs of active infection with the Zika virus, suggesting that a substantial portion of the island's population will become infected, federal health officials reported on Friday.

From April 3 to June 11, testing of 12,700 donations at blood centers in Puerto Rico identified 68 infected donors, according to the Centers for Disease Control and Prevention.

Over all, about 0.5 percent of donors had active Zika infections, but the prevalence rose to 1.1 percent in the week ending June 11. The virus, carried by the yellow fever mosquito, has been linked to birth defects in infants and neurological problems in adults.

''There are a lot more Zika-positive people than we would anticipate this early'' in the outbreak, said Phillip Williamson, an author of the C.D.C. report and the vice president of operations at Creative Testing Solutions, a blood-donor testing laboratory.

Based on prior experience, Dr. Williamson said he would not have expected so many Zika-infected donors until late June or at early July.

The C.D.C. has estimated that as many as a quarter of the island's 3.5 million people may become infected with the Zika virus this year.

''It's possible that thousands of pregnant women in Puerto Rico could be infected,'' Dr. Thomas R. Frieden, the agency's director, told Reuters on Friday, leading to ''dozens or hundreds of infants being born with microcephaly in the coming year.''

Zika-contaminated donations are removed from the blood supply. In the continental United States, where local transmission of the virus has yet to be reported, most blood banks are not yet using the experimental screening test used in Puerto Rico, which was made by Roche Diagnostics.

Mr. DURBIN. Mr. President, this article is entitled, ''U.S. Officials Are Surprised by Zika Rate in Puerto Rico.''

It goes on: ''Roughly 1 percent of recent blood donors in Puerto Rico showed signs of active infection with the Zika virus, suggesting that a substantial portion of the island's population will become infected, federal health officials reported on Friday.''

They go on to cite the statistics that have been analyzed by the Centers for Disease Control and Prevention, and here is what they concluded:

Based on prior experience, Dr. Williamson [of the CDC] said he would not have expected so many Zika-infected donors until late June or early July.

The CDC has estimated that as many as a quarter of the island's 3.5 million people may become infected with the Zika virus this year.

''It's possible that thousands of pregnant women in Puerto Rico could be infected,'' Dr. Thomas R. Frieden, [the CDC's] director, told Reuters . . . leading to ''dozens or hundreds of infants being born with microcephaly in the coming year.''

What is the Republican majority waiting for in the U.S. Senate? What is the Republican majority waiting for in the U.S. House of Representatives?

Don't they believe this is a serious public health threat? If they don't, they are ignoring the obvious—evidence given to us by the leading public health defense agency in the United States of America, if not the world. Over and over again, they tell us this is a deadly threat. While the infection rates increase and the infections among pregnant women increase and the number of these infants who are afflicted by serious birth defects increase, the Republicans in the House and Senate are too busy focusing on Donald Trump to pay attention to this public health crisis. It is about time they accepted the reality, and the reality is they were elected to lead, they were elected to protect, they were elected to serve, and when it comes to the Zika virus, they are doing none of this. They are standing back, twisted in knots, trying to figure out how to take money away from other public health challenges to deal with this, and 4 months have passed. These mosquitoes are spreading this infection across Puerto Rico, and soon we will know more in the United States.

Senator REID suggested there were 2,000 Americans with the Zika virus infection; 400—if I recall his numbers correctly—pregnant women, and there is already evidence of babies here being born afflicted because of this infection. What is the Republican majority waiting for?

FIGHTING TERRORISM

Mr. President, the Senate Republican leader came to the floor earlier this morning to speak to us about ISIL and

terrorism. I hope he understands there is a political consensus on the following statement: We should do everything in our power to prevent any terrorist attack in the United States and everything in our power to stop the spread of terrorism overseas, including and especially when it comes to ISIS.

What Senator REID asked of Senator MCCONNELL is the right question. You come with criticism of our current policy, but you offer nothing. There is no suggestion by the Senate Republican leader that we should be sending invading armies again. We did try that in Iraq, and the consequences are well known. We lost 4,844 lives—American soldiers who gave their lives in Iraq. Over a half million returned with injuries, some of them with injuries that will be with them for a lifetime. The cost to the United States in terms of death, injury, and the problems that these veterans face will go on for generations. Is the Senator from Kentucky suggesting we should do that again? I hope not.

What we are doing is joining up with Iraqi forces to defeat ISIS. We are using the best of American intelligence and guidance to make sure they are effective and there is evidence of success.

The statement put in the RECORD from Senator CARPER goes into detail. Senator REID alluded to it in his speech. It talks about the things we have done and the success we have had. The notion that we can do this overnight, that we just invade with a large U.S. Army—if that is what Senator MCCONNELL is suggesting, I would suggest he go back in history and reflect on his own vote for the invasion of Iraq, which I disagreed with at the time and still do. It was a mistake for us to invade.

Then there is the question about the gun issue, particularly when it comes to assault weapons. Do you know what the terrorists have told us? They basically said to us: Go ahead and fight the last war. Focus on what happened on 9/11. Put all your resources at airports. Be ready to stop anyone who wants to take over an airplane. It is a worthy goal, but while you are diverted with that goal, fighting the last terrorist war, we are opening up new fronts, and one of those fronts very specifically is that the terrorists warned us: We know where to buy assault weapons in the United States. We know about your gun shows. We know about your Internet sales, and that is where we are going to turn.

They are calling on their aspiring terrorists around the world to find access to assault weapons and turn them on innocent Americans. We saw the devastating impact of that in Orlando two weeks ago.

Because of the filibuster last week that was initiated by Senator MURPHY of Connecticut and sustained by Senator BOOKER of New Jersey and Senator BLUMENTHAL of Connecticut and 37 others who came to the floor to support them, we forced a vote on Monday night on 4 gun safety issues. None of them passed. It was established that they needed an extraordinary majority. That was the decision made by the Republican leadership. While we came close to a majority on many of these votes, we didn't have the 60 votes necessary to make them law.

Luckily, we have one Republican Senator on the Republican side who showed extraordinary courage. Senator COLLINS of Maine has stepped up to try to craft a measure to keep deadly weapons out of the hands of terrorists in the United States. Do the American people agree with Senator COLLINS? Only by a margin of 90 percent, they believe she is right. They believe we are right—that we should do something to defy the National Rifle Association and make it more difficult for those who are suspected terrorists to buy firearms, especially assault weapons. Well, she is working on it, and I am working with her. Many of us are supporting her effort—a bipartisan effort, and one that is long overdue.

When the Senator who is the Republican majority leader comes to the floor and says we need to do more to fight terrorism, what is he doing to fight terrorism? When it comes to assault weapons and those who are purchasing them in the United States—like the deadly killer in Orlando—he can help us. The Kentucky Senator who is the Republican leader can help us by making America safer and keeping automatic weapons, assault weapons, and semiautomatic weapons out of the hands of would-be terrorists. That would mean defying the National Rifle Association, and many on the Republican side are scared to death of that—just scared to death of what that organization might do to them if they join Senator COLLINS, if they join Senator FEINSTEIN, in trying to stem the rise of terrorism from these assault weapons in the United States.

I have said it before and I will say it again: There is no self-respecting hunter, sportsman, or even a person looking for self-defense who can defend these weapons that are being sold in the United States.

There was a Snapchat video of one of the victims in Orlando, the last 9 seconds of her life before she was killed. She turned on her cell phone, and in 9 seconds, 17 rounds were fired by this aspiring ISIS terrorist who had access to an assault weapon. Assault weapons belong in the hands of law enforcement and the military. They shouldn't be so easily accessible by those who would turn them on innocent Americans, whether it is in a classroom in Newtown, CT, or in a nightclub in Orlando.

I would say to the Senator from Kentucky that if he wants to stop terrorism, start at home. Start at home by preventing terrorist access to these deadly weapons that have no effective use when it comes to sport and hunting and that are just being purchased, sadly, for collections reasons or for those who want to misuse the weapons to kill innocent people.

Mr. President, I yield the floor.

I suggest the absence of a quorum.

The PRESIDING OFFICER (Mr. COTTON). The clerk will call the roll.

The assistant bill clerk (Lindsay Gibmeyer) proceeded to call the roll.

Mr. DURBIN. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

The PRESIDING OFFICER. Without objection, it is so ordered.

Mr. DURBIN. Mr. President, I ask unanimous consent that the time be equally divided between the Democrats and Republicans during the quorum call.

The PRESIDING OFFICER. Is there objection?

Without objection, it is so ordered.

Mr. DURBIN. I suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The assistant bill clerk proceeded to call the roll.

Mr. LEAHY. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

The PRESIDING OFFICER. Without objection, it is so ordered.

AMENDMENT NO. 4787

Mr. LEAHY. Mr. President, as a member of the Appropriations Committee, I am concerned about a pending amendment, McCain amendment No. 4787.

We had a series of votes earlier this week on sensible gun safety measures. We know by all the polling that the overwhelming majority of Americans supported these measures, but they were blocked by Senate Republicans.

Now it appears the Republican leadership wants to change the subject. They are resorting to scare tactics to divert the attention of the American people from their failure to act in response to mass shootings. Let's be clear about what we need to stay safe. We need universal background checks for firearms purchases and we need to give the FBI the authority to deny guns to terrorist suspects.

Senate Republicans rejected those commonsense measures earlier this week, but we still have the chance to give law enforcement real and effective tools. We should strengthen our laws to make it easier to prosecute firearms traffickers and straw purchasers.

I am a gun owner. I know if I go in to buy a gun in Vermont—even though the gun store owner has known me most of their life—I have to go through a background check. But you can have somebody who has restraining orders against them, warrants outstanding against them, or who could have been convicted of heinous crimes, and they can walk into a gun show, with no background check, and buy anything they want.

We also know they can go and buy all kinds of weapons to sell at a great profit to criminal gangs that couldn't buy them otherwise, and of course to those who are going to commit acts of terrorism and hate crimes.

We also need to fund the FBI and the Justice Department so they have the resources to combat acts of terrorism and hate. Those are the elements of the amendment that Senators MIKULSKI, BALDWIN, NELSON and I filed yesterday.

In contrast, Republicans are proposing to reduce independent oversight of FBI investigations, and make permanent a law that as of last year had never been used. The McCain amendment would eliminate the requirement for a court order when the FBI wants to obtain detailed information about Americans' Internet activities in national security investigations.

You can almost hear J. Edgar Hoover, who loved to be able to spy on any American he didn't like, asking: Why didn't I have that when I was the head of the FBI?

The McCain amendment could cover Web sites Americans have visited; extensive information on who Americans communicate with through email, chat, and text messages; and where and when Americans log onto the Internet and into social media accounts. Over time, this information would provide highly revealing details about Americans' personal lives, Americans who are totally innocent of any kind of criminal activity, and they get all of this without prior court approval.

That is why this amendment is opposed by major technology companies and privacy groups across the political spectrum, from FreedomWorks to Google, to the ACLU.

Senator CORNYN and others have argued that we cannot prevent people on the terrorist watch list from obtaining firearms without due process and judicial review. Yet at the same time they are proposing to remove judicial approval when the FBI wants to find out what Web sites Americans are visiting. The FBI already has the authority to obtain this information if it obtains a court order under section 215 of the USA PATRIOT Act.

None of us would feel comfortable if the FBI or any law enforcement agency could just walk into our home, rifle through our desks, and go through the notes of whom we have called or whom we have talked to. But they are saying because we have done it electronically and through the Internet, we ought to be able to just ignore any right of privacy and go into it.

So rather than trying to distract us from their opposition to commonsense gun measures, such as their opposition to requiring somebody who has criminal indictments pending against them from being able to go to a gun show and buy guns, Republicans should support actions that will help protect us, such as those in the amendment filed by Senators MIKULSKI, BALDWIN, NELSON, and myself.

Instead of kowtowing to a very well-organized special interest lobbying group, why not listen to the lobby of the American people and do what Americans want. I hope Senators will oppose the McCain amendment. I hope they will support measures that will actually help keep our country safe.

Mr. President, I yield the floor to the distinguished Senator from Oregon.

The PRESIDING OFFICER. The Senator from Oregon.

Mr. WYDEN. Mr. President, I thank my colleague. He and I have worked on this. He is really outlining the hypocrisy behind what has been going on over the past few days.

Mr. President, due process ought to apply as it relates to guns, but due process wouldn't apply as it relates to the Internet activity of millions of Americans. My view is that the country wants policies that promote safety and liberty. Increasingly, we are getting policies that do not do much of either. Supporters of this amendment, the McCain amendment, have suggested that Americans need to choose between protecting their security and protecting their constitutional right to privacy.

The fact is, this amendment doesn't improve either. What it does is, it gives an FBI field office new authority to administratively scoop up Americans' digital records, their email and chat records, their text message logs, Web-browsing history, and certain types of location information without ever going to a judge.

The reason this is unnecessary—and it is something I believe in very strongly and worked hard for it in the FREEDOM Act—there is a very specific section in the FREEDOM Act, which I worked for and authored in a separate effort in 2013, that allows the FBI to demand all of these records—all of the records I described—in an emergency and then go get court approval after the fact. So unless you are opposed to court oversight, even after the fact, there is no reason to support this amendment.

The FBI has not, in any way, suggested that having this authority would have stopped the San Bernardino attack or the massacre at an LGBT nightclub in Orlando. That is because there is no reason to think that is the case.

The Founding Fathers wrote the Fourth Amendment to the Constitution for a good reason. We can protect security and liberty. We can have both. Somehow, the sponsors of the McCain amendment have said: You can really only have one or the other.

Mr. President and colleagues, the other argument that was made yesterday—some have said, we have to have this amendment because it will just fix a typo in the law. That is not true. I urge colleagues to take a look at the record on this. The record makes it clear that this provision was carefully circumscribed, was narrowly drawn. The notion that this is some sort of typo simply doesn't hold water.

The fact is, the Bush administration—hardly an administration that was soft on terror—said this was not needed, this was not something they would support; that the national security letter statute ought to be interpreted narrowly just the way the authors in 1993 envisioned.

I see my friend, the distinguished chair of the Intelligence Committee. I know we are going to hear how this is absolutely pivotal in order to protect the security of the American people. I will recap.

No. 1, never once has the FBI suggested this would have prevented Orlando; No. 2, in the face of an emergency under the legislation I authored, the government, in an Orlando or San Bernardino issue, can go get the records immediately and then after the fact settle up; No. 3, this was not a typo. This was what the authors had suggested; No. 4, the Bush administration, hardly soft on terror, didn't believe what this amendment was all about was necessary. This is an amendment that would undermine fundamental American rights without making our country safer.

In my view, undermining the role of judicial oversight, particularly when it doesn't make the country safer and we have a specific statutory provision for emergencies to protect the American people, this amendment defies common sense.

I hope my colleagues will oppose it. I urge my colleagues to do so. I think it is going to be very hard to explain to the American people how an approach like the one behind this amendment, that would allow any FBI field office to issue an administrative subpoena for email and chat records, text message logs, web-browsing history, location information—that you ought to be able to do it without judicial oversight, when you have a specific law that says government has the right to move quickly in an emergency. I think it is going to be pretty hard to explain to the American people how you are going to have an arrangement like this that does not make us safer and certainly jeopardizes our liberties.

I am for both, and this amendment doesn't do much of either.

I yield the floor.

The PRESIDING OFFICER. The Senator from North Carolina.

Mr. BURR. Mr. President, as I grew up, I remember listening daily to Paul Harvey on the radio. Paul Harvey's motto was, ''and now the rest of the story.''

That is where we are. I give Senator WYDEN a tremendous amount of credit for consistency. He is consistently against providing the tools that law enforcement needs to defend the American people. That is fine, if that is your position, but let's talk about fact.

This statute was changed in 1993, and in one subpart of that legislation, it was not carried over about the ISP—Internet service provider—responsibility to provide this information when requested by law enforcement.

From 1993 until 2010, every technology company, when requested by the FBI, continued to provide this information. This is not a new expansion.

It is clearly something that continued from 1993 until 2010, 6 years ago, when all of a sudden a tech company looked at it and said: Boy, it is in this subpart, but it doesn't state it in that subpart so we are not going to provide it for you anymore.

Myth: We have never asked for this. We have never had this.

No, we have had it for a long time, and until 2010, every company supplied it to the Federal Bureau of Investigation. All of a sudden, one company's general counsel said: We don't see it in this subpart; therefore, we are not bound to provide that for you.

We are either going to fight terrorism and prosecute criminals or we are not going to do it. We can take away every tool because we use this excuse that technology now forbids us from accessing information.

Let me say about this, we get no content. To get content, you have to go to a judge on a bench, and that judge has to give you permission to actually read the content. We are talking about addresses, locations, times that, in the case of reconstruction or in the case of trying to prevent an attack, could be crucial.

The one fact I heard from my colleague from Oregon is that this wouldn't have stopped San Bernardino or Orlando. He is 100 percent correct. But I hope there is no legislation we are considering in the Senate that is about a single incident. This is about a framework of tools law enforcement can use today, tomorrow, and into the future; it is not about looking back and saying: But it didn't exist here.

Let me just explain what happens if, in fact, this inadvertent change isn't made. It means the FBI goes from a 1-day process of getting this vital information to over a month. To go to the FISA Court and get approval to seek the information—over a month. If it had to do with a terrorist attack, boy, I hope the American people are comfortable with saying: As long as the FBI figures this out a month in advance, then we are OK. But when you look at the MO of attacks around the world, in most cases, we had no notice. In most cases, maybe another thread of information might have given us the preventive time we needed.

In many cases, connecting the dots is also a matter of time. Director Comey came and had a session with all Members of the Senate last week. His comment about expediting this information into the public domain was because he wanted to assure the American people that they had reviewed as much as they could to certify that there was not another cell, that the American people could sleep safe that night. Well, this is part of that process—being able to access the information you need in a timely fashion.

You know something he forgot to say is that this is the Obama administration's language. We can talk all we want to about Bush or Clinton or whatever; this is the Obama administration—the one that has the responsibility today to keep the American people safe. It is the administration that has come to the Senate, provided the language, and asked for this clarification to be made because it was inadvertently left out in 1993.

So we are here today to fix something that is broken, not to expand in any way, shape, or form the powers or to intrude into privacy, because there is no content collected. This is simply to provide law enforcement with tools that enable them to fulfill their mission, which is to keep America safe.

In addition to the ECTA fix, let me say there is a lone-wolf provision that extends the lone wolf permanently. The lone wolf provision provides the government's ability to target non-U.S. persons—foreigners only—who engage or attempt to engage in international terrorism but do not show specific links to a foreign power or terrorist organization to be under the lone-wolf provision. It is too important to let it expire.

This provision is not about addressing or responding to a single specific threat—particularly one that has already manifested itself—any more than the underlying bill is. I urge my colleagues to support this legislation. The American people need it, law enforcement needs it, and the Obama administration wants it. It is what we operated under from an understanding from 1993 until 2010, when a general counsel in one company decided to buck the system and say: Spell it out for me or we are not going to do it. Let's spell it out for them and give law enforcement this tool.

I yield the floor.

The PRESIDING OFFICER. The Senator from Arizona.

Mr. MCCAIN. Mr. President, how much time remains?

The PRESIDING OFFICER. Ten minutes remains.

Mr. MCCAIN. I won't take the entire 10 minutes. I notice the Senator from Oregon, and I would be glad to yield to him 3 minutes of the 10 minutes remaining so he can speak in his usual articulate fashion.

Mr. WYDEN. I thank my colleague for the time.

Mr. MCCAIN. I yield 3 minutes of my 10 minutes to the Senator from Oregon.

The PRESIDING OFFICER. The Senator from Oregon.

Mr. WYDEN. Mr. President, I want to come back again to the argument I made earlier. The Senator from North Carolina said the FBI would have to wait around if there was something that really had the well-being of the American people at stake. That is simply inaccurate. In the USA FREEDOM Act, I was able to add a provision I feel very strongly about, which says if the FBI thinks the security and well-being of the American people are on the line, the FBI can move immediately to collect all the information we have been talking about. So there is no waiting. There is no dawdling under the amendment we put in the FREEDOM Act. The government can go get that information immediately and come back and then settle up later with the judge. Frankly, that was something I felt extremely strongly about because I wanted it understood that there is not a debate about privacy versus security. This is about ensuring that we have both, and that is why that emergency provision is so important.

My colleague made mention of the fact that the FBI would be waiting around if the country's safety and well-being were on the line. No way—not because of the specific language in the USA FREEDOM Act I offered and my colleague supported. This is about ensuring that the American people can have both security and liberty.

We have heard the lone-wolf provision referred to. That was extended for 4 years in the USA FREEDOM Act. I supported that as well.

So what we are talking about today is not making the country safer but threatening our liberty. And I did draw a contrast between this and the issue with respect to guns. Our colleagues said we ought to have due process as it relates to guns. I certainly support the idea of due process, but it shouldn't be a double standard—we are going to have due process there, and we are not going to have due process as it relates to these national security letters.

The PRESIDING OFFICER. The Senator has used 3 minutes.

Mr. WYDEN. If I could have 10 additional seconds, and I appreciate my colleague's courtesy.

Mr. MCCAIN. Certainly.

Mr. WYDEN. The amendment gives the FBI field office authority to scoop up all this digital material without judicial oversight. That is a mistake.

I yield the floor.

The PRESIDING OFFICER. The Senator from Arizona.

Mr. MCCAIN. Mr. President, obviously I urge my colleagues to support this amendment. I thank the distinguished chairman of the Select Committee on Intelligence, who knows as much about this issue as any Member of Congress or anyone else, and I appreciate the great job he is doing and his important remarks.

Look, this is pretty simple. The amendment has the support of the National Fraternal Order of Police; the Federal Law Enforcement Agencies Association, which is the largest national professional law enforcement association; and the Federal Bureau of Investigation Agents Association. Literally every law enforcement agency in America supports this amendment so they can do their job and defend America.

Ronald Reagan used to say that facts are stubborn things. The fact is, according to the Director of the CIA, according to the Director of National Intelligence, right now Baghdadi, in Raqqa, is calling people in and saying: Get on this. Get on this and get back to the United States or Europe and contact us then and we will attack.

There will be more attacks, according to both the Director of the CIA and the Director of National Intelligence.

Right now there are, unfortunately, young people in this country who are self-radicalizing. And what vehicle is doing the self-radicalization? It is the Internet.

We are not asking for content here; we are just asking for usage, the same way we can do with financial records, the same way we can do with telephone records. This is an important tool.

How could anyone—and I say this with great respect for the Senator from Oregon. He is a passionate and articulate advocate for what he believes in, and he has my respect and friendship. But I ask, in all due respect, after the events of the last few days, when we know that attacker was self-radicalized—and what did he use for it? He used the Internet.

I don't know if that attack could have been prevented, but I know that attacks can be prevented because that is the view of the chairman of the Select Committee on Intelligence, the Director of the Federal Bureau of Investigation, the Director of the CIA, and the Director of National Intelligence, who are not interested in taking away our liberties but are interested in carrying out their fundamental responsibilities, which happen to be to protect this Nation.

So all I can say to my colleagues is that we need to protect the rights of all of our citizens. We can't intrude in their lives. This constant tension will go on between the right of privacy and national security, and I think there are gray areas we need to debate and come to agreement on finally over time, but this issue is, honestly, a no-brainer.

When the Director of the Federal Bureau of Investigation, who is probably one of the most respected individuals in America, admired and respected by all of us, is saying this is one of his highest priorities in order to protect America, then I think we should listen to him. When the Director of the CIA says they are planning further attacks on the United States of America and Europe, we should give them the tools they need to prevent that. When the Director of National Intelligence testifies before the Committee on Armed Services that there will be further attacks, shouldn't we give them this rudimentary tool, which, according to the chairman of the Select Committee on Intelligence, was basically an oversight? Shouldn't we correct that, and can't we protect the rights of every individual and every American and still enact this really modest change, which, although in some ways modest, according to the Director of the FBI, is of his highest priorities?

So let's listen. Let's listen to those whom we entrust our Nation's security to after going through the confirmation process and the approval or disapproval of the Members of this body, who are then entrusted with the solemn obligation of defending this Nation. They are saying unanimously that they need this authority in order to carry out their responsibilities.

Mr. President, we are going to vote here in a couple of minutes, and I would urge my colleagues to respect the views—maybe not mine, maybe not the chairman of the Select Committee on Intelligence, but let's respect the views of those who are entrusted with defending this Nation. I believe we should give them this authority.

This debate will go on, I say to my friend from Oregon. There will be other areas where there is tension between the right of every citizen to privacy and the requirement to defend this Nation because we are facing a challenge the likes of which we have never seen before, and that is this whole thing of self-radicalization and people who are sneaking into this country to commit acts of terror, which has the entire American public concerned—San Bernardino, Orlando.

I hope the Senator from Oregon and those who will vote no on this amendment understand that in the view of the experts on terrorism in this world—absolutely are convinced there will be further attacks. Shouldn't we give them this fundamental tool, this basic tool they have asked for? I believe they respect all Americans' right to privacy as well.

I urge my colleagues to vote aye on this amendment, and then we can move on to other ways to help our enforcement agencies and our intelligence agencies defend this Nation against this threat, which is not going away.

Mr. President, I believe my time has expired.

The PRESIDING OFFICER. The Senator from New Mexico.

Mr. HEINRICH. Mr. President, has all the time expired?

The PRESIDING OFFICER. All time has expired.

Mr. HEINRICH. I ask unanimous consent to speak for 2 minutes.

Mr. MCCAIN. I object.

The PRESIDING OFFICER. Objection is heard.

CLOTURE MOTION

Pursuant to rule XXII, the Chair lays before the Senate the pending cloture motion, which the clerk will state.

The bill clerk read as follows:

CLOTURE MOTION

We, the undersigned Senators, in accordance with the provisions of rule XXII of the Standing Rules of the Senate, do hereby move to bring to a close debate on Senate amendment No. 4787 to amendment No. 4685 to Calendar No. 120, H.R. 2578, an act making appropriations for the Departments of Commerce and Justice, Science, and Related Agencies for the fiscal year ending September 30, 2016, and for other purposes.

Mitch McConnell, Chuck Grassley, Orrin G. Hatch, John Thune, Thad Cochran, Marco Rubio, Tom Cotton, Richard Burr, Pat Roberts, Thom Tillis, Mike Rounds, John Cornyn, John Barrasso, Deb Fischer, Cory Gardner, Shelley Moore Capito, Johnny Isakson.

The PRESIDING OFFICER. By unanimous consent, the mandatory quorum call has been waived.

The question is, Is it the sense of the Senate that debate on amendment No. 4787, offered by the Senator from Kentucky for the Senator from Arizona, to amendment No. 4685 to H.R. 2578, shall be brought to a close?

The yeas and nays are mandatory under the rule.

The clerk will call the roll.

The bill clerk called the roll.

Mr. CORNYN. The following Senator is necessarily absent: the Senator from Idaho (Mr. CRAPO).

Mr. DURBIN. I announce that the Senator from Indiana (Mr. DONNELLY), the Senator from California (Mrs. FEINSTEIN), and the Senator from New Jersey (Mr. MENENDEZ) are necessarily absent.

The PRESIDING OFFICER (Mr. SULLIVAN). Are there any other Senators in the Chamber desiring to vote?

The yeas and nays resulted—yeas 58, nays 38, as follows:

[Rollcall Vote No. 108 Leg.]

YEAS—58

Alexander	Graham	Reed
Ayotte	Grassley	Reid
Barrasso	Hatch	Risch
Blunt	Heitkamp	Roberts
Boozman	Hoeven	Rounds
Burr	Inhofe	Rubio
Capito	Isakson	Sasse
Casey	Johnson	Scott
Cassidy	King	Sessions
Coats	Kirk	Shelby
Cochran	Klobuchar	Sullivan
Collins	Lankford	Thune
Corker	Manchin	Tillis
Cornyn	McCain	Toomey
Cotton	McCaskill	Vitter
Cruz	Mikulski	Warner
Enzi	Moran	Whitehouse
Ernst	Nelson	Wicker
Fischer	Perdue	
Flake	Portman	

NAYS—38

Baldwin	Gardner	Murray
Bennet	Gillibrand	Paul
Blumenthal	Heinrich	Peters
Booker	Heller	Sanders
Boxer	Hirono	Schatz
Brown	Kaine	Schumer
Cantwell	Leahy	Shaheen
Cardin	Lee	Stabenow
Carper	Markey	Tester
Coons	McConnell	Udall
Daines	Merkley	Warren
Durbin	Murkowski	Wyden
Franken	Murphy	

NOT VOTING—4

Crapo	Feinstein
Donnelly	Menendez

The PRESIDING OFFICER. On this vote, the yeas are 58, the nays are 38.

Three-fifths of the Senators duly chosen and sworn not having voted in the affirmative, the motion is rejected.

The Republican leader.

Mr. MCCONNELL. Mr. President, I enter a motion to reconsider the vote.

The PRESIDING OFFICER. The motion is entered.

Mr. CORNYN. Mr. President, I suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The legislative clerk proceeded to call the roll.

Mr. PORTMAN. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

The PRESIDING OFFICER. Without objection, it is so ordered.

COMPREHENSIVE ADDICTION AND RECOVERY BILL

Mr. PORTMAN. Mr. President, I rise today to talk about the heroin and prescription drug epidemic that is tearing families apart and devastating communities in every one of the States represented in this Chamber.

I rise today for the 10th time since this body, the Senate, passed CARA—the Comprehensive Addiction and Recovery Act—by a vote of 94 to 1. It took us 2½ weeks on the floor to get that done. It took 3 years of work to build up the right consensus, but we got it done. The House then proceeded over time to pass 18 separate bills dealing with this issue, and now we are in conference with the House.

As I have said in every speech I have given over the last 10 weeks we have been in session since that time, we need to move and move quickly, and there is no excuse for inaction. I am going to continue to come to the floor and talk to my colleagues on both sides of the aisle, leadership on both sides of the Capitol, on this issue until we get it done. Why? Because this is an emergency. This is not just another issue that Congress should take up; this is one that is affecting every single community in America. Sadly, it is getting worse, not better.

Every week when I come to the floor, unfortunately, I come with new news. I come with information that has come to my attention since my previous talk on the floor about what is happening in our communities, and I will do that again today.

There is some good news, and that is that since I spoke on the floor last week, the Senate Appropriations Committee has voted to increase funding to deal with this opioid issue—this is heroin, prescription drugs, and this new fentanyl, which is a synthetic form of heroin that is gripping our communities—and the funding increase was made as a commitment by the Senate Appropriations Committee on a bipartisan basis to have a 93-percent increase in funding as compared to this year.

This year we also saw an increase in funding. Thanks to the leadership of some of the Members in this body, we increased the funding for this year, and we have increased it again for next year. That is the good news, but we have to be sure the money is properly spent.

That is what CARA is about. It is an authorization bill, and it says that going forward, let's be sure we are spending it on evidence-based treatment and recovery that actually works to make a difference to get people back on track; let's be sure we are spending it on the kinds of things that keep people from getting into the funnel of addiction in the first place—again, evidence-based prevention and education; let's be sure we are helping our law enforcement and helping our health officials.

The reason the Fraternal Order of Police strongly supports this legislation is it helps them in training how to use naloxone and Narcan more effectively and provides them the ability to have that to be able to take these overdose increases we have seen in all of our States—be able to save lives.

So this legislation is comprehensive. It is needed. We now have the funding in place. Should there be more funding? Yes, I think so. But this is an awfully good start, to have a 93-percent increase and an increase already for this year.

There is no excuse for us not getting this conference committee completed and taking the comprehensive Senate bill and merging it with the individual House bills and getting it to the President's desk for his signature. The comprehensive approach is the only way to do this.

The acting U.S. attorney for Northern Ohio said it well. Her name is Carole Rendon. She is involved with it, folks. She is in the trenches. She said: ''The only way we can stem this tide is with a comprehensive approach.'' I couldn't agree more.

A lot of us, including my friends and allies on the outside, are interested in this issue. There are 130 national groups who have supported this legislation. Virtually every group in the country involved in prevention, education, treatment, recovery, and law enforcement has supported this. But they are concerned about the House versions—the 18 separate bills versus the comprehensive bill—because the House versions do not deal effectively with this issue of recovery. Treatment and recovery need to go hand in hand.

By the way, without recovery, the legislation is not comprehensive. It is called the Comprehensive Addiction and Recovery Act for a reason. We know that funding the right kinds of recovery programs will work to help people get back on track and bring their families back together and keep them away from some of the aspects we all know about. The No. 1 cause of accidental death in the State of Ohio is overdoses. It is probably the No. 1 cause of accidental death in the country, from the data we recently received. We have to be sure that recovery works.

CARA offers critical resources to develop recovery support services for individuals and families working to overcome addiction. It promotes recovery programs in high schools and colleges that, sadly, are needed.

At Ohio State University, we happen to have a model recovery program. Sarah Nerad, who is a brave young woman, started it. It is something other schools are now emulating. It started with a couple of people, and it has grown and grown in Ohio State. Recovering addicts can come together and talk among themselves in a support group. These are college students. This is something that has been very helpful at the college and high school level because it is needed.

There are some good ideas in the 18 bills passed by the House that were not in CARA, and we should incorporate those. One I like particularly is lifting the cap on Suboxone so we can expand the number of patients who can be treated by a doctor for an opioid dependency. Suboxone, like methadone, is one of the treatment methods that are used. That cap should be raised. There seems to be a bipartisan consensus about that.

I am hopeful that we can quickly resolve the differences we have between the House and Senate bills, pick up the good parts of the House bill, keep it comprehensive, and get it to the President's desk for his signature. I am encouraged that the conference is getting going. Last week I thanked Senator MCCONNELL, the majority leader, for naming the conferees on the Senate side. There has already been a lot of good work done, and now we have the conferees officially named on both sides. Again, there is no excuse for not moving forward.

I was very concerned yesterday when I heard a news report from National Public Radio about a White House meeting with some Democratic Members of Congress about potentially stalling CARA, the Comprehensive Addiction and Recovery Act. One White House legislative aide is quoted in the story as saying, ''We need to slow down the conference enough so that the White House . . . can bring it back to the American people. . . . We need . . . help in slowing it down.'' The piece went on to say that some of the Democratic Members who went down to the White House ''were eager to help'' to slow it down. I hope that is not accurate. I can't believe it would be. Delaying might be a good way to score some political points, but it is terrible policy. It is the wrong thing to do, and it is a disservice to the millions of Americans who are suffering across this country from the consequences of addiction and who are waiting for relief. They have been patient so far, but these 130 groups I talked about are getting increasingly impatient, and I don't blame them. I am too. This bill is about saving lives. Delay means the status quo continues.

On average, 129 Americans lose their lives every day. We had 129 families come to the Capitol a few weeks ago to make that point—the CARA family group—to be able to let Members know this is something we need to act on now. Every day five Ohioans, on average, lose their lives. That is one every 12 minutes at the national level. In the 103 days since we passed CARA in this Chamber with a 94-to-1 vote, during those 103 days, that means 12,000 Americans have lost their lives to overdoses from heroin and prescription drugs.

Again, the overdoses don't tell the story. As horrific as that is, it is a much bigger story. It is about all the casualties—people who may not have overdosed and died, but they are casualties. They have been torn apart from their families. They have been torn apart from their work. They have

been driven to crime, such as theft, to support their habit. They do feel as though there is no hope for them. Nine out of ten people who are addicted are not getting treatment. This is happening right now. The price of delay is those people are not getting the help they need. The longer we delay, the longer this epidemic continues to get worse.

Maybe some of those who want to delay CARA don't realize how urgent this crisis is. I know there is a lot going on right now, and maybe they are distracted by other issues. Maybe they don't know the statistics. Maybe they don't know the stories of the families broken up, the lives cut short, or those who are casualties to this. Maybe they don't know the faces behind these statistics.

Again, just since last week when I spoke last time, we have new information that is troubling. We know now that the Centers for Disease Control and Prevention is warning that the heroin epidemic is actually driving the threat of HIV and hepatitis C, including in my own area of Southwest Ohio. We now know that. So this is about heroin and prescription drugs, but it is also about hepatitis C, and it is also about HIV.

Maybe they don't know about the drug traffickers sentenced last week in Lima, OH, for trafficking $300,000 worth of heroin and 20,000 injections' worth of heroin.

Maybe they don't know about Stosh Simcak of Euclid, OH, outside Cleveland. He was a star athlete in soccer and football. He was a charismatic, talented, and joyful young man. In high school, he started to experiment with drugs. He started with marijuana and ecstasy and prescription pain killers. He got addicted to opioids and then turned to heroin because it is less expensive and more available. His relationship with his family suffered, of course, as it almost always does. The drug becomes everything. At times, his relationship was broken altogether. He had a hard time getting a job and keeping a full-time job. Finally, he agreed he needed help. His parents unsuccessfully tried to get him into five different rehabilitation centers. Often there was no room. He was arrested with a felony drug charge. He posted bond and was released. He told his dad Steve in a text message:

> I don't want to lose my family. I lost enough already. . . . I want to be the son you can be proud of if it's not too late.

That was the last time Steve ever heard from his son. Within 48 hours, he died of an overdose.

Maybe those who support delaying CARA don't know about Dan Durbin from Delphos, OH. It is a small town. He reports setting up on the front lawn for his daughter's high school graduation party recently and seeing in the alley right next door a heroin deal taking place in front of these high school students.

I know it is an even-numbered year, meaning it is an election year. There is always another election. But delaying CARA is unacceptable. Partisanship is not going to help people who are suffering to find treatment. It is not going to heal our families. It is not going to educate our kids so they don't become addicted. If we want to show the American people we can accomplish something that really makes our communities better, we will get CARA to the President as soon as possible.

We have kept this legislation completely nonpartisan, not just partisan. We brought in major experts from around the country. We had five conferences over a 3-year period. We gathered ideas from Democrats and Republicans. If anyone had a good idea, we didn't ask where it came from. We asked if it was a good idea, if it would help to address this problem. That is the way things are supposed to work.

We had strong help from the White House Director of National Drug Control Policy, Michael Botticelli, who has stated repeatedly we need a comprehensive solution and was quoted as saying:

> There is clear evidence that a comprehensive response looking at multidimensional aspects of this that are embedded in CARA are tremendously important. . . . We know that we need to do more, and I think all of those components put forward in CARA are critically important to make headway in terms of this epidemic.

That is the White House drug czar. I hope the White House staffer who was quoted as saying ''Let's delay'' actually talks to the drug czar.

Nearly every Democrat in this Chamber voted in support of CARA, and I commend them for that. Democrats were indispensable in crafting it. They were involved at the very start.

SHELDON WHITEHOUSE is the coauthor of this legislation with me. He has a real passion for this. He has a heart for it. He understands the pain these families who lost a loved one feel. He understands the casualties of this epidemic. He gets it.

AMY KLOBUCHAR has also been very involved, KELLY AYOTTE on our side, and others. This has been something from the start—again, not just partisan but nonpartisan. It has been a group effort. That is one reason I think we have received so much good support because we came up with the right ideas. These groups around the country who worked for us on that realize it is going to make a difference.

I have been involved with this issue of drug abuse and addiction for more than two decades. Twenty-two years ago, a mom came to my office and said her son had just died of an overdose. What was I doing? That got me engaged. I am the author of the Drug-Free Communities Act, the Drug-Free Media Campaign Act, and the Drug-Free Workplace Act.

In this Chamber I have been the author of other legislation, including with DIANNE FEINSTEIN, to stop these synthetic drugs and to make sure they are scheduled as illegal drugs. In terms of prescription drug monitoring, we have tried to help pass legislation on interstate prescription drug monitoring.

But this legislation, this CARA legislation, is what is needed now. There is no good reason to keep these families who are affected waiting.

We can have a conversation about funding. Again, I am for more funding. I have voted that way. This 93-percent increase in funding this year and in the next appropriations bill for next year is a great step forward.

Respectfully, let me just say again that this issue is not like everything else we face around here. This is urgent. We have to move, and we have to move now.

Will it solve the problem? No. The problem is not going to be solved from Washington, but Washington can be a better partner in addressing the issue right now, and it is a growing issue.

Whether I am in a suburb, a rural area, or the inner city in Ohio—no matter where I am, I hear from people about this issue. I have a tele-townhall tonight. I will hear about it.

A few weeks ago in our tele-townhall, a gentleman called in and wanted to talk about the treatment options in CARA. He seemed to know a lot about it. I asked him why he knew so much about this, if he wouldn't mind talking about it, reminding him there were probably 25,000 people on the call at the time and that he was being heard by a lot of people. He told his story, which unfortunately was a story you hear way too commonly in my State of Ohio. His daughter—in and out of treatment and, in her case, in and out of the criminal justice system—had decided to seek treatment. She went, she couldn't get in, and 14 days later she died of an overdose.

According to one poll, 3 in 10 Ohioans know someone who is struggling with an opioid addiction. Family members, friends, coworkers, fellow parishioners, their neighbors—those family members are hurting too. It is almost unbearable to watch a loved one suffer through this disease, and it is a disease in that it requires treatment.

Ohioans are taking action—and appropriate action too. I commend them for that.

In Warren, OH, the Braking Point Recovery Center recently held its annual Walk Against Heroin. Nicholas Story and Emily Smith, who are in recovery from addiction, bravely spoke at that rally about their experiences and how this epidemic is affecting them. Nicholas spoke about how much happier he is now that he is in recovery, saying: ''My life has improved so much it is amazing.'' Emily talked about how her mother, some of her cousins, and friends have suffered from addiction. Some have died of overdoses. I commend them for having the courage to speak up and to spread awareness about this epidemic.

Raymond Sansota of Euclid, OH, also spoke about losing his son, Josh, to a

heroin addiction. He was a star athlete, played point guard, and was a 4-year letterman in high school. He was an acolyte in his Catholic parish. He was known for his sense of humor, for his musical and artistic talents. He had a good job at a rubber company in Middlefield, OH, but he became addicted to prescription drug painkillers. Eventually, like so many others, he switched to the less expensive, more accessible option, which was heroin. He overdosed at the age of 31.

Raymond, thank you for speaking up.

At Barnesville High School in Barnesville, OH, OhioHealth Services, Barnesville Hospital, and Crossroads Counseling Services held a townhall about the heroin epidemic, bringing together doctors, lawyers, law enforcement, and public health officials.

Judge Frank Fregiato spoke there, and he said: ''Rich, poor, black, white, educated, non-educated, political, nonpolitical, whatever you are, your family is at risk.''

He is right. That is why we can't afford to delay.

Today I was talking to two high school principals who came to me at our weekly coffee in Ohio. They informed me they had lost six of their recent graduates to this issue and that they are holding a townhall on this subject soon at that high school.

On Saturday, in Stark County, dozens of motorcyclists participated in the second annual Families Against The Heroin Epidemic Rally in Stark. Families Against The Heroin Epidemic Rally is also F.A.T.H.E.R.S.; F.A.T.H.E.R.S. is the acronym. These fathers and those who support them raised money for addiction treatment, for treatment for education, and for law enforcement. I thank everyone who participated in this motorcycle ride and everyone who is doing their part to stop this epidemic.

That event was founded by Larry and Kara Vogt of Perry Township. Their sons had recovered from a heroin addiction, and he is in transitional housing. As Larry puts it: ''If you aren't affected by this now, you will be.''

I know the scope of this epidemic can sometimes feel overwhelming, but there is hope. There are many stories of people who have found themselves in the funnel of this addiction, the grip of this addiction, and have found hope through treatment and recovery. There are many who are now helping others to get treatment.

Michael Evans of Columbus, OH, is an example of that. He had chronic back pain. He had Percocet and OxyContin and became addicted. Now he is helping others. He has been clean and sober for more than a year. He is beating it because he got treatment.

Again, it is time for us to act. Again, I have told stories just from the last week of what is happening around the country and in my home State of Ohio. There is no excuse. We need to act quickly to find common ground, to get a comprehensive bill to the President so it can start to help those millions who are struggling. Delay is not an option.

I yield back the remainder of my time.

The PRESIDING OFFICER. The Senator from Oklahoma.

Mr. INHOFE. Mr. President, I ask unanimous consent to be recognized for such time as I may consume as in morning business.

The PRESIDING OFFICER. Without objection, it is so ordered.

Mr. INHOFE. Mr. President, let me just say that my friend from Ohio is truly passionate.

In the years I have been here, I have not heard of anyone who is stronger and has a better understanding of this issue than the Senator from Ohio. I find myself listening as he speaks and reflecting.

I hear the same things. It is not just in Ohio; it is in my meetings that I have in Oklahoma. I am glad he has that passion, pleased he does, and I wish him success.

Mr. PORTMAN. I thank the Senator.

MASS SHOOTING IN ORLANDO AND FIGHTING TERRORISM

Mr. INHOFE. Mr. President, I have to get on the record after the events of the last week and the claims that some of my colleagues made on the Senate floor and that the mainstream media have published about the horrific event in Orlando.

Before we had all the facts about what happened in Orlando last Sunday, people on the left were blaming Congress, and people on the left were blaming Republicans. They were blaming all gun owners who were out there, and they were blaming anyone they could think of for this terrorist attack. The actual person responsible for killing 49 people that day is Omar Mateen, an Islamic terrorist.

There is something wrong with this aversion they have to talking about the real cause of these tragedies that are going on right now around the Nation. By immediately politicizing this act of terrorism, the left has denied the victims, their families, and their friends our full attention and our care. They have denied the Nation a period of mourning for those we lost at the hands of a terrorist who pledged allegiance to the Islamic state.

Last week my colleagues on the other side of the aisle participated in a filibuster against gun rights, and they have continued to demonize those who still believe in the Constitution and the rights that it protects. I am not just talking about gun rights, I am talking about the right to due process, the right to be innocent until proven guilty.

In fact, in their effort to twist this act of terrorism into a need to curtail our constitutional rights, the Washington Post—we are talking about the Washington Post. That is not one of the more conservative publications around. They gave the arguments that they were using against guns three out of four Pinocchios for the way that they falsely twisted information to fit their narrative. Pinocchio means they have studied it, they have looked at it, and they have decided what they said wasn't true.

The left was given a chance for the Senate to vote on their gun control proposals, which would not have prevented this terrorist act from happening, and their proposals ultimately failed to progress in the Senate. Meanwhile, Democrats voted against the amendments that would strengthen our gun laws and keep guns out of the hands of terrorists while protecting the rights of due process.

Over the past week, you have heard my friends on the left say that if you can't fly, you shouldn't be able to buy a gun. Well, this sounds good, and a lot of the media has kind of bought into this idea, but you can't take away the fact that flying is a privilege in this country and gun ownership is a right that is guaranteed by the Constitution. That is a huge difference. You cannot take away a constitutionally protected right without notice and a fair and impartial hearing.

Denying someone their civil rights based on secret lists is unconstitutional. I think everyone knows that, and it will be struck down by the courts. Everybody knows that, but it sounds so good right now to say everyone is going to want to be for gun control. One of the things people forget is they are trying to pass laws that are going to offend the rights of gun owners when, by definition, a criminal breaks laws, a terrorist breaks laws. Consequently, you would have only those individuals who are law-abiding citizens complying with the law.

It is a very simple concept. Again, everyone knows that, but given the irrefutable evidence of Mateen's motivations, many wonder why the administration, supported by the Democrats, is so focused on policies that don't address the core cause of this horrific act—terrorism and the influence of radical Islam here in the United States of America.

The answer is simple. Focusing on the root cause and Mateen's motivations will only further expose the fact that the policies of this administration, supported by most of his own party in Congress, have been a complete failure. Time and again, the President's rhetoric on ISIL, terrorism, and the threat to America is proven wrong in reality.

In January of 2014, the President referred to ISIL as a JV squad and downplayed their threat and influence. Yet just 4 days before he dismissed ISIL as a minor player in the Middle East, they had captured and raised the flag over Fallujah, where our marines fought and died.

My State director is Brian Hackler. I first met Brian Hackler when I was in Fallujah. That was right after—we all remember; I am sure the Presiding Officer remembers—they were taking the

fingerprints of the heroic people who were risking their lives to vote over there, and we won in Fallujah. It was like World War II, door-to-door combat. We actually won.

Brian Hackler came back. I hired him after he came back. He is doing a great job for me now. When I called him and I had to tell him that we had lost Fallujah after we had Fallujah in our hands, he literally cried. He had friends who died over there.

Furthermore, the President failed to recognize the threat posed by the Muslim Brotherhood. President Obama created the vacuum in the Middle East that gave rise to ISIL.

He downplayed Benghazi. I remember he tried to blame it on a video. I can remember that because I talked to James Clapper, and I talked to all of the intelligence people right after that happened. I did so because of my position at that time as ranking member on the Armed Services Committee. They all said at the time of Benghazi they knew that it was a terrorist attack. It had nothing to do with the video.

The President also said that ISIL was contained hours before the attack on Paris.

The threat to our country and our security is increasing—Fort Hood, Boston, San Bernardino, and now Orlando. The attacks are not the fault of the West, they are the fault of radical Islam. Somehow the administration can't say it. They can't say radical Islam.

Most recently we heard from the White House that ISIL is retreating. This is from President Obama—that ISIL is retreating, it is declining and losing territory and losing funds, but just last week CIA Director John Brennan testified before the Senate Select Committee on Intelligence, and he said: ''Our efforts have not reduced ISIL's terrorism capability and global reach.'' Furthermore, Brennan went on to say: ''ISIL is probably exploring a variety of means for infiltrating operatives into the West, including the refugee flows, smuggling routes and the legitimate methods of travel.''

That is a quote from him. So we have the President on one hand saying it is contained, we are successful, ISIL is disappearing, at the same time the CIA Director he appointed is telling us the truth—that we are losing, and this is serious.

I have looked back wistfully at the good old days of the Cold War. I never thought I would say ''the good old days of the Cold War,'' but in reality we are in a much greater threatened position today than we ever were in the Cold War. In the Cold War, we had two superpowers. We knew what they had. They knew what we had. We were predictable. It was mutually assured destruction. That doesn't mean anything anymore. These people want to break the law.

It was incredible testimony John Brennan gave before the Senate committee, in light of the administration's talking points, and it should have all of us seeking ways to ensure they are not successful. However, policy proposals to combat these threats—extra vetting of the refugees, pausing the refugee program, the stepping up of border protection and enforcing our immigrations laws through visa enforcement—are all ignored by this administration. They would rather paint us, the Republicans, as arms dealers to terrorists and yet remain silent on the President's deal with Iran, the No. 1 state sponsor of terrorism.

I can remember when the President, with the Secretary of State, put together the deal with Iran. This was going to see Iran all of a sudden change. Today, Iran is still the chief supplier of terrorist activity around the world. Yet we released billions of dollars to them through this deal that was made.

It is interesting. I happened to be on the USS—I can't remember which one it was, one of the aircraft carriers in the Persian Gulf at the same time this deal was being put together by the President and by the Secretary of State. That is when we found that there was an Iranian ship that was carrying weapons from North Korea to Yemen at the very time they were pledging their love for us and they were working with us in this program.

Their deal with Iran is giving them the resources necessary to support terrorism. ISIL and similar radical groups seek to extinguish our freedoms and to terrorize, kill, and oppress anyone who lives counter to their extreme ideology. No matter how they carry out their evil, their mission will always be superseded by our Nation's laws. We have to protect the Constitution, support law-abiding citizens' rights to due process and to bear arms and to focus on the real threat: Islamic terrorism, radical Islam.

I just wish the administration would talk about this—this greatest threat to our Nation. We are doing something—though this is totally unrelated, but it is something that happened in my State of Oklahoma earlier this week. Earlier this week, the county commissioners in my city of Tulsa and in my State of Oklahoma voted to renew a memorandum of understanding with ICE—that is Immigration and Customs Enforcement—to detain their inmates and train local deputies to refer threats of violent criminals to the Federal authorities.

Entering into a memorandum of understanding—an MOU—had been a routine procedure until last week, when it was derailed by illegal immigrant activists—the same type of activists we see across the country pushing sanctuary policies, policies to give sanctuary to terrorists and policies to protect criminal aliens, allowing them to continue committing crimes against our citizens such as the one we saw with the murder of Kate Steinle in San Francisco almost a year ago.

Law enforcement across the country takes part in this program so they can do their job of keeping criminals off the streets. However, their efforts are continually frustrated by liberal activists seeking to shield those same criminals from the consequences of their actions. We should stand with our friends in law enforcement, in their communities, who are working every day to ensure our safety and the safety of others.

Whether criminal immigrants are here illegally or legally, it should not be controversial to deny them the privilege of staying in our country, and we should remove them from our communities until they are removed from our country. When we refuse to do it, we reward their behavior and give them an opportunity to continue to commit violent crimes.

Why is this such a big deal? In 2014—and people heard this way back in 2014 but they have forgotten it. During the year of 2014, the Obama administration released over 30,000 criminal aliens from custody, and by July of last year—so now we are talking about in the first 6 months after they released 30,000 criminal aliens—1,800 of them went on to commit over 2,500 new crimes.

That may not be believable, and because it is not believable, a lot of people don't believe it, but it actually happened. It is a fact the Obama administration released over 30,000 criminal aliens, and 6 months later, 1,800 of them—that we know of, probably more than that—went on to commit crimes. Instead of deporting people who shouldn't be here, the administration released them back onto our streets, where they committed new, preventable crimes, including assault, sex offenses, kidnappings, and even homicide.

Between 2010 and 2015, we had 135 preventable homicides occur in our communities across the country by criminal aliens who had been released by this administration. Now, this is very difficult to believe, and certainly it is not acceptable. The excuse the administration uses is two little known Supreme Court cases that determined criminal aliens cannot be detained in the United States for more than 6 months while awaiting deportation. However, there are many factors which can prevent a deportation from taking place within the 6-month period.

It is interesting that excuse is being used, and in order to take away this excuse, I introduced the Keep Our Communities Safe Act during the past two Congresses, and I am introducing it today as an amendment—amendment No. 4732—to the CJS appropriations bill. This legislation would allow the Department of Homeland Security to petition the courts to hold a criminally convicted alien for a renewable 6-month period until deportation occurs, if the Secretary deems the alien would be a threat to national security or the safety of the community, among other reasons.

We are talking about communities. This is back home. This is my community. This is where this is happening and throughout America. Some organizations, such as the ACLU and other liberal organizations, believe this bill amounts to indefinite detention, in violation of a criminal's due process rights. However, in addition to the specified circumstances of continued detention I just mentioned, this bill requires the Secretary of the Department of Homeland Security—that is what they are supposed to be doing—to recertify the person is a threat every 6 months. In other words, if this person is a threat, rather than automatically turning them loose in 6 months, he can recertify the fact they are a threat and every 6 months continue to keep them. Furthermore, an alien can submit evidence for review of his or her detention and will still have access to our courts, giving judges a say in the process.

We were unable to get this added in the last 2 years. I can't imagine, after all the things that have happened just this year—and of course right on the heels of the disaster that just happened—I can't imagine people wouldn't want to do this, do everything they can to keep from turning these people loose.

I go back and repeat that this administration turned loose 30,000 criminal aliens onto the streets—this was in the year of 2014—and in the first 6 months in the following year, they had actually committed more crimes.

So there is this thing about turning people loose. It is very similar to what the administration is doing in Gitmo. We passed a law, actually in the committee.

Let me make an inquiry of the Chair. Are we on a time requirement here?

The PRESIDING OFFICER (Mrs. ERNST). No, Senator, we are not.

Mr. INHOFE. The Presiding Officer is a member of the Committee on Armed Services who may very well remember when we passed a law, and that law said the President was not going to be able to release anyone from Gitmo until 30 days' notice is given to the Senate Committee on Armed Services. The President signed that bill and a matter of hours later released the Taliban Five.

Everybody remembers the Taliban Five. They were the most egregious of all the terrorists who were in Gitmo. We don't know what they are doing now. Supposedly they are in Qatar or someplace under some supervision, but it happens that the recidivism rate of those who have been released from Gitmo is 30 percent. In other words, 30 percent of those released are back trying to kill Americans again.

It is unacceptable, and it is very similar to this. Whether it is releasing people—terrorists from Gitmo—to go out and kill Americans or releasing people who are criminal aliens from our cities and towns, it is a problem, a serious problem, and we are going to have to address this problem, and we are going to address it.

With that, I suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The legislative clerk proceeded to call the roll.

Mr. TOOMEY. Madam President, I ask unanimous consent that the order for the quorum call be rescinded.

The PRESIDING OFFICER. Without objection, it is so ordered.

COMPROMISE GUN LEGISLATION

Mr. TOOMEY. Madam President, I rise this afternoon to discuss the pending legislation that would prevent terrorists from being able to legally purchase guns. This general topic of background checks for legal firearms sales is not new to me. It is an issue I have been wrestling with for some years now. Shortly after the horrific murders at Sandy Hook Elementary School, my Democratic colleague, Senator JOE MANCHIN from West Virginia, and I teamed up and worked together and produced a bipartisan bill designed to ensure that we would do background checks for commercial gun sales. So if someone wants to buy a firearm through a commercial mechanism—not a private transaction, like from a sibling or a neighbor or friend, but a commercial sale—they would be subject to a background check so that for the very criminals who have forfeited their Second Amendment rights and those who are dangerously mentally ill who also should not have guns, we would find a mechanism to prevent the sales. That was legislation that I worked on with Senator MANCHIN. As I said, it was bipartisan. It still marks the closest the Senate has come to passing legislation dealing with background checks in a meaningful way in quite some time. But we were not successful. It did not pass.

Then on June 12, we saw the worst terror attack on American soil since 9/11, an unbelievable massacre in Orlando that left 49 people dead and another 53 grievously wounded. It has raised the question of whether now there is an opportunity to do something to make it illegal—make it more difficult, if not impossible—for a terrorist whom we already deem to be too dangerous to board a plane to buy a firearm.

There are other things we need to be doing—a lot of other things we need to be doing—to keep us safe from the terrorists who want to kill Americans. We need to take stronger measures to keep them from entering the United States in the first place. We need to make sure they can't escape detention and capture. We need to make sure that local law enforcement is cooperating with Federal law enforcement and DHS folks. There are a lot of things we can do.

But one of the things we can do is the very simple measure that the Collins legislation addresses. This is too important an issue to be partisan. I took to the Senate floor last week to urge my colleagues. We had a number of our Democratic colleagues engaging in a filibuster, in an impassioned series of speeches about how important it was that we do something. My message was simply this: Let's stop talking, and let's actually do it. Let's actually find the mechanism, find the solution here.

There are two aspects we need to consider, in my view, in this legislation. One is that we want to block a terrorist from buying a firearm. I don't think that should be terribly controversial. But the second thing that is also very important to me—and I think to many of our colleagues—is to make sure that an innocent American who is wrongly put on the list has the opportunity to clear his or her name so that their Second Amendment rights are not infringed upon. That is the challenge, it seems to me, and it is not rocket science. This is something we can do.

So I actually drafted a bill that does that. I think the bill works very, very well. Senator COLLINS took a different approach and used a different mechanism for getting the same result. In the end, Senator COLLINS has legislation now that has significant bipartisan support. It is a compromise bill that I think strikes the right balance. As I announced yesterday, I intend to support her legislation. There is no question—it is an objective fact—that if Senator COLLINS' legislation becomes law, the Attorney General will have a tool that the Attorney General does not have today. It is a tool that will stop terrorists from being able to legally buy a gun. It is as simple as that. That is what it does. Importantly, to me and to many of my colleagues, it also provides the mechanisms whereby an innocent law-abiding American who is wrongly put on a no-fly list will be able to clear his or her name. I think that is very, very important.

The starting point for the Collins legislation is that if you are on the no-fly list, then you don't get to buy a gun. Now, let's think about this. If we deem a person to be so dangerous that we deny them the opportunity to board a commercial plane, should we really allow that person to walk down the street, walk into a firearms dealer, and buy an AR–15? I don't think that makes sense. I think most of us probably agree. That is a short list, actually, of people we deem to be so dangerous that we don't let them board a plane. It is pretty sensible, from my point of view, to also preclude a firearms purchase.

Then we have the selectee list. That is a separate list that subjects people to enhanced scrutiny because there is serious suspicion. It doesn't quite rise to the level of the no-fly list, but there is serious suspicion. So those people also would be denied a firearm. Now, as with the approach that I took, Senator COLLINS' legislation has a whole series of procedures, policies, and mechanisms to ensure that if someone is wrongly put on this list, they will have a way to get off the list. We know for

a fact that eventually some people will be put wrongly on the list because people make mistakes. Governments make mistakes. In fact, someone could even try to abuse the list. So we need to have a mechanism to make sure that an innocent person can have their name taken off. Senator COLLINS, I think, achieves that. She creates an adversarial challenge mechanism in court where the burden of proof is on the Federal Government to prove that the individual who has been denied the opportunity to buy a gun should be denied that—in other words, that the person is properly on the list. As in my legislation, if the individual succeeds in his challenge—if he says: I was denied the opportunity to buy this firearm; I am not the John Smith that you think I am and here is my proof—and the person wins, the U.S. Government would pay all of his reasonable attorney's fees and costs, as should be the case. The person shouldn't be financially penalized for simply clearing his or her own name.

Also, there needs to be a meaningful deadline for a court to make a decision. In the case of the Collins legislation it is 14 days. Otherwise, a court case could go on indefinitely. That wouldn't be right, either.

So the bottom line is simple. This legislation is a sensible, reasonable way to achieve the balance that I have been calling for—to make it illegal for a suspected terrorist, someone we won't allow to board a plane, to buy a gun, and, at the same time, to create a mechanism for someone wrongly put on the list to clear their name.

Last week we had quite a number of our colleagues down here on the Senate floor. As I said, they were giving impassioned speeches about how essential it was that we do something. What we are going to find out is whether that was sincere or whether that was political. That is what we are going to find out because this legislation achieves exactly what our colleagues said they wanted. It may not do it in exactly the same fashion in every little detail. It is not exactly the same as the legislation I have proposed. But it is bipartisan.

There are, at last count, at least five Members of the Democratic caucus who are on this bill. There are at least a comparable number of Republicans. There are probably more who are going to support this. It is really going to be a test of whether this body is serious about what it says it is serious about—whether the folks who came down here and gave impassioned speeches about how important it is we do something really want to get something done, or do they want a political message to run ads about? I hope it is the former.

I hope we are going to be able to get something done. As to Senator COLLINS and the other Senators she worked with, I appreciate the input she took from me and my office to craft a sensible, workable compromise bill that has bipartisan support that will achieve those two important goals of making sure that the bad guys can't buy guns and the good guys get a chance to clear their name and don't have their Second Amendment rights infringed. That is what this is about.

We need to have a vote on this, and we need to have a vote soon. I hope we will have a vote this week. But this is an opportunity for this body to take a big step forward and get something done with a bipartisan compromise bill that makes a lot of sense. We are going to have a test, and I hope this Chamber will pass the test.

I yield the floor.

The PRESIDING OFFICER. The Senator from Washington.

Mrs. MURRAY. Madam President, I want to start by thanking my colleague, Senator MIKULSKI, for her leadership in the fight for equal pay for equal work. It has been 50 years since the signing of the Equal Pay Act. But despite how far women have come, despite all the progress women have made and the ways women contribute across our economy, women still only make 79 cents on the dollar. The gap is even wider for women of color: for African-American women, 60 cents on the dollar; for Native American women, 59 cents on the dollar; and for Hispanic women, 55 cents on the dollar.

This status quo is not only deeply unfair to women, but it is also bad for families and it is bad for our economy because today 60 percent of working families rely on wages from two earners. We have to do better. That is why I was so pleased when earlier this year the Equal Employment Opportunity Commission took a very important step in the right direction with a modest proposal to collect pay data on a form that employers already submit in order to accomplish one goal—making sure that we have solid information about how employers pay their male and female workers.

This proposal is pretty straightforward. It brings new and much needed transparency to workplaces and might even help businesses address pay gaps that they weren't even aware existed. It would also make enforcement of pay discrimination laws more effective and efficient. Especially when it comes to an issue like wage discrimination, I would like to think it would be hard to argue against more transparency and more effective enforcement because when women are not getting equal pay for equal work, we should be able to find out about it and we should be able to fix it.

It is disappointing that Republicans in both the House and the Senate are opposing that proposal. That is absolutely the wrong approach. What makes this even more surprising is that just weeks ago I was very proud to stand right here to introduce a resolution in the Senate calling for equal pay for equal work for the U.S. women's national soccer team. It was a resolution that recognized the impact of the wage gap on women and the need to fix it, and it passed by voice vote.

Given that the Senate was able to agree on the seriousness of this problem, I would like to give all my colleagues an opportunity today to take another step forward—not backward—on equal pay for equal work. I have filed an amendment that would provide much needed new resources to ensure this important proposal can be implemented and finalized as quickly as possible. I urge our colleagues to support the amendment and oppose efforts by some in the Republican Party to stand in the way of better information and enforcement on pay equity.

It should go without saying, but if a woman still isn't getting equal pay in the 21st century, she deserves to know and she deserves action. This rule would take critical steps in the right direction for women, families, and our country as a whole, and I hope that our Republican colleagues will not stand in its way.

I yield the floor.

The PRESIDING OFFICER. The Senator from Maryland.

Ms. MIKULSKI. Madam President, I rise as an enthusiastic supporter of the Murray amendment requiring the EEOC to implement the change recommended by President Obama that would add compensation data to its employment data form, and also to provide it with $1 million to be able to pay for its implementation.

First, I would like to salute the Senator from Washington State, who has been a longstanding and assertive advocate of equal pay for equal work for women. I thank her for her ongoing, persistent advocacy.

I so admire this amendment, which insists we develop even better tools to pinpoint those companies with over 100 employees in terms of their pay.

The Senator from Washington State was right there when we passed the Lilly Ledbetter bill. She has been right there as we tried to move to the next step on the Paycheck Fairness Act, and now today she is here to implement the EEOC rule that would also help to do the kind of work we need to do to ensure that the Equal Pay Act of 1963, a major civil rights law which guaranteed equal pay for equal work, is enforced. We spent days talking about enforcement of civil rights laws. Let's enforce the law passed over 50 years ago to guarantee equal pay for equal work.

Here is a quick history. The Lilly Ledbetter bill kept the courthouse door open for when people wanted to file wage discrimination based on gender claims. That courthouse door was slammed in the face of Lilly and other women who found out too late about what they were paid. We kept the courthouse door open. Then, we introduced the Paycheck Fairness Act. The Paycheck Fairness Act would get rid of the other barriers to women getting equal pay for equal work.

One of the biggest barriers is that pay is kept a secret. One of the biggest secrets in the United States, other than national security, is what women

get paid in the workplace. Let's keep it our little secret, they say. In fact, in many instances, you have to sign an agreement in order to be hired that you will not disclose your pay to another worker. If you do, you can be fired.

We are not talking about small businesses. We are not talking about those mom-and-pop stores like my dad's grocery store. But I can assure you that my father paid equal pay for equal work to my mother. But in January, our President—President Obama—announced that the EEOC would add compensation data to its employment data form that companies must submit annually that will help shed light on the wage gap across geographic regions and industries.

Our colleague from Tennessee, the distinguished Senator, Mr. ALEXANDER, has introduced an amendment preventing this change from going into effect. We had dueling amendments. I am for the Murray amendment. It requires the EEOC to implement the Obama change and provides $1 million to do it.

What is the EEO–1 form? It is the employer information report that requires companies to submit information annually about their employees based on race, ethnicity, gender, and job category. So it is equal pay, equal work. The form helps identify and prevent discrimination and protects employees' civil rights.

In January, President Obama announced that companies with over 100 employees—remember, this is over 100 employees—must include compensation data on their EEO–1 form that would identify the wage gap based on gender and ethnicity across regions. This change has been strongly supported by many of us, and I support it.

Much is said about the President overreaching. I don't get it. Sometimes—often, the President is being criticized on the other side of the aisle for not doing too much—that he is not a leader, that he is not a fighter, that he is not a champion. I take exception to that. I think he is a leader. I think he is a fighter, and I think he is a champion, and he certainly has been that on behalf of the empowerment of women and girls. What did he do? He exercised his Executive authority to declare that the EEOC action on pay data collection would do this. The EEOC, in partnership with Department of Labor, has a proposal to annually collect summary pay data—as I said, in addition to gender, race, and ethnicity, which it already collects—from companies with over 100 employees. This proposal would cover 63 million employees. It stems from a recommendation of the President's Equal Pay Task Force in a Presidential memorandum issued in 2014. It will help focus public enforcement of equal pay laws and provide better insight into discriminatory pay practices across industries.

Today the EEOC is proposing revisions to its longstanding form to require these companies, not just contractors, to provide this information. It would go across 10 job categories and 12 pay bands, but it would not require the reporting of specific salaries of individual employees. Remember, the report is on the basis of job category and pay band. We won't know if Suzy Smith gets paid more or less than Sam Jones. What we will know is what they are paying computer operators. We will know what they are paying lab technicians. These are jobs that tend to be gender neutral. We will know if you are working in a call center or a firm that employs 100 people that you would be able to do it. Remember, it covers 63 million people.

The proposal is broader than one that was originally published by the Department of Labor, and it lays important groundwork for progress towards achieving equal pay. It will encourage and facilitate greater voluntary compliance by employers dealing with existing Federal pay law. It will also assist the EEOC, and in case of contractors, in better focusing investigations on employers that are unlawfully short-changing workers based on gender, race, or ethnicity. It wouldn't go into effect until September 2017.

Why is this important? It covers only companies of 100 or more employees. It will affect 63 million people. Nobody's personal privacy will be impinged upon because it is information with job category and pay band. But it will show, first of all, which are the good-guy companies. These become the best places to work. My gosh, this can be a small recruitment tool. You go to work for X company, and they do pay equal pay for equal work. But if it has been a persistent pattern of egregious violation of unequal pay for doing the same job, it enables sparse resources at the EEOC to be targeted.

One, I say cheers to President Obama for taking leadership to get to the real facts of the matter, and to pinpoint who the egregious violators are that employ more than 100 people. So, again, there is no negative impact on small business, and it gives no personal information, but does give corporate information. I think the Obama action was outstanding, and I think the Murray amendment defending the Obama action is exactly what is needed on this bill to take the very important steps of ensuring the enforcement of civil rights laws passed by Presidents Kennedy and Johnson that said equal pay for equal work.

I am sure there will be additional debate on this issue.

I yield the floor.

I suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The senior assistant legislative clerk proceeded to call the roll.

Mr. MERKLEY. Madam President, I ask unanimous consent that the order for the quorum call be rescinded.

The PRESIDING OFFICER. Without objection, it is so ordered.

CLIMATE CHANGE AND FOSSIL FUELS

Mr. MERKLEY. Madam President, global warming is the most grave concern facing human civilization on this planet. We are the first generation to see the impact, and that impact is occurring in so many ways right before us.

In my home State of Oregon, we are seeing the impact on our forests, which has resulted in a longer and drier fire season that burns more acreage and has more lightning strikes. We are seeing smaller snowpacks, and that is having an impact on our agriculture and trout streams. Everyone realizes that a smaller, warmer stream is not a pleasant place for trout to thrive. We are even seeing it in our Pacific Ocean oysters. The oysters are having trouble reproducing. They are having troubling reproducing because the ocean is more acidic. Because of the wave action, the oceans have absorbed a lot of the carbon dioxide, which has become carbonic acid, and the carbonic acid affects the formation of shells. These impacts are having a steady, detrimental impact, and it is occurring right before our eyes. It is affecting our fishing, farming, and forestry, and it is an assault on our resources. It is incumbent on all of us, this generation, to address these issues.

What we know is that the impacts we have seen in Oregon are being echoed in States across the country and nations across the globe. If you go to the Northeast, you might hear folks talking about how the moose are dying because the ticks aren't being killed by winters that are cold enough. You might hear about the migration of lobsters going north to find colder water, and so on and so forth. We are seeing it everywhere.

We know that in order to prevent the temperature of the planet from going up more than 2 degrees Centigrade, which is about 3.6 degrees Fahrenheit, we have to leave the vast bulk of our proven fossil fuel preserves in the ground. In other words, we have seen a 1-degree increase in temperature Centigrade, which is about 1.8 degrees Fahrenheit—almost 2 degrees—and that has come from burning fossil fuels. If we keep burning them, it will have a devastating impact and will burn up the planet. We have to stop and quickly pivot off of fossil fuels.

We have identified vast reserves of gas, oil, and coal across the planet, which is worth a lot of money, so of course the owners want to pull it out of the ground and sell it to be burned. Somehow we have to find the political will to take this on and leave 80 percent of those proven fossil fuel reserves in the ground. That is the magnitude of the challenge, and we can do all kinds of things that will help. We can produce more renewable energy, we can produce more conservation, and we can proceed to find ways to pull carbon out of smokestacks and store it in the ground, or at least we can try. We need to approach it from every possible angle.

I will keep coming to the floor, as I have before, to talk about keeping it in the ground. I especially wanted to emphasize that because when we simply talk about saving energy—like putting more insulation in a building, installing double-pane windows, or better mileage for cars—we aren't embracing the size of the challenge we are facing. It is an extraordinarily difficult challenge, and it is up to our generation to address it.

When I come to the floor, sometimes I will be speaking about the math behind the temperature increase, such as how the amount of carbon dioxide and methane in the air is changing the atmosphere of our planet. Other times I will be talking about the calamities we are seeing on the ground, things I have already mentioned, such as the pine beetles that are thriving because the winter is not cold enough to kill the pine beetles and ticks or the coral reefs that are bleaching across our planet. I will also highlight emerging technologies because we have to realize that as much as we talk about the problem, we also have to talk about efforts to address the problem. I will pick out various ideas and efforts that are appearing in our newspapers and scientific literature, and that is what I will do today.

The first innovation I will highlight today is about a strategy in Iceland to store carbon dioxide in the ground. This is one of the carbon capture strategies. This is not easy to do, and there are many different scientists working on different ways to attempt to capture carbon, but this is a new one, so I thought it merited discussion.

Scientists at Lamont-Doherty Earth Observatory at Columbia University invented a way to store carbon dioxide. It was invented here in America at Columbia University. They have found a way to store carbon dioxide by first dissolving the gas in water and then storing that water in rocks, where it reacts to form the mineral calcite. The calcite will then store the carbon dioxide as a solid deep underground.

This project at Columbia University being experimented with in Iceland is called CarbFix. They pumped about 250 tons of carbon dioxide, which was mixed with water, into rocks in 2012. When they came back in 2014, they found that 95 percent of the carbon dioxide had become calcite. While there are some very specific requirements to make this particular technology work, such as the right kind of rock, the right amount of water, and the carbon dioxide being generated close to the right kind of rocks, it is an example of innovative technology that could prove useful as another tool in the fight against climate change.

A second idea that is starting to expand is to recognize that we can put solar panels in a variety of places—not just on the ground and on our rooftops but also on bodies of water. This was reported in May 2016. This is referred to as floating solar.

Here we have a lake, and we can see these floating solar panels. Floating solar panels have several potential advantages over land-based panels. One advantage is more efficient cooling, and a second is that they might create less of an eyesore for the public. They might prevent surface water from evaporating, which can be a side effect that would be useful.

Japanese, Australian, and U.S. companies are currently pursuing this technology.

There is a planned array—50,904 panels floating on the Yamakura Dam reservoir in Japan. It would generate 16,000 megawatt hours annually, or to translate that to something more understandable, they could power 5,000 homes for a year, so it is significant. In the United States, there is a winery in California, and it goes by the name of Far Niente. They have combined both land and water arrays, and that combination produces 477 kilowatts of electricity at its peak. It is expected to pay for itself by 2020, or maybe sooner, so it has a high rate of return. These floating panels provide an opportunity for cheaper, out-of-the-way energy generation that has the potential to protect reservoirs from evaporation and water loss.

We must continue to invest and encourage innovative technologies—floating solar panels are one example—to make renewable energy adaptable to all environments, usable all over the world.

I thought I would highlight a third technology. One of the biggest uses of fossil fuel is vehicles. Vehicles burn gasoline and diesel. Oftentimes when the vehicle finally gets up to speed, it suddenly has to brake for a red light. Let's say you are traveling at 35 miles per hour on an urban road and you suddenly stop. You are wasting enormous amounts of energy. All of the momentum with that mass—that car or truck—traveling down the road is then converted primarily into heat through your brakes. That heat is lost, and it is not recaptured.

Along the way, as different companies started exploring electric cars, they said: We already have electric motors. We already have a battery sizable enough to accommodate quite a bit of electricity. Why don't we try to capture that energy from the braking process and put it back in the battery?

What they do is they utilize magnets, and as the magnets go through a field, that field creates resistance, it produces a current, and that current—those electrons are stored in the battery. This is called regenerative braking, and we have seen this on a variety of electric cars. It just makes sense, since they already have an electric drive and they have the batteries to accommodate it.

We have seen a lot of interest in electric cars. Recently, Tesla put out an invitation for people to put down $1,000 and get in line to buy their Model 3. They had the Roadster, they had the Model S, and now the Model 3. The Model 3 will be cost competitive with the Chevy Volt. It is going to be much cheaper than their previous cars. Their waiting list has already grown beyond 400,000 people—an enormous, unprecedented response.

Tesla cars, like the Volt and other electric cars, use regenerative braking, but what I wanted to highlight today is an effort to apply this in new ways.

UPS, the United Parcel Service, has a fleet of delivery trucks and they have invested in hybrid electric vehicles and they have used regenerative braking. Last October, they announced the deployment of 18 new delivery vehicles that use regenerative braking to reach pretty much close to a zero-emissions status. They have to take into account the source of the initial electrons that are used to charge the trucks.

In their announcement, they estimated those 18 delivery trucks, by using clean technologies, would save 1.1 million gallons of diesel fuel over 20 years. When we start talking about anything that includes the word ''million,'' such as 1 million gallons, that is a lot of savings from just 18 delivery trucks.

Even more recently, we have an article in which Mack Trucks is developing the ability to use regenerative braking on garbage trucks. They have developed a new electric hybrid garbage truck. It incorporates a powertrain technology developed by Wrightspeed.

Wrightspeed powertrains use electric motors to drive the wheels of the trucks, and the motors are powered by batteries on board the trucks, which are then recharged from the regenerative braking when the garbage truck comes to a stop.

The point is, when you have a very heavy truck that accelerates and stops often, it wastes a vast amount of energy, and now they are working to design an effective drive train to recapture that energy. The founder of Wrightspeed, Ian Wright, says this new technology can power these vehicles for a substantial distance, and very heavy vehicles—66,000 pounds—it can power them up pretty steep hills. A 40-percent grade is a very steep hill.

The main point is, it is capturing that energy that would otherwise be lost every time they stop. If you have watched a garbage truck go down the street, it stops, the men and women on board jump off, pick up the garbage cans, dump them into the truck, and then they accelerate and four houses later they are stopping again. So this is a very appropriate application.

I wonder how much energy would be saved if every car in America had regenerative braking. Almost every car is used in an urban setting where there is lots and lots of braking. How much would be saved if our light pickups had regenerative braking? How much energy would be saved if every delivery van that is heavy and starts up and stops many times—how much would be saved? At some other point, I want to

try to put together a calculation of that because it could be a substantial contributor.

Each of these technologies I have mentioned today—a new strategy on storing carbon dioxide underground, a new way of deploying solar panels through floating solar panels, an expansion of the use of regenerative braking—represent modest efforts in this effort to take on this large challenge of global warming. Added together, they can make a great difference and other technologies to come will make a great difference.

It is our challenge. It is our generation's responsibility to pivot quickly off of fossil fuels, and these strategies can help.

Thank you, Mr. President.

I yield the floor.

The PRESIDING OFFICER (Mr. TILLIS). The Senator from Wyoming.

FIGHTING TERRORISM

Mr. BARRASSO. Mr. President, last week, flags across the country were lowered to half-staff to honor the 49 lives which were lost in the terrorist attack in Orlando. The American flag also flew at half-staff following terrorist attacks in Brussels in March, in San Bernardino last December, and in Paris last November.

The flag is a symbol. It has great meaning and so do words. When we talk about the enemy, the words we use have meaning too, but now is not the time to talk. Now is the time to act. We must take action to stop the terrorists here and abroad.

That is why last week Republicans were eager to get to work on appropriations bills that give the FBI more of the resources they need to stop the threats on American soil. The bill that would give law enforcement officials more tools to help prevent terrorist attacks was brought up and discussed on the floor, but what did the Democrats do? They came to the floor and staged a campaign-style publicity stunt.

When Democrats were talking on the floor, Republicans attended a briefing by the FBI Director to listen—not to lecture, as Democrats were doing—but to listen and to get the facts about the specifics of what happened in Orlando. When Democrats held press conferences and sent out tweets, Republicans were pushing for the Defense Authorization Act that finally passed. This legislation actually does something by helping our military take on terrorist threats. It is directed at organizing the Pentagon to confront new threats. Democrats actually tried to block the legislation, and President Obama has threatened to veto it.

President Obama went out and gave a speech last week in which he said ISIL is on the defense. We remember when he compared ISIL to the JV team. Well, now the President says they are on defense. He bragged about all the success he has had fighting terrorists.

Then, his CIA Director, John Brennan, came to Capitol Hill. He came to speak to the Senate Intelligence Committee about what is happening with ISIS. He said, ''Our efforts have not reduced the group's terrorism capability and global reach.''

Does the President not believe his own CIA Director?

The CIA Director said that ISIS is adapting to our efforts, ''and it continues to generate at least tens of millions of dollars in revenue per month.'' He said that ISIL ''will intensify its global terror campaign.''

Why does the President of the United States—the Commander in Chief—refuse to accept the words of the CIA Director—his own CIA Director? The CIA Director came to the Senate and said that ''ISIS is training and attempting to deploy operatives for further attacks.''

Why does the President intentionally try to deceive the American people in terms of thinking about what the attacks are and what is happening? Why does the President want to say all is well?

The CIA Director said that ISIL ''has a large cadre of Western fighters who could potentially serve as operatives for further attacks.''

The President seems to suggest the problem is not coming from the terrorists but coming from the Second Amendment of the Constitution.

Whom should we believe, the President of the United States or his CIA Director? Somebody asked the CIA Director at the hearing last week if ISIL would be weaker if they didn't have a safe haven in Syria and in Iraq. The CIA Director replied:

> That is a big, big part of it. We need to take away their safe haven.

Terrorists use these safe havens to train, to raise money, and to plot more attacks. That should be the focus of President Obama and the Obama administration in response to Orlando.

The administration and the President want to pretend it is succeeding in getting rid of the safe havens abroad. That is simply not true. The terrorist army of ISIL controls a significant amount of territory across the globe, and it is not just ISIL. There are also additional terrorist groups.

The Director of National Intelligence testified to Congress earlier this year that Sunni violent extremists have more safe havens ''than at any other point in history.'' He added that Al Qaeda affiliates ''are positioned to make gains'' this year. According to the United Nations, the Taliban now controls more ground in Afghanistan than at any point since 2001.

Extremists groups like ISIL need the territory they control because it gives them safe havens and because the territory makes them more powerful. It helps them inspire more of their followers to launch attacks around the world. It makes it seem like the ideology of radical Islam is winning the battle of ideas. So it is imperative that we have a real strategy to defeat ISIL and other terrorist groups abroad.

We need to make sure someone in the United States or France or anywhere else in the world with an Internet connection does not see this radical Islamic ideology as victorious. That is why we need to pass the appropriations act that is on the floor today. Nobody believes that using the term ''radical Islam'' will magically defeat the enemy, but words do matter.

It is interesting. I note that in the New York Times op-ed page last Friday, an editorial written by David Brooks—he is a columnist. The President listens to him. He has him into the White House, and he is someone the President says he turns to.

David Brooks' column last Friday starts like this:

> Barack Obama is clearly wrong when he refuses to use the word ''Islam'' in reference to Islamic terrorism. The people who commit these acts are inflamed by a version of an Islamic ideology. They claim an Islamic identity.

But the President will not say it.

Brooks goes on—and I think it is very informative seeing that it is David Brooks who is writing this: ''Obama is using language to engineer a reaction rather than to tell the truth, which is the definition of propaganda.''

The definition of propaganda. That is what we have.

Well, if the President refuses to correctly name our enemy, he can't effectively fight the enemy because Democrats don't understand the enemy, and it seems they just want everyone to get along. The world does not work that way. So the Democrats tried to change the topic from terrorists to going after our Second Amendment rights. When they do this, they are not confronting the real threat, which is the ability of ISIL to inspire terrorists to act.

If you want to stop the terrorist threat, you need to address the real problem. We must give law enforcement the support they need to stop the terrorists here at home. We must give our military the strength to deprive the terrorists of their safe havens abroad. The Defense Authorization Act and this Justice appropriations legislation are important steps toward doing that.

Symbolic acts like lowering our flag matter, and so do words. Words matter.

President Obama seems to want to take a victory lap for his efforts so far. Well, there will be no time for victory until ISIL is no more.

Maybe President Obama really doesn't understand the truth about this threat from radical Islamic terrorists. Maybe he is just not being honest with the American people about it. Either way, Congress has been told the truth by the CIA Director. And it is up to us to do something about it. The CIA Director said it himself to the Senate last week. He said that ISIL ''would have to suffer even heavier losses of territory and money for its terrorist capacity to decline significantly.''

Our response to the Orlando attack should be to step up the fight against ISIS where they live. We need a real strategy to defeat the radical Islamic

terrorists and the resolve and the strength to carry it out.

Thank you, Mr. President.

I yield the floor.

I suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The senior assistant legislative clerk proceeded to call the roll.

Mr. MCCAIN. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

The PRESIDING OFFICER. Without objection, it is so ordered.

The Senator from Arizona.

FOREIGN POLICY

Mr. MCCAIN. Mr. President, in the last several days the conversation and the dispute and the rhetoric has been devoted to the issue of guns, which is certainly a worthy cause, but, unfortunately for the American people, the issue of how we got here has been ignored. Guns don't fire themselves. Guns and weapons are fired by people. They are fired by people, and in the cases of Orlando, San Bernardino, Paris, and others, they are fired by people who have been radicalized or trained or in some coordinated fashion have inflicted murder, death, and mayhem on innocent people.

While we in all our righteous indignation talk so strongly and so passionately about what we have to do about the weapons, we are ignoring exactly how all of this happened and why it happened, and it is because of the policies of this President and this administration from the beginning. From the beginning this President wanted to get out of Iraq, wanted to get out of Afghanistan, believing in some delusional fashion that if we got out of these conflicts, the conflict would end. Obviously, that has not been true.

I want to go forward and with the Senator from South Carolina, I want to go through a chronology of events very quickly.

President Obama in October 2011 said:

The tide of war is receding. . . . The long war in Iraq will come to an end by the end of this year. . . . We're also moving into a new phase in the relationship between the United States and Iraq.

We'll partner with an Iraq that contributes to regional security and peace. . . . Just as Iraqis have persevered through war, I'm confident that they can build a future worthy of their history as a cradle of civilization.

President Obama, December 2011: ''We're leaving behind a sovereign, stable and self-reliant Iraq.''

President Bush, July 2007:

To begin withdrawing before our commanders tell us we are ready would be dangerous for Iraq, for the region and for the United States. It would mean surrendering the future of Iraq to Al Qaeda. It would mean that we'd be risking mass killings on a horrific scale. It would mean we allow the terrorists to establish a safe haven in Iraq to replace the one they lost in Afghanistan. It would mean we'd be increasing the probability that American troops would have to return at some later date to confront an enemy that is even more dangerous.

I know my colleagues have not missed it. American troops have had to return to confront an enemy that is even more dangerous, and those are the words of President George W. Bush in July of 2007.

In October of 2011, at the same time that the President said that ''the tide of war is receding,'' I, myself, said:

[T]his decision will be viewed as a strategic victory for our enemies in the Middle East, especially the Iranian regime, which has worked relentlessly to ensure a full withdrawal of U.S. troops from Iraq.

[A]ll of our military commanders with whom I have spoken on my repeated visits to Iraq have told me that U.S. national security interests and the enduring needs of Iraq's military required a continued presence of U.S. troops in Iraq beyond 2011 to safeguard the gains that we and our Iraqi partners have made.

Nearly 4,500 Americans have given their lives for our mission in Iraq. Countless more have been wounded. . . . I fear that all of the gains made possible by these brave Americans in Iraq, at such grave cost, are now at risk.

That is what I said in October of 2011. As the situation worsened in December of 2011, I said:

[Domestic] political considerations in [the United States and Iraq] have been allowed to trump our common security interests. All of the progress that both Iraqis and Americans have made, at such painful and substantial cost, has now been put at greater risk.

Senators MCCAIN and GRAHAM in December 2011:

If Iraq slides back into sectarian violence, the consequences will be catastrophic for the Iraqi people and U.S. interests in the Middle East, and a clear victory for al Qaeda and Iran. A deterioration of the kind we are now witnessing in Iraq was not unforeseen, and now the U.S. government must do whatever it can to help Iraqis stabilize the situation. We call upon the Obama Administration and the Iraqi government to reopen negotiations with the goal of maintaining—

Reopen negotiations with the United States of America—

with the goal of maintaining an effective residual U.S. military presence in Iraq before the situation deteriorates further.

What we were saying is, we didn't have to pull everybody out of Iraq. We could have stayed. What they kept saying is: What we need is a status of forces agreement. The fact is that now there is no mention of a status of forces agreement, and there are 4,500 Americans there and possibly more.

President Obama, January of 2014: ''The analogy we use around here sometimes, and I think is accurate, is if a jayvee team puts on Lakers uniforms that doesn't make them Kobe Bryant.''

He went on to say they are the JV team; ISIS is the JV.

Senators MCCAIN and GRAHAM in October of 2013 wrote:

By nearly every indicator, the situation in Iraq has worsened dramatically since the beginning of the conflict in Syria and the withdrawal of U.S. forces from Iraq in 2011. . . . What's worse, the deteriorating conflict in Syria has enabled al Qaeda in Iraq to transform into the larger and more lethal Islamic State of Iraq and al-Sham (ISIS), which now has a major base for operations spanning both Iraq and Syria. It may just be a matter of time until al Qaeda seeks to use its new safe haven in these countries to launch attacks against U.S. interests.

That was what Senator GRAHAM and Senator MCCAIN said in October 2013.

Senators MCCAIN and GRAHAM, January 2014:

Reports that Al-Qaeda fighters have taken over Fallujah and are gaining ground in other parts of Iraq are as tragic as they are predictable.

The Administration's failure in Iraq has been compounded by its failed policy in Syria. It has sat by and refused to take any meaningful action, while the conflict has claimed more than 130,000 lives—

It has now taken more than 400,000 lives, by the way.

driven a quarter of the Syrian population from their homes, fueled the resurgence of Al-Qaeda, and devolved into a regional conflict that now threatens our national security interests and the stability of Syria's neighbors, especially Iraq.

As the situation worsened in April of 2014, I said:

It is reality check time in Iraq, where the Syria-Iraq border has turned into a major highway and safe haven for transnational terrorist groups. The black flags of al-Qaeda fly over the city of Fallujah, where hundreds of U.S. troops were killed and injured. Violence across the country has reached the same levels as at the height of the Iraqi insurgency in 2008, and the country is creeping dangerously close to a reignition of civil conflict.

President Obama, September 2014: ''We will degrade and ultimately destroy ISIL.''

JOHN MCCAIN, September 2014:

The President's plan will likely be insufficient to destroy ISIS, which is the world's largest, richest terrorist army. To destroy ISIS, create conditions for enduring security in the Middle East, and protect the American people, additional steps are necessary.

Half measures against ISIS only make it stronger and will not lead to its destruction.

That was almost 2 years ago.

Senators GRAHAM and MCCAIN, October of 2014:

We continue to urge the Administration to quickly adopt a comprehensive strategy [against ISIL] and avoid the perils of gradual escalation.

Degrading and ultimately destroying ISIS will require additional actions that we have long advocated, such as the deployment of U.S. Special Forces and military advisers on the ground to direct air strikes and advise our local partners; the expansion of assistance for moderate Syrian forces, and the establishment of safe zones protected by no fly zones in Syria. . . . That is ultimately what it will take to destroy ISIS and keep America safe, and we cannot avoid to delay any longer.

That was nearly 2 years ago.

The list goes on and on. I will make it a part of the RECORD.

My friend is here.

All during this time, while Senator GRAHAM and I were warning time after time, using every means possible to warn the American people and our colleagues that this thing was going to escalate because the President of the United States did not have a strategy, his policies failed. Now we have attacks on the United States of America. I have been pilloried because I used the

word ''personal.'' I said I misspoke. But have no doubt about why we are where we are today, and that is because this administration, this President, called ISIL the JV, saying that if a JV team puts on Lakers uniforms, that doesn't make them Kobe Bryant. Does anybody today believe that ISIS is JV?

The list goes on and on.

I want my colleague Senator GRAHAM to speak for a moment, and I will go on with these because we can see the competing statements between the administration and the President and Senators GRAHAM and MCCAIN. They are starkly different.

What else has happened there? The echo chamber, as was described by Mr. Rhodes, one of the President's chief advisers—the echo chamber of Krugman, of Zakaria, of Friedman, of Ignatius, all the echo chambers out there saying: He's doing fine. Everything is fine. This guy is leading great and not to worry. Things are really great. The echo chamber that Mr. Rhodes described in an article in The Atlantic about how they were able to orchestrate the Iranian agreement is out there.

So as we warned—as we warned and predicted—I wish we had been wrong. I would love to stand on the floor of the Senate and say: Senator GRAHAM and I were wrong. We didn't have to worry about ISIS. They were the JV.

We were right, and we continue to be right, and we still don't have a strategy. But there is the echo chamber out there. The echo chamber that goes on and on.

My friends, I believe the American people deserve better than what they are getting from this echo chamber, who are the Obamaphiles that can incredibly—incredibly—praise all of these mistakes.

Finally, I urge my colleagues—and I will go through some more of these—but my colleagues, I warn that unless we get a real strategy and stop this incrementalism, we are going to see—perhaps we will retake Fallujah, as we had. We may even retake Mosul. But this ISIS is still metastasizing and spreading throughout the world, and there is no better expert than the Director of the Central Intelligence Agency, who basically said that in a hearing to not only the Members of Congress but the American people.

I would like to yield for some comments to my friend, the Senator from South Carolina.

Mr. GRAHAM. Thank you very much.

The PRESIDING OFFICER. The Senator from South Carolina.

Mr. GRAHAM. I wish we were wrong too. The worst is yet to come. I hate to be saying this all the time, but as they are losing territory in Iraq, which they are, and they are being hurt some in Syria, which they are, they are becoming a lethal terrorist organization. They are a terrorist army now holding territory. All I can say is that you could see this coming a mile away if you spent any time looking.

The biggest flaw of the President of the United States, I believe, is that he doesn't think we are at war. He thinks this is a counterterrorism problem, that these are wayward souls or religious fanatics, and he doesn't embrace the fact that radical Islam is loosely associated throughout the globe. They have an agenda to destroy our way of life, to purify their religion, to destroy the State of Israel. It is on the Sunni and the Shia side. It represents a small minority of the Islamic faith.

When you talk about radical Islam, you are not slandering those who are fighting radical Islam. They don't feel slandered. I have been to Iraq and Afghanistan with Senator MCCAIN over 37 times. I have yet to have one leader in that part of the world tell me: Would you quit using the term ''radical Islam.'' They appreciate the fact that we understand the threat and that what we have been proposing would actually work.

The JV team here is in the White House. I really don't mean to slander JV teams. The bottom line is that the people in the White House have proven they are not up to the task of defending this Nation, destroying radical Islam, and coming up with a plan to make us safe and protect our allies. How much more has to happen before you realize the people running this war, No. 1, don't realize we are at war. It is hard to win a war when you don't realize you are in one.

What happened in Orlando breaks your heart, but the Attorney General went down yesterday—and I like her very much—to offer sympathy to the victims, and she made a statement: We will never know what motivated this man.

Excuse me. We do. All you have to do is listen to what he said. He pledged allegiance to al-Baghdadi in the middle of the slaughter. He went to the other side.

In every war America has been in, we have had Americans side with the enemy. It is an unfortunate event, but it happens in all wars. Radical Islamic groups like ISIL are trying to turn American citizens against us. This man joined their cause. He called 911 and said: I am now a soldier in the army of ISIS. I pledge allegiance to al-Baghdadi—not to the citizens of the United States and the country in which he was a citizen. And he slaughtered a bunch of people.

Madam Attorney General, I know why he did it. The fact that you cannot understand why he did it bothers me as far as your view of the fight we are in.

But let's go back to the time ISIL was created. Al Qaeda in Iraq was decimated by the surge. It is fair to criticize the Bush administration. President Bush did make mistakes. Senator MCCAIN called for the removal of the Secretary of Defense under President Bush's watch, Secretary Rumsfeld, because he believed Secretary Rumsfeld did not appreciate the deteriorating security environment in Iraq.

As the Middle East deteriorates, I don't remember anybody on this side of the aisle standing up and saying: President Obama, you need to reconsider what you are doing.

Senator MCCAIN, when the Republicans were in charge, President Bush was Commander in Chief, challenged the construct that all things were going well in Iraq when they were not. So I want to give some credit to Senator MCCAIN. It is not just Obama; when he sees a problem, he speaks up.

The bottom line is that President Bush made an adjustment. He doubled down on the surge. He sent more troops into Iraq under General Petraeus. Guess what. The new strategy worked.

By 2011, President Obama was claiming this to be a successful operation, that we could leave Iraq whole, free, secure, and stable. Vice President BIDEN said it may be the biggest accomplishment of the Obama administration, to withdraw our forces from Iraq because we are in such a good spot. The New York Times held the security environment in Iraq as a major achievement.

What we were trying to say, along with our military commanders, was that if they pull out now, the gains we fought for are going to be lost.

This is what I said on April 3, 2011, as this negotiation was going on:

> If we're not smart enough to work with the Iraqis to have 10–15,000 American troops in Iraq in 2012, Iraq could go to hell.
>
> I'm urging the Obama Administration to work with the Maliki Administration in Iraq to make sure we have enough troops, 10 to 15 thousand, beginning in 2012 to secure the gains that we have achieved. . . . This is a defining moment in the future of Iraq . . . and in my view they are going down the wrong road in Iraq.

When the administration tells you that the Iraqis would not accept a residual force, they are lying. I don't use that word lightly because it is a harsh word. They are intentionally misleading you. They are lying. Let me tell you why I know.

I was there. I got a phone call from Secretary of State Hillary Clinton asking me—along with Senator MCCAIN and Senator Lieberman—to go to Iraq to see if we could talk to the Iraqis about a residual force. We met with Barzani, the President of the Kurdish element of Iraq. Not only would he have accepted 15,000, he would have accepted 250,000. Anybody who knows anything about the Kurds, they are not resistant to American troops in Iraq. They would put them all in Kurdistan if we would let them.

Then we went to Maliki, who was a Prime Minister, head of a Sunni block. He said the Sunni members of this political block realize that without an American follow-on force, Iran will come in, fill the vacuum, and the Sunnis will feel threatened because the political achievements will all be at risk because the balance of the military power will change.

Then we went to Maliki. I can remember it like it was yesterday. It was Senator MCCAIN, Senator Lieberman,

and I. It was always us three, and I am at the end of the line, as I should be. There was Ambassador Jeffries and General Austin, who was the commander of our forces in Iraq.

When it was my time, I looked Maliki in the eye and said: Would you support a residual force to maintain the gains we have achieved jointly?

He looked me in the eye and he said: How many troops are you talking about?

I turned to General Austin and Ambassador Jeffries, and General Austin said: We are still working on that number.

We went back to talk to the Vice President. The military had recommended 18,000—General Austin had—and the Chairman of the Joint Chiefs said we could get by with 10,000, but they wouldn't go below 10,000. According to General Dempsey, then Chairman of the Joint Chiefs, the administration kept reducing the number below 10,000, and it got to almost 1,500.

This cascading of numbers of troops did not come from the Iraqis saying that was too many; it came from the White House, which really wanted to get to zero. So when you try to blame the Iraqis for your mistake, you are lying.

Mr. MCCAIN. Mr. President, I ask unanimous consent for a colloquy with Senator GRAHAM.

The PRESIDING OFFICER. Without objection, it is so ordered.

Mr. MCCAIN. May I also add that at the same time, this President and his administration were saying that we can't get a status of forces agreement with the Iraqi Government; that has to go through the Parliament. Is there any mention today of this same President who says it is absolutely necessary for us to have a status of forces agreement as we incrementally increase our troop strength in Iraq?

Mr. GRAHAM. Isn't it kind of odd that we have not 4,500, we have over 5,000 troops. They are playing with the numbers again. I know this. There are over 5,000 troops. About 1,000 are off the books. They are there; they are just not being counted.

This incessant desire by the President to say we are not in combat offends the heck out of me. Tell that to the family of the Navy SEAL who was killed. They don't want to admit we are in combat because that means we are at war. They don't want to admit we are at war, and I don't know why because this guy in Orlando certainly was at war with us.

We have a presence in Iraq, and isn't it unusual that no one is saying that we need approval from the Iraqi Government now? This was never the problem. The problem was that President Obama sincerely wanted to end both wars. He saw an opportunity in 2011 to fulfill a campaign promise because America is war weary, and I understand that. But at the end of the day, he ignored sound military advice, and everything that Senator MCCAIN and I and others have said has come true in spades.

Let me tell you about a comment by the President yesterday that our military strategy regarding ISIL is hitting on all cylinders. Mr. President, you need to get out of the White House and take a new look at what is going on in the world.

Yesterday there was testimony by a Yazidi woman in the Homeland Security Committee.

Last week the U.N. issued a report that ISIL is engaged in genocide against the Yazidi people. This is a people who mix Christianity and Islam, and they have a unique religion. ISIL is in the process of destroying the Yazidi community that has been in existence for thousands of years.

Yesterday this woman testified that eight members of her family, including her mother, were killed by ISIL. She was gang-raped. She said: Don't feel sorry for me; they are doing this to girls as young as 8 years old.

So, Mr. President, go tell that young woman that your military strategy when it comes to ISIL is working on all cylinders. The U.N. Special Envoy to Syria estimates that 400,000 people have been killed in Syria, where ISIL's headquarters exist.

Mr. President, go tell the people, the families of the victims of ISIL in Syria, that your military strategy is working on all cylinders. How do you explain the fact that there are now up to 8,000 ISIL fighters in Libya?

I had a conversation yesterday with AFRICOM Commander Waldhauser, who is an incredibly gifted man. I asked him: Is ISIL in Libya?

He said: Yes.

Are they a threat to our homeland?

He said: Yes.

Are we doing anything militarily to engage them?

He said: Virtually nothing.

I asked him: How many airstrikes have there been against ISIL soldiers in Libya?

He said: Zero.

The bottom line, Mr. President, is we are not hitting on all cylinders. We are making some gains, but you don't have an overall strategy to secure these gains. Leaving Assad in power is the worst possible outcome for the United States because the Sunni Arabs see him as a puppet of Iran, and he is the one who has killed most of the 400,000, not ISIL. The Syrian people are never going to accept him as their leader.

Russia and Iran have come to the aid of the Butcher of Damascus, Assad. They have bombed the people we have trained to fight not only ISIL but Assad. The Russian people have killed the people the American President tried to recruit to our cause, and we are not doing a darn thing about it.

Mr. President, your military strategy is not working. Tell that to the King of Jordan, where there are more Syrian refugees today than there has ever been in the history of Jordan. Two weeks ago there was a report that there were more refugees in the world now than there were post-World War II. Tell it to the people of Lebanon, where one out of five children in the primary schools is a Syrian refugee child. Tell that to the people of Turkey.

Mr. President, the bottom line: You always underestimate the threat. You try to undersell what is going on, and you oversell our successes.

I hope the people in this body will realize that some of the votes we are going to take in the coming weeks will correct this course, and I hope you realize that the war is not going as well as the President says it is. I want it to go better. I want to destroy ISIL. I promise you this: The strategy we have in Syria will never lead to ISIL's destruction. The people we are training to fight ISIL are mostly Kurds, and the Kurds do not have the ability to go into Raqqah, Syria, which is an Arab town, and take it away from ISIL and hold it. And the people we are training are Communist, Marxist Kurds. Their acronym is YPG. They are associated with the PKK, which is a terrorist organization in Turkey. I appreciate their help, but the future of Syria should not lie in the hands of a bunch of Communist, Marxist Kurds who could never ever bring about stability in Syria.

We don't have a game plan to end this war. We don't have a diplomatic strategy. If you don't believe me, ask the 50-plus Foreign Service officers who wrote a letter publicly urging the President to change his strategy in Syria because it is not working. You can discount Senator MCCAIN and me if you would like, but these are 50 people who dedicated their lives to understanding the Middle East. They said in an open letter that we should be taking the Assad regime on because if he stays in power, this war will never end. He is literally getting away with murder. And our strategy of appeasing Assad because of Russia and Iran's involvement is going to lead not only to the destruction of Syria but also to a change in the power balance in the Middle East that is harmful to us.

It is not just us saying it is not working. Mr. President, your military strategy is not working on all cylinders. The Yazidi community is being decimated on your watch. Some 400,000 people have been murdered on your watch, and we haven't even gotten to the mistake you made in Syria yet. As we withdrew our forces from Iraq against sound military advice, the people of Syria rose up against Assad, demanding the freedom all of us take for granted. There was a moment in time when Assad was on the ropes. The people of Syria rose up as part of the Arab spring. Every person in the administration advised President Obama to help the Free Syrian Army while they were intact, and he said no. When he said no, Hezbollah, which is an agent of Iran, the Shia militia, sent 5,000 troops to support Assad. Russia eventually got in on Assad's side, and the entire mess

in Syria has exploded. His unwillingness to help the Free Syrian Army take Assad out created the vacuum inside of Syria that ISIL filled.

So to those who look at Orlando as a gun control problem, I think you are missing the story of Orlando. Orlando is about ISIL being seen as a winner by people over here who are sympathetic to their cause. ISIL is being seen throughout the world as a winning team, not a JV team. What we see in Orlando is someone who was recruited to their cause and our intelligence systems failed.

I am not blaming the FBI, but the fact of the matter is we interviewed this guy a couple of times, he was on our watch list, and he fell through the cracks.

Mr. MCCAIN. May I also point out to my friend that the President and members of the administration continuously say: We only have two choices. One is do nothing or very little, or we have to send 200,000 troops. You know, I grow so weary of that straw man being set up by the President of the United States, because it is intellectually dishonest.

What we have called for—I am not sure this President can lead and do it because he has no credibility in the Middle East anywhere. When he decided that they had crossed the redline and we were going to take military action and then did nothing, that had a profound effect throughout the Middle East. There is no trust or confidence in the United States. But if there were, it would be approximately 100,000 troops—about 10,000 Americans, the Sunni Arabs, Turkey, Saudi Arabia, and the other Gulf countries—a force that would go to Iraq today and take out ISIS.

I want to assure my fellow Americans that as long as ISIS has a geographic base in Raqqa, they will be exporting terror into the United States and Europe. Baghdadi, we know, is sending people with these devices—secure encrypted devices. We know there is self-radicalization taking place as we speak. We know they are being inserted into the refugee stream. We know these things. As long as they have a capital and we have no strategy for retaking that capital, there will be further attacks, as the Director of the CIA has said, as the Director of National Intelligence has said. There will be further attacks on the United States of America.

Mr. President, I ask unanimous consent to have printed in the RECORD these statements by the President and by Senator GRAHAM and myself.

There being no objection, the material was ordered to be printed in the RECORD, as follows:

OBAMA ON WITHDRAWAL FROM IRAQ

PRESIDENT OBAMA, OCTOBER 2011

''The tide of war is receding . . . The long war in Iraq will come to an end by the end of this year . . . We're also moving into a new phase in the relationship between the United States and Iraq . . . We'll partner with an Iraq that contributes to regional security and peace . . . Just as Iraqis have persevered through war, I'm confident that they can build a future worthy of their history as a cradle of civilization.''

PRESIDENT OBAMA, DECEMBER 2011

''We're leaving behind a sovereign, stable and self-reliant Iraq.''

PRESIDENT BUSH, JULY 2007

''To begin withdrawing before our commanders tell us we are ready would be dangerous for Iraq, for the region and for the United States. It would mean surrendering the future of Iraq to Al Qaeda. It would mean that we'd be risking mass killings on a horrific scale. It would mean we allow the terrorists to establish a safe haven in Iraq to replace the one they lost in Afghanistan. It would mean we'd be increasing the probability that American troops would have to return at some later date to confront an enemy that is even more dangerous.''

SENATOR MCCAIN, OCTOBER 2011

''This decision will be viewed as a strategic victory for our enemies in the Middle East, especially the Iranian regime, which has worked relentlessly to ensure a full withdrawal of U.S. troops from Iraq . . . all of our military commanders with whom I have spoken on my repeated visits to Iraq have told me that U.S. national security interests and the enduring needs of Iraq's military required a continued presence of U.S. troops in Iraq beyond 2011 to safeguard the gains that we and our Iraqi partners have made . . . Nearly 4,500 Americans have given their lives for our mission in Iraq. Countless more have been wounded . . . I fear that all of the gains made possible by these brave Americans in Iraq, at such grave cost, are now at risk.''

As the situation worsened . . .

SENATOR MCCAIN, DECEMBER 2011

''[Domestic] political considerations in [the United States and Iraq] have been allowed to trump our common security interests. All of the progress that both Iraqis and Americans have made, at such painful and substantial cost, has now been put at greater risk.''

SENATORS MCCAIN AND GRAHAM, DECEMBER 2011

''If Iraq slides back into sectarian violence, the consequences will be catastrophic for the Iraqi people and U.S. interests in the Middle East, and a clear victory for al Qaeda and Iran. A deterioration of the kind we are now witnessing in Iraq was not unforeseen, and now the U.S. government must do whatever it can to help Iraqis stabilize the situation. We call upon the Obama Administration and the Iraqi government to reopen negotiations with the goal of maintaining an effective residual U.S. military presence in Iraq before the situation deteriorates further.''

OBAMA: ASSAD MUST GO

PRESIDENT OBAMA, AUGUST 2011

''For the sake of the Syrian people, the time has come for President Assad to step aside.''

OBAMA ADMINISTRATION OFFICIAL IN THE NEW YORKER, DECEMBER 2015

''The meaning of 'Assad has to go' has evolved.''

SENATOR MCCAIN, DECEMBER 2015

''So why has the meaning of 'Assad has to go' evolved? Because this Administration was overpowered, outplayed, and outmatched. This Administration consoled themselves with the mantra of 'there is no military solution,' rather than facing the reality that there is a clear military dimension to a political solution in Syria. That is what Russia and Iran have demonstrated. They have changed the military facts on the ground and created the terms for a political settlement more favorable to their interests. And I believe as a result, the conflict will grind on, ISIL will grow stronger, and the refugees will keep coming.''

WHITE HOUSE: ASSAD'S FALL IS INEVITABLE

WHITE HOUSE PRESS SECRETARY JAY CARNEY, JANUARY 2012

''Assad's fall is inevitable . . . It's important to calculate into your consideration the fact that he will go. The regime has lost control of the country and he will eventually fall.''

SENATOR MCCAIN, MARCH 2012

''The Administration's approach to Syria is starting to look more like a hope than a strategy. So, too, does their continued insistence that Assad's fall is 'inevitable.' Tell that to the people of Homs. Tell that to the people of Idlib, or Hama, or the other cities that Assad's forces are now moving against. Nothing in this world is pre-determined. And claims about the inevitability of events can often be a convenient way to abdicate responsibility.''

Warning about sectarian conflict in Syria . . .

SENATOR MCCAIN, MARCH 2012

''The surest way for Al-Qaeda to gain a foothold in Syria is for us to turn our backs on those brave Syrians who are fighting to defend themselves. After all, Sunni Iraqis were willing to ally with Al-Qaeda when they felt desperate enough. But when America gave them a better alternative, they turned their guns on Al-Qaeda. Why should it be different in Syria? . . . As we saw in Iraq, or Lebanon before it, time favors the hard-liners in a conflict like this. The suffering of Sunnis at the hands of Assad only stokes the temptation for revenge, which in turn only deepens fears among the Alawites, and strengthens their incentive to keep fighting. For this reason alone, it is all the more compelling to find a way to end the bloodshed as soon as possible.''

SENATOR MCCAIN, JUNE 2012

''If we fail to act, the consequences are clear. Syria will become a failed state in the heart of the Middle East, threatening both our ally Israel and our NATO ally Turkey. With or without Assad, the country will devolve into a full-scale civil war with areas of ungoverned space that Al-Qaeda and its allies will occupy. Violence and radicalism will spill even more into Lebanon and Iraq, fueling sectarian conflicts that are still burning in both countries. Syria will turn into a battlefield between Sunni and Shia extremists, each backed by foreign powers, which will ignite sectarian tensions from North Africa to the Gulf and risk a wider regional conflict. This is the course we are on in Syria, and we must act now to avoid it.''

OBAMA: RUSSIAN SYRIA INTERVENTION WILL BE QUAGMIRE

PRESIDENT OBAMA, OCTOBER 2015

''An attempt by Russia and Iran to prop up Assad and try to pacify the population is just going to get them stuck in a quagmire and it won't work.''

SECRETARY KERRY, MARCH 2016

''Russia is now helping with the cessation of hostilities. And if Russia can help us to actually effect this political transition, that is all to the strategic interest of the United States of America.''

Warning of foreign intervention . . .

SENATOR MCCAIN, MARCH 2012

''Increasingly, the question for U.S. policy is not whether foreign forces will intervene

militarily in Syria. We can be confident that Syria's neighbors will do so eventually, if they have not already. Some kind of intervention will happen, with us or without us . . . We also hear it said, including by the Administration, that we should not contribute to the militarization of the conflict. If only Russia and Iran shared that sentiment. Instead, they are shamelessly fueling Assad's killing machine. We need to deal with reality as it is, not as we wish it to be—and the reality in Syria today is largely a one-sided fight where the aggressors are not lacking for military means and zeal. Indeed, Assad appears to be fully committed to crushing the opposition at all costs. Iran and Russia appear to be fully committed to helping him do it.''

On the nature of Russian intervention . . .

SENATOR MCCAIN, OCTOBER 2015

The Administration has accepted ''Russia's expanded role in Syria, and as a consequence, for Assad's continued brutalization of the Syrian people. It is simply incomprehensible that the Administration is taking such great pains to offer Russia a 'constructive' role in Syria, pretending that Russia has the slightest interest in anything other than propping up the murderous Assad regime. That is what Russia has been doing for four years as Assad has slaughtered more than 200,000 Syrians, and that is what Russia is doing now.''

What has happened since . . .

SENATOR MCCAIN, APRIL 2016

''Last year, Vladimir Putin moved to fill the strategic vacuum that the United States has left in the Middle East. In its first out-of-area military since the time of the czars, Russian forces moved into Syria, doubled down on the Assad regime, and decimated the moderate Syrian opposition groups that America and our allies said we were supporting. Russia has used Syria as a live-fire exercise for its modernizing military. Despite predictions of a Russian quagmire, Putin has instead used limited military means to achieve distinct political goals. Despite Putin's pledged withdrawal from Syria, Assad's forces, backed by Russia, now appear poised to retake Aleppo. Meanwhile, advanced Russian military capabilities remain in Syria, enhancing Putin's ability to project power beyond the region.''

OBAMA UNDERESTIMATING ISIL

PRESIDENT OBAMA, JANUARY 2014

''The analogy we use around here sometimes, and I think is accurate, is if a jayvee team puts on Lakers uniforms that doesn't make them Kobe Bryant.''

SENATORS MCCAIN AND GRAHAM, OCTOBER 2013

''By nearly every indicator, the situation in Iraq has worsened dramatically since the beginning of the conflict in Syria and the withdrawal of U.S. forces from Iraq in 2011 . . . What's worse, the deteriorating conflict in Syria has enabled al Qaeda in Iraq to transform into the larger and more lethal Islamic State of Iraq and al-Sham (ISIS), which now has a major base for operations spanning both Iraq and Syria. It may just be a matter of time until al Qaeda seeks to use its new safe haven in these countries to launch attacks against U.S. interests.''

ISIL captured Fallujah three months later . . .

SENATORS MCCAIN AND GRAHAM, JANUARY 2014

''Reports that Al-Qaeda fighters have taken over Fallujah and are gaining ground in other parts of Iraq are as tragic as they were predictable . . . The Administration's failure in Iraq has been compounded by its failed policy in Syria. It has sat by and refused to take any meaningful action, while the conflict has claimed more than 130,000 lives, driven a quarter of the Syrian population from their homes, fueled the resurgence of Al-Qaeda, and devolved into a regional conflict that now threatens our national security interests and the stability of Syria's neighbors, especially Iraq.''

As the situation worsened . . .

SENATOR MCCAIN, APRIL 2014

''It is reality check time in Iraq, where the Syria-Iraq border has turned into a major highway and safe haven for transnational terrorist groups. The black flags of al-Qaeda fly over the city of Fallujah, where hundreds of U.S. troops were killed and injured. Violence across the country has reached the same levels as at the height of the Iraqi insurgency in 2008, and the country is creeping dangerously close to a reignition of civil conflict.''

OBAMA ON LEAVING ISIL UNCHECKED

PRESIDENT OBAMA, SEPTEMBER 2014

''So ISIL poses a threat to the people of Iraq and Syria, and the broader Middle East—including American citizens, personnel and facilities. If left unchecked, these terrorists could pose a growing threat beyond that region, including to the United States.''

SENATORS MCCAIN AND GRAHAM, AUGUST 2014

''Americans need to know that ISIS is not just a problem for Iraq and Syria. It is a threat to the United States. Doing too little to combat ISIS has been a problem. Doing less is certainly not the answer now . . . ISIS presents Mr. Obama with a similar challenge, and it has already forced him to begin changing course, albeit grudgingly. He should accept the necessity of further change and adopt a strategy to defeat this threat . . . If he does not, ISIS will continue to grow into an even graver danger to our allies and to us.''

Nearly two years into the campaign to ''check'' ISIL . . .

ISIL has metastasized to Yemen, Egypt, Lebanon, Afghanistan, and Libya.

As of the end of April 2016, CNN reported that ISIL had conducted or inspired at least 90 terrorist attacks in 21 countries other than Iraq and Syria.

That, of course, doesn't account for the 49 Americans murdered in Orlando by a terrorist who pledged allegiance to ISIL.

If it wasn't clear then, ISIL's threat to our homeland is real, direct, and growing.

OBAMA ON DESTROYING ISIL

PRESIDENT OBAMA, SEPTEMBER 2014

''We will degrade and ultimately destroy ISIL.''

SENATOR MCCAIN, SEPTEMBER 2014

''The President's plan will likely be insufficient to destroy ISIS, which is the world's largest, richest terrorist army. To destroy ISIS, create conditions for enduring security in the Middle East, and protect the American people, additional steps are necessary . . . Half measures against ISIS only make it stronger and will not lead to its destruction.''

Urging a comprehensive plan . . .

SENATORS MCCAIN AND GRAHAM, OCTOBER 2014

''We continue to urge the Administration to quickly adopt a comprehensive strategy [against ISIL and avoid the perils of gradual escalation . . . Degrading and ultimately destroying ISIS will require additional actions that we have long advocated, such as the deployment of U.S. Special Forces and military advisers on the ground to direct airstrikes and advise our local partners; the expansion of assistance for moderate Syrian forces, and the establishment of safe zones protected by no fly zones in Syria . . . That is ultimately what it will take to destroy ISIS and keep America safe, and we cannot afford to delay any longer.''

SENATOR MCCAIN, NOVEMBER 2014

''Applying a half-hearted bombing campaign without seriously undertaking complementary efforts to train and assist local forces and protect civilians in Syria is simply doomed to fail. It is time for this Administration to stand by our Syrian allies, as it has done for other communities in Iraq and Syria, and move quickly to support moderate opposition forces fighting against ISIS and Jabhat al-Nusra and protect the Syrian people from Assad's deadly air campaign. Until such actions are taken, I fear that the threat posed by ISIS will continue to metastasize.''

OBAMA ON CONTAINING ISIL

PRESIDENT OBAMA, NOVEMBER 2015

''We have contained them.''

The day after this statement, ISIL attacked in Paris . . .

SENATOR MCCAIN, NOVEMBER 2015

''What should now be clear is that ISIL is determined to attack the heart of the civilized world, Europe and the United States—that it has the intent to attack us, the capability to attack us, and the sanctuary from which to plan those attacks. What should now be clear is that our people and our allies will not be safe until ISIL is destroyed—not just degraded, but destroyed; not eventually, but as soon as possible.''

GENERAL JOSEPH DUNFORD, DECEMBER 2015

''We have not contained ISIL.''

Further warning that ISIL is not contained . . .

SENATOR MCCAIN, DECEMBER 2015

''As long as this caliphate exists in Raqqa, they are going to be able to orchestrate attacks and metastasize and maybe even move to Libya.''

ISIL's scored its biggest victory in Libya in June 2016 when it captured Sirte. Today, ISIL still has over 5,000 fighters in Libya.

In January 2016, ISIL was so contained that the Obama Administration approved targeting ISIL in Afghanistan nearly a year after they had arrived on the battlefield . . .

SENATOR MCCAIN, JANUARY 2016

''Now the administration seems to be waking up to the fact that more than a year into the U.S. military campaign, ISIL's reach is global and growing. We can only hope it won't take so long for the administration to realize that conditions on the ground in Afghanistan simply don't warrant a dangerous, calendar-driven withdrawal of U.S. forces.''

As of today, the Obama administration is moving forward with plans to cut U.S. forces in half by the end of the year.

Mr. MCCAIN. I would point out that, as long ago as August 2014, Senator GRAHAM and I said:

Americans need to know that ISIS is not just a problem for Iraq and Syria. It is a threat to the United States. Doing too little to combat ISIS has been a problem. Doing less is certainly not the answer now . . . ISIS presents Mr. Obama with a similar challenge, and it has already forced him to begin changing course, albeit grudgingly. . . . If he does not, ISIS will continue to grow into an even graver danger to our allies and to us.

It was obvious.

Here is a quote from President Obama from November 2015: ''We have contained them.''

Really? We have contained them?

Again, General Dunford said, in a further warning, that ISIL is not contained.

I said in December of 2015: ''As long as this caliphate exists in Raqqa, they are going to be able to orchestrate attacks and metastasize and maybe even move to Libya.''

Guess what. They moved to Libya.

The list goes on and on.

From August 2011, here is one of my favorites from President Obama: ''For the sake of the Syrian people, the time has come for President Assad to step aside.''

An Obama administration official said in the New Yorker in December 2014, 4 years later: ''The meaning of 'Assad has to go' has evolved.''

''The meaning of Assad has to go has evolved.''

Anyway, the list goes on and on.

President Obama said in October 2015: ''An attempt by Russia and Iran to prop up Assad and try to pacify the population is just going to get them stuck in a quagmire and it won't work.''

''In a quagmire, and it won't work.''

Secretary Kerry said in March of 2016:

> Russia is now helping with the cessation of hostilities. And if Russia can help us to actually effect this political transition, that is all to the strategic interest of the United States of America.

And now, what did they do? They bombed the people we trained and equipped. They murdered. Bashar Assad has murdered so many more than ISIS with his barrel bombs and the indiscriminate killing of men, women, and children. He has never paid a penalty for the use of sarin gas, with which he gassed thousands of innocent men, women, and children in Syria.

Does anybody believe that Assad is leaving power anytime soon? Of course not.

So again, we have been talking about this, and we have been warning about it. By the way, Senator GRAHAM and I are always described in the liberal media this way: ''Senator GRAHAM and Senator MCCAIN, among Obama's harshest critics.'' They do not mention that we called for the removal of President Bush's Secretary of Defense.

No, we are not his harshest critics. We are the ones who have been telling the truth to the American people ever since this debacle began, because we have an obligation—we have an obligation—to those men and women in uniform serving in the longest wars in our history. We have an obligation to the families of those who have been killed and wounded. We have an obligation to try to force this President to understand that we have failed. We are failing, and we have failed.

Yes, we are making some gains with the retaking of Fallujah, after two battles—by the way, where American troops were wounded and killed. There is some small success. But the fact is that none of this had to happen, and that is the great tragedy of the last few years. None of it had to happen, and this President didn't lead because he believed all we needed to do was get out and those conflicts would end.

So I say directly to my colleagues: The President's policies are responsible for the deaths, untold deaths, the quagmire we are in, the metastasizing of ISIL and the rise of Russia as a new power in the Middle East and the retention of Bashar Assad ensconced as a ruler of Syria—the same person about whom the President of the United States said: It is not whether Bashar Assad leaves power; it is when.

Mr. GRAHAM. If I may, just to wrap this up, 50 diplomats who served in the Mideast wrote an open letter to the world to say that we have let Assad get away with murder. Assad will be in power when Obama is gone. Russia and Iran have gone to Assad's aid. The biggest winners of Obama's strategy in Syria have been Russia and Assad. The biggest losers have been our allies—Arab allies, in particular and the people in Syria.

About our willingness to help, I was in a multiperson primary back in 2014. The President basically reached out to Senator MCCAIN and myself after Assad had crossed the redline the President drew regarding chemical weapons. It was Labor Day. I will never forget it as long as I live. I flew up with Senator MCCAIN, and we met with President Obama in the Oval Office and Susan Rice. They informed us of what Assad did, and were seeking our support to basically hit him militarily as punishment for crossing the redline.

The goal was to degrade Assad's capability on the battlefield, upgrade the ability of the opposition to fight him and change momentum on the battlefield. Senator MCCAIN and I went out in front of the Oval Office in the driveway and said: We stand with the President in his efforts to deal with Assad for crossing the redline, to upgrade the opposition, degrade Assad, and change the momentum on the battlefield.

This was right around Labor Day. It was supposed to happen in a couple of days—airstrikes from the sea and land. Nothing happened. By the end of the week, the President decided to go to Congress, and, unfortunately, Congress didn't respond well. So there is some blame in the body. But President Obama has yet to call us and tell us that.

Now, I am in the middle of a primary and people are war weary, and I just really thought the President was doing the right thing to hold Assad accountable. So I want to help him where I can.

I have tried to put money in the budget to help secure the gains we have achieved in Iraq. I hope Fallujah falls, and I think it will, but I said 8,000 to 10,000 U.S. soldiers would be necessary to destroy ISIL inside Iraq. We are over 5,000, and we have to go to Mosul, which is a city of a million people. If we don't have more American ground components, then we are not going to retake Mosul, and the Shia militia, which are controlled by Iran, are going to have way too much to say in terms of the future of Iraq.

So inside Syria there is no strategy to destroy ISIL. I think President Obama is passing this on to the next President, not wanting to break his promises, not recommitting troops, and he is just ignoring good sound military advice. The bottom line is—and I hate to say this—if there is a JV team on the field in the War on Terror, it is in the White House. The bottom line is they are at war with us, but we are really not at war with them. We can't even say ''combat.''

So I want to help this President where we can. We have had a very contentious debate about guns. Things have been said on both sides of the aisle that I think are, quite frankly, out of bounds. I don't want to sell guns to ISIL; I want to destroy them.

I think we have several choices here. We are going to fight them in their backyard or ours. I choose to fight them in their backyard—with partners. The Arabs want to help us because they are in the crosshairs of ISIL. But they are not going in to fight ISIL in Syria and wind up giving the whole country to the Iranians by keeping Assad in power. They have told us.

The King of Saudi Arabia told us: You can have our army. But they want to make sure that when we finish the job in Syria, the Iranians are not in control of Syria. They are dominating four Arab capitals and the Arabs are tired of this.

The bottom line is Iran is running wild, ISIL is a growing threat to the homeland, and we don't have a strategy to destroy ISIL and secure the gains and stabilize Iraq and Syria. When it comes to Iran, we have empowered the most tyrannical regime on the planet, I think, by giving them $150 billion to put in their war machine. They will have a pathway to a bomb and a missile to deliver it even if they do not cheat under this agreement.

So the next President of the United States is going to have a mess on their hands, but we still have a long way to go with this President.

So, Mr. President, send a couple thousand more troops into Iraq and make sure we liberate Mosul and can hold the place. Up your game in Syria. Work with our Arab partners who will go in on the ground with you. Tell Assad he has to go, and tell the Russians, if you want to fight for the Butcher of Damascus, you are welcome to do so—and they won't. Let the Syrian people rebuild Syria, pick their leader, and not have the Russians or the Iranians pick their leader.

There is a way forward. It is going to take more effort on our part but not 100,000 troops. We are talking less than 10,000 to get this job done. But we do need a different approach to Syria particularly or this will never end.

Here is what I worry about the most. The thousands of foreign fighters who have joined the jihad have Western passports, and people on my side of the aisle were saying some pretty crazy things, quite frankly. You can't seal

America off from the world. People do travel, and they do trade. So the ability to penetrate the homeland exists. The bottom line is that the sooner we can destroy ISIL, the safer we will be and the quicker we can live in peace in the region—and we don't have a plan to do it.

I hope the President will make an adjustment. President Bush adjusted. It is not easy for a President to adjust. I can get that. But he made a decision to listen to his commanders and he adjusted. This President is making some adjustments, but they are incremental in nature. He downplays the adjustments he is making. He downplays the threats we face. When the Attorney General says: I really don't understand what motivated this man, that really breaks my heart because I think most of us do.

Here is what I worry the most about. It is taking too long to take these guys out over there. They are reaching into Libya, and another 9/11 is on the way if we don't put these guys on the defensive. I want to hit them before they hit us. I want partners. I don't want to fight this war alone. I want to keep the war over there. It is coming here. No matter what you do, it may come here anyway, but we are allowing them to come here quicker and faster than they should be allowed to come here. We are allowing them to stay stronger—longer than they should.

In the wake of this foreign policy debacle, we have lost an entire group of people called the Yazidis, who have been basically wiped off the face of the planet. There have been hundreds of thousands of people displaced—millions displaced—and they are going to look at America and say: You can't count on America. Every young child in a refugee camp who was driven to that camp because of our failure to deal with ISIL, allowing Assad to barrel-bomb his or her family, is going to grow up not liking us. One day we are going to have to confront them.

The effects of this strategy of failed foreign policy are going to be generational. Mr. President, there is still time to adjust, if you will adjust your strategy and not just listen to us but listen to the 50 people who wrote the letter and listen to your military commanders. If you make these adjustments, we will be there with you.

Mr. MCCAIN. Mr. President, I wish to summarize, the reason Senator GRAHAM and I came to the floor at this time is because it is pretty obvious the debate now is over guns, and there should be a legitimate debate over the use and availability of weapons. I hope we could reach a reasonable compromise so we can act.

I want to emphasize, we would not be having this debate if it were not for the failed policies that led to where we are today, where a young man—either instructed or self-radicalized—took the lives of nearly 50 brave Americans. That was not like a hurricane. It was not like an earthquake. It was because this President has failed to lead. Look at the world as it was in the times when I was talking and look at the world today. We have to have a strategy to defeat ISIS, and we cannot stand to have this brutal dictator named Bashar al-Assad continue to slaughter his own people. We have to stand with our allies and stand with our friends, but what is most important is, we have to have a strategy to defeat this enemy, which has proven at least twice it has the ability to attack the mainland of the United States of America. That is not there today.

AMENDMENT NO. 4787

Mr. CORNYN. Mr. President, would the Senator from Arizona yield for a question?

Mr. MCCAIN. Absolutely.

Mr. CORNYN. Mr. President, I would say to my friend from Arizona, before lunch we had a vote on a very important amendment the Senator sponsored, along with the chairman of the Intelligence Committee, that received a majority vote of the Senate but not enough to get us to the 60-vote threshold. I know the majority leader has put in a motion to reconsider, which will allow him to bring that up because of some absenteeism.

I want to ask my friend, during the time the shooter in Orlando was under surveillance by the FBI and was actually put on a watch list, the authority they had to gather information about him and particularly his computer usage by issuing a subpoena to the Internet service provider in order to identify IP addresses and perhaps email addresses, not content—they were denied the opportunity to get that kind of information. Does the Senator have any idea whether perhaps the FBI might have been tipped to the fact that this shooter—let's say he was accessing YouTube videos of Anwar al-Awlaki like Nidal Hasan in Fort Hood was before he committed his terrorist attack there, or let's say one of the email addresses they were able to collect was one of a known terrorist or somebody the FBI suspected was complicit in terrorism, obviously, under the Senator's amendment, in order to get the content of that, the FBI would have to go to the FISA Court and establish probable cause.

Does the Senator have an opinion whether that kind of information, to which the FBI was blinded by the lapse in this authority—whether that would be helpful information in identifying potential threats like we saw in Orlando?

Mr. MCCAIN. I say to my friend and colleague who has done so much hard work on trying to achieve a careful balance and compromise that all of us could agree to on the issue of weapons, I appreciate the question and I appreciate his work.

I can't specifically state I know for a fact that the failure of the ability of the FBI to monitor and know about use of the Internet—not content but use of the Internet, such as the Senator mentioned IP addresses and others. I can't say that would have prevented it. What I can say, and the Senator knows, the Director of the FBI said this is the most important tool he needs to defend this country against further attacks. Is there anyone now in America who doesn't believe there is going to be another self-radicalized or instructed individual who will try to attack the United States of America? Of course not.

In their wisdom, a majority of my colleagues over there and a group of my colleagues over here have rejected the urgent request from the Director of the Federal Bureau of Investigation. I have seen a lot of strange votes around here, I would say to my friend from Texas, but to see Republicans, who advertise themselves as trying to protect the people of this Nation, not give the Director of the Federal Bureau of Investigation the tool he needs the most to counter what is clearly coming, frankly, is one of the most puzzling and disappointing actions that have been taken by my colleagues on this side of the aisle.

Mr. CORNYN. I thank the Senator.

I would merely add, this is not a partisan issue. As the Presiding Officer and as the Senator from Arizona knows, the Intelligence Committee has voted in a bipartisan way, with only one Senator dissenting in the Intelligence reauthorization bill, to reinstate this very authority the amendment of the Senator from Arizona pertained to. I believe, of all the votes we have had this week, the vote on Senator MCCAIN's amendment was the one with the greatest potential to stop future terrorist attacks like we saw in Orlando—because we all know the shooter in Orlando was under two separate FBI investigations and he was put on a watch list. With so much discussion about watch lists, he was no longer on a watch list so the FBI was not notified when he went in and purchased the two firearms he used in this attack. We also know he was a licensed security guard, and he actually had a license to own firearms.

This is a complicated and complex and confusing picture we have all been presented, and we are all trying to figure out what is the solution or what could we do to help reduce the possibility that something like this might happen in the future? I can guarantee one thing. It is not to limit the constitutional rights of law-abiding citizens. That is not going to stop future terrorist attacks. If we fail to give law enforcement and counterterrorism authorities the means by which to identify these self-radicalized terrorists before they kill—if we don't do that, then shame on us. This is not partisan, as I said, because a bipartisan majority—with one dissenting vote—on the Intelligence Committee voted for this provision, but we need to get serious about this. I know, because of some absenteeism today—necessary, I am sure—we didn't have every Senator here present and voting.

I hope in the interim, from the time of that failed cloture vote on the McCain-Burr amendment until the time we vote on this again when the majority leader moves to reconsider, we can have some serious discussions and serious efforts at trying to make our country safer and protecting innocent Americans from terrorist attacks on our own soil.

If we deny the FBI Director the No. 1 legislative priority of the agency, as he has told us time and time again—most recently in the SCIF, in the secure facility. Obviously, that part is not classified, but he said this is a very important tool. If we are going to ask the FBI and our counterterrorism authorities to connect the dots, well, they can't connect the dots unless they can collect the dots. Again, this is with proper and appropriate regard, under the Fourth Amendment, for American citizens when it comes to searches of their property or seizures. Under the Fourth Amendment, we know there has to be established probable cause that a crime has been committed, established before an impartial judge. We are not talking about the content. We are saying, if there are enough dots to connect together to raise a reasonable suspicion on the part of our counterterrorism authorities, they ought to then have the opportunity to go to a judge and get the content of that communication under appropriate constitutional Fourth Amendment procedures. If they don't even have access to the basic information, then they can't connect the dots because they can't collect them.

So of all the votes we have had this week, I believe the vote on the McCain-Burr amendment was the most important because I think it was the one most likely to produce additional tools that our counterterrorism authorities could use in an investigation to identify self-radicalized terrorists in the United States before they strike. It is too late after they strike, when we are all asking the question: What can we possibly do in order to prevent something like this from happening again? We now know what we can do. It may not be a panacea, but it is making sure our law enforcement authorities, such as the FBI, have the tools they need in order to conduct these investigations, again to collect the dots so they can connect those dots.

Mr. President, I yield the floor.

I suggest the absence of a quorum.

The PRESIDING OFFICER (Mr. FLAKE). The clerk will call the roll.

The legislative clerk proceeded to call the roll.

Mr. COATS. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

The PRESIDING OFFICER. Without objection, it is so ordered.

Mr. COATS. Mr. President, there is a lot going on around here. Before lunch, we finished a vote that I was very disappointed did not reach the 60-vote threshold so we could proceed to debate and vote on what I think is one of the more important issues we are dealing with; that is, our ability to stop terrorist attacks.

As a member of the Senate Intelligence Committee, we have had the opportunity to meet several times with Director Comey, the head of the FBI, asking him if they have the tools necessary to prevent terrorist attacks against innocent Americans. Simply because of changes in technology, a tool they had before—and by ''tool,'' a method they had before to try to determine who is trying to do us harm—works for one type of technology, but new technology, basically because of an omission in the language that was never intended by the Congress, does not give us the ability to so-call connect the dots to give us the opportunity to then go and seek a warrant for further investigation.

This was the vote we had on the floor. We came up just one or two votes short. I know the majority leader made a motion to reconsider so we will be taking this up again. I hope my colleagues who did not vote for this will take the opportunity as a Member of the U.S. Senate to come to the Intelligence Committee to sit down, look at the classified information, and assure themselves this does nothing that invades anyone's privacy rights.

There seems to be a lack of information as to what is being asked for. In that regard, hopefully during this next few days, we will have the opportunity for our colleagues to come and understand this. Frankly, it is something many had voted for but were not aware of this glitch in the language that has put us in this particular position. I will be happy to accompany any of my colleagues to a place where we can look through, on a classified basis, why this is so important.

WASTEFUL SPENDING

Mr. President, I want to do what I have been doing now for about 46 weeks in the Senate in this cycle; that is, to discuss the waste of the week. The waste of the week is something we have been talking about. While I deeply regret we have not been able to fashion a long-term program dealing with our debt and our deficit, which is so critical for the future of this country, the least we can do is look at the way we currently spend taxpayer money, and in doing so, weed out those programs that simply don't justify the use of taxpayer money.

I was going to do this last week, and after the tragic events of Orlando, I didn't think it was the appropriate time to do so. So today I am doing two wastes of the week to make up for last week and this week.

This week, the Senate is considering legislation that funds a number of agencies, including the National Science Foundation. When Congress created the National Science Foundation, the agency's goals were to promote progress in science, help secure our national defense, and advance national health, prosperity, and welfare. That is a great goal.

I am not here today to question the validity of the National Science Foundation. There is no question that research funded by the NSF has led to remarkable discoveries in that the majority of the work they do, their research, is worthwhile. However, thanks to the work started by my former colleague Senator Tom Coburn, it has now become clear that the National Science Foundation has funded some research that truly falls in the category of a waste of taxpayer dollars—either because the research has questionable benefit or because it is research that should more appropriately be conducted by the private sector or perhaps it doesn't even need to be conducted.

By the way, these are all documented. Inspectors general—the Government Accountability Office goes in and does audits and they look at how money is spent. Then they report this back to us. We look at this and say: How in the world did this ever get approved? Who agreed to spend this kind of money on this kind of research project when we are running deficits, when we are deeply in debt here as a nation? Is this a wise way to spend hard-earned tax dollars?

We are trying to bring these to light in a transparent way so our Members will say: Let's crack down on this kind of stuff. I don't want to go home and tell my constituents their tax dollars are going toward this kind of stuff.

We had another example several months ago about—you can't make this stuff up—whether, if people are hungry, they are more disposed to be a little curt or a little angry with their spouse. Somebody came up with the idea: Let's test this out. The expenditure was considerable for this research. I can't remember exactly what it is right now, but they gave husbands and wives voodoo dolls and a bunch of pins. They said: Every time you feel a bad feeling or want to say something mean to your spouse, you take your voodoo doll—you have your voodoo doll that looks like your wife and your wife has one that looks like her husband—and you take a pin and stick it in the voodoo doll. When you did this, you were asked the question: Were you hungry at the time? If you were hungry at the time, they said to count all the pins and say: Well, OK, we have proven the fact that if you are hungry, you are more likely to be upset with your spouse than if you are not hungry.

To come here and explain this, people say this can't be true. Tell me, tell me tax dollars are not used for something like this out of an agency as respected as the National Science Foundation. Yet they defended this process as a legitimate grant, expenditure of taxpayer dollars, and used a new word, ''hangry.'' It is the combination of being hungry and angry, and it is hangry. Are you hangry? And if you are, you might be upset with your spouse a little more quickly because

the pins in the voodoo dolls prove that. I promise you, I am not making this up. This is documented. This is what the research project included.

Today, I want to name two additional examples. I am not picking on the NSF, but we keep reading about this. Here are two examples that cost taxpayers nearly $2.2 million. The first example is a $171,000 grant to research how monkeys gamble. Yes, you heard that correctly. Researchers actually taught monkeys to gamble to see if they could develop a hot-hand mentality.

Now let me put my cards on the table and explain what this means. Researchers taught monkeys to keep gambling and keep playing, despite potential risk, in order to maximize their rewards. Instead of earning money, which the monkeys weren't going to take the money to a store and spend, the monkeys were rewarded with food. It turns out the monkeys tried to get as much food as possible from their gambling game. In other words, knowing there was going to be the reward of more food if they kept gambling, the monkeys kept gambling.

First of all, I didn't know monkeys could gamble so I guess we learned something there. Secondly, my bet is that taxpayers agree with me that there are much more pressing issues that deserve Federal funding.

The second example I want to talk about is the nearly $2 million grant to Cornell University for a study on popular landmark photos. This money was used to study photos that have been posted—I think we have a chart here. We actually found a picture of the monkeys gambling. Here are their chips. Somehow they taught them to gamble. They were rewarded with food. The monkeys figured out pretty quickly that if they kept gambling, they could get more food.

It is not unlike my dog. We wake up in the morning, and the first one up in our house—my wife or myself—feeds the dog. If we forget to tell each other that we fed the dog—I go off to work, catch a plane to come back to Washington—I get a call from my wife: Did you feed the dog? Yes, I did feed the dog. Well, she is sitting here begging, looking like, ''Poor thing, I didn't get anything to eat this morning''—soulful eyes on Honey Hoosier. That is our dog, soulful eyes looking at you, ''Oh, if you could just give me something to eat.'' My wife says: I fed the dog because I thought you surely didn't feed the dog because she looked so sad.

Hey, she is gaming the whole program here. She is very successful with me because I look at her and say: Oh, you poor thing. Let me give you some food. And then my wife comes out later and says: You know, I fed the dog. I hope you didn't feed her again.

Anyway, the animals figured it out pretty quickly, and I don't know what this leads to as a conclusion. All I know is, why should the taxpayer be paying for stuff like this? These are fun things maybe to do for somebody if they want to do them, I suppose, but the conclusions they come to, it may benefit society, but does it have to be done with taxpayer dollars? So on and on we go.

The second issue here is this Cornell study on photos. The researchers claim they searched the 40 billion pages of Web sites with photos to make photo archives available to social science for research. In reality, the researchers examined photos that had been uploaded to a popular photo-sharing site called Flickr and then determined some of the top photograph sites in the world. What did they find? Unsurprisingly, the most popular sites included the Eiffel Tower, Big Ben, the Empire State Building. Unfortunately, the Indianapolis Motor Speedway was not included, which is disturbing to me. They also found that the Apple store on Fifth Avenue in New York City is more popular on Flickr than the White House. You can come to your own conclusions as to what you might think about that, but we have to ask ourselves: Was this basic Internet research really worth $2 million of taxpayer money? The researchers said it is because the work can help with online travel guides and improve social media sites' ability to guess where a photo was taken. Helping improve online travel guides and social media geolocation services is not exactly part of the NSF's original mission, which I read to you.

What can Congress do about these kind of things? One problem with Congress's inability to crack down on wasteful spending is the lack of transparency, and what we are doing here is trying to be transparent. We are exposing to my colleagues, we are exposing to the American public the kind of waste that is going on with their hard-earned tax dollars. They sent their hard-earned tax dollars to Washington thinking that it would be invested in building new roads, infrastructure, providing for our military defense, or the veterans who have come home and need support. No, instead it goes to grants that go to these kinds of crazy things. That is why I submitted an amendment to this week's bill to require the National Science Foundation to publish the full documents submitted by NSF grant recipients outlining what the research will entail. We can no longer trust the decisionmaking process of the National Science Foundation. We want them to publish and provide documentation to the Congress so we know who is and why they are making these decisions and where this money is going.

As of today, the NSF provides only short summaries of the proposals that are awarded funds, but these summaries are very limited, and, of course, they are written in a way that makes it look as though it is legitimate and something that we really need to do. We cannot appropriately fix the problem without all of the information and a clear understanding of the intent of the research grants that are awarded by the National Science Foundation. Taxpayers have a right to know how their money is being spent.

Our ever-growing accumulation of wasted taxpayer dollars can now add over $2 million for gambling monkeys in a photo popularity contest, bringing our pricetag to nearly $176 billion of taxpayer money wasted on projects that really provide little or no benefit to the American people. That is what the inspectors general at the Government Accountability Office and others have determined, and this is not small change. People work really hard to raise this kind of money and are then taxed at a level of $176 billion only to see every dollar and every penny of that essentially wasted through fraud or abuse.

I will keep coming to the floor, so stay tuned for next week's revelation. I could probably come down and do this every day when the Senate is in session because I am just scratching the surface. We will keep pointing out how the people's money is being spent, and hopefully on the basis of that, Congress will take action to make sure it no longer falls under the category of waste, fraud, and abuse.

With that, I yield the floor.

I suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The bill clerk proceeded to call the roll.

Mr. BROWN. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

The PRESIDING OFFICER (Mr. TOOMEY). Without objection, it is so ordered.

Mr. BROWN. I ask unanimous consent to proceed as in morning business.

The PRESIDING OFFICER. Without objection, it is so ordered.

VETERANS FIRST ACT

Mr. BROWN. Mr. President, I want to thank my colleagues from the Veterans Affairs' Committee for their work on the Veterans First Act. I just left the committee, where Senator ISAKSON and Senator BLUMENTHAL are in their typical bipartisan way working together with the VA to improve veterans' health care. I am appreciative of that. They will be on the floor later this afternoon to urge the Senate to move quickly on this important legislation for our Nation's heroes.

This comprehensive, bipartisan bill will grant vets and their families expanded benefits that will ensure that the VA has resources to provide veterans with the highest quality of care. No veteran should face exploitation by for-profit colleges, inadequate care, or life on the street. We address all these issues with this bill.

This bill will expand educational opportunities for veterans and their families, including my constituent, Melissa Twine. Ms. Twine is an Air Force veteran from Batavia, east of Cincinnati, in Clermont County. Her husband Philip Twine died serving our country in the Air Force.

The Fry Scholarship provides GI bill benefits to surviving spouses and children of servicemembers who have died in the line of duty since 9/11. However, when Congress extended the benefit to spouses in the Veterans Access, Choice, and Accountability Act of 2014, a 15-year limitation was put on these benefits. Captain Twine passed away in 2002, meaning that now, as his wife tries to go back to school to pursue her master's degree, she and so many other surviving spouses don't have the time to use this benefit. This bill will fix that and give veterans' families the opportunity to further their education.

In addition to expanding the Fry Scholarship, the bill will expand the VA's Yellow Ribbon Program to help students with out-of-pocket tuition and fees and to include all spouses and children of servicemembers who gave their lives fighting for our country. The bill also incorporates legislation I helped to introduce to restore GI benefits of veterans who lost credit or training time because their school permanently closed. We have heard too many stories of shady, for-profit colleges that close abruptly, leaving students and many veterans in limbo. This ensures the veterans don't lose their GI benefits.

We know that, shamefully, too many veterans don't have a roof over their heads or a place to call home. The legislation incorporates elements of the Veteran Housing Stability Act, which would increase veterans' access to permanent housing options.

This is an issue that we have been working on for years. Last year, I visited organizations around Ohio that are doing terrific work to give veterans the support they need to get back on their feet and find permanent homes. With this bill we will give veterans the support they need. Even one veteran on the streets means Congress isn't doing nearly enough to tackle this problem.

The legislation also helps ensure whistleblowers at the VA can disclose concerns relating to veterans care without fearing retaliation.

It expands a critical program to support veteran caregivers.

As a country, we made a promise to care for veterans in return for their service to this country. Far too often people in this body are willing to vote billions of dollars for defense but then not do what we should with veterans. This bill helps to change that. Right now, 9/11 veterans and their families already take advantage of this critical support. This bill will make the same support available to families and veterans of all generations.

I urge my colleagues to move quickly in this important legislation to protect and honor our Nation's heroes.

CONGRATULATING THE CLEVELAND CAVALIERS FOR WINNING THE 2016 NATIONAL BASKETBALL ASSOCIATION FINALS

Mr. BROWN. Mr. President, I know I will be joined in a few moments by my colleague from Ohio, Senator PORTMAN.

I rise to make some remarks on a resolution Senator PORTMAN has submitted with me.

Mr. President, journalists and sports fans like to describe victories as ''historic,'' and often that is a bit of hyperbole. But in the case of the Cleveland Cavaliers' NBA championship win on Sunday, the word ''historic'' is warranted.

Today, several hundred thousand people gathered in downtown Cleveland. Senator PORTMAN and I talked about how we would have liked to have joined in. But we have these day jobs, and we just figured we couldn't really go back. Today, literally hundreds of thousands of people are in downtown Cleveland. Some estimates were as high as almost all the adult population of Cuyahoga County. The numbers are pretty spectacular. The word ''historic'' is warranted in this Cavaliers victory on Sunday night.

No other team in NBA history has come from a 3-to-1 series deficit in the finals, until now. No other major American city has gone so long as Cleveland has without winning a major league sports championship.

It is fitting for my city—my wife and I call Cleveland home—that this championship came down to game 7. The series played out like a metaphor for what this means in Cleveland—ever the underdog, down 3 games to 1.

To understand what this victory means for our Midwestern city on the lake, think about the last time we won a championship in a major sport. None of the pages sitting here were born. In fact, some of their parents might not have yet been born. It was 1964.

Lyndon Johnson was President. Martin Luther King, Jr., was in the middle of a very successful civil rights campaign. Robert Kennedy, who sat at this desk on the Senate floor, was still alive, campaigning for civil rights and economic justice. America was beginning to hear more and more about Vietnam on the evening news. We had no idea of the nightmare that it would become.

The Beatles had just come to America. We had three TV channels in Cleveland—channels 3, 5, and 8. The most popular shows were ''Bonanza'' and ''Bewitched.''

As a boy growing up in Mansfield—not far from Cleveland, about 70 miles—I watched with pride a little more than 2 years before that when Ohio's John Glenn orbited the Earth in *Friendship 7*. The moon was still a distant dream, and none of us had heard of astronaut Neil Armstrong.

The Cleveland Browns with Jim Brown brought home the NFL championship for us that December. It wasn't even called the Super Bowl back then. That is how long ago this was. It was called the NFL championship. Little did any of us know that we wouldn't see another trophy for another half century.

I was 12 years old at the time.

The Cleveland Cavaliers did not exist. The NBA was much smaller. Three years earlier, the Indians had traded the beloved outfielder, the hero of all young fans. Rocco Colavito was traded away to Detroit. The Indians were in the midst of losing season after losing season. Within a year or 2, they put together a top-line four-person starting pitching staff—Sonny Siebert, Luis Tiant, Sam McDowell, Steve Hargan—but still the Cleveland Indians didn't win.

As a 10-year-old, a 12-year-old, and a 15-year-old, my dad would take us up old U.S. 42, often to see a double-header, back when they played those kinds of double-headers on Sunday.

My dad would never take us to see the New York Yankees, a team he despised, because he knew that 15 or 20 cents of our ticket price would go to Mickey Mantle or Roger Maris and Yogi Berra and other Yankees.

Every year I was naive to think the Indians would win the pennant. Never in those years would they even get close. By July, or certainly by August, it was clear even to this 12-year-old boy that the Indians were not going to win the pennant.

For the next 52 years after the 1964 Browns championship, we were challenged in the city of Cleveland. The manufacturing economy that sustained Northeast Ohio eroded with decades of policy choices that closed factories and shipped jobs overseas. Too often there was bad trade policy and bad tax policy. The population of the city shrank to almost half its population from my boyhood, from my early years.

Beginning in 1995, Ohio had 14 years of consecutive foreclosure increases, each year more than the year before.

But today, downtown Cleveland is coming back, not just because hundreds of thousands of people are in downtown Cleveland celebrating this first NBA championship, but it is coming back. My wife and I moved into the city 3 years ago. We wanted to be a part of this renaissance, and we have seen the city beginning to return to its glory.

Nothing has embodied the hope and the determination and the grit of our city like this team. We know that sports teams are far more than the sum of their parts. They are a point of connection for people in every walk of life in the city. There is a reason we have begun to call it Believeland.

On Monday, a native Clevelander who had to move away from his hometown posted this on Facebook:

> We draw so much from our teams. It's wound up in our identity—a token of the pride we have for the local tribe from which we came.

My wife Connie reposted the man's words that night, and hundreds chimed

in to explain the connection they felt to the Cavaliers and their fellow Clevelanders. One woman said Cleveland sports were her connection to her family—her grandfather, her parents, aunts and uncles, cousins, some of whom have scattered across the State and across the country.

Our faith had been tested for decades. For the past decade, the hopes of this city—at least in sports—rested on the shoulders of one talented young man. I watched LeBron James play in high school. His best friend's mother worked with me in Akron. LeBron played for St. Vincent-St. Mary, a Catholic school. I saw him at the University of Akron arena, where the team played its home games because LeBron was so in demand that people all over Northeast Ohio came to see him in high school. I saw him play at Barberton High School in the State tournament.

We knew he was a star. You didn't have to know much about basketball to know that. We were heartbroken when he went to Miami. But like families do, we welcomed him back with opened arms in 2014, and pretty much forgot that he had ever left—once an Ohioan, always an Ohioan.

For the next 2 years, he carried the weight of our city's championship dreams. He was all in, his city was all in, and this year, he and his team delivered. King James will go down in the history books as perhaps the NBA's greatest basketball player. I will debate that, if anybody would like. Certainly, he is one of the greatest athletes of all time.

He was unanimously named the 2016 NBA Finals MVP. He led all players in points, rebounds, assists, steals, and blocked shots. Nobody has ever come close to doing that in any championship series. His leadership was important, but the victory was surely was a team effort.

Kyrie Irving scored 26 points in the final game and scored a crucial 3-pointer with less than 1 minute left. It was decisive. Coach Tyronn Lue and his coaching staff worked to put the team in a position to win. With the hopes and dreams of a city riding on them, win is what they did, ending that 52-year championship drought and restoring faith to Cleveland.

I wish I could have been on East 9th Street this morning for the parade. My wife left home at 7 a.m. for what normally should only have been a 20-minute drive to downtown. We live in the city, only 5 miles from downtown. She knew it would take at least an hour because of the crowds gathered.

I am heading back to my office in a few moments to meet my colleague from the Golden State, Senator BOXER. She owes Ohioans some beer. We bet Cleveland-brewed beer against Bay Area-brewed beer. She will be sporting a LeBron James jersey to make the delivery. I had to do that last year. Turnaround is fair play.

On behalf of my colleague Senator PORTMAN, who attended a number of the games and is as excited as I am about this, congratulations to the Cavaliers, congratulations to the city of Cleveland, and congratulations to the fans scattered far and wide across this country who never gave up, and now, on to next season.

Mr. President, I ask unanimous consent that the Senate proceed to the immediate consideration of S. Res. 509, submitted earlier today.

The PRESIDING OFFICER. The clerk will report the resolution by title.

The bill clerk read as follows:

A resolution (S. Res. 509) congratulating the Cleveland Cavaliers for winning the 2016 National Basketball Association Finals.

There being no objection, the Senate proceeded to consider the resolution.

Mr. BROWN. Mr. President, I ask unanimous consent that the resolution be agreed to, the preamble be agreed to, and the motions to reconsider be considered made and laid upon the table with no intervening action or debate.

The PRESIDING OFFICER. Without objection, it is so ordered.

The resolution (S. Res. 509) was agreed to.

The preamble was agreed to.

(The resolution, with its preamble, is printed in today's RECORD under ''Submitted Resolutions.'')

Mr. BROWN. Mr. President, I yield to my friend from Ohio, Senator PORTMAN.

Mr. PORTMAN. I thank my colleague, and I thank the Presiding Officer.

Wow, what an incredible week for Cleveland. While we are talking today, there are several hundred thousand fans walking down the streets in Cleveland in an awesome parade. As much as I appreciate being in the Senate doing my constitutional duty in my day job, I wish I were there. I know Senator BROWN feels the same way. Because we cannot be there, we wanted to provide the resolution today at the time of the parade and be sure that all of our colleagues know how proud we are of the Cavs and get them on record.

We are trying not to rub it in too much with our California colleagues, although I will now say I have a case of Great Lakes beer in my refrigerator that otherwise would have gone to one of my Senate colleagues, Senator FEINSTEIN. Instead, I get a case of California wine. That is nice because last year it was the other way around.

What an amazing season and incredible finals. I did get a chance to go to some of the games. I lived in Cleveland for a brief time when I was a kid. At that time, Cleveland was not known as a great sports town. Jimmy Brown and the Cleveland Browns were our last team to win a championship in 1964. Fifty-two years is a long time. The drought is over, and the Cavs did it in the Northeast way. Northeast Ohio is an area where, through grit and determination and perseverance, we are on the way back up. We are a comeback region. Cleveland is a comeback city, and that is exactly what happened.

In many respects, the way we won the finals is the way we worked through the season with some of the challenges we had. We changed coaches in midstream, and every single player showed grit and determination. Whether it was Iman Shumpert or Kevin Love or certainly Kyrie Irving and that incredible 3-pointer in the seventh game, Tristan Thompson, and then, of course, the king—he really willed victory that night. Game 7—you saw the blocked shot at the end. You saw his layup at the end. He did get a triple-double that night. He not only got a triple-double, but throughout the entire series, he was a star in the sense that—and this has never happened in the finals before, ever. He did have more blocked shots, he did have more assists, he did have more points, he did have more rebounds, and he did have more steals than any player on either team. When you think about that, it is extraordinary. In my view, he is the greatest basketball player living today, and he will go down in history, because of this one series, as being the guy who really pulled Cleveland over the line.

I went to the fourth game. This was the game we lost in Cleveland. We were down 3 to 1. No one has ever come back to win a series being down 3 to 1 in the finals, ever. But the fans did not give up that night. More importantly, the players I talked about and the other players who came off the bench and did an awesome job never gave up. They never gave up because they had that grit and perseverance which characterizes Northeast Ohio and because they wanted to make good on the promise.

When LeBron James came back to Cleveland, what did he say? He said: I am going to bring my hometown, my home area, a championship. Born and raised in Akron, he was a high school player who was a phenomenon. He is a guy who loves his State, loves Northeast Ohio. I think he summed it all up when he came back and said: I am going to deliver a championship. I think he was very emotional after game 7, in part because his goal, his dream—not for himself but for Cleveland—was finally accomplished.

About Cleveland and Northeast Ohio, he says it is an area where you work hard and you earn it. He said that you don't get success just for your talent, just through showing up; you get your success by working hard and earning it. That is a great message. It is a message that he has imbued in the minds of young people all over Northeast Ohio, specifically in Akron, where so many young men and young women have been able to be more successful in life thanks to his efforts, his funding his foundation to help them get through high school and get into college. He has told them: This is about grit, perseverance, hard work, and discipline. You don't just get there because of your talent.

He is probably the most talented athlete I know, but, as we saw in game 7,

it wasn't just about talent, it was about perseverance, determination, and focus.

I am very proud of the Cavs. I am very proud of the way they won. I am proud of Cleveland.

As you know, the Republican convention is coming up in Cleveland. Someone asked me today: Do you think they will take down the Cavs posters?

I said: I hope not. This is all part of a big celebration.

It was great for Cleveland in terms of the hotels and restaurants being full, certainly great for the economy to have the finals, but more importantly, it is great for the spirit of Cleveland and consistent with the comeback city, consistent with this notion that, yes, we have had tough times before, we have had our share of challenges in Cleveland, and we still do, but we are Believeland, Cleveland. We believe. We believe that through hard work and perseverance, we can make progress and we can be successful, just as the Cavs were during this final series.

I also thank Dan Gilbert, the owner of the team. He is the guy who worked hard to get the team back together, to get the band back together. I am sure bringing together Kyrie Irving, Kevin Love, Tristan Thompson, and certainly the king, LeBron James—you know it is not easy to bring all those players together and make it all work and gel, but Gilbert believed. Gilbert believes in Cleveland. He is a Detroit guy, but he believes in Cleveland. He has made a big investment in Cleveland in other ways in the community and in the economic development there, and certainly what the Cavs just did assisted in that.

Ultimately, this is a celebration, not just because they won the finals, but because of the way they did it. It was a tough season. They switched coaches in midstream. They had some injuries back and forth. They did it the hard way—through perseverance, determination, and hard work.

I am proud of Cleveland. Senator BROWN and I are proud to have this resolution before the Senate today. We are pleased it passed with unanimous consent. That doesn't happen with everything in the U.S. Congress, as some of you may have noticed, but it certainly happens here because in this case the Cavaliers earned it. You earn it in Northeast Ohio, and that is what they did. I am proud of them.

Thank you for allowing us to present this resolution. And Go Cavs. We are all in.

Mr. President, I suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The legislative clerk proceeded to call the roll.

Mr. MORAN. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

The PRESIDING OFFICER. Without objection, it is so ordered.

COMMERCE, JUSTICE, SCIENCE, AND RELATED AGENCIES APPROPRIATIONS ACT, 2016—Continued

Mr. MORAN. Mr. President, I ask unanimous consent that I be allowed to address the Senate as in morning business.

The PRESIDING OFFICER. Without objection, it is so ordered.

FAA REAUTHORIZATION BILL

Mr. MORAN. Mr. President, I am here to speak on the FAA reauthorization and several things and stories that have arisen in the last few days which are very discouraging to me and troublesome to a cause I care a lot about.

I am an advocate for general aviation, and I was pleased the Senate was able to pass the FAA Reauthorization Act of 2016 by a vote of 95 to 3—95 to 3, this Senate approved legislation reauthorizing the FAA for the next 18 months. It is an unusual occurrence around here when anything passes 95 to 3.

I also would indicate our committee voted—I am a member of the Commerce Committee—unanimously to report that bill to the Senate in a favorable recommendation, again demonstrating overwhelmingly bipartisan support in regard to this aviation legislation.

Kansas is an aviation State. Wichita and South Central Kansas are known as the significant provider of airplanes—general aviation airplanes and parts. We have lots of subcontractors in that process. We are also a rural State. In fact, Wichita is known as the air capital of the world. In addition to the manufacturing sector, which is so important to our State's economy, so important to our ability to compete globally, we are a rural State, and airplanes and airports matter to us greatly.

So while we care a lot about the manufacturing of general aviation airplanes, we also care a lot about airports and their ability to take care of flights coming in and out of small communities across our State and certainly across the country. That general aviation airport is a connection to the rest of the world, and it allows for medical expertise to be flown into a community in lifesaving efforts, but just on a more day-to-day basis, it allows for us to have access to customers, to suppliers, to clients because we have manufacturing and other businesses in rural communities across Kansas whose connection with their customer base and suppliers is through that airport. In the absence of general aviation manufacturing, our State suffers greatly, but in the absence of general aviation airports, our State would suffer greatly as well.

What I am worried about is the House has not acted in any positive way on the passage of this bill, and the deadline of July 15 is rapidly approaching. If the House does not take up the Senate-passed version, what that would mean is the expectation—in fact, the stated circumstance is the House would pass a short-term extension of the current FAA legislation and leave the Senate bill hanging.

Many of the folks in this Senate who have served longer than I have would recognize the history of this issue, where one extension after another was required because consensus was never developed, and the leadership was not provided to resolve the differences over the years on FAA reauthorization. The point I wish to make by being on the Senate floor and expressing my views to my colleagues is, do not allow us to get into this position again where we would have a series of extensions of the FAA legislation.

We need the House to act on the Senate bill that is pending in their committee, that is pending on the House side, and differences need to be resolved. At the moment, the House has not passed an FAA reauthorization bill. Time is short. On July 15, the current law expires. My plea to my colleagues in the House, where I formerly served, is to take up the Senate bill, address the issues you want as Members of the House, representing your constituency, and send the bill back to us so we can conference this issue and have a more long-term reauthorization bill.

Certainty matters. Certainty matters to the manufacturers in Kansas. Certainty matters to the airports and the pilots who utilize those airports. Do not allow us, once more, to be in this circumstance of an extension one time after another and the uncertainty that provides.

It is my view that it would be a shame if the important reforms included in the bill the Senate approved in such an overwhelming fashion were held up by the House, in large part because of a significant controversial proposal to privatize the national air traffic control system. It sharply divides Congress. Everything I have read publicly and everything I have heard from my friends and colleagues, former colleagues in the House, is that there are not the necessary votes present to pass that provision in the House. From my own experience in the Senate, those votes don't exist in the Senate Commerce Committee and they do not exist on the Senate floor.

So let's not tie up this bill over a proposal that does not have the votes to pass, and let's not lose the opportunity to take advantage of the reforms that were included in the Senate FAA reauthorization bill. We should not consider what would be called a clean extension of the FAA, when the authorization under our bill is the same length. The House is talking about sending us an 18-month extension. The Senate bill, as passed, is an 18-month extension. What would be missing are reforms we have worked so hard to include after significant amounts of testimony, after a number of hearings and conversations within

the Commerce Committee to make certain we were doing good work. Don't let that opportunity pass us by.

So my point in having this, in this case, monologue—hopefully a dialogue with my colleagues on the Senate floor—is, first of all, to make sure we stand firm. I am a Senator who would be opposed to a short-term, even 18-month extension, if it does not include the broad array of things the Senate has included in our bill.

My message to my House colleagues and friends is this: Don't bog this process down in a way that makes it impossible for us to pass the reauthorization legislation to begin with. These are important issues that we ought not let be sidetracked by a proposal that remains dubious, and with great concern is considered by Members of Congress. As I said earlier, every indication that I know and see is that this proposal would not receive support in the Senate or even in the House.

So my request once again to the House of Representatives is this: Please take up the Senate bill and work your will in that bill but send us something more than just a short-term extension that doesn't include the important and necessary reforms and improvements that the Senate-passed bill does.

Mr. President, I appreciate the opportunity to have a conversation about this topic.

I yield the floor.

I suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The legislative clerk proceeded to call the roll.

Mr. LEE. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

The PRESIDING OFFICER (Mr. GARDNER). Without objection, it is so ordered.

Mr. LEE. Mr. President, whenever government acts, it does so inevitably, unavoidably necessarily at the expense of individual freedom, at the expense of individual liberty and autonomy. This doesn't mean every act by government is bad—quite the contrary.

We need government. We need it to protect us from those who would undermine our liberty, those who would interfere with it, those who would harm us personally, whether physically or in some other way. But just as it doesn't mean that every act by government is bad, we should also not be too quick to leap to any conclusion that any and every act of government is good.

We have to balance liberty, privacy, autonomy with our corresponding needs for security and physical protection. These things need not be deemed irreconcilable with one another. They can exist in the same universe. In fact, when they are properly balanced, our privacy and our liberty become far from incompatible with our physical security, far from at odds with our need for protection. They can become part of the same whole. In other words, in this respect, our privacy is not at odds with our security. Our privacy is in fact part of our security.

To be truly secure means there are limits as to what the government can do to you. It means there are limits as to what information the government can obtain. There are limits as to how the government may go about getting information about you. There are limits as to what the government can do to you in depriving you of any of your fundamental rights.

We are here this week, as we had been last week, in the wake of a tragedy, a horrible tragedy in Orlando, one in which 49 people were killed. Forty-nine people lost their lives at the hands of Omar Mateen, an individual who had pledged allegiance to ISIS. This is the worst terrorist attack we have seen on U.S. soil since that tragic day on September 11, 2001.

I do want to make clear that pretending this attack was simply a crime of gun violence would be an exercise in willful denial and in political theater. Ignoring it altogether is also not something we can or should do, but it is important to make clear, even when—and I would argue especially when—a tragedy like this prompts Congress or any legislative body to act.

It is in those moments we have to be very careful of how we act. We have to remember there is this tension. We have to remember, especially in those moments when we are feeling the anxiety of an attack, feeling the anxiety of some tragedy, that we have to be very careful to make sure the rights of our fellow Americans are not undermined as we try, in our zeal, perhaps with the best intentions, to make sure we do what we can to protect ourselves.

We have been addressing a couple of provisions this week. One we voted on earlier today is a proposal brought forward from the senior Senator from Arizona, an individual for whom I have great respect. Nonetheless, his proposal is one that troubles me. His proposal is one that would have given law enforcement officers, law enforcement agencies the power to access Americans' Internet browsing history and email metadata. These are things that can be analyzed to reveal the most intimate details of a person's life, the most intimate details of how a person thinks, a person's thought processes, and to do so, moreover, without a warrant, without probable cause, without any kind of judicial review by a Federal court or any other court, for that matter, is a problem.

This interferes with some of our most fundamental rights, and I believe it is incompatible at least with the spirit, if not also the letter, of the Fourth Amendment to the U.S. Constitution, which provides that in order for the government to gain access to your papers, your person, your residence, it has to do so in a particular way. For example, if it wants to get a warrant to search through your papers, it has to go to court, and it has to establish what is called probable cause. It has to show evidence demonstrating probable cause that a crime has been committed and a reason to look at a particular thing in a particular place. It can't simply say: Trust us. We have a good reason. A government agency or a group of government agents can't simply say: Trust us. We are doing the right thing here. We have your security interests at heart. No, they have to go to a judge—somebody who is in a different branch of government. They have to show evidence they need it; that they need it based on evidence demonstrating probable cause of a crime, showing some kind of a connection between what they want to search and the crime.

This was understood by the founding generation. The founding generation may not have been familiar with the Internet. In fact, it didn't exist. It wouldn't be invented for a couple of centuries after that, but they were very familiar with these same concepts. They were very familiar with the need for privacy, the need to restrain government, and the need to make sure people don't live in constant fear that the government is going to start rifling through their personal effects without some reason, without probable cause. Nor were they unaware of the fact that tragedies would happen.

The Founding Fathers fully understood that tragedies arise. They understood that violence erupts from time to time and that people engage in lawless behavior from time to time that threatens not only the lives of individual citizens but also threatens to undermine the very foundations of our society. Yet, notwithstanding this well-developed grasp they had of the existence of tragedy and the risk that people could do harm, notwithstanding the fact that they themselves had been revolutionaries just a few years earlier, and notwithstanding that many of these people who had a hand in the drafting of our Constitution and drafting and ratification of the Bill of Rights had themselves been revolutionaries and had themselves witnessed and in some cases even been a part of the violence that propelled the American Revolution, they understood it was imperative that we constrain the power of government relative to the liberty interest protected within the Bill of Rights, relative for our purposes here to the zone of interest of the Fourth Amendment. They understood that, and they understood it well.

They also understood that if someone had papers in their home, those papers would be protected by the Fourth Amendment regardless of whether the papers had been written by the person residing in that home. They likewise understood the possibility that in some instances the papers might not even be kept at home; they might be kept somewhere else. But they understood that there were zones in which people had a legitimate and reasonable expectation of privacy, and it is in those

areas where things need to be protected, regardless of who wrote the papers in question or where they might be located. If they were in an area where there was a reasonable expectation of privacy, the government has to follow certain procedures.

Here is why I worry about the measure offered by the Senator from Arizona. It is because this would get at the very privacy interest that is supposed to be protected by the Fourth Amendment. If passed, this would give law enforcement agencies the authority to access your Internet browsing history and email metadata, meaning data about whom you emailed, who emailed you, and when the transmissions occurred, without probable cause, without a warrant, without any review by a Federal court and without any review by any court.

This is a problem, and it is a problem because, as I think most Americans can appreciate—certainly most Americans outside Washington, DC, can appreciate—the papers referenced in the Fourth Amendment would absolutely have to include electronic papers, such as records regarding your browsing history. Your browsing history is just like papers you might collect in your home for your own reading, and regardless of whether you had authored the papers in question, they wouldn't lose their protection simply because someone else had authored them. The fact that you had them in your home and the fact that you had obviously been reviewing them by virtue of their location in your home says a lot, perhaps, about what your interests are. We understand that your interests are not necessarily the government's business simply because someone in the government arbitrarily decides that is going to be the case.

There is another measure that we will be reviewing and that we expect to vote on later this week, and it is an amendment that has been proposed by another one of my esteemed colleagues, the senior Senator from Maine. This amendment would prevent anyone appearing on a particular list, such as the no-fly list or selectee list—these lists are maintained for the purpose of trying to track those who should perhaps not be allowed to board an airplane or, in the case of the selectee list, individuals who have been determined to be candidates for additional screening at airports before boarding a plane—from purchasing firearms, denying Americans their Second Amendment rights based on a mere suspicion that the FBI might have information which shows that the person in question is engaged in terrorist activity.

There are a couple of things that worry me about this, notwithstanding the good intentions underlying it. This one implicates not only the Second Amendment, which protects Americans and their right to bear arms, but it also implicates the Fifth Amendment, which guarantees that we won't be deprived of life, liberty, or property without due process of law. If this provision, as it is now written and as I have read it in its current formation, were to become law, it would, as I understand it, allow the government to take away your Second Amendment rights—anyone's Second Amendment rights—based on a mere suspicion and not based on probable cause, although I don't believe that in and of itself would be enough either.

It would allow that right to be taken away, and it would do so without any opportunity for the citizen affected by this action to challenge this decision prior to the deprivation. It would, to be sure, set up a procedure whereby someone could go into court and challenge the action taken by the government, but, as I read the proposal, the government would end up winning. It would end up winning based on this same reasonable suspicion standard.

Let me explain what that means. Reasonable suspicion refers to the relatively low threshold of legal justification required before a police officer may initiate a stop—what we call a noncustodial stop or what lawyers sometimes refer to as a Terry stop—to engage in a conversation with a citizen. Before a police officer pulls you over—for example, if you are driving in your car, the police officer has to have a reasonable, articulable suspicion that a law has been violated, and that reasonable, articulable suspicion can't be just based on an unparticularized suspicion or a hunch but must be based on some type of objective observation indicative of a possible violation of the law. But it is a relatively low threshold, and for that reason—when reasonable suspicion exists and therefore justifies a brief noncustodial stop—that stop may continue only for as long as it takes for the officer to either confirm or refute the initial basis for the suspicion, and usually that means not very long unless, of course, during the stop they learn more information which may lead to probable cause.

That leads us to probable cause. What does that do? Well, probable cause is there. Probable cause is the standard used. It is a higher standard and requires more evidence, more of a showing, and more of a likelihood that some kind of a violation of the law has occurred.

I mentioned probable cause a moment ago as being the standard used to determine whether the government can get a warrant. It is also a standard used in deciding whether the police have authority to undertake an arrest, but it is not a permanent thing. Those persons who are convicted and in custody have the right to a trial. At the end of that trial, they have a right to have a jury make a determination about guilt. The jury is supposed to make that determination on the basis of a standard that says that based on the evidence, they can conclude beyond a reasonable doubt that a crime has been committed.

It seems odd that we would allow a court to take away a fundamental constitutional right without any review prior to that constitutional deprivation and thereafter purport to allow a challenge to that action by the government but say that the government will prevail if the government can show reasonable suspicion on the part of the person whose due process rights have been deprived.

Again, we have to get back to the fact that we have very good intentions that are animating the legislative proposals we have been reviewing. We have an understandable reaction to these tragic deaths that have occurred in Orlando, FL. Yet even in those circumstances—and I would add especially in those circumstances—we have to be especially vigilant and not less vigilant about protecting the rights of each individual American citizen. Those rights are fundamental. They are not to be tinkered with.

The dignity of the human soul is at the core of our constitutional Republic. It is the very reason it is so important that we have to balance the government's action and the interest that we pursue in the name of security with liberty and privacy. The two don't have to be at odds with each other; they can be in conflict. And in the end I believe that our security is not at odds with our privacy. Properly understood, our privacy is part of our security. In fact, we cannot be truly secure unless we are secure from unlawful, unwarranted, and unjust actions by the government, and this is why we can't be too quick to jump. This is why we can't be too eager to expand government authority without analyzing the basic constitutional and fundamental liberties that are at stake.

I have been inspired by the example of an Englishman named John Wilkes, who was a member of Parliament. John Wilkes found himself living through a very real deprivation of liberty and a very real intrusion into his privacy. He found himself at the receiving end of a general warrant issued by the administration of King George III. His offense was criticizing the administration of King George III in a publication called the North Briton. The North Briton 45 criticized the King and the King's ministers, and for that, John Wilkes had his house aggressively searched. It was effectively ransacked by officers who were searching for something, and they were doing so pursuant to a general warrant, a warrant that basically said: Those involved in the publication of North Briton 45 have engaged in illegal activity. Go find the people responsible for this and search any and all places and things that might contain relevant information regarding this offense. There was no particular area that was required under that warrant.

Well, this was incompatible with the rights of Englishmen at the time, and so John Wilkes fought the King's officials in court. He eventually won not only his freedom, but he also secured a

civil judgment against the King and was awarded substantial money damages.

As a result of this fight, John Wilkes became a hero throughout England and in America at the time. The number 45 associated with North Briton 45, the offending publication, became synonymous with the name of John Wilkes, and both the name of John Wilkes and the number 45 became synonymous with the cause of liberty on both sides of the Atlantic because of the fact that truth resonates with people, particularly with those people who believe in freedom. People on both sides of the Atlantic understood that John Wilkes's cause was a just cause and that he should be congratulated for this. It was the example of John Wilkes that was still well known at the time of the American Revolution. It was still fresh in the minds of the American people at the time the Constitution was drafted in 1787 and took effect a couple of years later and by the time the Fourth Amendment was ratified and amended after that.

These early Americans and these patriots on the other side of the Atlantic understood this very same principle: that our liberty and our privacy on the one hand are not inevitably incompatible or irreconcilably at odds with our security and our protection. The two can be balanced, and that balance has been struck. That balance was struck more than two centuries ago. It was struck and put in place in our Constitution.

Our Constitution does contain these protections, at least three of which are relevant to our discussions here with the Second Amendment and the Fourth Amendment and the Fifth Amendment. We cannot sidestep them just because something bad is happening. In fact, it is especially when something bad has happened that we realize we are not the first generation of Americans to experience bad things, to experience violence. We are not the first generation of Americans who have understood that when we give government too much power in those circumstances, other bad things will happen.

We can protect ourselves and at the same time protect our liberty. We can do both. The Constitution requires both.

So I say to those who think this is a fool's errand, we can, in fact, do these things. We can, we must, and together I hope and I pray that we will.

The PRESIDING OFFICER. The Senator from Georgia.

VETERANS FIRST ACT

Mr. ISAKSON. Mr. President, as the chairman of the Veterans' Affairs Committee of the Senate, I am pleased to be joined on the floor today by Senator TILLIS, Senator ROUNDS, Senator CASSIDY, and Senator BLUMENTHAL, who will follow later, to take about 45 minutes to discuss with the citizens of our country, Members of the U.S. Senate, and, most importantly, those people who have served in our military around the world for years and years, the Veterans First Act, accountability in the Veteran's Administration, and ensuring the proper services to our veterans who served our country so well.

As chairman of the committee, first I want to say how indebted I am to Senator BLUMENTHAL of Connecticut, my ranking member, who has done outstanding work in developing this legislation. Senator TILLIS, Senator ROUNDS, and Senator CASSIDY have done great work. We are proud to be a part of what is a great piece of legislation that will address many of the questions that have been raised about the treatment of our veterans over the years.

There is a chart here, and I wish to read these headlines that every American has read over the last year and a half.

''VA abandons law aimed at firing employees.'' That was June 17 of this year in the Stars and Stripes, where Loretta Lynch, the Attorney General of the United States, and Secretary McDonald of the VA announced they were not going to enforce the Veterans Choice Act and the laws that gave them the authority to bring about accountability and discipline at the VA. Why did that come about? I will tell you why it came about.

This headline is from November 11, 2015: ''Veterans Affairs pays $142 million in bonuses amidst scandals.'' That rocked the country, it rocked our committee, and it rocked the U.S. Senate.

June 3, 2016: ''Half a million veterans still waiting a month or more for VA care.''

February 1, 2016: ''Judge overturns demotion of VA official accused in job scam.''

In the past 2 years, we have had people fired by the VA in Arizona and in Pennsylvania who appealed their firing and were reestablished by the courts or the Merit Systems Protection Board at full pay back in the jobs they had. There is no accountability.

Secretary McDonald, as good a job as he tries to do, has no teeth behind whatever it is that he says. The 314,000 employees who are part of the veterans health system have an ability, if they are fired, to appeal. That appeal can be drug out over periods of time as long as 9 months, and they can serve with pay until the appeal is finally heard. There is no swift judgment in the VA. There is no accountability in the VA. There is no culture of accountability in the VA.

I have been joined by members of the committee, and 3½ weeks ago every member of the committee, Republican and Democrat alike, voted unanimously for the Veterans First bill. There was not a single dissenting vote. Why? Because it first of all hits the heart and strikes the point we all know needs to be struck. That is No. 1. No. 2, it is bipartisan and has as many Republican proposals as it does Democratic proposals, but most importantly it has American proposals. When you are on the battlefield, when you have that M–14 rifle, when you are charging the hill, you are not a Republican, you are not a Democrat, you are an American. Our veterans, who have served us, fought for us, risked their lives for us, and in some cases died for us, deserve the respect, the treatment, and benefits they were promised when they signed up for duty.

So we have introduced the veterans accountability bill; it is called the Veterans First bill. I wish to speak very quickly and briefly about why it brings accountability to the VA.

First of all, there are 434 senior managers of the Veterans' Administration, the executive leadership, the senior executive leadership—434 of them. Every one of those people now can be fired unless they go before the Merit Systems Protection Board, which can reinstate them. We take away the Merit Systems Protection Board protections for senior management and give Secretary McDonald the power to hire them and the power to fire them, and if they appeal their firing, they appeal to Secretary McDonald, not to some innocuous court or some third party. So the boss is really finally the boss, and on his shoulders becomes the responsibility for performing at the VA.

Secondly, in terms of the rank-and-file members of the VA, we say: Yes, if you are fired, you have a right to appeal. If you are fired, you get 10 days to respond, and when you make an appeal, you get 11 days for an answer. Once you get that answer, if you appeal it, you go home without pay until the appeal is over. In other words, justice is swift, accountability is swift, and the employee responds accordingly.

Thirdly, we all know that whistleblowers are an integral part of an accountability system. Having the protection and the ability for an employee within an agency to go out and say: Look, I have seen something wrong in my agency. I want to tell you about it, but I want the protection as a whistleblower to be protected by the management—we put an office of whistleblower protection in the Veterans' Administration so those employees will know we want to hear their criticism and we want to know when they see something going wrong, and we want to give them the protection to do so. If they abuse it, they will be punished, but if they use it for the right reasons, we will have a better VA and a more responsible and a more accountable VA.

Talking about accountability, what is the least accountable thing that has happened for years in the VA? The overprescription of opioids and the Tomah case in Wisconsin. This bill reforms opioid treatment in the Veterans' Administration. It moves away from handing out opioids like candy. Instead, it addresses the real problems of mental health and PTSD and TBI.

We go through all of those issues that have confronted the Veterans' Administration that serves our veterans.

We do everything we can to improve it, but first and foremost, we have accountability.

The VA doesn't lack for money. They have averaged 9.2 percent more money every year in appropriations over the last 4 years. That is bigger than any agency of government. They are not short of employees. It is the second largest agency of the Federal Government, with 414,000 employees. They have a singular mission, and that is to take care of the veterans who have taken care of us. We need to see to it that they do it and if they don't, that they are held accountable.

The VA is full of employees who do a great job. In fact, I will tell you from having run a company myself, it is always the 99 percent who do a good job; it is the 1 percent who do a bad job, and they give us a bad name. But if you have a system to hold that 1 percent accountable when they fall and don't do well, you have a system that works together and you create teamwork.

We are all about creating a change in the culture of the Veterans' Administration, so we improve the Veterans' Administration for its service to our veterans. The Veterans First Act, which is now pending and will soon come to the floor, hopefully under a UC, is an act that does exactly that.

So when you go home to your constituents who say, What is it is about these bonuses going to people who aren't doing their job? What is it about veterans waiting longer than 30 days for an appointment? What is it about a Veterans' Administration job scam getting overturned by a judge to get their job back? What is it about an agency that can't seem to enforce discipline and have accountability in the agency? You tell them that is no more because this Senate, this Congress, this country is going to see to it that our veterans get the service they deserve and that our Veterans' Administration has the accountability it needs and must have.

With that said, I would like to take a second, if I can, and yield to the Senator from South Dakota, Mr. ROUNDS.

The PRESIDING OFFICER. The Senator from South Dakota.

Mr. ROUNDS. Mr. President, it is truly an honor to work with the Senator from Georgia, the chairman of the Veterans' Affairs Committee. I can tell you that on behalf of the 72,000 veterans from South Dakota, it is work that needs to be done. We appreciate the service of the chairman and the service of the ranking member in making this a bipartisan effort.

Unfortunately, many of our Nation's heroes aren't receiving the quality of health care they have been promised due to decades of mismanagement and ongoing problems with the VA. It is not acceptable, as the chairman has pointed out. In fact, of all the calls we receive in my State asking for help with Federal agencies, over half of all of those calls are coming from veterans seeking help with VA issues. These veterans in South Dakota and across the entire country continue to experience problems with health care delivery at the VA, including backlogs, long wait times, and frequent billing errors.

As we seek to address these issues within the entire VA system, accountability is as important as it has ever been. The Veterans First Act takes meaningful steps to hold the VA accountable and in turn improve the care for our veterans, which is the most important priority of all.

This legislation, the Veterans First Act, puts the needs of our veterans first by addressing the lack of accountability at the VA. Unfortunately, the administration last week announced that it would not defend a provision of the Veterans Choice Act, which was passed with strong majorities in both Chambers of Congress in 2014 and was signed by the President. In response, the VA announced last week it would no longer use its expedited removal authority to hold VA senior executives accountable, given this Justice Department decision. Regardless of the legal arguments surrounding this issue, the fact is that as a result of the VA's decision, we are now back to pre-Phoenix scandal accountability at the VA.

We owe it to our veterans to make certain they receive the best care possible and not have the agency responsible for that care refuse to remove nonperforming or even criminally acting officials from important positions, as Congress granted the VA the right to do in the Veterans Choice Act 2 years ago.

This is also important given that until recently, the VA didn't have a permanent inspector general, or IG, in the last 2 years. Inspectors general are impartial and independent units within most Federal agencies whose duty it is to provide accountability and oversight to combat waste, fraud, and abuse within the government. During that same timeframe, the VA has been plagued with some of the worst scandals and mismanagement in the agency's history, and our veterans have paid the price. Some have even died.

While I am glad that Inspector General Missal is now in office and can begin to address some of the VA's fraud and waste allegations, it is still too little too late.

That is why the bipartisan Veterans First Act is so important. Our bill will take strong, definitive, immediate steps to hold VA employees accountable for their actions.

Let me give some examples of what this bill includes. It will shorten the grievance process, making it easier to dismiss VA officials who breached the trust of the veterans they are supposed to serve. It will remove the Merit Systems Protection Board from the appeal process for senior executives, and it expedites, when necessary, the removal of any employees at the—executives and rank-and-file employees alike.

You don't have to take my word for it, and you don't have to take the word of any Senator in this body; you can simply listen to the words of Secretary McDonald himself. On Monday he stated—this is a quote from Secretary McDonald of the VA:

> The answer to the whole thing in my opinion is the Veterans First Act. The provisions that Senator ISAKSON and Senator BLUMENTHAL have put in the Veterans First Act we all support. VA supports them. The Republican party in the Senate supports them. The Democratic party in the Senate supports them. We really think that this is the ultimate answer. I'm hoping the Veterans First Act will get passed soon.

This bill also includes a number of provisions that I have offered to improve accountability and care at the VA, such as the Veterans Choice Equal Cost for Care Act, which amends the Choice Act by eliminating the secondary payer clause to make certain veterans do not pay more for private care under the Choice Act than they would have if they were seen at the U.S. Department of Veterans Affairs facility.

The key to that is right now we have veterans going in and getting care at a private facility and assuming that the VA is going to pick up the cost for them, and then they find out that under the current plan where the VA is a secondary payer only, they have to pick up their own deductibles, which they are not being reimbursed for, because the VA is secondary, not primary. That is wrong. That was not the intent of the Choice Act in the first place. The Veterans First Act takes care of that issue and will take care of a huge amount of the challenges we have right now with the Choice Act.

Also, the Veterans Health Administration Spending and Transparency Oversight Act is legislation that requires the Veterans Health Administration, or VHA, to produce an annual report to Congress detailing the cost of the health care that it provides to our veterans. Having accurate cost accounting by the VHA will help Congress identify legislation options aimed at better health care for our Nation's veterans.

I am proud to be an original cosponsor of the Veterans First Act, and I thank the members of the Veterans' Affairs Committee, especially Chairman ISAKSON, Ranking Member BLUMENTHAL, and all the Members here today for working together to produce meaningful bipartisan reforms at the VA.

Our Nation's veterans, who are now defending and have selflessly defended and protected our freedoms, deserve that same commitment from the country they so proudly fought for and defended.

With that, Mr. President, I would like to yield back to the chairman.

The PRESIDING OFFICER. The Senator from Georgia.

Mr. ISAKSON. I thank the distinguished Senator from South Dakota. I appreciate his commitment to the committee and to the many men and women of the armed services from the

Dakotas and from all the United States of America.

I am pleased to recognize Senator THOM TILLIS from North Carolina—the home of Camp Lejeune and the home of many military installations, such as Fort Bragg—and I am proud to have him as one of the cosponsors of the Veterans First bill.

The PRESIDING OFFICER. The Senator from North Carolina.

Mr. TILLIS. Thank you, Mr. President.

I am proud to represent North Carolina. North Carolina has nearly 1 million veterans in the State. When you add to that the members of the armed services inactive and in the Reserve and the National Guard, we are over 1.2 million people. They, too, will become veterans someday. We need to fix this so that the problems our veterans are experiencing today are not experienced by the men and women who are fighting for our freedom wherever we ask them to go.

Mr. President, I know you know a lot about the lack of accountability in the VA within your great State of Colorado. We have problems. We have to increase the accountability in the VA. In 2014, in the wake of the Phoenix wait list scandal, Congress came together and demanded accountability. That is why they passed the Veterans Choice Act. When the President signed the bill into law, he stated:

If you engage in unethical practice, if you cover up a serious problem, you should be fired. Period. It shouldn't be that difficult.

Now we are hearing just recently that apparently in consultation with the President, Attorney General Lynch and the Justice Department have decided not to defend the Veterans Choice Act against the constitutional challenge from Sharon Helman, the former director of the Phoenix VA who sat on top of this scandal and was fired for her role denying veterans' access. This same disgraced VA executive also pled guilty to hiding more than $50,000 in gifts from lobbyists. She embodies the very worst of the worst of the small percentage of the VA who need to be held to a higher standard of accountability.

Then we add insult to injury. The VA decided not to use its expedited removal authority to hold VA executives accountable. Because of these actions, we are now back to square one, as if the President did not even sign that bill.

Now, I should have started at the beginning, though, to thank Senator ISAKSON for his yeoman's work in support of veterans. He is a fantastic chairman of the Veterans' Affairs Committee. He brings people together. That is why the Veterans First Act was unanimously supported in the committee. It is bipartisan on steroids. Everybody thinks that this bill needs to go into law and that the VA needs to be held accountable. We need to pass the Veterans First Act.

There are a number of things in this act that even go beyond accountability, and I note in the colloquy that other elements of this act will be brought up. I will bring up a few of them. One of them has to do with the opioid safety act. What we are trying to do is improve the safety and supervision of treatment plans for veterans who legitimately need some sort of pain medication, possibly an opioid prescription regimen.

As to the Whistleblower Protection Act, we need more people with their eyes and ears in the VA who are comfortable saying: Something isn't right here, and I need to be able to report up and know my job is not at risk because I am doing the right thing.

That is in the Veterans First Act.

The other thing we need to do is to get back to what we tried to accomplish in the 2014 bill—fire people who are not doing their job, fire people who are being unethical, fire people who are not putting veterans at the very top of the list. That is why the VA exists.

The VA doesn't exist for their own sake. The VA exists for providing the care that the veterans deserve. They should get it on a timely basis. When there are no reasonable excuses for some of these wait times and we find that it is the people who are causing the problem, those people should be held accountable. The senior members should be held accountable, and they should be able to be terminated without any sort of review subject to the discretion of the Secretary of the VA.

Ladies and gentlemen, it is time for us to act on the Veterans First Act. It is time for us to get back to fulfilling the promise that this President made just a couple of years ago. It is time to put veterans first.

I want to thank all of my colleagues here. I want to thank my colleagues on the other side of the aisle who I know share this view. We need to get this bill out of the Senate, to the House, and to the President's desk with the promise this time that the President will stand with us and with the veterans to do what we need to do, and that is to put veterans first.

I urge all the Members' support, and I appreciate again Senator ISAKSON's work to get it to this point, but now we need to get it done.

The PRESIDING OFFICER. The Senator from Georgia.

Mr. ISAKSON. I thank Senator TILLIS for his dedicated work and representation for the people of North Carolina and the veterans of America.

I am pleased now to yield to the Senator from Alaska, Mr. SULLIVAN.

Ms. MIKULSKI. Will the Senator withhold for just 1 minute?

Will the chairman of the committee yield for a question? This is not to hold you up, but I do have a question for the chairman of the committee.

Mr. ISAKSON. I yield.

Mr. SULLIVAN. I yield to the Senator from Maryland.

Ms. MIKULSKI. Mr. Chairman of the Veterans' Affairs Committee, is it the desire of the other party to be doing, like, a colloquy—an extensive colloquy—dealing with the Veterans First Act?

I am trying to get the lay of the land here on the floor, because the Commerce-Justice act—this is really a parliamentary question to you.

The pending business is the Commerce-Justice-Science appropriations bill. We are now debating the Veterans First Act. I am not objecting to that, but could you tell me what the lay of the land is here?

Mr. ISAKSON. Happily. The lay of the land is that we asked for 45 minutes for a colloquy to discuss the Veterans First bill, which we are in the process of doing now. Senator BLUMENTHAL, the ranking member, will join us in a minute, and we should be completed by 5:15, and that was the time we asked for.

Ms. MIKULSKI. First of all, thank you, to the Senator. I, in no way, want to impede this conversation. I didn't realize that you had asked for 45 minutes, and I really found these comments by the supporters of the bill really quite instructive, and I appreciate the discussion and the debate.

Why don't you proceed. I would just like to bring to the distinguished chairman's attention, though, that we are trying to get the VA–MILCON bill conference done—real money and the real checkbook—to support the great work this authorizing committee is doing.

I don't know if you know that the House is proposing a $500 million cut below the Senate level. So you and I should talk about that.

I thank the Senator from Alaska, and please proceed with your colloquy.

Mr. ISAKSON. I thank the distinguished Senator from Maryland, and I am always interested in discussing the best interests of veterans in Maryland and in Georgia any time the Senator would like.

I yield to Senator SULLIVAN.

The PRESIDING OFFICER. The Senator from Alaska.

Mr. SULLIVAN. Mr. President, I want to rise to also support my colleagues on the Veterans Affairs' Committee. It is an honor to serve with the chairman of the committee, the distinguished senior Senator from Georgia, and the ranking member from Connecticut, Senator BLUMENTHAL.

One of the great honors about being on that committee is not just serving our veterans but that it is a committee that gets a lot of work done. It is a very bipartisan committee, and that is why so many of us are coming to the Senate floor to talk about this important issue—accountability for the VA.

I was home in Alaska this past weekend, and as I often do, I ran into veterans. Every State in the Union likes to talk about their veterans and brag a little bit. Well, in my State we have more veterans per capita than any State in the Union. We are very proud of that.

I was talking to a Vietnam veteran on Friday in Anchorage, a combat veteran corpsman. He saved a lot of marines during his time. He had such deep frustration about this issue of accountability with the VA. As a matter of fact, he used to work at the VA. The one issue he raised with me was this: How can we do more with regard to accountability? He reads about it in the paper.

The key here to that conversation and to so many conversations I had with veterans back home is that we must restore the bond of trust between the VA and the veterans that the VA serves because we all know that bond of trust has eroded. Trust is eroded when no one is accountable.

Trust is eroded when no one is accountable. My colleagues have already talked about it, but once again, it is very disappointing to see the VA walking away from accountability as opposed to embracing it.

Senator TILLIS did a great job of describing the bill that was signed by the President in 2014, the Choice Act, which had some strong accountability measures. Yet, just recently, the Attorney General of the United States sided with the argument of a former Phoenix VA director who was at the helm when as many as 40 veterans died waiting for health care. The Attorney General of the United States sided with her argument and is not even testing the accountability provisions in this new law that was passed by this body and signed by the President. She just quit and didn't even let the courts declare that this law is unconstitutional. She just quit and sided with that argument. I think that is an outrage. What it does is undermine the issue of trust. It is also a dangerous precedent by allowing the head of the VA and the Attorney General of the United States to substitute the judgment of the Congress of the United States in a law, saying we are not even going to defend this issue anymore. It is a precedent that I don't think anyone in this body would agree with—essentially gutting the accountability provisions in a recently enacted law signed by President Obama and not even trying to defend them. This is exactly the kind of action that further erodes the trust between the VA and our veterans.

Yesterday, in a hearing chaired by the senior Senator from Georgia, we demanded a bipartisan approach and that the Attorney General or her representative get before the VA committee very soon and explain what she is up to, because I don't think anyone in this body is agreeing with the actions they are taking.

While we are waiting for answers from the Attorney General, we are not going to give up on the critically important issue of VA accountability, which is why moving forward on the Veterans First Act, which does focus on accountability, is so important, and why we are on the floor making the case for this.

This bill which I cosponsor currently has 44 cosponsors and has support from multiple veterans service organizations. You have heard about some of the important accountability measures that are in this bill.

I want again to thank the great leadership of Chairman ISAKSON and Ranking Member BLUMENTHAL on this. What we need to do is move forward on this bill and restore this issue of trust. The best way we can restore trust is to let our veterans know that the leadership of the VA is accountable.

Remember, the leadership of the VA works for our veterans, and when they see people getting away with malfeasance and incorrect behavior, that trust is further eroded.

I yield the floor back to Chairman ISAKSON.

The PRESIDING OFFICER. The Senator from Georgia.

Mr. ISAKSON. Mr. President, I see the ranking member, Senator BLUMENTHAL, has joined us on the floor. I might, with your permission, pose a question: If the Senator would not mind Senator BOOZMAN making his remarks, and then Senator BLUMENTHAL and I will close the debate; would that be OK?

Mr. BLUMENTHAL. That would be fine.

Mr. ISAKSON. I yield to Senator BOOZMAN.

The PRESIDING OFFICER. The Senator from Arkansas.

Mr. BOOZMAN. I thank the Presiding Officer.

Mr. President, I will be brief. I wanted to come down to the floor. Right now we are in the midst of discussing a very important bill, the Commerce-Justice-Science appropriations act, funding law enforcement. We all know that we are in troubled times, and we are trying to get things sorted out in that regard. So why take 45 minutes to come down and speak on the Senate floor about such an important subject as what is going on in the VA?

Last week the Secretary of the VA decided that he would no longer support the expedited removal authority that we allowed him when we passed the Choice Act. There was a case and the Attorney General decided that she felt like it might be unconstitutional. So the Secretary of the VA took it upon himself to no longer use that authority. The way that I found out, and I think the way the rest of the members of the committee found out, was to read this in the press. The Secretary didn't have the courtesy to contact us and tell us what was going on. He arbitrarily decided it was unconstitutional.

I voted for it. Most of the Members in this body voted it. Most of the Members of the House of Representatives voted for it. If I thought it was unconstitutional, I certainly would not have voted for it—again, acknowledging the duties of being a U.S. Senator.

We passed it overwhelmingly and, as my colleague from Alaska has commented, the Secretary has set dangerous precedent by simply ignoring it.

He went on to say on Monday that the accountability procedures we have had in place are working fine. If that is true, then why has the VA chronically had an issue with lackluster and negligent employees? He was very supportive of this authority until this case came up. In light of the VA's decision last week, it is even more imperative that this body move to pass the Veterans First Act, which will significantly improve accountability at the VA. This was a bipartisan, comprehensive initiative.

The American Legion said: ''This legislation will shorten the grievance process, make it easier to dismiss VA officials that breach the trust of the veterans that they are supposed to serve.''

For those of us on the committee, my only concern is that the Secretary at some point will decide this is unconstitutional and do his own thing.

Again, this is such an important issue. It is something that the committee is working so hard on, but it is wrong. We have a situation now where we have employees who we know have abused their power.

On the other hand, the vast majority of the people of the VA—the vast, vast majority—are hard-working and do a tremendous job. I am so proud of the VAs that I have in Arkansas, our facility in Little Rock, our facility in Fayetteville. There are no finer hospitals in the country.

On the other hand, when people act up and they don't do what they are supposed to, we need to hold them accountable. We certainly need a Secretary of the VA who is more concerned about veterans than he is about labor issues.

With that, I yield the floor.

Mr. ISAKSON. Mr. President, I thank the Senator from Arkansas.

I yield to the distinguished Senator of Connecticut, Mr. BLUMENTHAL, the ranking member of the Veterans' Affairs Committee. He has been an invaluable partner with me in the development of this legislation, the management of the committee, and he deserves tremendous credit.

The PRESIDING OFFICER (Mr. LEE). The Senator from Connecticut.

Mr. BLUMENTHAL. First, Mr. President, I thank the chairman of the Veterans' Affairs Committee, Senator ISAKSON of Georgia. To say that he has been a leader is certainly an understatement. He has devoted countless hours to forging a coalition in the best tradition of the U.S. Senate, a bipartisan coalition that enabled us to unanimously bring together Republicans and Democrats on the Veterans' Affairs Committee in approving the Veterans First Act for consideration by this body.

My reason for being here today is to say to our colleagues that we must move forward. We must seize this opportunity—no matter which side of the aisle we sit on—to move this bill forward, keep faith with our veterans,

leave no veteran behind, and make sure we honor their service by fulfilling our obligations to our job. Our job now is to make sure we pass the Veterans First Act.

I have listened with interest to some of my colleagues' comments on a decision by the Attorney General of the United States, and then the Secretary of the Veterans Administration, to decline to defend a part of the Choice statute. Quite frankly, I share their questions and a number of their concerns. I want to know from the Attorney General of the United States why the decision was made to decline enforcement of this statute on constitutional grounds, saying that it violated the appointments clause of the Constitution.

After 40 years of practicing law, I can say I have done very little litigation involving the appointments clause of the U.S. Constitution. It is seemingly an arcane and abstruse section of law. I say that with great humility in light of the experience of the Presiding Officer. He and I may have a discussion away from the floor about the merits of this decision.

The point is that we must look forward. We need to demand those answers—and I expect the Attorney General of the United States will be forthcoming—but let's look forward to the central task right now and avoid being distracted by what happened in the past and move forward on the Veterans First bill. This measure imposes accountability lacking for too long, laggard in too many instances. We saw it dramatically and tragically in Phoenix and many other areas around the country where still there has been inadequate or completely absent discipline and accountability imposed.

This measure makes it easier for the VA to both hire and remove senior executives, giving the Secretary much needed flexibility in hiring and firing, improving the training of managers, and implementing an outside review.

Yesterday we heard from an outstanding nominee, a veteran of years of leadership in the Marine Corps. That kind of quality person ought to be in the VA more commonly.

This legislation also protects whistleblowers. In my view, that is critically important. They are the brave employees who see something wrong and say something, at risk to themselves. That risk should be eliminated. In this new proposal, the Veterans First Act, we create an office of accountability and whistleblower protection and require that the VA take the necessity of listening and protecting whistleblowers into account in its training and evaluation of supervisors.

This measure goes well beyond accountability, although accountability is central to this bill. It also helps veterans of all eras who may have been exposed to toxic substances in their service. There are so many more unknowns on the battlefield now that can do harm to our soldiers—chemicals, radiation, and other toxic substances—so we can better understand and address the long-term effects of that toxic exposure. That is why the Vietnam Veterans of America fully supports this measure.

Thanks to the work of Senator BALDWIN, the Veterans First Act also addresses the opioid overprescription crisis among veterans. All too often and for far too long, the VA doctors have relied on powerful opioid painkillers when other kinds of medical care are more appropriate. This legislation will reduce the overuse and, thereby, the addiction of our veterans to these powerful painkiller.

As I know from having spoken to Sarah Greene, a constituent of mine who lives in Branford, CT, whose husband perished in the post-9/11 wars while in combat, and her State Representative Lonnie Reed, this bill expands the GI benefits to surviving spouses and their dependents who lost a servicemember after 9/11.

It also reinstates those benefits to veterans who attended a school that permanently closed, such as Corinthian Colleges. These predatory schools should not be permitted to deprive our veterans of those benefits that they need and deserve.

This measure also provides support for caregivers, the moms, dads, brothers, sisters, and children who give of themselves and give up livelihoods and careers to care for their veteran family members. They should receive the kind of support they need and deserve. Their service is no less worthy and worthwhile than that of their family veteran members.

The measure also includes important provisions to address the scourge of homelessness among veterans. I was pleased to work with Lisa Tepper Bates of the Connecticut Coalition to End Homelessness; and Margaret Middleton, leader of the veterans programs in Connecticut, principally the Connecticut Veterans Legal Center, to create more permanent housing opportunities and provide legal services to homeless veterans.

Finally, most important, this bill enhances programs to prepare veterans for careers through licensure, certification programs, and other programs to make sure that veterans have jobs. They need and deserve jobs.

As a Member of the Senate, my priority has been jobs and economic progress for our veterans—for all the people of Connecticut. That is why I am pleased that this measure will help veterans find employment as they transition home with employers such as Frontier Communications—very proudly doing business in Connecticut—which is looking to make veterans 15 percent of its new hires.

This measure includes many other provisions that are worthy of passage. The point is that we must pass it. I challenge my colleagues to do this bill before July 4, to move forward before we recess for the summer, to address the challenge of providing veterans what they have earned.

We are not talking about handouts; we are talking about something veterans have earned—that we keep faith with them.

This measure is bipartisan. Nothing stands in its way. There is no reason that merits its being stopped or blocked. I challenge my colleagues to move forward with this measure.

I again thank my colleague from Georgia, who is not only a fellow member of the Veterans' Affairs Committee but also a friend of mine and truly a friend of all veterans, the senior Senator from Georgia, JOHNNY ISAKSON.

I yield the floor to Senator ISAKSON.

The PRESIDING OFFICER. The Senator from Georgia.

Mr. ISAKSON. Mr. President, I thank Senator BLUMENTHAL for his kind remarks and his steadfast, hard work on developing this legislation over the last 18 months. I thank all the members of the Committee, everyone who is a cosponsor of this bill. I thank the 44 Members of the Senate who have already cosponsored it and ask the remaining 56 to consider being a part of it.

We owe our veterans no less than the absolute commitment that matches the commitment they made to us. It is time they had accountability for the benefits they have earned, the health care they deserve, and a VA that means what it says when it tells them it is going to take care of the veterans of the United States.

I thank the Chair for giving us the time to bring out these issues today.

I urge all our Members to contact either Senator BLUMENTHAL or the committee staff or me if they have questions as we move forward before July 4 to make the Veterans First Act a reality, and once and for all put our veterans first, as always they should be and always they will be.

With that, I yield back the remainder of my time.

I suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The assistant bill clerk proceeded to call the roll.

Ms. MIKULSKI. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

The PRESIDING OFFICER. Without objection, it is so ordered.

Ms. MIKULSKI. Mr. President, we just heard a very instructive discussion on legislation proposed by the veterans authorizing committee.

I wish to compliment both the chair and the ranking member on the debate. It was content rich, it was civil, and there were moments where we learned things about what was going on at the VA that were new to many of us.

What was so impressive was the fact that they worked together on a bipartisan basis. They saw that their first duty was a patriotic duty, which was to serve veterans. You just heard the distinguished chair and ranking member

speak to that. I thought it was terrific. They took about 45 minutes off because the bill pending is the Commerce-Justice-Science bill. Because I knew compromises were being worked on, this was time we were more than willing to share with them. So I want to compliment them.

That also happened in the Committee on Appropriations. Senator KIRK, who chairs the Appropriations Subcommittee on MILCON–VA, and the ranking member, Senator JON TESTER, have worked hard too. Right now we are trying to get a conference report done so there are the financial resources to help implement the policy objectives my colleagues so eloquently and instructively presented to us just now. I would hope we have a conference that is worthy of the authorization that is being presented. I can assure you—again, in the spirit my colleagues represented here—our patriotic responsibility comes before personality or party, which is the way to go. That is what our team did in the Appropriations Committee under the very able chairmanship of Senator THAD COCHRAN and I hope the tone I have set as the vice chair. So stay tuned for this conference because we want to match the appropriations with the authorizing.

I think this is the way we ought to be operating. Take our patriotic duty first, over party, over personality, over ego or party logo. I just want to say that as I sat here hoping to get compromises achieved on gun control, under the leadership of the distinguished Senator from Maine, I think this is what the American people want: civility, intellectual rigor, commitment to responsibility, and fiscal responsibility.

I would like to salute my colleagues. It was an excellent debate. I wish more could be like this. I thank my colleagues very much.

Mr. President, as we are waiting on the Commerce-Justice-Science bill, this is what I hope is going on behind the scenes. I know we have had a spirited debate—at times quite tense and at times even terse on the issue of gun control—but for us it is not about gun control. It is about violence control. It is not about gun control because then people want to immediately grab their gun and say: What are you trying to do to us? Nobody is trying to do anything to any law-abiding citizen, but we are trying to control violence.

Violence is a national epidemic. It has been a national epidemic for some time, and there are many reasons for it. This is not the day to talk about root causes, but it is time to talk about the mood and tone of the institution. Right now, the House is engaged in a sit-in. Can you believe that, a sit-in? Why would the House be sitting in? Well, it is not the House. It is the House Democrats. Why are they doing that? They are doing it simply because they cannot get a vote on the no-fly, no-buy. What does that mean? If you are on the no-fly list, you shouldn't be able to buy a gun.

There are many different solutions to this problem. I am the first to recognize that. In our own institution, we had an amendment offered by the distinguished Senator from California, Mrs. FEINSTEIN, that was rejected. There was an amendment offered on the other side of the aisle, and that was rejected. Now the Senator from Maine and Senators on both sides of the aisle are meeting to see if they can fashion a compromise.

We believe ''compromise'' is not a word to be dismissed or denigrated. Compromise does not mean capitulation on principle. I can assure you, from those of us who want to control violence, we in no way want to impinge upon Second Amendment rights, but we do want to do what we can to curb violence in our country.

In the spirit offered by the Senator from Maine, which she has done before, I hope we can achieve this. I think we ought to give her a chance, and I think that is happening now. I sure hope we give her idea a vote. I am not sure how I will vote on it until I know the substance, but I sure have an open mind on it.

What I would like to do, using the words of my colleague from Maryland, Congressman ELIJAH CUMMINGS—and we have just lived through quite a turmoil in Baltimore—is seek not only common ground but we seek higher ground. How can we kind of get above the muck and mire of partisan politics or personality, strutting or whatever, and focus on the issue of the day?

I know people on both sides of the aisle want to curb violence. We have a set of solutions. They were rejected. Could we now, in the tone we just heard here, try to find this? What I do hope is that we don't block attempts to find solutions to parliamentary procedures.

Too many people think about the Congress and the Senate, that when all is said and done, more gets said than gets done. This is what they are frustrated about. They are frustrated about many things—their future, their hope for their children, the safety and security of our country. This is what Senators should be thinking and talking about, and as we think and talk about it, though, we should do more thinking and less talking. In our thinking and doing less talking, maybe we can find this common ground and higher ground.

I look forward to continuing to move the Commerce-Justice-Science bill. I so much appreciate the chairman of the subcommittee, Senator SHELBY. We have put together a very good bipartisan bill. We would hope, as we move our bill forward—and we have done our best to fund the Justice Department, science, and technology, to talk about jobs today and the kind of research that will give us the jobs of tomorrow—that we also now seriously take a deep breath and a deep dive into policy alternatives and come up with a compromise to curb violence in our country.

Once again, I thank the Senator from Maine for taking the diplomatic role she has undertaken. I wish her well. I support all my colleagues involved in it. They will find no obstructionism in BARBARA MIKULSKI.

Mr. President, I yield the floor.

The PRESIDING OFFICER. The Senator from Kansas is recognized.

ACCOUNTABILITY AT THE DEPARTMENT OF VETERANS AFFAIRS

Mr. MORAN. Mr. President, a number of my colleagues—both Republican and Democratic—from the Senate Veterans' Affairs Committee were on the floor just a few moments ago, and I wish to join them in expressing genuine concern about continued developments at the Department of Veterans Affairs.

Many of us remember the tremendous circumstances our veterans found themselves in at hospitals across the country, with long waiting lines, with lists that were inappropriate and didn't really exist—I suppose in an effort to camouflage the delay veterans were experiencing across the country. At the same time, to demonstrate that veterans were being cared for, the VA wanted to show that things were fine, and yet we saw that was not the case.

Unfortunately, those headlines continue about the Department of Veterans Affairs. For years, we have heard reports of long wait lines, privacy issues, and failure to remove employees whose actions endanger the health and safety of our veterans. Many of us have worked to try to give the leadership of the Department of Veterans Affairs greater authority to discipline and to discharge wrongdoers who are at the Department of Veterans Affairs. Generally, my focus has been on the upper echelon leadership of the Department of Veterans Affairs, generally considered to be the top 400 executives at the VA. I am always nervous about the issue of employees and staff who are actually providing care for our veterans in the hospital. I don't want them to be a scapegoat for problems at the hospital when I think the most serious challenge the VA faces is its leadership.

Those stories are continuing, and we keep waiting for accountability to occur. It has been something the current Secretary of the Department of Veterans Affairs has said he cares greatly about, but even when it comes to the circumstances we found, particularly at the VA hospital in Phoenix, we still have yet to see disciplinary action take place. It is too long. It is 2 years. It seems to me 2 years is too long to see any real concrete effort to discharge those who wrongfully use their position and fail to provide the necessary care and treatment for veterans.

In a ''60 Minutes'' interview back in November of 2014, which I happened to watch, the Secretary of the Department referred to a report generated in

2014 that listed more than 1,000 VA employees who should be removed from the VA for violations: ''people who violated our values . . . its integrity, its advocacy, its respect, its excellence.'' He also described, with multiple news outlets, that he would be taking ''aggressive, expeditious, disciplinary action'' to address the wrongdoers who violated VA values.

It was made abundantly clear that Congress needed to give him the necessary tools to discipline VA employees because he was ''hamstrung'' by the current process with the Merit Systems Protection Board and the appeals process. Congress did that. While we may not remember the provisions of the Choice Act—because it was known for the efforts to provide veterans across the country who live long distances from a VA facility or who can't get the services they need within 30 days from the VA, it gave them hometown local options. That is what this Choice Act was known for, but the Choice Act also included important accountability provisions. The Secretary has those provisions now with the passage of the Choice Act that occurred in August of 2014. Those authorities seemingly are the ones the Secretary has been reluctant to use. We have complained about the reluctance at the VA to use those authorities and to discipline members of the leadership, employees at the Department of Veterans Affairs, but now we just learned, as my colleagues earlier indicated, that the leadership of the VA refuses to use the authorities at all. So it is not just a reluctance. It is now an admission that we are not going to use them.

As disappointed as I am, as a Member of Congress—as my colleagues are who spoke earlier in this VA decision, our frustration has to be nothing—nothing—compared to what our Nation's veterans experience in their dissatisfaction with a VA that declines to hold accountable those who work in leadership positions. We ought to be honoring their service. What Department would we expect to care for, to treat, to love and show compassion for more than our Department of Veterans Affairs? Whom would we expect to receive that kind of noble treatment? It would be those who serve us in our military. Americans—both veterans and nonveterans—are waiting for the VA to step up and do what is right by removing those who have no place within the VA system.

I also would say, as I talk to employees of the Department of Veterans Affairs—those who actually work in the hospitals, provide the benefits, man the computers—they are dissatisfied too. They want to see change at the VA. So many employees are looking for leadership at the VA that holds accountable those in leadership who have failed to bring about the necessary change, and to have that necessary change takes discipline of those who are wrongdoers.

I want to make certain people understand this is not an attack on those who work at the VA. They, too, want a VA system they can be proud to work for. I acknowledge and pay my respect and regard to the many, many, many employees of the Department who work every day to make certain that good things happen and that care is provided for those who served our Nation.

It seems to me, it is unfortunate the VA blames everybody but themselves for the problems at the VA. In fact, earlier this year, a couple months ago, April of 2016, the Secretary indicated that the fault—the inability to fix these problems—lies with Congress for not giving the VA enough money. He said budgetary failure led to the crisis. We have worked hard to make certain—in fact, I have indicated that if you can show a demonstrated need for more money at the Department of Veterans Affairs to take care of those who served our country, I am one who will vote for that. No one asked those who served our country about what it was going to cost to go to war. We ought not be unwilling to pay the price for those who did go to war on our behalf.

I would say the VA's problems are not budgetary. President Obama himself stated that the VA is the most funded agency across the Federal Government, with an increase of more than 80 percent in resources since 2009. I remember reading this quote. The President said that the most resourced agency in his administration, in his time in office, was the Department of Veterans Affairs.

The blame for the VA's inadequacies have nothing to do with the demand or insufficient funds but the management and lack of leadership. In fact, according to the VA's own data, veterans are waiting 50 percent longer to receive health care services than they were in 2014 when we realized the crisis existed. At the height of the crisis, we had a waiting list. That waiting list is now 50 percent longer than it was at that time. It has become clear that the VA seemingly is more concerned with protecting those who work there within their ranks and the leadership than protecting the veteran who has sacrificed so much for our Nation. The VA was created to serve veterans, not to serve the VA.

Today my colleagues from the Committee on Veterans' Affairs were here raising their desire to give the Secretary even more authority and expressing their frustration, which I share, with the lack of urgency to hold bad actors accountable. In that process of the conversation that took place earlier, they were advocating for legislation that is pending before the Senate called the Veterans First Act that was passed by our Committee on Veterans' Affairs weeks ago, and they believe that legislation will give the Secretary even additional authorities. That is true.

The Senator from Connecticut, Mr. BLUMENTHAL, the ranking member of the committee, and I worked to include in the Veterans First Act a number of accountability provisions to try to fix the VA at the root of its problem at the top.

So while I agree with the desire to see the Veterans First Act passed into law and while I agree that it will give the Secretary and others at the Department of Veterans Affairs more authority to hold accountable bad actors at the VA, I think what we really need to make certain happens is that the Secretary and the leadership of the Department of Veterans Affairs use the authority they already had provided them by Congress in August of 2014 to hold people accountable.

If actions this week tell us anything, we must push the VA to use the authorities they already have, and we would have cause, reason to be skeptical that even giving them greater authorities would result in a better outcome.

Our Nation's veterans deserve better, and they deserve a VA in which those who do wrong pay a consequence for that bad behavior.

I yield the floor.

I suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The assistant bill clerk proceeded to call the roll.

Mr. MCCONNELL. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

The PRESIDING OFFICER (Mr. TILLIS). Without objection, it is so ordered.

MORNING BUSINESS

Mr. MCCONNELL. Mr. President, I ask unanimous consent that the Senate be in a period of morning business, with Senators permitted to speak therein for up to 10 minutes each.

The PRESIDING OFFICER. Without objection, it is so ordered.

TRIBUTE TO DORA MARGARET SAMUDIO

Mr. CORNYN. Mr. President, today I would like to pay tribute to a great American public servant and Texan, Ms. Dora Margaret Samudio. Ms. Samudio is retiring after 50 years of dedicated Federal service.

Dora was born on October 1, 1945. After she graduated from Sam Houston High School in 1963, Dora began her distinguished Federal career with the Texas State Department of Public Welfare. Shortly thereafter, she became a clerk typist at the U.S. Army Medical Field Service School in Fort Sam Houston, TX.

In September 1969, in the midst of the Vietnam war, Dora left her native Texas to pursue a career in Washington, DC. For the next year, she worked for the U.S. Army Medical Research and Development Command in the Surgeon General's office until she moved to the War Plans Division at the Pentagon in 1970. At the Pentagon,

Dora served as a stenographer with the Deputy Chief of Staff for Military Operations. She then transferred to the litigation division, where she worked for the U.S. Army Judge Advocate General. Dora was responsible for gathering Army witnesses from all over the world to testify in Federal court and kept records of collateral Army aircraft accidents in Vietnam. In 1972, she began working for the U.S. Army Court of Military Review in Falls Church, VA.

Dora briefly left Federal service to work at Williams, Connall & Califano in Washington, DC, and at Robinson, Robinson & Cole in Hartford, CT.

In the grand tradition of transplant Texans, Dora returned to the Lone Star State in 1978, where she has spent the remainder of her Federal service. In San Antonio, Dora worked at the U.S. Attorney's office until 1980, when she began working for the Honorable William S. Sessions, who was Chief Judge of the Western District of Texas. Dora served a vital role in his office until he was appointed as Director of the FBI in 1987. She then served as a secretary to an attorney and three Customs agents with the Narcotic and Dangerous Drug Section of the Department of Justice, DOJ, Criminal Division.

In July 1988, Ms. Samudio began her nearly 30 years of work as a judicial assistant to the Honorable John W. Primomo, U.S. magistrate judge. Judge Primomo holds Dora with highest regards and had the following to say about her:

I have known Dora for more than 30 years since she was the Judicial Assistant for Chief Judge William S. Sessions of the Western District of Texas. After his appointment as Director of the F.B.I. and my appointment as United States Magistrate Judge in 1988, it was my fortune that Dora applied to be my judicial assistant. I was surprised that she would be willing to 'humble' herself to work for a magistrate judge after serving the chief judge of the district. She is exceptional in all respects. I have always told Dora she is overqualified to be my judicial assistant, yet she has stayed. She is totally dedicated and extremely loyal. We have shared many of our personal ups and downs over the years. A part of me will be missing when Dora retires at the end of the month. It has been a privilege and an honor to work with her for the past 28 years.

Throughout her career, she has served with integrity and character. Her legacy will continue to benefit those who know her, and I join with her family, friends, and coworkers in telling that her experience and dedication will be missed.

I offer my thanks and appreciation to Dora Samudio for 50 years of steadfast service to our Nation and send my best wishes for the years ahead.

ADDITIONAL STATEMENTS

RECOGNIZING BALDOR ELECTRIC COMPANY

● Mr. BOOZMAN. Mr. President, today I wish to honor the Baldor Electric Company of Fort Smith, AR, for officially completing 15 million accident-free work hours.

Baldor moved its production of industrial electric motors to Fort Smith in 1956 and, in 1961, relocated its corporate headquarters there as well. The company has employed thousands of Arkansans for nearly 60 years.

This company produces products that are part of every industry in America. Its equipment powers everything from drills on oil rigs and conveyer belts in mining operations, to air conditioning systems in hospitals and thrusters on Navy and Coast Guard ships.

The Arkansas Department of Labor, the Arkansas Insurance Department, and the Arkansas Workers' Compensation Commission recently presented Baldor Electric Company with a ''Fifteen Million Man Hour Award'' for its extraordinary commitment to workplace safety, making it the first company in Arkansas to receive this designation. This means that between August of 2010 and May of 2016, Baldor successfully prevented a work-related illness or injury for 1,250 employees.

This brings me tremendous pleasure as I understand full well that the importance of workplace safety cannot be overstated. Families across the State of Arkansas, as well as the country, depend on and expect the safe return of their loved ones each day—and with 15 million accident-free hours, Baldor Electric Company has truly set the standard in ensuring just that. Much of Baldor's success has stemmed from its use of a safety program that utilizes a safety committee that includes both employees and managers.

I offer my gratitude to Baldor Electric Company for ensuring the safety of its employees for over 15 million hours of work. I congratulate the company for breaking Arkansas' safety record. I look forward to hearing about the company's future success.●

TRIBUTE TO GRACIE SCHRAM

● Mr. ROBERTS. Mr. President, I wish to recognize an inspirational artist, entrepreneur, and philanthropist from my State, Gracie Schram, who has been awarded the 2016 Nation Federation of Independent Business Owners Young Entrepreneur Award.

Miss Schram, of Leawood, KS, is the founder and owner of Gracie Schram Music, an entertainment company that provides live performance, speaking engagements, original music, recordings, and merchandise.

At the young age of 10, she was introduced to the reality of underprivileged children in Haiti and Africa. Inspired to do good, she was determined to improve the living conditions of so many she hadn't even met.

She went on to write and produce several albums, the proceeds of which led to the building of two fish ponds in Africa and an orphanage in Haiti. This is an extraordinary accomplishment. When asked why she has chosen to help those in need, her response was, ''I was just a kid who wasn't willing to wait for somebody else to change the world.''

I ask my colleagues to join me in recognizing Miss Schram on her outstanding achievements. We wish her nothing but the best for her future entrepreneurial and educational endeavors.●

PEASE GREETERS' 1,000TH FLIGHT

● Mrs. SHAHEEN. Mr. President, as we approach the Fourth of July, I want to salute the Pease Greeters for their very special brand of patriotism—a patriotism of deeds, not words. Since 2005, they have gathered at Pease International Airport in Portsmouth, NH, to give a warm send-off or welcome home to servicemembers in transit to or from conflict zones in the Middle East and elsewhere. This past Sunday, the Greeters reached a remarkable milestone by gathering at Pease to meet their 1,000th flight. The welcoming ceremony concluded with words that have become the group's signature greeting: ''We the old warriors salute you the young warriors.''

For tens of thousands of uniformed servicemembers, many of them en route to or from combat zones in Iraq or Afghanistan, Pease airport is the last place they set foot on U.S. soil when they depart and the first place they set foot when they return. Prior to 2005, troops encountered a mostly empty and unwelcoming airport terminal. That year, airport officials contacted Charles Cove, a Vietnam war veteran and asked if he would gather a group of Granite Staters to greet a unit of 135 servicemembers heading to combat duty in Iraq. Mr. Cove gathered some fellow veterans and others, and they met the Iraq-bound soldiers with coffee, doughnuts, and warm words of support and appreciation.

Following that impromptu event, Mr. Cove and co-founder Edmund Johnson, a decorated Marine veteran of the Korean war, joined with fellow veterans and other Seacoast residents to form the Pease Greeters. Many in the group are old enough to remember that servicemembers returning from the Vietnam war were greeted with indifference or even hostility. Mr. Cove, who earned two Purple Hearts in Vietnam, said he made a promise to himself and his country that he would not allow this to happen to future servicemembers and veterans.

Since 2005, the Pease Greeters have not missed a single flight, ensuring that every departing and returning servicemember is given a hero's greeting and warm words of appreciation. Several thousand volunteers, ranging in age from retired veterans to young children, have joined in this mission. They have transformed the airport terminal at Pease into a ''Heroes' Walk,'' with framed group photos of all the military units that have passed through the airport since 2005.

Typically, 100 or more Pease Greeters will be on hand for a ceremony, forming a celebratory gauntlet to cheer and welcome servicemembers as they disembark from a troop transport plane. In addition to refreshments and gifts, each servicemember is given a cut-out embroidered star from a retired American flag. On one occasion, the group was informed at 10 p.m. that a Marine unit bound for Afghanistan would be flying out of Pease just six hours later, at 4 a.m. The Greeters scrambled to meet the challenge and were present with refreshments and a cheering crowd for the pre-dawn send-off.

In addition to meeting flights, the Pease Greeters organize efforts to support veterans, Active-Duty servicemembers, and their families. They also send care packages to servicemembers on duty overseas. Since 2008, the Greeters have sent more than 75,000 pounds of care package items to those serving in conflict zones.

I salute the Pease Greeters for their dedication to supporting and thanking our brave men and women in uniform, one flight at a time. Across 1,000 flights, they have delivered to our servicemembers an important message, eloquently expressed by Mr. Cove: ''The road to freedom is a toll road. We thank you for paying our way.''

We join with the Greeters in thanking the men and women of our Armed Forces. In addition, I want to express my deep appreciation to the Pease Greeters for their own generous service to our Nation.●

TRIBUTE TO DR. ROBERT E. WITT

● Mr. SHELBY. Mr. President, I rise today to recognize Dr. Robert E. Witt, chancellor of the University of Alabama system, who is retiring in August of this year. Dr. Witt will be long remembered for his remarkable career, his extraordinary leadership, and for his role in restoring the University of Alabama to its rightful place as the capstone of higher education.

A native of Bridgeport, CT, Dr. Witt received his bachelor's degree in economics from Bates College. He received his M.B.A. from the Tuck School of Business at Dartmouth College and his Ph.D. from the Pennsylvania State University.

Dr. Witt began his 35-year career in higher education in 1968 when he joined the business school faculty at the University of Texas at Austin. He eventually became department chair, associate dean, and in 1985, he was named dean of the UT business school. In 1995, Dr. Witt was named president of the University of Texas at Arlington, where he served until 2003 before moving to Tuscaloosa, AL.

Prior to his election as chancellor of Alabama's largest education enterprise, Dr. Witt served as president of the University of Alabama from 2003 to 2012. Throughout his tenure, I was impressed by his vision and commitment to growing the capstone into one of the leading institutions for higher education in the South.

During his 9 years as president of the university, he led an ambitious campaign for academic growth and achievement that positioned the University of Alabama as one of America's fastest growing public universities. Because of his efforts, the university has achieved a higher position academically, which continues to bring positive growth to the University of Alabama and our State as a whole.

In addition to serving as president of the University of Alabama system, Dr. Witt is chairman of the Council of the Presidents of Alabama's public colleges and universities. He is a member of the Governor's College & Career Ready Task Force, the American Cast Iron Pipe Company Board of Directors, the Alexis deTocqueville Executive Committee, the Advisory Board, and the Elizabeth Project Care Board. Dr. Witt is past chairman of the chamber of commerce of West Alabama, a past member of the Tuscaloosa County IDA Board, and the Black Warrior Council Boy Scouts of America.

In 2011, Dr. Witt was inducted into the Alabama Academy of Honor, which is comprised of 100 living Alabamians elected for their noteworthy service to the State.

Dr. Witt's many accomplishments, as well as his contributions to the University of Alabama, city of Tuscaloosa, and the State of Alabama, will not be soon forgotten. Our State and community have been fortunate to have a leader like Dr. Robert Witt, and I wish Dr. Witt and his wife, Sandee, the very best in their next chapter.●

MESSAGES FROM THE HOUSE

ENROLLED BILL SIGNED

At 9:32 a.m., a message from the House of Representatives, delivered by Mrs. Cole, one of its reading clerks, announced that the Speaker has signed the following enrolled bill:

S. 337. An act to improve the Freedom of Information Act.

The enrolled bill was subsequently signed by the President pro tempore (Mr. HATCH).

At 1:38 p.m., a message from the House of Representatives, delivered by Mrs. Cole, one of its reading clerks, announced that the House has passed the following bills, without amendment:

S. 2133. An act to improve Federal agency financial and administrative controls and procedures to assess and mitigate fraud risks, and to improve Federal agencies' development and use of data analytics for the purpose of identifying, preventing, and responding to fraud, including improper payments.

S. 2487. An act to direct the Secretary of Veterans Affairs to identify mental health care and suicide prevention programs and metrics that are effective in treating women veterans as part of the evaluation of such programs by the Secretary, and for other purposes.

The message further announced that the House has passed the following bills, in which it requests the concurrence of the Senate:

H.R. 2395. An act to amend the Inspector General Act of 1978 to strengthen the independence of the Inspectors General, and for other purposes.

H.R. 2607. An act to designate the facility of the United States Postal Service located at 7802 37th Avenue in Jackson Heights, New York, as the ''Jeanne and Jules Manford Post Office Building''.

H.R. 3936. An act to direct the Secretary of Veterans Affairs to carry out a pilot program under which the Secretary carries out Veteran Engagement Team events where veterans can complete claims for disability compensation and pension under the laws administered by the Secretary, and for other purposes.

H.R. 4010. An act to designate the facility of the United States Postal Service located at 522 North Central Avenue in Phoenix, Arizona, as the ''Ed Pastor Post Office''.

H.R. 4372. An act to designate the facility of the United States Postal Service located at 15 Rochester Street, Bergen, New York, as the Barry G. Miller Post Office.

H.R. 4590. An act to authorize the Secretary of Veterans Affairs to carry out certain major medical facility projects for which appropriations are being made for fiscal year 2016, and for other purposes.

H.R. 4639. An act to reauthorize the Office of Special Counsel, to amend title 5, United States Code, to provide modifications to authorities relating to the Office of Special Counsel, and for other purposes.

H.R. 4777. An act to designate the facility of the United States Postal Service located at 1301 Alabama Avenue in Selma, Alabama as the ''Amelia Boynton Robinson Post Office Building''.

H.R. 4902. An act to amend title 5, United States Code, to expand law enforcement availability pay to employees of U.S. Customs and Border Protection's Air and Marine Operations.

H.R. 4925. An act to designate the facility of the United States Postal Service located at 229 West Main Cross Street, in Findlay, Ohio, as the ''Michael Garver Oxley Memorial Post Office Building''.

H.R. 4960. An act to designate the facility of the United States Postal Service located at 525 N Broadway in Aurora, Illinois, as the ''Kenneth M. Christy Post Office Building''.

H.R. 5028. An act to designate the facility of the United States Postal Service located at 10721 E Jefferson Ave in Detroit, Michigan, as the ''Mary E. McCoy Post Office Building''.

H.R. 5170. An act to encourage and support partnerships between the public and private sectors to improve our Nation's social programs, and for other purposes.

H.R. 5317. An act to designate the Department of Veterans Affairs health care center in Center Township, Butler County, Pennsylvania, as the ''Abie Abraham VA Clinic''.

H.R. 5388. An act to amend the Homeland Security Act of 2002 to provide for innovative research and development, and for other purposes.

H.R. 5389. An act to encourage engagement between the Department of Homeland Security and technology innovators, and for other purposes.

H.R. 5447. An act to provide an exception from certain group health plan requirements for qualified small employer health reimbursement arrangements.

H.R. 5452. An act to amend the Internal Revenue Code of 1986 to permit individuals eligible for Indian Health Service assistance to qualify for health savings accounts.

H.R. 5456. An act to amend parts B and E of title IV of the Social Security Act to invest in funding prevention and family services to help keep children safe and supported

at home, to ensure that children in foster care are placed in the least restrictive, most family-like, and appropriate settings, and for other purposes.

MEASURES REFERRED

The following bills were read the first and the second times by unanimous consent, and referred as indicated:

H.R. 2395. An act to amend the Inspector General Act of 1978 to strengthen the independence of the Inspectors General, and for other purposes; to the Committee on Homeland Security and Governmental Affairs.

H.R. 2607. An act to designate the facility of the United States Postal Service located at 7802 37th Avenue in Jackson Heights, New York, as the ''Jeanne and Jules Manford Post Office Building''; to the Committee on Homeland Security and Governmental Affairs.

H.R. 3936. An act to direct the Secretary of Veterans Affairs to carry out a pilot program under which the Secretary carries out Veteran Engagement Team events where veterans can complete claims for disability compensation and pension under the laws administered by the Secretary, and for other purposes; to the Committee on Veterans' Affairs.

H.R. 4010. An act to designate the facility of the United States Postal Service located at 522 North Central Avenue in Phoenix, Arizona, as the ''Ed Pastor Post Office''; to the Committee on Homeland Security and Governmental Affairs.

H.R. 4372. An act to designate the facility of the United States Postal Service located at 15 Rochester Street, Bergen, New York, as the Barry G. Miller Post Office; to the Committee on Homeland Security and Governmental Affairs.

H.R. 4590. An act to authorize the Secretary of Veterans Affairs to carry out certain major medical facility projects for which appropriations are being made for fiscal year 2016, and for other purposes; to the Committee on Homeland Security and Governmental Affairs.

H.R. 4777. An act to designate the facility of the United States Postal Service located at 1301 Alabama Avenue in Selma, Alabama as the ''Amelia Boynton Robinson Post Office Building''; to the Committee on Homeland Security and Governmental Affairs.

H.R. 4925. An act to designate the facility of the United States Postal Service located at 229 West Main Cross Street, in Findlay, Ohio, as the ''Michael Garver Oxley Memorial Post Office Building''; to the Committee on Homeland Security and Governmental Affairs.

H.R. 4960. An act to designate the facility of the United States Postal Service located at 525 N Broadway in Aurora, Illinois, as the ''Kenneth M. Christy Post Office Building''; to the Committee on Homeland Security and Governmental Affairs.

H.R. 5028. An act to designate the facility of the United States Postal Service located at 10721 E Jefferson Ave in Detroit, Michigan, as the ''Mary E. McCoy Post Office Building''; to the Committee on Homeland Security and Governmental Affairs.

H.R. 5170. An act to encourage and support partnerships between the public and private sectors to improve our Nation's social programs, and for other purposes; to the Committee on Finance.

H.R. 5317. An act to designate the Department of Veterans Affairs health care center in Center Township, Butler County, Pennsylvania, as the ''Abie Abraham VA Clinic''; to the Committee on Veterans' Affairs.

H.R. 5388. An act to amend the Homeland Security Act of 2002 to provide for innovative research and development, and for other purposes; to the Committee on Homeland Security and Governmental Affairs.

H.R. 5389. An act to encourage engagement between the Department of Homeland Security and technology innovators, and for other purposes; to the Committee on Homeland Security and Governmental Affairs.

H.R. 5452. An act to amend the Internal Revenue Code of 1986 to permit individuals eligible for Indian Health Service assistance to qualify for health savings accounts; to the Committee on Finance.

MEASURES READ THE FIRST TIME

The following bills were read the first time:

H.R. 5447. An act to provide an exception from certain group health plan requirements for qualified small employer health reimbursement arrangements.

H.R. 5456. An act to amend parts B and E of title IV of the Social Security Act to invest in funding prevention and family services to help keep children safe and supported at home, to ensure that children in foster care are placed in the least restrictive, most family-like, and appropriate settings, and for other purposes.

ENROLLED BILL PRESENTED

The Secretary of the Senate reported that on today, June 22, 2016, she had presented to the President of the United States the following enrolled bill:

S. 337. An act to improve the Freedom of Information Act.

EXECUTIVE AND OTHER COMMUNICATIONS

The following communications were laid before the Senate, together with accompanying papers, reports, and documents, and were referred as indicated:

EC–5832. A communication from the Chairman, Medicare Payment Advisory Commission, transmitting, pursuant to law, a report entitled ''Report to the Congress: Medicare and the Health Care Delivery System''; to the Committee on Finance.

EC–5833. A communication from the Chief of the Publications and Regulations Branch, Internal Revenue Service, Department of the Treasury, transmitting, pursuant to law, the report of a rule entitled ''Recovery of Investment in the Contract from Payments Received From a Qualified Defined Benefit Plan by an Employee During Phased Retirement'' (Notice 2016–39) received in the Office of the President of the Senate on June 20, 2016; to the Committee on Finance.

EC–5834. A communication from the Chief of the Publications and Regulations Branch, Internal Revenue Service, Department of the Treasury, transmitting, pursuant to law, the report of a rule entitled ''Section 108.—Income from Discharge of Indebtedness'' (Rev. Rul. 2016–15) received in the Office of the President of the Senate on June 20, 2016; to the Committee on Finance.

EC–5835. A communication from the Chief of the Publications and Regulations Branch, Internal Revenue Service, Department of the Treasury, transmitting, pursuant to law, the report of a rule entitled ''Phased Retirement for Non-Qualified Plans'' (Rev. Proc. 2016–36) received in the Office of the President of the Senate on June 20, 2016; to the Committee on Finance.

EC–5836. A communication from the Chief of the Publications and Regulations Branch, Internal Revenue Service, Department of the Treasury, transmitting, pursuant to law, the report of a rule entitled ''Update of Weighted Average Interest Rates, Yield Curves, and Segment Rates'' (Notice 2016–38) received in the Office of the President of the Senate on June 20, 2016; to the Committee on Finance.

EC–5837. A communication from the Assistant Secretary, Legislative Affairs, Department of State, transmitting, pursuant to law, a report relative to section 36(c) of the Arms Export Control Act (DDTC 15–139); to the Committee on Foreign Relations.

EC–5838. A communication from the Assistant Secretary, Legislative Affairs, Department of State, transmitting, pursuant to law, a report relative to section 36(c) of the Arms Export Control Act (DDTC 16–035); to the Committee on Foreign Relations.

EC–5839. A communication from the Assistant Secretary, Legislative Affairs, Department of State, transmitting, pursuant to law, a report relative to section 36(c) of the Arms Export Control Act (DDTC 15–126); to the Committee on Foreign Relations.

EC–5840. A communication from the Assistant Secretary, Legislative Affairs, Department of State, transmitting, pursuant to law, a report relative to section 36(c) of the Arms Export Control Act (DDTC 16–012); to the Committee on Foreign Relations.

EC–5841. A communication from the Assistant Secretary, Legislative Affairs, Department of State, transmitting, pursuant to law, a report relative to section 36(c) of the Arms Export Control Act (DDTC 16–033); to the Committee on Foreign Relations.

EC–5842. A communication from the Assistant Secretary, Legislative Affairs, Department of State, transmitting, pursuant to law, a report relative to section 36(c) of the Arms Export Control Act (DDTC 16–018); to the Committee on Foreign Relations.

EC–5843. A communication from the Assistant Secretary, Legislative Affairs, Department of State, transmitting, pursuant to law, a report relative to section 36(c) of the Arms Export Control Act (DDTC 15–125); to the Committee on Foreign Relations.

EC–5844. A communication from the Assistant Secretary, Legislative Affairs, Department of State, transmitting, pursuant to law, a report prepared by the Department of State on progress toward a negotiated solution of the Cyprus question covering the period February 1, 2016 through March 31, 2016; to the Committee on Foreign Relations.

EC–5845. A communication from the Director of Regulations and Policy Management Staff, Food and Drug Administration, Department of Health and Human Services, transmitting, pursuant to law, the report of a rule entitled ''Use of Symbols in Labeling'' ((RIN0910–AG74) (Docket No. FDA–2013–N–0125)) received in the Office of the President of the Senate on June 20, 2016; to the Committee on Health, Education, Labor, and Pensions.

EC–5846. A communication from the Railroad Retirement Board, transmitting, pursuant to law, a report relative to the actuarial status of the railroad retirement system; to the Committee on Health, Education, Labor, and Pensions.

EC–5847. A communication from the Railroad Retirement Board, transmitting, pursuant to law, a report entitled ''Railroad Unemployment Insurance System''; to the Committee on Health, Education, Labor, and Pensions.

EC–5848. A communication from the Assistant Secretary for Legislation, Department of Health and Human Services, transmitting, pursuant to law, a report entitled ''Report to Congress on American Indian and Alaska Native Head Start Facilities, FY 2015''; to the Committee on Health, Education, Labor, and Pensions.

EC–5849. A communication from the Secretary of Education, transmitting, pursuant to law, the Department of Education's Semiannual Report of the Inspector General for the period from October 1, 2015 through March 31, 2016; to the Committee on Homeland Security and Governmental Affairs.

EC–5850. A communication from the District of Columbia Auditor, transmitting, pursuant to law, a report entitled ''The Department of General Services Failed to Provide Information the DC Council Needed to Make Informed Decisions on the Scope and Cost of Modernizing the Duke Ellington School of the Arts''; to the Committee on Homeland Security and Governmental Affairs.

EC–5851. A communication from the Attorney-Advisor, U.S. Coast Guard, Department of Homeland Security, transmitting, pursuant to law, the report of a rule entitled ''Security Zone; Military Ocean Terminal Concord (MOTCO); Concord, California'' ((RIN1625–AA87) (Docket No. USCG–2015–0330)) received in the Office of the President of the Senate on June 20, 2016; to the Committee on Commerce, Science, and Transportation.

EC–5852. A communication from the Attorney-Advisor, U.S. Coast Guard, Department of Homeland Security, transmitting, pursuant to law, the report of a rule entitled ''Regulated Navigation Area; Holiday Events; Biscayne Bay, Miami, FL'' ((RIN1625–AA11) (Docket No. USCG–2015–0786)) received in the Office of the President of the Senate on June 20, 2016; to the Committee on Commerce, Science, and Transportation.

EC–5853. A communication from the Attorney-Advisor, U.S. Coast Guard, Department of Homeland Security, transmitting, pursuant to law, the report of a rule entitled ''Renaming of Sector Baltimore as Sector Maryland-National Capital Region; Conforming Amendments'' ((RIN1625–AA11) (Docket No. USCG–2016–0060)) received in the Office of the President of the Senate on June 20, 2016; to the Committee on Commerce, Science, and Transportation.

EC–5854. A communication from the Attorney-Advisor, U.S. Coast Guard, Department of Homeland Security, transmitting, pursuant to law, the report of a rule entitled ''Drawbridge Operation Regulation; Kennebec River, Richmond and Dresden, ME'' ((RIN1625–AA09) (Docket No. USCG–2016–0344)) received in the Office of the President of the Senate on June 20, 2016; to the Committee on Commerce, Science, and Transportation.

EC–5855. A communication from the Attorney-Advisor, U.S. Coast Guard, Department of Homeland Security, transmitting, pursuant to law, the report of a rule entitled ''Safety Zones; Upper Mississippi River between mile 179.2 and 180.5, St. Louis, MO and between mile 839.5 and 840, St. Paul, MN'' ((RIN1625–AA00) (Docket No. USCG–2016–0354)) received in the Office of the President of the Senate on June 20, 2016; to the Committee on Commerce, Science, and Transportation.

EC–5856. A communication from the Attorney-Advisor, U.S. Coast Guard, Department of Homeland Security, transmitting, pursuant to law, the report of a rule entitled ''Drawbridge Operation Regulation; Broad Creek, Laurel, DE'' ((RIN1625–AA09) (Docket No. USCG–2015–1011)) received in the Office of the President of the Senate on June 20, 2016; to the Committee on Commerce, Science, and Transportation.

EC–5857. A communication from the Attorney-Advisor, U.S. Coast Guard, Department of Homeland Security, transmitting, pursuant to law, the report of a rule entitled ''Safety Zone; Monongahela River mile 97.5 to mile 100.5, Morgantown, WV'' ((RIN1625–AA00) (Docket No. USCG–2016–0202)) received in the Office of the President of the Senate on June 20, 2016; to the Committee on Commerce, Science, and Transportation.

EC–5858. A communication from the Attorney-Advisor, U.S. Coast Guard, Department of Homeland Security, transmitting, pursuant to law, the report of a rule entitled ''Safety Zone; Chesapeake Bay, Cape Charles, VA'' ((RIN1625–AA00) (Docket No. USCG–2016–0319)) received in the Office of the President of the Senate on June 20, 2016; to the Committee on Commerce, Science, and Transportation.

EC–5859. A communication from the Attorney-Advisor, U.S. Coast Guard, Department of Homeland Security, transmitting, pursuant to law, the report of a rule entitled ''Safety Zone; Upper New York Bay, Liberty Island, NY'' ((RIN1625–AA00) (Docket No. USCG–2016–0318)) received in the Office of the President of the Senate on June 20, 2016; to the Committee on Commerce, Science, and Transportation.

EC–5860. A communication from the Attorney-Advisor, U.S. Coast Guard, Department of Homeland Security, transmitting, pursuant to law, the report of a rule entitled ''Safety Zone; Raritan Bay, Perth Amboy, NJ'' ((RIN1625–AA00) (Docket No. USCG–2016–0297)) received in the Office of the President of the Senate on June 20, 2016; to the Committee on Commerce, Science, and Transportation.

EC–5861. A communication from the Attorney-Advisor, U.S. Coast Guard, Department of Homeland Security, transmitting, pursuant to law, the report of a rule entitled ''Safety Zone; Ohio River mile 25.2 to mile 25.6, Beaver, PA'' ((RIN1625–AA00) (Docket No. USCG–2016–0424)) received in the Office of the President of the Senate on June 20, 2016; to the Committee on Commerce, Science, and Transportation.

EC–5862. A communication from the Attorney-Advisor, U.S. Coast Guard, Department of Homeland Security, transmitting, pursuant to law, the report of a rule entitled ''Safety Zone; Ohio River mile 43.2 to mile 43.6, East Liverpool, OH'' ((RIN1625–AA00) (Docket No. USCG–2016–0389)) received in the Office of the President of the Senate on June 20, 2016; to the Committee on Commerce, Science, and Transportation.

EC–5863. A communication from the Attorney-Advisor, U.S. Coast Guard, Department of Homeland Security, transmitting, pursuant to law, the report of a rule entitled ''Safety Zone; Cincinnati Reds Season Fireworks'' ((RIN1625–AA00) (Docket No. USCG–2016–0145)) received in the Office of the President of the Senate on June 20, 2016; to the Committee on Commerce, Science, and Transportation.

EC–5864. A communication from the Attorney-Advisor, U.S. Coast Guard, Department of Homeland Security, transmitting, pursuant to law, the report of a rule entitled ''Safety Zone; Monongahela River mile 97.5 to mile 100.5, Morgantown, WV'' ((RIN1625–AA00) (Docket No. USCG–2016–0202)) received in the Office of the President of the Senate on June 20, 2016; to the Committee on Commerce, Science, and Transportation.

EC–5865. A communication from the Attorney-Advisor, U.S. Coast Guard, Department of Homeland Security, transmitting, pursuant to law, the report of a rule entitled ''Special Local Regulation for Marine Events; James River, Midlothian, VA'' ((RIN1625–AA08) (Docket No. USCG–2016–0355)) received in the Office of the President of the Senate on June 20, 2016; to the Committee on Commerce, Science, and Transportation.

EC–5866. A communication from the Attorney-Advisor, U.S. Coast Guard, Department of Homeland Security, transmitting, pursuant to law, the report of a rule entitled ''Special Local Regulations and Safety Zones; Recurring Marine Events Held in the Coast Guard Northern New England Captain of the Port Zone'' ((RIN1625–AA00 and RIN1625–AA08) (Docket No. USCG–2015–1052)) received in the Office of the President of the Senate on June 20, 2016; to the Committee on Commerce, Science, and Transportation.

EC–5867. A communication from the Attorney-Advisor, U.S. Coast Guard, Department of Homeland Security, transmitting, pursuant to law, the report of a rule entitled ''Special Local Regulations; Marine Events held in the Sector Long Island Sound Captain of the Port Zone'' ((RIN1625–AA08) (Docket No. USCG–2016–0324)) received in the Office of the President of the Senate on June 20, 2016; to the Committee on Commerce, Science, and Transportation.

EC–5868. A communication from the Attorney-Advisor, U.S. Coast Guard, Department of Homeland Security, transmitting, pursuant to law, the report of a rule entitled ''Special Local Regulation; Midwest Masters Sprints; Maumee River; Toledo, OH'' ((RIN1625–AA08) (Docket No. USCG–2016–0463)) received in the Office of the President of the Senate on June 20, 2016; to the Committee on Commerce, Science, and Transportation.

EC–5869. A communication from the Attorney-Advisor, U.S. Coast Guard, Department of Homeland Security, transmitting, pursuant to law, the report of a rule entitled ''Special Local Regulations; Marine Events in the Seventh Coast Guard District'' ((RIN1625–AA08) (Docket No. USCG–2013–0272)) received in the Office of the President of the Senate on June 20, 2016; to the Committee on Commerce, Science, and Transportation.

EC–5870. A communication from the Attorney-Advisor, U.S. Coast Guard, Department of Homeland Security, transmitting, pursuant to law, the report of a rule entitled ''Special Local Regulation; On Water Activities Associated With the 2016 Macy's 4th of July Fireworks, East River, Manhattan, NY'' ((RIN1625–AA08) (Docket No. USCG–2016–0377)) received in the Office of the President of the Senate on June 20, 2016; to the Committee on Commerce, Science, and Transportation.

EC–5871. A communication from the Attorney-Advisor, U.S. Coast Guard, Department of Homeland Security, transmitting, pursuant to law, the report of a rule entitled ''Special Local Regulation; Ohio River mile 791.0 to 795.0, Evansville, IN'' ((RIN1625–AA08) (Docket No. USCG–2016–0395)) received in the Office of the President of the Senate on June 20, 2016; to the Committee on Commerce, Science, and Transportation.

EC–5872. A communication from the Legal Intern, U.S. Coast Guard, Department of Homeland Security, transmitting, pursuant to law, the report of a rule entitled ''Special Local Regulation; Cumberland River, Mile 190.5 to 194.0; Nashville, TN'' ((RIN1625–AA08) (Docket No. USCG–2016–0322)) received in the Office of the President of the Senate on June 20, 2016; to the Committee on Commerce, Science, and Transportation.

EC–5873. A communication from the Legal Intern, U.S. Coast Guard, Department of Homeland Security, transmitting, pursuant to law, the report of a rule entitled ''Special Local Regulations; Sector Ohio Valley Annual and Recurring Special Local Regulations Update'' ((RIN1625–AA08) (Docket No. USCG–2015–1039)) received in the Office of the President of the Senate on June 20, 2016; to the Committee on Commerce, Science, and Transportation.

EC–5874. A communication from the Attorney-Advisor, U.S. Coast Guard, Department of Homeland Security, transmitting, pursuant to law, the report of a rule entitled ''Special Local Regulation for Marine Events;

James River, Midlothian, VA'' ((RIN1625–AA08) (Docket No. USCG–2016–0355)) received in the Office of the President of the Senate on June 20, 2016; to the Committee on Commerce, Science, and Transportation.

EC–5875. A communication from the Attorney-Advisor, U.S. Coast Guard, Department of Homeland Security, transmitting, pursuant to law, the report of a rule entitled ''Inspection of Towing Vessels'' ((RIN1625–AB06) (Docket No. USCG–2006–24412)) received in the Office of the President of the Senate on June 20, 2016; to the Committee on Commerce, Science, and Transportation.

EC–5876. A communication from the Attorney-Advisor, U.S. Coast Guard, Department of Homeland Security, transmitting, pursuant to law, the report of a rule entitled ''Drawbridge Operation Regulation; Indian River, Miami Beach, FL'' ((RIN1625–AA09) (Docket No. USCG–2015–0940)) received in the Office of the President of the Senate on June 20, 2016; to the Committee on Commerce, Science, and Transportation.

INTRODUCTION OF BILLS AND JOINT RESOLUTIONS

The following bills and joint resolutions were introduced, read the first and second times by unanimous consent, and referred as indicated:

By Mr. PETERS (for himself, Mrs. CAPITO, and Mr. KIRK):

S. 3082. A bill to amend title XVIII of the Social Security Act to reduce the occurrence of diabetes in Medicare beneficiaries by extending coverage under Medicare for medical nutrition therapy services to such beneficiaries with pre-diabetes or with risk factors for developing type 2 diabetes; to the Committee on Finance.

By Mr. MENENDEZ (for himself, Mr. SCOTT, Mr. COONS, and Mr. BLUNT):

S. 3083. A bill to provide housing opportunities in the United States through modernization of various housing programs, and for other purposes; to the Committee on Banking, Housing, and Urban Affairs.

By Mr. GARDNER (for himself, Mr. PETERS, Mr. THUNE, and Mr. NELSON):

S. 3084. A bill to invest in innovation through research and development, and to improve the competitiveness of the United States; to the Committee on Commerce, Science, and Transportation.

By Mr. ROBERTS:

S. 3085. A bill to improve forest management activities on National Forest System land and public land, and for other purposes; to the Committee on Agriculture, Nutrition, and Forestry.

By Mr. BOOKER:

S. 3086. A bill to reauthorize and amend the Marine Debris Act to promote international action to reduce marine debris and for other purposes; to the Committee on Commerce, Science, and Transportation.

By Mr. SULLIVAN (for himself and Ms. CANTWELL):

S. 3087. A bill to establish the American Fisheries Advisory Committee to assist in the awarding of fisheries research and development grants and for other purposes; to the Committee on Commerce, Science, and Transportation.

SUBMISSION OF CONCURRENT AND SENATE RESOLUTIONS

The following concurrent resolutions and Senate resolutions were read, and referred (or acted upon), as indicated:

By Mr. RUBIO (for himself, Mr. COONS, Ms. AYOTTE, Mr. CASEY, Mr. KIRK, Mrs. GILLIBRAND, Mr. ISAKSON, Mr. BOOKER, Mr. PERDUE, Mr. KAINE, Mr. COTTON, Mr. PETERS, Mr. HATCH, Mr. BLUMENTHAL, Mr. CRUZ, Mr. WARNER, Mr. BOOZMAN, Mr. CORNYN, and Mr. ROBERTS):

S. Res. 508. A resolution expressing support for the expeditious consideration and finalization of a new, robust, and long-term Memorandum of Understanding on military assistance to Israel between the United States Government and the Government of Israel; to the Committee on Foreign Relations.

By Mr. BROWN (for himself and Mr. PORTMAN):

S. Res. 509. A resolution congratulating the Cleveland Cavaliers for winning the 2016 National Basketball Association Finals; considered and agreed to.

ADDITIONAL COSPONSORS

S. 689

At the request of Mr. THUNE, the name of the Senator from Mississippi (Mr. WICKER) was added as a cosponsor of S. 689, a bill to provide protections for certain sports medicine professionals who provide certain medical services in a secondary State.

S. 1555

At the request of Ms. HIRONO, the name of the Senator from Ohio (Mr. BROWN) was added as a cosponsor of S. 1555, a bill to award a Congressional Gold Medal, collectively, to the Filipino veterans of World War II, in recognition of the dedicated service of the veterans during World War II.

S. 1679

At the request of Mr. HELLER, the name of the Senator from Mississippi (Mr. COCHRAN) was added as a cosponsor of S. 1679, a bill to amend the Flood Disaster Protection Act of 1973 to require that certain buildings and personal property be covered by flood insurance, and for other purposes.

S. 2341

At the request of Mr. BENNET, the name of the Senator from New York (Mrs. GILLIBRAND) was added as a cosponsor of S. 2341, a bill to designate a portion of the Arctic National Wildlife Refuge as wilderness.

S. 2599

At the request of Mrs. MCCASKILL, the name of the Senator from California (Mrs. BOXER) was added as a cosponsor of S. 2599, a bill to prohibit unfair and deceptive advertising of hotel room rates, and for other purposes.

S. 2650

At the request of Mr. THUNE, the name of the Senator from Utah (Mr. HATCH) was added as a cosponsor of S. 2650, a bill to amend the Internal Revenue Code of 1986 to exclude from gross income any prizes or awards won in competition in the Olympic Games or the Paralympic Games.

S. 2800

At the request of Mr. COONS, the name of the Senator from California (Mrs. FEINSTEIN) was added as a cosponsor of S. 2800, a bill to amend the Internal Revenue Code of 1986 and the Higher Education Act of 1965 to provide an exclusion from income for student loan forgiveness for students who have died or become disabled.

S. 2825

At the request of Ms. COLLINS, the name of the Senator from Delaware (Mr. COONS) was added as a cosponsor of S. 2825, a bill to amend title 37, United States Code, to require compliance with domestic source requirements for footwear furnished to enlisted members of the Armed Forces upon their initial entry into the Armed Forces.

S. 2873

At the request of Mr. HATCH, the name of the Senator from Mississippi (Mr. WICKER) was added as a cosponsor of S. 2873, a bill to require studies and reports examining the use of, and opportunities to use, technology-enabled collaborative learning and capacity building models to improve programs of the Department of Health and Human Services, and for other purposes.

S. 2934

At the request of Mr. SCHUMER, the name of the Senator from Hawaii (Mr. SCHATZ) was added as a cosponsor of S. 2934, a bill to ensure that all individuals who should be prohibited from buying a firearm are listed in the national instant criminal background check system and require a background check for every firearm sale.

S. 3007

At the request of Mr. COTTON, the name of the Senator from Texas (Mr. CRUZ) was added as a cosponsor of S. 3007, a bill to prohibit funds from being obligated or expended to aid, support, permit, or facilitate the certification or approval of any new sensor for use by the Russian Federation on observation flights under the Open Skies Treaty unless the President submits a certification related to such sensor to Congress and for other purposes.

S. 3034

At the request of Mr. CRUZ, the name of the Senator from Arkansas (Mr. COTTON) was added as a cosponsor of S. 3034, a bill to prohibit the National Telecommunications and Information Administration from allowing the Internet Assigned Numbers Authority functions contract to lapse unless specifically authorized to do so by an Act of Congress.

S.J. RES. 35

At the request of Mr. FLAKE, the names of the Senator from Utah (Mr. HATCH) and the Senator from Arizona (Mr. MCCAIN) were added as cosponsors of S.J. Res. 35, a joint resolution providing for congressional disapproval under chapter 8 of title 5, United States Code, of the final rule of the Department of Labor relating to ''Interpretation of the 'Advice' Exemption in Section 203(c) of the Labor-Management Reporting and Disclosure Act''.

S. CON. RES. 36

At the request of Mr. NELSON, the name of the Senator from Florida (Mr.

RUBIO) was added as a cosponsor of S. Con. Res. 36, a concurrent resolution expressing support of the goal of ensuring that all Holocaust victims live with dignity, comfort, and security in their remaining years, and urging the Federal Republic of Germany to reaffirm its commitment to that goal through a financial commitment to comprehensively address the unique health and welfare needs of vulnerable Holocaust victims, including home care and other medically prescribed needs.

S. RES. 83

At the request of Mr. MENENDEZ, the name of the Senator from Massachusetts (Mr. MARKEY) was added as a cosponsor of S. Res. 83, a resolution supporting the goals and ideals of the Secondary School Student Athletes' Bill of Rights.

S. RES. 465

At the request of Mr. HEINRICH, the name of the Senator from Delaware (Mr. COONS) was added as a cosponsor of S. Res. 465, a resolution supporting the United States solar energy industry in its effort to bring low-cost, clean, 21st-century solar technology into homes and businesses across the United States.

S. RES. 482

At the request of Mr. INHOFE, his name was added as a cosponsor of S. Res. 482, a resolution urging the European Union to designate Hizballah in its entirety as a terrorist organization and to increase pressure on the organization and its members to the fullest extent possible.

S. RES. 501

At the request of Mr. PERDUE, the name of the Senator from Florida (Mr. RUBIO) was added as a cosponsor of S. Res. 501, a resolution expressing the sense of the Senate on Russian military aggression.

AMENDMENT NO. 4725

At the request of Mrs. MURRAY, the names of the Senator from Maryland (Ms. MIKULSKI) and the Senator from Vermont (Mr. LEAHY) were added as cosponsors of amendment No. 4725 intended to be proposed to H.R. 2578, a bill making appropriations for the Departments of Commerce and Justice, Science, and Related Agencies for the fiscal year ending September 30, 2016, and for other purposes.

AMENDMENT NO. 4726

At the request of Mrs. MURRAY, the names of the Senator from Maryland (Ms. MIKULSKI) and the Senator from Vermont (Mr. LEAHY) were added as cosponsors of amendment No. 4726 intended to be proposed to H.R. 2578, a bill making appropriations for the Departments of Commerce and Justice, Science, and Related Agencies for the fiscal year ending September 30, 2016, and for other purposes.

AMENDMENT NO. 4762

At the request of Mr. MERKLEY, the names of the Senator from Delaware (Mr. CARPER), the Senator from Michigan (Ms. STABENOW) and the Senator from Hawaii (Mr. SCHATZ) were added as cosponsors of amendment No. 4762 intended to be proposed to H.R. 2578, a bill making appropriations for the Departments of Commerce and Justice, Science, and Related Agencies for the fiscal year ending September 30, 2016, and for other purposes.

AMENDMENT NO. 4766

At the request of Ms. CANTWELL, the name of the Senator from Hawaii (Mr. SCHATZ) was added as a cosponsor of amendment No. 4766 intended to be proposed to H.R. 2578, a bill making appropriations for the Departments of Commerce and Justice, Science, and Related Agencies for the fiscal year ending September 30, 2016, and for other purposes.

AMENDMENT NO. 4785

At the request of Mr. TOOMEY, the name of the Senator from Louisiana (Mr. VITTER) was added as a cosponsor of amendment No. 4785 intended to be proposed to H.R. 2578, a bill making appropriations for the Departments of Commerce and Justice, Science, and Related Agencies for the fiscal year ending September 30, 2016, and for other purposes.

AMENDMENT NO. 4814

At the request of Ms. COLLINS, the name of the Senator from Illinois (Mr. KIRK) was added as a cosponsor of amendment No. 4814 intended to be proposed to H.R. 2578, a bill making appropriations for the Departments of Commerce and Justice, Science, and Related Agencies for the fiscal year ending September 30, 2016, and for other purposes.

AMENDMENT NO. 4846

At the request of Mrs. BOXER, the name of the Senator from California (Mrs. FEINSTEIN) was added as a cosponsor of amendment No. 4846 intended to be proposed to H.R. 2578, a bill making appropriations for the Departments of Commerce and Justice, Science, and Related Agencies for the fiscal year ending September 30, 2016, and for other purposes.

AMENDMENT NO. 4848

At the request of Ms. MIKULSKI, the names of the Senator from California (Mrs. FEINSTEIN) and the Senator from New York (Mr. SCHUMER) were added as cosponsors of amendment No. 4848 intended to be proposed to H.R. 2578, a bill making appropriations for the Departments of Commerce and Justice, Science, and Related Agencies for the fiscal year ending September 30, 2016, and for other purposes.

SUBMITTED RESOLUTIONS

SENATE RESOLUTION 508—EXPRESSING SUPPORT FOR THE EXPEDITIOUS CONSIDERATION AND FINALIZATION OF A NEW, ROBUST, AND LONG-TERM MEMORANDUM OF UNDERSTANDING ON MILITARY ASSISTANCE TO ISRAEL BETWEEN THE UNITED STATES GOVERNMENT AND THE GOVERNMENT OF ISRAEL

Mr. RUBIO (for himself, Mr. COONS, Ms. AYOTTE, Mr. CASEY, Mr. KIRK, Mrs. GILLIBRAND, Mr. ISAKSON, Mr. BOOKER, Mr. PERDUE, Mr. KAINE, Mr. COTTON, Mr. PETERS, Mr. HATCH, Mr. BLUMENTHAL, Mr. CRUZ, Mr. WARNER, Mr. BOOZMAN, Mr. CORNYN, and Mr. ROBERTS) submitted the following resolution; which was referred to the Committee on Foreign Relations:

S. RES 508

Whereas in April 1998 the United States designated Israel as a ''major non-NATO ally'';

Whereas, on August 16, 2007, the United States and Israel signed a 10-year Memorandum of Understanding (MoU) on United States military assistance to Israel, under which total assistance would equal $30,000,000,000;

Whereas, since the signing of the 2007 Memorandum of Understanding, intelligence and defense cooperation has continued to grow;

Whereas, on October 15, 2008, the Naval Vessel Transfer Act of 2008 was signed into law (Public Law 110–429), defining Israel's qualitative military edge (QME) as ''the ability to counter and defeat any credible conventional military threat from any individual state or possible coalition of states or from non-state actors, while sustaining minimal damage and casualties, through the use of superior military means, possessed in sufficient quantity, including weapons, command, control, communication, intelligence, surveillance, and reconnaissance capabilities that in their technical characteristics are superior in capability to those of such other individual or possible coalition of states or non-state actors'';

Whereas, on July 27, 2012, the United States-Israel Enhanced Security Cooperation Act of 2012 (Public Law 112–150) declared it to be the policy of the United States ''to help the Government of Israel preserve its qualitative military edge amid rapid and uncertain regional political transformation'';

Whereas Israel faces immediate threats to its security from the United States-designated Foreign Terrorist Organization, Hezbollah, and its missile and rocket stockpile estimated to number around 150,000, and from the United States-designated Foreign Terrorist Organization, Hamas, which continues to attempt to rebuild its tunnel network to infiltrate Israel and restock its own missile and rocket stockpiles;

Whereas Israel also faces immediate threats to its security from the ongoing regional instability in the Middle East, especially from the ongoing conflict in Syria and from militant groups in the Sinai;

Whereas Iran remains a threat to Israel, as demonstrated by Iran's continued bellicosity, including several hostile and provocative tests of ballistic missiles capable of carrying nuclear warheads, even reportedly marking several of these weapons with Hebrew words declaring ''Israel must be wiped out'';

Whereas the National Defense Authorization Act for Fiscal Year 2016 (Public Law 114–92) authorized funds to be appropriated for Israeli cooperative missile defense program codevelopment and coproduction, including funds to be provided to the Government of Israel to procure the David's Sling weapon system as well as the Arrow 3 Upper Tier Interceptor Program; and

Whereas, on December 19, 2014, President Barack Obama signed into law the United States-Israel Strategic Partnership Act of 2014 (Public Law 113–296), which stated the sense of Congress that Israel is a major strategic partner of the United States and declared it to be the policy of the United States ''to continue to provide Israel with robust security assistance, including for the procurement of the Iron Dome Missile Defense System'': Now, therefore, be it

Resolved, That the Senate—

(1) reaffirms that Israel is a major strategic partner of the United States;

(2) reaffirms that it is the policy and law of the United States to ensure that Israel maintains its qualitative military edge and has the capacity and capability to defend itself from all credible military threats;

(3) reaffirms United States support of a robust Israeli tiered missile defense program;

(4) supports continued discussions between the United States Government and the Government of Israel for a robust and long-term Memorandum of Understanding on United States military assistance to Israel;

(5) urges the expeditious finalization of a new Memorandum of Understanding between the United States Government and the Government of Israel; and

(6) supports a robust and long-term Memorandum of Understanding negotiated between the United States and Israel regarding military assistance that increases the amount of aid from previous agreements and significantly enhances Israel's military capabilities.

SENATE RESOLUTION 509—CONGRATULATING THE CLEVELAND CAVALIERS FOR WINNING THE 2016 NATIONAL BASKETBALL ASSOCIATION FINALS

Mr. BROWN (for himself and Mr. PORTMAN) submitted the following resolution; which was considered and agreed to:

S. RES. 509

Whereas, on June 19, 2016, the Cleveland Cavaliers defeated the Golden State Warriors by a score of 93 to 89 in Oakland, California, in a decisive game 7 to win the 2016 National Basketball Association (referred to in the preamble as the ''NBA'') Finals;

Whereas the Cleveland Cavaliers have captured the first NBA Finals victory in franchise history and have at last brought the Larry O'Brien Championship Trophy to Cleveland;

Whereas the Cleveland Cavaliers became the first team in NBA Finals history to win a series after trailing 3 games to 1;

Whereas LeBron James, who averaged 29.7 points, 8.9 assists, and 11.3 rebounds during the NBA Finals, led all players from both teams in the respective statistical categories of total points, rebounds, assists, steals, and blocks and was named Most Valuable Player of the NBA Finals for the third time in his career;

Whereas LeBron James became the third player in NBA Finals history and the first since 1988 to record a triple-double in game 7, scoring 27 points, grabbing 11 rebounds, and making 11 assists in leading his team to victory;

Whereas Kyrie Irving, who played a critical role through the 2016 NBA Finals, scored 26 points in game 7 and hit a crucial three-pointer with 53 seconds left to play in the game;

Whereas every member of the 2015–2016 Cleveland Cavaliers team, including Matthew Dellavedova, Channing Frye, Kyrie Irving, LeBron James, Richard Jefferson, Dahntay Jones, James Jones, Sasha Kaun, Kevin Love, Jordan McRae, Timofey Mozgov, Iman Shumpert, J. R. Smith, Tristan Thompson, and Mo Williams, played an integral role in bringing the NBA Championship to Cleveland;

Whereas head coach Tyronn Lue and his entire team of assistants and team staff worked together to put the Cleveland Cavaliers players in a position to win the 2016 NBA Finals;

Whereas General Manager David Griffin and the entire Cavaliers basketball front office have worked to assemble a championship team and create a culture and environment that fosters the very best performance and the highest success;

Whereas owner Dan Gilbert has helped build a first-rate, championship sports franchise in the city of Cleveland;

Whereas, prior to June 19, 2016, the 3 major sports franchises in Cleveland had not won a championship since 1964;

Whereas on June 19, 2016, LeBron James completed his goal of bringing an NBA Championship back to northeast Ohio, and the Cleveland Cavaliers ended a 52-year championship drought for the city of Cleveland; and

Whereas the 2016 Cleveland Cavaliers have brought pride and elation to Cleveland and the entire State of Ohio by winning the 2016 NBA Finals:

Now, therefore, be it

Resolved, That the Senate—

(1) congratulates the Cleveland Cavaliers for winning the 2016 National Basketball Association Finals;

(2) recognizes the contributions and achievements of all the players, coaches, and staff who contributed to the 2015–2016 season;

(3) applauds the fans of the Cleveland Cavaliers who have never given up hope in the pursuit of their first ever championship; and

(4) directs the Secretary of the Senate to transmit for appropriate display an official copy of this resolution to—

(A) the owner of the Cleveland Cavaliers, Dan Gilbert;

(B) the coach of the Cleveland Cavaliers, Tyronn Lue; and

(C) the leader of the Cleveland Cavaliers, LeBron James.

AMENDMENTS SUBMITTED AND PROPOSED

SA 4854. Mr. WARNER (for himself and Mr. COCHRAN) submitted an amendment intended to be proposed to amendment SA 4685 proposed by Mr. SHELBY (for himself and Ms. MIKULSKI) to the bill H.R. 2578, making appropriations for the Departments of Commerce and Justice, Science, and Related Agencies for the fiscal year ending September 30, 2016, and for other purposes; which was ordered to lie on the table.

SA 4855. Mr. LANKFORD (for himself, Mr. CORNYN, Mr. LEE, Mr. HATCH, Mr. CRUZ, Mr. INHOFE, and Mr. JOHNSON) submitted an amendment intended to be proposed to amendment SA 4685 proposed by Mr. SHELBY (for himself and Ms. MIKULSKI) to the bill H.R. 2578, supra; which was ordered to lie on the table.

SA 4856. Mr. BENNET submitted an amendment intended to be proposed to amendment SA 4685 proposed by Mr. SHELBY (for himself and Ms. MIKULSKI) to the bill H.R. 2578, supra; which was ordered to lie on the table.

TEXT OF AMENDMENTS

SA 4854. Mr. WARNER (for himself and Mr. COCHRAN) submitted an amendment intended to be proposed to amendment SA 4685 proposed by Mr. SHELBY (for himself and Ms. MIKULSKI) to the bill H.R. 2578, making appropriations for the Departments of Commerce and Justice, Science, and Related Agencies for the fiscal year ending September 30, 2016, and for other purposes; which was ordered to lie on the table; as follows:

On page 71, line 3, insert before the period the following: ''; *Provided*, That $10,000,000 shall be for NASA to conduct further research at the Federal Aviation Administration's six test sites in collaboration with the FAA's Unmanned Aircraft Systems Center of Excellence on UAS use in a broad range of public safety applications over land and maritime environments''.

SA 4855. Mr. LANKFORD (for himself, Mr. CORNYN, Mr. LEE, Mr. HATCH, Mr. CRUZ, Mr. INHOFE, and Mr. JOHNSON) submitted an amendment intended to be proposed to amendment SA 4685 proposed by Mr. SHELBY (for himself and Ms. MIKULSKI) to the bill H.R. 2578, making appropriations for the Departments of Commerce and Justice, Science, and Related Agencies for the fiscal year ending September 30, 2016, and for other purposes; which was ordered to lie on the table; as follows:

At the end of title V, add the following:

SEC. 539. None of the funds made available by this Act may be used to enter into a civil settlement agreement on behalf of the United States that includes a term requiring that any donation be made to any nonparty by any party-defendant to such agreement other than a payment that provides restitution for or otherwise directly remedies actual harm (including to the environment) directly and proximately caused by the party making the payment, or constitutes payment for services rendered in connection with the case.

SA 4856. Mr. BENNET submitted an amendment intended to be proposed to amendment SA 4685 proposed by Mr. SHELBY (for himself and Ms. MIKULSKI) to the bill H.R. 2578, making appropriations for the Departments of Commerce and Justice, Science, and Related Agencies for the fiscal year ending September 30, 2016, and for other purposes; which was ordered to lie on the table; as follows:

At the appropriate place, insert the following:

SEC. _____. MARIJUANA RESEARCH.

(a) DEFINITIONS.—In this section—

(1) the term ''Administrator'' means the Administrator of the Drug Enforcement Administration;

(2) the term ''eligible State'' means a State that, in accordance with State law, permits the production, possession, use, distribution, dispensation, administration, laboratory testing, or delivery of medical and recreational marijuana;

(3) the term ''marijuana'' has the meaning given the term ''marihuana'' in section 102 of the Controlled Substances Act (21 U.S.C. 802); and

(4) the term ''State'' has the meaning given the term in section 102 of the Controlled Substances Act (21 U.S.C. 802).

(b) MANUFACTURE OF MARIJUANA FOR RESEARCH.—Not later than 1 year after the date of enactment of this Act, in order to meet the legitimate research needs of the United States, the Attorney General, acting through the Administrator, shall register not fewer than 3 applicants in each eligible State under section 303(a) of the Controlled Substances Act (21 U.S.C. 823(a)) to manufacture marijuana for research purposes.

(c) OVERSIGHT.—The Attorney General, acting through the Administrator—

(1) shall directly oversee the registration under subsection (b) in accordance with section 303(a) of the Controlled Substances Act (21 U.S.C. 823(a)); and

(2) may not delegate oversight authority to any other official.

(d) QUOTA.—Not later than 180 days after the date of enactment of this Act and each year thereafter, the Attorney General, acting through the Administrator, shall establish an annual quota under section 306(a) of the Controlled Substances Act (21 U.S.C. 826(a)) for the production of marijuana for research that is not less than 125 percent of the aggregate production specified in all research applications approved or reasonably expected to be approved during the applicable year by the Secretary of Health and Human Services.

(e) RESEARCH REGISTRATION PROCESS.—The Attorney General, acting through the Administrator, shall expedite the registration process for research on marijuana under section 303(f) of the Controlled Substances Act (21 U.S.C. 823(f)) for practitioners in eligible States who have been approved by the Secretary of Health and Human Services to conduct such research.

AUTHORITY FOR COMMITTEES TO MEET

COMMITTEE ON FOREIGN RELATIONS

Mr. COATS. Mr. President, I ask unanimous consent that the Committee on Foreign Relations be authorized to meet during the session of the Senate on June 22, 2016, at 10:30 a.m., to conduct a classified hearing entitled ''Security Assistance: Cutting Through a Tangled Web of Authorities.''

The PRESIDING OFFICER. Without objection, it is so ordered.

COMMITTEE ON HOMELAND SECURITY AND GOVERNMENTAL AFFAIRS

Mr. COATS. Mr. President, I ask unanimous consent that the Committee on Homeland Security and Governmental Affairs be authorized to meet during the session of the Senate on June 22, 2016, at 10 a.m. to conduct a hearing entitled ''Renewing Communities and Providing Opportunities Through Innovative Solutions to Poverty.''

The PRESIDING OFFICER. Without objection, it is so ordered.

COMMITTEE ON INDIAN AFFAIRS

Mr. COATS. Mr. President, I ask unanimous consent that the Committee on Indian Affairs be authorized to meet during the session of the Senate on June 22, 2016, in room SD–628 of the Dirksen Senate Office Building, at 2:15 p.m., to conduct a hearing entitled ''Accessing USDA Rural Development Programs in Native Communities.''

The PRESIDING OFFICER. Without objection, it is so ordered.

COMMITTEE ON THE JUDICIARY

Mr. COATS. Mr. President, I ask unanimous consent that the Committee on the Judiciary be authorized to meet during the session of the Senate on June 22, 2016, at 10 a.m., in room SD–226 of the Dirksen Senate Office Building, to conduct a hearing entitled ''Oversight of the Drug Enforcement Administration.''

The PRESIDING OFFICER. Without objection, it is so ordered.

COMMITTEE ON VETERANS' AFFAIRS

Mr. COATS. Mr. President, I ask unanimous consent that the Committee on Veterans' Affairs be authorized to meet during the session of the Senate on June 22, 2016, at 2:30 p.m., in room SR–418 of the Russell Senate Office Building, to conduct a hearing entitled ''Examining the Progress and Challenges in Modernizing Information Technology at the Department of Veterans Affairs.''

The PRESIDING OFFICER. Without objection, it is so ordered.

SUBCOMMITTEE ON CLEAN AIR AND NUCLEAR SAFETY

Mr. COATS. Mr. President, I ask unanimous consent that the Subcommittee on Clean Air and Nuclear Safety of the Committee on Environment and Public Works be authorized to meet during the session of the Senate on June 22, 2016, at 2:30 p.m., in room SD–406 of the Dirksen Senate Office Building, to conduct a hearing entitled ''Examining Pathways Towards Compliance of the National Ambient Air Quality Standard for Ground-Level Ozone: Legislative Hearing on S. 2882 and S. 2072.''

The PRESIDING OFFICER. Without objection, it is so ordered.

PRIVILEGES OF THE FLOOR

Mr. MERKLEY. Mr. President, I ask unanimous consent that my intern, Marty Bergen, be granted floor privileges for the remainder of the day.

The PRESIDING OFFICER. Without objection, it is so ordered.

Mr. MORAN. Mr. President, I ask unanimous consent that James Kelly, a member of my staff, be granted floor privileges for the remainder of this Congress.

The PRESIDING OFFICER. Without objection, it is so ordered.

NOTICE OF ADOPTION OF REGULATIONS AND TRANSMITTAL FOR CONGRESSIONAL APPROVAL

Mr. HATCH. Mr. President, I ask unanimous consent that the attached documentation from the Office of Compliance be printed in the RECORD.

U.S. CONGRESS,
OFFICE OF COMPLIANCE,
Washington, DC, June 22, 2016.

Hon. ORRIN HATCH,
President Pro Tempore of the U.S. Senate, Washington, DC.

DEAR MR. PRESIDENT: Section 304(b)(3) of the Congressional Accountability Act (''CAA''), 2 U.S.C. §1384(b)(3), requires that, with regard to substantive regulations under the CAA, after the Board of Directors of the Office of Compliance (''Board'') has published a general notice of proposed rulemaking as required by subsection (b)(1), and received comments as required by subsection (b)(2), ''the Board shall adopt regulations and shall transmit notice of such action together with a copy of such regulations to the Speaker of the House of Representatives and the President pro tempore of the Senate for publication in the Congressional Record on the first day on which both Houses are in session following such transmittal.''

The Board has adopted the regulations in the Notice of Adoption of Substantive Regulations and Transmittal for Congressional Approval which accompany this transmittal letter. The Board requests that the accompanying Notice be published in the Senate version of the *Congressional Record* on the first day on which both Houses are in session following receipt of this transmittal.

The Board has adopted the same regulations for the Senate, the House of Representatives, and the other covered entities and facilities, and therefore recommends that the adopted regulations be approved by concurrent resolution of the Congress.

All inquiries regarding this notice should be addressed to Barbara J. Sapin, Executive Director of the Office of Compliance, Room LA–200, 110 2nd Street, SE, Washington, DC 20540;

(202) 724–9250.

Sincerely,

BARBARA L. CAMENS,
Chair of the Board of Directors, Office of Compliance.

FROM THE BOARD OF DIRECTORS OF THE OFFICE OF COMPLIANCE

NOTICE OF ADOPTION OF REGULATIONS AND TRANSMITTAL FOR CONGRESSIONAL APPROVAL

Modifications to the rights and protections under the Family and Medical Leave Act of 1993 (FMLA), Notice of Adoption of Regulations, as required by 2 U.S.C. §1384, Congressional Accountability Act of 1995, as amended (CAA).

Background

The purpose of this Notice is to announce adoption of modifications to the existing legislative branch FMLA substantive regulations under section 202 of the CAA (2 U.S.C. §1302 et seq.), which applies to covered employees the rights and protections of sections 101 through 105 of the FMLA (29 U.S.C. §§2611 through 2615), and such remedies as would be appropriate if awarded under paragraph (1) of section 107(a) of the FMLA (29 U.S.C. §2617(a)(1)). These modifications are necessary in order to bring previously approved existing legislative branch FMLA regulations (approved by Congress April 15, 1996) in line with current Department of Labor (DOL) regulations implementing recent statutory changes to the FMLA, 29 U.S.C. §2601 et seq.

What is the authority under the CAA for these adopted substantive regulations?

Section 202(a) of the CAA provides that the rights and protections established by sections 101 through 105, and remedies under section 107(a)(1) of the FMLA (29 U.S.C. §§2611–2615) shall apply to covered employees.

Section 202(d)(1) and (2) of the CAA require that the Office of Compliance (OOC) Board of Directors (the Board), pursuant to section 1384 of the CAA, issue regulations implementing the rights and protections of the FMLA and that those regulations shall be ''the same as substantive regulations promulgated by the Secretary of Labor to implement the statutory provisions referred to

in subsection (a) [of section 202 of the CAA] except insofar as the Board may determine, for good cause shown . . . that a modification of such regulations would be more effective for the implementation of the rights and protections under this section.'' The modifications to the regulations issued by the Board herein are all on matters for which section 202 of the CAA requires regulations to be issued.

Are there FMLA regulations currently in effect?

Yes. On January 22, 1996, the OOC Board adopted and submitted for publication in the Congressional Record the original FMLA final regulations implementing section 202 of the CAA, which applies certain rights and protections of the FMLA. On April 15, 1996, pursuant to section 304(c) of the CAA, the House and the Senate passed resolutions approving the final regulations. Specifically, the Senate passed S. Res. 242, providing for approval of the final regulations applicable to the Senate and the employees of the Senate; the House passed H. Res. 400 providing for approval of the final regulations applicable to the House and the employees of the House; and the House and the Senate passed S. Con. Res. 51, providing for approval of the final regulations applicable to employing offices and employees other than those offices and employees of the House and the Senate. Once approved by Congress, these regulations would supersede and replace the current substantive Board FMLA regulations from 1996.

What does the FMLA provide?

The FMLA entitles eligible employees of covered employers to take job-protected, unpaid leave, or to substitute appropriate accrued paid leave, for up to a total of 12 workweeks in a 12-month period: for the birth of the employee's son or daughter and to care for the newborn child; for the placement of a son or daughter with the employee for adoption or foster care; to care for the employee's spouse, parent, son, or daughter with a serious health condition; when the employee is unable to work due to the employee's own serious health condition; or for any qualifying exigency arising out of the fact that the employee's spouse, son, daughter, or parent is a military member on covered active duty (''qualifying exigency leave''). An eligible employee may also take up to 26 workweeks of FMLA leave during a ''single 12–month period'' to care for a covered servicemember with a serious injury or illness, when the employee is the spouse, son, daughter, parent, or next of kin of the servicemember.

FMLA leave may be taken in a block or, under certain circumstances, intermittently or on a reduced leave schedule basis. In addition to providing job-protected family and medical leave, employers must also maintain any preexisting group health plan coverage for an employee on FMLA-protected leave under the same conditions that would apply if the employee had not taken leave. 2 U.S.C. §1312(a)(1) (incorporating 29 U.S.C. §2614). Once the leave period is concluded, the employer is required to restore the employee to the same or an equivalent position with equivalent employment benefits, pay, and other terms and conditions of employment. *Id*. Under the FMLA statute, but not applicable to the legislative branch, if an employee believes that his or her FMLA rights have been violated, the employee may file a complaint with the DOL or file a private lawsuit in federal or state court.

Under the CAA, a covered employee of the legislative branch may initiate proceedings with the OOC and may be awarded damages if the employing office has violated the employee's FMLA rights. The employee is entitled to reimbursement for any monetary loss incurred, equitable relief as appropriate, interest, attorneys' fees, expert witness fees, and court costs. Liquidated damages also may be awarded. *See* 29 U.S.C. §2617.

What changes do the proposed amendments make?

First, these regulations add the military leave provisions of the FMLA enacted under the National Defense Authorization Acts (NDAA) for Fiscal Years 2008 and 2010 (Pub.L. 110–181, Div. A, Title V §§585(a)(2), (3)(A)–(D) and Pub.L. 111–84, Div. A, Title V §565(a)(1)(B) and (4), which: extend the availability of FMLA leave to family members of the Regular Armed Forces for qualifying exigencies arising out of a servicemember's deployment; define those deployments covered under these provisions; extend FMLA military caregiver leave for family members of current servicemembers to include an injury or illness that existed prior to service and was aggravated in the line of duty on active duty; and extend FMLA military caregiver leave to family members of certain veterans with serious injuries or illnesses. These regulations also set forth the revised definition of ''spouse'' under the FMLA in light of the DOL's February 25, 2015 Final Rule on the definition of spouse, and the United States Supreme Court's decision in *Obergefell, et al., v. Hodges*, **No. 14–556**, 135 S. Ct. 2584 **(2015)**, which requires a state to license a marriage between two people of the same sex and to recognize a marriage between two people of the same sex when their marriage was lawfully licensed and performed out-of-state.

Why are these changes to the FMLA regulations necessary?

The CAA requires that the FMLA regulations applicable to the legislative branch and promulgated by the Board be the same as substantive regulations issued by the Secretary of Labor, unless good cause is shown that a modification would be more effective for the implementation of the rights and protections under the section. 2 U.S.C. §1312(d)(2).

On March 8, 2013, the DOL issued its Final Rule implementing its amended FMLA regulations (77 FR 8962), which provide for military caregiver leave for a veteran, qualifying exigency leave for parental care, and special leave calculations for flight crew employees. The Board is required pursuant to the CAA to amend its regulations to achieve parity, unless there is good cause shown to deviate from the DOL's regulations.

In addition, the FMLA amendments providing additional rights and protections for servicemembers and their families were enacted into law by the NDAA for Fiscal Years 2008 and 2010. The Congressional committee reports that accompany the NDAA for Fiscal Years 2008 and 2010 and the amended FMLA provisions do not ''describe the manner in which the provision of the bill [relating to terms and conditions of employment] . . . apply to the legislative branch'' or ''include a statement of the reasons the provision does not apply [to the legislative branch]'' (in the case of a provision not applicable to the legislative branch) as required by Section 102(b)(3) of the CAA. 2 U.S.C. §1302(3); House Committee on Armed Services, H. Rpt. 110–146 (May 11, 2007), H. Rpt. 111–166 (June 18, 2009). Consequently, when the FMLA was amended to add these additional rights and protections, it was not clear whether Congress intended that these additional rights and protections apply in the legislative branch.[1]

Several commenters expressed the opinion that when a statutory provision of the FMLA that has generally been incorporated into the CAA is amended, the provision applies as amended unless a provision of the CAA precludes its application. However, there is no clear provision in the CAA that so provides.

To the extent that there may be an ambiguity regarding the applicability to the legislative branch of the 2008 and 2010 FMLA amendments, the Board makes clear through these regulations that the rights and protections for military servicemembers apply in the legislative branch and that protections under the CAA are in line with existing public and private sector protections under the FMLA.[2] Accordingly, the Board recommends that Congress use its rulemaking authority to clarify that the rights and protections for legislative branch servicemembers and their families have been expanded in a manner consistent with the 2008 and 2010 amendments to the FMLA.

What do the military family leave provisions provide?

Section 585(a) of the NDAA for Fiscal Year 2008 amends the FMLA to provide leave to eligible employees of covered employers to care for injured servicemembers and for any qualifying exigency arising out of the fact that a covered family member is on active duty or has been notified of an impending call to active duty status in support of a contingency operation (collectively referred to herein as ''military family leave''). The provisions of this amendment providing FMLA leave to care for a covered servicemember became effective when the law was enacted on January 28, 2008. The provisions of this amendment providing for FMLA leave due to a qualifying exigency arising out of a covered family member's active duty (or call to active duty) status were effective on January 16, 2009.

Section 565(a) of the NDAA for Fiscal Year 2010, enacted on October 28, 2009, amends the military family leave provisions of the FMLA. Pub. Law 111–84. The Fiscal Year 2010 NDAA expands the availability of qualifying exigency leave and military caregiver leave. Qualifying exigency leave, which was made available to family members of the National Guard and Reserve components under the Fiscal Year 2008 NDAA, is expanded to include family members of the Regular Armed Forces. The entitlement to qualifying exigency leave is expanded by substituting the term ''covered active duty'' for ''active duty'' and defining covered active duty for a member of the Regular Armed Forces as ''duty during the deployment of the member with the Armed Forces to a foreign country'' and for a member of the Reserve components of the Armed Forces as ''duty during the deployment of the member with the Armed Forces to a foreign country under a call or order to active duty under a provision of law

[1] In contrast, the committee report accompanying the bill containing the ADA Amendments Act of 2008 complied with section 102(b)(3) of the CAA and contained a provision that indicated an intent to apply the ADA Amendments to the legislative branch. Committee on Education and Labor, H. Rpt. 110–730 §VII (June 23, 2008).

[2] An approved regulation can require employing offices to provide the additional rights and protections for servicemembers and their families added to the FMLA since 1996. This is because, unlike executive branch agencies, the rulemaking power of the Board (after Congressional approval) is ''an exercise of the rulemaking power of the House of Representatives and the Senate'' under the Constitution. 2 U.S.C. §1431(1). The rulemaking power of Congress under the Constitution, U.S. Const. Art. 1, §5, cl. 2, is a ''broad grant of authority'' that allows each house of Congress to determine its own internal rules bounded only by ''constitutional restraints and fundamental rights.'' *Consumers Union of U.S., Inc. v. Periodical Correspondents' Ass'n*, 515 F.2d 1341, 1343 (D.C. Cir. 1975); *United States v. Ballin*, 144 U.S. 1,5 (1892).

referred to in section 101(a)(13)(B) of title 10, United States Code.'' 29 U.S.C. §2611(14). Prior to the Fiscal Year 2010 NDAA amendments, there was no requirement that members of the National Guard and Reserves be deployed to a foreign country.

The Fiscal Year 2010 NDAA amendments expand the definition of a ''serious injury or illness'' for military caregiver leave for current members of the Armed Forces to include an injury or illness that existed prior to service and was aggravated in the line of duty on active duty. 29 U.S.C. §2611(18)(A). These amendments also expand the military caregiver leave provisions of the FMLA to allow family members to take military caregiver leave to care for certain veterans. The definition of a ''covered servicemember,'' which is the term the Act uses to indicate the group of military members for whom military caregiver leave may be taken, is broadened to include a veteran with a serious injury or illness who is receiving medical treatment, recuperation, or therapy, if the veteran was a member of the Armed Forces at any time during the period of five years preceding the date of the medical treatment, recuperation, or therapy. 29 U.S.C. §2611(15)(B). The amendments define a serious injury or illness for a veteran as a ''qualifying (as defined by the Secretary of Labor) injury or illness that was incurred by the member in the line of duty on active duty in the Armed Forces (or existed before the beginning of the member's active duty and was aggravated by service in the line of duty on active duty in the Armed Forces) and that manifested itself before or after the member became a veteran.'' 29 U.S.C. §2611(18)(B).

What is the effect of amending the definition of "spouse"?

In its Notice of Proposed Rulemaking, the Board modified its definition of spouse and invited comment regarding whether it should adopt the DOL's current definition of spouse or revise the definition of spouse with its newly drafted definition.

All commenters suggested the Board adopt the DOL definition of ''spouse'' as announced in the DOL's Final Rule for 29 C.F.R. §825 dated February 25, 2015 (one suggesting it be only slightly modified to include a reference to *federal law*), because the Supreme Court's decision in *Obergefell v. Hodges* does not invalidate the DOL's definition of spouse, and the Board has not shown good cause to modify the DOL's definition. *See* 2 U.S.C. §1312(d)(2).

The Board has determined that no good cause has been shown to modify the definition of spouse found in the DOL's current regulations and, therefore, adopts the DOL definition.

Minor editorial changes have been made to sections 825.120, 825.121, 825.122, 825.127, 825.201 and 825.202 to make gender neutral references to husbands and wives, and mothers and fathers where appropriate so that they apply equally to opposite-sex and same-sex spouses. The Board uses the terms ''spouses'' and ''parents,'' as appropriate, in these regulations. These editorial changes do not change the availability of FMLA leave, but simply clarify its availability for all eligible employees who are legally married.

Procedural Summary

How are substantive regulations proposed and approved under the CAA?

Pursuant to section 304 of the CAA, 2 U.S.C. §1384, the procedure for proposing and approving substantive regulations provides that:

(1) the Board of Directors proposes substantive regulations and publishes a general notice of proposed rulemaking in the Congressional Record;

(2) there be a comment period of at least 30 days after the date of publication of the general notice of proposed rulemaking;

(3) after consideration of comments by the Board of Directors, the Board adopts regulations and transmits notice of such action (together with the regulations and a recommendation regarding the method for Congressional approval of the regulations) to the Speaker of the House and President Pro Tempore of the Senate for publication in the Congressional Record;

(4) the adopted regulations are referred to committees for action by resolution in each chamber by concurrent resolution, or by joint resolution; and

(5) approved regulations are then published in the Congressional Record, with an effective date.

This Notice of Adoption of Regulations is step (3) of the outline set forth above. For more detail, please reference the text of 2 U.S.C. §1384.

What is the approach taken by these adopted substantive regulations?

The Board will follow the procedures as enumerated above and as required by statute. The Board has reviewed and responded to the comments received under step (2) of the outline above, and made changes where necessary to ensure that the adopted regulations fully implement section 202 of the CAA, and reflect the practices and policies particular to the legislative branch.

Are there substantive differences in the adopted regulations for the House of Representatives, the Senate, and other employing offices?

No. The Board of Directors has adopted one set of regulations for all employing offices. The House suggested that separate regulations be adopted by the Board because of its ''unique administrative structures.'' For the reasons stated in this Notice, the Board finds no reason to vary the text of the regulations. Therefore, if these regulations are approved as adopted, there will be one text applicable to all employing offices and covered employees. *See* 2 U.S.C. §1331(e)(2).

Are these adopted regulations also recommended by the Office of Compliance's Executive Director, the Deputy Executive Director for the Senate, and the Deputy Executive Director for the House of Representatives?

Yes. As required by section 304(b)(1) of the CAA, 2 U.S.C. §1384(b)(1), the substance of these regulations is also recommended by the Executive Director, the Deputy Executive Director for the Senate, and the Deputy Executive Director for the House of Representatives.

What are the next steps in the process of promulgation of these regulations?

Pursuant to section 304(b)(4) of the CAA, 2 U.S.C. 1384(b)(4), the Board of Directors is required to recommend to Congress a method of approval for these regulations. As the Board has adopted the same regulations for the Senate, the House of Representatives, and the other covered entities and facilities, it therefore recommends that the adopted regulations be approved by concurrent resolution of the Congress.

Are these adopted substantive regulations available to persons with disabilities in an alternate format?

Yes. This Notice of Adopted Regulations and the substantive regulations are available on the OOC's web site, www.compliance.gov, which is compliant with section 508 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. §794(d). This Notice can also be made available in large print or Braille. Requests for this Notice in an alternative format should be made to: Alexandria Sabatini, Administrative Assistant, Office of Compliance, 110 2nd Street, S.E., Room LA–200, Washington, D.C. 20540; 202–724–9250; FAX: 202–426–1913.

Am I allowed to view copies of comments submitted by others?

Yes. Copies of submitted comments are available for review on the OOC's web site at www.compliance.gov, and at the Office of Compliance, 110 Second Street, S.E., Washington, D.C. 20540–1999, on Monday through Friday (non-federal holidays) between the hours of 9:30 a.m. and 4:30 p.m.

Summary

The Congressional Accountability Act of 1995 (CAA), PL 104–1, was enacted into law on January 23, 1995. The CAA, as amended, applies the rights and protections of thirteen federal labor and employment statutes to covered employees and employing offices within the legislative branch of the federal government. Section 202 of the CAA applies to employees covered by the CAA, the rights and protections established by sections 101 through 105 of the Family and Medical Leave Act of 1993 (FMLA), 29 U.S.C. §§2611—2615. The above provisions of section 202 became effective on January 1, 1997. 2 U.S.C. §1312.

The Board of Directors of the Office of Compliance is now publishing its adopted amended regulations to implement section 202 of the CAA, 2 U.S.C. §§1301–1438, as applied to covered employees of the House of Representatives, the Senate, and certain Congressional instrumentalities listed below.

The purpose of these amended regulations is to implement section 202 of the CAA. In this Notice of Adoption of Regulations, the Board adopts identical regulations for the Senate, the House of Representatives, and the seven Congressional instrumentalities. Accordingly:

(1) *Senate.* The amended regulations adopted in this Notice shall apply to entities within the Senate, as recommended by the OOC's Deputy Executive Director for the Senate.

(2) *House of Representatives.* The amended regulations adopted in this Notice shall apply to entities within the House of Representatives, as recommended by the OOC's Deputy Executive Director for the House of Representatives.

(3) *Certain Congressional instrumentalities.* The amended regulations in this Notice shall apply to the Office of Congressional Accessibility Services, the United States Capitol Police, the Congressional Budget Office, the Office of the Architect of the Capitol, the Office of the Attending Physician, the Office of Compliance, and the Office of Technology Assessment; as recommended by the OOC's Executive Director.

Section-by-Section Discussion of Adopted Changes to the FMLA Regulations

The following is a section-by-section discussion of the adopted regulations. Where a change is made to a regulatory section, that section is discussed below. However, as the DOL has significantly reorganized its FMLA regulations, which the Board's adopted regulations mirror, many of the sections are moved into other areas of the subpart. The Board as a result will use the adopted section and numbers to provide explanation and analysis of changes. In addition, even if a section is not discussed, there may be minor editorial changes or corrections that do not warrant discussion.

In addition, several sections have been restructured and reorganized to improve the accessibility of the information (*e.g.*, guidance on leave for pregnancy and birth of a child is addressed in one consolidated section; an employing office's notice obligations are combined in one section).

Some commenters suggested that the Board modify the regulations where a commenter believed that clarification was needed to resolve potential ambiguities in the DOL regulation. However, the Board has long held that it will not opine on interpretive ambiguities in the regulations—outside of the adjudicatory context of individual cases. The Board's rulemaking authority under the CAA is restricted to circumstances where there is ''good cause'' to depart from the Secretary of Labor's substantive regulations. Further, the Board's adjudicatory function would be undermined if it prejudged ambiguous or disputed interpretive matters. Therefore, the Board does not find ''good cause'' to modify a regulation where the request is based on an ostensible need for clarification.

Section by Section Discussion and Board Consideration of Comments

SUBPART A—COVERAGE UNDER THE FAMILY AND MEDICAL LEAVE ACT, AS MADE APPLICABLE BY THE CAA

To clarify that the CAA and not the FMLA applies directly to employing offices, the Board has added ''as made applicable by the CAA'' to the section title at the suggestion of one commenter.

A commenter suggested that the Board clarify that these regulations supersede and replace the Board's substantive regulations currently applicable to the covered legislative branch entities. To resolve any uncertainty, if approved by Congress, these regulations would necessarily supersede and replace the current substantive Board FMLA regulations.

Section 825.100 The Family and Medical Leave Act.

825.100(a)

This section allows eligible employees to take FMLA leave for reasons including a qualifying exigency '' . . . arising out of the fact that the employee's spouse, son, daughter, or parent . . . is on call to active duty status.'' One commenter requested the Board add an ''*ed*'' to the word ''call'' for clarity—so that the phrase would read: '' . . . arising out of the fact that the employee's spouse, son, daughter, or parent is a military member on active duty or call*ed* to covered active duty status . . . '' The Board finds that the ''call to covered active duty status'' is a status term appearing in the DOL's regulations, and finds no good cause to modify DOL's terminology.

825.100(b)

In the proposed regulations, the Board italicized a reference to the House of Representatives. A commenter suggested making consistent the House and instrumentalities' versions of these regulations with the Senate version. Because there is only one version of these regulations, the italicized and parenthetical language that references separate entities has been deleted from these adopted regulations.

Section 825.102 Definitions.

The Board finds good cause to depart from the DOL regulations with respect to some definitions. As discussed above, the Board clarifies that the CAA and not the ADA applies directly to employing offices by adding ''as made applicable by the CAA'' to the definition of ADA.

In addition, the term ''Act'' as defined in the DOL regulations and referred to in the FMLA can be confused with the Congressional Accountability Act (CAA). Accordingly, the definition of ''Act'' is excluded from the Board's regulations. To avoid any confusion, the definition for ''Administrator'' in the DOL regulations has been deleted. Similarly, as there is no airline flight crew covered under the CAA, the definition of and all references to ''airline flight crew employee'' has been deleted in the Board's regulations.

Because the DOL definitions of ''commerce and industry or activity affecting commerce'' and ''applicable monthly guarantee'' involve concepts that do not apply to employing offices covered by the CAA, the Board finds good cause to exclude these definitions from the regulations.

One commenter suggested, as a general observation, that several definitions conflict with the statutory definitions of the FMLA (29 U.S.C. §2611) and the CAA (2 U.S.C. §1312). The Board responds to the comment by addressing the definitions as they appear in the provisions.

''Covered active duty or call to covered active duty status''

One commenter suggested that the regulatory definition improperly expands the coverage of ''Covered active duty'' and suggested the Board seek a statutory correction to 2 U.S.C. §2611 or 2 U.S.C. §1312 if an expanded definition is intended. The Board finds that its regulation is consistent with DOL's regulation which was intended to expand such coverage under the FMLA in line with the military leave provisions of the FMLA enacted under the National Defense Authorization Acts (NDAA), and therefore does not find good cause to modify its regulation.

''Covered employee''

One commenter suggested that the definition of ''Covered employee'' does not need to be included in these regulations because that term is defined in 2 U.S.C. §1302(3)–(10) of the CAA. The Board finds no good cause to modify the regulation, and includes the definition of ''Covered employee'' in its regulations.

''Covered servicemember''

One commenter stated that the regulatory definition is inconsistent with the definition in 2[sic] U.S.C. §2611 (15), and suggested deleting the definition. The Board finds that the proposed definition of ''Covered servicemember'' is consistent with the DOL's regulation and that no good cause has been shown to modify the DOL's regulation.

''Covered veteran''

One commenter claimed that the regulatory definition is inconsistent with the statutory definition in 2[sic] U.S.C. §2611 (15) and (19), and suggested deletion. The Board finds that the definition of ''Covered veteran'' is consistent with the DOL's regulation and that no good cause to modify the DOL's regulation has been shown.

''Eligible employee''

A commenter noted that the definition of ''Eligible employee'' in the Board's regulations is different than the statutory definition of ''Eligible employee'' under section 202(a)(2)(B), but made no recommendation. Because the DOL's definition of ''Eligible employee'' (paragraphs ii(3)(4)(5)(6)(7) in section 825.102) is not consistent with the definition of ''Eligible employee'' in CAA section 202(a)(2)(B), the Board finds good cause to keep the definition of ''Eligible employee'' that is used in the current version of the OOC FMLA regulations and to delete the definition as it appears in the DOL regulation.

''Employee''

One commenter suggested that this definition need not be included in the FMLA regulations because it is already covered in 2 U.S.C. §1301 of the CAA. The Board finds that no good cause has been provided to modify the regulation, and includes the definition of ''Employee'' in its regulations.

''Employee employed in an instructional capacity''

One commenter suggested that reference to teachers should be deleted from the regulations because the commenter does not currently employ teachers. The Board finds that this section may be relevant to other employing offices now or in the future, and therefore finds no good cause to delete the definition.

''Employee of the House of Representatives''

One commenter suggested correcting the definition of ''Employee of the House of Representatives'' to state that it does not include any individual employed in subparagraphs 2–9 in the definition of covered employee above. The Board is following the language of the statute (*see* 2 U.S.C §1301(7)) and finds no good cause to modify this provision.

''Employee of the Senate''

One commenter suggested that the definition of ''Employee of the Senate'' should be corrected to include ''but not any individual employed by any entity listed in subparagraphs 1, or 3–9. The Board is following the language of the statute (*see* 2 U.S.C §1301(8)) and finds no good cause to modify this provision.

''Employing office''

One commenter suggested that the definition of ''Employing office'' does not need to be included in these regulations because this definition is already covered in 2 U.S.C. §1301 of the CAA. The Board finds good cause to keep the definition—modified to the extent that it reflects the unique definition of ''Employing office'' under the CAA.

''Employment benefits''

One commenter suggested deleting this regulatory definition because it is similar but not the same as the statutory definition found in 2[sic] U.S.C. §2611(5). The Board finds that the definition of ''Employment benefits'' is consistent with the DOL's regulation, and that no good cause has been shown to modify the DOL's regulation.

''FLSA'' means the Fair Labor Standards Act (29 U.S.C. §201 *et seq.*), as made applicable by the Congressional Accountability Act. To clarify that the CAA and not the FLSA applies directly to employing offices, the Board has added ''as made applicable by the CAA'' to the section title, at the suggestion of a commenter.

''FMLA'' means the Family and Medical Leave Act of 1993, Public Law 103–3 (February 5, 1993), 107 Stat. 6 (29 U.S.C. §2601 *et seq.*, as amended), as made applicable by the Congressional Accountability Act. To clarify that the CAA and not the FMLA applies directly to employing offices, the Board has added ''as made applicable by the CAA'' to the section title, at the suggestion of a commenter.

''Health care provider''

In the paragraphs defining ''Health care provider,'' to avoid confusion, the Board is substituting ''the Secretary'' with ''the Department of Labor.'' Thus, the Board's FMLA regulations define ''Health care provider'' as ''any other person determined by the Department of Labor to be capable of providing health care services.''

One commenter suggested that in the definition ''any other person . . . capable of providing healthcare services . . .'' is overly broad. The Board's definition of ''Health care provider'' is consistent with the DOL's regulation and good cause has not been shown to modify the DOL's regulation.

''Outpatient status''

One commenter claimed the definition of ''Outpatient status'' is different than the statutory definition in 29 U.S.C. §2611(16) and suggested that the Board use the statutory definition. The Board finds that the definition of ''Outpatient status'' in its regulations is consistent with the DOL's regulations and that no good cause has been shown to modify the DOL's regulations.

''Physical or mental disability''

Under the paragraph defining ''physical or mental disability,'' the Board has replaced

the language from the DOL regulations indicating that 29 CFR part 1630, issued by the Equal Employment Opportunity Commission under the Americans with Disabilities Act (ADA), 42 U.S.C. §12101 *et seq.*, as amended, ''*defines*'' these terms, and states instead that regulations issued by the EEOC ''*provide guidance to*'' these terms.'' (Italics added).

Because the terms ''Person'' and ''Public agency'' are not applicable to employing offices covered by the CAA, the Board has also found good cause to exclude these DOL definitions from its proposed regulations.

''Spouse''

The Board had proposed to adopt the following definition of ''Spouse'' that is not the same as the DOL definition:

Spouse means a husband or wife. For purposes of this definition, husband or wife refers to all individuals in lawfully recognized marriages. This definition includes an individual in a same-sex marriage. This definition also includes an individual in a common law marriage that either: (1) was entered into in a State that recognizes such marriages or, (2) if entered into outside of any State, is valid in the place where entered into and could have been entered into in at least one State.

Commenters suggested that the Board adopt the DOL's definition of spouse noting that the Supreme Court's decision in *Obergefell* v. *Hodges*, does not invalidate the DOL's definition. In addition, one commenter suggested that the Board's proposed definition is inconsistent with the statutory definition (''spouse'' means a husband or wife, as the case may be) and the DOL's regulations. Another commenter suggested that the Board's proposed definition does not include a requirement that a valid marriage between participants of any sex is defined by reference to state law. Finding that no good cause has been shown to modify the current definition of spouse found in the DOL's regulations, the Board adopts the DOL definition.

Section 825.104 Covered employing offices.

Three commenters suggested that section 825.104(c) should be deleted because the integrated employer concept does not apply in the context of the CAA. Under the integrated employer test, separate entities of a private sector employer will be regarded as a single employer based on an evaluation of such factors as common management, interrelation between operations, centralized control of labor relations, and degree of common ownership/financial control. *See* 29 C.F.R. §825.104(c)(2). If the integrated employer test is met, all entities in question will be considered one employer, for purposes of counting employees. Under the FMLA, private sector employees engaged in commerce or an industry affecting commerce are covered if 50 or more employees are employed in at least 20 or more calendar workweeks. Under the CAA, however, there is no such numerosity requirement; the CAA covers all employing offices regardless of the number of employees. The integrated employer concept therefore is inapplicable. Based on the foregoing, the Board agrees that the integrated employer concept does not currently apply to the legislative branch covered employing offices and has deleted section 825.104(c) from its adopted regulations.

Section 825.106 Joint employer coverage.

As joint employment relationships are treated differently under the CAA than by the DOL, the Board finds good cause to keep the language in the current OOC regulations in paragraphs (b) through (e) of this section. Also, as it is not applicable under the CAA, the Board finds good cause to exclude from its definitions language relating to Professional Employer Organizations (PEOs) as joint employers. As the DOL has noted, PEOs contract with private small businesses to provide services that large businesses can afford, but that small businesses cannot afford, such as compliance with government standards, employer liability management, retirement benefits, and other employment benefits. Congress already provides these services for its employees.

Section 825.110 Eligible employees.

This section defines who may be eligible for FMLA leave. One commenter suggested that the provision is inconsistent with the statutory definition of ''Eligible employee'' under the CAA, and is thus ultra vires and should not be adopted. The Board finds that this provision is not inconsistent with the definition of ''Eligible employee'' under the CAA, and that it is in line with the expanded coverage under the FMLA, as applied by the CAA.

825.110(a)(1)

This section provides that ''An eligible employee is an employee of a covered employing office who: (1) Has been employed by any employing office for at least 12 months . . . '' One commenter stated that this section expands the definition of eligible employee found in section 825.102, and suggested that the language in section 825.110(a) be revised to read ''An eligible employee is a *covered employee* of an employing office who . . . '' (Italics added). The Board has made the language in the definition of eligible employee in section 825.110(a) consistent with the definition in section 825.102 and the CAA because the statute uses the terms ''Covered employee'' and ''Employing office.''

825.110(a)(3) and (e)

The Board finds good cause to exclude from its regulations the following language from the DOL regulations because it is not applicable to the CAA:

''(3) Is employed at a worksite where 50 or more employees are employed by the employer within 75 miles of that worksite. (See section 825.105(b) regarding employees who work outside the U.S.) ''

Similarly, the Board finds good cause to exclude from these regulations the following paragraph:

''(e) Whether 50 employees are employed within 75 miles to ascertain an employee's eligibility for FMLA benefits is determined when the employee gives notice of the need for leave. Whether the leave is to be taken at one time or on an intermittent or reduced leave schedule basis, once an employee is determined eligible in response to that notice of the need for leave, the employee's eligibility is not affected by any subsequent change in the number of employees employed at or within 75 miles of the employee's worksite, for that specific notice of the need for leave. Similarly, an employer may not terminate employee leave that has already started if the employee-count drops below 50. For example, if an employer employs 60 employees in August, but expects that the number of employees will drop to 40 in December, the employer must grant FMLA benefits to an otherwise eligible employee who gives notice of the need for leave in August.''

825.110(b)(1)–(2)

The Board has determined that the use of the term ''any employing office'' clarifies that work in more than one employing office may be aggregated to determine eligibility.

825.110(c)(1)

Regarding the aggregation of hours where an employee works for more than one employing office, the Board proposed:

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

Several commenters suggested that because section 825.110(c)(1) allows employees to aggregate their hours of work from sequential employing offices to meet the hours or months of service requirements to be eligible for FMLA leave, the Board must clarify that FMLA leave taken by an employee at a former employing office may count against FMLA leave entitlement at another employing office in the 12 month period. Section 825.208(f) of the OOC's 1996 regulations made it clear that a subsequent employing office may count FMLA leave taken with a prior employing office against a covered employee's current FMLA entitlement. As a general rule, the legislative branch allows for the aggregation of time whereas the private sector and the executive branch do not. One commenter suggested that the Board incorporate a paragraph (e) in this section that would read:

''(e) If, before beginning employment with an employing office, an employee had been employed by another employing office, the subsequent employing office may count against the employee's FMLA leave entitlement FMLA leave taken from the prior employing office.''

The Board finds good cause to add language clarifying that FMLA leave taken by an employee may count against FMLA leave entitlement at another employing office, see section 825.110(e).

825.110(c)(3)

One commenter mentioned that the second sentence of this section references ''a *person* reemployed following USERRA-covered service . . .'' (Italics added) and suggested changing the term ''person'' to ''covered employee.'' The Board has determined that language in this section is consistent with DOL regulations, and there is no good cause shown to modify the DOL regulations.

825.110(c)(4)

A commenter suggested that a parenthetical reference to the FLSA regulations should reference the OOC substantive regulations, rather than the DOL citation (i.e., OOC Regulations §§H541.1–H541.3). In addition, the commenter suggested that because the definition of ''teacher'' does not apply to any House entity, the Board should either simplify the clarifying ''example'' contained in this paragraph (e.g., removing the reference to the definition of teacher), or find another example that would be relevant to House employing offices. The Board has amended the proposed language to clarify that the FLSA is made applicable to the legislative branch by the CAA and its substantive regulations, but finds no reason to deviate from the example provided in the DOL regulation regarding this provision.

825.110(d)

One commenter suggested that the term ''worked'' is not defined, and suggests including ''met the hours or service requirement.'' The Board agrees that the term ''worked'' is not consistent with the DOL provision and has substituted the phrase ''meets the hours of service requirement'' in the section, as provided in the DOL regulations.

Section 825.112 Qualifying reasons for leave, general rule.

825.112(a)(5)

One commenter stated that the DOL limits ''qualifying exigency'' as determined by regulation of the Secretary (see 29 U.S.C. §2612(a)(1)(e)), and that the Board's proposed regulations do not place any such limitations. The commenter suggested that the Board define what is meant by any ''qualifying exigency.'' The Board has determined that no good cause has been shown to modify the DOL regulation.

Two commenters suggested adding ''duty'' in between ''covered active'' and ''status'' as

shown above in section 825.112(a)(5). The Board has made the suggested change.

Section 825.114 Inpatient Care.

One commenter noted that ''any period of incapacity'' is defined as an ''inability to work'' but doesn't require medical verification. The commenter suggested adding after ''period of incapacity as defined in section 825.113(b) ''as verified by a medical certification in accordance with section 825.305'' to clarify. The Board finds no good cause to add the suggested language to the provision.

Section 825.115 Continuing Treatment.

825.115(a)(5)

The Board proposed to adopt unchanged the DOL's definitions of ''serious health condition'' and ''incapacity plus treatment.'' One commenter suggested that these definitions as written, while intending to exempt minor ailments from FMLA coverage as legislative history would require, could be argued to cover a three day absence from work combined with a visit to a doctor and round of antibiotics, or an otherwise minor ailment in contravention of the FMLA's intended coverage. The commenter requested that the Board increase the days of incapacity from three to five and further require two visits to a healthcare provider within 30 days of the incapacity to demonstrate ''continuing treatment,'' as opposed to also allowing one visit to a doctor coupled with ''a regimen of continuing treatment.'' (*See* §825.115) The commenter believed there to be good cause to change the DOL definitions because legislative branch offices offer generous paid time off and sick leave policies that would more appropriately cover the minor and non-chronic ailments that Congress recognized as outside the statutory protections of the FMLA. The Board finds that no good cause has been shown to deviate from the DOL definitions of ''serious health condition'' or ''incapacity plus treatment.''

Section 825.120 Leave for pregnancy or birth.

References in the DOL's regulations to state law in this section and other sections throughout the DOL's regulations have not been adopted by the Board because state law does not apply to the legislative branch.

Further, in this section and other sections throughout the DOL regulations, any references to spouses who are employed at two different worksites of an employer located more than 75 miles from each other have not been adopted by the Board because such scenarios are not applicable to the legislative branch.

Two commenters suggested deleting the following sentence from section 825.120(a)(3): ''Note, too, that many state pregnancy disability laws specify a period of disability either before or after the birth of a child; such periods would also be considered FMLA leave for a serious health condition of the birth mother, and would not be subject to the combined limit'' because state law does not apply to the legislative branch. Indeed, the commenter notes that the Board, in its preamble to the proposed regulations, agreed that the section should be deleted. If the reasoning for discussing ''state pregnancy disability laws'' is to underscore the point that the birth mother may suffer pre/post-birth medical complications that would not be subject to the combined limitation of FMLA leave for spouses, the language earlier in this section, as well as in the following section, (a)(4), clarifies that the serious health condition of the birth mother, either before or after the birth, would independently qualify for FMLA leave. Finally, removal of this language is consistent with the removal of similar references to state law in section 825.121(a)(2) (removing the DOL language that instructs the reader to ''*See* section 825.701 regarding non-FMLA leave which may be available under applicable State laws''). The Board finds good cause to delete this reference to state law, and has deleted the last sentence of section 825.120(a)(3) from its adopted regulations.

Section 825.121(b) Use of Intermittent and reduced schedule leave.

One commenter suggested that the reference to section 825.601 at the conclusion of this section regarding ''special rules applicable to instructional employees of schools'' is not applicable to House employing offices, and suggested deleting this language. The Board contemplates that if not currently applicable, the term may become applicable to an employing office, and finds that good cause to delete this language from its regulations has not been shown.

Section 825.122(b) Covered servicemember spouse.

Commenters noted that the definition of ''spouse'' contained in the proposed regulation deviates from the corresponding DOL regulation, and the Board has not shown good cause for such deviation. As noted previously, the Board hereby adopts DOL's current definition of spouse.

Section 825.122(d)(2) Physical or mental disability.

One commenter suggested replacing ''define these terms'' in section 825.122(d)(2) with ''provide guidance for these terms.'' As a basis, the commenter noted that the EEOC's ADA regulations do not define terms related to physical or mental disabilities but merely provide guidance in interpreting those terms. *See* 161 Cong. Rec. S6707. The Board finds good cause to deviate from DOL's language with regard to this provision, and replaces ''define these terms'' with ''provide guidance for these terms.''

Section 825.125(a)(2)–(3)

One commenter said that ''any other person'' is overly broad and expands the statutory definition in 2[sic] U.S.C. §2611(6), and suggested that the Board use the statutory definition with a clarification. The Board finds that its regulation mirrors the DOL's definition, and that no good cause to modify the regulation has been shown.

SUBPART B—EMPLOYEE LEAVE ENTITLEMENTS UNDER THE FAMILY AND MEDICAL LEAVE ACT

Section 825.200 Amount of Leave.

825.200(a)(5)

One commenter suggested adding ''covered'' between ''order to'' and ''active duty'' in section 825.200(a)(5). The Board has made the suggested change.

825.200(h)

One commenter suggested that since the House no longer has a school, the example of a school closing two weeks for the Christmas/New Year Holiday or for a summer vacation is not helpful when discussing temporary cessation of business activities. The Board finds that no good cause has been shown to modify the DOL regulation.

Section 825.202 Intermittent leave or reduced leave schedule.

825.202(b)

One commenter requested additional guidance regarding the use of intermittent leave claiming the terms ''medical necessity'' and ''to provide care or psychological comfort to a covered family member with a serious health condition'' are too vague. As noted previously, the Board declines to modify DOL's regulations to resolve potential ambiguities.

825.202(d)

One commenter suggested that ''qualifying exigency'' be specifically defined (as discussed in section 825.112 above). The Board has determined that no good cause has been shown to modify the DOL regulation, and the Board will not modify DOL's regulations to resolve potential ambiguities.

Section 825.203 Scheduling of intermittent or reduced schedule leave.

825.203

One commenter suggested that section 825.203 addresses only situations where intermittent leave is ''medically necessary'' or ''because of a qualifying exigency'' and does not address the circumstances outlined in section 825.202. Further, the commenter suggests that the proposed regulation be rewritten to address each circumstance proposed in section 825.202, and to provide ''objective specific notice requirements an employee must provide to an employing office.'' The commenter also suggested that section 825.203 be rewritten to consider each of the factors enumerated in proposed regulation section 825.303, particularly section 303(c) ''Complying with Employing Office Policies,'' or minimally, that section 825.203 should have a 24 hour notice period requirement, absent exceptional circumstances, to ''avoid situations where an employee attempts to use intermittent leave to avoid working additional duty—placing supervisors in the position of questioning the need for leave and staffing the post.'' The Board has determined that no good cause has been shown to modify the current DOL regulation.

Section 825.205 Increments of FMLA leave for intermittent or reduced schedule leave.

825.205(a)(2)

One commenter suggested that the examples given that include reference to a flight attendant or a railroad conductor scheduled to work aboard an airplane or train, or a laboratory employee are not useful because there is no equivalent position available in the House of Representatives. The commenter suggested using examples that would occur in the House workplace. Also, given the statement in the definitions section of the Preamble that all references to ''airline flight crew employee'' have been deleted, the reference to ''flight attendant'' should be deleted because of the similarity between these descriptions. The examples given are for illustrative purposes only. The Board has determined that no good cause has been shown to modify the current DOL regulation.

Section 825.206 Interaction with the FLSA, as made applicable by the CAA.

Although the DOL amended its FMLA regulations to add computer employees to the list of exempt employees who do not lose their FLSA exempt status despite being provided unpaid FMLA leave, the Board finds good cause not to include ''computer employees'' to the list of employees who may qualify as exempt from the overtime and minimum wage requirements of the FLSA. The Board's September 29, 2004 Proposed Regulations implementing exemptions from the overtime pay requirements under the Fair Labor Standards Act of 1938 (FLSA) were never enacted into law, and so the existing OOC FLSA regulations do not include exemptions for computer employees. Therefore, the OOC's adopted FMLA regulations do not include these employees in this section.

One commenter suggested that the Board reference OOC's FLSA regulations concerning ''employees exempt under a salary and duties test'' rather than mention each category of employee subject to the exemption and specifically exclude computer employees. The Board has determined that there is good cause to modify the provision to exclude reference to DOL's specific categories of exemption because that reference

conflicts with the Board's 1996 FLSA regulations.

825.206(c)

One commenter suggested that the Board delete ''such as leave in excess of 12 weeks in a year'' after ''for leave which is more generous than provided by the FMLA, as made applicable by the CAA.'' The Board has made the requested change making the Board's regulation the same as the current DOL regulation.

Two commenters suggested that this section refers to ''. . . leave to care for a grandparent or for a medical condition which does not qualify as a serious health condition,'' but the language of the corresponding DOL regulation reads ''. . . leave to care for a grandparent or for a medical condition which does not qualify as a serious health condition *or serious injury or illness*'' (emphasis supplied). The commenters suggested that it is unclear why there is a variation between the language of the DOL regulations and the proposed amendments to the Board's regulations. One commenter noted that the April 19, 1996 FMLA regulations issued by the Board also inexplicably contain this variation in the language from the DOL regulations. Further, the broader description as stated in the DOL regulations more fully captures the scope of the definition of a ''serious health condition.'' The commenters suggested that the Board revise the language in this section to make it consistent with the DOL regulations. The Board has made the suggested change making the Board's regulation the same as the current DOL regulation.

Further, any references in this section and other sections throughout the DOL regulations which place limitations on an employee who works for an employing office with fewer than 50 employees have not been adopted by the Board because such limitations do not apply to the legislative branch. *See* 825.111.

Section 825.207 Substitution of paid leave.

825.207(a)

A commenter suggested that the phrase ''will remain entitled to all paid leave which is earned or accrued'' in section 825.207(b) is not clear when an employee takes unpaid leave. The commenter noted that many employing offices' policies do not permit paid leave to be earned or accrued when an employee takes unpaid leave, and suggested that the following language be added to section 825.207(a): ''If neither the employee nor the employing office elects to substitute paid leave for unpaid FMLA leave under the above conditions and circumstances, the employee will accrue leave in accordance with the employing offices[sic] stated policies.'' Section 825.207(a) and (b) reference the requirements of an employer's leave plan, and the Board finds no good cause to modify the regulation.

825.207(f)

Under the FLSA, an employing office always has the right to cash out an employee's FLSA compensatory time or to require the employee to use the time. Therefore, if an employee requests and is permitted to use accrued FLSA compensatory time to receive pay for time taken off for an FMLA reason, or if the employing office requires such use pursuant to the FLSA, the time taken may be counted against the employee's FMLA leave entitlement.

The Board sought comments from interested parties as to whether such a provision is appropriate for the legislative branch.

One commenter suggested that the proposed language is appropriate given the fact that there is no reason to treat compensatory time differently than paid annual or sick leave for purposes of substituting that time for unpaid FMLA leave.

One commenter suggested substituting ''as applied by §1313 of the Congressional Accountability Act'' for ''as made applicable by the CAA'' in section 825.207(f). The Board has determined that the current language sufficiently underscores the fact that the CAA, and not the FLSA, applies to employing offices.

A commenter suggested that under the proposed regulation, the payment of compensatory time is not clear because some employing offices provide compensatory time that is not covered/authorized under the FLSA, and suggested the regulation state ''FLSA'' prior to each reference to FLSA compensatory time. The commenter is correct that in some cases employing offices may grant ''time off awards'' or other nonmonetary entitlements to time away from the workplace that do not accrue under the FLSA. However, these grants of time do not necessarily entitle employees to pay, and may not be ''cashed out'' for wages as this section instructs. The section specifically covers an employee's use of accrued compensatory time that was earned in lieu of overtime pay ''under the FLSA,'' and the Board finds no good cause to modify the provision.

Section 825.209 Maintenance of employee benefits.

The Board has changed what it believes to be a typographical error in the DOL regulations and cross references this section with section 825.102 and not section 825.800 when referring to the definition of ''group health plan.''

Section 825.215 Equivalent position.

Any references from the DOL regulations in this section and other sections to the Employee Retirement Income Security Act (ERISA) have not been adopted by the Board because ERISA does not apply to the legislative branch.

Section 825.216 Limitations on employee's right to reinstatement.

This section clarifies that an employee has no greater employment rights than if the employee had been continually employed during the FMLA leave period. The Board questioned whether the following language in section 825.216(a)(3) of the DOL regulations applied to the legislative branch: ''On the other hand, if an employee was hired to perform work on a contract, and after that contract period the contract was awarded to another contractor, the successor contractor may be required to restore the employee if it is a successor employer. *See* section 825.107.''

The Board proposed that the OOC regulations contain the following language and requested comments from interested parties, especially with respect to caucus or committee employees: ''On the other hand, if an employee was hired to perform work for one employing office for a project for a specific time period, and after that time period has ended, the same employee was assigned to work at another employing office on the same project, the successor employing office may be required to restore the employee if it is a successor employing office.''

Two commenters suggested deleting section 825.216(a)(3) because it refers to the concept of successor liability, a concept they say is inapplicable, and cross-references §825.107 which has been ''reserved'' by the Board in these proposed regulations.

The concept of ''successor in interest'' is developed in section 825.107 of the Secretary of Labor's regulations. The regulations state that a determination of whether a ''successor in interest'' exists is determined by the ''entire circumstances * * * viewed in their totality.'' The regulation also states: ''The factors to be considered include: (1) Substantial continuity of the same business operations; (2) Use of the same plant; (3) Continuity of the work force; (4) Similarity of jobs and working conditions; (5) Similarity of supervisory personnel; (6) Similarity of machinery, equipment, and production methods; (7) Similarity of products or services; and (8) The ability of the predecessor to provide relief.'' Many of the factors listed above are inapplicable to the legislative branch. Thus, section 825.107 remains reserved in these regulations. However, situations may arise where the concept of successorship will be relevant. For example, if committee jurisdictions are restructured, it may be necessary to determine which, if any, of the surviving committees is the ''successor in interest'' to the former committee. Thus, determining the successor may be important in determining whether a remaining committee must grant leave for an eligible employee who provided adequate notice to the former committee, or must continue leave begun while an employee was employed by the former committee. Therefore, a determination as to successorship may yet be decided. As such, the Board finds no good cause to modify the DOL regulation, but has deleted the cross reference to section 825.107 because it is reserved in these regulations.

825.216(e)

This regulation prohibits an employing office that does not have a policy regarding outside income from denying benefits to which an employee is entitled under FMLA, unless fraudulently obtained. One commenter suggested that the Board's proposed language ignores the fact that there are statutory and ethics rules governing the outside employment of all House employees. *See, e.g.*, House Ethics Manual (2008 Ed.) 185–246. To address this issue, the commenter suggested that the Board amend the second sentence of this section to include the following italicized language:

''An employing office which does not have such a policy may not deny benefits to which an employee is entitled under FMLA, as made applicable by the CAA, on this basis unless the FMLA leave was fraudulently obtained as in paragraph (d) of this section *or the employee's outside or supplemental employment violates applicable law, regulation or House Rule.*''

The Board has determined that there is no good cause to modify the rule as suggested because the Board's proposed language is the same as the DOL regulation, and the term ''policy'' should be broad enough to include ''applicable law, regulation, or rule'' as it is applied to the employing offices, including the House, should there be such a rule.

Section 825.217 Key employee, general rule.

For the reasons already stated, the Board finds good cause to modify the DOL changes to section 825.217(b) which exempt computer employees from the minimum wage and overtime requirements of the FLSA. As the language in the FLSA is inconsistent with the 1996 OOC FLSA regulations, the Board believes that this exemption should not be included.

825.217(b)

One commenter believes the regulations should reference ''OOC's FLSA regulations concerning employees who are exempt under the salary and duties test'' instead of listing the exemption categories (professional, executive, administrative), and specifically excluding computer employees. As the salary and duties test is made applicable by the CAA, the Board finds good cause to delete the parenthetical list of exemptions as well as the superfluous ''end parentheses'' typographical error as suggested.

Section 825.220 Protection for employees who request leave or otherwise assert FMLA rights.

825.220(a)(2)

This section protects employees who exercise their rights under the law. One commenter suggested that section 825.220(a) is confusing and not consistent with 29 U.S.C. §2615, as adopted by the CAA, and stated that since section 825.220(a)(1–3) merely restates the law, they should be deleted as duplicative. In addition, by adding ''complaining about'' in section 825.220(2), a cause of action not otherwise available under the CAA is created. The Board has determined that no good cause has been shown to modify the DOL regulation, with two minor deviations (''person v. covered employee'' and ''covered employee v. eligible employee'') which are terms that are substituted to make the regulation consistent with the CAA terminology. While the term ''complaining'' is not found in section 207 of the CAA, it is the language used by the DOL in its anti-retaliation regulation (*See* 29 C.F.R. §825.220). Covered employees are covered by the anti-retaliation prohibition in both the CAA and the FMLA.

825.220(b)

Two commenters proposed removing the sentence ''An employing office may be liable for compensation and benefits lost by reason of the violation, for other actual monetary losses sustained as a direct result of the violation, and for appropriate equitable or other relief, including employment, reinstatement, promotion, or any other relief tailored to the harm suffered. *See* section 825.400(c).'' One commenter suggested that the quoted language misstates the law as it applies to the CAA because an employing office could not be liable for compensation and benefits lost by reason of the violation and for other actual monetary losses sustained. See 29 U.S.C. §2617(a)(1)(A)(i). The commenter suggested that only one type of recovery is lawfully available, as an employee is entitled to either ''any wages, salary, employing benefits, or other compensation denied or lost to such employee by reason of the violation'' or when ''wages, salary, employing benefits, or other compensation have not been denied or lost to the employee, any actual monetary losses sustained by the employee as a direct result of the violation.'' In other words, an employee is not entitled to both compensation and other actual monetary losses sustained. Additionally, the commenter suggested removing the cross-reference to section 825.400(c) because it does not outline what remedies are available for violations of the FMLA, as made applicable by the CAA; rather, proposed regulation section 825.400(c) merely states where aggrieved covered employees can find the OOC's complaint procedures. Another commenter proposed removing subsection (b) because it is inconsistent with 2 U.S.C. §1361(d)(1) regarding exclusive procedures under the CAA, attempts to ''make applicable additional causes of action'' by use of the term ''manipulation,'' and expands ''the scope of rights . . . under the FMLA and the CAA.''

The Board finds that no good cause has been shown to modify or delete the DOL regulation because the CAA applies section 2617(a)(1)(A)(i) of the FMLA, and the Board's regulation is the same as the DOL regulation applying that section. While we recognize that the commenters' arguments may have merit, it would not be appropriate for the Board to make that determination as a part of its rulemaking authority under the CAA. The Board finds that it is appropriate to reserve section 825.220(b)(1) regarding numerosity.

With respect to a commenter's suggestion that the Board remove the cross-reference to section 825.400(c) in its proposed regulations because it does not outline what remedies are available for violations of the FMLA but merely states where an aggrieved covered employee can find the OOC's complaint procedures, the Board did revisit this section and add the DOL's remedies section 825.400(c) to its regulations, and moved the reference to its complaint procedures to subsection (d).

825.220(d)

Except for the paragraph related to settlements, as noted below, the Board proposed to adopt the DOL amendments with respect to this section. Section 825.220 provides protection for employees who request leave or otherwise assert FMLA rights and includes new language discussing remedies when an employing office interferes with an employee's rights under the FMLA. This section further clarifies that the prohibition against interference includes prohibitions against retaliation as well as discrimination. The Board finds that there is good cause to modify DOL's language in paragraph (d) of this section.

Sections 1414 and 1415 of the CAA govern awards and settlements made as a result of parties proceeding through an OOC process. While the Board recognizes that parties will now have the right to settle or release FMLA claims without the approval of the OOC or a court, parties seeking to release claims which were raised in an OOC process pursuant to CAA sections 1414 and 1415 must still comply with those provisions. Therefore, the Board proposed to insert the following language: ''Except for settlement agreements covered by sections 1414 and/or 1415 of the Congressional Accountability Act, this does not prevent the settlement or release of FMLA claims by employees based on past employing office conduct without the approval of the Office of Compliance or a court.''

One commenter noted that an employee's acceptance of a light duty assignment or right to restoration beyond the 12 month FMLA year may be terms of an approved settlement agreement, and ''should not be restricted in considering prospective rights in a settlement of an FMLA claim.'' The Board finds no good cause to modify the regulation.

One commenter agreed that the regulation should be amended to clarify that employing offices are permitted to settle FMLA claims without OOC or court approval unless the settlement agreement is covered by section 1414 or 1415 of the CAA. The commenter further suggested that the phrase ''based on past employing office conduct'' found in the third sentence of the section hints of presumptive inappropriate conduct by employing offices and that the phrase is unnecessary to achieve the goal of this sentence. The commenter suggested deleting it. The Board has determined that there is no good cause shown to modify the DOL regulation.

825.220(e)

Two commenters suggested that only ''covered employees'' and ''employees,'' as defined in sections 101(3) and (4) of the CAA, and not ''individuals,'' are protected by the CAA; therefore (e) should be deleted. The Board has determined that good cause has been shown to modify the DOL regulation and delete the term ''individuals'' from section 825.220(e). The 1996 Board regulations do not reference the term ''individuals.'' The term ''Individuals'' was added to the proposed regulations to be consistent with the DOL regulations. However, the Board wants to clarify that only ''covered employees,'' as defined by the CAA, are entitled to FMLA protection under the CAA.

SUBPART C—EMPLOYEE AND EMPLOYING OFFICE RIGHTS AND OBLIGATIONS UNDER THE FMLA, AS MADE APPLICABLE BY THE CAA.

Section 825.300 Employing office notice requirements.

The Board follows the DOL regulations insofar as they consolidate the employing office notice requirements from sections 825.300, 825.301, 825.110 and 825.208 into one comprehensive section addressing an employing office's notice obligations. However, the Board finds good cause not to adopt the DOL regulations in section 825.300(a) General notice, but instead to keep the requirements found in the current OOC regulations under section 825.301(a). The DOL regulations, at section 825.300(a), address the requirement that employing offices post a notice on employee rights and responsibilities under the law and the civil monetary penalty provision in the law for employing offices who willfully violate the posting requirement. In 1995, while developing the current FMLA regulations, the OOC Board determined that ''while the CAA incorporates certain specific sections of the FMLA, the CAA explicitly did not incorporate the notice posting and recordkeeping requirements of sections 106(b) and 109 of the FMLA. The CAA has not incorporated the notice posting and recordkeeping requirements of the FMLA, and the Board will not do so.'' As a result, we find no authority that would require employing offices covered under the CAA to provide notice postings of employees' FMLA rights in the workplace. *See* November 28, 1995 OOC Notice of Proposed Rulemaking S17628. As to the remainder of the paragraphs in this section, the Board finds no good cause to depart from the amendments adopted by the DOL.

The Board adopts section 825.300 regarding the eligibility notice (825.300(b)); the rights and responsibility notice (825.300(c)); the designation notice (825.300(d)); and the consequences of failing to provide notice (825.300(e)).

(b) *Eligibility notice.*

The Board adopts the DOL amendments with respect to this section. The Board also adopts the DOL regulations consolidating existing eligibility notice requirements in current sections 825.110 and 825.301 into one section, section 825.300(b) of the OOC regulations, to strengthen and clarify them. For example, section 825.300(b)(1) of the DOL regulations requires an employer to advise an employee of his or her eligibility status when the employee requests leave under the FMLA. The regulations extend the time frame for an employer to respond to an employee's request for FMLA leave from two business days to five business days. Further, the DOL regulations in section 825.300(b)(2) specify what information an employer must convey to an employee as to eligibility status. Analogous to the DOL's regulations, the Board adopts in its regulations that an employing office must provide reasons to an employee if he or she is not eligible for FMLA leave, as do the DOL regulations. The regulations limit that notification to any one of the potential reasons why an employee fails to meet the eligibility requirements.

One commenter supported the OOC's reorganization and consolidation of its notice provisions to better align with DOL's regulations. In particular, the commenter welcomed the extension of time from 2 to 5 business days to provide an employee the required eligibility notice in response to the employee's request for FMLA leave.

Further, the OOC regulations require employing offices to include in the eligibility notice an explanation of conditions applicable to the use of paid leave that runs concurrently with unpaid FMLA leave. While this requirement is in the Board's 1996 regulations, it is expanded to require that employing offices also notify employees of their continuing entitlement to take unpaid FMLA leave if they do not comply with an employing office's required conditions for use of paid leave.

(c) *Rights and responsibilities notice.*

The Board is following the DOL regulations separating the notice of rights and responsibilities from the notice of eligibility. Accordingly, if the employee is eligible for FMLA leave, section 825.300(c) of the OOC regulations require the employing office to provide the employee with specific notice of his or her rights and obligations under the law and the consequences of failing to meet those obligations.

To simplify the timing of the notice of rights and responsibilities and to avoid unnecessary administrative burden on employing offices, section 825.300(c)(1) of the Board's regulations require employing offices to provide this notice to employees at the same time they provide the eligibility notice. Additionally, if the information in the notice of rights and responsibilities changes, section 825.300(c) requires the employing office to notify the employee of any changes within five business days of the first notice of the need for FMLA leave subsequent to any change. This timing requirement will ensure that employees receive timely notice of the expectations and obligations associated with their FMLA leave each leave year and also receive prompt notice of any change in those rights or responsibilities when leave is needed during the leave year.

In this section, employing offices are required to notify employees of the method used for establishing the 12-month period for FMLA entitlement, or, in the case of military caregiver leave, the start date of the ''single 12-month period.''

Employing offices are not, however, required to provide the certification form with the notice of rights and responsibilities. Notice of any changes in the rights and responsibilities notice must be provided within five business days of the first notice of an employee's need for leave subsequent to any change. Electronic distribution of the notice of rights and responsibilities is allowed, so long as the employing office can demonstrate that the employee (who may already be on leave and who may not have access to employing office-provided computers) has access to the information electronically.

825.300(b)(2)

Two commenters suggested deleting the sentence ''The employing office is obligated to translate this notice in any situation in which it is obligated to do so in 825.300(a)(4)'' because section 825.300(a)(4) does not exist in the regulations. The Board has made the suggested change because the referenced section does not exist in its regulations.

One commenter suggested that the OOC provide a Spanish language translation of its prototype forms and notices, as Spanish is the most widely spoken second language in the United States. The commenter suggested that because many Congressional employing offices do not have in-house capability to translate notices, uniform prototype notices in Spanish will encourage consistency and assist in compliance with the FMLA. The Board welcomes the suggestion, and will provide a Spanish language translation of its forms.

825.300(c)(ii)

One commenter suggested adding ''covered'' between ''qualifying exigency arising out of'' and ''active duty.'' The Board has made the suggested change.

825.300(c)(6)

One commenter requested that the Board provide more guidance concerning what methods are sufficient to assume and/or demonstrate receipt of notices electronically sent to employees. The commenter suggested that court decisions illustrate uncertainty in this area. The Board has determined that no good cause has been shown to modify the DOL regulations.

(d) *Designation notice.*

The Board adopts the DOL amendments with respect to this requirement. Section 825.300(d) outlines the requirements of the designation notice an employing office must provide to an employee. Once the employing office has enough information to determine whether the leave qualifies as FMLA leave, the employing office must notify the employee within five business days of making the determination whether the leave has or has not been designated as FMLA leave. This is an increase from the two-day time frame in the current OOC regulations. Further, only one designation notice is required for each FMLA-qualifying reason per leave year, regardless of whether the leave is taken as a continuous block of leave or on an intermittent or reduced leave schedule basis.

Further, the employing office must inform the employee of the number of hours that would be designated as FMLA leave, only upon employee request and no more often than every 30 days if FMLA leave was taken during that period. To the extent it is not possible to provide such information (such as in the case of unforeseeable intermittent leave), the employing office is required to provide such information to the employee every 30 days if the employee took leave during the 30-day period. The employing office is permitted to notify the employee of the hours counted against the FMLA leave entitlement orally and follow up with written notification on a pay stub at the next payday (unless the next payday is in less than one week, in which case the notice must be no later than the subsequent payday). If the employing office requires that paid leave be substituted for unpaid leave, or that paid leave taken under an existing leave plan be counted as FMLA leave, the employing office must inform the employee of this designation at the time the leave is designated as FMLA leave.

Although the designation notice has to be in writing, it may be in any form, including a notation on the employee's pay stub. If the leave is not designated as FMLA leave, the notice to the employee may be in the form of a simple written statement. Employing offices can provide an employee with both the eligibility and designation notice at the same time in cases where the employing office has adequate information to designate leave as FMLA leave when an employee requests the leave.

Employing offices must provide written notice of any requirement for a fitness-for-duty certification, including whether the fitness-for-duty certification must address the employee's ability to perform the essential functions of the employee's position and, if so, to provide a list of the essential functions of the employee's position with the designation notice. If the employee handbook or other written documents clearly provides that a fitness-for-duty certificate will be required, written notice is not required, but oral notice must be provided.

Finally, the employing office is required to notify the employee if the information provided in the designation notice changes. For example, if an employee exhausts his or her FMLA leave entitlement and the leave will no longer be designated as FMLA leave, the employing office must provide the employee with written notice of this change consistent with this section.

825.300(d)(4)

One commenter would like clarification that electronic receipt of the ''designation notices'' is permitted in addition to the notice of rights and responsibilities. The Board finds good cause to clarify that the designation notice may be distributed electronically, so long as it otherwise meets the requirements of section 825.300(d)(4) and the employing office can demonstrate that the employee (who may already be on leave and who may not have access to employing office-provided computers) has access to the information electronically.

825.300(e)

The Board proposed to adopt the DOL amendments with respect to this section entitled ''Consequences of failing to provide notice.'' Section 825.300(e) clarifies that failure to comply with the notice requirements set forth in this section could constitute interference with, restraint of, or denial of the use of FMLA leave. The Board proposed that the following language be included in the OOC regulations:

Consequences of failing to provide notice. Failure to follow the notice requirements set forth in this section may constitute an interference with, restraint, or denial of the exercise of an employee's FMLA rights. An employing office may be liable for compensation and benefits lost by reason of the violation, for other actual monetary losses sustained as a direct result of the violation, and for appropriate equitable or other relief, including employment, reinstatement, promotion, or any other relief tailored to the harm suffered. See section 825.400(c).

One commenter asserted that the proposed regulation section 825.300(e) derives from section 109 of the FMLA, and suggested deleting the entire section because the Board had proposed to establish a remedy for a right that does not exist under the FMLA, as applied by the CAA. The CAA incorporates the ''rights and protections established by section 101 through 105'' of the FMLA and incorporates remedies ''as would be appropriate if awarded under'' section 107(a)(1) of the FMLA. *See* 2 U.S.C. §§1312(a)(1), (b). The Board agrees that Section 109 of the FMLA is not incorporated in the CAA, and that no legal authority exists for a regulation that incorporates requirements and penalties based on section 109 of the FMLA. However, the Board does not agree with the commenter's assertion that the remedies for section 825.300(e) derive from Section 109 of the FMLA, and finds that no good cause has been shown to modify the DOL regulation.

Section 825.301 Designation of FMLA leave.

The Board proposed to adopt the DOL amendments with respect to this section. Section 825.301 addresses an employing office's obligations regarding timely designation of leave as FMLA-qualifying and reiterates the requirement to notify the employee of the designation within five business days. Among other things, this section requires that the employing office's designation decision be based only on information received from the employee or the employee's representative and also provides that, if the employing office does not have sufficient information about the employee's reason for leave, the employing office should inquire further of the employee or of the employee's spokesperson.

One commenter suggested that the second sentence of subsection (e) regarding categories of potential remedies directs the reader to ''*See* 825.400(c),'' as does the DOL regulation. However, that section in the Board's proposed regulations simply references the regulations of the Office of Compliance, and suggests the reference be deleted. The Board agrees with the comment, and has modified the language of section 825.400 to include the potential remedies.

Another commenter suggested deleting the second sentence in section 825.301(e) for the same reasons as stated under section 825.220, above, that under the CAA, an employee is not entitled to both compensation and other actual monetary losses sustained. As discussed previously, the Board does not agree with the assertion that there is no legal authority for the remedies provided in section

825.301(e), and has determined that no good cause has been shown to modify the DOL regulation.

Section 825.302 Employee notice requirements for foreseeable FMLA leave.

The Board proposed to adopt the DOL amendments with respect to this section. In general, section 825.302 addresses an employee's obligation to provide notice of the need for foreseeable FMLA leave. This includes requiring an employee to give at least 30 days' notice when the need for FMLA leave is foreseeable at least 30 days in advance or ''as soon as practicable'' if leave is foreseeable but 30 days' notice is not practicable. In such cases, employees must respond to requests from employing offices to explain why it was not possible to give 30 days' notice. Further, the language in this section defines ''as soon as practicable'' to be ''as soon as both possible and practical, taking into account all of the facts and circumstances in the individual case.'' This is a change from defining ''as soon as practicable'' as ''ordinarily within one or two business days.''

Further, when an employee seeks leave for the first time for a FMLA-qualifying reason, the employee need not expressly assert rights under the FMLA, as made applicable by the CAA, or even mention the FMLA but must provide: sufficient information that indicates that a condition renders the employee unable to perform the functions of the job, or if the leave is for a family member, that the condition renders the family member unable to perform daily activities; the anticipated duration of the absence; and whether the employee or the employee's family member intends to visit a health care provider or has a condition for which the employee or the employee's family member is under the continuing care of a health care provider. The regulations set forth the types of information that an employee may have to provide in order to put an employing office on notice of the employee's need for FMLA-protected leave. Rather than establish a list of information that must be provided in all cases, the regulations provide additional guidance to employees so that they would know what information to provide to their employing offices. The nature of the information necessary to put the employing office on notice of the need for FMLA leave will vary depending on the circumstances.

Employees seeking leave for previously certified FMLA leave must inform the employing office that the leave is for a condition, covered servicemember's serious injury or illness, or qualifying exigency that was previously certified or for which the employee has previously taken FMLA leave.

While an employee must still comply with the employing office's usual notice and procedural requirements for calling in absences and requesting leave, under the new regulations, language stating that an employing office cannot delay or deny FMLA leave if an employee fails to follow such procedures has been deleted. However, employing offices may need to inquire further to determine for which reason the leave is being taken, and employees will be required to respond to such inquiries.

Additionally, the regulations make clear that the requirement that an employee and employing office attempt to work out a schedule without unduly disrupting the employing office's operations applies only to military caregiver leave. It does not apply to qualifying exigency leave.

825.302 (g)

Regarding a waiver of notice requirements, one commenter suggested replacing the reference ''*See* 825.304'' with the more specific reference ''*See* 825.304(e).'' The Board understands that such a reference would be more direct, but as such would have limited context. Therefore, the Board finds that no good cause has been shown to modify the DOL regulation.

Section 825.303 Employee notice requirements for unforeseeable FMLA leave.

The Board proposed to adopt the DOL amendments with respect to this section. Section 825.303 addresses an employee's obligation to provide notice when the need for FMLA leave is unforeseeable. Section 825.303 retains the current standard that employees must provide notice of their need for unforeseeable leave ''as soon as practicable under the facts and circumstances of the particular case,'' but instead of expecting employees to give notice ''within no more than one or two working days of learning of the need for leave,'' in ''unusual circumstances,'' notice should be provided within the time prescribed by the employing office's usual and customary notice requirements applicable to such leave. Section 825.303 also retains the current standard that employees need not assert their rights under the FMLA or even mention the FMLA to put employing offices on notice of the need for unforeseeable FMLA leave, but adds the same language used in proposed section 825.302 clarifying what information must be provided in order to give sufficient notice to the employing office of the need for FMLA leave. New regulations in section 825.303 add that the employee has an obligation to respond to an employing office's questions designed to determine whether leave is FMLA-qualifying, explaining that calling in ''sick,'' without providing additional information, would not be sufficient notice.

Section 825.304 Employee failure to provide notice.

The Board proposed to adopt the DOL amendments with respect to this section. Section 825.304 follows the DOL's reorganization of the rules that are applicable to leave foreseeable at least 30 days in advance, leave foreseeable less than 30 days in advance, and unforeseeable leave. This section retains language that FMLA leave cannot be delayed due to lack of required employee notice if the employing office has not complied with its notice requirements.

One commenter suggested deleting or amending the sentence ''This condition would be satisfied by the employing office's proper posting, at the worksite where the employee is employed, of the information regarding the FMLA provided (pursuant to section 301(h)(2) of the CAA, 2 U.S.C. §1381(h)(2)) by the Office of Compliance to the employing office in a manner suitable for posting'' because posting is merely one way in which an employing office could provide employees with actual notice of the FMLA's notice requirements. Another commenter stated that since the FMLA's posting requirements do not apply to congressional employing offices, the Board has good cause to clarify that an employing office can also meet its notice requirements by distributing a written FMLA policy to employees, or including an FMLA policy in an employee handbook. The regulation merely suggests a method to provide notice, but does not provide that it is the only method. Therefore, the Board has determined that good cause has not been shown to modify the DOL regulation.

Section 825.305 Certification, general rule.

The Board proposed to adopt the DOL amendments with respect to this section. Under the FMLA, as applied under the CAA, employing offices are permitted to require that employees provide a certification from their health care provider (or their family member's health care provider, as appropriate) to support the need for leave due to a serious health condition. Section 825.305 sets forth the general rules governing employing office requests for medical certification to substantiate an employee's need for FMLA leave due to a serious health condition. Military family leave provisions have been added to permit employing offices to require employees to provide a certification in the case of leave taken for a qualifying exigency or to care for a covered servicemember with a serious injury or illness. Section 825.305 applies generally to all types of certification. In most cases, for example, former references to ''medical certification'' have been changed to ''certification.''

In section 825.305, the employing office should request that an employee furnish certification from a health care provider at the time the employee gives notice of the need for leave or within five business days thereafter, or, in the case of unforeseen leave, within five business days after the leave commences. This time frame has been increased from two to five business days after notice of the need for FMLA leave is provided. Further, the employing office may request certification at some later date if the employing office later has reason to question the appropriateness of the leave or its duration. This section also adds a 15-day time period for providing a requested certification to all cases.

Definitions of incomplete and insufficient certifications have been added in this section, as well as a procedure for curing an incomplete or insufficient certification. This procedure requires that an employing office notify the employee in writing as to what additional information is necessary for the medical certification and provides seven calendar days in which the employee must provide the additional information. If an employee fails to submit a complete and sufficient certification, despite the opportunity to cure the deficiency, the employing office may deny the request for FMLA leave.

Section 825.305 also deletes an earlier provision that if a less stringent medical certification standard applies under the employing office's sick leave plan, only that lesser standard may be required when the employee substitutes any form of paid leave for FMLA leave and replaces it with a provision allowing employing offices to require a new certification on an annual basis for conditions lasting beyond a single leave year.

825.305(b)

One commenter suggested that the opportunity to ''cure'' any deficiency be deleted because it makes no sense to have the employee serve as a ''go-between''—referencing its comments to section 825.307(a), below [suggesting the employing office be able to speak directly to the healthcare provider]. The Board has determined that good cause has not been shown to modify DOL regulations.

Section 825.306 Content of medical certification for leave taken because of an employee's own serious health condition or the serious health condition of a family member.

The Board proposed to adopt the DOL amendments with respect to this section. Section 825.306 addresses the information an employing office can require in the medical certification to substantiate the existence of a serious health condition (of the employee or a family member) and the employee's need for leave due to the condition, and adds: the health care provider's specialization; guidance as to what may constitute appropriate medical facts, including that a health care provider may provide a diagnosis; and whether intermittent or reduced schedule leave is medically necessary. Section 825.306 clarifies that where a serious health condition may also be a disability, employing offices are not prevented from following the

procedures under the Americans with Disabilities Act (ADA), as applied under the CAA, for requesting medical information. Section 825.306 also contains new language that employing offices may not require employees to sign a release of their medical information as a condition of taking FMLA leave.

825.306(a)(4)

One commenter suggested deleting ''and (c)'' because section 825.123(c) does not exist in the proposed regulations. The Board has made the suggested change.

This section does not apply to the military family leave provisions. The Board's proposed regulations have revised the current optional certification form into two separate optional forms, one for the employee's own serious health condition and one for the serious health condition of a covered family member.

Section 825.307 Authentication and clarification of medical certification for leave taken because of an employee's own serious health condition or the serious health condition of a family member; second and third opinions.

The Board proposed to adopt the DOL's amendments covered under this section. Section 825.307 addresses the employing office's ability to clarify or authenticate a complete and sufficient FMLA certification. Section 825.307 defines the terms ''authentication'' and ''clarification.'' ''Authentication'' involves providing the health care provider with a copy of the certification and requesting verification that the information on the form was completed and/or authorized by the provider. The regulations add that no additional medical information may be requested and the employee's permission is not required. In contrast, ''clarification'' involves contacting the employee's health care provider in order to understand the handwriting on the medical certification or to understand the meaning of a response. As is the case with authentication, no additional information beyond that included in the certification form may be requested. Any contact with the employee's health care provider must comply with the requirements of the HIPAA Privacy Rule.

It is no longer necessary that the employing office utilize a health care provider to make the contact with the employee's health care provider, but the regulations do clarify who may contact the employee's health care provider and ensure that the employee's direct supervisor is not the point of contact. Employee consent to the contact is no longer required. However, before the employing office contacts the employee's health care provider for clarification or authentication of the FMLA certification, the employee must first be given an opportunity to cure any deficiencies in the certification. Section 825.307 also provides requirements for an employing office's request for a second opinion, and adds language requiring the employee or the employee's family member to authorize his or her health care provider to release relevant medical information pertaining to the serious health condition at issue if such information is requested by the second opinion health care provider. Section 825.307 also increases the number of days the employing office has to provide an employee with a requested copy of a second or third opinion from two to five business days. This section of the regulations does not apply to the military family leave provisions.

One commenter supported allowing an individual from the employing office other than a health care professional to contact the health care provider for purposes of clarification and authentication of the medical certification.

One commenter suggested that the ''clarification and authentication'' creates more confusion than guidance. The commenter suggested that requiring the employer to first speak with the employee regarding clarification before it may directly contact the healthcare provider creates an opportunity for miscommunication about the information actually needed by the employer, an issue that can be best handled by direct communication. The commenter also believes that the regulation would allow an employee who may have furnished a fraudulent certification to ''cure'' the defect, and suggests that section 825.307(c) be deleted. Further, rather than deny an FMLA request for failure to 'clarify the certification' as in subsection (a), the commenter suggests that the regulation permit the employee to provide advanced authorization to the employing office to contact the healthcare provider for clarification or authentication. The Board has determined that no good cause has been shown to modify DOL regulations.

Another commenter suggested that the fourth sentence of section 825.307(a) addresses the issue of who within an employing office may contact the eligible employee's health care provider to clarify and/or authenticate the medical certification submitted by the employee. Specifically, the sentence, which is the same as that in the DOL's regulation, states that ''Under no circumstances, however, may the employee's direct supervisor contact the employee's health care provider.'' The commenter suggested that this provision would be unworkable with respect to many employing offices of the House, particularly Member offices, due to the statutory limit on the size of those offices. Specifically, under 2 U.S.C. §5321(a), Member offices are permitted to employ no more than 22 employees (this covers the total number of employees for both the Washington, D.C. and district offices). Accordingly, the vast majority of House employing offices do not have separate human resources divisions to assure compliance with the FMLA. In actuality, it is often the employee's direct supervisor (*e.g.* the District Director or the Chief of Staff) who handles FMLA requests. If the direct supervisor is prohibited from contacting the employee's health care provider, the employing office would have to find someone else—perhaps a peer/co-worker of the employee seeking FMLA—to contact the health care provider. This would unnecessarily expand the scope of individuals with knowledge of the employee's FMLA request, and would be inconsistent with the spirit of the regulations requiring that access to such FMLA-related information be limited to as few persons as possible to preserve privacy and confidentiality. The commenter also mentioned that it is notable that the DOL regulation applies to employers who have at least 50 employees (29 C.F.R. §825.104(a)), or are public agencies that are more likely to have other managers or a human resources office to contact health care providers. The commenter believes that, with respect to the House, there is good cause to deviate from the DOL regulations and to delete the fourth sentence from subsection (a).

Based on these comments and the unique nature of employing offices under the CAA, the Board modifies its regulation by deleting the fourth sentence and adding in its place ''An employee's direct supervisor may not contact the employee's healthcare provider, unless the direct supervisor is also the only individual in the employing office designated to process FMLA requests and the direct supervisor receives specific authorization from the employee to contact the employee's health care provider.'' This change will allow smaller employing offices, who only have one person designated to process FMLA leave requests to clarify and authenticate an employee's FMLA certification without violating the OOC's FMLA regulations. This narrowly tailored language will maintain the intent of the regulation—to prevent an employee's direct supervisor from contacting the employee's healthcare provider to clarify and authenticate a certification—without preventing small employing offices from clarifying and authenticating FMLA leave certifications.

A commenter also suggested that the reference to the Health Insurance Portability and Accountability Act (HIPAA) in section (a) be deleted. HIPAA, and the regulations promulgated thereunder, allow the Secretary of Health and Human Services to take enforcement action against health plans, health care clearinghouses, and specific health care providers for violations of privacy standards. 42 U.S.C. §1320d, *et seq.*; 45 C.F.R. §§160.102, 160.312. HIPAA does not create any obligations for Congressional employing offices. Thus, although a *health care provider* may require that a patient complete an appropriate HIPAA-authorization before that health care provider will speak to a representative of that patient's employing office, there is no basis for any implication that HIPAA applies *to Congressional employers*. The commenter suggested that the regulatory language in subsection (a) referencing HIPAA be deleted. The reference to HIPAA in this section should not be read to apply HIPAA to employing offices. However, it should be clear that the level of privacy afforded individually-identifiable health information created or held by HIPAA-covered entities is satisfied when this information is shared with an employing office by a HIPAA-covered health care provider. The Board finds that good cause has not been shown to modify the DOL regulation.

One commenter would like clarification on whether an employing office may rely on the findings of a second or third opinion examination to deny FMLA leave for a future absence requested by the employee for the same condition. Current regulations are silent with respect to the use of second and third opinion examinations. The Board finds that no good cause has been shown to modify the DOL regulation.

Section 825.308 Recertifications for leave taken because of an employee's own serious health condition or the serious health condition of a family member.

The Board proposed to adopt the DOL amendments covered in this section. Section 825.308 of the regulations addresses the employing office's ability to seek recertification of an employee's medical condition. This section has been reorganized to clarify how often employing offices may seek recertification in situations where the minimum duration of the condition, as opposed to the duration of the period of incapacity, exceeds 30 days. Thus, an employing office may request recertification no more often than every 30 days and only in connection with an absence by the employee, unless the medical certification indicates that the minimum duration of the condition is more than 30 days, then an employing office must wait until that minimum duration expires before requesting a recertification. In all cases, an employing office may request a recertification of a medical condition every six months in connection with an absence by the employee. An employing office may request recertification in less than 30 days if, among other things, the employee requests an extension of leave or circumstances described by the previous certification change significantly. This section clarifies that an employing office may request the same information

on recertification as required for the initial certification and the employee has the same obligation to cooperate in providing recertification as he or she does in providing the initial certification.

One commenter suggested that the Board clarify that an employing office may provide ''a record of the employee's absence pattern'' directly to the healthcare provider. The Board has determined that no good cause has been shown to modify the DOL regulation.

Section 825.309 Certification for leave taken because of a qualifying exigency.

The Board proposed to adopt the DOL's regulations under this section. Under the military family leave provisions of the DOL regulations, an employing office may require that leave taken because of a qualifying exigency be supported by a certification and require that the employee provide a copy of the covered military member's active duty orders or other documentation issued by the military, which indicates that the covered military member is on active duty (or has been notified of an impending call or order to active duty) in support of a contingency operation, as well as the dates of the covered military member's active duty service. While a form requesting this basic information may be used by the employing office, no information may be required beyond that specified in this section and in all instances the information on the form must relate only to the qualifying exigency for which the current need for leave exists. Section 825.309 also establishes the verification process for certifications.

This section also provides that the information required in a certification need only be provided to the employing office the first time an employee requests leave because of a qualifying exigency arising out of a particular active duty or call to active duty of a covered military member. While additional information may be needed to provide certification for subsequent requests for exigency leave, an employee is only required to give a copy of the active duty orders to the employing office once. A copy of new active duty orders or other documentation issued by the military only needs to be provided to the employing office if the need for leave because of a qualifying exigency arises out of a different active duty or call to active duty order of the same or a different covered military member. *See* DOL (Form WH–384) and OOC regulations proposed Form E.

One commenter suggested adding ''or Form WH–384 (developed by the Department of Labor)'' between ''Form E'' and ''another form containing the same basic information'' for consistency with other provisions cross-referencing DOL forms. *See*, e.g., §825.306(b) and §825.310(d). The Board has made the suggested change.

An employing office may contact an appropriate unit of the Department of Defense (DOD) to request verification that a covered military member has been called to active duty status (or notified of an impending call to active duty status) in support of a contingency operation. Again, no additional information may be requested by the employing office and the employee's permission is not required. This verification process will protect employees from unnecessary intrusion while still providing a useful tool for employing offices to verify the certification information given to them.

Consistent with the amendments to section 825.126(b)(6), with respect to Rest and Recuperation qualifying exigency leave, the employing office is permitted to request a copy of the military member's Rest and Recuperation orders, or other documentation issued by the military indicating that the military member has been granted Rest and Recuperation leave, as well as the dates of the leave, in order to determine the employee's specific qualifying exigency leave period available for Rest and Recuperation. Employing offices may also contact the appropriate unit of the DOD to verify that the military member is on active duty or call to active duty status. The employee's permission is not required to conduct such verifications. The employing office may not, however, request any additional information.

Section 825.310 Certification for leave taken to care for a covered servicemember (military caregiver leave).

The Board proposed to adopt the amendments covered in the DOL regulations under this section. While the military family leave provisions of the NDAA amended the FMLA's certification requirements to permit an employer to request certification for leave taken to care for a covered servicemember, the FMLA's existing certification requirements focus on providing information related to a serious health condition—a term that is not necessarily relevant to leave taken to care for a covered servicemember. At the same time, the military family leave provisions of the NDAA do not explicitly require that a sufficient certification for purposes of military caregiver leave provide relevant information regarding the covered servicemember's serious injury or illness. Section 825.310 of the DOL's regulations provide that when leave is taken to care for a covered servicemember with a serious injury or illness, an employer may require an employee to support his or her request for leave with a sufficient certification. An employer may require that certain necessary information to support the request for leave be supported by a certification from one of the following authorized health care providers: (1) a DOD health care provider; (2) a VA health care provider; (3) a DOD TRICARE network authorized private health care provider; or (4) a DOD non-network TRICARE authorized private health care provider. Sections 825.310(b)–(c) of the DOL regulations set forth the information an employing office may request from an employee (or the authorized health care provider) in order to support the employee's request for leave. The DOL developed a new optional form, Form WH–385, which the Board adopted for proposed OOC Form F. The Board agrees that OOC Form F may be used to obtain appropriate information to support an employee's request for leave to care for a covered servicemember with a serious injury or illness. However, an employing office may use any form containing the following basic information: (1) whether the servicemember has incurred a serious injury or illness; (2) whether the injury or illness may render the servicemember medically unfit to perform the duties of the member's office, grade, rank, or rating; (3) whether the injury or illness was incurred by the member in line of duty on active duty; and (4) whether the servicemember is undergoing medical treatment, recuperation, or therapy, is otherwise on outpatient status, or is otherwise on the temporary disability retired list. Additionally, as is the case for any required certification for leave taken to care for a family member with a serious health condition, no information may be required beyond that specified above. In all instances, the information on any required certification must relate only to the serious injury or illness for which the current need for leave exists.

Additionally, section 825.310 of the proposed OOC regulations provides that an employing office requiring an employee to submit a certification for leave to care for a covered servicemember must accept as sufficient certification ''invitational travel orders'' (ITOs) or ''invitational travel authorizations'' (ITAs) issued by the DOD for a family member to join an injured or ill servicemember at his or her bedside. If an employee will need leave to care for a covered servicemember beyond the expiration date specified in an ITO or an ITA, the regulations provide that an employing office may request further certification from the employee. Lastly this section provides that in all instances in which certification is requested, it is the employee's responsibility to provide the employing office with complete and sufficient certification and failure to do so may result in the denial of FMLA leave.

The regulations also permit an eligible employee who is a spouse, parent, son, daughter or next of kin of a covered servicemember to submit an ITO or ITA issued to another family member as sufficient certification for the duration of time specified in the ITO or ITA, even if the employee seeking leave is not the named recipient on the ITO or ITA. The regulations further permit an employing office to authenticate and clarify medical certifications submitted to support a request for leave to care for a covered servicemember using the procedures applicable to FMLA leave taken to care for a family member with a serious health condition. However, unlike the recertification, second and third opinion processes used for other types of FMLA leave, recertification, second and third opinions are not warranted for purposes of military caregiver leave when the certification has been completed by a DOD health care provider, a VA health care provider, a DOD TRICARE network authorized private health care provider, or a DOD non-network TRICARE authorized private health care provider, but are permitted when the certification has been completed by a health care provider who is not affiliated with the DOD, VA, or TRICARE.

An employee seeking to take military caregiver leave must provide the requested certification to the employing office within the time frame requested by the employing office (which must allow at least 15 calendar days after the employing office's request), unless it is not practicable under the particular circumstances to do so despite the employee's diligent, good faith efforts.

One commenter suggested that the reference to section 825.122(j) in the final sentence of subsection (d) be changed to section 825.122(k). The Board has made the suggested correction to the provision.

One commenter suggested replacing ''However, second and third opinions under 825.307 are not permitted for leave to care for a covered servicemember'' with ''Second and third opinions under 825.307 are not permitted for leave to care for a covered servicemember when the certification has been completed by one of the types of healthcare providers identified in 825.310(a)(1–4). However, second and third opinions under 825.307 are permitted when the certification has been completed by a health care provider as defined in 825.125 that is not one of the types identified in 825.310(a)(1)–(4).'' The Board has made the requested correction to the provision.

Section 825.311 Intent to Return to Work.

One commenter noted that section 825.311(b) states that, ''subject to COBRA requirements or 5 U.S.C. §8905a, whichever is applicable'' employing offices do not need to maintain health benefits once an employee gives unequivocal notice of his or her intent not to return to work. The commenter suggested that DOL regulations do not contain the reference to 5 U.S.C. §8905a. The commenter suggested that it is unclear whether the Board considered the application of the Affordable Care Act and/or enrollment in

state exchanges in developing its language. The commenter requests that the Board state its position on this issue. The Board has deleted reference to ''5 U.S.C. §8905a.''

Section 825.312 Fitness-for-duty certification.

The Board proposed to adopt the amendments covered in the DOL's regulations under this section. Section 825.312 addresses the fitness-for-duty certification that an employee may be required to submit upon return to work from FMLA leave. This section clarifies that employees have the same obligation to provide a complete certification or provide sufficient authorization to the health care provider in order for that person to provide the information directly to the employing office in the fitness-for-duty certification process as they do in the initial certification process. The employing office may require that the fitness-for-duty certification address the employee's ability to perform the essential functions of the employee's job, as long as the employing office provides the employee with a list of those essential job functions no later than the employing office provides the designation notice. The designation notice must indicate that the certification address the employee's ability to perform those essential functions. An employing office may contact the employee's health care provider directly, consistent with the procedure in proposed section 825.307(a), for purposes of authenticating or clarifying the fitness-for-duty certification. The employing office is required to advise the employee in the eligibility notice required by proposed section 825.300(b) if the employing office will require a fitness-for-duty certification to return to work. Employees are not entitled to the reinstatement protections of the Act if they do not provide the required fitness-for-duty certification or request additional FMLA leave.

Section 825.312 also requires that the employing office uniformly apply its policies permitting fitness-for-duty certifications to intermittent and reduced schedule leave users when reasonable safety concerns are present, but limits the frequency of such certifications to once in a 30–day period in which intermittent or reduced schedule leave was taken. ''Reasonable safety concerns'' means a reasonable belief of a significant risk of harm to the individual employee or others. In determining whether reasonable safety concerns exist, an employing office should consider the nature and severity of the potential harm and the likelihood that potential harm will occur. This is meant to be a high standard. Thus, the determination that there are reasonable safety concerns must rely on objective factual evidence, not subjective perceptions. Employing offices cannot, under this section, require such certifications in all intermittent or reduced leave schedule situations, but only where reasonable safety concerns are present. There is no fitness-for-duty certification form, nor is there any specific format such a certification must follow as long as it contains the required information. An employing office is allowed to require that the fitness-for-duty certification address the employee's ability to perform the essential functions of his or her position. However, the employing office can choose to accept a simple statement in place of the fitness-for-duty certification (or not require a fitness-for-duty certification at all).

There is no second and third opinion process for a fitness-for-duty certification. A fitness-for-duty certification need only address the condition for which FMLA leave was taken and the employee's ability to perform the essential functions of the job. The employee's health care provider determines whether a separate examination is required in order to determine the employee's fitness to return to duty under the FMLA. A medical examination at the employing office's expense may be required only after the employee has returned from FMLA leave and must be job-related and consistent with business necessity as required by the ADA. The employing office cannot delay the employee's return to work while arranging for and having the employee undergo a medical examination.

One commenter suggested that this provision limits an employing office's ability to seek a fitness-for-duty certification at any time it deems necessary, and that it would be negligent to preclude a fitness-for-duty test on an officer carrying a weapon because the FMLA regulations limit the ability to conduct a fitness-for-duty test. The commenter suggested that proposed section 825.312(i) be added to permit the employing office to conduct fitness for duty certifications at any time it deems a police officer may not be able to perform the essential functions of the position, and that it not be considered retaliation. The Board has determined that good cause has not been shown to modify the DOL regulation.

825.312(e)

One commenter noted that when an employee is delayed by the employer from returning to work because the employee has not provided a fitness-for-duty certification, it is not clear what the employee's status is. The commenter suggested that the regulation permit the employing office to carry the employee in an AWOL (absent without approved leave) status, or the employee may use approved annual leave until the certification is provided. The commenter also suggested the regulation provide a 15 day time limit for the employee to act on the fitness for duty certification. The Board has determined that no good cause has been shown to modify the DOL regulation.

Section 825.313 Failure to provide certification.

The Board proposed to adopt the amendments covered in the DOL regulations under this section. Section 825.313 explains the consequences for an employee who fails to provide medical certification in a timely manner. An employing office may deny FMLA leave until the required certification is provided. This section also addresses the consequences of failing to provide timely recertification. Section 825.313 also clarifies that recertification does not apply to leave taken for a qualifying exigency or to care for a covered servicemember.

Employees must be provided at least 15 calendar days to provide the requested certification, and are entitled to additional time when they are unable to meet that deadline despite their diligent, good-faith efforts. An employee's certification (or recertification) is not untimely until that period has passed. Employing offices may deny FMLA protection when an employee fails to provide a timely certification or recertification, but the FMLA does not require employing offices to do so. Employing offices always have the option of accepting an untimely certification and not denying FMLA protection to any absences that occurred during the period in which the certification was delayed.

One commenter suggested that while consistent with the language of the DOL regulation that states, ''If the employee never produces the certification, the leave is not FMLA leave,'' the proposed regulation necessarily begs the question: when can an employing office plausibly state that the employee ''never'' produced a certification? Given this ambiguity, the commenter suggested that the Board deviate from the DOL language and provide more direction in this area by amending the last sentence of this section to read, ''If the employee fails to produce the certification after a reasonable amount of time under the circumstances, the leave is not FMLA leave.'' Although there still may be a question of what constitutes a ''reasonable amount of time under the circumstances,'' this language, in the commenter's view, provides more clarity on the issue. The Board has determined that no good cause has been shown to modify the DOL regulation.

One commenter suggested that a ''grace period'' should be provided, as it proposes in section 312(e) above, to bridge the gap between the expiration of FMLA leave and termination. The Board has determined that no good cause has been shown to modify the DOL regulation.

SUBPART D—Administrative Process

Section 825.400, Administrative Process, general rules.

One commenter suggested that section 825.400 be deleted in its entirety because the CAA specifically addresses the procedures to be followed, and the proposed regulation is duplicative. Additionally, the commenter proposed that regulation section 825.400(c) is not appropriate and should be deleted because it does not govern ''enforcement of the FMLA rights,'' and the citation to a website does not assist in determining what procedures have been approved by Congress.

Another commenter agreed that there is good cause not to adopt the DOL regulation because the enforcement provisions of the FMLA differ from those applicable in CAA actions. However, in section 825.400(c), the commenter suggested that the Board identify the exact name/nature of the procedures referenced, and also clarify that these procedures only apply to CAA complaints pending before the OOC, not those brought in federal court.

Upon review of the comments regarding section 825.400, the Board has decided to retain section 825.400 in the final regulation, change the title of the Subpart D from ''Enforcement Mechanisms'' to ''Administrative Process'' and change the subtitle ''Enforcement, general rules'' to ''Administrative Process, general rules.'' In addition, the DOL language added as section 825.400(c) to the Board's final regulation describes the remedies available to covered employees for a violation of the FMLA, as made applicable by the CAA.

Sections 825.401–825.404 Filing a complaint with the Federal Government; Violations of the posting requirement; Appealing the assessment of a penalty for willful violation of the posting requirement; Consequences for an employer when not paying the penalty assessment after a final order is issued.

These sections do not apply to the CAA and will remain reserved in the OOC regulations.

SUBPART E—RECORDKEEPING REQUIREMENTS

Section 825.500 Recordkeeping requirements.

This section does not apply to the CAA and will remain reserved in the OOC regulations.

SUBPART F—SPECIAL RULES APPLICABLE TO EMPLOYEES OF SCHOOLS

Sections 825.600–825.604 Special rules for school employees, definitions; Special rules for school employees, limitations on intermittent leave; Special rules for school employees, limitations on leave near the end of an academic term; Special rules for school employees, duration of FMLA leave; Special rules for school employees, restoration to an equivalent position.

The Board proposed to adopt the amendments covered in the DOL regulations under

these sections. Sections 825.600–825.604 cover the special rules applicable to instructional employees. When an eligible instructional employee needs intermittent leave or leave on a reduced schedule basis to care for a covered servicemember, the employee may choose to either: (1) take leave for a period or periods of particular duration; or (2) transfer temporarily to an available alternative position with equivalent pay and benefits that better accommodates recurring periods of leave.

These sections also extend some of the limitations on leave near the end of an academic term to leave requested during this period to care for a covered servicemember. If an instructional employee begins leave for a purpose other than the employee's own serious health condition during the five-week period before the end of the term, the employing office may require the employee to continue taking leave until the end of the term if the leave will last more than two weeks and the employee would return to work during the two-week period before the end of the term. Further, an employing office may require an instructional employee to continue taking leave until the end of the term if the employee begins leave that will last more than five working days for a purpose other than the employee's own serious health condition during the three-week period before the end of the term. The types of leave that are subject to the limitations are: (1) leave because of the birth of a son or daughter, (2) leave because of the placement of a son or daughter for adoption or foster care, (3) leave taken to care for a spouse, parent, or child with a serious health condition, and (4) leave taken to care for a covered servicemember.

One commenter suggested that this provision demonstrated a need for FMLA regulations specific to the House. The commenter suggested that, unlike in the Senate, the House no longer has a school and thus these regulations are inapplicable to the House. The Board finds no good cause to modify the regulation as a whole.

SUBPART G—EFFECT OF OTHER LAWS, EMPLOYING OFFICE PRACTICES, AND COLLECTIVE BARGAINING AGREEMENTS ON EMPLOYEE RIGHTS UNDER FMLA, AS MADE APPLICABLE BY THE CAA

Section 825.700 Interaction with employing office's policies.

The Board proposed to adopt the amendments covered in the DOL regulations under this section. Section 825.700 provides that an employing office may not limit the rights established by the FMLA through an employment benefit program or plan, but an employing office may provide greater leave rights than the FMLA requires. This section also provides that an employing office may amend existing leave programs, so long as they comply with the FMLA, and that nothing in the FMLA is intended to discourage employing offices from adopting or retaining more generous leave policies. The Board proposed to follow the DOL regulations and delete from the current OOC section 825.700(a) the following: ''If an employee takes paid or unpaid leave and the employing office does not designate the leave as FMLA leave, the leave taken does not count against an employee's FMLA entitlement.'' As explained by the DOL, this last sentence of section 825.700(a) was deleted in order to conform to the U.S. Supreme Court's decision in *Ragsdale v. Wolverine World Wide*, 535 U.S. 81 (2002), which specifically invalidated this provision.

825.700(a)

One commenter objected to the first sentence of this section, suggesting that the proposed regulation state that where an employing office fails to observe a program providing greater benefits than those provided under the FMLA, the employee has a right to bring a claim under the CAA. The commenter suggested instead, that the avenue for redress of a claim arising in another program, for example in the collective bargaining agreement, would be through the grievance process or another section of the CAA, and not under the FMLA provision of the CAA. The Board has determined that no good cause has been shown to modify the DOL regulation.

One commenter notes that subsection (a) limits an employing office's ability to change its policies, including a policy with greater employment benefits, impermissibly requiring an employing office to continue a benefit program that it may no longer be able to afford. Thus, it improperly limits management's right to determine its own policies. The Board has determined that no good cause has been shown to modify the DOL regulation.

One commenter agrees that the Board should follow the DOL regulation to comply with the Supreme Court's decision in *Ragsdale v. Wolverine World Wide*, 535 U.S. 81 (2002) (holding that an employer may retroactively designate leave as FMLA leave under certain circumstances). However, the commenter urges the Board to further clarify the following language: ''An employing office must observe any employment benefit program or plan that provides greater family or medical leave rights to employees than the rights established by the FMLA.'' Specifically, the commenter suggested that the Board clarify what constitutes such an employment benefit program or plan. This proposed section discusses a hypothetical example of a collective bargaining agreement which provides for reinstatement rights based on seniority; however, the commenter recommends that the Board offer additional examples (e.g., to clarify whether leave policies set forth in an employee handbook qualify) and clarify that this language does not contemplate the application of state law. The Board has determined that no good cause has been shown to modify the DOL regulations.

Section 825.701 Interaction with State laws.

This DOL section does not apply to the CAA and will remain reserved in the OOC regulations.

Section 825.702 Interaction with anti-discrimination laws, as applied by section 201 of the CAA.

The Board proposed to adopt the amendments covered in the DOL regulations under this section. Section 825.702 addresses the interaction between the FMLA and other Federal and State antidiscrimination laws. Section 825.702 discusses the interaction between the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA) and the FMLA. Under USERRA, a returning servicemember would be entitled to FMLA leave if, after including the hours that he or she would have worked for the civilian employing office during the period of military service, the employee would have met the FMLA eligibility threshold. This is not an expansion of FMLA rights through regulation; this is a requirement of USERRA.

With respect to the interaction of the FMLA and ADA, where both laws may apply, the applicability of each statute needs to be evaluated independently.

Further, the reference to employers who receive Federal financial assistance and employers who contract with the Federal government in this section has not been adopted by the Board because federal contractor employers are not covered by the CAA.

One commenter suggested adding ''as made applicable by the CAA'' between ''(ADA)'' and ''the employing office.'' The same commenter suggested adding ''as made applicable by the CAA'' after ''afford an employee his or her FMLA rights.'' The Board has made the suggested changes.

One commenter suggested adding ''as made applicable by the CAA'' after ''he or she will have rights under the ADA.'' The Board has made the suggested change.

COMMENTS ON MODEL FORMS:

I. In its final regulations, the DOL removed the following optional-use forms and notices from the Appendix of the regulations, but continued to make them available to the public on the WHD Web site: Forms WH–380–E (Certification of Health Care Provider for Employee's Serious Health Condition); WH–380–F (Certification of Health Care Provider for Family Member's Serious Health Condition); WH–381 (Notice of Eligibility and Rights & Responsibilities); WH–382 (Designation Notice); WH–384 (Certification of Qualifying Exigency for Military Family Leave); WH–385 (Certification for Serious Injury or Illness of Current Servicemember for Military Family Leave); and WH–385–V (Certification for Serious Injury or Illness of a Veteran for Military Caregiver Leave).

The Board proposed to revise its forms and to make the following OOC forms available on its website: Form A: Certification of Health Care Provider for Employee's Serious Health Condition; Form B: Certification of Health Care Provider for Family Member's Serious Health Condition; Form C: Notice of Eligibility and Rights and Responsibilities; Form D: Designation Notice to Employee of FMLA Leave; Form E: Certification of Qualifying Exigency for Military Family Leave; Form F: Certification for Serious Injury or Illness of Covered Servicemember for Military Family Leave; and Form G: Certification for Serious Injury or Illness of a Veteran for Military Caregiver Leave. The Board's proposed forms now include references to the Genetic Information Nondiscrimination Act of 2008, which is made applicable to employees covered under the CAA. In any event, the use of a specific set of forms is optional and other forms requiring the same information may be used instead. In proposing these revised forms, the Board recognizes that the use of specific forms play a key role in employing offices' compliance with the FMLA and employees' ability to take FMLA protected leave when needed.

One commenter recommended that the OOC follow its past practice of creating FMLA-related forms that are CAA-compliant rather than directing covered employees and employing offices to the DOL website for the appropriate forms.

One commenter suggested that these forms should be available on the OOC's website and not in the regulations themselves because use of the proposed model forms is not required. The Board will make the forms available on the OOC website and, consistent with the DOL, will not include them in its regulations. Some commenters suggested minor changes to the forms, and the Board has made the appropriate modifications.

One commenter suggested that the Board adopt and include (on Model Forms A, B, F, and G) the EEOC's ''safe harbor'' language for employers to use to warn employees that their healthcare providers should not provide genetic information in their response to an FMLA request. The commenter suggested use of the EEOC's model warning language as opposed to the DOL language that was included in the Board's proposal. The commenter also suggested that the language should be more prominent and obvious,

which would have the intended effect of reducing additional notices to employees and thus burdens on the employing offices. Having reviewed the EEOC's model warning language, as well as model warning language from government agencies and private employers, the Board finds good cause to modify the DOL's GINA model warning language on Forms A, B, F, and G.

Substantive Regulations Adopted by the Board of Directors of the Office of Compliance Extending Rights and Protections Under the Family and Medical Act of 1993, as amended, as Made Applicable by the Congressional Accountability Act

FINAL REGULATIONS

825.1 Purpose and scope.

(a) Section 202 of the Congressional Accountability Act (CAA) (2 U.S.C. 1312) applies the rights and protections of sections 101 through 105 of the Family and Medical Leave Act of 1993 (FMLA) (29 U.S.C. 2611–2615) to covered employees. (The term ''covered employee'' is defined in section 101(3) of the CAA (2 U.S.C. 1301(3)). *See* 825.102 of these regulations for that definition.) The purpose of this part is to set forth the regulations to carry out the provisions of section 202 of the CAA.

(b) These regulations are issued by the Board of Directors (Board) of the Office of Compliance, pursuant to sections 202(d) and 304 of the CAA, which direct the Board to promulgate regulations implementing section 202 that are ''the same as substantive regulations promulgated by the Secretary of Labor to implement the statutory provisions referred to in subsection (a) [of section 202 of the CAA] except insofar as the Board may determine, for good cause shown . . . that a modification of such regulations would be more effective for the implementation of the rights and protections under this section.'' The regulations issued by the Board herein are on all matters for which section 202 of the CAA requires regulations to be issued. Specifically, it is the Board's considered judgment, based on the information available to it at the time of the promulgation of these regulations, that, with the exception of regulations adopted and set forth herein, there are no other ''substantive regulations promulgated by the Secretary of Labor to implement the statutory provisions referred to in subsection (a) [of section 202 of the CAA].''

(c) In promulgating these regulations, the Board has made certain technical and nomenclature changes to the regulations as promulgated by the Secretary. Such changes are intended to make the provisions adopted accord more naturally to situations in the legislative branch. However, by making these changes, the Board does not intend a substantive difference between these regulations and those of the Secretary from which they are derived. Moreover, such changes, in and of themselves, are not intended to constitute an interpretation of the regulation or of the statutory provisions of the CAA upon which they are based.

(d) Pursuant to section 304(b)(4) of the CAA, 2 U.S.C. 1384(b)(4), the Board of Directors is required to recommend to Congress a method of approval for these regulations. As the Board has adopted the same regulations for the Senate, the House of Representatives, and the other covered entities and facilities, it therefore recommends that the adopted regulations be approved by concurrent resolution of the Congress.

SUBPART A—COVERAGE UNDER THE FAMILY AND MEDICAL LEAVE ACT, AS MADE APPLICABLE BY THE CONGRESSIONAL ACCOUNTABILITY ACT

825.100 The Family and Medical Leave Act.

(a) The Family and Medical Leave Act of 1993 (FMLA), as made applicable by the Congressional Accountability Act (CAA), allows eligible employees of an employing office to take job-protected, unpaid leave, or to substitute appropriate paid leave if the employee has earned or accrued it, for up to a total of 12 workweeks in any 12 months (*see* 825.200(b)) because of the birth of a child and to care for the newborn child, because of the placement of a child with the employee for adoption or foster care, because the employee is needed to care for a family member (child, spouse, or parent) with a serious health condition, because the employee's own serious health condition makes the employee unable to perform the functions of his or her job, or because of any qualifying exigency arising out of the fact that the employee's spouse, son, daughter, or parent is a military member on active duty or call to covered active duty status (or has been notified of an impending call or order to covered active duty). In addition, eligible employees of a covered employing office may take job-protected, unpaid leave, or substitute appropriate paid leave if the employee has earned or accrued it, for up to a total of 26 workweeks in a single 12–month period to care for a covered servicemember with a serious injury or illness. In certain cases, FMLA leave may be taken on an intermittent basis rather than all at once, or the employee may work a part-time schedule.

(b) An employee on FMLA leave is also entitled to have health benefits maintained while on leave as if the employee had continued to work instead of taking the leave. If an employee was paying all or part of the premium payments prior to leave, the employee would continue to pay his or her share during the leave period. The employing office or a disbursing or other financial office may recover its share only if the employee does not return to work for a reason other than the serious health condition of the employee or the employee's covered family member, the serious injury or illness of a covered servicemember, or another reason beyond the employee's control.

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

(d) The employing office generally has a right to advance notice from the employee. In addition, the employing office may require an employee to submit certification to substantiate that the leave is due to the serious health condition of the employee or the employee's covered family member, due to the serious injury or illness of a covered servicemember, or because of a qualifying exigency. Failure to comply with these requirements may result in a delay in the start of FMLA leave. Pursuant to a uniformly applied policy, the employing office may also require that an employee present a certification of fitness to return to work when the absence was caused by the employee's serious health condition (*see* 825.312 and 825.313)). The employing office may delay restoring the employee to employment without such certificate relating to the health condition which caused the employee's absence.

825.101 Purpose of the FMLA.

(a) FMLA is intended to allow employees to balance their work and family life by taking reasonable unpaid leave for medical reasons, for the birth or adoption of a child, for the care of a child, spouse, or parent who has a serious health condition, for the care of a covered servicemember with a serious injury or illness, or because of a qualifying exigency arising out of the fact that the employee's spouse, son, daughter, or parent is a military member on covered active duty or call to covered active duty status. The FMLA is intended to balance the demands of the workplace with the needs of families, to promote the stability and economic security of families, and to promote national interests in preserving family integrity. It was intended that the FMLA accomplish these purposes in a manner that accommodates the legitimate interests of employing offices, and in a manner consistent with the Equal Protection Clause of the Fourteenth Amendment in minimizing the potential for employment discrimination on the basis of sex, while promoting equal employment opportunity for men and women.

(b) The FMLA was predicated on two fundamental concerns—the needs of the American workforce, and the development of high-performance organizations. Increasingly, America's children and elderly are dependent upon family members who must spend long hours at work. When a family emergency arises, requiring workers to attend to seriously-ill children or parents, or to newly-born or adopted infants, or even to their own serious illness, workers need reassurance that they will not be asked to choose between continuing their employment, and meeting their personal and family obligations or tending to vital needs at home.

(c) The FMLA is both intended and expected to benefit employing offices as well as their employees. A direct correlation exists between stability in the family and productivity in the workplace. FMLA will encourage the development of high-performance organizations. When workers can count on durable links to their workplace they are able to make their own full commitments to their jobs. The record of hearings on family and medical leave indicate the powerful productive advantages of stable workplace relationships, and the comparatively small costs of guaranteeing that those relationships will not be dissolved while workers attend to pressing family health obligations or their own serious illness.

825.102 Definitions.

For purposes of this part:

ADA means the Americans With Disabilities Act (42 U.S.C. 12101 *et seq.*, as amended), as made applicable by the Congressional Accountability Act.

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

COBRA means the continuation coverage requirements of Title X of the Consolidated Omnibus Budget Reconciliation Act of 1986 (Pub. Law 99–272, title X, section 10002; 100 Stat. 227; 29 U.S.C. 1161–1168).

Contingency operation means a military operation that:

(1) Is designated by the Secretary of Defense as an operation in which members of the Armed Forces are or may become involved in military actions, operations, or hostilities against an enemy of the United States or against an opposing military force; or

(2) Results in the call or order to, or retention on, active duty of members of the uniformed services under section 688, 12301(a), 12302, 12304, 12305, or 12406 of Title 10 of the United States Code, chapter 15 of Title 10 of the United States Code, or any other provision of law during a war or during a national emergency declared by the President or Congress. *See also* 825.126(a)(2).

Continuing treatment by a health care provider means any one of the following:

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

(i) Treatment two or more times, within 30 days of the first day of incapacity, unless extenuating circumstances exist, by a health care provider, by a nurse 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

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

(iii) The requirement in paragraphs (i) and (ii) of this definition for treatment by a health care provider means an in-person visit to a health care provider. The first in-person treatment visit must take place within seven days of the first day of incapacity.

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

(v) The term ''extenuating circumstances'' in paragraph (i) means circumstances beyond the employee's control that prevent the follow-up visit from occurring as planned by the health care provider. Whether a given set of circumstances are extenuating depends on the facts. *See also* 825.115(a)(5).

(2) *Pregnancy or prenatal care.* Any period of incapacity due to pregnancy, or for prenatal care. 825.120.

(3) *Chronic conditions.* Any period of incapacity or treatment for such incapacity due to a chronic serious health condition. A chronic serious health condition is one which:

(i) Requires periodic visits (defined as at least twice a year) for treatment by a health care provider, or by a nurse under direct supervision of a health care provider;

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

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

(4) *Permanent or long-term conditions.* A period of incapacity 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.

(5) *Conditions requiring multiple treatments.* 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, for:

(i) Restorative surgery after an accident or other injury; or

(ii) A condition that would likely result in a period of incapacity of more than three consecutive full calendar days in the absence of medical intervention or treatment, such as cancer (chemotherapy, radiation, *etc.*), severe arthritis (physical therapy), kidney disease (dialysis).

(6) Absences attributable to incapacity under paragraphs (2) or (3) of this definition qualify for FMLA leave even though the employee or the covered family member does not receive treatment from a health care provider during the absence, and even if the absence does not last more than three consecutive, full calendar days. For example, an

employee with asthma may be unable to report for work due to the onset of an asthma attack or because the employee's health care provider has advised the employee to stay home when the pollen count exceeds a certain level. An employee who is pregnant may be unable to report to work because of severe morning sickness.

Covered active duty or call to covered active duty status means:

(1) In the case of a member of the Regular Armed Forces, duty during the deployment of the member with the Armed Forces to a foreign country; and,

(2) In the case of a member of the Reserve components of the Armed Forces, duty during the deployment of the member with the Armed Forces to a foreign country under a Federal call or order to active duty in support of a contingency operation pursuant to: Section 688 of Title 10 of the United States Code, which authorizes ordering to active duty retired members of the Regular Armed Forces and members of the retired Reserve who retired after completing at least 20 years of active service; Section 12301(a) of Title 10 of the United States Code, which authorizes ordering all reserve component members to active duty in the case of war or national emergency; Section 12302 of Title 10 of the United States Code, which authorizes ordering any unit or unassigned member of the Ready Reserve to active duty; Section 12304 of Title 10 of the United States Code, which authorizes ordering any unit or unassigned member of the Selected Reserve and certain members of the Individual Ready Reserve to active duty; Section 12305 of Title 10 of the United States Code, which authorizes the suspension of promotion, retirement or separation rules for certain Reserve components; Section 12406 of Title 10 of the United States Code, which authorizes calling the National Guard into Federal service in certain circumstances; chapter 15 of Title 10 of the United States Code, which authorizes calling the National Guard and state military into Federal service in the case of insurrections and national emergencies; or any other provision of law during a war or during a national emergency declared by the President or Congress so long as it is in support of a contingency operation. *See* 10 U.S.C. 101(a)(13)(B). *See also* 825.126(a).

Covered employee as defined in the CAA, means any employee of—(1) the House of Representatives; (2) the Senate; (3) the Office of Congressional Accessibility Services; (4) the Capitol Police; (5) the Congressional Budget Office; (6) the Office of the Architect of the Capitol; (7) the Office of the Attending Physician; (8) the Office of Compliance; or (9) the Office of Technology Assessment.

Covered servicemember means:

(1) A current member of the Armed Forces, including a member of the National Guard or Reserves, who is undergoing medical treatment, recuperation, or therapy, is otherwise in outpatient status, or is otherwise on the temporary disability retired list, for a serious injury or illness, or

(2) A covered veteran who is undergoing medical treatment, recuperation, or therapy for a serious injury or illness.

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

Eligible employee as defined in the CAA, means:

(1) A covered employee who has been employed for a total of at least 12 months in any employing office on the date on which any FMLA leave is to commence, except that an employing office need not consider any period of previous employment that occurred more than seven years before the date of the most recent hiring of the employee, *unless:*

(i) The break in service is occasioned by the fulfillment of the employee's Uniformed Services Employment and Reemployment Rights Act (USERRA), 38 U.S.C. 4301, et seq., covered service obligation (the period of absence from work due to or necessitated by USERRA-covered service must be also counted in determining whether the employee has been employed for at least 12 months by any employing office, but this section does not provide any greater entitlement to the employee than would be available under the USERRA, as made applicable by the CAA); or

(ii) A written agreement, including a collective bargaining agreement, exists concerning the employing office's intention to rehire the employee after the break in service (*e.g.*, for purposes of the employee furthering his or her education or for childrearing purposes); and

(2) Who, on the date on which any FMLA leave is to commence, has met the hours of service requirement by having been employed for at least 1,250 hours of service with an employing office during the previous 12–month period, *except that:*

(i) An employee returning from fulfilling his or her USERRA-covered service obligation shall be credited with the hours of service that would have been performed but for the period of absence from work due to or necessitated by USERRA-covered service in determining whether the employee met the hours of service requirement (accordingly, a person reemployed following absence from work due to or necessitated by USERRA-covered service has the hours that would have been worked for the employing office added to any hours actually worked during the previous 12–month period to meet the hours of service requirement); and

(ii) To determine the hours that would have been worked during the period of absence from work due to or necessitated by USERRA-covered service, the employee's pre-service work schedule can generally be used for calculations.

Employ means to suffer or permit to work.

Employee means an employee as defined by the CAA and includes an applicant for employment and a former employee.

Employee employed in an instructional capacity. See the definition of Teacher in this section.

Employee of the Capitol Police means any member or officer of the Capitol Police.

Employee of the House of Representatives means an individual occupying a position the pay for which is disbursed by the Clerk of the House of Representatives, or another official designated by the House of Representatives, or any employment position in an entity that is paid with funds derived from the clerk-hire allowance of the House of Representatives but not any such individual employed by any entity listed in subparagraphs (3) through (9) under the definition of covered employee above.

Employee of the Office of the Architect of the Capitol means any employee of the Office of the Architect of the Capitol or the Botanic Garden.

Employee of the Senate means any employee whose pay is disbursed by the Secretary of the Senate, but not any such individual employed by any entity listed in subparagraphs (3) through (9) under the definition of covered employee above.

Employing Office, as defined by the CAA, means:

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

(2) A committee of the House of Representatives or the Senate or a joint committee;

(3) Any other office headed by a person with the final authority to appoint, hire, discharge, and set the terms, conditions, or privileges of the employment of an employee of the House of Representatives or the Senate; or

(4) The Office of Congressional Accessibility Services, the United States Capitol Police, the Congressional Budget Office, the Office of the Architect of the Capitol, the Office of the Attending Physician, the Office of Compliance, and the Office of Technology Assessment.

Employment benefits means all benefits provided or made available to employees by an employing office, including group life insurance, health insurance, disability insurance, sick leave, annual leave, educational benefits, and pensions, regardless of whether such benefits are provided by a practice or written policy of an employing office or through an employee benefit plan. The term does not include non-employment related obligations paid by employees through voluntary deductions such as supplemental insurance coverage. *See also* 825.209(a).

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

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

Group health plan means the Federal Employees Health Benefits Program and any other plan of, or contributed to by, an employing office (including a self-insured plan) to provide health care (directly or otherwise) to the employing office's employees, former employees, or the families of such employees or former employees. For purposes of FMLA, as made applicable by the CAA, the term *group health plan* shall not include an insurance program providing health coverage under which employees purchase individual policies from insurers provided that:

(1) No contributions are made by the employing office;

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

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

(4) The employing office receives no consideration in the form of cash or otherwise in connection with the program, other than reasonable compensation, excluding any profit, for administrative services actually rendered in connection with payroll deduction; and,

(5) The premium charged with respect to such coverage does not increase in the event the employment relationship terminates.

Health care provider means:

(1) The FMLA, as made applicable by the CAA, defines health care provider as:

(i) A doctor of medicine or osteopathy who is authorized to practice medicine or surgery (as appropriate) by the State in which the doctor practices; or

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

(2) Others ''capable of providing health care services'' include only:

(i) Podiatrists, dentists, clinical psychologists, optometrists, and chiropractors (limited to treatment consisting of manual manipulation of the spine to correct a subluxation as demonstrated by X-ray to exist) authorized to practice in the State and performing within the scope of their practice as defined under State law;

(ii) Nurse practitioners, nurse-midwives and clinical social workers and physician assistants who are authorized to practice

under State law and who are performing within the scope of their practice as defined under State law;

(iii) Christian Science practitioners listed with the First Church of Christ, Scientist in Boston, Massachusetts. Where an employee or family member is receiving treatment from a Christian Science practitioner, an employee may not object to any requirement from an employing office that the employee or family member submit to examination (though not treatment) to obtain a second or third certification from a health care provider other than a Christian Science practitioner except as otherwise provided under applicable State or local law or collective bargaining agreement;

(iv) Any health care provider from whom an employing office or a group health plan's benefits manager will accept certification of the existence of a serious health condition to substantiate a claim for benefits; and

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

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

Incapable of self-care means that the individual requires active assistance or supervision to provide daily self-care in several of the ''activities of daily living'' (ADLs) or ''instrumental activities of daily living'' (IADLs). Activities of daily living include adaptive activities such as caring appropriately for one's grooming and hygiene, bathing, dressing and eating. Instrumental activities of daily living include cooking, cleaning, shopping, taking public transportation, paying bills, maintaining a residence, using telephones and directories, using a post office, etc.

Instructional employee: See the definition of *Teacher* in this section.

Intermittent leave means leave taken in separate periods of time due to a single illness or injury, rather than for one continuous period of time, and may include leave of periods from an hour or more to several weeks. Examples of intermittent leave would include leave taken on an occasional basis for medical appointments, or leave taken several days at a time spread over a period of six months, such as for chemotherapy.

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

Key employee means a salaried FMLA-eligible employee who is among the highest paid 10 percent of all the employees employed by the employing office within 75 miles of the employee's worksite. *See also* 825.217.

Mental disability: See the definition of *Physical or mental disability* in this section.

Military caregiver leave means leave taken to care for a covered servicemember with a serious injury or illness under the Family and Medical Leave Act of 1993. *See also* 825.127.

Next of kin of a covered servicemember means the nearest blood relative other than the covered servicemember's spouse, parent, son, or daughter, in the following order of priority: blood relatives who have been granted legal custody of the covered servicemember by court decree or statutory provisions, brothers and sisters, grandparents, aunts and uncles, and first cousins, unless the covered servicemember has specifically designated in writing another blood relative as his or her nearest blood relative for purposes of military caregiver leave under the FMLA. When no such designation is made, and there are multiple family members with the same level of relationship to the covered servicemember, all such family members shall be considered the covered servicemember's next of kin and may take FMLA leave to provide care to the covered servicemember, either consecutively or simultaneously. When such designation has been made, the designated individual shall be deemed to be the covered servicemember's only next of kin. *See also* 825.127(d)(3).

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

Outpatient status means, with respect to a covered servicemember who is a current member of the Armed Forces, the status of a member of the Armed Forces assigned to either a military medical treatment facility as an outpatient; or a unit established for the purpose of providing command and control of members of the Armed Forces receiving medical care as outpatients. *See also* 825.127(b)(1).

Parent means a biological, adoptive, step or foster father or mother or any other individual who stood in loco parentis to the employee when the employee was a son or daughter as defined below. This term does not include parents ''in law.''

Parent of a covered servicemember means a covered servicemember's biological, adoptive, step or foster father or mother, or any other individual who stood in loco parentis to the covered servicemember. This term does not include parents ''in law.'' See also 825.127(d)(2).

Physical or mental disability means a physical or mental impairment that substantially limits one or more of the major life activities of an individual. Regulations at 29 CFR part 1630, issued by the Equal Employment Opportunity Commission under the Americans with Disabilities Act (ADA), 42 U.S.C. 12101 et seq., as amended, provide guidance for these terms.

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

Reserve components of the Armed Forces, for purposes of qualifying exigency leave, include the Army National Guard of the United States, Army Reserve, Navy Reserve, Marine Corps Reserve, Air National Guard of the United States, Air Force Reserve, and Coast Guard Reserve, and retired members of the Regular Armed Forces or Reserves who are called up in support of a contingency operation. *See also* 825.126(a)(2)(i).

Secretary means the Secretary of Labor or authorized representative.

Serious health condition means an illness, injury, impairment, or physical or mental condition that involves inpatient care as defined in 825.114 or continuing treatment by a health care provider as defined in 825.115. Conditions for which cosmetic treatments are administered (such as most treatments for acne or plastic surgery) are not serious health conditions unless inpatient hospital care is required or unless complications develop. Restorative dental or plastic surgery after an injury or removal of cancerous growths are serious health conditions provided all the other conditions of this regulation are met. Mental illness or allergies may be serious health conditions, but only if all the conditions of 825.113 are met.

Serious injury or illness means:

(1) In the case of a current member of the Armed Forces, including a member of the National Guard or Reserves, an injury or illness that was incurred by the covered servicemember in the line of duty on active duty in the Armed Forces or that existed before the beginning of the member's active duty and was aggravated by service in the line of duty on active duty in the Armed Forces and that may render the servicemember medically unfit to perform the duties of the member's office, grade, rank, or rating; and

(2) In the case of a covered veteran, an injury or illness that was incurred by the member in the line of duty on active duty in the Armed Forces (or existed before the beginning of the member's active duty and was aggravated by service in the line of duty on active duty in the Armed Forces) and manifested itself before or after the member became a veteran, and is:

(i) A continuation of a serious injury or illness that was incurred or aggravated when the covered veteran was a member of the Armed Forces and rendered the servicemember unable to perform the duties of the servicemember's office, grade, rank, or rating; or

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

(iii) A physical or mental condition that substantially impairs the covered veteran's ability to secure or follow a substantially gainful occupation by reason of a disability or disabilities related to military service, or would do so absent treatment; or

(iv) An injury, including a psychological injury, on the basis of which the covered veteran has been enrolled in the Department of Veterans Affairs Program of Comprehensive Assistance for Family Caregivers. *See also* 825.127(c).

Son or daughter means a biological, adopted, or foster child, a stepchild, a legal ward, or a child of a person standing in loco parentis, who is either under age 18, or age 18 or older and ''incapable of self-care because of a mental or physical disability'' at the time that FMLA leave is to commence.

Son or daughter of a covered servicemember means a covered servicemember's biological, adopted, or foster child, stepchild, legal ward, or a child for whom the covered servicemember stood in loco parentis, and who is of any age. *See also* 825.127(d)(1).

Son or daughter on covered active duty or call to covered active duty status means the employee's biological, adopted, or foster child, stepchild, legal ward, or a child for whom the employee stood in loco parentis, who is on covered active duty or call to covered active duty status, and who is of any age. *See also* 825.126(a)(5).

Spouse means a husband or wife. For purposes of this definition, husband or wife refers to the other person with whom an individual entered into marriage as defined or recognized under state law for purposes of marriage in the State in which the marriage was entered into or, in the case of a marriage entered into outside of any State, if the marriage is valid in the place where entered into and could have been entered into in at least one State. This definition includes an individual in a same-sex or common law marriage that either:

(1) Was entered into in a State that recognizes such marriages; or

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

Teacher (or employee employed in an instructional capacity, or instructional employee) means an employee employed principally in an instructional capacity by an educational agency or school whose principal function is to teach and instruct students in a class, a small group, or an individual setting, and includes athletic coaches, driving

instructors, and special education assistants such as signers for the hearing impaired. The term does not include teacher assistants or aides who do not have as their principal function actual teaching or instructing, nor auxiliary personnel such as counselors, psychologists, curriculum specialists, cafeteria workers, maintenance workers, bus drivers, or other primarily noninstructional employees.

TRICARE is the health care program serving active duty servicemembers, National Guard and Reserve members, retirees, their families, survivors, and certain former spouses worldwide.

825.103 [Reserved]

825.104 Covered employing offices.

(a) The FMLA, as made applicable by the CAA, covers all employing offices. As used in the CAA, the term employing office means:

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

(2) A committee of the House of Representatives or the Senate or a joint committee;

(3) Any other office headed by a person with the final authority to appoint, hire, discharge, and set the terms, conditions, or privileges of the employment of an employee of the House of Representatives or the Senate; or

(4) The Office of Congressional Accessibility Services, the United States Capitol Police, the Congressional Budget Office, the Office of the Architect of the Capitol, the Office of the Attending Physician, the Office of Compliance, and the Office of Technology Assessment.

825.105 [Reserved].

825.106 Joint employer coverage.

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

(1) Where there is an arrangement between employing offices to share an employee's services or to interchange employees;

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

(3) Where the employing offices are not completely disassociated with respect to the employee's employment and may be deemed to share control of the employee, directly or indirectly, because one employing office controls, is controlled by, or is under common control with the other employing office.

(b) A determination of whether or not a joint employment relationship exists is not determined by the application of any single criterion, but rather the entire relationship is to be viewed in its totality. For example, joint employment will ordinarily be found to exist when:

(1) An employee, who is employed by an employing office other than the personal office of a Member of the House of Representatives or of a Senator, is under the actual direction and control of the Member of the House of Representatives or Senator; or

(2) Two or more employing offices employ an individual to work on common issues or other matters for both or all of them.

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

(d) If an employing office is designated a primary employing office pursuant to paragraph (c) of this section, only that employing office is responsible for giving required notices to the covered employee, providing FMLA leave, and maintenance of health benefits. Job restoration is the primary responsibility of the primary employing office, and the secondary employing office(s) may, subject to the limitations in 825.216, be responsible for accepting the employee returning from FMLA leave.

(e) If employing offices employ an employee jointly, but fail to designate a primary employing office pursuant to paragraph (c) of this section, then all of these employing offices shall be jointly and severally liable for giving required notices to the employee, for providing FMLA leave, for assuring that health benefits are maintained, and for job restoration. The employee may give notice of need for FMLA leave, as described in 825.302 and 825.303, to whichever of these employing offices the employee chooses. If the employee makes a written request for restoration to one of these employing offices, that employing office shall be primarily responsible for job restoration, and the other employing office(s) may, subject to the limitations in 825.216, be responsible for accepting the employee returning from FMLA leave.

825.107 [Reserved]

825.108 [Reserved]

825.109 [Reserved]

825.110 Eligible employees.

(a) An eligible employee is a covered employee of an employing office who:

(1) Has been employed by any employing office for at least 12 months, and

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

(b) The 12 months an employee must have been employed by any employing office need not be consecutive months, *provided:*

(1) Subject to the exceptions provided in paragraph (b)(2) of this section, employment periods prior to a break in service of seven years or more need not be counted in determining whether the employee has been employed by any employing office for at least 12 months.

(2) Employment periods preceding a break in service of more than seven years must be counted in determining whether the employee has been employed by any employing office for at least 12 months where:

(i) The employee's break in service is occasioned by the fulfillment of his or her Uniformed Services Employment and Reemployment Rights Act (USERRA), 38 U.S.C. 4301, *et seq.*, covered service obligation. The period of absence from work due to or necessitated by USERRA-covered service must be also counted in determining whether the employee has been employed for at least 12 months by any employing office. However, this section does not provide any greater entitlement to the employee than would be available under the USERRA; or

(ii) A written agreement, including a collective bargaining agreement, exists concerning the employing office's intention to rehire the employee after the break in service (*e.g.*, for purposes of the employee furthering his or her education or for childrearing purposes).

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

(4) If an employee is maintained on the payroll for any part of a week, including any periods of paid or unpaid leave (sick, vacation) during which other benefits or compensation are provided by the employing office (*e.g.*, Federal Employees' Compensation, group health plan benefits, *etc.*), the week counts as a week of employment. For purposes of determining whether intermittent/occasional/casual employment qualifies as at least 12 months, 52 weeks is deemed to be equal to 12 months.

(5) Nothing in this section prevents employing offices from considering employment prior to a continuous break in service of more than seven years when determining whether an employee has met the 12–month employment requirement. However, if an employing office chooses to recognize such prior employment, the employing office must do so uniformly, with respect to all employees with similar breaks in service.

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

(2) Except as provided in paragraph (c)(3) of this section, whether an employee has worked the minimum 1,250 hours of service is determined according to the principles established under the Fair Labor Standards Act (FLSA), as applied by section 203 of the CAA (2 U.S.C. 1313), for determining compensable hours of work. The determining factor is the number of hours an employee has worked for one or more employing offices as defined by the CAA. The determination is not limited by methods of recordkeeping, or by compensation agreements that do not accurately reflect all of the hours an employee has worked for or been in service to the employing office. Any accurate accounting of actual hours worked under the FLSA's principles, as made applicable by the CAA (2 U.S.C. 1313), may be used.

(3) An employee returning from USERRA-covered service shall be credited with the hours of service that would have been performed but for the period of absence from work due to or necessitated by USERRA-covered service in determining the employee's eligibility for FMLA-qualifying leave. Accordingly, a person reemployed following USERRA-covered service has the hours that would have been worked for the employing office added to any hours actually worked during the previous 12–month period to meet the hours of service requirement. In order to determine the hours that would have been worked during the period of absence from work due to or necessitated by USERRA-covered service, the employee's pre-service work schedule can generally be used for calculations.

(4) In the event an employing office does not maintain an accurate record of hours worked by an employee, including for employees who are exempt from the overtime requirements of the FLSA, as made applicable by the CAA and its regulations, the employing office has the burden of showing that the employee has not worked the requisite hours. An employing office must be able to clearly demonstrate, for example, that full time teachers (*see* 825.102 for definition) of an elementary or secondary school system, or institution of higher education, or other educational establishment or institution (who often work outside the classroom or at their homes) did not work 1,250 hours during the previous 12 months in order to claim that the teachers are not covered or eligible for FMLA leave.

(d) The determination of whether an employee meets the hours of service requirement for any employing office and has been employed by any employing office for a total of at least 12 months, must be made as of the date the FMLA leave is to start. An employee may be on non-FMLA leave at the time he or she meets the 12-month eligibility

requirement, and in that event, any portion of the leave taken for an FMLA-qualifying reason after the employee meets the eligibility requirement would be FMLA leave. *See* 825.300(b) for rules governing the content of the eligibility notice given to employees.

(e) If, before beginning employment with an employing office, an employee had been employed by another employing office, the subsequent employing office may count against the employee's FMLA leave entitlement FMLA leave taken from the prior employing office, so long as the prior employing office properly designated the leave as FMLA under these regulations or other applicable requirements.

825.111 [Reserved]

825.112 Qualifying reasons for leave, general rule.

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

(1) For birth of a son or daughter, and to care for the newborn child (*see* 825.120);

(2) For placement with the employee of a son or daughter for adoption or foster care (*see* 825.121);

(3) To care for the employee's spouse, son, daughter, or parent with a serious health condition (*see* 825.113 and 825.122);

(4) Because of a serious health condition that makes the employee unable to perform the functions of the employee's job (*see* 825.113 and 825.123);

(5) Because of any qualifying exigency arising out of the fact that the employee's spouse, son, daughter, or parent is a military member on covered active duty (or has been notified of an impending call or order to covered active duty status) (*see* 825.122 and 825.126); and

(6) To care for a covered servicemember with a serious injury or illness if the employee is the spouse, son, daughter, parent, or next of kin of the covered servicemember (*see* 825.122 and 825.127).

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

(c) *Active employee.* In situations where the employing office/employee relationship has been interrupted, such as an employee who has been on layoff, the employee must be recalled or otherwise be re-employed before being eligible for FMLA leave. Under such circumstances, an eligible employee is immediately entitled to further FMLA leave for a qualifying reason.

825.113 Serious health condition.

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

(b) The term *incapacity* means inability to work, attend school or perform other regular daily activities due to the serious health condition, treatment therefore, or recovery therefrom.

(c) The term treatment includes (but is not limited to) 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. 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 (*e.g.*, oxygen). A regimen of continuing treatment that includes 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, is not, by itself, sufficient to constitute a regimen of continuing treatment for purposes of FMLA leave.

(d) Conditions for which cosmetic treatments are administered (such as most treatments for acne or plastic surgery) are not serious health conditions unless inpatient hospital care is required or unless complications develop. Ordinarily, unless complications arise, the common cold, the flu, ear aches, upset stomach, minor ulcers, headaches other than migraine, routine dental or orthodontia problems, periodontal disease, *etc.*, are examples of conditions that do not meet the definition of a serious health condition and do not qualify for FMLA leave. Restorative dental or plastic surgery after an injury or removal of cancerous growths are serious health conditions provided all the other conditions of this regulation are met. Mental illness or allergies may be serious health conditions, but only if all the conditions of this section are met.

825.114 Inpatient care.

In patient care means an overnight stay in a hospital, hospice, or residential medical care facility, including any period of incapacity as defined in 825.113(b), or any subsequent treatment in connection with such inpatient care.

825.115 Continuing treatment.

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

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

(1) Treatment two or more times, within 30 days of the first day of incapacity, unless extenuating circumstances exist, by a health care provider, by a nurse 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 treatment under the supervision of the health care provider.

(3) The requirement in paragraphs (a)(1) and (2) of this section for treatment by a health care provider means an in-person visit to a health care provider. The first (or only) in-person treatment visit must take place within seven days of the first day of incapacity.

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

(5) The term *extenuating circumstances* in paragraph (a)(1) of this section means circumstances beyond the employee's control that prevent the follow-up visit from occurring as planned by the health care provider. Whether a given set of circumstances are extenuating depends on the facts. For example, extenuating circumstances exist if a health care provider determines that a second in-person visit is needed within the 30-day period, but the health care provider does not have any available appointments during that time period.

(b) *Pregnancy or prenatal care.* Any period of incapacity due to pregnancy, or for prenatal care. *See also* 825.120.

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

(1) Requires periodic visits (defined as at least twice a year) for treatment by a health care provider, or by a nurse 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 incapacity (*e.g.*, asthma, diabetes, epilepsy, etc.).

(d) *Permanent or long-term conditions.* A period of incapacity 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.

(e) *Conditions requiring multiple treatments.* 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, for:

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

(2) A condition that would likely result in a period of incapacity of more than three consecutive, full calendar days in the absence of medical intervention or treatment, such as cancer (chemotherapy, radiation, *etc.*), severe arthritis (physical therapy), or kidney disease (dialysis).

(f) Absences attributable to incapacity under paragraphs (b) or (c) of this section qualify for FMLA leave even though the employee or the covered family member does not receive treatment from a health care provider during the absence, and even if the absence does not last more than three consecutive, full calendar days. For example, an employee with asthma may be unable to report for work due to the onset of an asthma attack or because the employee's health care provider has advised the employee to stay home when the pollen count exceeds a certain level. An employee who is pregnant may be unable to report to work because of severe morning sickness.

825.116 [Reserved]

825.117 [Reserved]

825.118 [Reserved]

825.119 Leave for treatment of substance abuse.

(a) Substance abuse may be a serious health condition if the conditions of 825.113 through 825.115 are met. However, FMLA leave may only be taken for treatment for substance abuse by a health care provider or by a provider of health care services on referral by a health care provider. On the other hand, absence because of the employee's use of the substance, rather than for treatment, does not qualify for FMLA leave.

(b) Treatment for substance abuse does not prevent an employing office from taking employment action against an employee. The employing office may not take action against the employee because the employee has exercised his or her right to take FMLA leave for treatment. However, if the employing office has an established policy, applied in a non-discriminatory manner that has been communicated to all employees, that provides under certain circumstances an employee may be terminated for substance abuse, pursuant to that policy the employee may be terminated whether or not the employee is presently taking FMLA leave. An employee may also take FMLA leave to care for a covered family member who is receiving treatment for substance abuse. The employing office may not take action against an employee who is providing care for a covered family member receiving treatment for substance abuse.

825.120 Leave for pregnancy or birth.

(a) *General rules.* Eligible employees are entitled to FMLA leave for pregnancy or birth of a child as follows:

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

(2) Both parents are entitled to FMLA leave to be with the healthy newborn child (*i.e.*, bonding time) during the 12-month period beginning on the date of birth. An employee's entitlement to FMLA leave for a birth expires at the end of the 12-month period beginning on the date of the birth. If the employing office permits bonding leave to be taken beyond this period, such leave will not qualify as FMLA leave. Under this section, both parents are entitled to FMLA leave even if the newborn does not have a serious health condition.

(3) Spouses who are eligible for FMLA leave and are employed by the same employing office may be limited to a combined total of 12 weeks of leave during any 12-month period if the leave is taken for birth of the employee's son or daughter or to care for the child after birth, for placement of a son or daughter with the employee for adoption or foster care or to care for the child after placement, or to care for the employee's parent with a serious health condition. This limitation on the total weeks of leave applies to leave taken for the reasons specified as long as the spouses are employed by the same employing office. It would apply, for example, even though the spouses are employed at two different worksites of an employing office. On the other hand, if one spouse is ineligible for FMLA leave, the other spouse would be entitled to a full 12 weeks of FMLA leave. Where spouses both use a portion of the total 12-week FMLA leave entitlement for either the birth of a child, for placement for adoption or foster care, or to care for a parent, the spouses would each be entitled to the difference between the amount he or she has taken individually and 12 weeks for FMLA leave for other purposes. For example, if each spouse took six weeks of leave to care for a healthy, newborn child, each could use an additional six weeks due to his or her own serious health condition or to care for a child with a serious health condition.

(4) The expectant mother is entitled to FMLA leave for incapacity due to pregnancy, for prenatal care, or for her own serious health condition following the birth of the child. An expectant mother may take FMLA leave before the birth of the child for prenatal care or if her condition makes her unable to work. The expectant mother is entitled to leave for incapacity due to pregnancy even though she does not receive treatment from a health care provider during the absence, and even if the absence does not last for more than three consecutive calendar days.

(5) A spouse is entitled to FMLA leave if needed to care for a pregnant spouse who is incapacitated or if needed to care for her during her prenatal care, or if needed to care for her following the birth of a child if she has a serious health condition. *See* 825.124.

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

(b) *Intermittent and reduced schedule leave.* An eligible employee may use intermittent or reduced schedule leave after the birth to be with a healthy newborn child only if the employing office agrees. For example, an employing office and employee may agree to a part-time work schedule after the birth. If the employing office agrees to permit intermittent or reduced schedule leave for the birth of a child, the employing office may require the employee to transfer temporarily, during the period the intermittent or reduced leave schedule is required, to an available alternative position for which the employee is qualified and which better accommodates recurring periods of leave than does the employee's regular position. Transfer to an alternative position may require compliance with any applicable collective bargaining agreement and federal law (such as the Americans with Disabilities Act, as made applicable by the CAA). Transfer to an alternative position may include altering an existing job to better accommodate the employee's need for intermittent or reduced leave. The employing office's agreement is not required for intermittent leave required by the serious health condition of the expectant mother or newborn child. *See* 825.202–825.205 for general rules governing the use of intermittent and reduced schedule leave. *See* 825.121 for rules governing leave for adoption or foster care. *See* 825.601 for special rules applicable to instructional employees of schools.

825.121 Leave for adoption or foster care.

(a) *General rules.* Eligible employees are entitled to FMLA leave for placement with the employee of a son or daughter for adoption or foster care as follows:

(1) Employees may take FMLA leave before the actual placement or adoption of a child if an absence from work is required for the placement for adoption or foster care to proceed. For example, the employee may be required to attend counseling sessions, appear in court, consult with his or her attorney or the doctor(s) representing the birth parent, submit to a physical examination, or travel to another country to complete an adoption. The source of an adopted child (*e.g.*, whether from a licensed placement agency or otherwise) is not a factor in determining eligibility for leave for this purpose.

(2) An employee's entitlement to leave for adoption or foster care expires at the end of the 12-month period beginning on the date of the placement. If the employing office permits leave for adoption or foster care to be taken beyond this period, such leave will not qualify as FMLA leave. Under this section, the employee is entitled to FMLA leave even if the adopted or foster child does not have a serious health condition.

(3) Spouses who are eligible for FMLA leave and are employed by the same covered employing office may be limited to a combined total of 12 weeks of leave during any 12-month period if the leave is taken for the placement of the employee's son or daughter or to care for the child after placement, for the birth of the employee's son or daughter or to care for the child after birth, or to care for the employee's parent with a serious health condition. This limitation on the total weeks of leave applies to leave taken for the reasons specified as long as the spouses are employed by the same employing office. It would apply, for example, even though the spouses are employed at two different worksites of an employing office. On the other hand, if one spouse is ineligible for FMLA leave, the other spouse would be entitled to a full 12 weeks of FMLA leave. Where spouses both use a portion of the total 12-week FMLA leave entitlement for either the birth of a child, for placement for adoption or foster care, or to care for a parent, the spouses would each be entitled to the difference between the amount he or she has taken individually and 12 weeks for FMLA leave for other purposes. For example, if each spouse took six weeks of leave to care for a healthy, newly placed child, each could use an additional six weeks due to his or her own serious health condition or to care for a child with a serious health condition.

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

(b) *Use of intermittent and reduced schedule leave.* An eligible employee may use intermittent or reduced schedule leave after the placement of a healthy child for adoption or foster care only if the employing office agrees. Thus, for example, the employing office and employee may agree to a part-time work schedule after the placement for bonding purposes. If the employing office agrees to permit intermittent or reduced schedule leave for the placement for adoption or foster care, the employing office may require the employee to transfer temporarily, during the period the intermittent or reduced leave schedule is required, to an available alternative position for which the employee is qualified and which better accommodates recurring periods of leave than does the employee's regular position. Transfer to an alternative position may require compliance with any applicable collective bargaining agreement and federal law (such as the Americans with Disabilities Act, as made applicable by the CAA). Transfer to an alternative position may include altering an existing job to better accommodate the employee's need for intermittent or reduced leave. The employing office's agreement is not required for intermittent leave required by the serious health condition of the adopted or foster child. *See* 825.202–825.205 for general rules governing the use of intermittent and reduced schedule leave. *See* 825.120 for general rules governing leave for pregnancy and birth of a child. *See* 825.601 for special rules applicable to instructional employees of schools.

825.122 Definitions of covered servicemember, spouse, parent, son or daughter, next of kin of a covered servicemember, adoption, foster care, son or daughter on covered active duty or call to covered active duty status, son or daughter of a covered servicemember, and parent of a covered servicemember.

(a) *Covered servicemember* means:

(1) A current member of the Armed Forces, including a member of the National Guard or Reserves, who is undergoing medical treatment, recuperation or therapy, is otherwise in outpatient status, or is otherwise on the temporary disability retired list, for a serious injury or illness; or

(2) A covered veteran who is undergoing medical treatment, recuperation, or therapy for a serious injury or illness. *Covered veteran* means an individual who was a member of the Armed Forces (including a member of the National Guard or Reserves), and was discharged or released under conditions other than dishonorable at any time during the five-year period prior to the first date the eligible employee takes FMLA leave to care for the covered veteran. *See* 825.127(b)(2).

(b) *Spouse* means a husband or wife. For purposes of this definition, husband or wife refers to the other person with whom an individual entered into marriage as defined or

recognized under state law for purposes of marriage in the State in which the marriage was entered into or, in the case of a marriage entered into outside of any State, if the marriage is valid in the place where entered into and could have been entered into in at least one State. This definition includes an individual in a same-sex or common law marriage that either:

(1) Was entered into in a State that recognizes such marriages; or

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

(c) *Parent*. Parent means a biological, adoptive, step or foster father or mother, or any other individual who stood in loco parentis to the employee when the employee was a son or daughter as defined in paragraph (d) of this section. This term does not include parents ''in law.''

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

(1) *Incapable of self-care* means that the individual requires active assistance or supervision to provide daily self-care in three or more of the activities of daily living (ADLs) or instrumental activities of daily living (IADLs). Activities of daily living include adaptive activities such as caring appropriately for one's grooming and hygiene, bathing, dressing and eating. Instrumental activities of daily living include cooking, cleaning, shopping, taking public transportation, paying bills, maintaining a residence, using telephones and directories, using a post office, *etc*.

(2) *Physical or mental disability* means a physical or mental impairment that substantially limits one or more of the major life activities of an individual. Regulations at 29 CFR 1630.2(h), (i), and (j), issued by the Equal Employment Opportunity Commission under the Americans with Disabilities Act (ADA), 42 U.S.C. 12101 *et seq*., provide guidance for these terms.

(3) Persons who are ''in loco parentis'' include those with day-to-day responsibilities to care for and financially support a child, or, in the case of an employee, who had such responsibility for the employee when the employee was a child. A biological or legal relationship is not necessary.

(e) *Next of kin of a covered servicemember* means the nearest blood relative other than the covered servicemember's spouse, parent, son, or daughter, in the following order of priority: blood relatives who have been granted legal custody of the covered servicemember by court decree or statutory provisions, brothers and sisters, grandparents, aunts and uncles, and first cousins, unless the covered servicemember has specifically designated in writing another blood relative as his or her nearest blood relative for purposes of military caregiver leave under the FMLA. When no such designation is made, and there are multiple family members with the same level of relationship to the covered servicemember, all such family members shall be considered the covered servicemember's next of kin and may take FMLA leave to provide care to the covered servicemember, either consecutively or simultaneously. When such designation has been made, the designated individual shall be deemed to be the covered servicemember's only next of kin. *See* 825.127(d)(3).

(f) *Adoption* means legally and permanently assuming the responsibility of raising a child as one's own. The source of an adopted child (*e.g*., whether from a licensed placement agency or otherwise) is not a factor in determining eligibility for FMLA leave. *See* 825.121 for rules governing leave for adoption.

(g) *Foster care* means 24-hour care for children in substitution for, and away from, their parents or guardian. Such placement is made by or with the agreement of the State as a result of a voluntary agreement between the parent or guardian that the child be removed from the home, or pursuant to a judicial determination of the necessity for foster care, and involves agreement between the State and foster family that the foster family will take care of the child. Although foster care may be with relatives of the child, State action is involved in the removal of the child from parental custody. *See* 825.121 for rules governing leave for foster care.

(h) *Son or daughter on covered active duty or call to covered active duty status* means the employee's biological, adopted, or foster child, stepchild, legal ward, or a child for whom the employee stood in loco parentis, who is on covered active duty or call to covered active duty status, and who is of any age. *See* 825.126(a)(5).

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

(j) *Parent of a covered servicemember* means a covered servicemember's biological, adoptive, step or foster father or mother, or any other individual who stood in loco parentis to the covered servicemember. This term does not include parents ''in law.'' *See* 825.127(d)(2).

(k) *Documenting relationships*. For purposes of confirmation of family relationship, the employing office may require the employee giving notice of the need for leave to provide reasonable documentation or statement of family relationship. This documentation may take the form of a simple statement from the employee, or a child's birth certificate, a court document, *etc*. The employing office is entitled to examine documentation such as a birth certificate, *etc*., but the employee is entitled to the return of the official document submitted for this purpose.

825.123 Unable to perform the functions of the position.

(a) *Definition*. An employee is unable to perform the functions of the position where the health care provider finds that the employee is unable to work at all or is unable to perform any one of the essential functions of the employee's position within the meaning of the Americans with Disabilities Act (ADA), as amended and made applicable by Section 201(a) of the CAA (2 U.S.C. 1311(a)(3)). An employee who must be absent from work to receive medical treatment for a serious health condition is considered to be unable to perform the essential functions of the position during the absence for treatment.

(b) *Statement of functions*. An employing office has the option, in requiring certification from a health care provider, to provide a statement of the essential functions of the employee's position for the health care provider to review. A sufficient medical certification must specify what functions of the employee's position the employee is unable to perform so that the employing office can then determine whether the employee is unable to perform one or more essential functions of the employee's position. For purposes of the FMLA, the essential functions of the employee's position are to be determined with reference to the position the employee held at the time notice is given or leave commenced, whichever is earlier. *See* 825.306.

825.124 Needed to care for a family member or covered servicemember.

(a) The medical certification provision that an employee is needed to care for a family member or covered servicemember encompasses both physical and psychological care. It includes situations where, for example, because of a serious health condition, the family member is unable to care for his or her own basic medical, hygienic, or nutritional needs or safety, or is unable to transport himself or herself to the doctor. The term also includes providing psychological comfort and reassurance which would be beneficial to a child, spouse or parent with a serious health condition who is receiving inpatient or home care.

(b) The term also includes situations where the employee may be needed to substitute for others who normally care for the family member or covered servicemember, or to make arrangements for changes in care, such as transfer to a nursing home. The employee need not be the only individual or family member available to care for the family member or covered servicemember.

(c) An employee's intermittent leave or a reduced leave schedule necessary to care for a family member or covered servicemember includes not only a situation where the condition of the family member or covered servicemember itself is intermittent, but also where the employee is only needed intermittently—such as where other care is normally available, or care responsibilities are shared with another member of the family or a third party. *See* 825.202–825.205 for rules governing the use of intermittent or reduced schedule leave.

825.125 Definition of health care provider.

(a) The FMLA, as made applicable by the CAA, defines *health care provider* as:

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

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

(3) In making a determination referred to in subparagraph (a)(2), and absent good cause shown to do otherwise, the Office of Compliance will follow any determination made by the Department of Labor (under section 101(6)(B) of FMLA (29 U.S.C. 2611(6)(B))) that a person is capable of providing health care services, provided the determination by the Department of Labor was not made at the request of a person who was then a covered employee.

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

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

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

(3) Christian Science Practitioners listed with the First Church of Christ, Scientist in Boston, Massachusetts. Where an employee or family member is receiving treatment from a Christian Science practitioner, an employee may not object to any requirement from an employing office that the employee or family member submit to examination (though not treatment) to obtain a second or third certification from a health care provider other than a Christian Science practitioner except as otherwise provided under

applicable State or local law or collective bargaining agreement;

(4) Any health care provider from whom an employing office or the employing office's group health plan's benefits manager will accept certification of the existence of a serious health condition to substantiate a claim for benefits; and

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

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

825.126 Leave because of a qualifying exigency.

(a) Eligible employees may take FMLA leave for a qualifying exigency while the employee's spouse, son, daughter, or parent (the military member or member) is on covered active duty or call to covered active duty status (or has been notified of an impending call or order to covered active duty).

(1) *Covered active duty or call to covered active duty status* in the case of a member of the Regular Armed Forces means duty during the deployment of the member with the Armed Forces to a foreign country. The active duty orders of a member of the Regular components of the Armed Forces will generally specify if the member is deployed to a foreign country.

(2) *Covered active duty or call to covered active duty status* in the case of a member of the Reserve components of the Armed Forces means duty during the deployment of the member with the Armed Forces to a foreign country under a Federal call or order to active duty in support of a contingency operation pursuant to: Section 688 of Title 10 of the United States Code, which authorizes ordering to active duty retired members of the Regular Armed Forces and members of the retired Reserve who retired after completing at least 20 years of active service; Section 12301(a) of Title 10 of the United States Code, which authorizes ordering all reserve component members to active duty in the case of war or national emergency; Section 12302 of Title 10 of the United States Code, which authorizes ordering any unit or unassigned member of the Ready Reserve to active duty; Section 12304 of Title 10 of the United States Code, which authorizes ordering any unit or unassigned member of the Selected Reserve and certain members of the Individual Ready Reserve to active duty; Section 12305 of Title 10 of the United States Code, which authorizes the suspension of promotion, retirement or separation rules for certain Reserve components; Section 12406 of Title 10 of the United States Code, which authorizes calling the National Guard into Federal service in certain circumstances; chapter 15 of Title 10 of the United States Code, which authorizes calling the National Guard and state military into Federal service in the case of insurrections and national emergencies; or any other provision of law during a war or during a national emergency declared by the President or Congress so long as it is in support of a contingency operation. *See* 10 U.S.C. 101(a)(13)(B).

(i) For purposes of covered active duty or call to covered active duty status, the Reserve components of the Armed Forces include the Army National Guard of the United States, Army Reserve, Navy Reserve, Marine Corps Reserve, Air National Guard of the United States, Air Force Reserve and Coast Guard Reserve, and retired members of the Regular Armed Forces or Reserves who are called up in support of a contingency operation pursuant to one of the provisions of law identified in paragraph (a)(2).

(ii) The active duty orders of a member of the Reserve components will generally specify if the military member is serving in support of a contingency operation by citation to the relevant section of Title 10 of the United States Code and/or by reference to the specific name of the contingency operation and will specify that the deployment is to a foreign country.

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

(4) A call to covered active duty for purposes of leave taken because of a qualifying exigency refers to a Federal call to active duty. State calls to active duty are not covered unless under order of the President of the United States pursuant to one of the provisions of law identified in paragraph (a)(2) of this section.

(5) *Son or daughter on covered active duty or call to covered active duty status* means the employee's biological, adopted, or foster child, stepchild, legal ward, or a child for whom the employee stood in loco parentis, who is on covered active duty or call to covered active duty status, and who is of any age.

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

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

(ii) Leave taken for this purpose can be used for a period of seven calendar days beginning on the date the military member is notified of an impending call or order to covered active duty;

(2) *Military events and related activities.* (i) To attend any official ceremony, program, or event sponsored by the military that is related to the covered active duty or call to covered active duty status of the military member; and

(ii) To attend family support or assistance programs and informational briefings sponsored or promoted by the military, military service organizations, or the American Red Cross that are related to the covered active duty or call to covered active duty status of the military member;

(3) *Childcare and school activities.* For the purposes of leave for childcare and school activities listed in (i) through (iv) of this paragraph, a child of the military member must be the military member's biological, adopted, or foster child, stepchild, legal ward, or child for whom the military member stands in loco parentis, who is either under 18 years of age or 18 years of age or older and incapable of self-care because of a mental or physical disability at the time that FMLA leave is to commence. As with all instances of qualifying exigency leave, the military member must be the spouse, son, daughter, or parent of the employee requesting qualifying exigency leave.

(i) To arrange for alternative childcare for a child of the military member when the covered active duty or call to covered active duty status of the military member necessitates a change in the existing childcare arrangement;

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

(iii) To enroll in or transfer to a new school or day care facility a child of the military member when enrollment or transfer is necessitated by the covered active duty or call to covered active duty status of the military member; and

(iv) To attend meetings with staff at a school or a daycare facility, such as meetings with school officials regarding disciplinary measures, parent-teacher conferences, or meetings with school counselors, for a child of the military member, when such meetings are necessary due to circumstances arising from the covered active duty or call to covered active duty status of the military member;

(4) *Financial and legal arrangements.* (i) To make or update financial or legal arrangements to address the military member's absence while on covered active duty or call to covered active duty status, such as preparing and executing financial and healthcare powers of attorney, transferring bank account signature authority, enrolling in the Defense Enrollment Eligibility Reporting System (DEERS), obtaining military identification cards, or preparing or updating a will or living trust; and

(ii) To act as the military member's representative before a federal, state, or local agency for purposes of obtaining, arranging, or appealing military service benefits while the military member is on covered active duty or call to covered active duty status, and for a period of 90 days following the termination of the military member's covered active duty status;

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

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

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

(7) *Post-deployment activities.* (i) To attend arrival ceremonies, reintegration briefings and events, and any other official ceremony or program sponsored by the military for a period of 90 days following the termination of the military member's covered active duty status; and

(ii) To address issues that arise from the death of the military member while on covered active duty status, such as meeting and recovering the body of the military member, making funeral arrangements, and attending funeral services;

(8) *Parental care.* For purposes of leave for parental care listed in (i) through (iv) of this paragraph, the parent of the military member must be incapable of self-care and must be the military member's biological, adoptive, step, or foster father or mother, or any other individual who stood in loco parentis to the military member when the member was under 18 years of age. A parent who is incapable of self-care means that the parent requires active assistance or supervision to provide daily self-care in three or more of the activities of daily living or instrumental activities of daily living. Activities of daily living include adaptive activities such as

caring appropriately for one's grooming and hygiene, bathing, dressing, and eating. Instrumental activities of daily living include cooking, cleaning, shopping, taking public transportation, paying bills, maintaining a residence, using telephones and directories, using a post office, *etc*. As with all instances of qualifying exigency leave, the military member must be the spouse, son, daughter, or parent of the employee requesting qualifying exigency leave.

(i) To arrange for alternative care for a parent of the military member when the parent is incapable of self-care and the covered active duty or call to covered active duty status of the military member necessitates a change in the existing care arrangement for the parent;

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

(iii) To admit to or transfer to a care facility a parent of the military member when admittance or transfer is necessitated by the covered active duty or call to covered active duty status of the military member; and

(iv) To attend meetings with staff at a care facility, such as meetings with hospice or social service providers for a parent of the military member, when such meetings are necessary due to circumstances arising from the covered active duty or call to covered active duty status of the military member but not for routine or regular meetings;

(9) *Additional activities*. To address other events which arise out of the military member's covered active duty or call to covered active duty status provided that the employing office and employee agree that such leave shall qualify as an exigency, and agree to both the timing and duration of such leave.

825.127 Leave to care for a covered servicemember with a serious injury or illness (military caregiver leave).

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

(b) *Covered servicemember* means:

(1) A current member of the Armed Forces, including a member of the National Guard or Reserves, who is undergoing medical treatment, recuperation, or therapy, is otherwise in outpatient status; or is otherwise on the temporary disability retired list, for a serious injury or illness. *Outpatient status* means the status of a member of the Armed Forces assigned to either a military medical treatment facility as an outpatient or a unit established for the purpose of providing command and control of members of the Armed Forces receiving medical care as outpatients.

(2) A covered veteran who is undergoing medical treatment, recuperation or therapy for a serious injury or illness. *Covered veteran* means an individual who was a member of the Armed Forces (including a member of the National Guard or Reserves), and was discharged or released under conditions other than dishonorable at any time during the five-year period prior to the first date the eligible employee takes FMLA leave to care for the covered veteran. An eligible employee must commence leave to care for a covered veteran within five years of the veteran's active duty service, but the single 12-month period described in paragraph (e)(1) of this section may extend beyond the five-year period.

(i) For an individual who was a member of the Armed Forces (including a member of the National Guard or Reserves) and who was discharged or released under conditions other than dishonorable prior to the effective date of this Final Rule, the period between October 28, 2009 and the effective date of this Final Rule shall not count towards the determination of the five-year period for covered veteran status.

(c) A *serious injury or illness* means:

(1) In the case of a current member of the Armed Forces, including a member of the National Guard or Reserves, means an injury or illness that was incurred by the covered servicemember in the line of duty on active duty in the Armed Forces or that existed before the beginning of the member's active duty and was aggravated by service in the line of duty on active duty in the Armed Forces, and that may render the member medically unfit to perform the duties of the member's office, grade, rank or rating; and,

(2) In the case of a covered veteran, means an injury or illness that was incurred by the member in the line of duty on active duty in the Armed Forces (or existed before the beginning of the member's active duty and was aggravated by service in the line of duty on active duty in the Armed Forces), and manifested itself before or after the member became a veteran, and is:

(i) A continuation of a serious injury or illness that was incurred or aggravated when the covered veteran was a member of the Armed Forces and rendered the servicemember unable to perform the duties of the servicemember's office, grade, rank, or rating; or

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

(iii) A physical or mental condition that substantially impairs the covered veteran's ability to secure or follow a substantially gainful occupation by reason of a disability or disabilities related to military service, or would do so absent treatment; or

(iv) An injury, including a psychological injury, on the basis of which the covered veteran has been enrolled in the Department of Veterans Affairs Program of Comprehensive Assistance for Family Caregivers.

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

(1) *Son or daughter of a covered servicemember* means the covered servicemember's biological, adopted, or foster child, stepchild, legal ward, or a child for whom the covered servicemember stood in loco parentis, and who is of any age.

(2) *Parent of a covered servicemember* means a covered servicemember's biological, adoptive, step or foster father or mother, or any other individual who stood in loco parentis to the covered servicemember. This term does not include parents ''in law.''

(3) *Next of kin of a covered servicemember* means the nearest blood relative, other than the covered servicemember's spouse, parent, son, or daughter, in the following order of priority: blood relatives who have been granted legal custody of the servicemember by court decree or statutory provisions, brothers and sisters, grandparents, aunts and uncles, and first cousins, unless the covered servicemember has specifically designated in writing another blood relative as his or her nearest blood relative for purposes of military caregiver leave under the FMLA. When no such designation is made, and there are multiple family members with the same level of relationship to the covered servicemember, all such family members shall be considered the covered servicemember's next of kin and may take FMLA leave to provide care to the covered servicemember, either consecutively or simultaneously. When such designation has been made, the designated individual shall be deemed to be the covered servicemember's only next of kin. For example, if a covered servicemember has three siblings and has not designated a blood relative to provide care, all three siblings would be considered the covered servicemember's next of kin. Alternatively, where a covered servicemember has a sibling(s) and designates a cousin as his or her next of kin for FMLA purposes, then only the designated cousin is eligible as the covered servicemember's next of kin. An employing office is permitted to require an employee to provide confirmation of covered family relationship to the covered servicemember pursuant to 825.122(k).

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

(1) The single 12-month period described in paragraph (e) of this section begins on the first day the eligible employee takes FMLA leave to care for a covered servicemember and ends 12 months after that date, regardless of the method used by the employing office to determine the employee's 12 workweeks of leave entitlement for other FMLA-qualifying reasons. If an eligible employee does not take all of his or her 26 workweeks of leave entitlement to care for a covered servicemember during this single 12-month period, the remaining part of his or her 26 workweeks of leave entitlement to care for the covered servicemember is forfeited.

(2) The leave entitlement described in paragraph (e) of this section is to be applied on a per-covered-servicemember, per-injury basis such that an eligible employee may be entitled to take more than one period of 26 workweeks of leave if the leave is to care for different covered servicemembers or to care for the same servicemember with a subsequent serious injury or illness, except that no more than 26 workweeks of leave may be taken within any single 12-month period. An eligible employee may take more than one period of 26 workweeks of leave to care for a covered servicemember with more than one serious injury or illness only when the serious injury or illness is a subsequent serious injury or illness. When an eligible employee takes leave to care for more than one covered servicemember or for a subsequent serious injury or illness of the same covered servicemember, and the single 12-month periods corresponding to the different military caregiver leave entitlements overlap, the employee is limited to taking no more than 26 workweeks of leave in each single 12-month period.

(3) An eligible employee is entitled to a combined total of 26 workweeks of leave for any FMLA-qualifying reason during the single 12-month period described in paragraph (e) of this section, provided that the employee is entitled to no more than 12 workweeks of leave for one or more of the following: because of the birth of a son or daughter of the employee and in order to care for such son or daughter; because of the placement of a son or daughter with the employee for adoption or foster care; in order to care for the spouse, son, daughter, or parent with a serious health condition; because of the employee's own serious health condition; or because of a qualifying exigency. Thus, for example, an eligible employee may, during the single 12-month period, take 16 workweeks of FMLA leave to care for a covered servicemember and 10 workweeks of FMLA leave to care for a newborn child. However,

the employee may not take more than 12 weeks of FMLA leave to care for the newborn child during the single 12-month period, even if the employee takes fewer than 14 workweeks of FMLA leave to care for a covered servicemember.

(4) In all circumstances, including for leave taken to care for a covered servicemember, the employing office is responsible for designating leave, paid or unpaid, as FMLA-qualifying, and for giving notice of the designation to the employee as provided in 825.300. In the case of leave that qualifies as both leave to care for a covered servicemember and leave to care for a family member with a serious health condition during the single 12-month period described in paragraph (e) of this section, the employing office must designate such leave as leave to care for a covered servicemember in the first instance. Leave that qualifies as both leave to care for a covered servicemember and leave taken to care for a family member with a serious health condition during the single 12-month period described in paragraph (e) of this section must not be designated and counted as both leave to care for a covered servicemember and leave to care for a family member with a serious health condition. As is the case with leave taken for other qualifying reasons, employing offices may retroactively designate leave as leave to care for a covered servicemember pursuant to 825.301(d).

(f) Spouses who are eligible for FMLA leave and are employed by the same covered employing office may be limited to a combined total of 26 workweeks of leave during the single 12-month period described in paragraph (e) of this section if the leave is taken for birth of the employee's son or daughter or to care for the child after birth, for placement of a son or daughter with the employee for adoption or foster care, or to care for the child after placement, to care for the employee's parent with a serious health condition, or to care for a covered servicemember with a serious injury or illness. This limitation on the total weeks of leave applies to leave taken for the reasons specified as long as the spouses are employed by the same employing office. It would apply, for example, even though the spouses are employed at two different worksites. On the other hand, if one spouse is ineligible for FMLA leave, the other spouse would be entitled to a full 26 workweeks of FMLA leave.

SUBPART B—EMPLOYEE LEAVE ENTITLEMENTS UNDER THE FAMILY AND MEDICAL LEAVE ACT, AS MADE APPLICABLE BY THE CONGRESSIONAL ACCOUNTABILITY ACT

825.200 Amount of Leave.

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

(1) The birth of the employee's son or daughter, and to care for the newborn child;

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

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

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

(5) Because of any qualifying exigency arising out of the fact that the employee's spouse, son, daughter, or parent is a military member on covered active duty status (or has been notified of an impending call or order to covered active duty).

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

(1) The calendar year;

(2) Any fixed 12-month leave year, such as a fiscal year or a year starting on an employee's anniversary date;

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

(4) A ''rolling'' 12-month period measured backward from the date an employee uses any FMLA leave as described in paragraph (a).

(c) Under methods in paragraphs (b)(1) and (b)(2) of this section an employee would be entitled to up to 12 weeks of FMLA leave at any time in the fixed 12-month period selected. An employee could, therefore, take 12 weeks of leave at the end of the year and 12 weeks at the beginning of the following year. Under the method in paragraph (b)(3) of this section, an employee would be entitled to 12 weeks of leave during the year beginning on the first date FMLA leave is taken; the next 12-month period would begin the first time FMLA leave is taken after completion of any previous 12-month period. Under the method in paragraph (b)(4) of this section, the ''rolling'' 12-month period, each time an employee takes FMLA leave the remaining leave entitlement would be any balance of the 12 weeks which has not been used during the immediately preceding 12 months. For example, if an employee has taken eight weeks of leave during the past 12 months, an additional four weeks of leave could be taken. If an employee used four weeks beginning February 1, 2008, four weeks beginning June 1, 2008, and four weeks beginning December 1, 2008, the employee would not be entitled to any additional leave until February 1, 2009. However, beginning on February 1, 2009, the employee would again be eligible to take FMLA leave, recouping the right to take the leave in the same manner and amounts in which it was used in the previous year. Thus, the employee would recoup (and be entitled to use) one additional day of FMLA leave each day for four weeks, commencing February 1, 2009. The employee would also begin to recoup additional days beginning on June 1, 2009, and additional days beginning on December 1, 2009. Accordingly, employing offices using the rolling 12-month period may need to calculate whether the employee is entitled to take FMLA leave each time that leave is requested, and employees taking FMLA leave on such a basis may fall in and out of FMLA protection based on their FMLA usage in the prior 12 months. For example, in the example above, if the employee needs six weeks of leave for a serious health condition commencing February 1, 2009, only the first four weeks of the leave would be FMLA-protected.

(d)(1) Employing offices will be allowed to choose any one of the alternatives in paragraph (b) of this section for the leave entitlements described in paragraph (a) of this section provided the alternative chosen is applied consistently and uniformly to all employees. An employing office wishing to change to another alternative is required to give at least 60 days notice to all employees, and the transition must take place in such a way that the employees retain the full benefit of 12 weeks of leave under whichever method affords the greatest benefit to the employee. Under no circumstances may a new method be implemented in order to avoid the CAA's FMLA leave requirements.

(2) [Reserved]

(e) If an employing office fails to select one of the options in paragraph (b) of this section for measuring the 12-month period for the leave entitlements described in paragraph (a), the option that provides the most beneficial outcome for the employee will be used. The employing office may subsequently select an option only by providing the 60-day notice to all employees of the option the employing office intends to implement. During the running of the 60-day period any other employee who needs FMLA leave may use the option providing the most beneficial outcome to that employee. At the conclusion of the 60-day period the employing office may implement the selected option.

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

(g) During the single 12-month period described in paragraph (f), an eligible employee's FMLA leave entitlement is limited to a combined total of 26 workweeks of FMLA leave for any qualifying reason. *See* 825.127(e)(3).

(h) For purposes of determining the amount of leave used by an employee, the fact that a holiday may occur within the week taken as FMLA leave has no effect; the week is counted as a week of FMLA leave. However, if an employee is using FMLA leave in increments of less than one week, the holiday will not count against the employee's FMLA entitlement unless the employee was otherwise scheduled and expected to work during the holiday. Similarly, if for some reason the employing office's business activity has temporarily ceased and employees generally are not expected to report for work for one or more weeks (*e.g.,* a school closing two weeks for the Christmas/New Year holiday or the summer vacation or an employing office closing the office for repairs), the days the employing office's activities have ceased do not count against the employee's FMLA leave entitlement. Methods for determining an employee's 12-week leave entitlement are also described in 825.205.

(i)(1) If employing offices jointly employ an employee, and if they designate a primary employing office pursuant to 825.106(c), the primary employing office may choose any one of the alternatives in paragraph (b) of this section for measuring the 12-month period, provided that the alternative chosen is applied consistently and uniformly to all employees of the primary employing office including the jointly employed employee.

(2) If employing offices fail to designate a primary employing office pursuant to 825.106(c), an employee jointly employed by the employing offices may, by so notifying one of the employing offices, select that employing office to be the primary employing office of the employee for purposes of the application of paragraphs (d) and (e) of this section.

825.201 Leave to care for a parent.

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

(b) *Same employing office limitation.* Spouses who are eligible for FMLA leave and are employed by the same covered employing office may be limited to a combined total of 12 weeks of leave during any 12-month period if the leave is taken to care for the employee's

parent with a serious health condition, for the birth of the employee's son or daughter or to care for the child after the birth, or for placement of a son or daughter with the employee for adoption or foster care or to care for the child after placement. This limitation on the total weeks of leave applies to leave taken for the reasons specified as long as the spouses are employed by the same employing office. It would apply, for example, even though the spouses are employed at two different worksites of an employing office. On the other hand, if one spouse is ineligible for FMLA leave, the other spouse would be entitled to a full 12 weeks of FMLA leave. Where the spouses both use a portion of the total 12-week FMLA leave entitlement for either the birth of a child, for placement for adoption or foster care, or to care for a parent, the spouses would each be entitled to the difference between the amount he or she has taken individually and 12 weeks for FMLA leave for other purposes. For example, if each spouse took six weeks of leave to care for a parent, each could use an additional six weeks due to his or her own serious health condition or to care for a child with a serious health condition. *See also* 825.127(d).

825.202 Intermittent leave or reduced leave schedule.

(a) *Definition*. FMLA leave may be taken intermittently or on a reduced leave schedule under certain circumstances. *Intermittent leave* is FMLA leave taken in separate blocks of time due to a single qualifying reason. A *reduced leave schedule* is a leave schedule that reduces an employee's usual number of working hours per workweek, or hours per workday. A reduced leave schedule is a change in the employee's schedule for a period of time, normally from full-time to part-time.

(b) *Medical necessity*. For intermittent leave or leave on a reduced leave schedule taken because of one's own serious health condition, to care for a spouse, parent, son, or daughter with a serious health condition, or to care for a covered servicemember with a serious injury or illness, there must be a medical need for leave and it must be that such medical need can be best accommodated through an intermittent or reduced leave schedule. The treatment regimen and other information described in the certification of a serious health condition and in the certification of a serious injury or illness, if required by the employing office, addresses the medical necessity of intermittent leave or leave on a reduced leave schedule. See 825.306, 825.310. Leave may be taken intermittently or on a reduced leave schedule when medically necessary for planned and/or unanticipated medical treatment of a serious health condition or of a covered servicemember's serious injury or illness, or for recovery from treatment or recovery from a serious health condition or a covered servicemember's serious injury or illness. It may also be taken to provide care or psychological comfort to a covered family member with a serious health condition or a covered servicemember with a serious injury or illness.

(1) Intermittent leave may be taken for a serious health condition of a spouse, parent, son, or daughter, for the employee's own serious health condition, or a serious injury or illness of a covered servicemember which requires treatment by a health care provider periodically, rather than for one continuous period of time, and may include leave of periods from an hour or more to several weeks. Examples of intermittent leave would include leave taken on an occasional basis for medical appointments, or leave taken several days at a time spread over a period of six months, such as for chemotherapy. A pregnant employee may take leave intermittently for prenatal examinations or for her own condition, such as for periods of severe morning sickness. An example of an employee taking leave on a reduced leave schedule is an employee who is recovering from a serious health condition and is not strong enough to work a full-time schedule.

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

(c) *Birth or placement*. When leave is taken after the birth of a healthy child or placement of a healthy child for adoption or foster care, an employee may take leave intermittently or on a reduced leave schedule only if the employing office agrees. Such a schedule reduction might occur, for example, where an employee, with the employing office's agreement, works part-time after the birth of a child, or takes leave in several segments. The employing office's agreement is not required, however, for leave during which the expectant mother has a serious health condition in connection with the birth of her child or if the newborn child has a serious health condition. See 825.204 for rules governing transfer to an alternative position that better accommodates intermittent leave. *See also* 825.120 (pregnancy) and 825.121 (adoption and foster care).

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

825.203 Scheduling of intermittent or reduced schedule leave.

Eligible employees may take FMLA leave on an intermittent or reduced schedule basis when medically necessary due to the serious health condition of a covered family member or the employee or the serious injury or illness of a covered servicemember. See 825.202. Eligible employees may also take FMLA leave on an intermittent or reduced schedule basis when necessary because of a qualifying exigency. If an employee needs leave intermittently or on a reduced leave schedule for planned medical treatment, then the employee must make a reasonable effort to schedule the treatment so as not to disrupt unduly the employing office's operations.

825.204 Transfer of an employee to an alternative position during intermittent leave or reduced schedule leave.

(a) *Transfer or reassignment*. If an employee needs intermittent leave or leave on a reduced leave schedule that is foreseeable based on planned medical treatment for the employee, a family member, or a covered servicemember, including during a period of recovery from one's own serious health condition, a serious health condition of a spouse, parent, son, or daughter, or a serious injury or illness of a covered servicemember, or if the employing office agrees to permit intermittent or reduced schedule leave for the birth of a child or for placement of a child for adoption or foster care, the employing office may require the employee to transfer temporarily, during the period the intermittent or reduced leave schedule is required, to an available alternative position for which the employee is qualified and which better accommodates recurring periods of leave than does the employee's regular position. *See* 825.601 for special rules applicable to instructional employees of schools.

(b) *Compliance*. Transfer to an alternative position may require compliance with any applicable collective bargaining agreement and Federal law (such as the Americans with Disabilities Act, as made applicable by the CAA). Transfer to an alternative position may include altering an existing job to better accommodate the employee's need for intermittent or reduced scheduled leave.

(c) *Equivalent pay and benefits*. The alternative position must have equivalent pay and benefits. An alternative position for these purposes does not have to have equivalent duties. The employing office may increase the pay and benefits of an existing alternative position, so as to make them equivalent to the pay and benefits of the employee's regular job. The employing office may also transfer the employee to a part-time job with the same hourly rate of pay and benefits, provided the employee is not required to take more leave than is medically necessary. For example, an employee desiring to take leave in increments of four hours per day could be transferred to a half-time job, or could remain in the employee's same job on a part-time schedule, paying the same hourly rate as the employee's previous job and enjoying the same benefits. The employing office may not eliminate benefits which otherwise would not be provided to part-time employees; however, an employing office may proportionately reduce benefits such as vacation leave where an employing office's normal practice is to base such benefits on the number of hours worked.

(d) *Employing office limitations*. An employing office may not transfer the employee to an alternative position in order to discourage the employee from taking leave or otherwise work a hardship on the employee. For example, a white collar employee may not be assigned to perform laborer's work; an employee working the day shift may not be reassigned to the graveyard shift; an employee working in the headquarters facility may not be reassigned to a branch a significant distance away from the employee's normal job location. Any such attempt on the part of the employing office to make such a transfer will be held to be contrary to the prohibited acts provisions of the FMLA, as made applicable by the CAA.

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

825.205 Increments of FMLA leave for intermittent or reduced schedule leave.

(a) *Minimum increment*. (1) When an employee takes FMLA leave on an intermittent or reduced leave schedule basis, the employing office must account for the leave using an increment no greater than the shortest period of time that the employing office uses to account for use of other forms of leave provided that it is not greater than one hour and provided further that an employee's FMLA leave entitlement may not be reduced by more than the amount of leave actually taken. An employing office may not require an employee to take more leave than is necessary to address the circumstances that precipitated the need for the leave, provided that the leave is counted using the shortest increment of leave used to account for any other type of leave. *See also* 825.205(a)(2) for the physical impossibility exception, and 825.600 and 825.601 for special rules applicable to employees of schools. If an employing office uses different increments to account for different types of leave, the employing office must account for FMLA leave in the smallest increment used to account for any other

type of leave. For example, if an employing office accounts for the use of annual leave in increments of one hour and the use of sick leave in increments of one-half hour, then FMLA leave use must be accounted for using increments no larger than one-half hour. If an employing office accounts for use of leave in varying increments at different times of the day or shift, the employing office may also account for FMLA leave in varying increments, provided that the increment used for FMLA leave is no greater than the smallest increment used for any other type of leave during the period in which the FMLA leave is taken. If an employing office accounts for other forms of leave use in increments greater than one hour, the employing office must account for FMLA leave use in increments no greater than one hour. An employing office may account for FMLA leave in shorter increments than used for other forms of leave. For example, an employing office that accounts for other forms of leave in one hour increments may account for FMLA leave in a shorter increment when the employee arrives at work several minutes late, and the employing office wants the employee to begin work immediately. Such accounting for FMLA leave will not alter the increment considered to be the shortest period used to account for other forms of leave or the use of FMLA leave in other circumstances. In all cases, employees may not be charged FMLA leave for periods during which they are working.

(2) Where it is physically impossible for an employee using intermittent leave or working a reduced leave schedule to commence or end work mid-way through a shift, such as where a flight attendant or a railroad conductor is scheduled to work aboard an airplane or train, or a laboratory employee is unable to enter or leave a sealed ''clean room'' during a certain period of time and no equivalent position is available, the entire period that the employee is forced to be absent is designated as FMLA leave and counts against the employee's FMLA entitlement. The period of the physical impossibility is limited to the period during which the employing office is unable to permit the employee to work prior to a period of FMLA leave or return the employee to the same or equivalent position due to the physical impossibility after a period of FMLA leave. *See* 825.214.

(b) *Calculation of leave.* (1) When an employee takes leave on an intermittent or reduced leave schedule, only the amount of leave actually taken may be counted toward the employee's leave entitlement. The actual workweek is the basis of leave entitlement. Therefore, if an employee who would otherwise work 40 hours a week takes off eight hours, the employee would use one-fifth (1/5) of a week of FMLA leave. Similarly, if a full-time employee who would otherwise work eight hour days works four-hour days under a reduced leave schedule, the employee would use one half (1/2) week of FMLA leave each week. Where an employee works a part-time schedule or variable hours, the amount of FMLA leave that an employee uses is determined on a pro rata or proportional basis. If an employee who would otherwise work 30 hours per week, but works only 20 hours a week under a reduced leave schedule, the employee's 10 hours of leave would constitute one-third (1/3) of a week of FMLA leave for each week the employee works the reduced leave schedule. An employing office may convert these fractions to their hourly equivalent so long as the conversion equitably reflects the employee's total normally scheduled hours. An employee does not accrue FMLA-protected leave at any particular hourly rate. An eligible employee is entitled to up to a total of 12 workweeks of leave, or 26 workweeks in the case of military caregiver leave, and the total number of hours contained in those workweeks is necessarily dependent on the specific hours the employee would have worked but for the use of leave. *See also* 825.601 and 825.602 on special rules for schools.

(2) If an employing office has made a permanent or long-term change in the employee's schedule (for reasons other than FMLA, and prior to the notice of need for FMLA leave), the hours worked under the new schedule are to be used for making this calculation.

(3) If an employee's schedule varies from week to week to such an extent that an employing office is unable to determine with any certainty how many hours the employee would otherwise have worked (but for the taking of FMLA leave), a weekly average of the hours worked over the 12 months prior to the beginning of the leave period (including any hours for which the employee took leave of any type) would be used for calculating the employee's leave entitlement.

(c) *Overtime.* If an employee would normally be required to work overtime, but is unable to do so because of a FMLA-qualifying reason that limits the employee's ability to work overtime, the hours which the employee would have been required to work may be counted against the employee's FMLA entitlement. In such a case, the employee is using intermittent or reduced schedule leave. For example, if an employee would normally be required to work for 48 hours in a particular week, but due to a serious health condition the employee is unable to work more than 40 hours that week, the employee would utilize eight hours of FMLA-protected leave out of the 48-hour workweek, or one-sixth (1/6) of a week of FMLA leave. Voluntary overtime hours that an employee does not work due to an FMLA-qualifying reason may not be counted against the employee's FMLA leave entitlement.

825.206 Interaction with the FLSA, as made applicable by the Congressional Accountability Act.

(a) Leave taken under FMLA, as made applicable by the CAA, may be unpaid. If an employee is otherwise exempt from minimum wage and overtime requirements of the Fair Labor Standards Act (FLSA), as made applicable by the CAA, and as exempt under regulations issued by the Board, at part 541, providing unpaid FMLA-qualifying leave to such an employee will not cause the employee to lose the FLSA exemption. This means that under regulations currently in effect, where an employee meets the specified duties test, is paid on a salary basis, and is paid a salary of at least the amount specified in the regulations, the employing office may make deductions from the employee's salary for any hours taken as intermittent or reduced FMLA leave within a workweek, without affecting the exempt status of the employee.

(b) For an employee paid in accordance with a fluctuating workweek method of payment for overtime, where permitted by section 203 of the CAA (2 U.S.C. 1313), the employing office, during the period in which intermittent or reduced schedule FMLA leave is scheduled to be taken, may compensate an employee on an hourly basis and pay only for the hours the employee works, including time and one-half the employee's regular rate for overtime hours. The change to payment on an hourly basis would include the entire period during which the employee is taking intermittent leave, including weeks in which no leave is taken. The hourly rate shall be determined by dividing the employee's weekly salary by the employee's normal or average schedule of hours worked during weeks in which FMLA leave is not being taken. If an employing office chooses to follow this exception from the fluctuating workweek method of payment, the employing office must do so uniformly, with respect to all employees paid on a fluctuating workweek basis for whom FMLA leave is taken on an intermittent or reduced leave schedule basis. If an employing office does not elect to convert the employee's compensation to hourly pay, no deduction may be taken for FMLA leave absences. Once the need for intermittent or reduced scheduled leave is over, the employee may be restored to payment on a fluctuating workweek basis.

(c) This special exception to the salary basis requirements of the FLSA exemption or fluctuating workweek payment requirements applies only to employees of covered employing offices who are eligible for FMLA leave, and to leave which qualifies as FMLA leave. Hourly or other deductions which are not in accordance with the Board's FLSA regulations at part 541 or with a permissible fluctuating workweek method of payment for overtime may not be taken, for example, where the employee has not worked long enough to be eligible for FMLA leave without potentially affecting the employee's eligibility for exemption. Nor may deductions which are not permitted by the Board's FLSA regulations at part 541 or by a permissible fluctuating workweek method of payment for overtime be taken from such an employee's salary for any leave which does not qualify as FMLA leave, for example, deductions from an employee's pay for leave required under an employing office's policy or practice for a reason which does not qualify as FMLA leave, *e.g.*, leave to care for a grandparent or for a medical condition which does not qualify as a serious health condition or serious injury or illness; or for leave which is more generous than provided by the FMLA, as made applicable by the CAA. Employing offices may comply with the employing office's own policy/practice under these circumstances and maintain the employee's eligibility for exemption or for the fluctuating workweek method of pay by not taking hourly deductions from the employee's pay, in accordance with FLSA requirements, as made applicable by the CAA, or may take such deductions, treating the employee as an hourly employee and pay overtime premium pay for hours worked over 40 in a workweek.

825.207 Substitution of paid leave.

(a) Generally, FMLA leave is unpaid leave. However, under the circumstances described in this section, FMLA, as made applicable by the CAA, permits an eligible employee to choose to substitute accrued paid leave for FMLA leave. If an employee does not choose to substitute accrued paid leave, the employing office may require the employee to substitute accrued paid leave for unpaid FMLA leave. The term substitute means that the paid leave provided by the employing office, and accrued pursuant to established policies of the employing office, will run concurrently with the unpaid FMLA leave. Accordingly, the employee receives pay pursuant to the employing office's applicable paid leave policy during the period of otherwise unpaid FMLA leave. An employee's ability to substitute accrued paid leave is determined by the terms and conditions of the employing office's normal leave policy. When an employee chooses, or an employing office requires, substitution of accrued paid leave, the employing office must inform the employee that the employee must satisfy any procedural requirements of the paid leave policy only in connection with the receipt of such payment. *See* 825.300(c). If an employee does not comply with the additional requirements in an employing office's paid leave

policy, the employee is not entitled to substitute accrued paid leave, but the employee remains entitled to take unpaid FMLA leave. Employing offices may not discriminate against employees on FMLA leave in the administration of their paid leave policies.

(b) If neither the employee nor the employing office elects to substitute paid leave for unpaid FMLA leave under the above conditions and circumstances, the employee will remain entitled to all the paid leave which is earned or accrued under the terms of the employing office's plan.

(c) If an employee uses paid leave under circumstances which do not qualify as FMLA leave, the leave will not count against the employee's FMLA leave entitlement. For example, paid sick leave used for a medical condition which is not a serious health condition or serious injury or illness does not count against the employee's FMLA leave entitlement.

(d) Leave taken pursuant to a disability leave plan would be considered FMLA leave for a serious health condition and counted in the leave entitlement permitted under FMLA if it meets the criteria set forth above in 825.112 through 825.115. In such cases, the employing office may designate the leave as FMLA leave and count the leave against the employee's FMLA leave entitlement. Because leave pursuant to a disability benefit plan is not unpaid, the provision for substitution of the employee's accrued paid leave is inapplicable, and neither the employee nor the employing office may require the substitution of paid leave. However, employing offices and employees may agree to have paid leave supplement the disability plan benefits, such as in the case where a plan only provides replacement income for two-thirds of an employee's salary.

(e) The FMLA, as made applicable by the CAA, provides that a serious health condition may result from injury to the employee on or off the job. If the employing office designates the leave as FMLA leave in accordance with 825.300(d), the leave counts against the employee's FMLA leave entitlement. Because the workers' compensation absence is not unpaid, the provision for substitution of the employee's accrued paid leave is not applicable, and neither the employee nor the employing office may require the substitution of paid leave. However, employing offices and employees may agree, to have paid leave supplement workers' compensation benefits, such as in the case where workers' compensation only provides replacement income for two-thirds of an employee's salary. If the health care provider treating the employee for the workers' compensation injury certifies the employee is able to return to a light duty job but is unable to return to the same or equivalent job, the employee may decline the employing office's offer of a light duty job. As a result, the employee may lose workers' compensation payments, but is entitled to remain on unpaid FMLA leave until the employee's FMLA leave entitlement is exhausted. As of the date workers' compensation benefits cease, the substitution provision becomes applicable and either the employee may elect or the employing office may require the use of accrued paid leave. *See also* 825.210(f), 825.216(d), 825.220(d), 825.307(a) and 825.702 (d)(1) and (2) regarding the relationship between workers' compensation absences and FMLA leave.

(f) Under the FLSA, as made applicable by the CAA, an employing office always has the right to cash out an employee's compensatory time or to require the employee to use the time. Therefore, if an employee requests and is permitted to use accrued compensatory time to receive pay for time taken off for an FMLA reason, or if the employing office requires such use pursuant to the FLSA, the time taken may be counted against the employee's FMLA leave entitlement.

825.208 [Removed and reserved]

825.209 Maintenance of employee benefits.

(a) During any FMLA leave, an employing office must maintain the employee's coverage under the Federal Employees Health Benefits Program or any group health plan (as defined in the Internal Revenue Code of 1986 at 26 U.S.C. 5000(b)(1)) on the same conditions as coverage would have been provided if the employee had been continuously employed during the entire leave period. All employing offices are subject to the requirements of the FMLA, as made applicable by the CAA, to maintain health coverage. The definition of group health plan is set forth in 825.102. For purposes of FMLA, the term group health plan shall not include an insurance program providing health coverage under which employees purchase individual policies from insurers provided that:

(1) No contributions are made by the employing office;

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

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

(4) The employing office receives no consideration in the form of cash or otherwise in connection with the program, other than reasonable compensation, excluding any profit, for administrative services actually rendered in connection with payroll deduction; and

(5) The premium charged with respect to such coverage does not increase in the event the employment relationship terminates.

(b) The same group health plan benefits provided to an employee prior to taking FMLA leave must be maintained during the FMLA leave. For example, if family member coverage is provided to an employee, family member coverage must be maintained during the FMLA leave. Similarly, benefit coverage during FMLA leave for medical care, surgical care, hospital care, dental care, eye care, mental health counseling, substance abuse treatment, etc., must be maintained during leave if provided in an employing office's group health plan, including a supplement to a group health plan, whether or not provided through a flexible spending account or other component of a cafeteria plan.

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

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

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

(f) Except as required by the Consolidated Omnibus Budget Reconciliation Act of 1986 (COBRA) or 5 U.S.C. 8905a, whichever is applicable, and for key employees (as discussed below), an employing office's obligation to maintain health benefits during leave (and to restore the employee to the same or equivalent employment) under FMLA ceases if and when the employment relationship would have terminated if the employee had not taken FMLA leave (*e.g.*, if the employee's position is eliminated as part of a nondiscriminatory reduction in force and the employee would not have been transferred to another position); an employee informs the employing office of his or her intent not to return from leave (including before starting the leave if the employing office is so informed before the leave starts); or the employee fails to return from leave or continues on leave after exhausting his or her FMLA leave entitlement in the 12-month period.

(g) If a key employee (*see* 825.218) does not return from leave when notified by the employing office that substantial or grievous economic injury will result from his or her reinstatement, the employee's entitlement to group health plan benefits continues unless and until the employee advises the employing office that the employee does not desire restoration to employment at the end of the leave period, or the FMLA leave entitlement is exhausted, or reinstatement is actually denied.

(h) An employee's entitlement to benefits other than group health benefits during a period of FMLA leave (*e.g.*, holiday pay) is to be determined by the employing office's established policy for providing such benefits when the employee is on other forms of leave (paid or unpaid, as appropriate).

825.210 Employee payment of group health benefit premiums.

(a) Group health plan benefits must be maintained on the same basis as coverage would have been provided if the employee had been continuously employed during the FMLA leave period. Therefore, any share of group health plan premiums which had been paid by the employee prior to FMLA leave must continue to be paid by the employee during the FMLA leave period. If premiums are raised or lowered, the employee would be required to pay the new premium rates. Maintenance of health insurance policies which are not a part of the employing office's group health plan, as described in 825.209(a), are the sole responsibility of the employee. The employee and the insurer should make necessary arrangements for payment of premiums during periods of unpaid FMLA leave.

(b) If the FMLA leave is substituted paid leave, the employee's share of premiums must be paid by the method normally used during any paid leave, presumably as a payroll deduction.

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

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

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

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

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

(5) Another system voluntarily agreed to between the employing office and the employee, which may include prepayment of premiums (*e.g.*, through increased payroll deductions when the need for the FMLA leave is foreseeable).

(d) The employing office must provide the employee with advance written notice of the terms and conditions under which these payments must be made. *See* 825. 300(c).

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

(f) An employee who is receiving payments as a result of a workers' compensation injury must make arrangements with the employing office for payment of group health plan benefits when simultaneously taking FMLA leave. *See* 825.207(e).

825.211 Maintenance of benefits under multi-employer health plans.

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

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

(c) During the duration of an employee's FMLA leave, coverage by the group health plan, and benefits provided pursuant to the plan, must be maintained at the level of coverage and benefits which were applicable to the employee at the time FMLA leave commenced.

(d) An employee using FMLA leave cannot be required to use banked hours or pay a greater premium than the employee would have been required to pay if the employee had been continuously employed.

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

(1) The employee's FMLA leave entitlement is exhausted;

(2) The employing office can show that the employee would have been laid off and the employment relationship terminated; or

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

825.212 Employee failure to pay health plan premium payments.

(a) (1) In the absence of an established employing office policy providing a longer grace period, an employing office's obligations to maintain health insurance coverage cease under FMLA if an employee's premium payment is more than 30 days late. In order to drop the coverage for an employee whose premium payment is late, the employing office must provide written notice to the employee that the payment has not been received. Such notice must be mailed to the employee at least 15 days before coverage is to cease, advising that coverage will be dropped on a specified date at least 15 days after the date of the letter unless the payment has been received by that date. If the employing office has established policies regarding other forms of unpaid leave that provide for the employing office to cease coverage retroactively to the date the unpaid premium payment was due, the employing office may drop the employee from coverage retroactively in accordance with that policy, provided the 15-day notice was given. In the absence of such a policy, coverage for the employee may be terminated at the end of the 30-day grace period, where the required 15-day notice has been provided.

(2) An employing office has no obligation regarding the maintenance of a health insurance policy which is not a group health plan. *See* 825.209(a).

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

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

(c) If coverage lapses because an employee has not made required premium payments, upon the employee's return from FMLA leave the employing office must still restore the employee to coverage/benefits equivalent to those the employee would have had if leave had not been taken and the premium payment(s) had not been missed, including family or dependent coverage. *See* 825.215(d)(1)–(5). In such case, an employee may not be required to meet any qualification requirements imposed by the plan, including any new preexisting condition waiting period, to wait for an open season, or to pass a medical examination to obtain reinstatement of coverage. If an employing office terminates an employee's insurance in accordance with this section and fails to restore the employee's health insurance as required by this section upon the employee's return, the employing office may be liable for benefits lost by reason of the violation, for other actual monetary losses sustained as a direct result of the violation, and for appropriate equitable relief tailored to the harm suffered.

825.213 Employing office recovery of benefit costs.

(a) In addition to the circumstances discussed in 825.212(b), an employing office may recover its share of health plan premiums during a period of unpaid FMLA leave from an employee if the employee fails to return to work after the employee's FMLA leave entitlement has been exhausted or expires, unless the reason the employee does not return is due to:

(1) The continuation, recurrence, or onset of either a serious health condition of the employee or the employee's family member, or a serious injury or illness of a covered servicemember, which would otherwise entitle the employee to leave under FMLA; or

(2) Other circumstances beyond the employee's control. Examples of other circumstances beyond the employee's control are necessarily broad. They include such situations as where a parent chooses to stay home with a newborn child who has a serious health condition; an employee's spouse is unexpectedly transferred to a job location more than 75 miles from the employee's worksite; a relative or individual other than a covered family member has a serious health condition and the employee is needed to provide care; the employee is laid off while on leave; or, the employee is a key employee who decides not to return to work upon being notified of the employing office's intention to deny restoration because of substantial and grievous economic injury to the employing office's operations and is not reinstated by the employing office. Other circumstances beyond the employee's control would not include a situation where an employee desires to remain with a parent in a distant city even though the parent no longer requires the employee's care, or a parent chooses not to return to work to stay home with a well, newborn child.

(3) When an employee fails to return to work because of the continuation, recurrence, or onset of either a serious health condition of the employee or employee's family member, or a serious injury or illness of a covered servicemember, thereby precluding the employing office from recovering its (share of) health benefit premium payments made on the employee's behalf during a period of unpaid FMLA leave, the employing office may require medical certification of the employee's or the family member's serious health condition or the covered servicemember's serious injury or illness. Such certification is not required unless requested by the employing office. The cost of the certification shall be borne by the employee, and the employee is not entitled to be paid for the time or travel costs spent in acquiring the certification. The employee is required to provide medical certification in a timely manner which, for purposes of this section, is within 30 days from the date of the employing office's request. For purposes of medical certification, the employee may use the optional forms developed for this purpose. *See* 825.306(b), 825.310(c)–(d) and Forms A, B, and F. If the employing office requests medical certification and the employee does not provide such certification in a timely manner (within 30 days), or the reason for not returning to work does not meet the test of other circumstances beyond the employee's control, the employing office may recover 100 percent of the health benefit premiums it paid during the period of unpaid FMLA leave.

(b) Under some circumstances an employing office may elect to maintain other benefits, *e.g.*, life insurance, disability insurance, *etc.*, by paying the employee's (share of) premiums during periods of unpaid FMLA leave. For example, to ensure the employing office can meet its responsibilities to provide equivalent benefits to the employee upon return from unpaid FMLA leave, it may be necessary that premiums be paid continuously to avoid a lapse of coverage. If the employing office elects to maintain such benefits during the leave, at the conclusion of leave, the employing office is entitled to recover only the costs incurred for paying the employee's share of any premiums whether or not the employee returns to work.

(c) An employee who returns to work for at least 30 calendar days is considered to have returned to work. An employee who transfers directly from taking FMLA leave to retirement, or who retires during the first 30 days after the employee returns to work, is deemed to have returned to work.

(d) When an employee elects or an employing office requires paid leave to be substituted for FMLA leave, the employing office may not recover its (share of) health insurance or other non-health benefit premiums for any period of FMLA leave covered by paid leave. Because paid leave provided under a plan covering temporary disabilities (including workers' compensation) is not unpaid, recovery of health insurance premiums does not apply to such paid leave.

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

(f) When an employee fails to return to work, any health and non-health benefit premiums which this section of the regulations permits an employing office to recover are a debt owed by the non-returning employee to the employing office. The existence of this debt caused by the employee's failure to return to work does not alter the employing office's responsibilities for health benefit coverage and, under a self-insurance plan, payment of claims incurred during the period of FMLA leave. To the extent recovery is allowed, the employing office may recover the costs through deduction from any sums due to the employee (*e.g.*, unpaid wages, vacation pay, *etc.*), provided such deductions do not otherwise violate applicable wage payment or other laws. Alternatively, the employing office may initiate legal action against the employee to recover such costs.

825.214 Employee right to reinstatement.

General Rule. On return from FMLA leave, an employee is entitled to be returned to the same position the employee held when leave commenced, or to an equivalent position with equivalent benefits, pay, and other terms and conditions of employment. An employee is entitled to such reinstatement even if the employee has been replaced or his or her position has been restructured to accommodate the employee's absence. *See also* 825.106(e) for the obligations of employing offices that are joint employers.

825.215 Equivalent position.

(a) *Equivalent position*. An equivalent position is one that is virtually identical to the employee's former position in terms of pay, benefits and working conditions, including privileges, prerequisites and status. It must involve the same or substantially similar duties and responsibilities, which must entail substantially equivalent skill, effort, responsibility, and authority.

(b) *Conditions to qualify*. If an employee is no longer qualified for the position because of the employee's inability to attend a necessary course, renew a license, *etc.*, as a result of the leave, the employee shall be given a reasonable opportunity to fulfill those conditions upon return to work.

(c) *Equivalent Pay*. (1) An employee is entitled to any unconditional pay increases which may have occurred during the FMLA leave period, such as cost of living increases. Pay increases conditioned upon seniority, length of service, or work performed must be granted in accordance with the employing office's policy or practice with respect to other employees on an equivalent leave status for a reason that does not qualify as FMLA leave. An employee is entitled to be restored to a position with the same or equivalent pay premiums, such as a shift differential. If an employee departed from a position averaging ten hours of overtime (and corresponding overtime pay) each week, an employee is ordinarily entitled to such a position on return from FMLA leave.

(2) Equivalent pay includes any bonus or payment, whether it is discretionary or nondiscretionary, made to employees consistent with the provisions of paragraph (c)(1) of this section. However, if a bonus or other payment is based on the achievement of a specified goal such as hours worked, products sold or perfect attendance, and the employee has not met the goal due to FMLA leave, then the payment may be denied, unless otherwise paid to employees on an equivalent leave status for a reason that does not qualify as FMLA leave. For example, if an employee who used paid vacation leave for a non-FMLA purpose would receive the payment, then the employee who used paid vacation leave for an FMLA-protected purpose also must receive the payment.

(d) *Equivalent benefits*. Benefits include all benefits provided or made available to employees by an employing office, including group life insurance, health insurance, disability insurance, sick leave, annual leave, educational benefits, and pensions, regardless of whether such benefits are provided by a practice or written policy of an employing office through an employee benefit plan.

(1) At the end of an employee's FMLA leave, benefits must be resumed in the same manner and at the same levels as provided when the leave began, and subject to any changes in benefit levels that may have taken place during the period of FMLA leave affecting the entire work force, unless otherwise elected by the employee. Upon return from FMLA leave, an employee cannot be required to requalify for any benefits the employee enjoyed before FMLA leave began (including family or dependent coverages). For example, if an employee was covered by a life insurance policy before taking leave but is not covered or coverage lapses during the period of unpaid FMLA leave, the employee cannot be required to meet any qualifications, such as taking a physical examination, in order to requalify for life insurance upon return from leave. Accordingly, some employing offices may find it necessary to modify life insurance and other benefits programs in order to restore employees to equivalent benefits upon return from FMLA leave, make arrangements for continued payment of costs to maintain such benefits during unpaid FMLA leave, or pay these costs subject to recovery from the employee on return from leave. *See* 825.213(b).

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

(3) If, while on unpaid FMLA leave, an employee desires to continue life insurance, disability insurance, or other types of benefits for which he or she typically pays, the employing office is required to follow established policies or practices for continuing such benefits for other instances of leave without pay. If the employing office has no established policy, the employee and the employing office are encouraged to agree upon arrangements before FMLA leave begins.

(4) With respect to pension and other retirement plans, any period of unpaid FMLA leave shall not be treated as or counted toward a break in service for purposes of vesting and eligibility to participate. Also, if the plan requires an employee to be employed on a specific date in order to be credited with a year of service for vesting, contributions or participation purposes, an employee on unpaid FMLA leave on that date shall be deemed to have been employed on that date. However, unpaid FMLA leave periods need not be treated as credited service for purposes of benefit accrual, vesting and eligibility to participate.

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

(e) *Equivalent terms and conditions of employment*. An equivalent position must have substantially similar duties, conditions, responsibilities, privileges and status as the employee's original position.

(1) The employee must be reinstated to the same or a geographically proximate worksite (*i.e.*, one that does not involve a significant increase in commuting time or distance) from where the employee had previously been employed. If the employee's original worksite has been closed, the employee is entitled to the same rights as if the employee had not been on leave when the worksite closed. For example, if an employing office transfers all employees from a closed worksite to a new worksite in a different city, the employee on leave is also entitled to transfer under the same conditions as if he or she had continued to be employed.

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

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

(4) FMLA does not prohibit an employing office from accommodating an employee's request to be restored to a different shift, schedule, or position which better suits the employee's personal needs on return from leave, or to offer a promotion to a better position. However, an employee cannot be induced by the employing office to accept a different position against the employee's wishes.

(f) *De minimis exception*. The requirement that an employee be restored to the same or equivalent job with the same or equivalent pay, benefits, and terms and conditions of employment does not extend to de minimis, intangible, or unmeasurable aspects of the job.

825.216 Limitations on an employee's right to reinstatement.

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

(1) If an employee is laid off during the course of taking FMLA leave and employment is terminated, the employing office's responsibility to continue FMLA leave, maintain group health plan benefits and restore the employee ceases at the time the employee is laid off, provided the employing office has no continuing obligations under a collective bargaining agreement or otherwise. An employing office would have the burden of proving that an employee would have been laid off during the FMLA leave period and, therefore, would not be entitled to restoration. Restoration to a job slated for lay-off when the employee's original position is not would not meet the requirements of an equivalent position.

(2) If a shift has been eliminated, or overtime has been decreased, an employee would not be entitled to return to work that shift or the original overtime hours upon restoration. However, if a position on, for example, a night shift has been filled by another employee, the employee is entitled to return to the same shift on which employed before taking FMLA leave.

(3) If an employee was hired for a specific term or only to perform work on a discrete

project, the employing office has no obligation to restore the employee if the employment term or project is over and the employing office would not otherwise have continued to employ the employee. On the other hand, if an employee was hired to perform work for one employing office for a specific time period, and after that time period has ended, the work was assigned to another employing office, the successor employing office may be required to restore the employee if it is a successor employing office.

(b) In addition to the circumstances explained above, an employing office may deny job restoration to salaried eligible employees (key employees, as defined in 825.217(c)), if such denial is necessary to prevent substantial and grievous economic injury to the operations of the employing office; or may delay restoration to an employee who fails to provide a fitness-for-duty certificate to return to work under the conditions described in 825.312.

(c) If the employee is unable to perform an essential function of the position because of a physical or mental condition, including the continuation of a serious health condition or an injury or illness also covered by workers' compensation, the employee has no right to restoration to another position under the FMLA. The employing office's obligations may, however, be governed by the Americans with Disabilities Act (ADA), as amended and as made applicable by the CAA. *See* 825.702.

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

(e) If the employing office has a uniformly-applied policy governing outside or supplemental employment, such a policy may continue to apply to an employee while on FMLA leave. An employing office which does not have such a policy may not deny benefits to which an employee is entitled under FMLA, as made applicable by the CAA, on this basis unless the FMLA leave was fraudulently obtained as in paragraph (d) of this section.

825.217 Key employee, general rule.

(a) A *key employee* is a salaried FMLA-eligible employee who is among the highest paid 10 percent of all the employees employed by the employing office within 75 miles of the employee's worksite.

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

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

(1) In determining which employees are among the highest paid 10 percent, year- to-date earnings are divided by weeks worked by the employee (including weeks in which paid leave was taken). Earnings include wages, premium pay, incentive pay, and nondiscretionary and discretionary bonuses. Earnings do not include incentives whose value is determined at some future date, *e.g.*, benefits or prerequisites.

(2) The determination of whether a salaried employee is among the highest paid 10 percent shall be made at the time the employee gives notice of the need for leave. No more than 10 percent of the employing office's employees within 75 miles of the worksite may be key employees.

825.218 Substantial and grievous economic injury.

(a) In order to deny restoration to a key employee, an employing office must determine that the restoration of the employee to employment will cause substantial and grievous economic injury to the operations of the employing office, not whether the absence of the employee will cause such substantial and grievous injury.

(b) An employing office may take into account its ability to replace on a temporary basis (or temporarily do without) the employee on FMLA leave. If permanent replacement is unavoidable, the cost of then reinstating the employee can be considered in evaluating whether substantial and grievous economic injury will occur from restoration; in other words, the effect on the operations of the employing office of reinstating the employee in an equivalent position.

(c) A precise test cannot be set for the level of hardship or injury to the employing office which must be sustained. If the reinstatement of a key employee threatens the economic viability of the employing office, that would constitute substantial and grievous economic injury. A lesser injury which causes substantial, long-term economic injury would also be sufficient. Minor inconveniences and costs that the employing office would experience in the normal course would certainly not constitute substantial and grievous economic injury.

(d) FMLA's substantial and grievous economic injury standard is different from and more stringent than the undue hardship test under the ADA, as made applicable by the CAA. *See also* 825.702.

825.219 Rights of a key employee.

(a) An employing office that believes that reinstatement may be denied to a key employee, must give written notice to the employee at the time the employee gives notice of the need for FMLA leave (or when FMLA leave commences, if earlier) that he or she qualifies as a key employee. At the same time, the employing office must also fully inform the employee of the potential consequences with respect to reinstatement and maintenance of health benefits if the employing office should determine that substantial and grievous economic injury to the employing office's operations will result if the employee is reinstated from FMLA leave. If such notice cannot be given immediately because of the need to determine whether the employee is a key employee, it shall be given as soon as practicable after being notified of a need for leave (or the commencement of leave, if earlier). It is expected that in most circumstances there will be no desire that an employee be denied restoration after FMLA leave and, therefore, there would be no need to provide such notice. However, an employing office who fails to provide such timely notice will lose its right to deny restoration even if substantial and grievous economic injury will result from reinstatement.

(b) As soon as an employing office makes a good faith determination, based on the facts available, that substantial and grievous economic injury to its operations will result if a key employee who has given notice of the need for FMLA leave or is using FMLA leave is reinstated, the employing office shall notify the employee in writing of its determination, that it cannot deny FMLA leave, and that it intends to deny restoration to employment on completion of the FMLA leave. It is anticipated that an employing office will ordinarily be able to give such notice prior to the employee starting leave. The employing office must serve this notice either in person or by certified mail. This notice must explain the basis for the employing office's finding that substantial and grievous economic injury will result, and, if leave has commenced, must provide the employee a reasonable time in which to return to work, taking into account the circumstances, such as the length of the leave and the urgency of the need for the employee to return.

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

(d) After notice to an employee has been given that substantial and grievous economic injury will result if the employee is reinstated to employment, an employee is still entitled to request reinstatement at the end of the leave period even if the employee did not return to work in response to the employing office's notice. The employing office must then again determine whether there will be substantial and grievous economic injury from reinstatement, based on the facts at that time. If it is determined that substantial and grievous economic injury will result, the employing office shall notify the employee in writing (in person or by certified mail) of the denial of restoration.

825.220 Protection for employees who request leave or otherwise assert FMLA rights.

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

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

(2) An employing office is prohibited from discharging or in any other way discriminating against any covered employee (whether or not an eligible employee) for opposing or complaining about any unlawful practice under the FMLA, as made applicable by the CAA.

(3) All employing offices are prohibited from discharging or in any other way discriminating against any covered employee (whether or not an eligible employee) because that covered employee has—

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

(ii) Given, or is about to give, any information in connection with an inquiry or proceeding relating to a right under the FMLA, as made applicable by the CAA;

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

(b) Any violations of the FMLA, as made applicable by the CAA, or of these regulations constitute interfering with, restraining, or denying the exercise of rights provided by the FMLA, as made applicable by the CAA. An employing office may be liable for compensation and benefits lost by reason of the violation, for other actual monetary losses sustained as a direct result of the violation, and for appropriate equitable or other relief, including employment, reinstatement, promotion, or any other relief tailored to the harm suffered. *See* 825.400(c). Interfering with the exercise of an employee's rights would

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

(1) [Reserved]

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

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

(c) The FMLA's prohibition against interference prohibits an employing office from discriminating or retaliating against an employee or prospective employee for having exercised or attempted to exercise FMLA rights. For example, if an employee on leave without pay would otherwise be entitled to full benefits (other than health benefits), the same benefits would be required to be provided to an employee on unpaid FMLA leave. By the same token, employing offices cannot use the taking of FMLA leave as a negative factor in employment actions, such as hiring, promotions or disciplinary actions; nor can FMLA leave be counted under no fault attendance policies. *See* 825.215.

(d) Employees cannot waive, nor may employing offices induce employees to waive, their rights under FMLA. For example, employees (or their collective bargaining representatives) cannot trade off the right to take FMLA leave against some other benefit offered by the employing office. Except for settlement agreements covered by 1414 and/or 1415 of the Congressional Accountability Act, this does not prevent the settlement or release of FMLA claims by employees based on past employing office conduct without the approval of the Office of Compliance or a court. Nor does it prevent an employee's voluntary and uncoerced acceptance (not as a condition of employment) of a light duty assignment while recovering from a serious health condition. *See* 825.702(d). An employee's acceptance of such light duty assignment does not constitute a waiver of the employee's prospective rights, including the right to be restored to the same position the employee held at the time the employee's FMLA leave commenced or to an equivalent position. The employee's right to restoration, however, ceases at the end of the applicable 12–month FMLA leave year.

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

SUBPART C—EMPLOYEE AND EMPLOYING OFFICE RIGHTS AND OBLIGATIONS UNDER THE FMLA, AS MADE APPLICABLE BY THE CAA

825.300 Employing office notice requirements.

(a)(1) If an employing office has any eligible employees and has any written guidance to employees concerning employee benefits or leave rights, such as in an employee handbook, information concerning both entitlements and employee obligations under the FMLA, as made applicable by the CAA, must be included in the handbook or other document. For example, if an employing office provides an employee handbook to all employees that describes the employing office's policies regarding leave, wages, attendance, and similar matters, the handbook must incorporate information on FMLA rights and responsibilities and the employing office's policies regarding the FMLA, as made applicable by the CAA. Informational publications describing the provisions of the FMLA, as made applicable by the CAA, are available from the Office of Compliance and may be incorporated in such employing office handbooks or written policies.

(2) If such an employing office does not have written policies, manuals, or handbooks describing employee benefits and leave provisions, the employing office shall provide written guidance to an employee concerning all the employee's rights and obligations under the FMLA, as made applicable by the CAA. This notice shall be provided to employees each time notice is given pursuant to paragraph (c), and in accordance with the provisions of that paragraph. Employing offices may duplicate and provide the employee a copy of the FMLA Fact Sheet available from the Office of Compliance to provide such guidance.

(b) *Eligibility notice.* (1) When an employee requests FMLA leave, or when the employing office acquires knowledge that an employee's leave may be for an FMLA-qualifying reason, the employing office must notify the employee of the employee's eligibility to take FMLA leave within five business days, absent extenuating circumstances. *See* 825.110 for definition of an eligible employee. Employee eligibility is determined (and notice must be provided) at the commencement of the first instance of leave for each FMLA-qualifying reason in the applicable 12–month period. *See* 825.127(c) and 825.200(b). All FMLA absences for the same qualifying reason are considered a single leave and employee eligibility as to that reason for leave does not change during the applicable 12-month period.

(2) The eligibility notice must state whether the employee is eligible for FMLA leave as defined in 825.110. If the employee is not eligible for FMLA leave, the notice must state at least one reason why the employee is not eligible, including as applicable the number of months the employee has been employed by the employing office and the hours of service with the employing office during the 12-month period. Notification of eligibility may be oral or in writing; employing offices may use Form C to provide such notification to employees.

(3) If, at the time an employee provides notice of a subsequent need for FMLA leave during the applicable 12-month period due to a different FMLA-qualifying reason, and the employee's eligibility status has not changed, no additional eligibility notice is required. If, however, the employee's eligibility status has changed (*e.g.*, if the employee has not met the hours of service requirement in the 12 months preceding the commencement of leave for the subsequent qualifying reason), the employing office must notify the employee of the change in eligibility status within five business days, absent extenuating circumstances.

(c) *Rights and responsibilities notice.* (1) Employing offices shall provide written notice detailing the specific expectations and obligations of the employee and explaining any consequences of a failure to meet these obligations. This notice shall be provided to the employee each time the eligibility notice is provided pursuant to paragraph (b) of this section. If leave has already begun, the notice should be mailed to the employee's address of record. Such specific notice must include, as appropriate:

(i) That the leave may be designated and counted against the employee's annual FMLA leave entitlement if qualifying (*see* 825.300(c) and 825.301) and the applicable 12-month period for FMLA entitlement (*see* 825.127(c), 825.200(b), (f), and (g));

(ii) Any requirements for the employee to furnish certification of a serious health condition, serious injury or illness, or qualifying exigency arising out of covered active duty or call to covered active duty status, and the consequences of failing to do so (*see* 825.305, 825.309, 825.310, 825.313);

(iii) The employee's right to substitute paid leave, whether the employing office will require the substitution of paid leave, the conditions related to any substitution, and the employee's entitlement to take unpaid FMLA leave if the employee does not meet the conditions for paid leave (*see* 825.207);

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

(v) The employee's status as a key employee and the potential consequence that restoration may be denied following FMLA leave, explaining the conditions required for such denial (*see* 825.218);

(vi) The employee's right to maintenance of benefits during the FMLA leave and restoration to the same or an equivalent job upon return from FMLA leave (*see* 825.214 and 825.604); and

(vii) The employee's potential liability for payment of health insurance premiums paid by the employing office during the employee's unpaid FMLA leave if the employee fails to return to work after taking FMLA leave (*see* 825.213).

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

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

(4) If the specific information provided by the notice of rights and responsibilities changes, the employing office shall, within five business days of receipt of the employee's first notice of need for leave subsequent to any change, provide written notice referencing the prior notice and setting forth any of the information in the notice of rights and responsibilities that has changed. For example, if the initial leave period was paid leave and the subsequent leave period would be unpaid leave, the employing office may need to give notice of the arrangements for making premium payments.

(5) Employing offices are also expected to responsively answer questions from employees concerning their rights and responsibilities under the FMLA, as made applicable under the CAA.

(6) A prototype notice of rights and responsibilities may be obtained in Form C, or from the Office of Compliance. Employing offices may adapt the prototype notice as appropriate to meet these notice requirements. The notice of rights and responsibilities may be distributed electronically so long as it otherwise meets the requirements of this section.

(d) *Designation notice.* (1) The employing office is responsible in all circumstances for designating leave as FMLA-qualifying, and for giving notice of the designation to the employee as provided in this section. When the employing office has enough information to determine whether the leave is being taken for a FMLA-qualifying reason (*e.g.*, after receiving a certification), the employing office must notify the employee whether the leave will be designated and will be counted as FMLA leave within five business days absent extenuating circumstances. Only one notice of designation is required for each FMLA-qualifying reason per applicable 12–month period, regardless of whether the

leave taken due to the qualifying reason will be a continuous block of leave or intermittent or reduced schedule leave. If the employing office determines that the leave will not be designated as FMLA-qualifying (*e.g.*, if the leave is not for a reason covered by FMLA or the FMLA leave entitlement has been exhausted), the employing office must notify the employee of that determination. If the employing office requires paid leave to be substituted for unpaid FMLA leave, or that paid leave taken under an existing leave plan be counted as FMLA leave, the employing office must inform the employee of this designation at the time of designating the FMLA leave.

(2) If the employing office has sufficient information to designate the leave as FMLA leave immediately after receiving notice of the employee's need for leave, the employing office may provide the employee with the designation notice at that time.

(3) If the employing office will require the employee to present a fitness-for-duty certification to be restored to employment, the employing office must provide notice of such requirement with the designation notice. If the employing office will require that the fitness-for-duty certification address the employee's ability to perform the essential functions of the employee's position, the employing office must so indicate in the designation notice, and must include a list of the essential functions of the employee's position. *See* 825.312. If the employing office's handbook or other written documents (if any) describing the employing office's leave policies clearly provide that a fitness-for-duty certification will be required in specific circumstances (*e.g.*, by stating that fitness-for-duty certification will be required in all cases of back injuries for employees in a certain occupation), the employing office is not required to provide written notice of the requirement with the designation notice, but must provide oral notice no later than with the designation notice.

(4) The designation notice must be in writing. A prototype designation notice is contained in Form D which may be obtained from the Office of Compliance. If the leave is not designated as FMLA leave because it does not meet the requirements of the FMLA, as made applicable by the CAA, the notice to the employee that the leave is not designated as FMLA leave may be in the form of a simple written statement. The designation notice may be distributed electronically so long as it otherwise meets the requirements of this section and the employing office can demonstrate that the employee (who may already be on leave and who may not have access to employing office-provided computers) has access to the information electronically.

(5) If the information provided by the employing office to the employee in the designation notice changes (*e.g.*, the employee exhausts the FMLA leave entitlement), the employing office shall provide, within five business days of receipt of the employee's first notice of need for leave subsequent to any change, written notice of the change.

(6) The employing office must notify the employee of the amount of leave counted against the employee's FMLA leave entitlement. If the amount of leave needed is known at the time the employing office designates the leave as FMLA-qualifying, the employing office must notify the employee of the number of hours, days, or weeks that will be counted against the employee's FMLA leave entitlement in the designation notice. If it is not possible to provide the hours, days, or weeks that will be counted against the employee's FMLA leave entitlement (such as in the case of unforeseeable intermittent leave), then the employing office must provide notice of the amount of leave counted against the employee's FMLA leave entitlement upon the request by the employee, but no more often than once in a 30–day period and only if leave was taken in that period. The notice of the amount of leave counted against the employee's FMLA entitlement may be oral or in writing. If such notice is oral, it shall be confirmed in writing no later than the following payday (unless the payday is less than one week after the oral notice, in which case the notice must be no later than the subsequent payday). Such written notice may be in any form, including a notation on the employee's pay stub.

(e) *Consequences of failing to provide notice.* Failure to follow the notice requirements set forth in this section may constitute an interference with, restraint, or denial of the exercise of an employee's FMLA rights. An employing office may be liable for compensation and benefits lost by reason of the violation, for other actual monetary losses sustained as a direct result of the violation, and for appropriate equitable or other relief, including employment, reinstatement, promotion, or any other relief tailored to the harm suffered. *See* 825.400(c).

825.301 Designation of FMLA leave.

(a) *Employing office responsibilities.* The employing office's decision to designate leave as FMLA-qualifying must be based only on information received from the employee or the employee's spokesperson (*e.g.*, if the employee is incapacitated, the employee's spouse, adult child, parent, doctor, *etc.*, may provide notice to the employing office of the need to take FMLA leave). In any circumstance where the employing office does not have sufficient information about the reason for an employee's use of leave, the employing office should inquire further of the employee or the spokesperson to ascertain whether leave is potentially FMLA-qualifying. Once the employing office has acquired knowledge that the leave is being taken for a FMLA-qualifying reason, the employing office must notify the employee as provided in 825.300(d).

(b) *Employee responsibilities.* An employee giving notice of the need for FMLA leave does not need to expressly assert rights under the FMLA, as made applicable by the CAA, or even mention the FMLA to meet his or her obligation to provide notice, though the employee would need to state a qualifying reason for the needed leave and otherwise satisfy the notice requirements set forth in 825.302 or 825.303 depending on whether the need for leave is foreseeable or unforeseeable. An employee giving notice of the need for FMLA leave must explain the reasons for the needed leave so as to allow the employing office to determine whether the leave qualifies under the FMLA, as made applicable by the CAA. If the employee fails to explain the reasons, leave may be denied. In many cases, in explaining the reasons for a request to use leave, especially when the need for the leave was unexpected or unforeseen, an employee will provide sufficient information for the employing office to designate the leave as FMLA leave. An employee using accrued paid leave may in some cases not spontaneously explain the reasons or their plans for using their accrued leave. However, if an employee requesting to use paid leave for a FMLA-qualifying reason does not explain the reason for the leave and the employing office denies the employee's request, the employee will need to provide sufficient information to establish a FMLA-qualifying reason for the needed leave so that the employing office is aware that the leave may not be denied and may designate that the paid leave be appropriately counted against (substituted for) the employee's FMLA leave entitlement. Similarly, an employee using accrued paid vacation leave who seeks an extension of unpaid leave for a FMLA-qualifying reason will need to state the reason. If this is due to an event which occurred during the period of paid leave, the employing office may count the leave used after the FMLA-qualifying reason against the employee's FMLA leave entitlement.

(c) *Disputes.* If there is a dispute between an employing office and an employee as to whether leave qualifies as FMLA leave, it should be resolved through discussions between the employee and the employing office. Such discussions and the decision must be documented.

(d) *Retroactive designation.* If an employing office does not designate leave as required by 825.300, the employing office may retroactively designate leave as FMLA leave with appropriate notice to the employee as required by 825.300 provided that the employing office's failure to timely designate leave does not cause harm or injury to the employee. In all cases where leave would qualify for FMLA protections, an employing office and an employee can mutually agree that leave be retroactively designated as FMLA leave.

(e) *Remedies.* If an employing office's failure to timely designate leave in accordance with 825.300 causes the employee to suffer harm, it may constitute an interference with, restraint of, or denial of the exercise of an employee's FMLA rights. An employing office may be liable for compensation and benefits lost by reason of the violation, for other actual monetary losses sustained as a direct result of the violation, and for appropriate equitable or other relief, including employment, reinstatement, promotion, or any other relief tailored to the harm suffered. *See* 825.400(c). For example, if an employing office that was put on notice that an employee needed FMLA leave failed to designate the leave properly, but the employee's own serious health condition prevented him or her from returning to work during that time period regardless of the designation, an employee may not be able to show that the employee suffered harm as a result of the employing office's actions. However, if an employee took leave to provide care for a son or daughter with a serious health condition believing it would not count toward his or her FMLA entitlement, and the employee planned to later use that FMLA leave to provide care for a spouse who would need assistance when recovering from surgery planned for a later date, the employee may be able to show that harm has occurred as a result of the employing office's failure to designate properly. The employee might establish this by showing that he or she would have arranged for an alternative caregiver for the seriously-ill son or daughter if the leave had been designated timely.

825.302 Employee notice requirements for foreseeable FMLA leave.

(a) *Timing of notice.* An employee must provide the employing office at least 30 days advance notice before FMLA leave is to begin if the need for the leave is foreseeable based on an expected birth, placement for adoption or foster care, planned medical treatment for a serious health condition of the employee or of a family member, or the planned medical treatment for a serious injury or illness of a covered servicemember. If 30 days notice is not practicable, such as because of a lack of knowledge of approximately when leave will be required to begin, a change in circumstances, or a medical emergency, notice must be given as soon as practicable. For example, an employee's health condition may require leave to commence earlier than anticipated before the birth of a child. Similarly, little opportunity for notice may be

given before placement for adoption. For foreseeable leave due to a qualifying exigency, notice must be provided as soon as practicable, regardless of how far in advance such leave is foreseeable. Whether FMLA leave is to be continuous or is to be taken intermittently or on a reduced schedule basis, notice need only be given one time, but the employee shall advise the employing office as soon as practicable if dates of scheduled leave change or are extended, or were initially unknown. In those cases where the employee is required to provide at least 30 days notice of foreseeable leave and does not do so, the employee shall explain the reasons why such notice was not practicable upon a request from the employing office for such information.

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

(c) *Content of notice.* An employee shall provide at least verbal notice sufficient to make the employing office aware that the employee needs FMLA-qualifying leave, and the anticipated timing and duration of the leave. Depending on the situation, such information may include that a condition renders the employee unable to perform the functions of the job; that the employee is pregnant or has been hospitalized overnight; whether the employee or the employee's family member is under the continuing care of a health care provider; if the leave is due to a qualifying exigency, that a military member is on covered active duty or call to covered active duty status (or has been notified of an impending call or order to covered active duty), and that the requested leave is for one of the reasons listed in 825.126(b); if the leave is for a family member, that the condition renders the family member unable to perform daily activities, or that the family member is a covered servicemember with a serious injury or illness; and the anticipated duration of the absence, if known. When an employee seeks leave for the first time for a FMLA-qualifying reason, the employee need not expressly assert rights under the FMLA, as made applicable by the CAA, or even mention the FMLA. When an employee seeks leave due to a FMLA-qualifying reason, for which the employing office has previously provided FMLA-protected leave, the employee must specifically reference the qualifying reason for leave or the need for FMLA leave. In all cases, the employing office should inquire further of the employee if it is necessary to have more information about whether FMLA leave is being sought by the employee, and obtain the necessary details of the leave to be taken. In the case of medical conditions, the employing office may find it necessary to inquire further to determine if the leave is because of a serious health condition and may request medical certification to support the need for such leave. *See* 825.305. An employing office may also request certification to support the need for leave for a qualifying exigency or for military caregiver leave. *See* 825.309, 825.310. When an employee has been previously certified for leave due to more than one FMLA-qualifying reason, the employing office may need to inquire further to determine for which qualifying reason the leave is needed. An employee has an obligation to respond to an employing office's questions designed to determine whether an absence is potentially FMLA-qualifying. Failure to respond to reasonable employing office inquiries regarding the leave request may result in denial of FMLA protection if the employing office is unable to determine whether the leave is FMLA-qualifying.

(d) *Complying with the employing office policy.* An employing office may require an employee to comply with the employing office's usual and customary notice and procedural requirements for requesting leave, absent unusual circumstances. For example, an employing office may require that written notice set forth the reasons for the requested leave, the anticipated duration of the leave, and the anticipated start of the leave. An employee also may be required by an employing office's policy to contact a specific individual. Unusual circumstances would include situations such as when an employee is unable to comply with the employing office's policy that requests for leave should be made by contacting a specific number because on the day the employee needs to provide notice of his or her need for FMLA leave there is no one to answer the call-in number and the voice mail box is full. Where an employee does not comply with the employing office's usual notice and procedural requirements, and no unusual circumstances justify the failure to comply, FMLA-protected leave may be delayed or denied. However, FMLA-protected leave may not be delayed or denied where the employing office's policy requires notice to be given sooner than set forth in paragraph (a) of this section and the employee provides timely notice as set forth in paragraph (a) of this section.

(e) *Scheduling planned medical treatment.* When planning medical treatment, the employee must consult with the employing office and make a reasonable effort to schedule the treatment so as not to disrupt unduly the employing office's operations, subject to the approval of the health care provider. Employees are ordinarily expected to consult with their employing offices prior to the scheduling of treatment in order to work out a treatment schedule which best suits the needs of both the employing office and the employee. For example, if an employee who provides notice of the need to take FMLA leave on an intermittent basis for planned medical treatment neglects to consult with the employing office to make a reasonable effort to arrange the schedule of treatments so as not to unduly disrupt the employing office's operations, the employing office may initiate discussions with the employee and require the employee to attempt to make such arrangements, subject to the approval of the health care provider. *See* 825.203 and 825.205.

(f) Intermittent leave or leave on a reduced leave schedule must be medically necessary due to a serious health condition or a serious injury or illness. An employee shall advise the employing office, upon request, of the reasons why the intermittent/reduced leave schedule is necessary and of the schedule for treatment, if applicable. The employee and employing office shall attempt to work out a schedule for such leave that meets the employee's needs without unduly disrupting the employing office's operations, subject to the approval of the health care provider.

(g) An employing office may waive employees' FMLA notice requirements. *See* 825.304.

825.303 Employee notice requirements for unforeseeable FMLA leave.

(a) *Timing of notice.* When the approximate timing of the need for leave is not foreseeable, an employee must provide notice to the employing office as soon as practicable under the facts and circumstances of the particular case. It generally should be practicable for the employee to provide notice of leave that is unforeseeable within the time prescribed by the employing office's usual and customary notice requirements applicable to such leave. *See* 825.303(c). Notice may be given by the employee's spokesperson (*e.g.*, spouse, adult family member, or other responsible party) if the employee is unable to do so personally. For example, if an employee's child has a severe asthma attack and the employee takes the child to the emergency room, the employee would not be required to leave his or her child in order to report the absence while the child is receiving emergency treatment. However, if the child's asthma attack required only the use of an inhaler at home followed by a period of rest, the employee would be expected to call the employing office promptly after ensuring the child has used the inhaler.

(b) *Content of notice.* An employee shall provide sufficient information for an employing office to reasonably determine whether the FMLA may apply to the leave request. Depending on the situation, such information may include that a condition renders the employee unable to perform the functions of the job; that the employee is pregnant or has been hospitalized overnight; whether the employee or the employee's family member is under the continuing care of a health care provider; if the leave is due to a qualifying exigency, that a military member is on covered active duty or call to covered active duty status (or has been notified of an impending call or order to covered active duty), that the requested leave is for one of the reasons listed in 825.126(b), and the anticipated duration of the absence; or if the leave is for a family member that the condition renders the family member unable to perform daily activities or that the family member is a covered servicemember with a serious injury or illness; and the anticipated duration of the absence, if known. When an employee seeks leave for the first time for a FMLA-qualifying reason, the employee need not expressly assert rights under the FMLA, as made applicable by the CAA, or even mention the FMLA. When an employee seeks leave due to a qualifying reason, for which the employing office has previously provided the employee FMLA-protected leave, the employee must specifically reference either the qualifying reason for leave or the need for FMLA leave. Calling in ''sick'' without providing more information will not be considered sufficient notice to trigger an employing office's obligations under the FMLA, as made applicable by the CAA. The employing office will be expected to obtain any additional required information through informal means. An employee has an obligation to respond to an employing office's questions designed to determine whether an absence is potentially FMLA-qualifying. Failure to respond to reasonable employing office inquiries office regarding the leave request may result in denial of FMLA protection if the employing office is unable to determine whether the leave is FMLA-qualifying.

(c) *Complying with employing office policy.* When the need for leave is not foreseeable, an employee must comply with the employing office's usual and customary notice and procedural requirements for requesting leave, absent unusual circumstances. For example, an employing office may require employees to call a designated number or a specific individual to request leave. However, if an employee requires emergency medical treatment, he or she would not be required to follow the call-in procedure until his or her condition is stabilized and he or she has access to, and is able to use, a phone. Similarly, in the case of an emergency requiring leave because of a FMLA-qualifying reason, written advance notice pursuant to an employing office's internal rules and procedures

may not be required when FMLA leave is involved. If an employee does not comply with the employing office's usual notice and procedural requirements, and no unusual circumstances justify the failure to comply, FMLA-protected leave may be delayed or denied.

825.304 Employee failure to provide notice.

(a) *Proper notice required.* In all cases, in order for the onset of an employee's FMLA leave to be delayed due to lack of required notice, it must be clear that the employee had actual notice of the FMLA notice requirements. This condition would be satisfied by the employing office's proper posting, at the worksite where the employee is employed, of the information regarding the FMLA provided (pursuant to section 301(h)(2) of the CAA, 2 U.S.C. 1381(h)(2)) by the Office of Compliance to the employing office in a manner suitable for posting.

(b) *Foreseeable leave—30 days.* When the need for FMLA leave is foreseeable at least 30 days in advance and an employee fails to give timely advance notice with no reasonable excuse, the employing office may delay FMLA coverage until 30 days after the date the employee provides notice. The need for leave and the approximate date leave would be taken must have been clearly foreseeable to the employee 30 days in advance of the leave. For example, knowledge that an employee would receive a telephone call about the availability of a child for adoption at some unknown point in the future would not be sufficient to establish the leave was clearly foreseeable 30 days in advance.

(c) *Foreseeable leave—less than 30 days.* When the need for FMLA leave is foreseeable fewer than 30 days in advance and an employee fails to give notice as soon as practicable under the particular facts and circumstances, the extent to which an employing office may delay FMLA coverage for leave depends on the facts of the particular case. For example, if an employee reasonably should have given the employing office two weeks' notice but instead only provided one week's notice, then the employing office may delay FMLA-protected leave for one week (thus, if the employing office elects to delay FMLA coverage and the employee nonetheless takes leave one week after providing the notice (*i.e.*, a week before the two week notice period has been met) the leave will not be FMLA-protected).

(d) *Unforeseeable leave.* When the need for FMLA leave is unforeseeable and an employee fails to give notice in accordance with 825.303, the extent to which an employing office may delay FMLA coverage for leave depends on the facts of the particular case. For example, if it would have been practicable for an employee to have given the employing office notice of the need for leave very soon after the need arises consistent with the employing office's policy, but instead the employee provided notice two days after the leave began, then the employing office may delay FMLA coverage of the leave by two days.

(e) *Waiver of notice.* An employing office may waive employees' FMLA notice obligations or the employing office's own internal rules on leave notice requirements. If an employing office does not waive the employee's obligations under its internal leave rules, the employing office may take appropriate action under its internal rules and procedures for failure to follow its usual and customary notification rules, absent unusual circumstances, as long as the actions are taken in a manner that does not discriminate against employees taking FMLA leave and the rules are not inconsistent with 825.303(a).

825.305 Certification, general rule.

(a) *General.* An employing office may require that an employee's leave to care for the employee's covered family member with a serious health condition, or due to the employee's own serious health condition that makes the employee unable to perform one or more of the essential functions of the employee's position, be supported by a certification issued by the health care provider of the employee or the employee's family member. An employing office may also require that an employee's leave because of a qualifying exigency or to care for a covered servicemember with a serious injury or illness be supported by a certification, as described in 825.309 and 825.310, respectively. An employing office must give notice of a requirement for certification each time a certification is required; such notice must be written notice whenever required by 825.300(c). An employing office's oral request to an employee to furnish any subsequent certification is sufficient.

(b) *Timing.* In most cases, the employing office should request that an employee furnish certification at the time the employee gives notice of the need for leave or within five business days thereafter, or, in the case of unforeseen leave, within five business days after the leave commences. The employing office may request certification at some later date if the employing office later has reason to question the appropriateness of the leave or its duration. The employee must provide the requested certification to the employing office within 15 calendar days after the employing office's request, unless it is not practicable under the particular circumstances to do so despite the employee's diligent, good faith efforts or the employing office provides more than 15 calendar days to return the requested certification.

(c) *Complete and sufficient certification.* The employee must provide a complete and sufficient certification to the employing office if required by the employing office in accordance with 825.306, 825.309, and 825.310. The employing office shall advise an employee whenever the employing office finds a certification incomplete or insufficient, and shall state in writing what additional information is necessary to make the certification complete and sufficient. A certification is considered incomplete if the employing office receives a certification, but one or more of the applicable entries have not been completed. A certification is considered insufficient if the employing office receives a complete certification, but the information provided is vague, ambiguous, or non-responsive. The employing office must provide the employee with seven calendar days (unless not practicable under the particular circumstances despite the employee's diligent good faith efforts) to cure any such deficiency. If the deficiencies specified by the employing office are not cured in the resubmitted certification, the employing office may deny the taking of FMLA leave, in accordance with 825.313. A certification that is not returned to the employing office is not considered incomplete or insufficient, but constitutes a failure to provide certification.

(d) *Consequences.* At the time the employing office requests certification, the employing office must also advise an employee of the anticipated consequences of an employee's failure to provide adequate certification. If the employee fails to provide the employing office with a complete and sufficient certification, despite the opportunity to cure the certification as provided in paragraph (c) of this section, or fails to provide any certification, the employing office may deny the taking of FMLA leave, in accordance with 825.313. It is the employee's responsibility either to furnish a complete and sufficient certification or to furnish the health care provider providing the certification with any necessary authorization from the employee or the employee's family member in order for the health care provider to release a complete and sufficient certification to the employing office to support the employee's FMLA request. This provision will apply in any case where an employing office requests a certification permitted by these regulations, whether it is the initial certification, a recertification, a second or third opinion, or a fitness-for-duty certificate, including any clarifications necessary to determine if such certifications are authentic and sufficient. *See* 825.306, 825.307, 825.308, and 825.312.

(e) *Annual medical certification.* Where the employee's need for leave due to the employee's own serious health condition, or the serious health condition of the employee's covered family member, lasts beyond a single leave year (as defined in 825.200), the employing office may require the employee to provide a new medical certification in each subsequent leave year. Such new medical certifications are subject to the provisions for authentication and clarification set forth in 825.307, including second and third opinions.

825.306 Content of medical certification for leave taken because of an employee's own serious health condition or the serious health condition of a family member.

(a) *Required information.* When leave is taken because of an employee's own serious health condition, or the serious health condition of a family member, an employing office may require an employee to obtain a medical certification from a health care provider that sets forth the following information:

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

(2) The approximate date on which the serious health condition commenced, and its probable duration;

(3) A statement or description of appropriate medical facts regarding the patient's health condition for which FMLA leave is requested. The medical facts must be sufficient to support the need for leave. Such medical facts may include information on symptoms, diagnosis, hospitalization, doctor visits, whether medication has been prescribed, any referrals for evaluation or treatment (physical therapy, for example), or any other regimen of continuing treatment;

(4) If the employee is the patient, information sufficient to establish that the employee cannot perform the essential functions of the employee's job as well as the nature of any other work restrictions, and the likely duration of such inability (see 825.123(b));

(5) If the patient is a covered family member with a serious health condition, information sufficient to establish that the family member is in need of care, as described in 825.124, and an estimate of the frequency and duration of the leave required to care for the family member;

(6) If an employee requests leave on an intermittent or reduced schedule basis for planned medical treatment of the employee's or a covered family member's serious health condition, information sufficient to establish the medical necessity for such intermittent or reduced schedule leave and an estimate of the dates and duration of such treatments and any periods of recovery;

(7) If an employee requests leave on an intermittent or reduced schedule basis for the employee's serious health condition, including pregnancy, that may result in unforeseeable episodes of incapacity, information sufficient to establish the medical necessity for such intermittent or reduced schedule leave and an estimate of the frequency and duration of the episodes of incapacity; and

(8) If an employee requests leave on an intermittent or reduced schedule basis to

care for a covered family member with a serious health condition, a statement that such leave is medically necessary to care for the family member, as described in 825.124 and 825.203(b), which can include assisting in the family member's recovery, and an estimate of the frequency and duration of the required leave.

(b) The Office of Compliance has developed two optional forms (Form A and Form B) for use in obtaining medical certification, including second and third opinions, from health care providers that meets FMLA's certification requirements, as made applicable by the CAA. (See Forms A and B.) Optional Form A is for use when the employee's need for leave is due to the employee's own serious health condition. Optional Form B is for use when the employee needs leave to care for a family member with a serious health condition. These optional forms reflect certification requirements so as to permit the health care provider to furnish appropriate medical information. Forms A and B are modeled closely on Form WH–380E and Form WH–380F, as revised, which were developed by the Department of Labor (see 29 C.F.R. Part 825). The employing office may use the Office of Compliance's forms, or Form WH–380E and Form WH–380F, as revised, or another form containing the same basic information; however, no information may be required beyond that specified in 825.306, 825.307, and 825.308. In all instances the information on the form must relate only to the serious health condition for which the current need for leave exists.

(c) If an employee is on FMLA leave running concurrently with a workers' compensation absence, and the provisions of the workers' compensation statute permit the employing office or the employing office's representative to request additional information from the employee's workers' compensation health care provider, the FMLA does not prevent the employing office from following the applicable workers' compensation provisions and information received under those provisions may be considered in determining the employee's entitlement to FMLA-protected leave. Similarly, an employing office may request additional information in accordance with a paid leave policy or disability plan that requires greater information to qualify for payments or benefits, provided that the employing office informs the employee that the additional information only needs to be provided in connection with receipt of such payments or benefits. Any information received pursuant to such policy or plan may be considered in determining the employee's entitlement to FMLA-protected leave. If the employee fails to provide the information required for receipt of such payments or benefits, such failure will not affect the employee's entitlement to take unpaid FMLA leave. See 825.207(a).

(d) If an employee's serious health condition may also be a disability within the meaning of the Americans with Disabilities Act (ADA), as amended and as made applicable by the CAA, the FMLA does not prevent the employing office from following the procedures for requesting medical information under the ADA. Any information received pursuant to these procedures may be considered in determining the employee's entitlement to FMLA-protected leave.

(e) While an employee may choose to comply with the certification requirement by providing the employing office with an authorization, release, or waiver allowing the employing office to communicate directly with the health care provider of the employee or his or her covered family member, the employee may not be required to provide such an authorization, release, or waiver. In all instances in which certification is requested, it is the employee's responsibility to provide the employing office with complete and sufficient certification and failure to do so may result in the denial of FMLA leave. See 825.305(d).

825.307 Authentication and clarification of medical certification for leave taken because of an employee's own serious health condition or the serious health condition of a family member; second and third opinions.

(a) *Clarification and authentication.* If an employee submits a complete and sufficient certification signed by the health care provider, the employing office may not request additional information from the health care provider. However, the employing office may contact the health care provider for purposes of clarification and authentication of the medical certification (whether initial certification or recertification) after the employing office has given the employee an opportunity to cure any deficiencies as set forth in 825.305(c). To make such contact, the employing office must use a health care provider, a human resources professional, a leave administrator, or a management official. An employee's direct supervisor may not contact the employee's health care provider, unless the direct supervisor is also the only individual in the employing office designated to process FMLA requests and the direct supervisor receives specific authorization from the employee to contact the employee's health care provider. For purposes of these regulations, *authentication* means providing the health care provider with a copy of the certification and requesting verification that the information contained on the certification form was completed and/or authorized by the health care provider who signed the document; no additional medical information may be requested.

Clarification means contacting the health care provider to understand the handwriting on the medical certification or to understand the meaning of a response. Employing offices may not ask health care providers for additional information beyond that required by the certification form. The requirements of the Health Insurance Portability and Accountability Act (HIPAA) Privacy Rule, (*see* 45 CFR parts 160 and 164), which governs the privacy of individually-identifiable health information created or held by HIPAA-covered entities, must be satisfied when individually-identifiable health information of an employee is shared with an employing office by a HIPAA-covered health care provider. If an employee chooses not to provide the employing office with authorization allowing the employing office to clarify the certification with the health care provider, and does not otherwise clarify the certification, the employing office may deny the taking of FMLA leave if the certification is unclear. *See* 825.305(d). It is the employee's responsibility to provide the employing office with a complete and sufficient certification and to clarify the certification if necessary.

(b) *Second Opinion.* (1) An employing office that has reason to doubt the validity of a medical certification may require the employee to obtain a second opinion at the employing office's expense. Pending receipt of the second (or third) medical opinion, the employee is provisionally entitled to the benefits of the FMLA, as made applicable by the CAA, including maintenance of group health benefits. If the certifications do not ultimately establish the employee's entitlement to FMLA leave, the leave shall not be designated as FMLA leave and may be treated as paid or unpaid leave under the employing office's established leave policies. In addition, the consequences set forth in 825.305(d) will apply if the employee or the employee's family member fails to authorize his or her health care provider to release all relevant medical information pertaining to the serious health condition at issue if requested by the health care provider designated to provide a second opinion in order to render a sufficient and complete second opinion.

(2) The employing office is permitted to designate the health care provider to furnish the second opinion, but the selected health care provider may not be employed on a regular basis by the employing office. The employing office may not regularly contract with or otherwise regularly utilize the services of the health care provider furnishing the second opinion unless the employing office is located in an area where access to health care is extremely limited (*e.g.*, a rural area where no more than one or two doctors practice in the relevant specialty in the vicinity).

(c) *Third opinion.* If the opinions of the employee's and the employing office's designated health care providers differ, the employing office may require the employee to obtain certification from a third health care provider, again at the employing office's expense. This third opinion shall be final and binding. The third health care provider must be designated or approved jointly by the employing office and the employee. The employing office and the employee must each act in good faith to attempt to reach agreement on whom to select for the third opinion provider. If the employing office does not attempt in good faith to reach agreement, the employing office will be bound by the first certification. If the employee does not attempt in good faith to reach agreement, the employee will be bound by the second certification. For example, an employee who refuses to agree to see a doctor in the specialty in question may be failing to act in good faith. On the other hand, an employing office that refuses to agree to any doctor on a list of specialists in the appropriate field provided by the employee and whom the employee has not previously consulted may be failing to act in good faith. In addition, the consequences set forth in 825.305(d) will apply if the employee or the employee's family member fails to authorize his or her health care provider to release all relevant medical information pertaining to the serious health condition at issue if requested by the health care provider designated to provide a third opinion in order to render a sufficient and complete third opinion.

(d) *Copies of opinions.* The employing office is required to provide the employee with a copy of the second and third medical opinions, where applicable, upon request by the employee. Requested copies are to be provided within five business days unless extenuating circumstances prevent such action.

(e) *Travel expenses.* If the employing office requires the employee to obtain either a second or third opinion the employing office must reimburse an employee or family member for any reasonable ''out of pocket'' travel expenses incurred to obtain the second and third medical opinions. The employing office may not require the employee or family member to travel outside normal commuting distance for purposes of obtaining the second or third medical opinions except in very unusual circumstances.

(f) *Medical certification abroad.* In circumstances in which the employee or a family member is visiting in another country, or a family member resides in another country, and a serious health condition develops, the employing office shall accept a medical certification as well as second and third opinions from a health care provider who practices in that country. Where a certification

by a foreign health care provider is in a language other than English, the employee must provide the employing office with a written translation of the certification upon request.

825.308 Recertifications for leave taken because of an employee's own serious health condition or the serious health condition of a family member.

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

(b) *More than 30 days*. If the medical certification indicates that the minimum duration of the condition is more than 30 days, an employing office must wait until that minimum duration expires before requesting a recertification, unless paragraph (c) of this section applies. For example, if the medical certification states that an employee will be unable to work, whether continuously or on an intermittent basis, for 40 days, the employing office must wait 40 days before requesting a recertification. In all cases, an employing office may request a recertification of a medical condition every six months in connection with an absence by the employee. Accordingly, even if the medical certification indicates that the employee will need intermittent or reduced schedule leave for a period in excess of six months (*e.g.*, for a lifetime condition), the employing office would be permitted to request recertification every six months in connection with an absence.

(c) *Less than 30 days*. An employing office may request recertification in less than 30 days if:

(1) The employee requests an extension of leave;

(2) Circumstances described by the previous certification have changed significantly (*e.g.*, the duration or frequency of the absence, the nature or severity of the illness, complications). For example, if a medical certification stated that an employee would need leave for one to two days when the employee suffered a migraine headache and the employee's absences for his or her last two migraines lasted four days each, then the increased duration of absence might constitute a significant change in circumstances allowing the employing office to request a recertification in less than 30 days. Likewise, if an employee had a pattern of using unscheduled FMLA leave for migraines in conjunction with his or her scheduled days off, then the timing of the absences also might constitute a significant change in circumstances sufficient for an employing office to request a recertification more frequently than every 30 days; or

(3) The employing office receives information that casts doubt upon the employee's stated reason for the absence or the continuing validity of the certification. For example, if an employee is on FMLA leave for four weeks due to the employee's knee surgery, including recuperation, and the employee plays in company softball league games during the employee's third week of FMLA leave, such information might be sufficient to cast doubt upon the continuing validity of the certification allowing the employing office to request a recertification in less than 30 days.

(d) *Timing*. The employee must provide the requested recertification to the employing office within the time frame requested by the employing office (which must allow at least 15 calendar days after the employing office's request), unless it is not practicable under the particular circumstances to do so despite the employee's diligent, good faith efforts.

(e) *Content*. The employing office may ask for the same information when obtaining recertification as that permitted for the original certification as set forth in 825.306. The employee has the same obligations to participate and cooperate (including providing a complete and sufficient certification or adequate authorization to the health care provider) in the recertification process as in the initial certification process. *See* 825.305(d). As part of the information allowed to be obtained on recertification for leave taken because of a serious health condition, the employing office may provide the health care provider with a record of the employee's absence pattern and ask the health care provider if the serious health condition and need for leave is consistent with such a pattern.

(f) Any recertification requested by the employing office shall be at the employee's expense unless the employing office provides otherwise. No second or third opinion on recertification may be required.

825.309 Certification for leave taken because of a qualifying exigency.

(a) *Active Duty Orders*. The first time an employee requests leave because of a qualifying exigency arising out of the covered active duty or call to covered active duty status (or notification of an impending call or order to covered active duty) of a military member (*see* 825.126(a)), an employing office may require the employee to provide a copy of the military member's active duty orders or other documentation issued by the military which indicates that the military member is on covered active duty or call to covered active duty status, and the dates of the military member's covered active duty service. This information need only be provided to the employing office once. A copy of new active duty orders or other documentation issued by the military may be required by the employing office if the need for leave because of a qualifying exigency arises out of a different covered active duty or call to covered active duty status (or notification of an impending call or order to covered active duty) of the same or a different military member;

(b) *Required information*. An employing office may require that leave for any qualifying exigency specified in 825.126 be supported by a certification from the employee that sets forth the following information:

(1) A statement or description, signed by the employee, of appropriate facts regarding the qualifying exigency for which FMLA leave is requested. The facts must be sufficient to support the need for leave. Such facts should include information on the type of qualifying exigency for which leave is requested and any available written documentation which supports the request for leave; such documentation, for example, may include a copy of a meeting announcement for informational briefings sponsored by the military, a document confirming an appointment with a counselor or school official, or a copy of a bill for services for the handling of legal or financial affairs;

(2) The approximate date on which the qualifying exigency commenced or will commence;

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

(4) If an employee requests leave because of a qualifying exigency on an intermittent or reduced schedule basis, an estimate of the frequency and duration of the qualifying exigency;

(5) If the qualifying exigency involves meeting with a third party, appropriate contact information for the individual or entity with whom the employee is meeting (such as the name, title, organization, address, telephone number, fax number, and email address) and a brief description of the purpose of the meeting; and

(6) If the qualifying exigency involves *Rest and Recuperation* leave, a copy of the military member's Rest and Recuperation orders, or other documentation issued by the military which indicates that the military member has been granted Rest and Recuperation leave, and the dates of the military member's Rest and Recuperation leave.

(c) The Office of Compliance has developed an optional form (Form E) for employees' use in obtaining a certification that meets FMLA's certification requirements. This optional form reflects certification requirements so as to permit the employee to furnish appropriate information to support his or her request for leave because of a qualifying exigency. Form E, or Form WH–384 (developed by the Department of Labor), or another form containing the same basic information, may be used by the employing office; however, no information may be required beyond that specified in this section.

(d) *Verification*. If an employee submits a complete and sufficient certification to support his or her request for leave because of a qualifying exigency, the employing office may not request additional information from the employee. However, if the qualifying exigency involves meeting with a third party, the employing office may contact the individual or entity with whom the employee is meeting for purposes of verifying a meeting or appointment schedule and the nature of the meeting between the employee and the specified individual or entity. The employee's permission is not required in order to verify meetings or appointments with third parties, but no additional information may be requested by the employing office. An employing office also may contact an appropriate unit of the Department of Defense to request verification that a military member is on covered active duty or call to covered active duty status (or has been notified of an impending call or order to covered active duty); no additional information may be requested and the employee's permission is not required.

825.310 Certification for leave taken to care for a covered servicemember (military caregiver leave).

(a) *Required information from health care provider*. When leave is taken to care for a covered servicemember with a serious injury or illness, an employing office may require an employee to obtain a certification completed by an authorized health care provider of the covered servicemember. For purposes of leave taken to care for a covered servicemember, any one of the following health care providers may complete such a certification:

(1) A United States Department of Defense (''DOD'') health care provider;

(2) A United States Department of Veterans Affairs (''VA'') health care provider;

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

(4) A DOD non-network TRICARE authorized private health care provider; or

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

(b) If the authorized health care provider is unable to make certain military-related determinations outlined below, the authorized health care provider may rely on determinations from an authorized DOD representative (such as a DOD recovery care coordinator) or an authorized VA representative. An employing office may request that the health care provider provide the following information:

(1) The name, address, and appropriate contact information (telephone number, fax number, and/or email address) of the health care provider, the type of medical practice, the medical specialty, and whether the health care provider is one of the following:

(i) A DOD health care provider;
(ii) A VA health care provider;
(iii) A DOD TRICARE network authorized private health care provider;
(iv) A DOD non-network TRICARE authorized private health care provider; or
(v) A health care provider as defined in 825.125.

(2) Whether the covered servicemember's injury or illness was incurred in the line of duty on active duty or, if not, whether the covered servicemember's injury or illness existed before the beginning of the servicemember's active duty and was aggravated by service in the line of duty on active duty;

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

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

(i) In the case of a current member of the Armed Forces, such medical facts must include information on whether the injury or illness may render the covered servicemember medically unfit to perform the duties of the servicemember's office, grade, rank, or rating and whether the member is receiving medical treatment, recuperation, or therapy;

(ii) In the case of a covered veteran, such medical facts must include:

(A) Information on whether the veteran is receiving medical treatment, recuperation, or therapy for an injury or illness that is the continuation of an injury or illness that was incurred or aggravated when the covered veteran was a member of the Armed Forces and rendered the servicemember medically unfit to perform the duties of the servicemember's office, grade, rank, or rating; or

(B) Information on whether the veteran is receiving medical treatment, recuperation, or therapy for an injury or illness that is a physical or mental condition for which the covered veteran has received a U.S. Department of Veterans Affairs Service-Related Disability Rating (VASRD) of 50 percent or greater, and that such VASRD rating is based, in whole or in part, on the condition precipitating the need for military caregiver leave; or

(C) Information on whether the veteran is receiving medical treatment, recuperation, or therapy for an injury or illness that is a physical or mental condition that substantially impairs the covered veteran's ability to secure or follow a substantially gainful occupation by reason of a disability or disabilities related to military service, or would do so absent treatment; or

(D) Documentation of enrollment in the Department of Veterans Affairs Program of Comprehensive Assistance for Family Caregivers.

(5) Information sufficient to establish that the covered servicemember is in need of care, as described in 825.124, and whether the covered servicemember will need care for a single continuous period of time, including any time for treatment and recovery, and an estimate as to the beginning and ending dates for this period of time;

(6) If an employee requests leave on an intermittent or reduced schedule basis for planned medical treatment appointments for the covered servicemember, whether there is a medical necessity for the covered servicemember to have such periodic care and an estimate of the treatment schedule of such appointments;

(7) If an employee requests leave on an intermittent or reduced schedule basis to care for a covered servicemember other than for planned medical treatment (e.g., episodic flare-ups of a medical condition), whether there is a medical necessity for the covered servicemember to have such periodic care, which can include assisting in the covered servicemember's recovery, and an estimate of the frequency and duration of the periodic care.

(c) *Required information from employee and/or covered servicemember.* In addition to the information that may be requested under 825.310(b), an employing office may also request that such certification set forth the following information provided by an employee and/or covered servicemember:

(1) The name and address of the employing office of the employee requesting leave to care for a covered servicemember, the name of the employee requesting such leave, and the name of the covered servicemember for whom the employee is requesting leave to care;

(2) The relationship of the employee to the covered servicemember for whom the employee is requesting leave to care;

(3) Whether the covered servicemember is a current member of the Armed Forces, the National Guard or Reserves, and the covered servicemember's military branch, rank, and current unit assignment;

(4) Whether the covered servicemember is assigned to a military medical facility as an outpatient or to a unit established for the purpose of providing command and control of members of the Armed Forces receiving medical care as outpatients (such as a medical hold or warrior transition unit), and the name of the medical treatment facility or unit;

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

(6) Whether the covered servicemember is a veteran, the date of separation from military service, and whether the separation was other than dishonorable. The employing office may require the employee to provide documentation issued by the military which indicates that the covered servicemember is a veteran, the date of separation, and that the separation is other than dishonorable. Where an employing office requires such documentation, an employee may provide a copy of the veteran's Certificate of Release or Discharge from Active Duty issued by the U.S. Department of Defense (DD Form 214) or other proof of veteran status. *See* 825.127(c)(2).

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

(d) The Office of Compliance has developed an optional form (Form F) for employees' use in obtaining certification that meets FMLA's certification requirements. (*See* Form F). This optional form reflects certification requirements so as to permit the employee to furnish appropriate information to support his or her request for leave to care for a covered servicemember with a serious injury or illness. Form F, or Form WH–385 (developed by the Department of Labor), or another form containing the same basic information, may be used by the employing office; however, no information may be required beyond that specified in this section. In all instances the information on the certification must relate only to the serious injury or illness for which the current need for leave exists. An employing office may seek authentication and/or clarification of the certification under 825.307. Second and third opinions under 825.307 are not permitted for leave to care for a covered servicemember when the certification has been completed by one of the types of healthcare providers identified in section 825.310(a)(1–4). However, second and third opinions under 825.307 are permitted when the certification has been completed by a health care provider as defined in 825.125 that is not one of the types identified in 825.310(a)(1)–(4). Additionally, recertifications under 825.308 are not permitted for leave to care for a covered servicemember. An employing office may require an employee to provide confirmation of covered family relationship to the seriously injured or ill servicemember pursuant to 825.122(k) of the FMLA.

(e) An employing office requiring an employee to submit a certification for leave to care for a covered servicemember must accept as sufficient certification, in lieu of the Office of Compliance's optional certification form (Form F) or an employing office's own certification form, invitational travel orders (ITOs) or invitational travel authorizations (ITAs) issued to any family member to join an injured or ill servicemember at his or her bedside. An ITO or ITA is sufficient certification for the duration of time specified in the ITO or ITA. During that time period, an eligible employee may take leave to care for the covered servicemember in a continuous block of time or on an intermittent basis. An eligible employee who provides an ITO or ITA to support his or her request for leave may not be required to provide any additional or separate certification that leave taken on an intermittent basis during the period of time specified in the ITO or ITA is medically necessary. An ITO or ITA is sufficient certification for an employee entitled to take FMLA leave to care for a covered servicemember regardless of whether the employee is named in the order or authorization.

(1) If an employee will need leave to care for a covered servicemember beyond the expiration date specified in an ITO or ITA, an employing office may request that the employee have one of the authorized health care providers listed under 825.310(a) complete the Office of Compliance optional certification form (Form F) or an employing office's own form, as requisite certification for the remainder of the employee's necessary leave period.

(2) An employing office may seek authentication and clarification of the ITO or ITA under 825.307. An employing office may not utilize the second or third opinion process outlined in 825.307 or the recertification process under 825.308 during the period of time in which leave is supported by an ITO or ITA.

(3) An employing office may require an employee to provide confirmation of covered family relationship to the seriously injured or ill servicemember pursuant to 825.122(k) when an employee supports his or her request for FMLA leave with a copy of an ITO or ITA.

(f) An employing office requiring an employee to submit a certification for leave to care for a covered servicemember must accept as sufficient certification of the servicemember's serious injury or illness documentation indicating the servicemember's enrollment in the Department of Veterans Affairs Program of Comprehensive Assistance for Family Caregivers. Such documentation is sufficient certification of the servicemember's serious injury or illness to support the employee's request for military caregiver leave regardless of whether the employee is the named caregiver in the enrollment documentation.

(1) An employing office may seek authentication and clarification of the documentation indicating the servicemember's enrollment in the Department of Veterans Affairs Program of Comprehensive Assistance for Family Caregivers under 825.307. An employing office may not utilize the second or third opinion process outlined in 825.307 or the recertification process under 825.308 when the servicemember's serious injury or illness is

shown by documentation of enrollment in this program.

(2) An employing office may require an employee to provide confirmation of covered family relationship to the seriously injured or ill servicemember pursuant to 825.122(k) when an employee supports his or her request for FMLA leave with a copy of such enrollment documentation. An employing office may also require an employee to provide documentation, such as a veteran's Form DD–214, showing that the discharge was other than dishonorable and the date of the veteran's discharge.

(g) Where medical certification is requested by an employing office, an employee may not be held liable for administrative delays in the issuance of military documents, despite the employee's diligent, good-faith efforts to obtain such documents. *See* 825.305(b). In all instances in which certification is requested, it is the employee's responsibility to provide the employing office with complete and sufficient certification and failure to do so may result in the denial of FMLA leave. *See* 825.305(d).

825.311 Intent to return to work.

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

(b) If an employee gives unequivocal notice of intent not to return to work, the employing office's obligations under FMLA, as made applicable by the CAA, to maintain health benefits (subject to COBRA requirements) and to restore the employee cease. However, these obligations continue if an employee indicates he or she may be unable to return to work but expresses a continuing desire to do so.

(c) It may be necessary for an employee to take more leave than originally anticipated. Conversely, an employee may discover after beginning leave that the circumstances have changed and the amount of leave originally anticipated is no longer necessary. An employee may not be required to take more FMLA leave than necessary to resolve the circumstance that precipitated the need for leave. In both of these situations, the employing office may require that the employee provide the employing office reasonable notice (*i.e.*, within two business days) of the changed circumstances where foreseeable. The employing office may also obtain information on such changed circumstances through requested status reports.

825.312 Fitness-for-duty certification.

(a) As a condition of restoring an employee whose FMLA leave was occasioned by the employee's own serious health condition that made the employee unable to perform the employee's job, an employing office may have a uniformly-applied policy or practice that requires all similarly-situated employees (*i.e.*, same occupation, same serious health condition) who take leave for such conditions to obtain and present certification from the employee's health care provider that the employee is able to resume work. The employee has the same obligations to participate and cooperate (including providing a complete and sufficient certification or providing sufficient authorization to the health care provider to provide the information directly to the employing office) in the fitness-for-duty certification process as in the initial certification process. *See* 825.305(d).

(b) An employing office may seek a fitness-for-duty certification only with regard to the particular health condition that caused the employee's need for FMLA leave. The certification from the employee's health care provider must certify that the employee is able to resume work. Additionally, an employing office may require that the certification specifically address the employee's ability to perform the essential functions of the employee's job. In order to require such a certification, an employing office must provide an employee with a list of the essential functions of the employee's job no later than with the designation notice required by 825.300(d), and must indicate in the designation notice that the certification must address the employee's ability to perform those essential functions. If the employing office satisfies these requirements, the employee's health care provider must certify that the employee can perform the identified essential functions of his or her job. Following the procedures set forth in 825.307(a), the employing office may contact the employee's health care provider for purposes of clarifying and authenticating the fitness-for-duty certification. Clarification may be requested only for the serious health condition for which FMLA leave was taken. The employing office may not delay the employee's return to work while contact with the health care provider is being made. No second or third opinions on a fitness-for-duty certification may be required.

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

(d) The designation notice required in 825.300(d) shall advise the employee if the employing office will require a fitness-for-duty certification to return to work and whether that fitness-for-duty certification must address the employee's ability to perform the essential functions of the employee's job.

(e) An employing office may delay restoration to employment until an employee submits a required fitness-for-duty certification unless the employing office has failed to provide the notice required in paragraph (d) of this section. If an employing office provides the notice required, an employee who does not provide a fitness-for-duty certification or request additional FMLA leave is no longer entitled to reinstatement under the FMLA. *See* 825.313(d).

(f) An employing office is not entitled to a certification of fitness to return to duty for each absence taken on an intermittent or reduced leave schedule. However, an employing office is entitled to a certification of fitness to return to duty for such absences up to once every 30 days if reasonable safety concerns exist regarding the employee's ability to perform his or her duties, based on the serious health condition for which the employee took such leave. If an employing office chooses to require a fitness-for-duty certification under such circumstances, the employing office shall inform the employee at the same time it issues the designation notice that for each subsequent instance of intermittent or reduced schedule leave, the employee will be required to submit a fitness-for-duty certification unless one has already been submitted within the past 30 days. Alternatively, an employing office can set a different interval for requiring a fitness-for-duty certification as long as it does not exceed once every 30 days and as long as the employing office advises the employee of the requirement in advance of the employee taking the intermittent or reduced schedule leave. The employing office may not terminate the employment of the employee while awaiting such a certification of fitness to return to duty for an intermittent or reduced schedule leave absence. Reasonable safety concerns means a reasonable belief of significant risk of harm to the individual employee or others. In determining whether reasonable safety concerns exist, an employing office should consider the nature and severity of the potential harm and the likelihood that potential harm will occur.

(g) If the terms of a collective bargaining agreement govern an employee's return to work, those provisions shall be applied.

(h) Requirements under the Americans with Disabilities Act (ADA), as amended and as made applicable by the CAA, apply. After an employee returns from FMLA leave, the ADA requires any medical examination at an employing office's expense by the employing office's health care provider be job-related and consistent with business necessity. For example, an attorney could not be required to submit to a medical examination or inquiry just because her leg had been amputated. The essential functions of an attorney's job do not require use of both legs; therefore such an inquiry would not be job related. An employing office may require a warehouse laborer, whose back impairment affects the ability to lift, to be examined by an orthopedist, but may not require this employee to submit to an HIV test where the test is not related to either the essential functions of his or her job or to his/her impairment. If an employee's serious health condition may also be a disability within the meaning of the ADA, as made applicable by the CAA, the FMLA does not prevent the employing office from following the procedures for requesting medical information under the ADA.

825.313 Failure to provide certification.

(a) *Foreseeable leave.* In the case of foreseeable leave, if an employee fails to provide certification in a timely manner as required by 825.305, then an employing office may deny FMLA coverage until the required certification is provided. For example, if an employee has 15 days to provide a certification and does not provide the certification for 45 days without sufficient reason for the delay, the employing office can deny FMLA protections for the 30-day period following the expiration of the 15-day time period, if the employee takes leave during such period.

(b) *Unforeseeable leave.* In the case of unforeseeable leave, an employing office may deny FMLA coverage for the requested leave if the employee fails to provide a certification within 15 calendar days from receipt of the request for certification unless not practicable due to extenuating circumstances. For example, in the case of a medical emergency, it may not be practicable for an employee to provide the required certification within 15 calendar days. Absent such extenuating circumstances, if the employee fails to timely return the certification, the employing office can deny FMLA protections for the leave following the expiration of the 15-day time period until a sufficient certification is provided. If the employee never produces the certification, the leave is not FMLA leave.

(c) *Recertification.* An employee must provide recertification within the time requested by the employing office (which must allow at least 15 calendar days after the request) or as soon as practicable under the particular facts and circumstances. If an employee fails to provide a recertification within a reasonable time under the particular facts and circumstances, then the employing office may deny continuation of the FMLA leave protections until the employee produces a sufficient recertification. If the employee never produces the recertification, the leave is not FMLA leave. Recertification does not apply to leave taken for a qualifying exigency or to care for a covered servicemember.

(d) *Fitness-for-duty certification.* When requested by the employing office pursuant to a uniformly applied policy for similarly-situated employees, the employee must provide medical certification, at the time the employee seeks reinstatement at the end of FMLA leave taken for the employee's serious health condition, that the employee is fit for duty and able to return to work (*see* 825.312(a)) if the employing office has provided the required notice (*see* 825.300(e)); the employing office may delay restoration until the certification is provided. Unless the employee provides either a fitness-for-duty certification or a new medical certification for a serious health condition at the time FMLA leave is concluded, the employee may be terminated. *See also* 825.213(a)(3).

SUBPART D—ADMINISTRATIVE PROCESS

825.400 Administrative Process, general rules.

(a) To commence a proceeding, a covered employee alleging a violation of the rights and protections of the FMLA, as made applicable by the CAA, must request counseling by the Office of Compliance not later than 180 days after the date of the alleged violation. If a covered employee misses this deadline, the covered employee will be unable to obtain a remedy under the CAA.

(b) The following procedures are available under title IV of the CAA (2 U.S.C. 1401) for covered employees who believe that their rights under FMLA, as made applicable by the CAA, have been violated:

(1) counseling;

(2) mediation; and

(3) election of either—

(A) a formal complaint, filed with the Office of Compliance, and a hearing before a hearing officer, subject to review by the Board of Directors of the Office of Compliance, and judicial review in the United States Court of Appeals for the Federal Circuit; or

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

(c) If an employer has violated one or more provisions of FMLA, and if justified by the facts of a particular case, an employee may receive one or more of the following: wages, employment benefits, or other compensation denied or lost to such employee by reason of the violation; or, where no such tangible loss has occurred, such as when FMLA leave was unlawfully denied, any actual monetary loss sustained by the employee as a direct result of the violation, such as the cost of providing care, up to a sum equal to 26 weeks of wages for the employee in a case involving leave to care for a covered servicemember or 12 weeks of wages for the employee in a case involving leave for any other FMLA qualifying reason. In addition, the employee may be entitled to interest on such sum, calculated at the prevailing rate. An amount equaling the preceding sums may also be awarded as liquidated damages unless such amount is reduced by the court because the violation was in good faith and the employer had reasonable grounds for believing the employer had not violated the Act. When appropriate, the employee may also obtain appropriate equitable relief, such as employment, reinstatement and promotion. When the employer is found in violation, the employee may recover a reasonable attorney's fee, reasonable expert witness fees, and other costs of the action from the employer in addition to any judgment awarded by the court.

(d) Regulations of the Office of Compliance describing and governing these procedures are found at 150 Cong. Rec. H4166–02 (2004), 150 Cong. Rec. S6870–02 (2004), and may be found on the Office's website.

825.401 [Reserved]
825.402 [Reserved]
825.403 [Reserved]
825.404 [Reserved]

SUBPART E—[RESERVED]

SUBPART F—SPECIAL RULES APPLICABLE TO EMPLOYEES OF SCHOOLS

825.600 Special rules for school employees, definitions.

(a) Certain special rules apply to employees of local educational agencies, including public school boards and elementary schools under their jurisdiction, and private elementary and secondary schools. The special rules do not apply to other kinds of educational institutions, such as colleges and universities, trade schools, and preschools.

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

(c) The special rules affect the taking of intermittent leave or leave on a reduced leave schedule, or leave near the end of an academic term (semester), by instructional employees. *Instructional employees* are those whose principal function is to teach and instruct students in a class, a small group, or an individual setting. This term includes not only teachers, but also athletic coaches, driving instructors, and special education assistants such as signers for the hearing impaired. It does not include, and the special rules do not apply to, teacher assistants or aides who do not have as their principal job actual teaching or instructing, nor does it include auxiliary personnel such as counselors, psychologists, or curriculum specialists. It also does not include cafeteria workers, maintenance workers, or bus drivers.

(d) Special rules which apply to restoration to an equivalent position apply to all employees of local educational agencies.

825.601 Special rules for school employees, limitations on intermittent leave.

(a) Leave taken for a period that ends with the school year and begins the next semester is leave taken consecutively rather than intermittently. The period during the summer vacation when the employee would not have been required to report for duty is not counted against the employee's FMLA leave entitlement. An instructional employee who is on FMLA leave at the end of the school year must be provided with any benefits over the summer vacation that employees would normally receive if they had been working at the end of the school year.

(1) If an eligible instructional employee needs intermittent leave or leave on a reduced leave schedule to care for a family member with a serious health condition, to care for a covered servicemember, or for the employee's own serious health condition, which is foreseeable based on planned medical treatment, and the employee would be on leave for more than 20 percent of the total number of working days over the period the leave would extend, the employing office may require the employee to choose either to:

(i) Take leave for a period or periods of a particular duration, not greater than the duration of the planned treatment; or

(ii) Transfer temporarily to an available alternative position for which the employee is qualified, which has equivalent pay and benefits and which better accommodates recurring periods of leave than does the employee's regular position.

(2) These rules apply only to a leave involving more than 20 percent of the working days during the period over which the leave extends. For example, if an instructional employee who normally works five days each week needs to take two days of FMLA leave per week over a period of several weeks, the special rules would apply. Employees taking leave which constitutes 20 percent or less of the working days during the leave period would not be subject to transfer to an alternative position. *Periods of a particular duration* means a block, or blocks, of time beginning no earlier than the first day for which leave is needed and ending no later than the last day on which leave is needed, and may include one uninterrupted period of leave.

(b) If an instructional employee does not give required notice of foreseeable FMLA leave (*see* 825.302) to be taken intermittently or on a reduced leave schedule, the employing office may require the employee to take leave of a particular duration, or to transfer temporarily to an alternative position. Alternatively, the employing office may require the employee to delay the taking of leave until the notice provision is met.

825.602 Special rules for school employees, limitations on leave near the end of an academic term.

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

(1) An instructional employee begins leave more than five weeks before the end of a term. The employing office may require the employee to continue taking leave until the end of the term if—

(i) The leave will last at least three weeks, and

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

(2) The employee begins leave during the five-week period before the end of a term because of the birth of a son or daughter; the placement of a son or daughter for adoption or foster care; to care for a spouse, son, daughter, or parent with a serious health condition; or to care for a covered servicemember. The employing office may require the employee to continue taking leave until the end of the term if—

(i) The leave will last more than two weeks, and

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

(3) The employee begins leave during the three-week period before the end of a term because of the birth of a son or daughter; the placement of a son or daughter for adoption or foster care; to care for a spouse, son, daughter, or parent with a serious health condition; or to care for a covered servicemember. The employing office may require the employee to continue taking leave until the end of the term if the leave will last more than five working days.

(b) For purposes of these provisions, *academic term* means the school semester, which typically ends near the end of the calendar year and the end of spring each school year. In no case may a school have more than two academic terms or semesters each year for purposes of FMLA, as made applicable by the CAA. An example of leave falling within these provisions would be where an employee plans two weeks of leave to care for a family member which will begin three weeks before the end of the term. In that situation, the employing office could require the employee to stay out on leave until the end of the term.

825.603 Special rules for school employees, duration of FMLA leave.

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

(b) In the case of an employee who is required to take leave until the end of an academic term, only the period of leave until the employee is ready and able to return to work shall be charged against the employee's FMLA leave entitlement. The employing office has the option not to require the employee to stay on leave until the end of the school term. Therefore, any additional leave required by the employing office to the end of the school term is not counted as FMLA leave; however, the employing office shall be required to maintain the employee's group health insurance and restore the employee to the same or equivalent job including other benefits at the conclusion of the leave.

825.604 Special rules for school employees, restoration to an equivalent position.

The determination of how an employee is to be restored to an equivalent position upon return from FMLA leave will be made on the basis of ''established school board policies and practices, private school policies and practices, and collective bargaining agreements.'' The ''established policies'' and collective bargaining agreements used as a basis for restoration must be in writing, must be made known to the employee prior to the taking of FMLA leave, and must clearly explain the employee's restoration rights upon return from leave. Any established policy which is used as the basis for restoration of an employee to an equivalent position must provide substantially the same protections as provided in the FMLA, as made applicable by the CAA, for reinstated employees. *See* 825.215. In other words, the policy or collective bargaining agreement must provide for restoration to an equivalent position with equivalent employment benefits, pay, and other terms and conditions of employment. For example, an employee may not be restored to a position requiring additional licensure or certification.

SUBPART G—EFFECT OF OTHER LAWS, EMPLOYING OFFICE PRACTICES, AND COLLECTIVE BARGAINING AGREEMENTS ON EMPLOYEE RIGHTS UNDER THE FMLA, AS MADE APPLICABLE BY THE CAA.

825.700 Interaction with employing office's policies.

(a) An employing office must observe any employment benefit program or plan that provides greater family or medical leave rights to employees than the rights established by the FMLA. Conversely, the rights established by the FMLA, as made applicable by the CAA, may not be diminished by any employment benefit program or plan. For example, a provision of a collective bargaining agreement (CBA) which provides for reinstatement to a position that is not equivalent because of seniority (*e.g.*, provides lesser pay) is superseded by FMLA. If an employing office provides greater unpaid family leave rights than are afforded by FMLA, the employing office is not required to extend additional rights afforded by FMLA, such as maintenance of health benefits (other than through COBRA or 5 U.S.C. 8905a, whichever is applicable), to the additional leave period not covered by FMLA.

(b) Nothing in the FMLA, as made applicable by the CAA, prevents an employing office from amending existing leave and employee benefit programs, provided they comply with FMLA, as made applicable by the CAA. However, nothing in the FMLA, as made applicable by the CAA, is intended to discourage employing offices from adopting or retaining more generous leave policies.

825.701 [Reserved]

825.702 Interaction with anti-discrimination laws, as applied by section 201 of the CAA.

(a) Nothing in the FMLA modifies or affects any applicable law prohibiting discrimination on the basis of race, religion, color, national origin, sex, age, or disability (*e.g.*, Title VII of the Civil Rights Act of 1964, as amended by the Pregnancy Discrimination Act and as made applicable by the CAA). FMLA's legislative history explains that FMLA is ''not intended to modify or affect the Rehabilitation Act of 1973, as amended, the regulations concerning employment which have been promulgated pursuant to that statute, or the Americans with Disabilities Act of 1990 [as amended] or the regulations issued under that act. Thus, the leave provisions of the [FMLA] are wholly distinct from the reasonable accommodation obligations of employers covered under the [ADA] . . . or the Federal government itself. The purpose of the FMLA, as applied by the CAA, is to make leave available to eligible employees and [employing offices] within its coverage, and not to limit already existing rights and protection.'' S. Rep. No. 3, 103d Cong., 1st Sess. 38 (1993). An employing office must therefore provide leave under whichever statutory provision provides the greater rights to employees. When an employer violates both FMLA and a discrimination law, an employee may be able to recover under either or both statutes (double relief may not be awarded for the same loss; when remedies coincide a claimant may be allowed to utilize whichever avenue of relief is desired. *Laffey* v. *Northwest Airlines, Inc.*, 567 F.2d 429, 445 (D.C. Cir. 1976), *cert. denied*, 434 U.S. 1086 (1978).

(b) If an employee is a qualified individual with a disability within the meaning of the Americans with Disabilities Act (ADA), as made applicable by the CAA, the employing office must make reasonable accommodations, *etc.*, barring undue hardship, in accordance with the ADA. At the same time, the employing office must afford an employee his or her FMLA rights, as made applicable by the CAA. ADA's ''*disability*'' and FMLA's ''*serious health condition*'' are different concepts, and must be analyzed separately. FMLA entitles eligible employees to 12 weeks of leave in any 12-month period due to their own serious health condition, whereas the ADA allows an indeterminate amount of leave, barring undue hardship, as a reasonable accommodation. FMLA requires employing offices to maintain employees' group health plan coverage during FMLA leave on the same conditions as coverage would have been provided if the employee had been continuously employed during the leave period, whereas ADA does not require maintenance of health insurance unless other employees receive health insurance during leave under the same circumstances.

(c) (1) A reasonable accommodation under the ADA might be accomplished by providing an individual with a disability with a part-time job with no health benefits, assuming the employing office did not ordinarily provide health insurance for part-time employees. However, FMLA would permit an employee to work a reduced leave schedule until the equivalent of 12 workweeks of leave were used, with group health benefits maintained during this period. FMLA permits an employing office to temporarily transfer an employee who is taking leave intermittently or on a reduced leave schedule to an alternative position, whereas the ADA allows an accommodation of reassignment to an equivalent, vacant position only if the employee cannot perform the essential functions of the employee's present position and an accommodation is not possible in the employee's present position, or an accommodation in the employee's present position would cause an undue hardship. The examples in the following paragraphs of this section demonstrate how the two laws would interact with respect to a qualified individual with a disability.

(2) A qualified individual with a disability who is also an eligible employee entitled to FMLA leave requests 10 weeks of medical leave as a reasonable accommodation, which the employing office grants because it is not an undue hardship. The employing office advises the employee that the 10 weeks of leave is also being designated as FMLA leave and will count towards the employee's FMLA leave entitlement. This designation does not prevent the parties from also treating the leave as a reasonable accommodation and reinstating the employee into the same job, as required by the ADA, rather than an equivalent position under FMLA, if that is the greater right available to the employee. At the same time, the employee would be entitled under FMLA to have the employing office maintain group health plan coverage during the leave, as that requirement provides the greater right to the employee.

(3) If the same employee needed to work part-time (a reduced leave schedule) after returning to his or her same job, the employee would still be entitled under FMLA to have group health plan coverage maintained for the remainder of the two-week equivalent of FMLA leave entitlement, notwithstanding an employing office policy that part-time employees do not receive health insurance. This employee would be entitled under the ADA to reasonable accommodations to enable the employee to perform the essential functions of the part-time position. In addition, because the employee is working a part-time schedule as a reasonable accommodation, the FMLA's provision for temporary assignment to a different alternative position would not apply. Once the employee has exhausted his or her remaining FMLA leave entitlement while working the reduced (part-time) schedule, if the employee is a qualified individual with a disability, and if the employee is unable to return to the same full-time position at that time, the employee might continue to work part-time as a reasonable accommodation, barring undue hardship; the employee would then be entitled to only those employment benefits ordinarily provided by the employing office to part-time employees.

(4) At the end of the FMLA leave entitlement, an employing office is required under FMLA to reinstate the employee in the same or an equivalent position, with equivalent pay and benefits, to that which the employee held when leave commenced. The employing office's FMLA obligations would be satisfied if the employing office offered the employee an equivalent full-time position. If the employee were unable to perform the essential functions of that equivalent position even with reasonable accommodation, because of a disability, the ADA may require the employing office to make a reasonable accommodation at that time by allowing the employee to work part-time or by reassigning the employee to a vacant position, barring undue hardship.

(d) (1) If FMLA entitles an employee to leave, an employing office may not, in lieu of FMLA leave entitlement, require an employee to take a job with a reasonable accommodation. However, ADA may require that an employing office offer an employee the opportunity to take such a position. An employing office may not change the essential functions of the job in order to deny FMLA leave. *See* 825.220(b).

(2) An employee may be on a workers' compensation absence due to an on-the-job injury or illness which also qualifies as a serious health condition under FMLA. The workers' compensation absence and FMLA leave may run concurrently (subject to proper notice and designation by the employing office). At some point the health care provider providing medical care pursuant to the

workers' compensation injury may certify the employee is able to return to work in a light duty position. If the employing office offers such a position, the employee is permitted but not required to accept the position. *See* 825.220(d). As a result, the employee may no longer qualify for payments from the workers' compensation benefit plan, but the employee is entitled to continue on unpaid FMLA leave either until the employee is able to return to the same or equivalent job the employee left or until the 12-week FMLA leave entitlement is exhausted. *See* 825.207 (e). If the employee returning from the workers' compensation injury is a qualified individual with a disability, he or she will have rights under the ADA, as made applicable by the CAA.

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

(f) Under Title VII of the Civil Rights Act of 1964, as amended by the Pregnancy Discrimination Act, and as made applicable by the CAA, an employing office should provide the same benefits for women who are pregnant as the employing office provides to other employees with short-term disabilities. Because Title VII does not require employees to be employed for a certain period of time to be protected, an employee employed for less than 12 months by the employing office (and, therefore, not an ''eligible'' employee under FMLA, as made applicable by the CAA) may not be denied maternity leave if the employing office normally provides short-term disability benefits to employees with the same tenure who are experiencing other short-term disabilities.

(g) Under the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA), 38 U.S.C. 4301, *et seq.*, veterans are entitled to receive all rights and benefits of employment that they would have obtained if they had been continuously employed. Therefore, under USERRA, a returning servicemember would be eligible for FMLA leave if the months and hours that he or she would have worked for the civilian employing office during the period of absence due to or necessitated by USERRA-covered service, combined with the months employed and the hours actually worked, meet the FMLA eligibility threshold of 12 months of employment and the hours of service requirement. *See* 825.110(b)(2)(i) and (c)(2) and 825.802(c).

(h) For further information on Federal antidiscrimination laws applied by section 201 of the CAA (2 U.S.C. 1311), including Title VII, the Rehabilitation Act, and the ADA, individuals are encouraged to contact the Office of Compliance.

MEASURES READ THE FIRST TIME—H.R. 5447 AND H.R. 5456

Mr. MCCONNELL. Mr. President, I understand there are two bills at the desk, and I ask for their first reading en bloc.

The PRESIDING OFFICER. The clerk will read the bills by title for the first time.

The senior assistant legislative clerk read as follows:

A bill (H.R. 5447) to provide an exception from certain group health plan requirements for qualified small employer health reimbursement arrangements.

A bill (H.R. 5456) to amend parts B and E of title IV of the Social Security Act to invest in funding prevention and family services to help keep children safe and supported at home, to ensure that children in foster care are placed in the least restrictive, most family-like, and appropriate settings, and for other purposes.

Mr. MCCONNELL. Mr. President, I now ask for a second reading, and I object to my own request, all en bloc.

The PRESIDING OFFICER. Objection having been heard, the titles of the bills will be read for the second time on the next legislative day.

ORDERS FOR THURSDAY, JUNE 23, 2016

Mr. MCCONNELL. Mr. President, I ask unanimous consent that when the Senate completes its business today, it adjourn until 9:30 a.m., Thursday, June 23; that following the prayer and pledge, the morning hour be deemed expired, the Journal of proceedings be approved to date, and the time for the two leaders be reserved for their use later in the day; further, that following leader remarks, the Senate be in a period of morning business until 10:30 a.m., with Senators permitted to speak therein for up to 10 minutes each; finally, that following morning business, the Senate resume consideration of H.R. 2578.

The PRESIDING OFFICER. Without objection, it is so ordered.

ADJOURNMENT UNTIL 9:30 A.M. TOMORROW

Mr. MCCONNELL. Mr. President, if there is no further business to come before the Senate, I ask unanimous consent that it stand adjourned under the previous order.

There being no objection, the Senate, at 6:29 p.m., adjourned until Thursday, June 23, 2016, at 9:30 a.m.