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OFFICE OF PERSONNEL MANAGEMENT

5 CFR Part 630

RIN 3206-AN49

Weather and Safety Leave

AGENCY: Office of Personnel Management.

ACTION: Final rule.

SUMMARY: The Office of Personnel Management is issuing new regulations on the granting and recording of weather and safety leave for Federal employees. The Administrative Leave Act of 2016 created four new categories of statutorily authorized paid leave—administrative leave, investigative leave, notice leave, and weather and safety leave—and established parameters for their use by Federal agencies. These regulations will provide a framework for agency compliance with the new statutory requirements regarding weather and safety leave. OPM will issue separate final regulations to address administrative leave, investigative leave, and notice leave at a later date.

DATES: *Effective date:* This final rule is effective on [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

FOR FURTHER INFORMATION CONTACT: Kurt Springmann by email at pay-leave-policy@opm.gov or by telephone at (202) 606-2858.

SUPPLEMENTARY INFORMATION: The Office of Personnel Management (OPM) is issuing final regulations to implement the weather and safety leave provisions of the Administrative Leave Act of 2016, enacted under section 1138 of the National Defense Authorization Act for Fiscal Year 2017 (Public Law 114-328, 130 Stat. 2000, December 23,

2016). The Administrative Leave Act of 2016, hereafter referred to as “the Act,” added three new sections in title 5 of the U.S. Code that provide for specific categories of paid leave and requirements that apply to each: section 6329a regarding administrative leave; section 6329b regarding investigative leave and notice leave; and section 6329c regarding weather and safety leave.

OPM published proposed regulations (82 FR 32263) on these new categories of leave on July 13, 2017. The 30-day comment period for the proposed regulations ended on August 14, 2017. After careful consideration of the comments received, and in recognition of the different implementation dates for the new leave categories under the Act, OPM has determined that it would better serve agencies if the final regulations on new subpart P, Weather and Safety Leave, were issued separately from the final regulations on the other leave categories. Accordingly, this *Federal Register* document provides general information, addresses the comments received, and issues final regulations that reflect changes to the proposed regulations expressly regarding subpart P, Weather and Safety Leave. OPM will issue separate final regulations on the other leave categories in the *Federal Register* at a later date.

Effective Date

While the Act directed OPM to prescribe (i.e., publish) regulations no later than 270 calendar days after the Act’s enactment on December 23, 2016—i.e., September 19, 2017—OPM was unable to meet that requirement. The Act further directed that agencies “revise and implement the internal policies of the agency” to meet the statutory requirements pertaining to administrative leave, investigative leave, and notice leave no later than 270 calendar days after the date on which OPM issues its regulations. (See 5 U.S.C. 6329a(c)(2) and 6329b(h)(2).) However, there is no similar agency implementation provision in the law governing weather and

safety leave. Therefore, the weather and safety leave regulations in subpart P must be implemented when the final rule is effective—i.e., 30 days after publication. (See the DATES section of this preamble.) OPM will delay enforcing the requirement in subpart P that agencies separately report weather and safety leave to OPM until the 270th day following publication of the final regulations on subparts N (administrative leave) and O (investigative leave and notice leave).

To the extent that existing agency collective bargaining agreements contain provisions that are inconsistent with the statutory provisions of the Administrative Leave Act (including sections 6329a, 6329b, or 6329c), then the Act supersedes—as of the applicable implementation date—conflicting provisions in agency collective bargaining agreements as a matter of law. For an agency collective bargaining agreement in effect before publication of these regulations, any provisions in the regulations (other than those restating statutory requirements) that are in conflict with the agreement may not be enforced until the expiration of the current term of the agreement. For an agency collective bargaining agreement that takes effect on or after the date these regulations are published, regulatory provisions will supersede conflicting provisions in the agreement during any period of time following the applicable regulatory implementation date. To the extent that the Act and accompanying regulations are not inconsistent with the provisions in agency collective bargaining agreements, those provisions remain in effect until the provisions expire or are renegotiated.

Agencies are responsible for compliance with time limits provided for in the Act and OPM regulations and guidance.

New Subpart in 5 CFR Part 630

In this final rule, OPM is adding subpart P, Weather and Safety Leave (implementing 5 U.S.C. 6329c) to 5 CFR part 630. Hereafter in this **SUPPLEMENTARY INFORMATION** section, references to statutory provisions in title 5 of the United States Code will generally be referred to by section number without restating the title 5 reference (e.g., section 6329c instead of 5 U.S.C. 6329c). Also, references to regulatory provisions in title 5 of the Code of Federal Regulations will generally be referred to by section number without restating the title 5 reference (e.g., § 630.1601 instead of 5 CFR 630.1601).

Weather and safety leave is permitted—at an agency’s discretion but subject to statutory and regulatory requirements, agency policies, and lawful collective bargaining provisions—only when an agency determines that employees cannot safely travel to and from, or perform work at, their normal worksite, a telework site, or other approved location because of severe weather or other emergency situations. Though granting of weather and safety leave must follow the guidelines and eligibility requirements contained in section 6329c and these implementing regulations, and it is anticipated that such leave would be granted sparingly in the case of employees participating in telework, there is no cap on the number of hours that may be granted for such leave.

Both the law and the regulations address recordkeeping and reporting requirements on weather and safety leave with which agencies must comply. Agencies must keep separate records on weather and safety leave.

Comments on Proposed Regulations

We received comments relating to the proposed regulations on weather and safety leave from 6 agencies, 4 unions, 1 other organization, and 8 individuals. In the first section below, we

address general or overarching comments. In the sections that follow, we address comments related to specific portions of the regulations.

General

Comment: Multiple commenters requested guidance about how the new types of leave should be coded in the payroll system to accurately account for and track the use of these new leave provisions.

OPM response: The regulations specify that an agency must track the use of the new categories of leave using five categories: (1) administrative leave for investigative purposes, (2) administrative leave for other purposes, (3) investigative leave, (4) notice leave, and (5) weather and safety leave. The regulations do not address details regarding the coding of leave in agency payroll systems or in OPM's Government payroll databases. OPM will be providing payroll providers with instructions on how to properly code the various types of leave.

Comment: An organization expressed concern that having reports prepared by the Government Accountability Office (GAO) submitted every 5 years is too infrequent. Instead, the organization stated that agencies should be required to maintain real-time, current tallies of all types of paid leave available on its website for all to see, rather than buried in obscure, long, after-the-fact reports.

OPM response: Payroll providers submit payroll data to OPM every biweekly pay period. Thus, agencies and OPM will have real-time data that could be used to generate reports as necessary. The requirement for GAO reports every 5 years is a statutory requirement, which OPM has no authority to change. (See section 1138(d)(2) of Public Law 114-328.)

Comment: An organization stated that the regulations make no provision for ensuring that agencies establish necessary agency rules or that agency rules are consistent with OPM regulations. The organization suggested that OPM exercise oversight over agency practices.

OPM response: The Administrative Leave Act directed OPM to issue regulations and guidance dealing with the appropriate uses and proper recording of the new types of leave, but otherwise imposed no special obligation to monitor agency practices. Although OPM has more general authority to exercise an oversight function, OPM does not have the resources to regularly evaluate every agency personnel program, and no need for such a program has, as yet, been established in this context. OPM can and will intervene if it becomes aware that an agency is not complying with the law and regulations for which OPM is responsible. Each agency, along with Inspectors General, is responsible for evaluating agency personnel programs and the actions of its managers.

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

OPM response: The Telework Enhancement Act of 2010 (the Act), now codified at 5 U.S.C. 6501-6506, specifies roles, responsibilities and expectations for all Federal executive agencies with regard to telework policies; employee eligibility and participation; program implementation; and reporting. Under the Act, each agency is responsible for ensuring that employees perform required hours of work while teleworking. These regulations merely recognize the fact that the option of telework is available by law, as specified, under authority of 5 U.S.C. chapter 65 and explains how telework relates to the new types of leave.

Comment: A union requested clarification that, unlike OPM’s Governmentwide regulations, OPM-issued “guidance” (e.g., weather/safety leave guidance) does not interfere with a union’s bargaining rights or legal obligations in existing collective bargaining agreements.

OPM response: To respond to the comment about the relationship between OPM guidance and collective bargaining agreements, we must first address how statutory and regulatory requirements affect collective bargaining agreements. Statutory requirements established by the Administrative Leave Act supersede conflicting provisions in any agency collective bargaining agreement—as of the applicable implementation date. Thus, the requirements in section 6329c would prevail over conflicting provisions in any agency collective bargaining agreement effective on the date that is 30 days after publication of these final regulations. For example, section 6329c allows agencies to provide weather/safety leave “only if” an employee is “prevented from safely traveling to or performing work at an approved location.” By definition, for an employee participating in a telework program, the telework site is an approved location. Thus, the law bars granting weather/safety leave to an employee who can safely work at home under a telework arrangement.

If OPM regulatory requirements that go beyond statutory requirements conflict with an existing agency collective bargaining agreement, those regulatory requirements may not be implemented until the expiration of the current term of the agreement. (See section 7116(a)(7).) However, for any agency collective bargaining agreement that takes effect on or after the date these regulations are published, regulatory provisions will supersede conflicting provisions in the agreement during any period of time following the regulatory implementation date (30th day following publication). Once applicable, OPM regulations will have the force of law and be binding on agencies.

Once OPM regulations are in force, we will also expect agencies to comply with any related OPM guidance concerning compliance with the Act or regulations, and such guidance may itself impact an agency's collective bargaining obligations. For example, if the negotiability of a proposal or provision is at issue before the FLRA or Courts in the future, an agency may rely upon OPM's regulations and guidance as reasons why the proposal or provision would be contrary to law under the Federal Service Labor-Management Relations Statute and, therefore, be nonnegotiable.

Comment: One individual commented that agencies should not grant weather and safety leave, but instead should require employees to use their annual leave when they are prevented from safely traveling to work.

OPM response: The statute confers upon agencies the authority to grant weather and safety leave without loss of "leave to which the employee or employees are otherwise entitled" (section 6329c(b)). Weather and safety leave is generally appropriate when Government offices are closed for a full or partial day because of snow or any other weather or safety conditions and the employee is prevented from working or otherwise unable to work at an alternative worksite pursuant to the criteria provided in section 6329c(b). This would cover situations where working at an alternative worksite is itself unsafe, where the employee is ineligible for telework, or where the employee is not participating in a telework program. At the sole and exclusive discretion of agency management, it could also be used to cover the unusual situation where a teleworker is unprepared to telework because the event could not be readily anticipated (e.g., the normal workplace is rendered unsafe following a fire, flood, or earthquake) and the employee does not have equipment or materials he or she would need to perform work.

Comment: A union believed that OPM should impose the same 270-day delay in implementation for agency internal policies on weather and safety leave as is done for administrative leave, investigative leave, and notice leave. The union said that otherwise, the implementation and use of weather and safety leave could be improperly delayed indefinitely, creating uncertainty and confusion in the workplace. An individual similarly commented that the subpart P regulations should take effect in 270 days consistent with the other requirements in the Act.

OPM response: The Act provides a 270-day implementation period for administrative leave under 5 U.S.C. 6329a(c)(2) and for investigative and notice leave under 5 U.S.C. 6329b(h)(2), but does not provide a similar period for weather and safety leave under 5 U.S.C. 6329c. Therefore, the regulations on weather/safety leave under subpart P will take effect 30 days from this date of publication. As provided in § 630.1604(b) of the regulations, agency policies and procedures on weather/safety leave must be consistent with OPM's regulations and guidance.

Section 630.1602—Definitions

Comment: One agency recommended that OPM change the definition of “act of God” to “act of nature.”

OPM response: OPM chose to use “act of God” over “act of nature” because “act of God” is the terminology used by the weather/safety leave statute. (See section 6329c(b)(1).)

Section 630.1603—Authorization

Comment: An agency recommended adding a fourth weather/safety leave category for severe commuting situations such as closure of a mass transit system or a major highway. An individual suggested that OPM revise § 630.1603 to authorize agencies to grant employees

weather/safety leave for the purposes of preparing their homes for an imminent hurricane or other natural disaster.

OPM response: The language of the weather and safety leave statute at section 6329c(b) authorizes its use only “if the employee or group of employees is prevented from *safely* traveling to or performing work at an approved location” (italics added). OPM cannot authorize this type of leave for mass transit or commuting problems not related to safety matters. Employees have other workplace flexibilities available to address these situations, including alternative work schedules, leave, and telework. However, an agency could choose to close the Federal facility in preparation for a severe hurricane or other pending disaster based on safety considerations. Since “weather and safety” leave may be granted when Government offices are closed for a full or partial day because of severe weather and safety conditions, provided an employee is prevented from performing or otherwise unable to work at an approved location based on criteria as specified in section 6329c(b), the leave may be appropriate for these purposes—e.g., evacuation of an area due to a hurricane.

Comment: An agency recommended that managerial discretion be allowed in instances where an employee is unavoidably delayed or necessarily absent for a short period of time because of a weather/safety issue.

OPM response: Weather/safety leave may be provided when employees are prevented from safely traveling to or safely performing work at an approved location. This type of leave is generally granted in conjunction with an agency or OPM operating status announcement. Such an operating status announcement may allow for a delayed arrival or early departure and the use of weather and safety leave to cover the short period of absence. In other circumstances, an agency may authorize administrative leave under section 6329a, subject to the 10-workday

calendar year limitation (once section 6329a is implemented), for employees whose arrival at work is delayed; however, such use is subject to the sole and exclusive discretion of the head of the agency or his or her delegees, and should be consistent with agency policy. It is anticipated that granting of such leave would be rare.

Comment: An individual asked what position should be taken if officials authorize weather/safety leave when there are no weather/safety conditions present.

OPM response: The statute at section 6329c(b) prescribes that weather/safety leave may be provided “only if the employee or group of employees is prevented from safely traveling to or performing work at an approved location” due to the conditions specified under § 630.1603. This type of leave is generally provided in connection with an OPM or agency-specific operating announcement. Providing this leave when none of the weather/safety conditions listed under § 630.1603 are present would be inconsistent with the statute. Each agency is responsible for ensuring the weather/safety leave is used appropriately and, when it is not, taking necessary corrective action.

Comment: To reflect the statutory language at section 6329c(b), an agency recommended that OPM add the word “only” to § 630.1603 so that it reads “only if they are prevented from safely traveling.”

OPM response: The word “only” has been added to § 630.1603.

Section 630.1604—OPM and agency responsibilities

Comment: A union asked if it was appropriate for an agency to require employees to request annual leave when prevented from traveling to the worksite by a weather/safety event and then later requiring the employees to request conversion of the annual leave to weather/safety leave.

OPM response: Weather and safety leave generally should be authorized based on operating status announcements. In most cases, if an employee requests annual leave in order to depart before an announcement is made, the employee will remain on annual leave. More information will be provided in OPM guidance.

Comment: An agency asked if weather/safety leave or administrative leave applies when OPM or a local Federal Executive Board closes installations due to snow.

OPM response: Weather/safety leave generally will be provided in conjunction with an operating status announcement and may be used when Government offices are closed because of snow or any other weather or safety conditions, provided conditions for granting leave pursuant to section 6329c(b) are met.

Section 630.1605—Telework and emergency employees

Comment: An individual commenter objected to § 630.1605(a)(1) because the commenter viewed the regulation as forcing an employee to telework when an agency closes during a weather or safety event. The commenter stated that this rule had the effect of treating all telework employees as emergency employees. The commenter further stated that the safety of the employee should be given priority. The commenter noted that some existing collective bargaining agreements do not allow employees to telework when an agency is closed due to a weather/safety event.

OPM response: The weather/safety leave regulation does not force employees to telework. Rather it recognizes that weather/safety leave is normally unnecessary if an employee is eligible for and participating in a telework program and is able to work at his or her alternative work location, notwithstanding the conditions at the default workplace. The regulation simply provides a framework and criteria for decisions about whether to grant weather and safety leave

to Federal employees, including those employees who are approved to telework. If a telework-participating employee does not meet the criteria for the granting of weather/safety leave and seeks not to telework, the employee has other options—the same options the employee would have on any other day he/she seeks not to work (e.g., requesting annual leave, requesting leave without pay etc.). Since the employee has the option to telework, the employee is able to work without compromising his/her safety. Weather/safety leave is granted solely because of safety risks. As stated in the law at section 6329c(b), weather/safety leave is to be granted “only if” an employee is “prevented from safely traveling to or performing work at an approved location,” and for an authorized teleworker the telework site (usually the employee’s home) is an approved work location. Emergency employees are governed by a different set of guidelines than telework-participating employees. Unlike many emergency employees, the teleworker is not expected to report to the regular worksite when an emergency has caused the regular office to be closed to the public. To the extent that an existing collective bargaining agreement contains provisions that conflict with the nonstatutory requirements in telework-related regulations in § 630.1605(a), however, this regulation may not be enforced during the current term of the agreement (5 U.S.C. 7116(a)(7)).

Comment: Another individual commented that the denial of weather/safety leave to teleworkers penalizes those who only occasionally telework and discourages employees from agreeing to situational telework. The commenter recommended that the regulations include an annual threshold for situational teleworking days under which an employee, with supervisor concurrence, would not be required to telework or take leave when the government is closed for weather and safety purposes.

OPM response: As noted above, the statute at section 6329c(b) permits weather/safety leave only if the employee is prevented from safely traveling to or performing work at an approved location. Occasional teleworkers have the same ability as regular teleworkers to perform work at an approved location (the telework site) during weather/safety events. Occasional teleworkers also realize the benefits of teleworking, although not as frequently as regular teleworkers. OPM does not believe that the inability to receive weather/safety leave on the rare occasions when weather/safety events close offices will discourage a significant number of employees from seeking the benefit of occasional teleworking. Even if it does cause some employees to not engage in occasional teleworking, however, the regulation is consistent with the underlying purpose of this later statute, which is to limit weather/safety leave to situations where an employee is unable to perform work at an approved location.

Comment: A union asked what criteria are necessary to determine if an employee can reasonably work from home and what happens if the employee does not have a home and equipment that are suitable for teleworking. The union also commented that it was not equitable for those with telework agreements to work on days when those without agreements are not required to work. The union further said that it is not reasonable to force teleworkers to be forecasters of weather and safety events such that they must be telework ready on all workdays. The union additionally stated that telework policies are trending toward expecting employees to maintain their residence in a continuous telework-ready state by requiring mandatory telework during emergency closure of the regular worksite, which in effect requires employees to provide “free rent” of their residential office to the government on days when they were not planning to telework.

OPM response: The regulations on weather/safety leave related to teleworkers apply only to employees who are already “participating in a telework program” (as defined in § 630.1602). For such telework program participants who already telework at home, they must have a home and equipment suitable for teleworking. Agency telework policies and employee telework agreements establish the criteria for determining whether an employee can reasonably work from home. At a minimum, and subject to other requirements of the agency, teleworkers must have sufficient work and a workplace conducive to performing the work. If the employee does not have a suitable home or cannot transport needed equipment to his or her home, then the employee should not have a telework agreement. Employees without telework agreements cannot work from home; therefore, they may be granted weather/safety leave under these regulations.

Employees with telework agreements gain the benefits of teleworking, but generally will not be granted weather/safety leave when a weather/safety event can be reasonably anticipated. Warnings for these anticipated events are usually broadcast in the media well in advance and, for that reason, teleworkers are generally expected to know that they need to be prepared to work from home when the event occurs. Because agencies may provide weather/safety leave to teleworkers when, in the agency’s judgment, the event could not be reasonably anticipated and an employee is otherwise prevented from performing work, there is no need for teleworkers to be prepared to telework on days when a major event is not anticipated unless it coincides with an already scheduled telework day. There is no requirement for employees to maintain their residence in a continuous telework-ready state or dedicate any part of their residence for telework purposes beyond any requirements in connection with their normally scheduled telework. For employees who have a regular telework schedule, there is essentially no difference

between activities required to maintain a residence in a telework-ready state when expecting a weather event and maintaining it in a telework ready state when preparing for any other telework day, nor is there any meaningful difference in how an employee would dedicate space in their residence under these respective scenarios. OPM also notes that these regulations do not require mandatory telework during emergency closures, but instead bar weather/safety leave from being granted when employees can telework.

Comment: A union said that it is the responsibility of the agency to timely notify employees of an impending weather/safety condition if the agency wants the employees to telework on a day when the employees would have otherwise worked in the office. The union believed it unfair and burdensome to make employees take annual leave when they do not bring work home.

OPM response: Under § 630.1605(a)(3), agencies have discretion in determining whether a weather/safety condition could be reasonably anticipated and whether the employee took reasonable steps to prepare for teleworking. OPM defers to an agency's judgment as to whether to provide notice in some manner of impending weather/safety conditions for which teleworking employees will not receive weather/safety leave. An agency notice, whether provided or not provided, may be a consideration in the determination as to whether an employee took reasonable steps to prepare for teleworking.

Comment: Three commenters expressed concern about employee dependent care responsibilities when an employee participates in a telework program and a weather or safety condition occurs that prevents safe travel. Two of the commenters pointed out that agencies often have telework policies that do not permit telework when employees have small children or other dependents at the telework site. Because § 630.1605(a)(1) prohibits agencies from

granting weather and safety leave when an employee can telework at an approved telework site, the commenters believe that this section precludes agencies from granting weather and safety leave to employees with dependent care responsibilities.

OPM response: An agency may determine that, under certain conditions, employees are capable of teleworking even if they have school-age children or elderly parents in the home and establish a policy of allowing telework in such situations. However, if these circumstances diminish an employees' ability to perform agency work, they will not be eligible to telework under these conditions (5 U.S.C. 6502(b)(1)). If an agency policy bars telework at home in the given child/elder care situation, then the home is not an approved location. Thus, if the employee is not permitted to telework under agency policies, and cannot safely travel to or perform work at the regular office location, an agency may grant weather/safety leave to the employee. If agency policies allow an employee to telework with a school-age child or an elderly parent in the home in a weather/safety situation, any time spent in giving care to such individuals would not be considered hours of work. Under this scenario, an employee would be expected to account for work and non-work hours during his or her tour of duty and take the appropriate leave (paid or unpaid) to account for the time spent away from normal work-related duties.

Comment: An agency recommended that agencies be permitted to grant employees administrative leave when needed to address the effects of weather/safety events to ensure their safety, the safety of others, the integrity of their property, and/or their ability to report to work. The agency provided as examples the need to clear snow or remove excess water from their property.

OPM response: To the extent that activities such as clearing snow are truly necessary to ensure that the employee can safely travel to or safely perform work at an approved location, within the meaning of section 6329c(b)(3), the agency can provide weather/safety leave at its discretion for the period needed. Employees would need to use their annual leave or other time off for activities such as clearing snow on sidewalks or basement water removal that are not necessary to ensure that the employee can safely travel to or perform work at an approved location. OPM's guidance on dismissal and closure policy and procedures will further address agency discretion in regard to granting weather/safety leave.

Comment: The same agency asked why § 630.1605(a)(2)(iii) is necessary since agencies may not approve weather/safety leave if an employee could reasonably anticipate the need to telework.

OPM response: Paragraphs (i) and (ii) of § 630.1605(a)(2) provide for the granting of weather/safety leave in two instances where the employee might otherwise be expected to telework. Paragraph (iii) provides that agencies can determine not to provide weather/safety leave in circumstances such as those provided under (i) and (ii) when the employee can safely travel to or perform work at the regular worksite. In these instances, the telework site might not be viable, but the employee might be able to work at the regular worksite. An employee is generally expected to report to the regular worksite—even on a day when he or she is scheduled to telework—if conditions at the telework site do not permit the performance of work (e.g., lack of internet access, loss of power).

Comment: The same agency asked when weather/safety leave is ever applicable to the telework site. The agency asked if it would be provided when the employee loses power while teleworking.

OPM response: Weather/safety leave may be granted to an employee at a telework site as provided under § 630.1605(a)(2)(ii). Examples of when weather/safety leave might be provided include weather-related damage to a home that makes occupying the home unsafe, loss of power at home (which makes the home not an approved location under agency telework policies), and employees not being prepared for teleworking when the conditions could not be anticipated (tornado or earthquake). The agency has discretion to grant weather/safety leave whenever an employee is prevented from safely working because of one of the conditions in § 630.1603.

Comment: A union requested that OPM clarify that under § 630.1605(a)(2)(iii) it is presumed that, if Government offices are closed, the weather/safety conditions prevent the employee from safely traveling to their traditional worksite.

OPM response: No such presumption applies. The agency must determine the actual facts. Section 630.1605(a)(2)(iii) addresses situations when an employee who participates in telework is unable to work from home or another alternative location, due to a weather/safety event, but the employee's regular worksite is open (or has reopened) for business. Even if the employee (who is a telework program participant) is not able to telework at home under the conditions described in paragraph (i) or (ii), the agency may choose not to provide an employee with weather/safety leave if the employee can safely travel to and work at the regular worksite—regardless of whether the given day was a scheduled telework day. Section 630.1605(a)(2)(iii) does not apply if the regular worksite is closed for weather/safety reasons.

Comment: An agency recommended that OPM correct the section reference in § 630.1605(a)(2)(iii) from “630.1603(a)” to “630.1603.” Another agency recommended that the same change be made in § 630.1605(a)(3). Two unions recommended that OPM provide in

§ 630.1605(b) that agencies inform employees of their designation as emergency employees at the time the designation is made.

OPM response: These changes have been made. OPM removed the paragraph designation from the § 630.1603 references and modified § 630.1605(b) to state “an agency should inform employees of their designation as emergency employees well in advance.”

Comment: A union objected to the provision at § 630.1605(b) giving agencies discretion to designate emergency employees who are critical to agency operations. The union said that the provision would not prohibit or deter an agency from broadly construing “necessary for critical agency operations” and excluding an overly large group of employees from weather/safety leave. The union recommended that § 630.1605(b) be stricken in its entirety or, at a minimum, modified to narrow the types of employees who could be categorized as emergency employees. The union said that these employees should not be required to physically report to work when their colleagues are granted weather and safety leave.

OPM response: Agencies have extensive experience with designating emergency employees under prior dismissal and closure procedures used for weather and other emergencies. Since the Telework Enhancement Act of 2010, OPM has incorporated telework into our emergency operating announcements not only for the safety of our employees, but also to support continuity of operations, both for mission-critical functions and more general work to the extent possible. The Federal Government has a vital role in our economy and it is extremely important that we continue operations to the greatest degree possible. OPM believes agencies are in the best position to make determinations as to which employees should be designated as emergency employees and which employees are eligible to telework. Agencies are also in the

best position to decide if emergency employees are needed at the worksite or whether their duties can be performed while teleworking.

Section 630.1606—Administration of weather and safety leave

Comment: Two unions expressed concern about the regulation in § 630.1606(c), which provides that an employee may not receive weather/safety leave for hours during which the employee is on other preapproved leave (paid or unpaid) or paid time off. The unions objected to the rule that agencies should not approve weather/safety leave for an employee who, “in the agency’s judgment, is cancelling preapproved leave or paid time off, or changing a regular day off in a flexible or compressed work schedule, for the primary purpose of obtaining weather and safety leave.” One union stated that, if employees have a right to modify scheduled time off, the primary purpose of a modification should not be left to the determination of management. The union warned that this rule could result in mass grievances, which could result in large costs to both the agency and the union. The other union voiced similar concerns, stating that an agency should be required to prove that an employee is cancelling preapproved leave for the primary purpose of obtaining weather/safety leave.

OPM response: The reason behind the rule on cancelling scheduled time off is to prevent employees from receiving paid leave when the employee was not actually going to be available to perform work. This is not a new policy and is currently reflected in OPM’s operating status guidance for the Washington, DC, area. One good example is a situation in which an employee is on vacation in a distant location. Based on the unions’ position, such an employee should be allowed to cancel preapproved leave and receive weather/safety leave even though the employee was not available to work at the regular worksite and is not affected by the weather/safety emergency. Another example is an employee who is in the middle of a 6-week period of

scheduled unpaid leave under the Family and Medical Leave Act in order to recover from a serious illness and who clearly has no intention to report to work on the day of a weather/safety emergency. If such an employee tried to cancel the unpaid leave on the day of the weather/safety emergency, it would clearly be for the primary purpose of obtaining weather/safety leave. Given the variety of possible circumstances, OPM cannot prescribe a simple “bright line” rule (or even a set of rules) that does not require some judgment on the part of agency officials. Supervisors and managers are regularly called upon to exercise judgment in other contexts, and OPM believes they are capable of exercising appropriate judgment in this particular context and coming to a fair decision. OPM plans on providing additional guidance in this area regarding when a cancellation of preapproved leave would not prevent the granting of weather/safety leave because the employee’s leave plans are also changed due to the weather/safety emergency—for example, when a doctor’s appointment that was the reason for a request for sick leave is cancelled because of the same weather/safety event (e.g., a major snowstorm), or when an employee is unable to leave for vacation because the employee’s flight is cancelled due to such an event. (We note that any sick leave would mandatorily be cancelled if the doctor’s appointment is cancelled and the employee is not sick.)

Comment: One individual described the two sentences in § 630.1606(c) as being contradictory. Another individual found the paragraph confusing and requested language changes to clarify that weather/safety leave was not allowed unless the employee demonstrated that the weather/safety event prevented the employee from using preapproved leave for the originally planned purpose.

OPM response: After considering these comments, OPM does not believe the sentences are contradictory and will leave the paragraph unchanged. The first sentence prohibits the

granting of weather/safety leave to employees on preapproved leave. The second sentence bars an employee from receiving weather/safety leave if the agency determines that the employee cancelled preapproved leave for the primary purpose of receiving weather/safety leave. This bar does not apply to employees who cancel their preapproved leave because their leave plans are disrupted by the weather/safety event or some other reason (e.g., a cancelled medical appointment or scheduled flight to a vacation destination). These employees may be approved for weather and safety leave if not otherwise required to telework or report to work under § 630.1605. OPM will be issuing guidance that will address this provision in more detail.

Comment: One agency noted prior policy regarding early departures and asked if the regulations are intended to bar weather/safety leave whenever an employee has pre-approved leave, no matter what the circumstances of the employee's leave.

OPM response: As addressed above, employees who cancel their preapproved leave because their leave plans are disrupted by the weather/safety event may be granted weather/safety leave, and OPM will be issuing more detailed guidance on that matter. OPM will also be issuing guidance that will provide more information on the relationship of preapproved leave to early dismissal from work at a Federal office or alternate work location.

In addition to the changes noted above, OPM made minor technical changes to § 630.1604 to improve clarity. We also changed “approve” to “provide” in several places in §§ 630.1605(a) and 630.1606(c) where the context was the providing of leave, since the term “approve” might suggest the employee is requesting that a leave entitlement be invoked. There is no entitlement to weather and safety leave; it is always provided at the agency’s discretion.

Executive Order 13563 and Executive Order 12866

The Office of Management and Budget has reviewed this rule in accordance with E.O. 13563 and 12866.

Executive Order 13771

This rule is not subject to the requirements of E.O. 13771 (82 FR 9339, February 3, 2017) because the rule is related to agency organization, management, or personnel.

Regulatory Flexibility Act

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

List of Subjects in 5 CFR Part 630

Government employees.

Office of Personnel Management.

Jeff T.H. Pon,
Director.

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

PART 630—ABSENCE AND LEAVE

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

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

2. Subpart P is added to read as follows:

Subpart P—Weather and Safety Leave

Sec.

- 630.1601 Purpose and applicability.
- 630.1602 Definitions.
- 630.1603 Authorization.
- 630.1604 OPM and agency responsibilities.
- 630.1605 Telework and emergency employees.
- 630.1606 Administration of weather and safety leave.
- 630.1607 Records and reporting.

Subpart P—Weather and Safety Leave

§ 630.1601 Purpose and applicability.

(a) This subpart implements 5 U.S.C. 6329c, which allows an agency to provide a separate type of paid leave when weather or other safety-related conditions prevent employees from safely traveling to or safely performing work at an approved location due to an act of God, terrorist attack, or other applicable condition. Section 6329c(d) directs OPM to prescribe

regulations to carry out the statutory provisions on weather and safety leave, including regulations on the appropriate uses and the proper recording of this leave.

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

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

§ 630.1602 Definitions.

In this subpart:

Act of God means an act of nature, including hurricanes, tornadoes, floods, wildfires, earthquakes, landslides, snowstorms, and avalanches.

Agency means an Executive agency as defined in 5 U.S.C. 105, excluding the Government Accountability Office. When the term “agency” is used in the context of an agency making determinations or taking actions, it means the agency heads or management officials who are authorized (including by delegation) to make the given determination or take the given action.

Employee means an individual who is covered by this subpart, as described in § 630.1601(b) and (c).

OPM means the Office of Personnel Management.

Participating in a telework program means an employee is eligible to telework and has an established arrangement with his or her agency under which the employee is approved to participate in the agency telework program, including on a routine or situational basis. Such an employee who teleworks on a situational basis is considered to be continuously participating in a

telework program even if there are extended periods during which the employee does not perform telework.

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

Weather and safety leave means paid leave provided under the authority of 5 U.S.C. 6329c.

§ 630.1603 Authorization.

Subject to other provisions of this subpart, an agency may grant weather and safety leave to employees only if they are prevented from safely traveling to or safely performing work at a location approved by the agency due to—

- (a) An act of God;
- (b) A terrorist attack; or
- (c) Another condition that prevents an employee or group of employees from safely traveling to or safely performing work at an approved location.

§ 630.1604 OPM and agency responsibilities.

(a) OPM is responsible for prescribing regulations and guidance related to the appropriate use of leave under this subpart and the proper recording of such leave, including OPM guidance on Governmentwide dismissal and closure policies and procedures that provides for use of consistent terminology in describing various operating status scenarios. In issuing any operating status announcements for the Washington, DC, area, OPM must make the specific policies and procedures related to those announcements consistent with the regulations in this subpart and with OPM's Governmentwide guidance.

- (b) Employing agencies are responsible for—

(1) Establishing and applying policies and procedures related to use of leave under this subpart that are consistent with OPM regulations and guidance described in paragraph (a) of this section; and

(2) Using terminology required by OPM-issued Governmentwide guidance in any agency-specific operating status announcements they issue (for a specific geographic location or area).

§ 630.1605 Telework and emergency employees.

(a) *Telework employees.* (1) Except as provided under paragraph (a)(2) of this section, employees who are participating in a telework program and are able to safely travel to and work at an approved telework site may not be granted leave under § 630.1603. Employees who are eligible to telework and participating in a telework program under applicable agency policies are typically able to safely perform work at their approved telework site (e.g., home), since they are not required to work at their regular worksite.

(2)(i) If, in the agency's judgment, the conditions in § 630.1603 could not reasonably be anticipated, an agency may provide leave under this subpart to the extent an employee was not able to prepare for telework as described in paragraph (a)(3) of this section and is otherwise unable to perform productive work at the telework site.

(ii) If an employee is prevented from safely working at the approved telework site due to circumstances, arising from one or more of the conditions in § 630.1603, applicable to the telework site, an agency may, at its discretion, provide leave under this subpart to the employee.

(iii) Notwithstanding paragraphs (a)(2)(i) and (ii) of this section, an agency may decide not to provide leave under this subpart when the conditions in § 630.1603 do not prevent the

employee from safely traveling to or safely performing work at a regular worksite, even if the affected day is a scheduled telework day.

(3) In making a determination under paragraph (a)(2) of this section, an agency must evaluate whether any of the conditions in § 630.1603 could be reasonably anticipated and whether the employee took reasonable steps (within the employee's control) to prepare to perform telework at the approved telework site. For example, if a significant snowstorm is predicted, the employee may need to prepare by taking home any equipment (e.g., laptop computer) and work needed for teleworking. To the extent that an employee is unable to perform work at a telework site because of failure to make necessary preparations for reasonably anticipated conditions, an agency may not provide weather and safety leave, and the employee would need to use other appropriate paid leave, paid time off, or leave without pay.

(b) *Emergency employees.* An agency may designate emergency employees who are critical to agency operations and for whom weather and safety leave may not be applicable. To the extent practicable, an agency should inform employees of their designation as emergency employees well in advance in anticipation of the possible occurrence of the conditions set forth in § 630.1603. If the agency wishes to provide for the possibility that an emergency employee could work from an approved telework site in lieu of traveling to the regular worksite in appropriate circumstances, an agency should encourage the employee to enter into a telework agreement providing for that contingency. An agency may designate different emergency employees for the different circumstances expected to arise from these conditions. Emergency employees must report to work at their regular worksite or another approved location as directed by the agency, unless—

(1) The agency determines that travel to or performing work at the worksite is unsafe for emergency employees, in which case the agency may require the employees to work at another location, including a telework site as provided in paragraph (a) of this section, as appropriate; or

(2) The agency determines that circumstances justify granting leave under this subpart to emergency employees.

§ 630.1606 Administration of weather and safety leave.

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

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

(c) Employees may not receive weather and safety leave for hours during which they are on other preapproved leave (paid or unpaid) or paid time off. Agencies should not provide weather and safety leave to an employee who, in the agency's judgment, is cancelling preapproved leave or paid time off, or changing a regular day off in a flexible or compressed work schedule, for the primary purpose of obtaining weather and safety leave.

§ 630.1607 Records and reporting.

(a) *Record of placement on leave.* An agency must maintain an accurate record of the placement of an employee on weather and safety leave.

(b) *Reporting.* In agency data systems (including timekeeping systems) and in data reports submitted to OPM, an agency must record weather and safety leave under section 6329c and this subpart as a category of leave separate from other types of leave.

Billing Code 6325-39-P

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