



October 24, 2022

**VIA ELECTRONIC MAIL**

The Honorable Kiran Ahuja  
Director  
Office of Personnel Management  
1900 E Street, NW  
Washington, DC 20415

**RE: Denial of NTEU's Petition to Allow Weather and Safety Leave for  
Telework-Ineligible Employees in Mandatory COVID Isolation**

Dear Director Ahuja:

I am writing in response to the Office of Personnel Management's (OPM) August 30, 2022 denial of the National Treasury Employees Union's (NTEU)s rulemaking petition requesting that telework-ineligible federal employees become eligible for weather and safety leave during required COVID isolation. As the petition explained, NTEU's proposals promote fairness and equity for federal workers who have put their own safety at risk throughout the COVID-19 pandemic. NTEU's request to allow weather and safety leave for all telework-ineligible employees in required quarantine *and* isolation, along with its alternate proposals, represents good public policy and a faithful application of governing law. By denying NTEU's petition, OPM has lost an opportunity to reinforce its public commitment to health and safety in the federal workplace.

**I. OPM's rejection of NTEU's primary proposal penalizes employees by requiring them to use their personal leave to keep others in the workplace safe.**

OPM's complete denial of NTEU's petition hampers the Administration's ability to effectively address its "highest priority"—i.e., the health and safety of the federal workforce—which is "of paramount concern" for the Administration.<sup>1</sup> As the petition explained, NTEU's proposals would (1) promote workplace health and safety; and (2) prevent employees from sacrificing personal leave when they are required to isolate with COVID. Instead, OPM has determined that telework-ineligible employees must remain on the hook to burn through their personal leave when they are required to isolate for the benefit of others.

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<sup>1</sup> Task Force, COVID-19 Workplace Safety: Agency Model Safety Principles (July 29, 2021) ("highest priority"); Safer Federal Workforce Task Force (Task Force), Model Agency COVID-19 Safety Principles (Sept. 15, 2022) ("paramount concern").

Indeed, contrary to OPM’s argument in its response, NTEU’s primary proposal—that weather and safety leave be available to all COVID-infected, telework-eligible employees who are required to isolate—is lawful. Just like quarantine, for which OPM has consistently allowed weather and safety leave, the primary purpose of required isolation is to keep others safe. *See* [COVID-19 Quarantine and Isolation | CDC](#) (explaining that isolation is one of the available “precautions [one] can take to prevent spreading [COVID] to others”).

Because both quarantine *and* isolation serve to keep fellow employees and members of the public safe, NTEU’s proposal fits neatly with the weather and safety leave statute. COVID exposure *or infection* is a “condition” that prevents employees from “safely traveling to or performing work at an approved location.” 5 U.S.C. § 6329(c)(3). While telework-eligible employees can safely work at their homes (which are approved locations for them), telework-*ineligible* employees cannot safely work at any approved location.

The existence of sick leave does not change this analysis. Nothing in the statute or applicable regulations prevents the use of weather and safety leave when another type of leave could apply. All that matters is whether the circumstances fall within the coverage of 5 U.S.C. § 6329(c)(3). Because NTEU’s primary proposal is consistent with the statute, it is legal. Moreover, weather and safety leave is a “better fit” than sick leave because the purpose of both quarantine and isolation is to keep others in the workplace safe. *See* OPM Response (Aug. 30, 2022) (Response) at 5.

## **II. OPM’s rejection of NTEU’s alternate proposal and its request to modify relevant guidance rests on unreasoned, faulty analysis.**

OPM’s response fails to meaningfully respond to two other proposals in NTEU’s petition. First, OPM relied on an unreasoned interpretation of its own sick leave regulations when it denied NTEU’s alternate regulatory proposal. That proposal would have allowed weather and safety leave at least for *asymptomatic* employees, consistent with a proper reading of the sick leave regulations. Second, OPM refused to modify its February 2020 guidance on weather and safety leave (Guidance) to clarify conflicting statements. That refusal was based on a conclusory and incorrect assertion that the Guidance is already “clear[] and accurate[.]” *See* Response at 7.

### **A. OPM relied on an unreasonable interpretation of its own sick leave regulations when it denied NTEU’s alternate proposal.**

To support its denial of NTEU’s alternate proposal, OPM relies on a plain misreading of its sick leave regulations.

First, OPM points to the availability of sick leave for medical appointments to argue that asymptomatic employees are covered by the sick leave provision at 5 C.F.R. § 630.401(a)(2). *See* Response at 7. But the availability of sick leave for such appointments has no bearing on the proper interpretation of (a)(2). Sections 630.401(a)(1) and (a)(3) provide sick leave for employees’ and family members’ medical appointments, respectively. These separate provisions do not support OPM’s construction of § 630.401(a)(2).

Second, OPM contends that employees are “incapacitated,” as that term is used in § 630.401(a)(2), when they must isolate to protect others because they cannot “perform work as normal.” *See* Response at 7. This strained interpretation fails to give effect to all of the provision’s text. Section 630.401(a)(2) specifies that the employee must be incapacitated “by physical or mental illness, injury, pregnancy, or childbirth.” By definition, asymptomatic COVID-infected employees do not feel any effects of the disease. They are not incapacitated *by COVID*. Indeed, because they are physically and mentally able to perform their duties, they are not incapacitated at all. *See id.* (providing that employee must be “incapacitated” for “the performance of his or her duties”). OPM’s attempt to shoehorn asymptomatic employees into this sick leave provision thus misses the mark.

Finally, even if § 630.401(a)(2) *did* fit the circumstances, OPM would nonetheless have discretion to allow weather and safety leave notwithstanding the availability of sick leave. *See, e.g.,* Response at 5 (weather and safety leave should be used when it is a “better fit” than sick leave). The Guidance did exactly that when it declared that a separate sick leave provision, § 630.401(a)(5), was “supersede[d]” by weather and safety leave—at least for quarantine. *See id.* at 5, 7; Guidance at 2. Because the primary purpose of isolation is to keep others safe, weather and safety leave is a better fit than sick leave. OPM has not supplied any reasoned basis for its refusal to use its discretion to allow weather and safety leave for employees in mandatory isolation.

**B. OPM failed to acknowledge, let alone adequately address, the conflicting statements in its Guidance.**

OPM’s refusal to modify its Guidance to address conflicting statements regarding the availability of weather and safety leave for asymptomatic employees in isolation is puzzling. The agency’s insistence that the Guidance already “clearly and accurately” explains its position is irreconcilable with the text of the document itself. *See* Response at 7. The same is true of the assertion that the Guidance “did not, nor was it ever intended to, allow weather and safety leave for isolating employees with confirmed or suspected COVID-19.” *See id.*

NTEU’s petition identified the two directly conflicting statements in OPM’s guidance, which OPM’s response ignores. In one section of the Guidance, OPM instructed: “[A]gencies may authorize weather and safety leave when an *asymptomatic* employee (i.e., healthy, *not displaying symptoms* of the given disease) is subject to movement restrictions (quarantine *or isolation*) under the direction of public health authorities due to a significant risk of exposure to a quarantinable communicable disease, such as 2019-nCoV.” Guidance at 1 (emphasis added). A few paragraphs later, the Guidance suggested instead that weather and safety leave was “inappropriate” for all infected employees. *Id.* at 1–2. By failing to address this obvious conflict, OPM failed to meaningfully respond to NTEU’s request to modify the Guidance.

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For these reasons, NTEU urges OPM to reconsider its decision. Please do not hesitate to contact me to discuss NTEU's petition.

Sincerely,

A handwritten signature in black ink that reads "Anthony M. Reardon". The signature is written in a cursive, flowing style.

Anthony M. Reardon  
National President

Enclosure



UNITED STATES OFFICE OF PERSONNEL MANAGEMENT

Washington, DC 20415

The Director

August 30, 2022

Julie Wilson, Esq.  
General Counsel  
National Treasury Employees Union  
800 K Street, NW  
Suite 1000  
Washington, DC 20001

Dear Ms. Wilson:

On March 28, 2022, you filed a request, on behalf of the National Treasury Employees Union (NTEU), and pursuant to 5 U.S.C. § 553(e), that the Office of Personnel Management (OPM) amend the weather and safety leave regulations at 5 CFR part 630, subpart P to permit use of weather and safety leave during COVID-19 quarantine and isolation. Your primary proposal is that OPM revise the weather and safety leave regulations to allow agencies to grant weather and safety leave to non-telework-eligible employees who must quarantine or isolate because they have been exposed to or infected by a communicable disease like COVID-19. Alternatively, you propose that OPM revise the weather and safety leave regulations to explicitly allow weather and safety leave for employees who: 1) are exposed to a communicable disease like COVID-19 and must quarantine, or 2) are infected by a communicable disease like COVID-19 and must isolate yet are *asymptomatic*. And, pursuant to 5 CFR 120.8, you request that OPM modify its February 7, 2020, memorandum entitled “Human Resources Flexibilities Available for Federal Employees Impacted by the 2019 Novel Coronavirus” and the attachment thereto (Flexibilities Memo) consistent with the revisions you request OPM make to the weather and safety leave regulations and to eliminate allegedly inconsistent practices among agencies in applying the guidance.

For the reasons stated below, your petition to amend OPM’s weather and safety leave regulations and the Flexibilities Memo is denied.

**I. Relevant statutory and regulatory provisions**

*A. Sick Leave*

5 CFR 630.401(a):

[A]n agency must grant sick leave to an employee when he or she –

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(2) Is incapacitated for the performance of his or her duties by physical or mental illness, injury, pregnancy, or childbirth; [or]

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

*B. Weather and Safety Leave*

5 U.S.C. § 6329c(b):

An agency may approve the provision of leave under this section to an employee . . . only if the employee . . . is prevented from safely traveling to or performing work at an approved location due to—

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[a] condition that prevents the employee . . . from safely traveling to or performing work at an approved location.

5 CFR 630.1603:

[A]n 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 –

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(c) [a] condition that prevents an employee . . . from safely traveling to or safely performing work at an approved location.

5 CFR 630.1605(a)(1):

[E]mployees 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.

**II. Background**

*A. Sick leave*

The sick leave statute, 5 U.S.C. § 6307, and OPM’s implementing regulations at 5 CFR part 630, subpart D, which were made effective long before the weather and safety leave provisions, allow agencies to grant sick leave to an employee under certain conditions. As relevant here, these conditions include when an employee “is incapacitated for the performance of . . . duties by physical . . . illness [or] injury,” and when the employee “would, as determined

by the health authorities having jurisdiction or by a health care provider, jeopardize the health of others by his or her presence on the job because of exposure to a communicable disease.” 5 CFR 630.401(a)(2), (a)(5). Sick leave is an employee entitlement, and the employing agency must grant it to a qualifying employee to the extent available, consistent with statutory and regulatory requirements.

### *B. Weather and safety leave*

The weather and safety leave statute, 5 U.S.C. § 6329c, and OPM’s implementing regulations at 5 CFR part 630, subpart P, permit agencies to grant weather and safety 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. 5 CFR 630.1601(a), 630.1603. Weather and safety leave is granted at the employing agency’s discretion and is not an entitlement of the employee. An agency determination to grant weather and safety leave must be consistent with statutory and regulatory requirements, as well as any other applicable agency policies.

Generally, weather and safety leave is available whenever an employee is unable to safely travel to and perform work at an approved location. For a non-telework-eligible employee, the approved location is typically the agency worksite; for the telework-eligible employee, the approved locations are typically the agency worksite and the employee’s home (that is, an agency-approved alternative worksite). A non-telework-eligible employee unable to safely travel to and perform work at the agency worksite would be eligible for weather and safety leave. This is not the case, however, for telework-eligible employees. If a telework-eligible employee is able to safely travel to and perform work at an approved work location (such as the employee’s home), then weather and safety leave is generally not available or appropriate. 5 CFR 630.1605(a)(1).

Thus, weather and safety leave is available for a non-telework-eligible employee who is unable to safely travel to and perform work at an approved location because doing so poses a risk to the safety of the employee and/or other employees at the agency worksite.

### *C. The COVID-19 Pandemic and Leave Availability*

Throughout the COVID-19 pandemic, federal employees have taken leave both to quarantine and to isolate. The Center for Disease Control and Prevention (CDC) explains the distinction between quarantine and isolation as follows:

**Quarantine** is a strategy used to prevent transmission of COVID-19 by keeping people who have been in close contact with someone with COVID-19 apart from others.

**Isolation** is used to separate people with confirmed or suspected COVID-19 from those without COVID-19.

See [COVID-19 Quarantine and Isolation | CDC](#). Consistent with this CDC guidance, the Safer Federal Workforce Task Force (Task Force), of which OPM is a co-chair, has advised agencies that sick leave is appropriate for employees who must isolate, whereas weather and safety leave

is appropriate for non-telework eligible employees who must quarantine and who are not otherwise sick. See generally [Safer Federal Workforce, including Leave | Safer Federal Workforce](#).<sup>1</sup>

This distinction is consistent with the purposes for which use of sick leave and weather and safety leave were authorized, as discussed above. An isolating employee who has COVID-19 should take sick leave. Although the term “sick” is not defined in the statute or regulations, the ordinary meaning of the term is defined as “affected with disease or ill health” (<https://www.merriam-webster.com/dictionary/sick>) or “affected with a disease or illness” (<https://www.britannica.com/dictionary/sick>). COVID-19 is a disease. See CDC guidance: <https://www.cdc.gov/coronavirus/2019-ncov/faq.html>: (“COVID-19 is a disease caused by a virus called SARS-CoV-2.”) An individual who tests positive for COVID-19 is infected with the virus that causes COVID-19, SARS-CoV-2. See <https://www.cdc.gov/coronavirus/2019-ncov/testing/diagnostic-testing.html>. Sick leave should be granted to allow an employee to take time off when the employee is, among other things, affected by an illness or infected with a communicable disease—and thus when an employee tests positive for COVID-19, whether or not the employee is symptomatic.

By contrast, Task Force guidance has instructed that weather and safety leave should be granted for a non-telework eligible employee who does not have confirmed or suspected COVID-19 but who is required to quarantine. Because the employee is not sick, the primary purpose of requiring quarantine is to protect the health and safety of the workforce. In this situation, weather and safety leave, rather than sick leave, is appropriate.

### III. Response

#### A. *NTEU Proposal to Allow Weather and Safety Leave for Quarantining and Isolating Employees*

In your petition, you request that OPM amend its regulations to allow weather and safety leave for all non-telework-eligible employees who must quarantine or isolate due to COVID-19.

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<sup>1</sup> On August 11, 2022, the CDC streamlined its existing COVID-19 guidance to make it easier to understand COVID-19 risk, prevention steps, post-exposure precautions, and what actions to take when individuals are sick or test positive for the virus. On August 17, 2022, the Task Force issued initial implementation guidance on updates to Federal agency COVID-19 workplace safety protocols, consistent with CDC’s streamlined COVID-19 guidance. Among other things, that guidance instructed agencies to no longer require quarantine for individuals who are not up to date with COVID-19 vaccines and who have been exposed to someone with COVID-19. Therefore, at present, agencies should not require federal employees to quarantine as a result of a COVID-19 exposure. [See Initial Implementation Guidance for Federal Agencies on Updates to Federal Agency COVID-19 Workplace Safety Protocols](#).



i. Quarantine

To the extent the proposed amendment reflects OPM’s interpretation as to availability of weather and safety leave for *quarantining* employees based on their telework eligibility status, we find the language unnecessary. Current regulations already make clear that non-telework-eligible employees who are unable to safely travel to and perform work at an approved location are eligible for weather and safety leave, and that telework-eligible employees who are able to safely work from an approved location are ineligible for weather and safety leave. 5 CFR 630.1603; 630.1605(a)(1). A non-telework eligible employee who is required to quarantine is unable to safely travel to and perform work at the agency worksite, and therefore would be eligible for weather and safety leave. Consistent with OPM regulations, Task Force guidance has instructed agencies to provide weather and safety leave for non-telework eligible employees who must quarantine. See generally [Safer Federal Workforce, including Leave | Safer Federal Workforce](#).

Sick leave is also appropriate leave for a quarantining employee to take to avoid putting other employees’ health at risk. 5 CFR 630.401(a)(5). Before the enactment of the weather and safety leave statute, OPM’s predecessor, the Civil Service Commission, issued regulations allowing sick leave to be granted to an employee “when, through exposure to contagious disease, the presence of the employee at this post of duty would jeopardize the health of others.” 16 Fed. Reg. 13031. New regulations were later issued, and, today, 5 CFR 630.401(5) provides that sick leave is available when the employee “[w]ould, as determined by the health authorities having jurisdiction or by a health care provider, jeopardize the health of others by his or her presence on the job because of exposure to a communicable disease.” But while sick leave is *available* in these circumstances, weather and safety leave is a better fit for addressing quarantine situations, and therefore Task Force guidance has instructed agencies to grant weather and safety leave rather than sick leave for a non-telework eligible employee who must quarantine due to an exposure to COVID-19.

ii. Isolation

As for the proposal to make weather and safety leave available for *isolating* employees, we decline to make such an amendment, because weather and safety leave is not appropriate for such employees.

The original and primary purpose of sick leave—which is an employee entitlement—was to permit employees to take time off when they are ill. By contrast, the primary purpose of weather and safety leave—which is granted at agencies’ discretion—was to promote employee safety more broadly. The weather and safety leave regulations, which were issued after the sick leave regulations and did not rescind or amend or even reference the sick leave regulations, were not intended to replace the use of sick leave for periods of illness.

Under the sick leave regulations, then, sick leave is the appropriate form of leave for an employee diagnosed with an illness or experiencing symptoms of illness—as is the case when they are required to isolate. 5 CFR 630.401(a)(2). Such an employee, whether telework-eligible or not, whether infected or suffering symptoms following exposure to COVID-19 or some other

pathogen, must be granted sick leave to recuperate from illness, to comply with the direction of public health authorities to isolate, or both. Sick leave is specifically authorized for these purposes. This is true even if an employee infected with COVID-19 does not have symptoms associated with COVID-19.

These policies are consistent with, and give effect to, all of the relevant provisions of law.<sup>2</sup> Sick leave is an employee entitlement, whereas weather and safety leave is not. Therefore, for the reasons set forth herein, we decline to amend the weather and safety leave regulations as you have requested since such amendments would permit use of weather and safety leave under circumstances in which sick leave is more appropriate. OPM's position is consistent with and gives meaning to the relevant statutes and regulations and also reflects our long-standing position regarding the appropriate use of sick leave. Consistent with this approach, the Government-wide guidance issued by the Task Force reflects OPM's position—sick leave for isolation, weather and safety leave for quarantine if not telework-eligible. See generally [Safer Federal Workforce](#).

*B. NTEU's Proposal to Allow Weather and Safety Leave for Asymptomatic Employees in Isolation*

In the alternative, you request that OPM amend its regulations to explicitly allow weather and safety leave for *asymptomatic* employees in COVID-19 isolation along with those in quarantine. For the reasons discussed *supra*, we decline to make the requested amendment. An asymptomatic employee in isolation (that is, an employee with confirmed or suspected COVID-19) has an illness and should be granted sick leave under 5 CFR 630.401(a)(2), consistent with the primary purpose of that leave benefit. Even though the employee is not experiencing symptoms, the employee is infected or likely infected. Therefore, sick leave is the appropriate type of leave for such an individual. Weather and safety leave is available to an asymptomatic non-telework-eligible employee who is required to quarantine, but is not available for an isolating employee, regardless of telework-eligibility status.

Your primary argument in support of your alternative proposal is that an asymptomatic employee can work and therefore should not have to take sick leave. But an asymptomatic employee with COVID-19 is still ill, regardless of whether the employee is currently experiencing symptoms. Further, and importantly, there is no way to accurately determine if the employee will stay asymptomatic; instead, the employee might develop symptoms during the

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<sup>2</sup> You describe your proposed amendment as consistent with good policy and necessary due to the expiration of emergency paid leave. But the expiration of temporary leave benefits previously authorized by Congress (such as emergency paid sick leave under the Families First Coronavirus Response Act, Pub. L. No. 116-127 (March 18, 2020) as amended by the Coronavirus Aid, Relief, and Economic Security Act, 116-136 (March 27, 2020), and emergency paid leave under the American Rescue Plan Act of 2021, Pub. L. No. 117-2) is irrelevant to the appropriate uses of sick leave and weather and safety leave, which are ongoing, permanent benefits conferred on Federal employees. Indeed, the temporary nature of those benefits demonstrates that Congress knows how and when to supplement other leave benefits that are already available when needed to address temporary or extraordinary circumstances. Congress may authorize additional supplemental leave benefits should it determine them to be warranted.

isolation period. It therefore is not clear how your alternative proposal could be implemented in an administrable way.

You also posit that an asymptomatic employee is not “incapacitated” by a physical or mental illness under 5 CFR 630.401(a)(2). But sick leave is available for a number of conditions that do not necessarily render an employee unable to function (such as attending doctor’s appointments). The use of the term “incapacitated” in sec. 630.401(a)(2) is to be interpreted broadly to encompass situations when an employee is unable to perform work as normal. See definitions of “incapacitate” which include “to make someone unable to work or do things normally” (<https://dictionary.cambridge.org/us/dictionary/english/incapacitate>), and “made incapable of or unfit for normal functioning” (<https://www.merriam-webster.com/dictionary/incapacitated>). An asymptomatic employee who is isolating is incapacitated in the sense that the employee is unable to perform duties as normal because of a physical illness that requires isolation under CDC protocols. Because such an employee must isolate, the employee is not physically capable of coming to the office. Rather, such an employee is incapacitated for the performance of duties as normal by physical illness and entitled to sick leave under 5 CFR 630.401(a)(2).

While OPM did indicate in the 2020 Flexibilities Memo that use of weather and safety leave would supersede the use of sick leave for quarantine situations as would have otherwise been allowed pursuant to 5 CFR 630.401(a)(5), this policy did not vitiate the sick leave provision at sec. 630.401(a)(2). Weather and safety leave was authorized broadly at that time to cover quarantining employees in an abundance of caution as agencies grappled with the appropriate response to the spread of the novel coronavirus and its potential impact on health, safety, the economy, and national security. But the guidance did not, nor was it ever intended to, allow weather and safety leave for isolating employees with confirmed or suspected COVID-19.

### *C. NTEU’s Proposal to Amend OPM Guidance*

Lastly, you request that, pursuant to 5 CFR 120.8, OPM modify the Flexibilities Memo to eliminate confusion in agency administration of COVID-19 leave policies.<sup>3</sup> OPM declines to modify this guidance for the reasons described above. OPM has clearly and accurately stated in the Flexibilities Memo the circumstances under which agencies may and may not authorize weather and safety leave and sick leave, as applicable. An isolating employee diagnosed as being infected, or likely to have been infected, with a quarantinable communicable disease such as COVID-19 must request sick leave, not weather and safety leave. A quarantining employee who has been exposed to COVID-19 but is not ill and has not tested positive for COVID-19 should be granted weather and safety leave if unable to telework. The Task Force has consistently articulated this distinction in government-wide guidance, and there should be no confusion among agencies as to their appropriate use.

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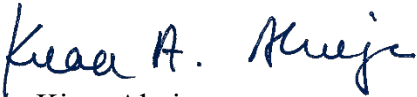
<sup>3</sup> We note that 5 CFR 120.8—the authority under which NTEU requests that OPM modify its guidance—was promulgated pursuant to E.O. 13891, which has now been revoked by E.O. 13992. Nonetheless, OPM has decided to respond to NTEU’s request.

#### IV. Conclusion

The weather and safety leave and sick leave regulations and policies we have issued represent a fair and lawful reading that gives effect to all of the relevant statutory and regulatory provisions. For the reasons described *supra*, we decline to amend the weather and safety leave regulations and the Flexibilities Memo as described in your petition.

Thank you for the opportunity to respond to you in this matter.

Sincerely,

Handwritten signature of Kiran Ahuja in blue ink.

Kiran Ahuja  
Director