III. Serious Health Condition

The Department asked two questions in its Request for Information about the definitions of serious health condition contained at 29 C.F.R. § 825.114: (1) "Section 825.114(c) states '[o]rdinarily, unless complications arise, the common cold, the flu, earaches, 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.' Have [the] limitations in section 825.114(c) been rendered inoperative by the regulatory tests set forth in section 825.114(a)?"; and (2) "Is there a way to maintain the substantive standards of section 825.114(a) while still giving meaning to section 825.114(c) and congressional intent that minor illnesses like colds, earaches, etc., not be covered by the FMLA?"

The regulatory definition of serious health condition is central to the FMLA because the primary reason that people take FMLA leave is to attend to their own or a family member's health needs. *See* Westat, "Balancing the Needs of Families and Employers, Family and Medical Leave Surveys, 2000 Update," January 2001, at 2-5 (hereinafter "2000 Westat Report") (83.3% of employees report "own health" or health of parent, child, or spouse as reason for taking leave); *see also* National Coalition to Protect Family Leave, Doc. 10172A, Darby Associates, Attachment at 10 ("The [employee's] own health . . . was the predominant reason for leave[.]").[3] The Department received an overwhelming response to these questions. In order to fully understand these comments, though, and to give them some context it is necessary to explain the regulatory history of the definition of serious health condition.

[3] Westat is a statistical survey research organization serving agencies of the U.S. Government, as well as businesses, foundations, and state and local governments. These surveys were commissioned by the Department of Labor in 2000 as an update to similar 1995 surveys ordered by the Commission on Family and Medical Leave, which was established by the FMLA.

A. History and Background

1. The Family and Medical Leave Act of 1993

Under the Act, an employee may be entitled to FMLA leave for any one of the four following reasons:

> (A) Because of the birth of a son or daughter of the employee and in order to care for such son or daughter.
>
> (B) Because of the placement of a son or daughter with the employee for adoption or foster care.
>
> (C) In order to care for the spouse, or a son, daughter, or parent, of the employee, if such spouse, son, daughter, or parent has a serious health condition.
>
> (D) Because of a serious health condition that makes the employee unable to perform the functions of the position of such employee.

29 U.S.C. § 2612(a)(1). The Act defines a serious health condition as "an illness, injury, impairment, or physical or mental condition that involves—(A) inpatient care in a hospital, hospice, or residential medical care facility; or (B) continuing treatment by a health care provider." 29 U.S.C. § 2611(11). The term "continuing treatment" is not defined by the statute. The FMLA expressly grants to the Secretary of Labor the authority to "prescribe such regulations as are necessary to carry out [the Act]." 29 U.S.C. § 2654.

The legislative history of the Act states that "[w]ith respect to an employee, the term 'serious health condition' is intended to cover conditions or illnesses that affect an employee's health to the extent that he or she must be absent from work on a recurring basis or for more than a few days for treatment or recovery." H. Rep. No. 103-8, at 40 (1991); S. Rep. No. 103-3, at 28 (1993). The scope of coverage intended by "serious health condition" is not unlimited, however:

> The term 'serious health condition' is not intended to cover short-term conditions for which treatment and recovery are very brief. It is expected that such conditions will fall within even the most modest sick leave policies. Conditions or medical procedures that would not normally be covered by the legislation include minor illnesses which last only a few days and surgical procedures which typically do not involve hospitalization and require only a brief recovery period. . . . It is intended that in any case where there is doubt whether coverage is provided by this act, the general tests set forth in this paragraph shall be determinative.

Id. The House and Senate Committee Reports also list the types of illnesses and conditions that *would* likely qualify as serious health conditions:

> Examples . . . include but are not limited to heart attacks, heart conditions requiring heart bypass or valve operations, most cancers, back conditions requiring extensive therapy or surgical procedures, strokes, severe respiratory conditions, spinal injuries, appendicitis, pneumonia, emphysema, severe arthritis, severe nervous disorders, injuries caused by serious accidents on or off the job, ongoing pregnancy, miscarriages, complications or illnesses related to pregnancy, such as severe morning sickness, the need for prenatal care, childbirth and recovery from childbirth.

H. Rep. No. 103-8, at 40 (1991); S. Rep. No. 103-3, at 29 (1993). The committee reports state, "All of these conditions meet the general test that either the underlying health condition or the treatment for it requires that the employee be absent from work on a recurring basis or for more than a few days for treatment or recovery." *Id.* The reports further explained that these covered conditions either involve inpatient care or significant continuing treatment. *See id.* ("For example, someone who suffers a heart attack generally requires both inpatient care at a hospital and ongoing medical supervision after being released from the hospital. . . . Someone who has suffered a serious industrial accident may require lengthy treatment in a hospital and periodic physical therapy under medical supervision thereafter.").

Significantly, the committee reports characterize covered FMLA conditions as ones that are not only serious but also cause the employee to be absent from work: "With respect to an employee, the term 'serious health condition' is intended to cover conditions or illnesses that affect an employee's health to the extent that *he or she must be absent from work*[.]" H. Rep. No. 103-8, at 40; S. Rep. No. 103-3, at 28 (emphasis added). "All of these health conditions require *absences from work*[.]" H. Rep. No. 103-8, at 41; S. Rep. No. 103-3, at 29 (emphasis added).

2. Department of Labor Regulations (1993-1995)

The Act, including the definition of serious health condition described above, was enacted on February 5, 1993. Congress gave the Department 120 days to promulgate regulations under the new statute. *See* 29 U.S.C. § 2654.

Pursuant to the Act, the Department promulgated interim regulations on June 4, 1993, which became effective August 5, 1993 (the effective date of the Act). The Department then received public comments on the regulations and used the comments to further refine the regulations. Final regulations were issued on January 6, 1995. These final regulations, adopted pursuant to this notice-and-comment rulemaking, established the comprehensive framework that exists today for determining a serious health condition.

The final rulemaking yielded *six* separate definitions of serious health condition that exist today. A statutory definition of serious health condition that involved only two parts (inpatient care or continuing treatment) has thus been expanded to six separate and distinct regulatory tests for determining a serious health condition. Giving meaning to the broad and undefined statutory term

"continuing treatment" presented a daunting task for the Department. Moreover, the Department had to be careful to ensure the definition covered every type of serious health condition that Congress intended to cover while not extending the Act's protections to those conditions Congress intended to exclude.

The first regulatory definition in the regulations is a stand-alone definition from the statute—"inpatient care (i.e., an overnight stay) in a hospital." This is followed by *five* separate definitions for "continuing treatment," all of which also qualify as serious health conditions. *See* 29 C.F.R. § 825.114(a)(1)-(2). One of these five definitions is "incapacity due to pregnancy," which is a discrete definition clearly articulated in the legislative history ("ongoing pregnancy, miscarriages, complications or illnesses related to pregnancy, . . . the need for prenatal care, childbirth, and recovery from childbirth.").

Of the four remaining definitions of serious health condition, stakeholders have focused significantly on one definition:[4]

> (i) A period of incapacity of more than three consecutive calendar days . . . that also involves:
>
> (A) Treatment two or more times by a health care provider . . . or
>
> (B) 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.

29 C.F.R. § 825.114(a)(2)(i)(A)-(B) (emphasis added). This is an objective definition of continuing treatment the Department established based in part on state workers' compensation laws and the Federal Employees' Compensation Act ("FECA"), which apply a three-day waiting period before compensation is paid to an employee for a temporary disability. *See* 60 Fed. Reg. 2180, 2192 (Jan. 6, 1995). "A similar provision [to FECA] was included in the FMLA rules; a period of incapacity of 'more than three days' was used as a 'bright line' test based on references in the legislative history to serious health conditions lasting 'more than few days.'" 60 Fed. Reg. at 2192.

This objective test changed little during the rulemaking process despite the numerous proposed revisions submitted to the Department. These comments received in response to the interim regulations represented a multitude of permissible alternative directions the Department might have gone with this test, but were rejected as the Department adhered to its original standard, which is reflected in the current regulations stated above. It is worth examining what some of those comments were to the original rulemaking record to better inform the comments received to the current RFI.

First, several parties contended that the period of incapacity—whatever the exact length of days—should be judged by "absence from work" as opposed to calendar days. 60 Fed. Reg. at 2192. Some stakeholders to the rulemaking noted that the Department's proposed "calendar day" rule contradicted the legislative intent (reflected in the committee reports) that "the employee must be absent *from work* for the required number of days[.]" *Id.* at 2192 (emphasis in original). Another commenter noted that under the three-calendar-day rule, employers would have no way of verifying incapacity because a single absence on a Friday followed by a weekend of incapacity could qualify as a serious health condition. *See id*. Other commenters similarly favored the workday schedule because it was more compatible with other sick leave and short-term disability programs and "removes any doubt as to whether an employee was otherwise incapacitated and unable to work during days the employee was not scheduled to work." *Id.* The Department originally chose "calendar days" in the interim regulations. After receiving comments, the Department chose, for two policy reasons, to

[4] Stakeholders did also comment significantly on the definition of a "chronic" serious health condition contained at 29 C.F.R. § 825.114(a)(2)(iii), which is discussed in Chapter IV.

retain calendar days as opposed to work days: "The Department has . . . concluded that it is not appropriate to change the standard to working days rather than calendar days because the severity of the illness is better captured by its duration rather than the length of time necessary to be absent from work." *Id.* at 2195. The Department further explained: "[A] working days standard would be difficult to apply to serious health conditions of family members or to part-time workers [who might be incapacitated but not necessarily absent from work]." *Id.*

Second, there was also a broad range of suggestions as to what length or type of incapacity was appropriate for defining a serious health condition. Some comments rejected any fixed day limitation at all, stating that a minimum durational limit had been specifically rejected during a committee markup of the bill. *See id.* at 2192. Still others suggested that three days was "unreasonably low and trivialized the concept of seriousness[.]" *Id.* "Fifteen commenters suggested extending the three-day absence period to 5, 6, 7, or 10 days[,] . . . two weeks[,] . . . or 31 days[.]" *Id.* Other commenters suggested eschewing a strict day standard in favor of adopting each individual state's waiting period for workers compensation benefits or, alternatively, the EEOC's definition of disability. *See id.* at 2193. The Department rejected these various proposals in favor of its original standard: "Upon review, the Department has concluded that the 'more than three days' test continues to be appropriate. The legislative history specifically provides that conditions lasting only a few days were not intended to be included as serious health conditions, because such conditions are normally covered by employers' sick leave plans." *Id.* at 2195.

The Department did make one change of note in the definition of serious health condition, however. After the 1993 interim regulations were promulgated, several commenters urged "clarifications [that would] exclude from the definition [of serious health condition] minor, short-term, remedial or self-limiting conditions, and normal childhood or adult diseases (*e.g.*, colds flu, ear infections, strep throat, bronchitis, upper respiratory infections, sinusitis, rhinitis, allergies, muscle strains, measles, even broken bones)." 60 Fed. Reg. at 2193. Still others suggested that the Department expressly list every ailment that would qualify as a serious health condition. *See id.* While the Department declined to provide a "laundry list of serious health conditions," 60 Fed. Reg. at 2195, we did enumerate in the final regulations examples of ailments that customarily would *not* be covered by the Act: "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." 29 C.F.R. § 825.114(c). This language would become the subject of much reported confusion in the regulated community (reflected in, among other things, the many comments on this subject submitted in response to the RFI).

3. Wage and Hour Opinion Letters

In 1995, shortly after the regulations became final, the Department provided its initial interpretation of the serious health condition objective test when responding to an employer's objections that the definition in sections 825.114(a)(2)(i)(A)-(B) did not reflect the intent of the Act's authors. The Department's response reflects an ongoing struggle to reconcile this objective test in the regulatory definition (more than three calendar days of incapacity plus treatment) with the legislative intent also reflected in the regulations that common conditions like colds and flus not be covered by the Act.

The Department's opinion letter response in 1995 stated that a minor illness such as the common cold *could not* be a serious health condition because colds were on the regulatory list of non-covered ailments. "The fact that an employee is incapacitated

for more than three days, has been treated by a health care provider on at least one occasion which has resulted in a regimen of continuing treatment prescribed by the health care provider does not convert minor illnesses such as the common cold into serious health conditions in the ordinary case (absent complications)." Wage and Hour Opinion Letter FMLA-57 (Apr. 7, 1995). More than a year and a half later, however, the Department reversed course, stating that Wage and Hour Opinion Letter FMLA-57 "expresses an incorrect view, being inconsistent with the Department's established interpretation of qualifying 'serious health conditions' under the FMLA regulations[.]" Wage and Hour Opinion Letter FMLA-86 (Dec. 12, 1996). In the second letter, the Department stated that such minor illnesses ordinarily would not be expected to last more than three days, but if they did meet the regulatory criteria for a serious health condition under section 825.114(a), they would qualify for FMLA leave. Complications, per se, need not be present to qualify as a serious health condition if the objective regulatory tests of a period of incapacity of "more than three consecutive calendar days" and a "regimen of continuing treatment by a health care provider" are otherwise met. *See id.* In reversing its position in this second opinion letter, the Department explained that the regulations reflect the view that, ordinarily, conditions like the common cold and flu would not routinely be expected to meet the regulatory tests. But such conditions could qualify under FMLA where the objective tests are, in fact, met in particular cases. *See id.* "For example, if an individual with the flu is incapacitated for more than three consecutive calendar days and receives continuing treatment, e.g., a visit to a health care provider followed by a regimen of care such as prescription drugs like antibiotics, the individual has a qualifying 'serious health condition' for purposes of FMLA." *Id.*

4. United States Court of Appeals Decisions

Employers challenged the Department's objective regulatory definition of serious health condition in two U.S. Courts of Appeals. In both cases, the regulatory test was upheld as a permissible legislative rule pursuant to a congressional delegation of authority under the Act. *See Thorson v. Gemini, Inc.*, 205 F.3d 370 (8th Cir. 2000); *Miller v. AT&T Corp.*, 250 F.3d 820 (4th Cir. 2001). The Eighth Circuit in *Thorson* found the statutory term "serious health condition" was not precisely defined in the statute and legislative history: "[W]e do not see th[e] legislative history as Congress speaking 'directly' to the question of what constitutes a 'serious health condition.'" *Thorson,* 205 F.3d at 381. Thus, the court deferred to the Department's reasonable legislative rule implementing the statute: "DOL's objective test for 'serious health condition,' which avoids the need for employers—and ultimately courts—to make subjective decisions about statutory 'serious health conditions,' is a permissible construction of the statute." *Id.* The Court acknowledged that this test might result in findings of serious health conditions for "minor illnesses" that Congress did not intend to cover, but that "the DOL reasonably decided that such would be a legitimate trade-off for having a definition of 'serious health condition' that sets out an objective test that all employers can apply uniformly." *Id.*

The Fourth Circuit even more squarely and directly upheld the objective test in the regulations because the plaintiff in that case was suffering from the flu—an illness listed in the regulations at 825.114(c) (reflecting legislative history) as an example of an illness that is generally *not* a serious health condition. The Fourth Circuit directly confronted the tension between the objective test and the list of ailments:

> There is unquestionably some tension between subsection (a), setting forth objective criteria for determining whether a serious health condition exists, and subsection (c), which states that certain enumerated conditions "ordinarily" are not serious health

> conditions. Indeed, that tension is evidenced by Miller's illness. Miller was incapacitated for more than three consecutive calendar days and received treatment two or more times; thus, she satisfied the regulatory definition of a serious health condition under subsection (a). But, the condition from which Miller suffered-the flu-is one of those listed as being "ordinarily" not subject to coverage under the FMLA.

Miller, 250 F.3d at 831. The Court concluded—even without deferring to the second Wage and Hour opinion letter—that "§ 825.114(c) is properly interpreted as indicating merely that common ailments such as the flu will not qualify for FMLA leave because they generally will not satisfy the regulatory criteria for a serious health condition." *Id.* at 832. However, "[s]ection 825.114(c) simply does not automatically exclude the flu from coverage under the FMLA. Rather, the provision is best read as clarifying that some common illnesses will not ordinarily meet the regulatory criteria and thus will not be covered under the FMLA." *Id.*

Having concluded the objective test was the dispositive one, the *Miller* court, like the *Thorson* court, upheld the regulatory definition as consistent with legislative intent. The court noted that these regulations were promulgated pursuant to an express delegation from Congress and should be given controlling effect "unless arbitrary, capricious, or manifestly contrary to statute." *Id.* at 833 (quotations omitted). The court stated that "when a regulatory choice represents a reasonable accommodation of conflicting policies that were committed to the agency's care by the statute, we should not disturb it unless it appears from the statute or the legislative history that the accommodation is not one that Congress would have sanctioned." *Id.* (quotations omitted). The court held that the Department clearly was within its statutory purview in this case, stating: "Consistent with the statutory language, the regulations promulgated by the Secretary of Labor establish a definition of 'serious health condition' that focuses on the effect of an illness on the employee and the extent of necessary treatment rather than on the particular diagnosis. This policy decision is neither unreasonable nor manifestly inconsistent with Congress' intent to cover illnesses that 'require[ ] that the employee be absent from work on a recurring basis or for more than a few days for treatment or recovery' and involve 'continuing treatment or supervision by a health care provider.'" 250 F.3d at 835 (citations omitted). Finally, like the Eighth circuit, the Fourth Circuit noted:

> It is possible that the definition adopted by the Secretary will, in some cases—and perhaps even in this one—provide FMLA coverage to illnesses Congress never envisioned would be protected. We cannot say, however, that the regulations adopted by the Secretary are so manifestly contrary to congressional intent as to be considered arbitrary.

Id.

B. Request for Information Comments and Recommendations

The responses to the RFI demonstrate that the definition of serious health condition continues to be a source of concern in the regulated community in terms of its scope and its meaning. While the Department asked only two narrow questions about the objective test and the list of ailments, commenters to the Request for Information voiced a wide array of opinions about the regulatory test in general.

A common theme the Department heard from various parties was that the regulatory definition of serious health condition is vague and/or confusing. The American Academy of Family Physicians stated: "The definition of a serious health condition within the Act creates confusion not only for the administrators of the program and employers but also for physicians. Requiring a physician to certify that a gastrointestinal virus or upper respiratory infection is a serious health condition in an otherwise healthy individual is incongruous with medical

training and experience. . . . . [Moreover, t]he categories of 'Serious Health Conditions' are overly complicated and . . . contradictory." Doc. FL25, at 1. The American College of Occupational and Environmental Medicine agreed: "The term 'serious health condition' is unnecessarily vague. Employees, employers and medical providers would be well served if the FMLA were to more clearly define the criteria for considering a health condition serious." Doc. 10109A, at 2. Other commenters echoed this same concern: "Uniformly, employers have found the definition of 'serious health condition' and the criteria for determining whether or not an employee has a 'serious health condition' to be extremely broad and very confusing." ORC Worldwide, Doc. 10138A, at 2. "This [serious health condition] definition is widely considered to be vague and overly broad, and has caused unnecessary confusion." Florida Power & Light Company, Doc. 10275A, at 2. "What constitutes a serious health condition? The definition is not clear." City of Philadelphia, Doc. 10058A, at 1. "The current definition is so vague that it is nearly impossible to define a condition that does *not* qualify as a serious medical condition." Northern Kentucky Chamber of Commerce, Doc. 10048A, at 2.

Commenters often pointed to the language in section 825.114(c) regarding minor ailments as the primary source of definitional confusion. Whereas the first part of the regulatory definition of serious health condition in subparagraph (a)(2) provides objective standards for leave (irrespective of the person's medical diagnosis) in terms of "days" and "incapacity" and "health care provider" visits, this language in subparagraph (c) suggests the opposite: excluding common illnesses by diagnosis/name without regard to seriousness. The American Bakers Association stated: "[The definition of serious health condition] has also caused unnecessary confusion for employers who rely on regulatory language that states, '*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.*' 29 C.F.R. §825.114(c)." American Bakers Association, Doc. R354A, at 4 (emphasis in original). The Association of Corporate Counsel made a similar point: "[T]he Department should clarify its guidance in section [825.114](c) on when conditions such as the common cold, the flu, earaches, upset stomach, minor ulcers, headaches, and routine dental or orthodontia problems could be considered as serious health conditions. The current regulation indicates that such conditions should not normally be considered serious health conditions." Doc. FL31, at 14.

Overall, it is probably fair to characterize the comments from employer groups about the regulatory definition of "serious health condition" as having written "serious" out of serious health condition. For example, the University of Minnesota stated:

> The current definition of "serious health condition" is broad enough to cover minor illnesses that were not intended to be covered by the Act. . . . . The University's experience indicates that the regulatory tests set forth in section 825.114(a) of the FMLA regulations renders the limitations in section 825.114(c) inoperative. Specifically, the test set forth in section 825.114(a)(2)(i) (period of incapacity lasting more than three days) is broad enough to cover minor illnesses, like the ones referenced in section 825.114(c). Such minor illnesses are regularly the subject of FMLA leave requests. Because physician certifications seldom use terms like "common cold", "upset stomach", "ear ache", etc., the University does not feel it can deny the requests, even when the University is convinced the illness is minor. As indicated in section 825.114(c), such minor illnesses were not intended to be covered by the Act.

University of Minnesota, Doc. 4777A, at 1-4. "Please redefine serious medical condition to cover truly

serious needs, not the common flu." Debbie Robbins, Human Resources, City of Gillette, Doc. 5214, at 1. "[T]he intent of the regulations was not to find conditions such as the flu, earaches, headaches, and upset stomach qualifying; however, as a result of DOL opinion letters it is practice for FMLA to be granted for these conditions when the regulatory criteria defining a serious health condition [are] met." Carle Clinic Association, Doc. 5449A, at 1. "The DOL needs to limit the definition of serious health condition to what it was originally intended by Congress. For example, while a common cold or flu were never intended to be serious health conditions, in case law courts have essentially done away with all the exclusions from the original definition by stating that 'complications' (without defining this) could cause virtually anything (a cold, an earache, a cut on finger) to become a serious health condition." Coolidge Wall Co. LPA, Doc. 5168, at 1. "As [the definition of a 'serious health condition'] has been interpreted, a common cold or flu bug lasting three days creates a FMLA qualifying event. . . . As it is, a 'runny nose' for three days would qualify as long as you saw the doctor for it. To call a 'common cold' a serious health condition significantly deval ues the FML Act." Mark Costa, Human Resources Director, Team 1 Michigan, Doc. 5172, at 1. "[T]he current Regulations seemingly extend coverage to considerably more than just serious health conditions and, in practice, the general definition often swallows up the so-called 'minor ailment exception.'" Proskauer Rose LLP, Doc. 10182, at 5. "Contrary to what Congress intended, the DOL regulation bypasses 'serious' in 'serious health condition' by assuming a condition is serious if an employee can get a physician to certify [that] he/she cannot work for three or more days and that he/she has seen a health care provider at least once and was prescribed continuing treatment by that health care provider, or that the employee has seen a health care provider twice regardless of whether any continuing treatment was prescribed." Southwest Airlines Co., Doc. 10183A, at 9.

The Department also received many comments from employees and employee groups, however, who felt that the objective test is a good, clear test that is serving its intended purpose. "[T]he current regulations are crafted appropriately to provide guidance on what constitutes a serious health condition without imposing overly rigid criteria that could hinder the ability of workers to take leave when necessary." National Partnership for Women & Families, Doc. 10204A, at 7. "[N]o definition, if it is to be effective, can impose precise categories for every health condition. The practical reality is that serious health conditions will differ from person to person. Thus, the regulations must necessarily have the flexibility to be applied to different individual circumstances." Faculty & Staff Federation of Community College of Philadelphia, Local 2026 of the American Federation of Teachers, Doc. 10242A, at 4. A letter from 53 Democratic Members of Congress also lauded the current definition of serious health condition as both expansive and flexible. The letter cited congressional intent of a "general test" that defines serious health condition: "We urge the Department to adhere to that test. Ultimately, Congress and the Department are not physicians, and we cannot evaluate every medical condition or necessary course of treatment. The presence of a serious health condition is something that is readily determined by medical professionals[.]" Letter from 53 Democratic Members of Congress, Doc. FL184, at 2. "To protect employers from employee abuse of this provision, the regulations establish an objective criteria to be used to determine whether conditions presented qualify for leave. This criteria creates a standard that can be applied in individual cases with sufficient flexibility to adjust for differences in how individuals are affected by illness. It also specifies that routine health matters cannot be considered serious health conditions, unless complications arise." Families USA, Doc. 10327A, at 3.

The AFL-CIO emphasized that the current objective test in the regulations best reflects congressional intent to cover health conditions that

have a "serious" effect on the individual regardless of the label of the impairment or illness. *See* Doc. R329A, at 21-24. "The regulations correctly *do not* define serious health condition by relying on non-exhaustive [e]xamples of serious health conditions that Congress provided in the legislative history to the Act . . . [but rather by defining] a serious health condition as an illness, injury or impairment, or physical condition that requires either inpatient care . . . or continuing treatment by a health care provider. . . . [W]e believe that the brightline tests set forth in Section 825.114(a) continue to provide the best means of determining what qualifies as a serious health condition." *Id.* at 22, 24 (emphasis in original) (quotation marks and citations omitted). The Coalition of Labor Union Women concurred: "Not only does this definition establish an objective basis for determining when an individual employee will and will not qualify for leave, but it also recognizes that every individual is different and thus likely to experience a particular medical condition differently from others. Our members have described various medical problems that affected them or their family members and reported how many supervisors or managers express a biased attitude toward these medical conditions based on a stereotypical view of the condition." Doc. R352A, at 3. Moreover, the Communication Workers of America provided a relevant example of a worker being uniquely affected by a common illness: "An employee of Verizon experienced an extreme allergic reaction to poison oak which made it impossible for her to sit or perform regular job functions for a week. The FMLA protected her during this period." Doc. R346A, at 12-13.

Finally, the Legal Aid Society pointed out that after Wage and Hour Opinion Letter FMLA-86 (Dec. 12, 1996), the meaning of "serious health condition" should be perfectly clear to the regulated community. It simply may not be as "serious" as some would like:

> With all due respect, there should not be any significant confusion over this definition. It is clearly defined in the regulations. Perhaps the term "serious health condition" is somewhat of a misnomer because it may cause the uneducated employer to assume that the medical condition must be sufficiently grave to warrant leave. However, the educated and compliant employer will be familiar with this key regulation. Indeed, the regulations make this definition quite clear, and should be used as a road map for ascertaining whether a medical condition constitutes a "serious health condition" within the meaning of FMLA. Moreover, the regulations make it perfectly clear that an employer is required to "inquire further" should it need more information to make this decision.

The Legal Aid Society-Employment Law Center, Doc. 10199A, at 2.

There was also no shortage of answers to the two questions we asked in the RFI: whether the limitations in section 825.114(c) have been rendered inoperative by the regulatory tests set forth in section 825.114(a), and whether there is a way to maintain the substantive standards of section 825.114(a) while still giving meaning to section 825.114(c) and congressional intent that minor illnesses like colds, earaches, etc., not be covered by the FMLA. Below are some of the most common answers and suggestions we received.

1. Section 825.114(c) Imposes no Independent Limitation on Serious Health Condition and Therefore Need not be Changed.

One common suggestion proffered for reconciling sections 825.114(a)(2) and (c) is to construe the list of ailments in subsection (c) as imposing no limitations on the definition of serious health condition. "We do not agree . . . that Section 825.114(c) places 'limitations' on Section 825.114(a)'s regulatory tests." American Federation of Labor and Congress of Industrial Organizations, Doc. R329A, at 21. The AFL-CIO noted that Congress did not express a specific intention to exclude "minor illnesses like

colds, earaches, etc.," but rather to exclude from serious health condition only "*short-term conditions* [whatever named] for which treatment and recovery are *very brief*[.]" American Federation of Labor and Congress of Industrial Organizations, Doc. R329A, at 21 n.34 (quoting S. Rep. No. 103-3, at 28). Thus, "subsection (c) [only] clarifies that certain conditions are not serious health conditions for FMLA purposes *unless they meet all of the regulatory measures of subsection (a)*. . . . [T]hese examples do not modify or limit the objective tests set forth in subsection (a)[.]" *Id.* at 23.

These commenters believe section 825.114(c) is merely an illustrative list of conditions that usually would not qualify as serious health conditions, but that the objective test is what matters and what is applied: "Section 825.114(c) of the regulations includes a list of conditions that *ordinarily* would not be considered serious health conditions, such as the common cold, the flu, earaches, or an upset stomach. But the regulation on its face also makes clear that complications can arise to make what is usually a routine health matter much more serious." National Partnership for Women & Families, Doc. 10204A, at 8. "The list of conditions set out in 825.114(c) is useful in setting out what 'ordinarily' would not be a qualifying serious health condition[.] . . . But the operative word in 825.114(c) is 'ordinary.' While these conditions would not 'ordinarily' constitute a serious health condition, there are extraordinary situations where these conditions do just that. In determining what those situations are, all employers have to do . . . is apply 'the *general tests*' . . . that were incorporated into the Department's regulations at 825.114(a)." Association of Professional Flight Attendants, Doc. 10056A, at 2 (citations omitted). "The existing regulations properly define 'serious health condition' by applying objective criteria, including the duration of an illness and the number of treatments, to a worker's individual case, rather than categorically excluding any set of health conditions from FMLA coverage." Faculty & Staff Federation of Community College of Philadelphia, Local 2026 of the American Federation of Teachers, Doc. 10242A, at 3. "As long as a diagnosis meets the 'objective criteria' of subsection (a), then subsection (c) makes it clear that the employee has a 'serious health' condition that qualifies for FMLA leave." American Federation of Labor and Congress of Industrial Organizations, Doc. R329A, at 23.

This view, commenters maintained, is the correct interpretation of the Act: "The statute itself recognizes the need for such flexibility. Congress expressly chose to forego excluding any conditions from the definition of a serious health condition and instead defined a serious health condition according to objective criteria." Women's Employment Rights Clinic, Golden Gate University School of Law, Doc. 10197A, at 5.

Commenters favoring a flexible definition of "serious health condition" generally believed no changes to the regulatory definition are necessary. "In light of [our] experience, we do not believe that there is any need to retreat from the existing regulatory definition of a 'serious health condition.'" Communication Workers of America, Doc. R346A, at 7. "We urge DOL to retain the regulatory language in 29 C.F.R. § 825.114(a) and not to alter those provisions so that conditions like earaches, flus, and similar illnesses can *never* constitute a serious health condition." Women's Employment Rights Clinic, Golden Gate University School of Law, Doc. 10197A, at 5. "We strongly oppose any efforts to restrict or narrow the definition of a serious health condition. The FMLA enables eligible workers to take family or medical leave for serious health conditions, and its regulations establish objective criteria to be used to determine whether conditions qualify for leave. While the regulations set parameters to help define serious health conditions, they do not include an exhaustive list of conditions deemed 'serious' or 'not serious.'" National Partnership for Women & Families, Doc. 10204A, at 7. "Imposing additional requirements on the nature or length of treatment,

or the duration of incapacity, will inevitably exclude, with no basis whatsoever, serious medical conditions from the ambit of the FMLA. The Department should resist making any changes in the definition of serious health condition." American Federation of Labor and Congress of Industrial Organizations, Doc. R329A, at 24. "I strongly oppose any changes to eligibility standards that would impose additional barriers for workers seeking FMLA leave, [and] regulatory revisions that would scale back the definition of 'serious health conditions' covered under the act[.]" Judith Stadman Tucker, The Mothers Movement Online, Doc. 4766, at 1. "It is especially important to me that the definition of 'serious health condition' is not narrowed and that leave remains flexible." An Employee Comment, Doc. 4790, at 1. "Altering the definition [of serious health condition to ten days or more] will leave out numerous serious conditions from pneumonia to appendicitis where a person could be treated and be back on the job under 10 days. We are concerned that altering the definition of a serious health condition will remove much needed job protection for millions of Americans when they need it most." Women's City Club of New York, Doc. 10003A, at 1. "We are strongly opposed to any revisions to the regulation that would narrow the current definition. As the regulation is currently written, it adequately addresses the fact that some conditions (e.g., a head cold) can grow into a serious health condition needing repeated treatment and an absence from work of more than three days." University of Michigan's Center for the Education of Women, Doc. 10194A, at 1. "Imposing categorical changes to the definition of serious health condition, such as increasing the required number of days of incapacity, could have a devastating impact on employees." Service Employees International Union District 1199P, Doc. FL104, at 2.

2. Section 825.114(c) Should be Converted into a Per Se Rule.

Other commenters took essentially the opposite tack: that the congressional intent to exclude minor illnesses (reflected in section 825.114(c)) has been rendered inoperative by the objective test and that the Department should breathe life into subsection (c) by making it more of a per se rule as it was interpreted by Wage and Hour Opinion Letter FMLA-57 (Apr. 7, 1995). Employers were largely in agreement that the regulatory list of ailments has been rendered inoperative: "[T]he limitations in Section 825.114 (c) have been rendered inoperative by the regulatory test in Section 825.114(a) largely by the interpretation of the Department in holding that even minor illnesses can meet the definition of 'serious health condition.'" ORC Worldwide, Doc. 10138A, at 2. "Section 825.114(c) . . . has been rendered effectively inoperative by the regulatory tests set forth in Section 825.114(a). . . . Wage and Hour letter of interpretation of December 1996 expanding 'serious health condition' to include colds and flu further erodes Section 825.114(c)'s potency as a brightline standard for what does not constitute a 'serious health condition.'" U.S. Chamber of Commerce, Doc. 10142, at 9. Some commenters pointed to legislative history from 1990-1991 that shows Congress expressly considered ailments like colds and flus and intended them *not* to be covered:

> The bill we are talking about requires medical certifications of serious illnesses. *We are not talking about a child with a cold. We are not talking about a parent with the flu*. We are talking about a child with cancer who must have radiation treatments. We are talking about an elderly parent recovering from a stroke who needs home care.

Pilchak Cohen & Tice, P.C., Doc. 10155A, at 8 (quoting Senate hearing) (emphasis added). These commenters also cited to similar words spoken by a co-sponsor of the FMLA: "We're talking about a seriously ill child, *not someone who has a cold here*." *Id.* at 8 (quoting statement of Senator Dodd at Senate hearing) (emphasis added).

This group of stakeholders suggested that unless

verifiable medical complications arise, the health conditions in the section 825.114(c) list—such as colds and flus—should *never* qualify as serious health conditions. "[T]he easiest solution to this dilemma is to rescind opinion letter FMLA-86 and carve minor illnesses out of section 825.114(c). This carve-out should include a list of example ailments that do *not* qualify as serious health conditions absent serious complications – in much the same way opinion letter FMLA-57 attempted to do. This list should, at a minimum, include the common cold, the flu, earaches, an upset stomach, minor ulcers, headaches, routine dental or orthodontia problems, and periodontal disease." Porter, Wright, Morris & Arthur LLP, Doc. 10124B, at 2. "[Fairfax County Public Schools] urges the department to return to its earlier interpretations, which emphasize that minor ailments do not qualify as 'serious.' Section 825.114(a) should be modified so that it no longer contradicts section 825.114(c). . . . Additional examples of minor, nonqualifying illnesses would be a useful addition to this subsection." Fairfax County Public Schools, Doc. 10134, at 1. "[Section] 825.114(c) should be clarified in that even where the common cold results in more than three consecutive days of missed work or school, it is not considered incapacitating or otherwise within FMLA's protections." Pilchak Cohen & Tice, P.C., Doc. 10155A, at 9. The Pilchak law firm further reasoned that if a cold or flu became truly incapacitating, "the illness would typically elevate to an ailment that is indeed within the FMLA's contemplation. For example, a common cold should never be an FMLA qualifying condition. However, if it progressed to pneumonia, then this is the type of incapacitating condition within the FMLA's contemplation." *Id.* at 9. "The substantive standards of section 825.114(a) cannot be maintained while giving meaning to section 825.114(c), and the legislative intent that not all conditions are covered cannot be secured unless and until section 825.114(c) is revised to state that, 'Unless complications arise, the common cold, the flu, ear aches, upset stomach, periodontal disease, and similar conditions are not serious health conditions and do not qualify for FMLA leave.' Absent such a revision, the DOL must further define other terms in Section 825.114(c), such as 'treatment.'" Fisher & Phillips LLP, Doc. 10262A, at 5. "[W]hen Congress passed FMLA, its intent was not to cover short-term illnesses where treatment and recovery are brief. By listing examples of conditions that would generally qualify and conditions that would generally be excluded, employers could reduce the use of FMLA leave for minor conditions in which treatment and recovery are brief. The Department should generally exclude from the list of conditions minor conditions such as colds, minor headaches, and flu and provide an improved definition of 'chronic conditions.'" National Business Group on Health, Doc. 10268A, at 2. *See also* Small Business Administration Office of Advocacy, Doc. 10332A, at 4-5 (collecting various proposals to exclude minor illnesses by name).

3. "More Than Three Days" Of Incapacity Should be Changed From Calendar Days to Work Days.

Another suggestion offered to give meaning to subsection (c) was to change the period of incapacity in the objective test from "calendar" days to "business" days. "The current regulations of the Department of Labor allow for protected leave when there is a 'more than three-day incapacity,' this should be defined as a 'more than three-day absence from work.'" Ken Lawrence, Doc. 5228, at 1. "My suggestion is that FMLA leave should have a waiting period, just like a disability plan. . . . Most truly serious health conditions, as defined by the act, last longer than 5 consecutive business days and would warrant the need for the employee to be absent from work." Cheryl Rothenberg, Human Resources Specialist, Doc. 4756, at 1. "[W]e suggest . . . [u]sing work days, rather than calendar days allows the employer to have actual knowledge of the employee's incapacity. . . . [I]t is difficult for the employer to verify employee incapacity over the

weekend or to have knowledge sufficient to know that the employee might be in need of FMLA leave." Foley & Lardner LLP, Doc. 10129A, at 2. "The current . . . 'more than three-day incapacity' . . . should be defined as a 'more than three-day absence from work.'" Bob Kiefer, Baldor Electric, Doc. 5141, at 1. "Redefine a period of incapacity to mean a period of more than five work days or seven consecutive calendar days, instead of the current just more than 3 days of `incapacity, before an employee is qualified for FMLA leave." U.S. Chamber of Commerce, Doc. 10142A, at 9. "We recommend that the definition be changed to 'three *work* days.' Health conditions that occur 'over the weekend' or other time off should . . . not be considered." Lorin Simpson, Manager of Operational Systems & Labor Relations, Utah Transit Authority, Doc. 10249A, at 1. "[W]e request that the Department amend this provision to require an absence for a specified length of 'consecutive scheduled work days' rather than 'consecutive calendar days.' Employers are most likely to be unaware of employees' sicknesses over a weekend so when employees take FMLA leave at the beginning of a workweek, this places a hardship on employers. With this clarification, employers will have advance notice of an employee taking FMLA leave." National Business Group on Health, Doc. 10268A, at 7. "[I]f the three-day standard is maintained, this should be defined as three *scheduled work days*[.]" The Miami Valley Human Resource Association, Doc. 10156A, at 3. "I think it would help if the criteria for incapacity were 5 work days as opposed to three calendar days. . . . [Five] days would be consistent with most short term disability waiting period requirements and with many waiting period time frames for indemnity payments for workers compensation. (Kentucky has a 7 day waiting period prior to the start of workers comp indemnity payments.)" Sharon Pepper, Doc. 5325, at 1.

4. The "Treatment Two Or More Times by a Health Care Provider" Must Occur During the Period of Incapacity.

Many commenters suggested the Department maintain the substantive language of both regulatory sections but explicitly adopt a recent United States Court of Appeals interpretation of the regulations that the "treatment two or more times by a health care provider" in subsection 825.114(a)(2)(i)(A) must occur during the period of "more than three days" incapacity. *See Jones v. Denver Pub. Sch.*, 427 F.3d 1315, 1323 (10th Cir. 2006) ("[U]nder the regulations defining 'continuing treatment by a health care provider,' the '[t]reatment two or more times' described in 825.114(a)(2)(i)(A) must take place during the 'period of incapacity' required by 825.114(a)(2)(i)."). "The Regulations need to be clarified to state that each examination must occur during the period of incapacity that has resulted in an employee's absence from work." South Central Human Resource Management Association, Doc. 10136, at 4. "WMATA proposes that an individual's illness or incapacity require the treatments by a health care provider to occur *during the period of incapacity* (rather than, for example, weeks later) in order to qualify as a serious health condition." Washington Metropolitan Area Transit Authority, Doc. 10147A, at 2. "We urge the Department to . . . require the employee or covered family member to be treated on two or more occasions during the period of incapacity and delete the reference to treatment on one occasion plus a regiment of continuing treatment." The Miami Valley Human Resource Association, Doc. 10156A, at 3.

5. The Period of Incapacity Should be Increased from "More Than Three Days" to a Greater Number of Days.

A number of stakeholders suggested reconciling the two regulatory provisions by simply tightening the requirements for qualifying for a serious health condition under the objective test. The primary suggestion (though by no means the only one) was to increase the minimum number of days an employee needs to be incapacitated to qualify for a serious health condition. Stakeholders suggested

changing the current regulatory threshold of "more than 3 days" to as many as "10 days or more." Miles & Stockbridge, P.C., Doc. FL79, at 2. "I would like to see the definition changed to require someone to miss work for at least a full week before it would qualify as FMLA, requiring 4 full days is at least a start." Ed Carpenter, Human Resources Manager, Tecumseh Power Company, Doc. R123, at 1. "[We] would recommend that the Department expand the more than three-day period in 825.114(a)(2)(i) to more than seven days. This would eliminate most minor illnesses and would also mirror more closely what employers have in their short-term and sick leave plans." ORC Worldwide, Doc. 10138, at 2. "Increasing the time to at least five work days would help in eliminating some . . . minor illnesses from coverage. Thus, the burden on physicians and employers would be reduced without significant impact upon employees with a serious medical situation." American Academy of Family Physicians, Doc. FL25, at 1.

Oxbow Mining suggested that "'serious health condition' should be a period of incapacity of no fewer than ten (10) consecutive work days as defined by an individual's work schedule." Doc. 10104, at 1. The Society for Human Resource Management and the U.S. Chamber of Commerce both proposed that the required incapacity continue for a minimum of five business days or seven consecutive calendar days. *See* Society for Human Resource Management, Doc. 10154A, at 4; U.S. Chamber of Commerce, Doc. 10142A, at 9. "MedStar Health requests that this regulatory test be modified to utilize a *more than five calendar days of incapacity* requirement." MedStar Health Inc., Doc. 10144, at 8. "Incorporate a longer period for the time of incapacitation to five (5) days." Kim Newsom, Personnel Director, Randolph County, North Carolina, Doc. 4764, at 1. *See also* Edison Electric Institute, Doc. 10128A, at 3 ("In order to limit FMLA leave to those conditions that are truly serious in nature, we believe the regulations should require a period of incapacity of more than five calendar days, the length of a typical workweek, before the condition may constitute a serious health condition.").

Other stakeholders suggested ranges in their comments. Foley & Lardner stated the Department should "extend the number of days of incapacity required to qualify as a 'serious health condition[]' . . . from the current 'more than three day' period to five, seven or ten consecutive work days[, which] would exclude most common, non-serious conditions, such as flu, bronchitis, sinus infections and similar common illnesses." Doc. 10129A, at 1. The Proskauer Rose law firm advocated "the extension of the three-day period of incapacity requirement to a five or ten day period of incapacity requirement." Doc. 10182, at 6. "The definition should be revised so that the period of incapacity is at least five consecutive days or the average waiting period provided by employer short-term disability periods." Detroit Medical Center, Doc. 10152A, at 2.