Federal Regulations: Part 825 The Family and Medical Leave Act of 1993

Title 29, Part 825 of the
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U.S. Department of Labor
Employment Standards Administration
Wage and Hour Division

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DEPARTMENT OF LABOR
Wage and Hour Division

29 CFR Part 825
RIN 1215-AA85

The Family and Medical Leave Act of 1993

AGENCY: Wage and Hour Division, Labor.

ACTION: Final rule.

SUMMARY: This document provides the text of final regulations implementing the Family and Medical Leave Act of 1993, Public Law 103-3, 107 Stat. 6 (29 U.S.C. 2601 *et seq.*) (FMLA or Act). FMLA generally requires private sector employers of 50 or more employees, and public agencies, to provide up to 12 workweeks of unpaid, job-protected leave to eligible employees for certain specified family and medical reasons; to maintain eligible employees' pre-existing group health insurance coverage during periods of FMLA leave; and to restore eligible employees to their same or an equivalent position at the conclusion of their FMLA leave.

EFFECTIVE DATE: These rules are effective on April 6, 1995.

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SUPPLEMENTARY INFORMATION:

I. Paperwork Reduction Act.

Recordkeeping requirements contained in these regulations (§ 825.500) have been reviewed and approved for use through July 1996 by the Office of Management and Budget (OMB) and assigned OMB control number 1215–0181 under the Paperwork Reduction Act of 1980 (Pub. L. 96-511). No substantive changes have been made in this final rule which affect the recordkeeping requirements and estimated burdens previously reviewed and approved under OMB control number 1215–0181. Comments received regarding the estimate of public reporting burden for the information collection requirements contained in these regulations are discussed below in connection with § 825.500.

II. Background.

The FMLA was enacted on February 5, 1993. In general, FMLA entitles an "eligible employee" to take up to a total of 12 workweeks of unpaid leave during any 12-month period for the birth of a child and to care for such child, for the placement of a child for adoption or foster care, to care for a spouse or an immediate family member with a serious health condition, or when he or she is unable to work because of a serious health condition. Employers covered by the law are required to maintain any pre-existing group health coverage during the leave period and, once the leave period is concluded, to reinstate the employee to the same or an equivalent job with equivalent employment benefits, pay, and other terms and conditions of employment.

Title I of the Act applies to private sector employers of 50 or more employees, public agencies, and certain Federal employers and entities, such as the U.S. Postal Service and Postal Rate Commission. These regulations, 29 CFR Part 825, implement Title I of the FMLA. Similar leave entitlement provisions in Title II of the FMLA apply to most other Federal civil service employees who are covered by the annual and sick leave system established under 5 U.S.C. Chapter 63, plus certain employees covered by other Federal leave systems. The U.S. Office of Personnel Management (OPM) administers the regulations implementing Title II of the FMLA (*see* 5 CFR Part 630). Title III established a temporary "Commission on Leave," which is to conduct a comprehensive study and produce a report on existing and proposed policies on leave and the costs, benefits, and impact on productivity of such policies. Title IV contains miscellaneous provisions, including rules governing the effect of the Act on more generous leave policies, other laws, and existing employment benefits. Title V extended similar leave provisions to certain employees of the U.S. Senate and the U.S. House of Representatives.

Section 404 of the Act required the Department of Labor to issue regulations to implement Title I and Title IV of FMLA within 120 days of enactment, or by June 5, 1993, with an effective date of August 5, 1993. Title I of FMLA became effective on August 5, 1993, except where a collective bargaining agreement (CBA) was in effect on that date, in which case the provisions took effect on the date the CBA terminated or on February 5, 1994, whichever date occurred earlier.

To obtain public input and assist in the development of FMLA's implementing regulations, the Department published a notice of proposed rulemaking in the Federal Register on March 10, 1993 (58 FR 13394), inviting comments until March 31, 1993, on a variety of questions and issues. A total of 393 comments were received in response to the notice — from employers, trade and professional associations, advocacy organizations, labor unions, State and local governments, law firms and employee benefit firms, academic institutions, financial institutions, medical institutions, governments, Members of Congress, and others.

After consideration of the comments received, the Department issued an interim final rule on June 4, 1993 (58 FR 31794), which went into effect on August 5, 1993, and which invited further public comment on FMLA's implementing rules until September 3, 1993. On August 30, 1993, the Department further extended the public comment period until December 3, 1993 (58 FR 45433). The Department received more than 900 comments on the interim final rules during the extended comment period from advocacy groups and associations, Members of Congress, employers, union organizations, governmental entities and associations, law firms, management consultants, marriage and family counselors and therapists, clinical social workers, property management companies, temporary help and employee leasing companies, professional and trade associations, universities, and individuals. In addition to the substantive comments discussed below, many commenters submitted minor editorial suggestions, some of which were adopted and some were not. Finally, a number of other minor editorial changes have been made to better organize and simplify the regulatory text.

On December 29, 1994, a meeting was held at OMB with representatives of Consolidated Edison Company of New York pursuant to E.O. 12866.

The Department would like to point out that it has prepared a lengthy preamble to accompany these regulations in an attempt to be fully responsive to the numerous comments received. The Department would welcome additional comments regarding employers' experience with the implementation of the FMLA over the course of the next year or so. Such comments will be reviewed together with the results of the comprehensive study on existing and proposed leave policies to be conducted by the Commission on Leave to determine whether further revisions to these regulations will be appropriate in the future.

Summary of Major Comments

I. Subpart A, §§ 825.100–825.118

Covered Employers (§ 825.104)

Under FMLA, any employer engaged in commerce or in an industry or activity affecting commerce is covered if 50 or more employees are employed in at least 20 or more calendar workweeks in the current or preceding calendar year. The Women's Legal Defense Fund and the Food & Allied Service Trades expressed concern that employers may manipulate workforce levels to avoid the Act's leave requirements. In this connection, they suggested that any intentional reduction to 49 or fewer employees after an employee request for FMLA leave should constitute unlawful interference with FMLA rights, and, as provided in regulations by the State of Oregon under its Family Leave Act, deemed a violation of the Act.

Section 825.220 discusses the prohibited acts and anti-discrimination provisions of the Act, including violative employer practices that attempt to interfere with an employee's exercise of rights under the Act. It is the Department's view that manipulation of workforce levels by employers covered by FMLA in an effort to deny employees' eligibility for leave is a violation of the Act's requirements, and this has been clarified in § 825.220.

Two commenters (Alabama Power Company and DLH Industries, Inc.) objected to the statement in § 825.104 that individuals such as corporate officers "acting in the interest of an employer" are individually liable for any violations of the Act. They contend that this provision could frustrate advancement to managerial positions and unnecessarily increase costs for insurance and bonding. The California Department of Fair Employment and Housing questioned whether managers or supervisors can be held personally liable under FMLA.

FMLA's definition of "employer" is the same as the Fair Labor Standards Act (FLSA), 29 U.S.C. 203(d), insofar as it includes any person who acts directly or indirectly in the interest of an employer to any of the employer's employees. Under established FLSA case law, corporate officers, managers and supervisors acting in the interest of an

employer can be held individually liable for violations of the law. *See, e.g.,* Reich v. Circle C Investments. Inc., 998 F.2d 324 (5th Cir. 1993); Dole v. Elliot Travel & Tours, Inc., 942 F.2d 962 (6th Cir. 1991).

The Chamber of Commerce of the USA expressed concern about the impact of the "employer" definition on various business arrangements, *e.g.,* leased employees, franchises, and other loosely-related business operations. The National Automobile Dealers Association stated that additional guidance on the application of the "integrated employer" test would benefit the small business community in particular.

The "integrated employer" test is not a new concept created solely for purposes of FMLA. It is based on established case law, as was explained in the preamble of the Interim Final Rule, arising under Title VII of the Civil Rights Act of 1964 and the Labor Management Relations Act. As FMLA's legislative history states, the definition of "employer" parallels Title VII's language defining a covered employer and is intended to receive the same interpretation. Under Title VII and other employment-related legislation, including the LMRA, when determining whether to treat separate entities as a single employer, individual determinations are highly fact-specific and are based on whether there is common management, an interrelation between operations, centralized control of labor relations, and the degree of common ownership/financial control. They are not determined by any single criterion, nor do all factors need to be present; rather, the entire relationship is viewed as a whole. Because it is a fact-specific question in each case, further detailed guidance cannot be provided in the regulations.

The Society for Human Resource Management questioned whether the Act applied to employers in Puerto Rico, or to such entities as the Resolution Trust Corporation or to Indian Tribes. FMLA's coverage extends to any State of the United States, the District of Columbia, and to any territory or possession of the United States (§ 101(3) of FMLA defines the term "State" to have the same meaning as defined in § 3(c) of the Fair Labor Standards Act). Employees of U.S. firms stationed at worksites outside the United States, its territories, or possessions are not protected by FMLA, nor are such employees counted for purposes of determining employer coverage or employee "eligibility" with respect to worksites inside the United States. This point has been clarified in § 825.105 of the regulations. The Resolution Trust Corporation can be a covered employer under Title I of FMLA as a "successor in interest" of a covered employer when it assumes control over a failing thrift as part of the resolution process. Because FMLA is a statute of broad general applicability, which applies to both the public and private sectors, and there is nothing in either the statute or its legislative history which provides an exemption for Indian tribes, it is the Department's view that Indian tribes may be covered by the legislation where the statutory prerequisites are met, as "a general statute in terms applying to all persons includes Indians and their property interests." FPC v. Tuscarora Indian Nation, 362 U.S. 99, 116 (1960). The rule in Tuscarora contains exceptions for laws that (1) affect exclusive rights of self-governance in purely intramural matters; (2) abrogate rights guaranteed in Indian treaties; or (3) provide proof by legislative history or otherwise that Congress intended the law not to apply to Indians. It is the Department's position that these exceptions do not apply to the FMLA, consistent with the reasoning of the Ninth Circuit in Donovan v. Coeur d'Alene Tribal Farm, 751 F.2d 1113, 1116 (1985). But see EEOC v. Cherokee Nation, 871 F.2d 937 (1989), in which the Tenth Circuit held that the Age Discrimination in Employment Act does not apply to Indians because its enforcement would interfere with the tribe's right of self-government.

50 Employee/20 Workweek Threshold (§ 825.105)

Private sector employers must employ 50 or more employees each working day during 20 or more calendar weeks in the current or preceding calendar year to be covered by FMLA. Nine commenters addressed the "50 or more employees" threshold test for coverage. The Women's Legal Defense Fund and the International Ladies' Garment Worker's Union objected to the exclusion of workers on temporary layoff from the count. They

argued that temporary workers with a reasonable expectation of return to active employment are counted as employees under the Worker Adjustment and Retraining Notification (WARN) Act; that the test for evaluating who is an employee should be that of a "continuing employment relationship" and not the actual performance of work during a given time period; and that only employees on an indefinite or long-term layoff should be excluded from the count.

FMLA has significantly different statutory coverage provisions and serves considerably different objectives than those of WARN. The FMLA regulations attempt to define the size of an employer's workforce count for leave purposes, and uses a "continuing employment relationship" principle. There is no continuing employee–employer relationship during a layoff, as evidenced by the fact that employees on layoff are entitled to unemployment benefits, and laid-off employees are not maintained on the payroll during such periods. Furthermore, being on unpaid leave is not the same as being laid off. Moreover, under FMLA, if, while on FMLA leave, an employee would have been laid off, and the employment relationship terminated, the employee's rights to continued leave and job reinstatement would not extend beyond the date the employee would have been laid off. While the regulations do not require actual performance of work during a given time period for an employee to be counted as having a continuing employment relationship (*e.g.,* employees on employer-approved leaves of absence are still included where there is a reasonable expectation of return to work), based on FMLA's legislative history, the regulations necessarily exclude all employees who are on layoff, and the employment relationship terminated, whether the layoff is temporary, indefinite or long-term.

Southern Electric International, Inc. felt that the treatment of part-time workers on the same basis as full-time workers unnecessarily broadened coverage because employer obligations under the Act, particularly employers with large numbers of part-time workers, were based on counting non-eligible employees. Southern Electric argued that part-time workers should be counted, if at all, only on a pro-rata basis, *i.e.,* two part-time workers working 20 hours a week would equal one equivalent full-time employee. The United Paperworkers International Union, on the other hand, supported counting part-time workers as consistent with the language of the Act and with Title VII of the Civil Rights Act of 1964. The union also felt that employers should be required to notify employees and their union representatives when the conditions for coverage are no longer met.

FMLA's legislative history clearly states Congressional intent to include part-time employees when counting the size of the employer's workforce. The committee reports state that part-time employees and employees on leaves of absence would be counted as "employed for each working day" so long as they are on the payroll for each day of the workweek. And, similarly, in aggregating the number of employees at the worksite and within 75 miles for determining employee eligibility, the legislative history states that all of the employees of the employer, not just eligible employees, are to be counted. Accordingly, part-time employees must be counted the same as full-time employees under FMLA.

With respect to adding a requirement that employers notify employees and their representatives when they cease to be covered by the Act, the Department believes that such a requirement would be overly burdensome. Questions of employer coverage and employee eligibility are fact-specific and may be subject to frequent change in some employment situations. They should be resolved as necessary when an employee requests leave.

Southern Electric International, Inc. also noted that the phrase "reasonable expectation that the employee will later return to work" is confusing as it relates to employees on long-term disability because such employees rarely ever return to work for the same employer. The commenter recommended that long-term disabled employees be excluded from the 50-employee count. The National Restaurant Association also maintained that the "reasonable expectation" requirement should be deleted because it had no basis in the Act or its legislative history, arguing further that the term was surplusage in that an employee is either on the payroll or is not on the payroll.

An employee who is *permanently* disabled from work would not reasonably be expected to return to work and, therefore, may be

excluded from the employee count. The Department continues to believe, however, that the employer's workforce count should be based on whether there is a continuing employment relationship between the employer and each of its employees. A "reasonable expectation" that an employee on leave will later return to work is an appropriate standard that contributes to a better understanding of that relationship for purposes of FMLA, and it is retained in the regulations.

Additionally, two public commenters (Association of Washington Cities and the California Department of Fair Employment and Housing) suggested that the phrase "on the payroll" needed clarification as applied to public employers. They noted practices of local governments to hire seasonal and temporary employees, particularly in public works and recreation, who mayor may not be rehired the following summer or after completion of short term projects; or to use volunteer firefighters and volunteer police reserve officers who receive only nominal stipends for service. Because public agencies are covered "employers" under the Act regardless of the number of employees employed (*see* § 825.108(a)), these comments more appropriately raise questions related to "employee eligibility" and are addressed in the discussion of §§ 825.110 and 825.111.

Joint Employment (§ 825.106)

Administaff, Abel Temps, National Staff Leasing Association, National Association of Temporary Services, and National Staff Network argued that temporary help and leasing agencies should not be held responsible, as the primary employer, for giving the required FMLA notices, providing leave, maintaining health benefits, and job restoration. In particular, they stressed the unique nature of their business and the relationship with client employers, who, rather than the temporary help or leasing agency, have control over worksites and jobs. They argue generally that client employers, as secondary employers, should be responsible for job restoration and other requirements of the Act for all their own employees, including leased or temporary employees. In the alternative, several of these commenters urged adoption of a "head of the line" standard, which would limit job restoration for temporary or leased employees where the client employer discontinues the services of the temporary or leasing agency or the services of the returning temporary/leased employee, to priority consideration by the temporary or leasing agency for possible placement in assignments with other client employers for which the employee is qualified. Several of these commenters also proposed differing criteria for situations where temporary or leasing agencies contract with covered and non-covered client employers.

The Department agrees that joint employment relationships do present special compliance concerns for temporary help and leasing agencies in that the ease with which they may be able to meet their statutory obligations under FMLA may depend largely on the nature of the relationship they have established with their client-employers. Our analysis of the statute and its legislative history in the context of the industry comments submitted, however, revealed no viable alternatives that could be implemented by regulation that would not also have the unacceptable result of depriving eligible employees of their statutory rights to job reinstatement at the conclusion of FMLA leave. As the legislative history clearly states, the right to be restored upon return from leave to the previous position or to an equivalent position with equivalent employment benefits, pay and other terms and conditions of employment is *central* to the entitlement provided by FMLA. Furthermore, it is the employment agency which is responsible for the employee's pay and benefits, and is in the best position to provide the rights and benefits of the Act.

FMLA does not entitle a restored employee to any right, benefit, or position of employment other than any right, benefit, or position which the employee would have held or been entitled to had the employee not taken leave. This means, for example, that if, but for being on leave, an employee would have been laid off, the employee's right to reinstatement is whatever it would have been had the employee not been on leave when the layoff occurred. Thus, if a client employer of a temporary help agency discontinued the services of the temporary help agency altogether, or discontinued contracting for the particular

services that were being furnished by the temporary employee who took FMLA leave, during the employee's FMLA leave period, following a "head of the line" approach for giving the returning employee priority consideration for possible placement in assignments with other client employers for which the employee is qualified would appear to be entirely consistent with the intent of the FMLA in those circumstances. As provided in § 825.216, an employer must show that an employee would not otherwise have been employed in order to deny restoration to employment in the same or an equivalent position. Failure to promptly restore a returning employee to employment at the conclusion of the leave where the client employer continues to utilize the same services as were previously furnished by the employee who took leave would be a violation of FMLA's job restoration requirements.

Two commenters (William M. Mercer, Inc. and Chamber of Commerce of the USA) noted that subsection (f) could be construed as requiring the secondary or client employer to restore the jobs of temporary or leased employees, which is disruptive to business and the contractual relationship between temporary or leasing agencies and the client employers. They felt that job restoration obligations should be the responsibility of the temporary or leasing agency (the primary employer).

The primary employer (temporary placement firm or leasing agency) is responsible for furnishing eligible employees with all FMLA-required notices, providing FMLA leave, maintaining health benefits during FMLA leave, and restoring employees to employment upon return from leave. In addition, although job restoration is the responsibility of the primary employer, the purposes of the Act would be thwarted if the secondary employer is able to prevent an employee from returning to employment. Accordingly, the regulations are revised to provide that the secondary employer is responsible for accepting an employee returning from leave in place of any replacement employee. Furthermore, the secondary employer (client employer) must observe FMLA's prohibitions in § 105(a)(1), including the prohibition against interfering with, restraining, or denying the exercise of or attempt to exercise any rights provided under the FMLA. It would be an unlawful practice, in the Department's view, if a secondary employer interfered with or attempted to restrain efforts by the primary (temporary help) employer to restore an employee who was returning from FMLA leave to his or her previous position of employment with the secondary (client) employer (where the primary (temporary help) employer is still furnishing the same services to the secondary (client) employer). Because the secondary employer is acting in the interest of the primary employer within the meaning of § 101(4)(A)(ii)(I) of the Act, the secondary employer has these responsibilities, regardless of the number of employees employed.

The National Association of Plumbing-Heating-Cooling Contractors noted a potential for misunderstandings of the "joint employment" criteria and the Chamber of Commerce of the USA, for similar reasons, urged that DOL reconsider the requirement in subsection (d) that jointly-employed employees are counted by both employers in determining employer coverage and employee eligibility. This requirement, according to the Chamber, was of particular concern to small businesses. To minimize the risk of unintentional violations of the Act, the Chamber recommended against a requirement to count employees jointly for purposes of determining eligibility status, and urged adoption of "good faith" defense provisions for employers confronted with joint employment quandaries.

In joint employment relationships, an individual employee's eligibility to take FMLA leave is determined from counting the employees employed by *that* employee's *primary* employer (*i.e.,* the one responsible for granting FMLA leave), and would exclude any "permanent" employees "primarily employed" by any secondary (joint) employer of that same employee. Thus, in practical effect, the employee is only counted once for purposes of determining his or her own individual eligibility to take FMLA leave. In the example of 15 employees from a temporary help agency working with 40 "permanent" employees employed by an employer, the eligibility of anyone of the 15 temporary help agency employees to take FMLA leave from their *primary*

employer (the temporary help agency) is determined by counting only the temporary help agency employees assigned (outplaced) from or working at the temporary help agency's "single site of employment" (*i.e.*, most likely the main placement or corporate office). Excluded from this count is any "permanent" employee of any of the temporary help agency's client employers. On the other hand, the client employer with 40 "permanent" employees is responsible for granting FMLA leave to its "permanent" employees because it employs a total of more than 50 employees when including the jointly-employed employees, but its obligation to grant FMLA leave extends to only its 40 "permanent" employees. Notwithstanding the complexities that arise in administering the law in joint employment contexts, there is no authority to adopt by regulation any "good faith" defense provisions that would take away employees' statutory rights.

William M. Mercer, Inc. noted that the requirement in subsection (d) relating to counting jointly-employed employees for coverage and eligibility purposes "whether or not maintained on a payroll" differed from § 825.111(c), which limits the employee count at a worksite to employees maintained on the payroll. The commenter urged clarification of "joint employment" principles in the case of worksite determinations and, also, in determinations of whether or not 1,250 hours have been worked for eligibility (§ 825.110(d)).

As noted above, § 825.106 provides particularized guidance that addresses the special circumstances of joint employment. Because in most joint employment situations there may be only one payroll, maintained by only the primary employer, the guidance in §§ 825.105 and 825.111, standing alone, would not be sufficient to address joint employment. Section 825.106 is revised to further clarify application, as the employee is maintained on only one payroll. In addition, in order to clarify and prevent misunderstandings, § 825.111 is revised to add similar guidance from § 825.106 on joint employment "worksite" determinations for purposes of determining employee eligibility. With respect to counting the hours worked by jointly-employed employees to determine if the 1,250 hour threshold is met, the calculation is relevant only with respect to the *primary* employer of the employee at the time the employee requests FMLA leave.

The discussion of employment relationship in general has been removed from this section of the regulations and a more general discussion has been included instead in § 825.105.

Successor in Interest (§ 825.107)

The Equal Employment Opportunity Commission (EEOC) pointed out that while the factors for determining "successor in interest" are based in part on Title VII precedent, no reference is made in this section to whether or not the successor had "notice" of pending complaints against a predecessor employer. The EEOC recommended clarifying how "notice" affects the liability of a successor employer or a statement explaining that the FMLA rule departs from established Title VII precedent in this respect.

As explained in the preamble to the Interim Final Rule, the list of factors is derived from Title VII and Vietnam Era Veterans' Readjustment Act of 1974 case law. The Department agrees with the court in Horton v. Georgia-Pacific Corp., 114 Lab. Cas. (CCH) par. 12,060 (B.D. Mich. 1990), that notice should not be considered to continue the predecessor's obligation to employees who are on leave, or for determining coverage and eligibility of employees continuing in employment. The Department believes, however, that notice may be relevant in determining a successor employer's liability for violations of the predecessor, and the rule is clarified accordingly.

The Chamber of Commerce of the USA indicated a need to clarify how a predecessor and successor employer can allocate FMLA liability and responsibility. In this connection, the commenter recommended adoption of criteria provided by 20 CFR § 639.4 of the Worker Adjustment and Retraining Notification Act regulations.

The WARN Act regulations, at § 639.4(c), discuss the effect of a sale of a business between a seller and a buyer and the continuing employer obligations, under WARN, for giving notice to employees of plans to carry out a plant closing or mass layoff. While the Department believes it is appropriate for a

seller of a business to inform a potential buyer of any eligible employees who are either to be out on FMLA leave at the time the business is sold (or have announced to the seller plans to take FMLA leave soon after the sale takes place), so that the buyer is aware of its "successor in interest" obligations under FMLA to maintain health benefits during the FMLA leave periods and to restore the employees at the conclusion of their FMLA leave, there is no "allocation" of responsibility under FMLA based on whether the seller and buyer have exchanged such information. The regulations are revised to make clear that an eligible employee of a covered predecessor employer who commences FMLA leave before the business is sold to a "successor in interest" employer is entitled under FMLA to be restored to employment by the successor employer without limitation.

The Employers Association of New Jersey questioned whether a successor employer had to meet coverage requirements (§ 825.104) in order to be considered a "successor in interest." FMLA's statutory definition of "employer" (§ 101(4)) includes "any successor in interest of an employer," which we interpret to include successor employers that employ fewer than 50 employees after the succession of interest. FMLA's obligations in such cases, however, are limited to completing the cycle of any FMLA leave requests initiated by employees of the *predecessor* employer, where the employees met the eligibility criteria at the time the leave was requested.

The Contract Services Association of America posed a series of questions related to FMLA's "successor in interest" obligations as applied to service contractors performing on Federal service contracts covered by the McNamara-O'Hara Service Contract Act (SCA). In the example posed, Employer A has lost a service contract (through recompetition) to Employer B. Employer B has been determined to be a "successor in interest." In its bid proposal, Employer B did not include several positions which Employer A employed on the predecessor contract. One of the eliminated positions was occupied by an employee of Employer A who was on FMLA leave at the time of the succession of the contract to Employer B. The Association questioned whether Employer A would have to continue to maintain the employee on FMLA leave and maintain his or her group health benefits, or whether the employee could be terminated at the time of contract turnover, treating it as a layoff and a lack of work. Employer A would not have to maintain this employee on FMLA leave or maintain health benefits if it can demonstrate that the employee would not otherwise have been employed as a result of the loss of the contract. This could be demonstrated, for example, if other, similarly situated employees of Employer A did not otherwise continue their employment with Employer A on other contract work or in some other capacity. Because Employer B had no comparable position in its bid proposal, Employer B would not be obligated to hire this employee either.

The Association also asked if an employee on an SCA-covered contract were on FMLA leave at the time of contract transition to another contractor, would a "successor in interest" contractor be required to hire the employee under the job protection provisions of FMLA? The answer is "yes," if the employee's position continues to exist under the successor contract (as distinguished from the facts in the previous example, above). The successor contractor would not have a right to "non-select" the employee in this example at the end of the employee's FMLA leave. The outgoing contractor would *not* be required to maintain this employee's group health plan benefits for the remaining period of FMLA leave extending beyond the contract changeover, but the "successor in interest" contractor would be required to do so, and to restore the employee to the same or an equivalent position.

With respect to the remaining questions posed by the Association, it would be helpful for a predecessor contractor to furnish a list to the successor in interest of the predecessor's employees who are on FMLA leave when contractors change, and a list of benefits being provided (so they may be maintained and/or restored at the same levels). If lists are not furnished, the successor in interest should attempt to determine its obligations without waiting for the employees on FMLA leave to apply for employment with the successor.

Public Agency (§ 825.108)

The State of Nevada personnel department objected to the designation of a State as a single employer, suggesting that certain individual "public agencies" of a State should be treated as separate employers based on criteria set forth in an administrative letter ruling issued by the Wage-Hour Administrator on October 10, 1985.

Treating a State as a single employer under FMLA is a result required by the statute. FMLA defines the term "employer" to include any "public agency" as defined in § 3(x) of the Fair Labor Standards Act, which defines "public agency" to include the government of a State or political subdivision of a State, and any agency of a State or a political subdivision of a State. The 1985 letter ruling cited by the commenter was issued before the enactment of the 1985 FLSA Amendments, under which the Congress included specially-tailored provisions for employees of public agencies to address special situations where they volunteer their services under certain conditions, and perform work in fire protection, law enforcement, or related activities on special details when hired for such work by a "separate and independent employer." Special rules to address FLSA's particular statutory provisions are found in 29 CFR Part 553; § 553.102 (b) provides that the determination of whether two agencies of the same State government constitute the same public agency can only be made on a case-by-case basis, but one factor supporting the conclusion that they are separate is whether they are treated separately for statistical purposes in the Census of Governments issued by the Bureau of the Census, U.S. Department of Commerce. Section 825.108(c) of the FMLA rules similarly provides for following the Census of Governments publication in resolving particular questions. FLSA's special rules for defining a public agency employer for other unique purposes mandated under FLSA are not analogous to FMLA leave situations, and we do not believe that any similar special rules are required under FMLA.

The Office of Legislative Auditor, State of Louisiana questioned the status of an agency of a State's legislative branch under FMLA, where the agency is not subject to the State's civil service regulations and is otherwise considered not covered under the FLSA.

Section 101(3) of the FMLA defines the term "employee" to have the same meaning as defined in § 3(e) of the Fair Labor Standards Act. Section 3(e)(2)(C) of the FLSA excludes from this definition of "employee" individuals who are not subject to the civil service laws of the State and who are employed in the legislative branch of that State (other than the legislative library). Thus, employees excluded from the FLSA statutory definition of "employee" would similarly be excluded from coverage under the FMLA.

The Government Finance Officers Association felt that a public employer, as a single employer, should not be required to notify all of its employees about FMLA entitlements because many employees may misunderstand that they are not eligible for FMLA leave.

FMLA imposes a statutory obligation on all covered employers to post the notice to employees informing them of FMLA's provisions, regardless of whether the employer has any "eligible" employees. Public agencies are covered "employers" without regard to the number of employees employed. There is no authorized exception that relieves covered employers from this notice requirement when they have no "eligible" employees. The DOL poster, however, includes the employee eligibility criteria and makes it apparent that FMLA' s entitlement to leave applies only to "eligible" employees. The individualized, specific notice to employees required to be furnished in response to FMLA leave requests applies only to FMLA-"eligible" employees.

Section 825.108(b) states that the U.S. Bureau of the Census' Census of Governments will be used to resolve questions about whether a public entity is distinguishable from another public agency. In this regard, the Office of the Treasurer, State of Ohio asked that more information be provided on how the census information can be accessed.

The Census Bureau takes a census of governments at five-year intervals. Volume I, Government Organization, contains the official count of the number of State and local governments. It includes tabulations of governments by State, type of government, size, and county location. Also produced is a universe list of governmental units, classified according to type of government. Copies of Volume 1 and subsequent volumes are avail-

able from the Superintendent of Documents, U.S. Government Printing Office, Washington, D.C. 20402; District Offices of the U.S. Department of Commerce; and Regional and selective depository libraries. For a list of all depository libraries, write to the U.S. Government Printing Office, 710 N. Capitol Street, NW, Washington, D.C. 20402.

Federal Agency Coverage (§ 825.109)

The Farm Credit Administration, the Chesapeake Farm Credit, and a number of other farm credit system institutions argued that system institutions should not be listed in this section dealing with Federal agencies, citing express legislation that defederalized system institution employees.

These commenters are correct. This section of the regulations has been revised to delete the former reference to the Farm Credit Administration. These employees will be treated in the same manner as employees in the private sector when determining employer coverage and employee eligibility under FMLA.

Section 825.109(b) further states that employees of the Library of Congress are covered by Title I provisions of FMLA, rather than Title II which is administered by the Office of Personnel Management (OPM). A review of applicable legislative authority indicates that employees of the Library of Congress should be covered by Title II of FMLA within the jurisdiction of OPM. The regulations have been revised to delete the Library of Congress from coverage under Title I.

12 Months and 1,250 Hours of Service (§ 825.110)

To be eligible for FMLA leave, an employee must have been employed for at least 12 months with the employer, and the 12 months need not be consecutive. Several commenters stated that determining past employment was burdensome, too indefinite, and urged various limitations on a 12-month coverage test. The Burroughs Wellcome Company suggested excluding any employment experience prior to an employee resignation or employer-initiated termination that occurred more than two years before the current date of reemployment. Another commenter, the State of Kansas Department of Administration, suggested limiting the 12 months of service to the period immediately preceding the commencement of leave. The ERISA Industry Committee argued that the 12 months should be either consecutive months, or 12 months of service as computed under bridging rules applicable to employer's pension plans.

Many employers require prospective employees to submit applications for employment which disclose employees' previous employment histories. Thus, the information regarding previous employment with an employer should be readily available and may be confirmed by the employer's records if a question arises. Further, there is no basis under the statute or its legislative history to adopt these suggestions.

A number of commenters urged clarifications with respect to the determination of 1,250 hours of service during the 12-month period preceding the commencement of leave. The Equal Rights Advocates argued that any FMLA leave taken in the previous 12 months should be included in the calculation of the requisite 1,250 hours of work. The State of New York Metropolitan Transportation Authority stated that it was not clear whether time paid but not worked (*i.e.*, vacation and personal days) should be counted and urged limiting the determination to only actual hours worked. The Edison Electric Institute made the same observation but noted that the standard in § 825.105 for determining coverage — 50-employee test — is based on employees appearing on the employer's payroll. In addition to vacation time, the Society for Human Resource Management asked whether overtime hours worked are to be included in the calculation. The Air Line Pilots Association also urged inclusion of all compensated hours (vacation, holiday, illness, incapacity, lay-off, jury duty, military duty, official company business, leave of absence or official union business) in determining the 1,250 hours of service. Finally, the Tennessee Association of Business requested clarification of the status of employees who are temporarily laid off for 2 or 3 weeks because of a plant shutdown.

The eligibility criteria are set forth in § 101(2) of FMLA as a statutory definition of "eligible employee." One component of the definition (§ 101(2)(C)) states that for pur-

poses of determining whether an employee meets the hours of service requirement, the legal standards established under § 7 of the FLSA shall apply. The legislative history explains that the minimum hours of service requirement is meant to be construed in a manner consistent with the legal principles established for determining hours of work for payment of overtime compensation under § 7 of the FLSA and regulations under that act, citing specifically 29 CFR Part 785 (Hours Worked [Under the FLSA]) and referencing 29 CFR 778.103 (which in turn states that the principles for determining what hours are hours worked within the meaning of the FLSA are discussed in 29 CFR Part 785). "Hours worked" does not include time paid but not "worked" (paid vacation, personal or sick leave, holidays), nor does it include unpaid leave (of any kind) or periods of layoff. Whether the hours are compensated or uncompensated is not determinative for purposes of FMLA's 1,250-hours-of-service test. The determining factor in all cases is whether the time constitutes hours of work under FLSA. Because overtime hours worked are "hours worked" within the meaning of FLSA, they are included.

The National Restaurant Association noted that the determination of the 1,250 hour/12 months test must be made as of the date leave commences; whereas the 50 employee within 75 miles test is to be determined when the employee requests FMLA leave. The Association argued that the same date should be used for determining all eligibility requirements. The USA Chamber of Commerce argued that § 825.110(d) as written forces an employer to avoid providing an ineligible employee with an estimated date of eligibility, a potential benefit for both employee and employer, because the employer that makes such an estimate is precluded from later challenging the employee's eligibility. This, according to the Chamber, ignores the very real possibility that an employee may reach the projected date and still not be eligible.

As explained in the preamble of the Interim Final Rule, the purpose and structure of FMLA's notice provisions intentionally encourage as much advance notice of an employee's need for leave as possible, to enable both the employer to plan for the absence and the employee to make necessary arrangements for the leave. Both parties are served by making this determination when the employee requests leave. Tying the worksite employee-count to the date leave commences as suggested could create the anomalous result of both the employee and employer planning for the leave, only to have it denied at the last moment before it starts if fewer than 50 employees are employed within 75 miles of the worksite at that time. This would entirely defeat the notice and planning aspects that are so integral and indispensable to the FMLA leave process. Accordingly, no changes have been made in response to the comments received from the National Restaurant Association and the Chamber of Commerce of the USA.

Several commenters (Nationsbank Corporation and South Coast Air Quality Management District) indicated that the terms "employee" and "eligible employee" required clarification regarding independent contractors, contract employees, and consultants. The Dow Chemical Company suggested that students working in co-op programs approved by their schools should not be deemed an employee eligible for FMLA benefits.

FMLA's definitions of "employ" and "employee" are "borrowed" from the FLSA. If a particular arrangement in fact constitutes an employee-employer relationship within the meaning of the FLSA (and case law thereunder) as contemplated by the statutory definitions, and the "employee" satisfies FMLA's eligibility criteria, the employee is entitled to FMLA's benefits. A true independent contractor relationship within the meaning of the FLSA would not constitute an employee-employer relationship. Thus, an independent consultant operating his or her own business ordinarily would not be considered an "employee" of the business that hires the consultant's services. Employees hired for a specified term to perform services under contract ("contract employees") would ordinarily be subject to FMLA if they otherwise meet FMLA's 12 months and 1,250-hours-of-service (with the "employer") eligibility criteria. It has been our experience that such persons rarely qualify as independent con-

tractors under the FLSA, and, therefore, they would rarely qualify as independent contractors under FMLA. There would be no authority under the statute to exclude students working in co-op programs approved by their schools if the arrangement otherwise meets the criteria for an employee-employer relationship. Many such students, however, may not be "eligible" under FMLA if they have not worked for the employer for at least 12 months and for at least 1,250 hours.

With respect to the 1,250 hours of service test, the California Rural Legal Assistance, Inc. expressed concern about situations where employers fail to keep required records of hours worked, and urged a reference to the "Mt. Clemens Pottery rule" as being applicable to such situations.

This comment refers to the U.S. Supreme Court's decision in Anderson v. Mt. Clemens Pottery Co., 328 U.S. 680 (1946), which provided a lighter burden of proof for employees where employers failed to maintain required records. The regulations already provide that eligibility is presumed for FLSA-exempt employees who have worked at least 12 months. The regulations have been revised in this section to provide the same presumption where FMLA-covered employers with 50 or more employees fail to keep records required for purposes of establishing employee eligibility for FMLA leave.

The American Federation of Teachers and the National Education Association expressed concern that employers may intentionally reduce or otherwise manipulate an employee's hours to avoid FMLA eligibility, and urged that such conduct be treated as a violation of the Act. This matter will be addressed in § 825.220(b) (the "prohibited acts" section of the regulations) by providing that FMLA-covered employers that intentionally limit or manipulate employees' work schedules to foreclose their eligibility for FMLA leave will be held in violation of the provisions of FMLA and these regulations which prohibit interfering with employees' exercise of rights.

The Air Line Pilots Association (ALPA) requested clarification of the discussion in the preamble about determining 1,250 hours of service, specifically the statement that on-call time includes ". . .hours of service where it meets the FLSA hours-worked requirements (29 CFR Part 785.17), as would ground time for flight crews." According to the ALPA, the term "ground time" requires clarification as applied in the airline industry, which typically distinguishes between "flight" time (time an airplane is actually in the air from take-off to landing), "duty" time (hours a pilot is on duty beginning with check-in for departure until returning to the domicile) and "reserve" time (designated on-call period when pilot must be available to be reached by phone, and must be able to report to the airport within one to three hours' notice). Pilots typically receive different rates of pay for the reserve time, the flight time and an hourly per-diem for all duty time. The commenter argues that all hours credited for such pay should be credited for hours of service.

Crediting the time attributable to all such pay would exceed the number of actual hours worked within the meaning of the FLSA and thus be contrary to FMLA' s provisions on crediting hours of service based on FLSA "hours worked" principles. Hours of service would normally include all "duty" time. "Reserve" time would not be included unless employees have further restrictions on their time so that they would be unable to use the time for their own purposes.

The International Brotherhood of Teamsters argued that the 1,250 hours of service test as currently defined effectively precludes coverage of airline crew members under FMLA. While § 825.110(c) applies FLSA principles for determining hours of service, the commenter notes that section 13(b) of the FLSA excludes any employee of a carrier by air subject to the provisions of Title II of the Railway Labor Act from the Act's provisions in section 207. According to the commenter, airline crew members' work schedules and pay formulas are predicated on "flight hours," — generally amounting to one-third of the hours of employees covered by the FLSA — and flight crew members are prohibited by regulation from exceeding 1,000 flight hours in a 12-month period. The commenter contends that it is improper to compare flight crew "hours of service" with the "hours of service" performed by FLSA-covered employees and that airline crew members should be specifically exempted from the minimum hours of service requirement.

Section 13(b) of the FLSA provides exemptions from FLSA's requirement to pay overtime compensation in certain cases; they are not exemptions from the rules on what constitutes "hours worked" within the meaning of the FLSA. The fact that a particular class of employee is exempt from overtime under FLSA § 13(b) has no impact on the applicability of FLSA's "hours worked" rules under § 101(2)(C) of the FMLA. Because the eligibility criteria are statutory, DOL lacks the authority to exempt airline crew members from the minimum hours of service criteria. As pointed out above, however, other "duty" time would normally be hours of service, in addition to the flight time.

50 Employees within 75 Miles (§ 825.111)

One of the tests for employee eligibility for FMLA leave requires that there be 50 employees employed by the employer within 75 miles of the worksite. This section described how "worksite" is construed and how to measure the 75 miles under this test.

The Equal Rights Advocates questioned measuring the 75 mile requirement by road miles and advocated a broader interpretation such as actual mileage between two employment facilities. The Medical Group Management Association stated that measuring a radius around a single point using road miles was very difficult and suggested a standard of traveling "75 miles in any direction using public surface transportation."

The regulations have been clarified by deleting the reference to "radius," a term not found in the statute. The 75-mile distance will be measured by surface miles using available transportation by the most direct route between worksites.

The Institute of Real Estate Management and 29 other associated real estate management companies complained that the 75-mile rule for determining employee eligibility creates unique hardships for most property management companies and could cause serious economic harm in the absence of industry-specific modifications.

The National Association of Temporary Services was also concerned over the impact of the 50-employee/75-mile eligibility test on temporary help offices, noting that most temporary help offices operate with very small office staffs but on any given day may have a significant number of temporary employees assigned to customer worksites. Because temporaries assigned to customers within 75 miles of the office are included in the eligibility determination, staff employees of two or three person offices become eligible for FMLA leave, which, according to the commenter, works a hardship on small temporary help offices. The commenter urged an exception which would permit such offices to exclude from the eligibility test those temporary employees assigned out of any particular office — temporaries would still be eligible if secondary employers have a total of 50 employees within 75 miles of their worksite. In support of this position, the commenter points to a colloquy between Congressman Derrick and Congressman Ford on H.R. 1 (Cong. Rec. 139, H396-7 (Feb. 3, 1993)) in which Congressman Ford indicated that the matter of temporary help offices with small staffs would be an appropriate subject for rulemaking and his hope that implementing regulations would address such situations taking into account the broad purpose of the Act to provide protection to as many employees as possible and, at the same time, the legitimate concerns of small businesses.

Employees employed by a temporary help office have, as their "single site of employment" worksite under FMLA, the site from which their work is assigned (*i.e.*, the temporary help office). Thus, *all* temporary employees assigned from the temporary help office, regardless of whether the customers' worksites are within 75 miles of the temporary help office, are included in the employee count for the temporary help office in determining if staff employees are eligible for FMLA leave. This provision, in our judgment, is required by the express intention of the Congress in the committee reports that the WARN Act regulations be used to determine "worksite." We believe that the implementing regulations accurately reflect, consistent with the express confines of the statute itself, the Congress' broad purpose to provide FMLA's protection to as many employees as possible while, at the same time, considering the legitimate concerns of small businesses.

Section 825.111(d) provides that eligibility determinations are to be made by

employers when the employee requests the leave; once eligibility has been established in response to the request, subsequent changes in the number of employees employed at or within 75 miles of the employee's worksite will not affect the employee's eligibility or leave once commenced. These provisions attracted considerable comment.

The California Rural Legal Assistance, Inc. argued that using the date the employee requests leave as the "trigger" date will deprive eligibility to many seasonal employees, especially if they give the requisite 30-days notice, because the 50-employee threshold may not be reached until the peak employment season. The commenter urges an alternate test for seasonal and other employers whose workforce varies greatly during the year, in particular that the test should allow a determination of eligibility at the time of the request if the employer can be expected to have at least 50 employees during any period in which FMLA leave is to be taken. This commenter would also apply such a test for teachers because many teachers are not actually under contract until just before or even after the school year has begun. In the alternative, the commenter suggested a position that an employee should be considered on the payroll as long as he or she is on an involuntary layoff with a reasonable expectation of returning to work within a reasonable period of time.

The Women's Legal Defense Fund, the Service Employees International Union, and the United Paperworkers International Union also expressed concern about determining eligibility from an employee count on a single day, *i.e.,* date of request, stating that such a test is arbitrary and subject to wide variation due to workforce fluctuations. They urged adoption of the counting method in the Act for determining employer coverage on the grounds that it is the only counting method statutorily based and is consistent with the legislative history. Thus, under this position, an employee would be eligible for FMLA leave if the employer has employed 50 or more employees within 75 miles of the employee's worksite for each working day during each of 20 or more calendar workweeks in the current or preceding calendar year.

A number of commenters stated that the "date of request" as a trigger date would be burdensome for employers in cyclical industries. Several commenters (California Department of Fair Employment and Housing and the Greater Cincinnati Chamber of Commerce) endorsed the option discussed in the preamble to the interim final rule: ". . .where notice is given 30 or more days prior to the commencement of leave, the count would be made on the 30th day preceding the start of leave, or, at the employer's option, as of the date leave is requested; where 30 days notice is not given, the count would be made at the time notice is given or the date leave begins, whichever is earlier." The Society of Human Resource Management supported a trigger date of "30 days prior to the onset of leave." To accommodate the particular needs of seasonal employers under the "date of request" trigger date, Southern Electric International, Inc. suggested that employers be permitted to cancel or reduce requested leave if the employee count falls below some reasonable number, *i.e.,* 40, by the time the leave is to be taken. The National Restaurant Association argued that the same date should be used for determining all eligibility requirements and the law firm of Sommer & Barnard also recommended a uniform eligibility criteria determination date, endorsing the "date of commencement of leave." The United Paperworkers International Union also endorsed uniformity in the methods of counting eligible employees and covered employers.

The USA Chamber of Commerce noted that under § 825.111(d) eligibility is a continuing, day-to-day determination, even during FMLA leave, and that an employee who is initially ineligible can subsequently become eligible. The commenter argues that the rationale should be consistent: if an ineligible employee can become eligible, then an eligible employee should be able to subsequently become ineligible and, thus, not be entitled to continue FMLA leave.

The Department has given careful consideration to all of the comments submitted in connection with the rule for determining employee eligibility based on the number of employees maintained on the payroll as of the date that an employee requests leave. We see no justifiable basis for altering our earlier policy decisions as reflected in the Interim Final Rule. In our view, none of the recom-

mendations suggest a course that would be entirely consistent with the literal language of the FMLA, its remedial purpose, or the expressions of Congressional intent contained in the legislative history. Congress directly addressed the treatment to be accorded seasonal, temporary and part-time employees by establishing statutory employer coverage and employee eligibility criteria. The Act exempts smaller and certain seasonal businesses by limiting coverage to employers with 50 or more employees in 20 or more calendar weeks of the year. It does not cover part-time or seasonal employees working less than 1,250 hours a year. To be eligible for leave, an employee must have worked for the employer for at least 12 months and for at least 1,250 hours during the 12-month period preceding the commencement of the leave. The employer must also employ at least 50 employees within 75 miles of the employee's worksite. Given Congress' specific treatment of these issues in the legislation, DOL lacks authority to write special rules for determining employee eligibility for seasonal workers in ways that depart from the statutory standards adopted in the legislation.

As explained in the preamble of the Interim Final Rule (and as noted above), the purpose and structure of FMLA's notice provisions intentionally encourage as much advance notice of an employee's need for leave as possible, to enable both the employer to plan for the absence and the employee to make necessary arrangements for the leave. Both parties are served by making this determination when the employee requests leave. But, at the same time, both parties need to be able to rely on the commitments they are making. Tying the worksite employee-count to the date leave commences as suggested could result in both the employee and the employer planning for the leave, only to have it denied at the last moment before it starts if fewer than 50 employees are employed within 75 miles of the worksite at that time. This would entirely defeat the notice and planning aspects that are an integral part of the FMLA leave process. The same would be true if employers were permitted to cancel or reduce requested leave if the employee count fell below some arbitrary number (*e.g.*, 40) at the time leave was being taken. As explained in the preamble to the Interim Final Rule, use of both a fixed date and the same date for determining employer coverage were previously considered and rejected as being inconsistent with the literal language of the Act and the legislative history, which both use the present tense in describing "eligible" employees (*i.e.*, employee is eligible if employed at least 12 months by the employer ". . .with respect to whom leave *is* requested . . ."; but excludes any employee ". . .*at* a worksite at which such employer *employs* less than 50 employees if the total. . . [within 75 miles] *is* less than 50.").

Accordingly, while clarifications are included to more carefully explain the applicable principles, no significant changes are included in this section to alter the policy on the timing of determining employee eligibility.

The term "worksite" also generated considerable comment. The Los Angeles County Metropolitan Transportation Authority and Society for Human Resource Management stated that additional guidance was needed to determine eligibility, particularly with respect to salespersons who work out of their homes. The International Organization of Master, Mates & Pilots stated that the applicable "worksite" in the case of maritime employment should be defined as the home office of the employer from which the job assignment originates, and the United Paperworkers International Union stated that, in the case of workers without a fixed worksite, the reference point should be those employees defined in the bargaining unit by any applicable collective bargaining agreement. For employees who typically have no fixed worksite, the USA Chamber of Commerce urged a provision that makes clear that an employee has only one worksite for purposes of making eligibility and coverage determinations.

In the case of pilots and flight crew members, the Air Line Pilots Association, Association of Professional Flight Attendants and Independent Federation of Flight Attendants contend that the characterization of a home base as an employee's worksite would be inappropriate in the airline industry because the actual "worksite" ranges across a particular carrier's entire route sys-

tem due to the availability and flexibility of the large number of employees employed in such job categories. They argue that employees at worksites with less than 50 employees within 75 miles should be eligible for FMLA leave if the employer (airline) employs more than 50 employees at all of its worksites and such employer can replace the employee on leave with another current employee through an employer-wide seniority system in the affected job classification.

Many of the comments reflect a misunderstanding of the "worksite" concept under the FMLA regulations. FMLA's legislative history explains that when determining if 50 employees are employed by the employer within 75 miles of the worksite of the employee intending to take leave, the term "worksite" is intended to be construed in the same manner as the term "*single* site of employment" under the WARN Act regulations (20 CFR Part 639). The legislative history further states that where employees have no fixed worksite, as is the case for many construction workers, transportation workers, and salespersons, such employees' "worksite" should be construed to mean the single site of employment to which they are assigned as their home base, from which their work is assigned, or to which they report. The regulations included these concepts.

Accordingly, salespersons who work out of their homes have as their single site of employment the site "from which their work is assigned or to which they report" (for example, the corporate or regional office). Their homes are not their "single site of employment" in any case. Tracking the number of employees in a collective bargaining unit, or defining the worksite for flight crew members as a carrier's entire route system, would deviate significantly from the legislative history's discussion of the applicable principles and cannot be adopted as suggested in the comments. (Members of flight crews thus have as their "worksite" the "site to which they are assigned as their home base, from which their work is assigned, or to which they report.")

One commenter, Employers Association of New Jersey, indicated that more guidance was needed on what employees are to be counted. The commenter asked whether only eligible employees as defined in § 825.110 are counted, or are temporarily inactive employees counted, such as those on leave of absence, strike, *etc.* As noted above, the employee count must include all employees of the employer who are "maintained on the payroll," including part-time, full-time, eligible and non-eligible employees. It must also include employees on paid or unpaid leaves of absence. Employees who have been laid off (whether temporary, indefinite, or long-term) are *not* included. (See the discussion of related issues under § 825.105.) In effect, the test of whether an individual is counted as an "employee" depends upon whether there is a continuing employment relationship, and being "maintained on the payroll" is used as a proxy for establishing the continuing nature of the relationship.

Leave Entitlement (§ 825.112)

Section 825.112 sets forth the basic statutory circumstances for which employers must grant FMLA leave. A number of commenters addressed these circumstances with suggestions, recommendations, or requests for clarifications. For example, Lancaster Laboratories suggested that an employer should not be required to approve prenatal care visits if such appointments could be scheduled outside of normal working hours. United Federal Credit Union felt that employers should be able to place a cap on how many employees may be on FMLA leave at any one time, with discretion linked to business needs. Another commenter indicated that FMLA leave should be allowed for a sister or brother living with the employee. The Society for Human Resource Management asked whether the terms "placement. . .for adoption" covered the situation where a child was placed in a new home for adoption and time was needed for bonding between the new parent and the child. The Society also asked if a pregnant employee were well enough to return to work after six weeks, but had requested 12 weeks, could the employer require the employee to return to work after six weeks. Oregon Bureau of Labor and Industries observed that § 825.112(d) states there is no age limit on a child being adopted or placed for foster care, but § 825.113(c) defines "son or daughter" to be a person *under* the age 18, or *18 or older and incapable of self-care,* and

questioned whether FMLA leave was available for adoption of a child age 18 or older who is *capable* of self-care. The Equal Employment Advisory Council argued, with respect to an employee who marries and requests FMLA leave to be with new stepchildren, that such leave should be explicitly prohibited unless the employee formally adopts the stepchildren.

California Department of Fair Employment and Housing and the law firm of Fisher and Phillips urged § 825.112 be expanded to incorporate provisions stated elsewhere in the regulations. Specifically, they argued that the definition of "son or daughter" in § 825.113 as it relates to the availability of FMLA leave to an employee who stands *in loco parentis* to a child should be added to § 825.112(a)(1), and that § 825.112(d) should be amended to reference the limitation in § 825.203 on the use of intermittent leave for purposes of birth, adoption or placement of a foster child that such leave is available only if the employer agrees. Sommer & Barnard noted that while an employee may be eligible for FMLA leave before "the actual date of birth" or "actual placement," there is no provision in the regulations that would permit an employer to require verification that leave requested for such purposes is for a statutory purpose.

With respect to scheduling prenatal care doctor's visits, the Act and regulations require that in any case where the need for leave is foreseeable based on planned medical care, the employee shall make a bona fide, reasonable effort to schedule the leave in a manner that does not unduly disrupt the employer's operations (subject to the approval of the employee's (or family member's) health care provider). However, it would be contrary to the statute for an employer to place any cap on the number of employees who could be eligible for FMLA leave at anyone time, or for the regulations to require employers to grant the same type of leave entitlement for a sister or brother living with the employee as FMLA provides for a spouse (although employers could adopt more generous leave policies than the minimums established by FMLA). With respect to leave for the birth of a child, the statute entitles an employee to FMLA leave for a period of up to 12 weeks for the birth *and care* of a child. Under the circumstances described by the Society for Human Resource Management, the employee may not be required to return to work after six weeks if the employee desires 12 weeks of FMLA leave for the birth of her child.

In response to the question on whether FMLA's leave entitlement for placement for adoption includes "bonding" time between the parent and child, we note from the legislative history's discussion of the need for family and medical leave legislation that:

> Adoptive parents also face difficulties in the absence of a reasonable family leave policy. Most adoption agencies require the presence of a parent in the home — some for as long as four months — when a child is placed with the family to allow them adequate time for proper bonding.***

The legislative history's discussion of the leave provisions themselves provides:

> Section 102(a)(2) requires that leave provided under § 102(a)(1)(A) or (B) to care for a newborn child *or a child newly placed with the employee for adoption or foster care be taken before the end of the first* 12 *months following the date of the birth or placement.*
> ***

Clearly, the intent of FMLA's leave entitlement in the case of leave for placement of a child with the employee for adoption or foster care includes "bonding" time with the newly-placed child, during the 12 months following the date of placement.

In response to the commenter who questioned whether FMLA leave is available for adoption of a child age 18 or older who is *capable* of self-care, upon reexamination of the statutory definitions and leave entitlement provisions of the Act, we have concluded that the availability of leave for adoption of a child age 18 or older is limited to those who are *incapable* of self-care because of a mental or physical disability, consistent with the statutory definition of "son or daughter" in § 101(12) of the FMLA. The regulations have been revised to delete the statement that there is no maximum age limit for a child placed

for adoption or foster care. Regarding the employee who marries and requests FMLA leave to be with new stepchildren, FMLA leave would only be available if the employee in that case formally adopted the stepchildren, as the commenter pointed out. However, if one of the children subsequently has a serous health condition, the stepparent would be entitled to FMLA leave to care for the child.

Many comments suggesting clarification or reiteration of provisions contained elsewhere in the regulations are being adopted. The regulations are also being revised at § 825.113 to permit an employer to request that employees provide reasonable documentation that verifies the legitimacy of an FMLA leave request, *i.e.,* that requested leave is for a qualifying statutory purpose. Reasonable documentation of a qualifying reason for FMLA leave can take the form of a simple signed statement by the employee. The employer's policies in this area should be communicated in advance to employees and be applied uniformly, and employees must be given a reasonable opportunity to respond.

Section 825.112(e) provides that "State" action must be involved in foster care placement to qualify for FMLA leave. The Community Legal Services, Inc. and Women's Legal Defense Fund stated that the "State" involvement requirement was not supported by the statute, legislative history, or sound public policy, and argued that the statutory definition of a "son or daughter," which includes a "child of a person standing *in loco parentis,*" implies that FMLA leave should be available whenever an employee takes primary responsibility for the care of a child with the intention of adopting or otherwise having day-to-day caretaking responsibility for that child. Thus, for example, parents of addicts who assume responsibility as primary caretakers for the addicts' children is a form of "foster" care in which FMLA leave should be available to such parents.

Section 102(a)(1)(B) of FMLA entitles an eligible employee to take FMLA leave *"[b]ecause* of the *placement* of a son or daughter *with the employee* for *adoption or foster care"* (emphasis added). Thus, the entitlement to leave under this section of the Act relates only to the actual *placement* with the eligible employee of an adopted or foster child. The act of providing "foster care," in and of itself, is not a qualifying reason for taking FMLA leave under the statute. On the other hand, in the example of parents of addicts who assume the primary, day-to-day responsibilities to care for and financially support the addicts' children, the *in loco parentis* relationship thus established could entitle the *in loco parentis* parents to take FMLA leave under a different section of the FMLA, § 102(a)(1)(C), if the *in loco parentis* parent was needed to care for the "child" (of the person standing *in loco parentis*) for a serious health condition (subject to the Act's medical certification provisions). FMLA's legislative history fully supports this view:

> The terms "parent" and "son or daughter". . .reflect the reality that many children in the United States today do not live in traditional "nuclear" families with their biological father and mother. Increasingly, those who find themselves in need of workplace accommodation of their child care responsibilities are not the biological parent of the children they care for, but their adoptive, step, or foster parents, their guardians, or sometimes simply their grandparents or other relatives or adults. This legislation deals with such families by *tying the availability of "parental" leave to the birth, adoption, or serious health condition of a "son or daughter" and then defining the term "son or daughter" to mean "a biological, adopted, or foster child, a stepchild, a legal ward, or a child of a person standing* in loco parentis***."
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> ***

Definition of Spouse, Parent, Son or Daughter (§ 825.113)

FMLA entitles an eligible employee to take leave "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" (emphasis added). Section 825.113(a) defines the term "spouse" to mean a husband or wife as defined or recognized under State law for purposes of marriage, including common law marriage in

States where it is recognized. A considerable number of comments urged that this definition be broadened to include domestic partners in committed relationships including same-sex relationships, or, in the alternative, to include all unions recognized by State or local law. The Society for Human Resource Management questioned whether an employer located in one State which does not recognize common law marriages would be required to grant FMLA leave to its employees with common law spouses who reside in another State that recognizes common law marriages. William M. Mercer, Inc. also recommended clarification of which State law would be controlling when the employee works in a different State.

FMLA defines the term "spouse" to mean "a husband or wife, as the case may be." In discussing this definition during Senate consideration of the legislation, Senator Nickles noted:

> . . .This is the same definition that appears in Title 10 of the United States Code (10 U.S.C. 101).
>
> Under this amendment, an employer would be required to give an eligible female employee unpaid leave to care for her husband and an eligible male employee unpaid leave to care for his wife. No employer would be required to grant an eligible employee unpaid leave to care for an unmarried domestic partner.
>
> This simple definition will spare us a great deal of costly and unnecessary litigation. Without this amendment, the bill would invite lawsuits by workers who unsuccessfully seek leave on the basis of their unmarried adult companions. (Cong. Rec. (S1347), Feb. 4, 1993.)

Accordingly, given this legislative history, the recommendations that the definition of "spouse" be broadened cannot be adopted. The definition is clarified, however, to reference the State "in which the employee resides" as being controlling for purposes of an employee qualifying to take FMLA leave to care for the employee's "spouse" with a serious health condition.

Section 825.113 (b) of the regulations defined "parent," as provided in § 101(7) of the FMLA, to mean a biological parent or an individual who stands or stood *in loco parentis* to an employee when the employee was a child. The regulatory definition noted that the term did not include a parent "in-law." Several commenters (City of Alexandria, Virginia; Fairfax Area Commission on Aging; Northern Virginia Aging Network; the Brooklyn and Green Mountain Chapters of the Older Women's League; Sisters of Charity of Nazareth; Retail, Wholesale and Department Store Union; and University of Vermont) viewed the regulatory definition as too restrictive, recommending in some instances that the term "parent" be broadened to specifically include parents "in-law." (An additional 107 cards or letters were received from individuals endorsing this view.)

Standard rules of statutory construction require that we interpret the availability of FMLA leave for a "parent" in a manner consistent with FMLA's definition of "parent," which is limited to the employee's biological parent or an individual who stood *in loco parentis* to the employee when the employee was a child, and does not extend to a parent "in-law." Moreover, the leave entitlement under § 102(a)(1)(C) of FMLA is expressly limited to ". . .care for the. . .parent, *of the employee,* if such. . .parent has a serious health condition." Thus, each eligible spouse may take qualifying FMLA leave to care for his or her own biological (or *in loco parentis*) "parent" who has a serious health condition, but the leave entitlement cannot be extended by regulation to parents "in-law."

FMLA § 101(12) defines "son or daughter" in part as one who is under age 18, or age 18 or older and "incapable of self-care because of a mental or physical disability." The Older Women's League, in commenting on the "incapable of self-care" provisions defined in § 825.113(c)(l), was concerned that requiring that an individual need active assistance or supervision to provide daily self-care in "several" of the "activities of daily living" would be interpreted to mean *three* or more, absent clarification, which they believe would unduly restrict eligibility for FMLA leave. The Consortium for Citizens with Disabilities, the Epilepsy Foundation of America,

and the United Cerebral Palsy Associations recommended that the definition of "incapable of self-care" be supplemented with additional criteria which more accurately reflect the needs of all people with disabilities, suggesting that "instrumental activities of daily living" or IADL's (activities necessary to remain independent) should be added to address the needs of people with mental and cognitive impairments.

In response to the comments received on this section, "incapable of self-care" is defined in the final rule to include, in addition to the "activities of daily living," the "instrumental activities of daily living," as recommended. We interpret "several" to mean more than two but fewer than many, *i.e.,* three or more (*see* Webster's; Black's Law).

The Equal Employment Opportunity Commission (EEOC), in commenting on "physical or mental disability" in § 825.113(c)(2), noted that the DOL rule cited, as a cross-reference, EEOC's entire regulatory part under the Americans with Disabilities Act (ADA), 29 CFR 1630, for defining "physical or mental disability." Because the current illegal use of drugs is not a disability within the meaning of the ADA, EEOC expressed concern that the broader cross-reference to the entire regulatory part could create confusion over whether an adult child currently engaging in the illegal use of drugs would be "disabled" for purposes of a parent qualifying to take FMLA leave. EEOC suggested that DOL be more specific in citing to the pertinent ADA regulations to foreclose the argument that "physical" or "mental" disability in this context would not include the current illegal use of drugs. We have adopted EEOC's suggestion in the final rule. An eligible employee's son or daughter who illegally uses drugs may be disabled for purposes of an eligible parent (employee) taking FMLA leave.

The University of Michigan includes in-laws, domestic partners, and other relatives within a broader definition of "family" for purposes of its family leave policies. The University suggested that the regulations enable employers that have extended their family leave policies to such "non-traditional" families to count as part of an employee's FMLA leave entitlement leave that is taken to care for such broader definitions of "family." This issue is addressed in § 825.700 of the regulations, which discusses the effect of employer policies that provide greater benefits than those required by FMLA. We interpret the statute as prohibiting an employer from counting as a part of an employee's FMLA leave entitlement leave granted for a reason that does not qualify under FMLA.

The law firm of Orr and Reno, and the Chicagoland Chamber of Commerce, *et al.,* urged that in addition to medical certifications presently required, the regulations should include provision for requests relating to child care because it is not always obvious that the leave is justified, particularly with respect to a father or in foster care situations.

Although leave to provide "child care" would not ordinarily qualify as FMLA leave if the child is not a newborn (in the first year after the birth) and is otherwise healthy, FMLA leave is "justified" (*and* may not be denied by the employer) if it is taken for one of FMLA's qualifying reasons, including where a father wants to stay home with a healthy newborn child in the first year after the birth, or needs to be home to care for a child with a serious health condition, or for placement with the employee of a child for foster care. The regulations have been amended in § 825.113(d) to permit employers to require reasonable documentation from the employee for confirmation of family relationships.

Definition of "Serious Health Condition" (§ 825.114)

Section 101(11) of FMLA defines "serious health condition" to mean

> ***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.

This scant statutory definition is further clarified by the legislative history. The congressional reports did indicate that the term was not intended to cover short-term conditions for which treatment and recovery are

very brief, as Congress expected that such conditions would be covered by even the most modest of employer sick leave policies. While the meaning of inpatient care is evident (*i.e.,* an overnight stay in the hospital, *etc.*), the concept of "continuing treatment" presents more difficult issues. Under the Interim Final Rule, "*continuing* treatment" required two or more visits to a health care provider or a single visit followed by a prescribed regimen of treatment, or a serious, incurable condition which existed over a prolonged period of time under the continuing supervision of a health care provider. When deciding upon the regulatory guidance for the definition in the Interim Final Rule, the Department relied heavily upon definitions and concepts from the Office of Workers' Compensation Programs. For example, under many State workers' compensation laws and the Federal Employees' Compensation Act (FECA), a three-day waiting period is applied before compensation is paid to an employee for a temporary disability. A similar provision was included in the FMLA rules; a period of incapacity of "more than three days" was used as a "bright line" test based on the references in the legislative history to serious health conditions lasting "more than a few days."

Eighty-eight comments were received on the regulatory definition of "serious health condition." Many commenters objected to the language in § 825.114(a)(3), which provided that a period of incapacity of more than three calendar days was an indicator of a serious health condition, and § 825.114(b)(2), which defined continuing treatment as including one visit to a health care provider which results in a regimen of continuing treatment under the supervision of the health care provider, *e.g.,* a course of medication or therapy to resolve the health condition. Some contended that the "more than three days" test encouraged employees to remain absent from work longer than necessary for the absence to qualify as FMLA leave, or that the duration of the absence was not a valid indicator of serious health conditions that are very brief (*e.g.,* a severe asthma attack that is disabling but requires fewer than three days for treatment and recovery to permit the employee's return to work). Some commenters felt the three-day rule was unreasonably low and trivialized the concept of seriousness, suggesting it more appropriately defined a "health condition" rather than a "*serious* health condition."

Nine commenters (9 to 5, National Association of Working Women; Federally Employed Women; Women's Legal Defense Fund; Federal Express; Linda Garcia; Kerryn M. Laumer; Epilepsy Foundation of America; International Ladies' Garment Workers' Union; Service Employees International Union) stated that the three-day rule was contrary to the statute and legislative history. The Women's Legal Defense Fund and the Epilepsy Foundation of America pointed out that the House Education and Labor Committee specifically rejected a minimum durational limit during a markup of the bill. These commenters, together with the Consortium for Citizens with Disabilities, National Community Mental HealthCare Council, and United Cerebral Palsy Associations, contended that seriousness and duration do not necessarily correlate, particularly for people with disabilities; that a fixed time limit fails to recognize that some illnesses and conditions are episodic or acute emergencies which may require only brief but essential health care to prevent aggravation into a longer term illness or injury, and thus do not easily fit into a specified linear time requirement; and that establishing arbitrary time lines in the definition only creates ambiguity and discriminates against those conditions that do not fit the average. The Women's Legal Defense Fund made the observation from the legislative history that Congress intended the severity and normal length of disabling conditions to be used as "general tests," not bright-line rules, and suggested that if a condition is sufficiently severe or threatening, duration is irrelevant.

The 9 to 5, National Association of Working Women, Los Angeles County Metropolitan Transportation Authority, Baptist Health Care, St. Vincent Medical Center, Chamber of Commerce of the USA, Chicagoland Chamber of Commerce, and Service Employees International Union, contended that a three-day absence requirement will inevitably result in employees with minor short-term afflictions unnecessarily extending their absences just to qualify for FMLA leave.

Fifteen commenters suggested extending the three-day absence requirement to a longer

period, such as 5, 6, 7, or 10 days (Care Providers of Minnesota, Cincinnati Gas & Electric Company, Chicago land Chamber of Commerce, Nevada Power Company, Federal Express, Chevron, PARC, Consolidated Edison Company of New York, Inc., Village of Schaumburg (Illinois) Human Resources, Food Marketing Institute, Society for Human Resource Management, Southwestern Bell Corporation, New York State Metropolitan Transportation Authority), two weeks (United HealthCare Corporation), or 31 days (the American Apparel Manufacturers Association, Inc., suggested that the definition should reflect the initial study by the U.S. General Accounting Office that estimated FMLA' s cost impact, noting further that the three-day rule is significantly more lenient than the "31 days or more of bed rest required to remedy the condition" used by GAD).

The Ohio Public Employer Relations Association strongly objected to the three-calendar-day rule on the grounds that a single workday absence on Friday followed by a weekend would qualify (or a Monday absence following a weekend). The law firm of Sommer and Barnard stated that it was not clear from the regulations or comments in the preamble whether the three days are consecutive or non-consecutive calendar days of work. The Chamber of Commerce of the USA questioned whether the rule, as drafted, could be construed as requiring three cumulative days in a calendar year as opposed to three consecutive calendar days.

Several additional commenters urged that the period be measured by business or working days in lieu of calendar days, while still others distinguished "consecutive" calendar days of absence from "consecutive" work days of absence as alternative suggestions (*i.e.,* more than five consecutive work days or seven consecutive calendar days). The Hospital Council of Western Pennsylvania argued that the standard should be one of incapacity requiring absence from work for more than three "consecutively scheduled workdays," as a workday standard is 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. Chicago land Chamber of Commerce commented that, with respect to an employee's own serious health condition, the qualifying standard pertains to work days and not calendar days, and yet the regulatory language would allow one to argue that an inability to carry out regular daily activities over the weekend counts toward the qualifying period. The Burroughs Wellcome Company emphasized that the committee reports clearly state that an employee must be absent *from work* for the required number of days and that absence from "school or other regular daily activities" relates only to a child's, spouse's, or parent's serious health condition.

The Chamber of Commerce of the USA and the National Association of Manufacturers recommended that DOL's definition of serious health condition adopt each State's waiting period for qualifying for workers' compensation benefits, noting that many States use as much as seven work days. As an alternative, the Chamber of Commerce and Consumers Power Company (Michigan) suggested that the ADA's definition of "disability" could be used — a mental or physical impairment that substantially limits a major life activity. EEOC, which enforces the ADA, has advised that ADA "disability" and FMLA "serious health condition" are different, and that they should be analyzed separately.

Massmutual noted that while the one incentive in FMLA to limit employee abuse of FMLA leave was the stipulation that leave is unpaid, some companies (like Massmutual) provide fully paid sick leave for short-term absences. Thus, for companies with similar programs, there is no incentive for employees not to abuse sick leave because they would always be paid and could not be disciplined for the abuse due to FMLA's employment protections. Massmutual recommended that the definition of serious health condition be limited to a period of incapacity requiring an absence of at least five *working* days *or* to those days when an employee is scheduled for actual treatment and/or recovery from a treatment.

The Burroughs Wellcome Company observed that the definition does not refer at all to the types of health conditions involved, as does the legislative history, but instead focuses only on what the committee reports

call the "general test" of incapacity for more than a few days and continuing medical treatment or supervision. Thus, the understanding of the test that Congress provided by listing examples of conditions that meet the test is lost. The Equal Employment Advisory Council recommended that the regulations include as serious health conditions all the conditions enumerated in the legislative history and, for those not enumerated, apply the general test. Federal Express similarly argued that a fixed number of consecutive absences and visits to a health care provider do not accurately reflect Congressional intent, as colds and flu could be included as "serious health conditions." Federal Express recommended the definition focus on the seriousness of the illness rather than on an arbitrary time period, and that the health conditions listed in the legislative history be used in conjunction with the general test in the legislative history for determining whether an illness constitutes a serious health condition. Chicagoland Chamber of Commerce presented similar views, arguing that it is contrary to obvious legislative intent (and grossly over-inclusive) for the regulation to focus on the extent to which medical consultation is sought rather than on the degree of incapacitation.

Several employers and law firms contended in their comments that the definition was too broad and inconsistent with the purpose of the Act, in that a common cold (or any particular illness) which incapacitates an employee for more than three days and involves two visits to a health care provider could be considered within the definition of "serious health condition." Giant Food Inc., Kennedy Memorial Hospitals, and LaMotte Company recommended clarifications to exclude from the definition 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 strain, measles, even broken bones). Southwestern Bell Corporation likewise requested that the regulations distinguish routine illness (measles, chicken pox, common ear infections) from serious health conditions by providing a sample list of health conditions which are not considered serious unless complications arise. Fisher and Phillips stated that pre-delivery maternity leave should not be available where the pregnancy does not render the employee unable to perform the functions of the job. Nevada Power Company recommended excluding: routine preventive physical examinations; illnesses and injuries which require less than six visits to a health care provider; conditions relating to transvestism, transsexualism, pedophilia, exhibitionism, voyeurism, gender disorders, or other sexual behavior disorders, kleptomania, pyromania or substance abuse disorders resulting from illegal use of drugs; other conditions which are neither life-threatening nor prolonged.

A number of commenters (City of Alexandria (Virginia), Fairfax Area Commission on Aging, Federally Employed Women, Northern Virginia Aging Network, the Brooklyn and Green Mountain Chapters of the Older Women's League, and Sisters of Charity of Nazareth) stated that the definition was too restrictive and recommended that it be expanded to specifically include chronic illnesses and long-term conditions which may not require inpatient care or treatment by a health care provider. The University of Vermont suggested that illnesses requiring respite care also be included. The LaMotte Company asked whether it would matter if an absence for a chronic illness (such as asthma) occurs infrequently — *e.g.,* would the absences have to be consecutive days or could they be one day this week and one the next, or one every month?

Blue Cross and Blue Shield of Texas, Inc., posed the issue as a quandary faced by employees and employers over the lack of definitive guidelines as follows: Is there a liability in covering less serious illnesses (such as chicken pox or a broken leg) as FMLA leave? If the employer does count time toward the 12-week entitlement, can the decision be challenged if, later in the year, a more severe condition arises and the employee has less than sufficient entitlement remaining?

Five commenters (Older Women's League, Women's Legal Defense Fund, Consortium for Citizens with Disabilities, Epilepsy Foundation of America, and United Cerebral Palsy Associations) took issue with the provisions in the definition which characterized "continu-

ing treatment" for a chronic or long-term condition that is "incurable." These commenters contended that curability is not a proper test for either a serious health condition or for continuing treatment, is ambiguous and subject to change over time, and should be deleted, noting that many incurable disabilities require continuing treatment that has nothing to do with curing the condition. Some pointed out that conditions such as epilepsy, traumatic brain injury, and cerebral palsy are typically conditions which are not "curable" in the generally accepted sense, but are conditions for which training and therapy can help restore, maintain or develop function or prevent deterioration, and noted that people with disabilities have struggled for a generation or more to overcome the image that disabilities are, or should be viewed as, curable or incurable. United Cerebral Palsy Associations noted that cerebral palsy is a term used to describe a group of chronic conditions affecting body movement and muscle coordination that are neither progressive nor communicable; that it is not a disease and should never be referred to as such, although training and therapy and assistive technology may help to restore, maintain or increase function.

Several commenters raised additional concerns on various aspects of the "continuing treatment" definition. The Equal Rights Advocates suggested that continuing treatment include situations where a serious health condition exists that, if left unattended, would result in a hospital stay of more than three days.

Burroughs Wellcome stated that because the committee reports make it clear that "continuing treatment" involves absences from work, the regulation misses the mark by including one visit to a physician plus medication. Sommer and Barnard was concerned that the discussion on continuing treatment lacked clarity due to the lack of a clearly defined time frame for multiple treatments; further, that a typical employer could not determine from the information in the medical certification whether a condition is "so serious that, if not treated, it would likely result in a period of incapacity of more than three calendar days." This application does not call for a medical judgment and the "likely" standard cannot possibly be administered. Sommer and Barnard also stated the regulations lack a meaningful definition of what constitutes a regimen of continuing treatment — would it include bed rest, home exercise, or instructions to use a non-prescription drug or medication? Sesco Management Consultants suggested the definition invalidly broadens the concept of continuing treatment by allowing "following courses of medication and therapy" to qualify, which could thus include taking aspirin for a few days while staying home, getting bed rest and stretching limbs, drinking liquids, *etc.*, which, this commenter contends, the Congress did not remotely suggest would qualify under FMLA.

Chicagoland Chamber of Commerce also considered the "continuing supervision" concept too vague, questioning whether "supervision" required the individual to actually be examined by the health care provider or to report in on some regular basis, or whether instructions to report in if the condition changes were sufficient. It considered treatment a definitive concept which could be proven, whereas "supervision" could not which would invite abuse and litigation.

The Food Marketing Institute commented that the Act defines a serious health condition to require continuing treatment by a health care provider, which necessarily means at least two visits to the health care provider. Conditions which result in self-treatment (*e.g.*, taking medication) "under the supervision of" a doctor are typically not serious health conditions as contemplated by the FMLA, according to this commenter. Similarly, the Society for Human Resource Management recommended that "continuing treatment" be redefined so that taking medications does not count the same as an office visit.

The Ohio Public Employer Labor Relations Association noted that while stress may contribute to illness in some persons, it is not an illness or a medical condition. The commenter recommended that treatment for stress without a commonly accepted and recognized medical diagnosis should not be included in the definition of a serious health condition.

Ten commenters raised various concerns regarding the availability of FMLA leave for treatment for substance abuse. The Epilepsy Foundation of America stated that substance

abuse programs and mental health services must be included in the definition of serious health condition. William M. Mercer, Inc., suggested that the preamble discussion from the Interim Final Rule on treatment for substance abuse should be set forth in the rule itself. Consolidated Edison Company of New York, Inc. commented that employees should be allowed FMLA leave for substance abuse treatment only if they are not current users of illegal drugs, consistent with the approach followed under the ADA's protections. Consumers Power Company (Michigan) also recommended excluding absences for an employee's illegal use of drugs, and limiting FMLA leaves to inpatient substance abuse treatment programs with durations of no less than 14, or preferably, 28 days. Nationsbank Corporation (Troutman Sanders) suggested the regulations specifically state: (1) FMLA does not prohibit discipline for an employee's drug use in violation of the employer's policy; (2) an employee may not use FMLA to avoid potential discipline or drug testing; and (3) an employee returning from FMLA leave for substance abuse may be drug tested as a condition of return to work and following return to work, pursuant to an employer's post-treatment drug policy. Nevada Power Company suggested that an employer should not have to offer more than one leave of absence for drug or alcohol rehabilitation; and that employers which expend funds to reform substance abusers should be allowed to terminate employees if they begin to abuse drugs or alcohol again. Edison Electric Institute also suggested employers should only have to provide professional rehabilitative service and support to drug abusers one time.

The American Trucking Association, in contrast, advocated eliminating substance abuse from the definition of serious health condition, because protection of substance abusers jeopardizes efforts by the trucking industry and the U.S. Department of Transportation to eradicate substance abusers from the nation's highways. Federal Highway Administration regulations require trucking companies to conduct substance abuse testing, but do not permit a motor carrier to test a driver who voluntarily admits to abuse because such an admission, without more, fails to trigger the duty to test under any of the five categories, in essence enabling the employee to "beat the system" by triggering FMLA rights before a drug test could be conducted. It was unclear to the Association under FMLA whether such an admission would preclude a motor carrier's ability to test a driver scheduled for a random drug test. The Association recommended changing the regulations to either totally exclude substance abuse from the definition of serious health condition, or exclude those persons who are subject to FHWA drug testing requirements from FMLA protections insofar as those protections include treatment for substance abuse. This commenter would also support an exclusion limited to those persons in the transportation industry subject to federal drug testing requirements, and also suggested the regulations make clear that persons currently engaged in illegal use of drugs have no FMLA protections, consistent with the provisions of the ADA.

The Chamber of Commerce of the USA recommended clarifications to provide that current illegal use of drugs during treatment for illegal drug use, or resumption of the illegal use of drugs following completion of treatment, removes such treatment from the category of "serious health condition" under FMLA, and that an employee who fails a drug test would be subject to the employer's normal disciplinary procedures and would not be protected by FMLA.

Louisiana Health Care Alliance (Phelps Dunbar) suggested that clarification be provided to ensure that employers have the continued right to enforce legitimate policies for drug- and alcohol-free workplaces, by explicitly stating in the regulations that nothing in FMLA prohibits an employer from terminating or otherwise disciplining an employee pursuant to a legitimate drug testing program.

The Department has carefully reviewed the comments and re-examined the legislative history and the definition of "serious health condition" in an attempt to assure that it is consistent with Congressional intent, and that FMLA leave is available in those situations where it is really needed. As a result of this review, the regulation has been significantly re-crafted, as discussed below.

As summarized above, comments were submitted opposing any duration limit, and equally strong comments suggested the stan-

dard was much too short. 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. The Department has also 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. Furthermore, a working days standard would be difficult to apply to serious health conditions of family members or to part-time workers. (It is noted that throughout the regulations, where a number of days is prescribed, calendar days is intended unless the regulation explicitly states business days.) The regulation has been revised, however, to make it clear that the absence must be a period of incapacity of more than three consecutive calendar days. "Incapacity," for purposes of this definition, means inability to work, attend school or perform other regular daily activities due to the serious health condition, treatment therefor, or recovery therefrom. Any subsequent treatment or incapacity relating to the same condition would also be included.

The regulation also retains the concept that continuing treatment includes either two visits to a health care provider (or to a provider of health care services on referral of a health care provider) or one visit followed by a regimen of continuing treatment under supervision of the health care provider. Regimen of continuing treatment is clarified in paragraph (b) of this section to make it clear that the taking of over-the-counter medications, bed-rest, drinking fluids, exercises, and other similar activities that can be initiated without a visit to a health care provider is not, by itself, sufficient to constitute a regimen of continuing treatment for purposes of FMLA leave. Prescription drugs or therapy requiring special equipment, for example, would be included. It is envisioned that a patient would be under continuing supervision in this context, for example, where the patient is advised to call if the condition is not improved.

The Department concurs with the comments that suggested that special recognition should be given to chronic conditions. The Department recognizes that certain conditions, such as asthma and diabetes, continue over an extended period of time (*i.e.,* from several months to several years), often without affecting day-to-day ability to work or perform other activities but may cause episodic periods of incapacity of less than three days. Although persons with such underlying conditions generally visit a health care provider periodically, when subject to a flare-up or other incapacitating episode, staying home and self-treatment are often more effective than visiting the health care provider (*e.g.,* the asthma-sufferer who is advised to stay home and inside due to the pollen count being too high). The definition has, therefore, been revised to include such conditions as serious health conditions, even if the individual episodes of incapacity are not of more than three days duration. Pregnancy is similar to a chronic condition in that the patient is periodically visiting a health care provider for prenatal care, but may be subject to episodes of severe morning sickness, for example, which may not require an absence from work of more than three days. It is clear from FMLA's legislative history that pregnancy was intended to be treated as a serious health condition entitling an individual to leave under the Act, and the definition therefore includes any period of incapacity due to pregnancy, or for prenatal care.

The Department has also included a definition to deal with serious health conditions which are not ordinarily incapacitating (at least at the current state of the patient's condition), but for which treatments are being given because the condition would likely result in a period of incapacity of more than three consecutive calendar days in the absence of medical intervention or treatment. The regulation requires multiple treatments, and includes as examples patients receiving chemotherapy or radiation for cancer, dialysis for kidney disease, or physical therapy for severe arthritis. Multiple treatments for restorative surgery after an accident or other injury is also specifically included. The previous requirement that the condition be chronic or long-term has been deleted because can-

cer treatments, for example, might not meet that test if immediate intervention occurs.

The portion of the definition dealing with long-term, chronic conditions such as Alzheimer's or a severe stroke has been modified to delete the reference to the condition being incurable, and to require instead that the condition involve a period of incapacity which is permanent or long-term and for which treatment may not be effective. Therefore, in this situation, as under the interim final rule, it is only necessary that the patient be under the supervision of a health care provider, rather than receiving active treatment.

The Department did not consider it appropriate to include in the regulation the "laundry list" of serious health conditions listed in the legislative history because their inclusion may lead employers to recognize only conditions on the list or to second-guess whether a condition is equally "serious," rather than apply the regulatory standard. However, the regulation does provide, as examples, that, unless complications arise, the common cold, the flu, ear aches, upset stomach, minor ulcers, headaches other than migraine, routine dental or orthodontia problems, and periodontal disease are not ordinarily serious health conditions. In addition, the regulation specifically states that routine physicals, eye examinations and dental examinations are not considered treatment, although examinations to determine if a serious health condition exists and evaluations of the condition are considered treatment.

The regulation has also been revised in paragraph (c) to delete the reference to "voluntary" treatments for which treatment is not medically necessary, and restrict the exclusion to cosmetic treatments (unless inpatient care is required or complications develop). The term "voluntary" was considered inappropriate because all treatments and surgery are voluntary. Furthermore, the Department did not wish to encourage employers to second-guess a health care provider's judgment that a treatment is advisable (*e.g.*, orthoscopic knee surgery on an out-patient basis) by questioning whether it is "necessary."

The regulation continues to recognize that substance abuse may be a serious health condition if the criteria of the regulation are met. However, the regulation is revised to make it clear that an absence because of the employee's use of the substance, rather than for treatment, is not protected. See also § 825.112(g) of the regulations, which has been revised to make it clear that an employer may take disciplinary action against an employee pursuant to a uniformly applied policy regarding substance abuse, provided the action is not being taken because the employee has exercised his or her right to take FMLA leave.

In response to the question by Blue Cross and Blue Shield of Texas regarding liability in covering less serious illnesses, the regulatory procedures in § 825.208 prescribe the method for an employer to designate FMLA leave. Under this procedure, an employee has an opportunity to counter an employer's designation of leave and resolve the dispute. *See* § 825.208(b).

As suggested, the reference in the interim final rule to stress as a possible serious health condition has been revised to mental illness resulting from stress.

Unable to Perform the Functions of the Position (§ 825.115)

An eligible employee may take FMLA leave due to a "serious health condition" that makes the employee "unable to perform the functions" of the employee's position. Section 825.115 of the Interim Final Rule states that an employee is "unable to perform the functions of the position" where the health care provider has found the employee either unable to work at all, or unable to perform any of the essential functions of the position within the meaning of the ADA and its implementing regulations (29 CFR Part 1630). For employers that request employees to furnish medical certification from the employee's health care provider to support the leave request, the regulations provide the employer the option of furnishing a statement (list) of the employee's essential functions for the health care provider to review when certifying to the employee's condition.

The Women's Legal Defense Fund, California Department of Fair Employment and Housing, and Consumers Power Company, Michigan commented that this section was

unclear as to whether an employee must be found unable to perform each and every essential function (*i.e.,* all), or only any single one, or some of several of the essential functions. Several commenters (Alabama Power Company (Balch & Bingham); Chamber of Commerce of the USA; Credit Union National Association, Inc.; National Restaurant Association; Society for Human Resource Management; William M. Mercer, Inc.) either questioned the effect of "reasonable accommodations" and "job restructuring" or modified "light duty assignments" on FMLA leave requests, or suggested that the FMLA regulations be interpreted to mean "unable to perform any of the essential functions with or without reasonable accommodation within the meaning of the ADA." Thus, under this latter view, FMLA leave could be denied to an employee with a serious health condition who, although unable to perform the essential job functions, would be able, despite the condition, to perform those functions if offered "reasonable accommodation." Some commenters noted the utility of creating "light duty" assignments for employees who suffer on-the-job injuries, and the impact on State workers' compensation benefits which can be suspended if an employee refuses to accept a medically-approved "light duty" assignment. The Consortium for Citizens with Disabilities, Epilepsy Foundation of America, and United Cerebral Palsy Associations noted a difference in the language in this section of the regulations and that of § 825.306(b) (discussing medical certifications) and suggested conforming changes so that both sections would be interpreted to mean "any one (or more) of the essential functions" (not all of the essential functions). The EEOC noted once again that the DOL rule cited to the entire body of the ADA regulations in the cross-reference and suggested refining the cite to the specific ADA rule that defines "essential functions" (29 CFR 1630.2(n)).

This section was intended to reflect that an employee would be considered "unable to perform the functions of the position" within the meaning of the regulations if the employee could not perform any *one* (or more) of the essential functions of the job held by the employee at the time the need for FMLA leave arose, and the final rule is so clarified (in §§ 825.115 and 825.306). EEOC's recommendation to cite to the specific ADA rule defining "essential functions" has also been adopted. The cite has been so revised, to make it clear that reasonable accommodation is irrelevant for purposes of FMLA.

The relationship between FMLA's leave provisions and other laws like the ADA and State workers' compensation laws is addressed under Title IV of the FMLA and in Subpart G of the FMLA regulations (§§ 825.700–825.702). As will be discussed further in connection with §§ 825.701 and 825.702 below, FMLA entitles an employee to take up to 12 weeks of *job-protected* leave, from the position of employment of the employee when the employee gives notice or when leave commences (whichever is earlier), for a serious health condition that makes the employee unable to perform anyone of the essential functions of the employee's position (the position held by the employee when the notice was given or the leave commenced). FMLA also entitles such an employee to be restored to that same position of employment (the one held by the employee when notice was given or the leave commenced), or to an equivalent position with equivalent employment benefits, pay, *and other terms and conditions of employment.* Under these statutory terms, if an employee qualifies under FMLA for job-protected leave, the employee may not be forced, before the employee's FMLA job-protected leave entitlement has expired, to return to work in a "light duty" (*i.e.,* an unequal, modified, or restructured) position, instead of continuing FMLA leave until the entitlement has been exhausted. To do so would violate an employee's job-protected rights to be restored to the *same or an equivalent* position. Furthermore, the circumstances in which an employer is permitted to place an employee in an alternative position are explicitly addressed in the Act (§ 102(b)(2)).

Regarding the comment that worker's compensation benefits may be suspended if an employee refuses a light duty assignment, we do not interpret the FMLA as prohibiting that result under applicable State workers' compensation statutes. In our view, where an employee is injured on the job and the injury also results in a serious health condition that makes the employee unable to perform

anyone of the essential functions of the employee's position within the meaning of FMLA, the employee effectively qualifies for *both* workers' compensation benefits and job-protected leave under the FMLA. This would mean that, in addition to the employee receiving payments from the workers' compensation fund for replacement of lost wages, the employer would be obligated to maintain (at least until the employee's FMLA leave entitlement is exhausted) any of the employee's pre-existing health benefits coverage under the same terms and conditions as if the employee had continued to work. If, as part of the workers' compensation claim process, the employee is offered a medically-approved "light duty" assignment, the employee may decline the assignment offer and instead choose to begin or continue to exercise FMLA rights and remain on leave for the remaining portion of the employee's FMLA leave entitlement. As discussed in § 825.220(d), if the employee freely accepts the "light duty" assignment offer in lieu of FMLA leave or returns to work before exhausting his or her FMLA leave entitlement, the employee would retain his or her right to the original or an equivalent position until 12 weeks have passed, including all FMLA leave taken that year. At the conclusion of the 12-week period, if the employee is not able to perform the essential functions of the original position, the employee's right to restoration ceases. The relationship between State workers' compensation laws and FMLA will be discussed in further detail in connection with § 825.702.

It should be noted that FMLA does not modify or affect any law prohibiting discrimination on the basis of disability, such as the ADA. Thus, if a "qualified individual with a disability" within the meaning of the ADA is also an "eligible employee" entitled to take FMLA leave, an employer has multiple compliance obligations under both the ADA and the FMLA. When one of these laws offers a superior right to an employee on a particular issue, the employer must provide that superior right to the employee. These issues will be discussed in further detail in connection with § 825.702.

This section is also revised to make it clear, as stated in the legislative history and in the preamble to the Interim Final Rule, an employee who is absent to receive medical treatment for a serious health condition is unable to perform the essential functions of the employee's job while absent for treatment.

Needed to Care for a Family Member (§ 825.116)

An eligible employee may take FMLA leave "in order to care for" an immediate family member (spouse, son, daughter, or parent) with a serious health condition. This section, in discussing what was meant by "needed to care for" a family member, provided that both physical and psychological care or comfort were contemplated under this provision of FMLA. Giant Food, Inc. recommended that a distinction be made between physical and psychological care and supervisory care, suggesting also that reasonable efforts should be made by employees to develop alternate day care plans in the event of a childhood illness to lessen the impact that excessive absenteeism can have on an employer's operations. The Ohio Public Employer Labor Relations Association objected to allowing FMLA leave solely to provide psychological comfort for a family member rather than actual physical assistance and care, and suggested that employers should have discretion to consider whether other care is being provided to the family member through health-care services as well as other family members. The Women's Legal Defense Fund, Consortium for Citizens with Disabilities, Epilepsy Foundation of America, National Community Mental Healthcare Council, and United Cerebral Palsy Associations objected to the reference to individuals "receiving inpatient care" in paragraph (a), because many individuals are in other situations, such as in the home, which require this type of care and assistance from family members. Several of these commenters also objected to use of the phrase "seriously-ill" as too limiting and recommended replacing it with the statutory term "serious health condition" for consistency with other sections of the regulations. Some of these commenters, in addition to the Food and Allied Service Trades, also recommended that "spouse" be added to the list of family members in this section.

The final rule has been revised to add "spouse" to the last sentence of paragraph

(a), to delete "inpatient care," and to replace "seriously-ill" with "serious health condition." No further changes have been made in response to the remaining comments. The legislative history clearly reflects the intent of the Congress that providing psychological care and comfort to family members with serious health conditions would be a legitimate use of FMLA's leave entitlement provisions. Because FMLA grants to eligible employees the absolute right to take FMLA leave for qualifying reasons under the law, employers have no discretion in this area and cannot deny the legitimate use of FMLA leave for such purposes without violating the prohibited acts section of the statute. *See* § 105 of FMLA.

Medical Need for Intermittent/Reduced Schedule Leave (§ 825.117)

FMLA permits eligible employees to take leave "intermittently or on a reduced leave schedule" under certain conditions. Intermittent leave may be taken for the birth of a child (and to care for such child) and for the placement of a child for adoption or foster care if the employer and employee agree to such a schedule. Leave for a serious health condition (either the employee's or family member's) may be taken intermittently or on a reduced leave schedule when "medically necessary" (§ 102(b)(1) of FMLA). An employer may request that an employee support an intermittent leave request for a serious health condition with certification from the health care provider of the employee or family member of the medical necessity of the intermittent leave schedule and its expected duration. Employees must make a reasonable effort to schedule their intermittent leave that is foreseeable based on planned medical treatments so as not to unduly disrupt the employer's operations (subject to the approval of the health care provider), and employers may assign employees temporarily to alternative positions with equivalent pay and benefits that better accommodate such recurring periods of intermittent leave. (*See* also § 825.203.)

The Employee Assistance Professional Association, Inc. commented that no rationale was provided for why intermittent leave or reduced leave schedules are not available to an employee seeking to take leave to care for a family member. Intermittent leave to care for an immediate family member is allowed, as discussed in § 825.116.

The Women's Legal Defense Fund recommended that the regulations state explicitly that the determination of medical necessity for intermittent or reduced leave schedules is made only by the health care provider of the employee, in consultation with the employee. The Department's medical certification form, as discussed in § 825.306, is the vehicle for obtaining certification of the medical necessity of intermittent leave or leave on a reduced leave schedule, and such determinations are made exclusively by the health care provider of the employee or employee's family member (subject to an employer's right to request a second opinion at its own expense if it has reason to doubt the validity of the certification provided).

HCMF (long term care facilities) questioned what reasonable efforts are required by employees to consult with the employer and attempt to schedule intermittent leave so as not to unduly disrupt the employer's operations. Cincinnati Gas & Electric Company suggested that it would be reasonable for an employer to request that an employee attempt to schedule planned medical treatment outside normal work hours. The Equal Employment Advisory Council recommended the rules state that an employer may deny intermittent or reduced leave schedules when the reason for the leave can be accommodated during non-work hours, because the need for leave in such circumstances is not "medically necessary." Gray, Harris & Robinson asked what would constitute an undue disruption, if it were analogous to ADA's "undue hardship" standard, and to what extent could an employer deny the leave. The Chamber of Commerce of the USA also recommended clarifications in the rules of the impact of an employee's failure to satisfy the obligation to avoid disruptions to the employer's operations.

As discussed in §§ 825.302(e) and (f), the employee and employer should attempt to work out a schedule which meets the employee's FMLA leave needs without unduly disrupting the employer's operations. The ultimate resolution of the leave schedule, however, always remains subject to the ap-

proval of the health care provider and the schedule established for the planned medical treatments. It should be noted that under this section, the health care provider either already has, or will, establish the medical necessity for the intermittent leave schedule; it is a prerequisite for the leave. Thus, denial of the leave would be out of the question. Even delay of the leave would be inappropriate unless the health care provider agreed to reschedule the medical treatments. What would be a "reasonable effort" by the employee and an "undue disruption" of the employer's operations are fact-specific in each case. Requesting that an employee attempt to schedule planned medical treatments outside normal work hours when scheduling them during work hours would not unduly disrupt the employer's operations would not be "reasonable" or consistent with FMLA's requirements.

Definition or "Health Care Provider" (§ 825.118)

FMLA entitles eligible employees to take leave for a serious health condition (of either the employee or an immediate family member). "Serious health condition" is defined to include an injury, illness, impairment, or physical or mental condition involving either inpatient care or "continuing treatment *by a health care provider.*" In addition, FMLA's medical certification provisions allow an employer to request that leave for a serious health condition ". . .be supported by a certification issued by the *health care provider*. . ." of the employee or family member. Section 101(6) of the Act defines "health care provider" as a doctor of medicine or osteopathy authorized in the State to practice medicine or surgery (as appropriate) or "any other person determined by the Secretary [of Labor] to be capable of providing health care services."

After reviewing definitions under several programs, including rules of the U.S. Office of Personnel Management and Medicare, DOL developed FMLA's regulatory definition of "health care provider" by beginning with the definition of "physician" under the Federal Employees' Compensation Act (5 U.S.C. 8101(2)), which also includes podiatrists, dentists, clinical psychologists, optometrists, and chiropractors (limited to treatment consisting of manual manipulation of the spine to correct a subluxation as demonstrated by X-ray to exist) authorized to practice in the State and performing within the scope of their practice as defined under State law, and by adding nurse practitioners and nurse-midwives (who provide diagnosis and treatment of certain conditions, especially at health maintenance organizations and in rural areas where other health care providers may not be available) if performing within the scope of their practice as allowed by State law. Finally, the definition included Christian Science Practitioners to reflect the Congressional intent that such practitioners be included (as expressed in colloquies on the floors of both the House and Senate, and as reflected in the Committee report accompanying Title II of FMLA applicable to Federal civil service employees).

Fifty-seven commenters submitted views on the regulatory definition of "health care provider." Most advocacy groups and various trade and professional associations viewed the definition as too restrictive and suggested that it be expanded to include a broad range of additional providers of health care and related services.

Federally Employed Women and the Women's Legal Defense Fund noted that OPM's definition for Federal civil service employees under Title II of FMLA includes those providers recognized by the Federal Employee's Health Benefits Program, and suggested a similar approach be used by DOL for Title I. They contended that including any providers covered by the employers health insurance plan avoids confusion as to whether the services would be reimbursed and ensures ease of administration.

Alabama Power Company (Balch & Bingham) considered the definition as written too broad and suggested DOL follow the lead of the States with FMLA-type laws, confining the definition to doctors and osteopaths. The ERISA Industry Committee felt that employers should not be required to recognize service providers not recognized by their health plans. Burroughs Wellcome Company suggested that Christian Science Practitioners not be included.

The American Association for Marriage and Family Therapy, 14 State Associations for Marriage and Family Therapy, Teton Youth

& Family Services, and the Women's Legal Defense Fund suggested that marriage and family therapists be included in the definition. Fourteen organizations (American Board of Examiners in Clinical Social Work; California Society for Clinical Social Work; Catholic Charities, Inc.; Council on Social Work Education; the Maryland, Mississippi, New Hampshire, New York State, Ohio, Rhode Island, Texas and Utah Chapters of the National Association of Social Workers; Women's Legal Defense Fund; and 9 to 5, National Association of Working Women), the Personnel Department of the City of Newport News, and five Members of Congress recommended that "clinical social workers" be added to the definition of "health care providers." In addition, 436 cards/letters (generally uniform in style and content) were received from practicing social workers also urging that "clinical social workers" be added.

The Consortium for Citizens with Disabilities, Epilepsy Foundation of America, and United Cerebral Palsy Associations suggested that the regulations include providers of specialized health-related services for the disabled, health care providers licensed by States or accredited by national certification organizations, a non-exclusive list of types of providers (whether or not licensed or accredited), and a procedure for applying to DOL to add "emerging" health care provider services. The Service Employees International Union also supported flexibility in the regulations to include other types of providers of services as new roles evolve with changes in the health care system.

The American Academy of Physician Assistants, Community Legal Services, Inc., Equal Rights Advocates, Hospital Council of Western Pennsylvania, 9 to 5, National Association of Working Women, and Older Women's League recommended that physician assistants be included. The National Acupuncture and Oriental Medicine Alliance recommended including Acupuncturists and Oriental Medicine Practitioners. Employee Assistance Professional Association, Inc. recommended that Certified Employee Assistance Professionals be recognized as "providers" capable of making determinations of whether an employee is able to work or unable to return to work.

The American Chiropractic Association and William M. Mercer, Inc. objected to the parenthetical phrase concerning chiropractors that limited treatment to manual manipulation of the spine to correct a subluxation demonstrated by X-ray to exist. The American Psychological Association recommended replacing "clinical psychologist" with "doctorally trained psychologist whose scope of competence includes clinical activities."

The American Psychiatric Association suggested that a distinction should be maintained between doctors of medicine or osteopathy and non-physician health care professionals, and that certification for intermittent or reduced leave schedules should be accepted only from doctors of medicine or osteopathy, not non-physician health care providers. The Consortium for Citizens with Disabilities, on the other hand, suggested that the medical certification form be revised so that it does not appear that only a medical doctor or osteopath can sign off on the form.

California Rural Legal Assistance, Inc., Equal Rights Advocates, and William M. Mercer, Inc. recommended that foreign-certified or foreign-licensed health care providers should be recognized under FMLA, to account for the fact that many workers' parents, spouses or children do not reside in the U.S. or that such family members may become ill while abroad. (California Rural Legal Assistance, Inc. stated that many U.S. residents rely on Mexican doctors for health care.)

The law firm of Fisher & Phillips recommended that DOL delay exercising its authority to designate health care providers until there is an opportunity to determine the impact on the President's health care proposal.

After giving careful consideration to the numerous suggestions for changes in the definition of "health care provider," we have revised the final rule in the following respects. The definition will be expanded to include any health care provider that is recognized by the employer or accepted by the group health plan (or equivalent program) of the employer. To the extent that the employers or the employers' group health plans recognize any such individuals for certification of the existence of a health condition to substantiate a

claim for health care and related services that are provided, they would be included in the revised definition of "health care provider" for purposes of FMLA. Clinical social workers will also be included because our review reveals that they are ordinarily authorized to diagnose and treat without supervision under State law. Physician's assistants are not included as health care providers under the regulations because they are ordinarily only permitted to practice under a doctor's supervision. An employee, however, may receive treatment by a physician's assistant or other health care professional under the supervision of a doctor or other health care provider without first seeing the health care provider and obtaining a referral. In addition, any services recognized by the plan which are furnished as a result of a referral while under the continuing supervision of a health care provider would qualify as medical treatment for purposes of FMLA leave (*see* § 825.114(c)(2)(i)(A)).

II. Subpart B, §§ 825.200–825.220

Amount of Leave (§ 825.200)

Employers must choose from among four options a single uniform method for calculating the 12-month period for determining "12 workweeks of leave during any 12-month period." The choice of options was intended to give maximum flexibility for ease in administering FMLA in conjunction with other ongoing employer leave plans, given that some employers establish a "leave year" and because of State laws that may require a particular result.

The California Department of Fair Employment and Housing recommended this section include cautionary advice to employers that the availability of options may be limited by State law (the California Family Rights Act starts the 12-month period with the date the employee first uses qualifying leave). William M. Mercer, Inc. questioned whether State family leave laws would control the employer's administration of FMLA, and also whether leave accrues under the backward rolling method on a daily basis. The State of New York's Department of Civil Service and the State of Nevada's Department of Personnel recommended that each agency or department within a State government be allowed to select a separate (*i.e.*, different) 12-month period.

The State of South Carolina's Division of Human Resource Management, the State of South Dakota's Bureau of Personnel, and the Edison Electric Institute recommended provisions be added to limit the amount of FMLA leave available to an employee for the birth or adoption of a child to a single 12-week period per event (*e.g.*, under the calendar year method, an employee who adopts or gives birth to a child late in the year would not be entitled to take additional leave in the second calendar year period because of the adoption or birth of that child). Similarly, Cincinnati Gas and Electric Company recommended the final rules prohibit an employee from receiving 24 weeks of protected leave for a single FMLA-covered event (*e.g.*, where the initial 12-week absence ends at the same time the next annual 12-week allotment begins). (See also the discussion of similar comments received on the section that follows, § 825.201.)

The Women's Legal Defense Fund recommended that DOL explicitly define the method rather than allowing employer choices, to prevent manipulation, and suggested the period be calculated as the 12-month period following commencement of an employee's first FMLA leave (§ 825.200(b)(3)). If choices are allowed, they urge that the 12-month period rolling backward method (paragraph (b)(4)) be rejected because it curbs employee flexibility and is confusing to them. The American Federation of Teachers/National Education Association concurred with WLDF's comments. The AFL-CIO and Service Employees International Union submitted similar views. (SEIU also suggested clarifying that employers may not switch methods to deny employees leave, and that such action would violate FMLA's anti-interference provisions.) The United Paperworkers International Union suggested that the 12-month period be calculated by using each individual employee's anniversary date, as employees are not eligible until they have worked for at least 12 months, and this would prevent employers from manipulating the 12-month period to avoid FMLA obligations.

Fisher & Phillips suggested that the regulations refer to the 12-month "rolling period" as the default method for employers that have not designated a 12-month period.

The Society for Human Resource Management questioned whether the 12-week entitlement was for each separate reason specified under FMLA (12 weeks for childbirth, plus 12 weeks for a sick parent, plus 12 weeks for the employee's serious health condition, *etc.*, all in the same 12-month period), or for all reasons (total for all events in a 12-month period limited to 12 weeks). This commenter also questioned whether an employer must allow an employee to return to work early in the situation where the employee requested 12 weeks of leave and, three weeks into the leave, the employee asks to return to work.

Black, McCuskey, Soucers & Arbaugh stated that employees of employers who selected the calendar year should be entitled to only five weeks of FMLA leave for the period between August 5, 1993, and December 31, 1993. The Department cannot agree with this line of reasoning, which would suggest that employees of employers who select the calendar year would be entitled to less leave than other employees. Nor do we believe that Congress intended that an employee be entitled to one week of leave for each remaining month of the year after eligibility is established.

The final rule has been clarified in response to several of the comments received. The rule notes that an employer may be unable to choose one method from among the available regulatory options if a particular method is dictated by a State family leave law. In this regard, employers operating in multiple States with differing State family/medical leave provisions affecting the 12-month calculation must follow the method required by the State laws. Absent a conflict with State law, employers must select a single, uniform policy covering its entire workforce. Employers must inform employees of the applicable method for determining FMLA leave entitlement when informing employees of their FMLA rights. If an employer fails to designate one of the methods, employees will be allowed to calculate their leave entitlement under whichever method is most beneficial to them. The employer in that case would subsequently be able to designate a choice prospectively, but would have to follow the rule for employers wishing to change to another alternative (*i.e.*, give 60 days notice to all employees, and employees retain the full benefit of 12 weeks of leave under whichever method yields the greatest benefit to employees during the 60-day transition period).

When determining the amount of FMLA leave taken, a holiday occurring within a week of FMLA leave has no effect — the week is still counted as a week of FMLA leave. If, however, the employer's activities temporarily cease for one or more weeks and employees generally are not expected to report for work (*e.g.*, a school that closes two weeks for the Christmas and New Year holiday or for the summer vacation; a plant that closes two weeks for repairs or retooling), the days on which the employer's activities have ceased do not count against an employee's FMLA leave entitlement.

The "rolling backward" method is a snapshot of the 12-month period that changes daily (*i.e.*, as each new day is added to the 12-month period, one day from 12-months ago is eliminated). While many comments were received opposing this method, it has been retained as one of the available options because it is the one method that most literally tracks the statutory language.

Once the 12-month period is determined, an employee's FMLA leave entitlement is limited to a total of *up to* 12 workweeks of leave in that 12-month period for any and all reasons that qualify for taking leave under FMLA. If an employer selects the calendar year as the 12-month period, there is no authority under the statutory language to limit an employee's entitlement to a "per event" concept. (This would be akin to saying that if an employee under the calendar year method suffered a heart attack in the month of December, that employee would no longer qualify, once the new year arrived, to take FMLA leave for that serious health condition. We ardently reject this strained interpretation.) The only limitation the Act places on an employee's taking FMLA leave in a subsequent 12-month period to care for a newborn or newly-adopted child is that the entitlement to leave for such purposes expires 12 months after the date of the birth or placement.

If an employee begins a requested 12-week leave of absence and, three weeks into the

leave, asks to return to work earlier than originally planned, the employer is obligated to promptly restore the employee. An employee may only take FMLA leave for reasons that qualify under the Act, and may not be required to take more leave than is necessary to respond to the need for FMLA leave. If circumstances change and the employee no longer has a need for FMLA leave (which could include a parent's changed decision not to stay home with a newborn child as long as originally planned), the employee's FMLA leave is concluded and the employee has an absolute right under the law to be promptly restored to his or her original or an equivalent position of employment. This view does not mean that employees do not also have obligations to provide notice to the employer of such changing circumstances. If an employee's status changes and the employee is able to return to work earlier than anticipated, the employee should give the employer reasonable advance notice, generally at least two working days. This is addressed in § 825.309(c). An employer may also obtain such information through periodic status reports on the employee's intent to return to work.

Conclusion of Leave for Birth or Adoption (§ 825.201)

Under § 102(a)(2) of FMLA, an employee's entitlement to leave for a birth or placement of a son or daughter "shall *expire* at the *end* of the 12-month period *beginning* on the date of such birth or placement" (emphasis added). This section of the regulations repeated the statutory terms with the added qualifications that State law may require, or an employer may permit, a longer period; any such *FMLA* leave, however, must be *concluded* within this statutory 12-month period.

The Los Angeles County Metropolitan Transportation Authority recommended this section be revised to state clearly that leave for the birth of a child, or placement of a child with the employee for adoption or foster care, must be initiated and completed within 12 months after the birth or placement. Nationsbank Corporation (Troutman Sanders) stated that the termination date for an employee's entitlement to leave under this section should occur 12 months after the first FMLA leave is taken in connection with the event, rather than 12 months after the date of birth or placement, suggesting this approach would be more consistent with other regulatory provisions allowing such leave to begin before the actual date of birth or placement. (Otherwise, they suggest, the 12 weeks of leave could be spread over a period greater than the 12-month period provided by FMLA's requirements.)

The Employers Association of New Jersey questioned whether a provision under the New Jersey law that requires leave to *commence* (but it need not conclude) within one year of the date of birth would prevail over the FMLA.

The Women's Legal Defense Fund considered the language in this section of the regulations too restrictive, suggesting it removes scheduling flexibility for employees. WLDF suggested replacing "concluded" with "begun" (which, thus, would read like the New Jersey law cited above).

The Chamber of Commerce of the USA suggested modifications that would limit an employee's leave entitlement to a single 12-week period for the birth or placement of a child, to make it clear that an employee is not entitled to "stack" leave periods in connection with a single birth or placement. The Association of Washington Cities expressed similar views.

Our review of the statute and its legislative history in the context of the comments received has confirmed our initial views on this section. The statute clearly states that the entitlement to leave *expires* at the end of one year following the date of birth or placement of the child. Thus, the leave must be concluded (*i.e.*, completed) within the statutory entitlement period. There is no authority to provide by regulation that the leave need only begin within the statutory 12-month period. If a State provision (as is the case in New Jersey) allows for a longer or more generous period, the more generous State provision would prevail but such leave beyond what FMLA requires would not count as FMLA leave (*see* § 401(b) of FMLA, discussed below in connection with § 825.701 of the regulations). There is no authority to shorten the statutory 12-month period under the regulations where an employee begins leave for the birth or placement prior to the actual

birth or placement. Nor is there authority to limit an employee's entitlement to a "per event" standard.

Limitation for Spouses Employed by the Same Employer (§ 825.202)

Section 102(f) of FMLA specifically limits the total aggregate number of workweeks of leave to which an "eligible" husband and wife are both entitled if they work for the same employer to 12 workweeks of leave (combined between the two spouses) if the leave is taken for: (1) the birth of a child; (2) the placement of a child for adoption or foster care; or (3) to care for a sick parent. The regulations specified which FMLA-covered purposes for taking leave were subject to the special limitation, and gave examples of how the limitation would apply when leave taken during the 12-month period is for both a reason subject to the limitation and one that is not (leave for an employee's own serious health condition, and "family" leave if it is for care of a spouse, son, or daughter, is not subject to the statutory limitation).

Twelve comments were received on this section. Many commenters misunderstood the relationship under the statute between leave taken for a reason subject to the combined limit of 12 weeks, and leave taken for reasons not within the limitation. Several commenters took issue with the reasoning for limiting leave entitlements for spouses employed by the same employer. Two individuals opposed the limitations as being discriminatory against spouses.

Martin, Pringle, Oliver, Wallace & Swartz and the Virginia Maryland Delaware Association of Electric Cooperatives both noted that the regulations provide no guidance in connection with siblings employed by the same employer. The Society for Human Resource Management noted that two employees living together but not legally married can each take 12 weeks for the birth or placement of a child, and recommended revising the regulations to provide that the 12-week-total limitation would also apply where both parents of a child work for the same employer. The Ohio Public Employer Labor Relations Association felt that employers should be able to limit the leave of spouses for the care of a seriously-ill child for the same reason spouses are limited for the birth or adoption of a child. George Washington University felt that care for a seriously-ill parent should entitle each spouse to 12 weeks of FMLA leave. Because FMLA does not cover care of a parent in-law, the Women Employed Institute felt that both the husband and wife should be entitled to 12 weeks of leave in order to care for their own parent, just as they are entitled to 12 weeks of leave for their own illness.

Fisher & Phillips noted that when a female employee takes leave for the birth of a child, the leave may have a dual purpose under FMLA. One purpose relates to the employee's own serious health condition for childbirth and recovery (§ 102(a)(1)(D) of FMLA). The other relates to the birth and care of a newborn child (§ 102(a)(1)(A) of FMLA). They recommended revising the rule to state that such "dual purpose" leave would always be treated as being subject to the limitation for purposes of the husband taking FMLA leave. Fisher & Phillips suggested further that the reference in the Act to "parent" must be an error, that the word "child" must have been intended (recommending such a revision be made through regulatory interpretation).

According to the legislative history, the limitation on leave taken by spouses who work for same employer is intended to eliminate any employer incentive to refuse to hire married couples. It is our view that the statutory provisions must be interpreted literally, and we do not agree that the legislative result is an error that should be altered by regulation. DOL lacks the authority to either add to, or subtract from, the circumstances that are subject to the statutory limitation for spouses who work for the same employer. The examples given in the regulation have been clarified in an effort to reduce the confusion that is apparent from the comments received on this section of the regulations. With respect to the comment by Fisher & Phillips on "dual purpose" leave, FMLA lacks any "dual purpose" concept. Further, the statutory limitation must be applied literally, and only to leave that is taken for a purpose that is expressly subject to the limitation. Clearly there is a period of disability following the birth of a child, as explicitly recognized under State pregnancy disability laws. Disability leave

recognized under such State laws for the birth of a child would also be considered FMLA leave for a serious health condition. Such leave, for one's own serious health condition, is not subject to the limitation for spouses who work for the same employer. Nor does the limitation apply to unmarried parents or to siblings employed by the same employer. The regulations have been clarified in response to the comments received.

Intermittent and Reduced Leave Schedules (§ 825.203)

FMLA permits eligible employees to take leave "intermittently or on a reduced leave schedule" under certain conditions. Intermittent leave is not available for the birth or adoption of a child unless the employee and employer agree otherwise. Subject to compliance with FMLA's "notice" and medical certification provisions, and the right of an employer to transfer an employee temporarily to an alternative position with equivalent pay and benefits that better accommodates recurring periods of leave, leave for a serious health condition (either the employee's or family member's) may be taken intermittently or on a reduced leave schedule when medically necessary.

The Women's Legal Defense Fund and the Service Employees International Union commented that intermittent leave should be permitted to accomplish a placement for adoption or for foster care prior to the actual placement without requiring the agreement of the employer. Section 825.112(d) of the Interim Final Rule provides for the taking of FMLA leave for purposes of adoption or foster care prior to the actual placement in situations when the employee may be required to attend counselling sessions, appear in court, *etc.* Unlike the circumstances in § 825.112(c) which provide for an expectant mother to take leave prior to the birth of a child for prenatal care or for her own condition, both of which are specifically identified as being a serious health condition, placement for adoption or foster care is not so identified. To provide intermittent leave without the employer's agreement prior to the actual placement would be contrary to the language contained in § 102(b)(1) of the statute, "In General. — Leave under subparagraph (A) *(birth of a child)* or (B) *(placement for adoption of foster care)* of subsection (a)(1) shall not be taken by an employee intermittently or on a reduced leave schedule unless the employee and the employer of the employee agree otherwise." We are unable to make the suggested change in the Final Rule.

Fifteen commenters, including public employers, public utilities, educators, health care industry employers and manufacturers urged that the taking of intermittent leave in increments of one hour or less was too burdensome. Many recommended that leave taken intermittently should be limited to half-days (four hours) or full days as a minimum. The legislative history provides that only the time actually taken is charged against the employee's entitlement (Senate Committee on Labor and Human Resources (S. 5), Report 103-3, January 27, 1993, pp. 27 & 29). Otherwise, the statute and the legislative history are silent regarding increments of time related to intermittent leave. In providing guidance on this issue in the Interim Final Rule, it seemed appropriate to relate the increments of leave to the employer's own recordkeeping system in accounting for other forms of leave or absences. Section 825.203(d) tracks that decision and provides that the employer's established recordkeeping system controls with regard to increments of FMLA leave of less than one hour. (The employer may not require leave to be taken in increments of more than one hour.) The guidance in the Interim Final Rule continues to be appropriate; otherwise employees could be required to take leave in amounts greater than necessary, thereby eroding the 12-week leave entitlement unnecessarily. The Final Rule will contain the same guidance; however, this section will be clarified to provide explicitly that the phrase "one hour or less" is dispositive.

Five commenters expressed concern that an employee taking intermittent leave could spread the 12-week leave entitlement over an extended period, up to the full 12 month leave period. The Equal Employment Advisory Council suggests that the amount of intermittent leave available be limited to four weeks of the 12 week total available in any 12 months. The Kennedy Memorial Hospitals suggests that a limit of six months be placed on the period over which intermittent leave

can be extended. The Koehler Manufacturing Company suggests that employees requesting intermittent leave should be eligible for a shorter time period. Care Providers of Minnesota point out there is no statutory prohibition for reasonably limiting the period of time for intermittent leave.

The statute makes no provision for limiting the time period over which an employee may take leave intermittently or on a reduced leave schedule. To the contrary, § 102(b)(1) of the statute provides that the taking of such leave ". . .shall not result in a reduction in the total amount of leave to which the employee is entitled under subsection (a) beyond the amount of leave actually taken." After due consideration, the Department finds that making such a change would be contrary to the statute and the intent of Congress.

Blue Cross and Blue Shield of Texas, Inc. asks if due to a medical certification an employee is limited to working eight hours per day, and thus is unable to work mandatory overtime hours, may the employee be subject to disciplinary action or may the employer charge the unworked overtime to the employee's FMLA leave entitlement. The question to be answered would be whether the employer's policy requires the taking of other forms of leave (*i.e.,* vacation or sick leave) to cover unworked overtime. The taking of FMLA leave is predicated on the employee's normal workweek (*see* § 825.205 of the Interim Final Rule). The definition of reduced leave schedule in § 101(9) of the statute speaks of *usual* number of hours per workweek, or hours per workday (emphasis added). If the employee's usual or normal workweek is greater than 40 hours or workday is greater than eight hours, the days or hours the employee does not work may be charged against the FMLA leave entitlement if the absence is for an FMLA qualifying reason. If, however, the overtime is assigned/required on an "as needed" basis, not a part of the employee's usual or normal work time, or is voluntary, the unworked overtime may not be charged to the employee's FMLA leave entitlement. The employee is not subject to disciplinary action for being unable to work overtime as a result of limitations contained in a medical certification obtained for purposes of FMLA.

The law firm of Sommer and Barnard urges that an employee be required to furnish evidence satisfactory to the employer that periods of intermittent leave requested for birth or placement of a child before the actual birth or placement will be used for the required reason, and that all the leave requested/approved will be devoted to the purposes for which the employee was eligible for such leave. The Final Rule has been amended in § 825.113(d) to permit an employer to require reasonable documentation of a family relationship for purposes of FMLA leave. It would be unreasonable, however, to expect an employee to predict with any precision the amount of leave that will be required in conjunction with a birth or placement when time spent in these activities is largely outside the employee's control (*e.g.,* attorneys, doctors, the courts, social workers, *etc.*). The possibility, moreover, that employees would lie to their employer and not use leave for the purposes indicated is not unique to leave taken prior to the birth or placement for adoption or foster care. Such fraud should be treated like any other fraud in connection with leave. See also § 825.312(g). In any event, employer permission is required for an employee to take intermittent FMLA leave for birth (other than medically-necessary leave) or placement for adoption or foster care. Consequently, the suggested change will not be made.

Massmutual Life Insurance Company recommends that reduced schedule leave and intermittent leave for personal medical leave should be limited solely to those times which are scheduled for treatment, recovery from treatment or recovery from illness. The definition of leave which may be taken intermittently or on a reduced leave schedule basis for an employee's own serious condition or the serious health condition of an immediate family member has been changed in § 825.203 of the Final Rule to incorporate this suggestion. The employee will also be entitled to take leave intermittently or on a reduced leave schedule for periods of disability due to a chronic serious health condition or to provide needed care for an immediate family member with a serious health condition, including psychological care when such care would prove beneficial to the patient.

Temporary Transfers to Alternative Positions (§ 825.204)

If an employee needs to take intermittent leave (*e.g.,* for medical treatment) or leave on a reduced leave schedule, the employer may temporarily transfer the employee to an available alternative position for which the employee is qualified and which better accommodates recurring periods of leave than the employee's regular position. The alternative position must have equivalent pay and benefits; it need not have equivalent duties. The conditions of a temporary transfer may not violate any applicable collective bargaining agreement containing higher standards or more generous provisions for employees than those required by FMLA, and employers must observe any other applicable standards under Federal or State laws (*e.g.,* the ADA).

As the legislative history explains, this provision was intended to give greater staffing flexibility to employers by enabling them temporarily to transfer employees who need intermittent leave or leave on a reduced leave schedule to positions more suitable for recurring periods of leave. At the same time, it ensures that employees will not be penalized for their need for leave by requiring that they receive equivalent pay and benefits during the temporary transfer. Congress anticipated that a reduced leave schedule would often be perceived as desirable by employers who would prefer to retain a trained and experienced employee part-time for the weeks that the employee is on leave rather than hire a full-time temporary replacement.

The Women Employed Institute and Women's Legal Defense Fund suggested revisions to the regulations to clarify that temporary transfers should last only as long as an employee needs to take leave intermittently or on a reduced leave schedule; once the leave need ends, the employer must then restore the employee to his or her original or an equivalent position.

Kaiser Permanente questioned whether an employer could provide "pay in lieu of benefits" if that is the general practice for employees who work less than 20 hours per week. William M. Mercer, Inc. asked if, when a full-time employee is temporarily transferred to a part-time reduced leave schedule, and part-time employees ordinarily have either reduced health care coverage or pay higher premiums, can the transferred employee's benefits be similarly reduced? Van Hoy, Reutlinger & Taylor noted that an employer is required to maintain the employee's full-time benefits (*e.g.,* life and disability insurance) while the employee is working part-time on intermittent leave but questioned, where such policies are based on pay, whether the employer may reduce such benefits — if not, the regulations should contain a stronger warning so employers do not inadvertently reduce such benefits. The University of California asked for clarification of whether only health benefits are required to be maintained for employees who take FMLA leave, whether they are on full leave, reduced leave schedule, intermittent leave, or while in an alternative position. The ERISA Industry Committee requested additional clarification on the treatment of annual bonuses, particularly whether they may be prorated for time on leave (a pro rata reduction would impact the calculation of other benefits).

An employee may not be required to take more leave than is necessary to satisfy the employee's need for FMLA leave. If a full-time employee switches to a part-time or reduced leave schedule under FMLA, the employee must continue to receive the same (full) level of benefits which the employee enjoyed before starting the FMLA leave, and may not be required to pay more to maintain that same level of benefits enjoyed prior to the start of the FMLA reduced leave schedule, regardless of any employer policy applicable to its part-time employees that would suggest a different result. To permit otherwise would result in the employee not receiving equivalent pay and benefits as required by FMLA. An employer may only proportionately reduce the kinds of benefits that are computed on the basis of the number of hours worked during the period, *e.g.,* vacation or sick leave, insurance or other benefits that are determined by the amount of earnings. Once an employee's need for a reduced leave schedule under FMLA has ended, the employer must restore that employee to his or her original position or to a position that is equivalent to the original position (with equivalent benefits, pay, *etc.*). An employer may not transfer an employee to an alternative position in order to

discourage the employee from taking the leave or otherwise create a hardship for the employee (*e.g.,* transfer to the "graveyard" shift; assigning an administrative employee to perform laborer's work; reassigning a headquarters staff employee to a remote branch site, *etc.*). This section has been so clarified. The relationship between FMLA's provisions and collective bargaining agreements containing greater employee rights or more generous provisions for employees is discussed in § 825.700.

Determining the Amount of Intermittent/ Reduced Leave (§ 825.205)

Only the amount of leave actually taken while on an intermittent or reduced leave schedule may be charged as FMLA leave. This means, for example, that if a full-time employee who normally worked eight-hour days switched to a half-time (four hours per day) reduced leave schedule, only ½ week of FMLA leave could be charged each week (and, at that rate, it would take 24 weeks to exhaust the employee's FMLA leave entitlement if no other FMLA leave were taken during the 12-month period). For employees working part-time or variable hours, the amount of leave entitlement is determined on a proportional basis by comparing the new schedule (after starting FMLA leave) to the normal schedule (before starting FMLA leave). If an employee's schedule varies week-to-week, a weekly average over the 12 weeks prior to starting FMLA leave is used for establishing the "normal" schedule.

California Rural Legal Assistance, Inc. suggested that the regulations make clear that FMLA leave may not be charged during a week when work would not otherwise be available. The Society for Human Resource Management questioned how a week of FMLA leave would be counted for employees who work seven days and then are off for seven days.

An employee's FMLA leave entitlement may only be reduced for time which the employee would otherwise be required to report for duty, *but for the taking of the leave.* If the employee is not scheduled to report for work, the time period involved may not be counted as FMLA leave. *See* § 825.200(f).

The American Compensation Association was not clear on how to calculate the pro rata depletion of FMLA leave time for an employee presently on a reduced leave schedule due to a disability who needs intermittent leave, perhaps one day per week, and asked if it would be based on the pre-disability schedule or the current work schedule. Chicagoland Chamber of Commerce expressed concern that this section might be construed to allow an exempt employee who normally works more than 40 hours per week to receive FMLA leave on an intermittent or reduced leave schedule basis in excess of his or her 12-week entitlement, suggesting the greatest number of hours any employee should be entitled to receive for intermittent or reduced leave schedule purposes is 480 (12 weeks x 40 hours). The Chamber of Commerce of the USA suggested the regulation make clear that the 12-week average rule is applied only if an employee's normal schedule fluctuates, and not if it fluctuates due to overtime hours of work.

Section 102 of FMLA states that an eligible employee is entitled to "a total of 12 *workweeks of leave*" during the 12-month period. The statute uses the "workweek" as the basis for leave entitlement, and an employee's normal "workweek" prior to the start of FMLA leave is the controlling factor for determining how much leave an employee uses when switching to a reduced leave schedule. Nothing in the Act or it's legislative history suggests that the maximum amount of leave available to an employee is 480 hours. If an employee's normal workweek exceeds 40 hours, the calculation of total FMLA leave available for pro rata reduction of total leave entitlement during intermittent leave or reduced leave schedules should be based on the employee's normal workweek — even if it exceeds 40 hours.

If an employee with a disability has already switched to a *permanently* reduced work schedule for reasons other than FMLA, and needs leave on an intermittent basis, the hours worked under the current schedule would be used for making the calculation as provided in § 825.205(c).

"541" Exemption (§ 825.206)

FMLA leave may be unpaid. Section 102(c) of FMLA expressly provides that where an employee is otherwise exempt from the Fair

Labor Standards Act's (FLSA) requirements for payment of minimum wage and overtime compensation for hours worked over 40 per week (the exemption for "executive, administrative, and professional" employees under FLSA § 13(a)(1)), compliance by an employer with FMLA's requirement to provide unpaid leave shall not affect the exempt status of the employee under the FLSA exemption and its regulations (29 CFR Part 541). Thus, employers can "dock" the pay of otherwise-exempt, salaried employees for FMLA leave taken for partial day absences. If an FLSA-exempt employee needs to work a reduced leave schedule under FMLA, the employer may deduct from the employee's salary partial-day absences for any hours taken as intermittent or reduced schedule FMLA leave within the workweek without causing loss of the employee's exempt status under 29 CFR Part 541. By operation of the statute (FMLA), this exception to the FLSA "salary basis" rule extends only to leave which qualifies as FMLA leave (*i.e.,* FMLA-eligible employees, working for FMLA-covered employers, who take FMLA leave only for reasons which qualify as FMLA leave).

Twenty comments were received on this provision. Many commenters complained that the tension between FMLA's requirement to grant unpaid leave and FLSA's "salary basis" rule prohibiting partial-day deductions from pay for FLSA-exempt employees discourages employers from maintaining more generous family leave policies that were in effect prior to FMLA, or from extending FMLA leave rights to non-covered or non-eligible employees, because of the risk of jeopardizing the exempt status of entire classes of employees. The Personnel Department of Whatcom County, Washington, noted the inequitable result under the rule that causes non-exempt employees to obtain a "better package" under FMLA than exempt employees do. In contrast, the Service Employees International Union stated it would have been inappropriate for DOL to expand FMLA's exception to the FLSA "salary basis" test beyond the use of FMLA-qualified leave. The United Food and Commercial Workers International Union opposed allowing even FMLA-required deductions from an employee's salary without affecting the employee's qualifications for exemption under the FLSA because it permits the employer to reduce an employee's wages for hourly leave without having to grant overtime pay for hours over 40 per week. Van Hoy, Reutlinger & Taylor recommended that the final rule also address how employers treat salaried but *non-exempt* employees who are paid on the "fluctuating workweek" method for payment of half-time overtime compensation when FMLA leave results in fewer than 40 hours being worked in the workweek.

An employee subject to FLSA's overtime requirements who is paid on a salary basis and whose work hours fluctuate each week may be paid overtime compensation under the "fluctuating workweek" method of payment described in 29 CFR § 778.114. Where the employee and employer mutually agree that the salary amount will compensate the employee for all straight-time earnings for whatever hours are worked in the week, whether few or many, payment of extra compensation, in addition to the salary, for all overtime hours worked at one-half the "regular rate" will meet FLSA's overtime compensation requirements. Because the salary covers "straight-time" compensation for however many hours are worked in the workweek, the employee's "regular rate" varies each week (determined by dividing the salary by the number of hours worked each week). Payment for the overtime hours at one-half the rate computed each week, in addition to the salary, results in payment of time-and-one-half the regular rate for all overtime hours worked each week. The "fluctuating workweek" method of payment for overtime hours may not be used unless the salary amount is enough to yield average hourly straight-time earnings in excess of the statutory minimum wage for each hour worked in the weeks when the employee works the greatest number of hours. Typically, it is mutually agreed by the parties under these types of salary arrangements that the salary will be paid as straight-time compensation for however many or few hours are worked, long weeks as well as short weeks, under the circumstances of the employment arrangement as a whole.

Therefore, because payment of the agreed-upon salary is required in each short workweek as a prerequisite for payment of overtime compensation on a "fluctuating

workweek" basis, employers may not dock the salary of an employee paid on this basis who takes FMLA leave intermittently or on a reduced leave schedule without abandoning the "fluctuating workweek" overtime formula. An employer may either continue paying such an employee the agreed-upon salary in any week in which any work is performed during the employee's FMLA leave period, or may choose to convert the employee to an hourly basis of payment, with payment of proper time-and-one-half the hourly rate for any overtime hours worked during the period of the condition for which FMLA leave is needed intermittently or on a reduced leave schedule basis, and later restore the salary basis of payment after the employee's need for intermittent or reduced schedule FMLA leave has concluded. If an employer chooses to follow this exception from the fluctuating workweek method of overtime payment, it must do so uniformly for all employees paid on a fluctuating workweek basis who take FMLA leave intermittently or on a reduced leave schedule, and may not do so for employees taking leave under circumstances not covered by FMLA. The final rule has been clarified to reflect this policy.

While the Department recognizes the view, as some commenters noted, that a tension exists between partial-day docking under the FLSA "salary basis" rule and the intent of FMLA to encourage more generous family and medical leave policies, we are constrained by the literal language of the statutory terms to adhere to the policy set forth in the Interim Final Rule. By operation of FMLA, the statutory exception to the FLSA 541 exemption's "salary basis" rule extends only to leave qualifying as FMLA leave that is taken by FMLA-eligible employees employed by FMLA-covered employers. No further revisions are made in this section.

Paid or Unpaid Leave (§ 825.207)

FMLA requires *unpaid* leave, generally. If an employer provides *paid* leave of fewer than the 12 workweeks required by FMLA, the additional weeks necessary to attain 12 workweeks of leave in the 12-month period may be unpaid. FMLA also provides for substituting appropriate paid leave for the unpaid leave required by the Act. An employee may elect, or an employer may require the employee, to substitute any of the employee's accrued paid *vacation* leave, *personal* leave, or *family* leave if it is: (1) for the birth of a child, and to care for such child; (2) for placement of a child with the employee for adoption or foster care, and to care for such child; or, (3) to care for the employee's spouse, child, or parent, if the spouse, child or parent has a serious health condition. The legislative history explains that "family leave" as used here in FMLA refers to paid leave provided by the employer ". . .covering the *particular circumstances* for which the employee is seeking leave under [FMLA for birth or adoption of a child, or for the serious health condition of an immediate family member]. . ." (emphasis added). Based on this legislative history, the regulations similarly included a limitation that family leave may only be substituted "under circumstances permitted by the employer's family leave plan" (§ 825.207(b)).

In addition, the employee may elect, or the employer may require the employee, to substitute any of the employee's accrued paid *vacation* leave, *personal* leave, or *medical* or *sick* leave for FMLA leave taken for the serious health condition of an immediate family member (spouse, child, or parent) or for the employee's own serious health condition that makes the employee unable to work, *except that* an employer is not required to provide paid *sick* leave or paid *medical* leave "in any situation in which the employer would not normally provide any such paid leave." (FMLA §§ 102(d)(2)(A) & (B).)

These substitution provisions are intended to allow for the specified paid leaves that have accrued but have not yet been taken by an employee to be substituted for the unpaid leave required under FMLA, in order to mitigate the financial impact of wage loss due to family and temporary medical leaves. The substitution provisions assure that an employee is entitled to the benefits of applicable paid leave, plus any remaining leave time made available by FMLA on an unpaid basis.

The State of Oregon's Bureau of Labor and Industries asked for clarification of whether the employee or the employer had the prerogative or control over the decision to substitute paid leave for FMLA leave. Sommer & Barnard suggested additional guid-

ance was needed on employee substitution where the employer does not require it. The California Department of Fair Employment and Housing recommended the rule clearly state that employees have the right to substitute paid vacation during FMLA leave, and suggested further amendments to allow employers to require certification for FMLA leave where an employee desires to use paid vacation leave. The California Teamsters Public Affairs Council opposed permitting an employer to force an employee to use paid vacation or personal leave during FMLA leave absent a specific request from the employee to substitute such paid leave. The Equal Employment Advisory Council suggested the regulations allow employers to restrict substitution of paid vacation if the employer policy normally restricts vacations to certain times during the year. Chevron and the American Apparel Manufacturers Association, Inc. stated that paid leave should only be permitted at the employer's option (or discretion). Cincinnati Gas & Electric Company suggested that paid leave should be available for substitution only under the rules of the plan which established the paid time off.

FMLA's substitution language provides that ". . .an eligible employee may elect, or an employer may require the employee, to substitute any of the. . ." appropriate paid leave for any part of the 12-week period of FMLA leave. Under these terms, if an employee does not elect to substitute appropriate paid leave when requesting FMLA leave, the employer has the right to require that the employee do so. An employee always has the right to request, in the first instance, that appropriate paid leave be substituted. There are no limitations, however, on the employee's right to elect to substitute accrued paid *vacation* or *personal leave* for qualifying FMLA leave, and the employer may not limit the timing during the year in which paid vacation may be substituted for FMLA-qualifying absences or impose other limitations. If the employee does not initially request substitution of appropriate paid leave, the employer retains the right to require it. An employer may not override an employee's initial election to substitute appropriate paid leave for FMLA leave, nor place any other limitations on its use (*e.g.*, minimum of full days or weeks at a time, *etc.*). At the same time, in the absence of other limiting factors (such as a State law or an applicable collective bargaining agreement), where an employee does not elect substitution of appropriate paid leave, the employee must nevertheless accept the employer's decision to require it, even where the employee would desire a different result. The regulations have been clarified to address these principles.

The Women's Legal Defense Fund, 9 to 5, National Association of Working Women, AFL-CIO, Food & Allied Service Trades, International Brotherhood of Teamsters, and Service Employees International Union opposed what they perceived as unwarranted regulatory restrictions on the ability to substitute paid "family leave" under FMLA, and recommended deletion of the restrictive language. We have revised the language in § 82S.207(b) to track the language of the legislative history, which explains the meaning of "family leave" in this context. The effect of the revision, however, is the same result as under the terms of the Interim Final Rule.

Sixteen comments raised concerns over the relationship and interaction between FMLA leave and absences caused by on-the-job, workers' compensation injuries, and requested further guidance. The Women Employed Institute and the Women's Legal Defense Fund argued that workers' compensation cannot be substituted as paid leave for FMLA leave, even if such payments are proxies for lost wages. Many employer commenters argued alternatively that employers should not only be allowed to count the workers' compensation absence as FMLA leave, but they should continue to be allowed to exercise their rights under workers' compensation laws to require an employee to return to work at restricted or "light" duty. The Employers Association of Western Massachusetts, Inc. requested clarification of whether insured disability plans and self-insured disability plans are similarly considered a form of "accrued paid leave" under FMLA.

An employee who incurs a work-related illness or injury elects whether to receive paid leave from the employer or worker's compensation benefits. An employee cannot receive both. Therefore, where a work-related illness or injury also causes a "serious health condi-

tion that makes the employee unable to perform the functions of the position of such employee" within the meaning of FMLA, and the employee has elected to receive worker's compensation benefits, an employer cannot require the employee to substitute, under FMLA, any paid vacation or other leave during the absence that is covered by payments from the State workers' compensation fund. Similarly, an employee cannot elect to receive both worker's compensation and paid leave benefits. Such an absence can count, however, against an employee's FMLA leave entitlement if it is properly designated at the beginning of the absence as required by these regulations. Neither the statute nor its legislative history suggests that time absent from work for work-related accidents should not run concurrently for purposes of FMLA and the State workers' compensation laws (provided the illness or injury also meets FMLA' s definition of "serious health condition"). Indeed, FMLA's legislative history suggests that the Congress contemplated this result — in describing the intended meaning of "serious health condition," the Committee reports refer to "injuries caused by serious accidents on or off the job" (among other examples). On the other hand, payments from a State workers' compensation fund are not benefits provided by the employer, nor are they a form of "paid leave" provided by the employer for purposes of FMLA's substitution provisions. While the time absent from work can simultaneously count under both FMLA and State workers' compensation programs, payments provided by State workers' compensation funds are not considered "accrued paid medical or sick leave" within the meaning of FMLA. In addition, when an employee is receiving payments from the State workers' compensation fund, the employee may *not* elect, nor may the employer *require* the employee, to exhaust any form of paid leave provided by the employer during any portion of the absence covered by the workers' compensation payments. Payments provided under other types of plans covering temporary disabilities (whether provided voluntarily through insurance or under a self-insured plan, or required to meet State-mandated disability provisions (*e.g.,* pregnancy disability laws)) are to be treated similarly under FMLA — the time may be charged against an employee's FMLA leave entitlement (provided employees are properly notified of the designation at the commencement of the absence and any group health benefits are maintained by the employer as if the employee had continued to work, as required by these regulations). But an employee's receipt of such payments precludes the employee from electing, and prohibits the employer from requiring, substitution of any form of accrued paid leave for any part of the absence covered by such payments.

As will be discussed in further detail in connection with § 825.702, an employer is precluded from requiring an employee to return to work prematurely in a "light duty" assignment, instead of taking FMLA leave, if the employee remains unable to perform any one or more of the essential functions of the original position and the employee has not yet exhausted his or her full FMLA leave entitlement in the 12-month period. The reference point for determining an employee's essential job functions is the position held by the employee *when the need for FMLA leave arises, i.e.,* when the employee's notice of the need for leave is given or leave commences, whichever is earlier. An employer may not modify a job to eliminate essential job functions in an effort to deny an employee his or her FMLA leave rights. On the other hand, FMLA does not prevent the continuation of lawful policies under State workers' compensation programs that discontinue wage replacement payments if and when an employee refuses to accept a medically-approved light duty assignment. In such a case, the employee may continue on FMLA leave where the employee cannot perform anyone or more of the essential functions of the employee's former position, and the employee would have the right to elect to substitute appropriate paid leave, or continue on unpaid FMLA leave, until the employee has exhausted his or her 12-week FMLA leave entitlement in the 12-month period. The regulations are clarified in response to these comments to address absences covered by State workers' compensation laws.

The Chamber of Commerce of the USA stated that employers should be able to draft paid leave policies expansively or restrictively, and if an employee is unable to use paid leave,

the leave will be unpaid. The National Restaurant Association similarly suggested that any substituted paid leave must be taken in accordance with the employer's paid leave policies. Fisher & Phillips considered the regulations contradictory and inconsistent with FMLA, because they allow employees to substitute paid vacation or personal leave for unpaid FMLA leave while prohibiting employers from imposing any limitations, yet also state that employees may be required to comply with requirements of the employer's leave plan. Fisher & Phillips suggested that all of an employer's normal restrictions on the use of paid leave should continue to apply when paid leave is substituted for FMLA leave, because FMLA does not require the use of paid leave. Sommer & Barnard and Fisher & Phillips also objected to § 825.207(g), which restricts an employer's ability to request notice and certification for FMLA leave where the employee substitutes paid leave and the employer's normal leave policies do not require notice or certification (the employee may only be required under the Interim Final Rule to comply with the less-stringent requirements of an employer's plan, and not any more stringent notice or certification requirements of FMLA, unless the paid leave period is followed by unpaid FMLA leave). These two commenters and United HealthCare Corporation suggested employers be allowed to deny FMLA leave unless FMLA's notice and certification requirements are met, whether the leave is unpaid or substituted paid leave, to assure employers of their statutory rights and avoid confusion for employees. The University of California asked that DOL clarify how the employer confirms that requested time off to care for an ill family member or for personal illness qualifies as FMLA leave if the employer cannot confirm the request by asking for medical certification.

In response to the comments, this section is clarified. When paid leave is substituted for unpaid FMLA leave, and an employer has less stringent procedural requirements for taking that kind of leave than those of FMLA, only those less stringent requirements may be applied. An employee who complies with the employer's less stringent leave plan requirements in such cases may not have leave for an FMLA purpose delayed or denied on the grounds that the employee failed to comply with stricter requirements of FMLA. However, where accrued paid vacation or personal leave is substituted for unpaid FMLA leave for a serious health condition, an employee may be required to comply with any less stringent medical certification requirements of the employer's sick leave program. Appropriate revisions have been made in the notice and certification provisions of §§ 825.302(g), 825.305(e), and 825.306(c). An employer of course may make revisions to its leave program to require notice or certification that corresponds to FMLA requirements, or may treat paid and unpaid leave differently, provided the program is not amended in a discriminatory manner that treats employees on FMLA leave differently from other, similarly situated, employees.

The State of Nevada's Department of Personnel recommended the regulations be revised to allow substitution of compensatory time-off for unpaid FMLA leave. The Town of Normal (Illinois) suggested the employer should be able to *require* an employee to take compensatory time for FMLA leave. Montgomery County (Maryland) recommended that DOL's interpretative ruling that prohibits employers from using compensatory time as FMLA leave be included in the regulations.

The use of compensatory time off is severely restricted under the Fair Labor Standards Act (FLSA) in ways that are incompatible with FMLA's substitution provisions. First, "comp" time is not a form of accrued paid leave mentioned in the FMLA or legislative history for purposes of substitution. It is also not a benefit provided by the employer. Rather, it is an alternative form for paying public employees (only) for overtime hours worked. The public employee's "comp time bank" is not the property of the employer to control, but rather belongs to the employee. If a public employee terminates employment, any unused comp time must be "cashed out." Thus, FMLA's provisions allowing an employer to unilaterally *require* substitution would conflict with FLSA's rules on public employees' use of comp time only pursuant to an agreement or understanding between the employer and the employee (or the employee's representative) reached *before* the performance of the work. A public employee who has accrued

comp time off must also be permitted to use the time "within a reasonable period after making the request *if the use of compensatory time does not unduly disrupt the operations of the public agency*" (FLSA § 7(o), emphasis added). To the extent that the conditions under which an employee may take comp time off are contained in an agreement or understanding, the terms of the agreement or understanding govern the meaning of "reasonable period" (29 CFR § 553.25). An agency may turn down an employee's request for comp time off under FLSA if it would be unduly disruptive to the agency's operations. The employer's right to control an employee's use of comp time, including authority to decline a request for its use, would simply be inconsistent with FMLA's provision authorizing the employee to elect to substitute paid leave (without qualification as to whether the time taken would be unduly disruptive). While a public employee may certainly request the use of comp time under FLSA for an FMLA-qualifying absence, the employer may not simultaneously charge the FLSA comp time hours taken against the employee's separate FMLA leave entitlement. To do so would amount to charging (debiting) two separate entitlements for a single absence. Accordingly, public employers may not use their employees' FLSA "comp time" banks as a form of "accrued paid leave" for purposes of substitution under FMLA, and this section is so revised.

Designating Paid Leave as FMLA Leave (§ 825.208)

This section of the Interim Final Rule placed responsibility on the employer to designate all FMLA leave taken, whether paid or unpaid, as FMLA-qualifying, based on information obtained directly from the employee. Because employees may not spontaneously explain the reasons for taking their accrued paid vacation or personal leave, the regulations allowed employees to request to use their paid leave without necessarily stating that it was for an FMLA purpose, and if the employer rejected the request under its normal leave policies, the eligible employee would be expected to come forward in response to the employer's further inquiry with additional information to enable the employer to determine that it is FMLA leave (which could not be denied). Employers are required to determine *and designate* "up front" before leave starts whether any paid leave to be taken counts toward an employee's FMLA leave entitlement, and so notify the employee "immediately" upon learning that it qualifies as FMLA leave (in accordance with the employer's "specific notice to employees" obligations under § 825.301(c)). Only where leave had already begun and the employer had insufficient information to determine whether it qualified under FMLA could it be retroactively designated as FMLA leave under the Interim Final Rule. Employers were precluded in all cases from retroactively designating any paid leave taken as FMLA leave once the leave had ended and the employee had returned to work.

This section was intended to resolve the question of FMLA designation as early as possible in the leave request process, to eliminate protracted "after the fact" disputes. The regulations expected disputes to be resolved through discussions between the employee and the employer at the beginning of the leave rather than at the end. Because of the possible "stacking" of unpaid FMLA leave entitlements in addition to an employer's pre-existing leave plan, it appears that some employers that wished to mitigate their exposure to extended leaves by employees have been motivated by the provisions in the Interim Final Rule to try to determine and count all possible FMLA-qualifying absences as FMLA leave (by whatever means, including through overly-intrusive inquiries of employees when they request to use their accrued paid leave).

The Commission on the Status of Women, Equal Rights Advocates, and Gwen Moore, Majority Whip, California Legislature objected to an employer's ability to inquire into the purposes of the employee's paid vacation or personal leave to determine if it qualifies under FMLA, because it allows the employer unfettered discretion to invade the employee's privacy. Federated Investors and Michigan Consolidated Gas Company noted that extracting the reason for an employee's need to be away from work could violate the Americans With Disabilities Act. Many employer groups, in contrast, felt that the employer

should be permitted to conduct a reasonable investigation to determine if leave qualifies as FMLA leave (including inquiring of persons other than the employee for purposes of verification, such as the employee's physician).

Blue Cross and Blue Shield of Texas, Inc. and LaMotte Company pointed out that circumstances could arise where the unduly restrictive structure of the regulations disadvantages employees, such as where an employee is about to be disciplined for attendance problems and time previously missed and is precluded, due to the bar against retroactive designation of FMLA leave, from asserting FMLA leave as a defense. Burroughs Wellcome Company, Massmutual Life Insurance Company, and several others noted the restrictive structure was inconsistent with other regulatory provisions that allow up to 15 days for employees to furnish medical certification to substantiate FMLA leaves — where leave is unplanned and of relatively short duration or if the employee or health care provider delay processing the certification, the employee could be back at work before the employer had sufficient information to confirm that the leave qualified under FMLA and the employee would lose FMLA's benefits and protections. Several commenters (including the Texas Department of Human Services) suggested that employers be allowed to designate FMLA leaves immediately upon the employee's return to work. William M. Mercer, Inc. suggested permitting an employer to designate leave as qualifying under FMLA after it has ended if the inability to designate it during the leave resulted from the employee refusing to give needed information, or providing wrong information. The Chamber of Commerce of the USA suggested that employees be required to declare their intention to take FMLA leave at the beginning of an FMLA-qualifying period, and that employers be allowed to consider information from third-parties and be allowed to designate leave as FMLA-qualifying within 90 days following the end of a leave period. The Equal Employment Advisory Council suggested similar approaches with related rationales, noting in particular that inquiring into the reasons for employee leave requests for vacation and personal days was having a negative impact on employer-employee relations. EEAC recommended that employees be required to give notice of FMLA leave, and an employer's request for medical certification should be deemed a provisional designation of FMLA leave (subject to the employee satisfying the certification process).

Sommer & Barnard recommended the regulations be amended to provide that when an employer policy requires an employee to designate paid leave as FMLA leave, the employee shall provide FMLA notice and certification (if applicable). They noted that when § 825.207(g) (which exempts an employee using paid leave that is *not* followed by unpaid FMLA leave from FMLA's notice and certification requirements) and § 825.208(a)(1) (relieves an employee using paid leave from any obligation to explain the reason for the leave unless the employer denies the request) are linked with § 825.208(b) (FMLA determinations to be based only on information furnished directly by the employee), the rules effectively deprive an employer of the opportunity to make an informed determination that paid leave will be used for FMLA-qualifying reasons and should be counted as FMLA unless the employee volunteers sufficient accurate information. Moreover, this structure could encourage employees to withhold information and misrepresent facts to expand the aggregate of employer-paid leave and FMLA's unpaid leave entitlement.

After careful consideration of the many comments and objections received on this section, the Department has revised the regulations along the following lines. Designation of leave as being FMLA-qualifying is still expected to take place "up front" whenever possible. The employer's notification to the employee of the designation may be oral, but must be confirmed in writing, no later than the next regular payday (unless less than a week remains until the next payday). The written notice may be in any form, including a notation on the pay stub.

If the employer has the requisite knowledge to determine that a leave is for an FMLA reason at the time the employee either gives notice of the need for leave or it commences, and the employer does not notify the employee as required at that time that the leave is being designated as FMLA leave, the employer may not then designate the leave as FMLA

leave retroactively; it may designate only prospectively, as of the date of notification to the employee of the designation, that the time is being charged against the employee's FMLA leave entitlement. The employer may not designate leave that has already been taken as FMLA leave after the employee returns to work, with two exceptions: (1) if an employee is out for an FMLA-qualifying reason and the employer does not learn of the reason for the leave until the employee returns to work, the employer may designate the leave as FMLA leave promptly (within two business days) upon the employee's return to work (including a provisional designation based on information from the employee, subject to confirmation upon the employer's receipt of medical certification if the employer requires it and has previously notified the employee of the requirement); or (2) if the employer has provisionally designated the leave under FMLA and is awaiting receipt from the employee of medical certification or other "reasonable documentation" allowed by this amended rule to confirm that the leave was FMLA-qualifying, or the employer and employee are in the process of obtaining second or third medical opinions. If the employer does not designate leave as FMLA leave in a timely manner as required by the regulations, the employer may not later designate the absence as FMLA leave absent the circumstances specified above. Similarly, the employee is not entitled to the protections of the FMLA if the employee gives notice of the reason for the leave later than two days after returning to work. The regulations are also clarified that if an absence which begins as other than FMLA leave later develops into an FMLA-qualifying absence (*e.g.,* employee takes a two-week vacation for a ski trip and suffers a severe accident requiring hospitalization beginning the second week), the entire portion of the leave period that qualifies under FMLA may be counted as FMLA leave (*e.g.,* the second week). Employers must still base their designations of FMLA leave on information obtained directly from the employee or the employee's spokesperson (in the event the employee is incapacitated or otherwise designates a point of contact, *e.g.,* an immediate family member). If an employee does not provide information regarding the reason for the leave, leave may be denied.

Designating leave as FMLA-qualifying does not b1ock greater ADA rights. *See* § 825.702.

Benefit Entitlements During FMLA Leave (§ 825.209)

Eligible employees who take FMLA leave are entitled to be restored, at the end of their leave, to the same jobs they held when the leave commenced, or to an equivalent job with equivalent employment benefits, pay, and other terms and conditions of employment. The taking of FMLA leave cannot result in the loss of any employment benefit accrued before the leave began; however, nothing in FMLA entitles restored employees to the accrual of seniority or employment benefits during the leave, or to any right, benefit, or position of employment other than what they would have been entitled to had they not taken the leave. (§§ 104(a)(1), (2), and (3) of FMLA.) In addition, during a period of FMLA leave, the employer must maintain coverage under any "group health plan" at the level and under the conditions coverage would have been provided if the employee had continued to be employed continuously during the leave. (§ 104(c)) The legislative history explains that this is strictly a maintenance of benefits provision. FMLA does not require an employer to provide health benefits if it does not do so at the time the employee commences leave. The legislative history notes further, however, that if an employer establishes a health benefits plan during an employee's leave, FMLA's provisions should be read to mean that the entitlement to health benefits would commence at the same point during the leave that employees would have become entitled to such benefits if still on the job.

Several commenters requested further clarification in this section on the impact on continued FMLA leave rights, maintenance of health benefits, and restoration to employment when the job of an employee on FMLA leave is eliminated, such as through a department-wide downsizing or layoff. FMLA's legislative history explains that the explicit limitation in FMLA § 104(a)(3) means that if, but for being on leave, an employee would have been laid off, the employee's right to reinstatement is whatever it would have been

had the employee not been on leave when the layoff occurred. In order to clarify this point, the regulations are revised at § 825.211(c) to provide that, except as required by COBRA and for "key" employees, an employer's obligation to maintain health benefits during FMLA leave and to restore an employee after the planned leave under FMLA ceases if and when the employee's employment relationship would have terminated (*e.g.,* the employee's position is eliminated as part of a nondiscriminatory reduction in force, *i.e.,* no transfer or reassignment option is available to similarly-affected employees not on FMLA leave); the employee informs the employer unequivocally of the employee's intent not to return from leave (including when the leave would have begun if the employee so informs the employer before the leave begins — unless the employee is on *paid* leave during the period); the employee fails to return from leave, and thereby terminates employment; or the employee stays on leave (*i.e.,* is unable to return to work) after exhausting his or her FMLA leave entitlement in the 12-month period.

The Chamber of Commerce of the USA suggested clarifications to unambiguously state that plan changes such as premium increases, increased deductibles, *etc.,* which apply to active employees also apply to employees who are on FMLA leave. This requirement has been clarified.

A number of commenters requested specific guidance in this section regarding how particular fringe benefit plans or practices with respect to "cafeteria plans," "flexible spending accounts," and the "continuation of health benefits provisions" of title X of the Consolidated Omnibus Budget Reconciliation Act of 1985 (COBRA) interact with FMLA, particularly in regard to the tax implications of such programs. These issues cannot be resolved through FMLA's implementing regulations, because they are within the authority of the Internal Revenue Service (IRS). Questions regarding these matters should be directed to the IRS. (*See* Notice 94-103 in Internal Revenue Bulletin No. 1994-51, dated December 19, 1994.)

Nationsbank Corporation (Troutman Sanders) and Southern Electric International, Inc. (Troutman Sanders) stated that the rule failed to specify whether family members whose coverage is dropped at the employee's election during FMLA leave may be required to requalify for coverage upon the employee's return to work, and suggested that FMLA was not intended to exempt non-employee insureds from requalification. An employee is entitled to be restored to the same level of benefits which the employee received prior to starting the leave, including family or dependent coverages, without any qualifying period, physical examination, exclusion of pre-existing conditions, *etc.,* and the regulations are clarified to reflect this requirement.

The UAW International Union recommended that this section be amended to state that an employer may not treat workers who take FMLA leave in a manner that discriminates against them — *e.g.,* if workers on other forms of paid or unpaid leave are entitled to have coverage maintained for other, non-health plan benefits (life insurance, disability insurance, *etc.*), then the employer is required to follow its established practice or policy for maintaining these benefits for workers on paid or unpaid FMLA leave. This is addressed under the "prohibited acts" section of the regulations, at § 825.220. This section has been clarified to address employees' entitlements to holiday pay and other benefits while on FMLA leave.

The law firm of Alston and Bird recommended that the term group health plan should not include non-employment related health benefits paid directly by employees through voluntary deductions, *e.g.,* individual insurance policies. We agree with the recommendation, and language has been added to § 825.209(a) to exclude such benefits from the definition of group health plan, and to make clear that an employer is not responsible for maintaining or restoring such benefits for employees who take FMLA leave.

Employee Payments of Health Benefit Premiums (§ 825.210)

Because health benefits must be maintained during FMLA leave at the level and under the conditions coverage would have been provided if the employee had continued to work, any share of group health plan premiums which the employee had paid before

starting FMLA leave must continue to be paid by the employee during the leave. Any changes to premium rates and levels of coverages or other conditions of the plan that apply to the employer's active workforce also apply to eligible employees on FMLA leave. The regulations discuss options available to employers for collecting premium payments from employees on FMLA leave. Employers must give employees advance written notice of the terms for payment of such premiums during FMLA leave, and an employer may not apply more stringent requirements to an employee on FMLA leave than required of employees on other forms of unpaid leave under the terms of the Interim Final Rule.

One option referenced in § 825.210(b)(4) provided that an employer's existing rules for payment by employees on "leave without pay" could be followed, provided prepayment (before the leave commenced) was not required. The State of Oregon's Bureau of Labor and Industry questioned whether existing employer policies that formerly required an employee to assume responsibility for payment of all premiums for group health plan coverage during unpaid leave (both employer *and* employee shares) could continue to operate under FMLA, as § 825.210(b)(4) appeared to imply, or did §§ 825.210(b)(4) and (e) refer only to the manner of payment rather than the duty to pay the premiums itself? The payment obligations of employers for group health plan premiums during FMLA leave are subject to the same conditions that coverage would have been provided if the employee had continued to work; thus, employers cannot increase the employee's share of premiums during unpaid FMLA leave. The rules referred only to the manner of collecting premium payments.

Nationsbank Corporation and Southern Electric International, Inc. (Troutman Sanders) questioned whether an employer may use different options with different employees on a case-by-case basis for recovery of premiums from employees during unpaid FMLA leave or whether the employer must choose one option and apply it uniformly. The rules do not prohibit an employer from using different options on a case-by-case approach to meet the particular needs of employees and the employer, provided the employer does not act in a discriminatory manner.

The Chamber of Commerce of the USA opposed the requirement that employer policies on FMLA leave be equal to other leaves without pay provided by the employer, suggesting there is no statutory basis for this rule. Under the Interim Final Rule, sections 105 and 402 of the Act were construed in § 825.210(e) of these regulations and elsewhere to prohibit an employer from requiring more of employees (or providing less to employees) who take unpaid FMLA leave than the employer's policies require of (or provide to) employees on other forms of unpaid leave. We continue to believe that this regulation represents the proper construction of the Act.

Multi-employer Health Plans (§ 825.211)

Seven comments were received on this section, which describes special rules for maintenance of group health benefits under multi-employer health plans. The Associated General Contractors of America (AGC) contended that DOL wrongly concluded that employers under multi-employer plans must continue to make contributions during FMLA leave and that the legislative history, on which DOL relies, is internally inconsistent. AGC also urged that DOL clarify the FMLA rights of an employee who would have been laid off by a contributing employer during a period of FMLA leave but who might also have found employment with another contributing employer during the same period. Even if the individual might have found other employment with another contributing employer, AGC contends that the employer of the employee when the FMLA leave commenced has no further obligations under FMLA beyond the date on which he or she would have been laid off. Constructors Association of Western Pennsylvania filed similar views on this point.

These last comments reflect a proper interpretation of FMLA, as reflected throughout the regulations. Coverage by the group health plan must be maintained at the level coverage would have been provided if the employee continued to be employed instead of taking FMLA leave. As discussed elsewhere in these regulations, this means, for example, that if, but for being on leave, an employee

would have been laid off, the employee's rights under FMLA, including the requirements to maintain group health plan coverage, are whatever they would have been had the employee not been on leave when the layoff occurred. And, of course, these FMLA obligations apply only with respect to an "eligible employee" who has met the length of employment and hours of service tests. Neither the employer nor the multiemployer plan has any obligation under FMLA with respect to persons who are not "eligible employees." The regulations are revised to clarify that group health coverage under a multi employer plan must be maintained for an employee on FMLA leave at the same level coverage was provided when the leave commenced until either: (1) the FMLA leave entitlement is exhausted; (2) the employer can show that the employee would have been laid off and the employment relationship terminated; or, (3) the employee provides unequivocal notice of an intent not to return to work. With respect to the remaining comments on this section, we consider that the legislative history, as well as the regulations, accurately reflect the intent of the Congress that multi employer plans must receive contributions during the period of an employee's FMLA leave, and that the rate of contribution is the same amount as if the employee were continuously employed, at the same schedule, at the same wage or salary, and otherwise under the same terms and conditions as he or she normally worked before going on leave, unless a contrary result can be clearly demonstrated by the employer (or by the plan, where appropriate).

Failure to Timely Pay Health Plan Premiums (§ 825.212)

This section provided that an employer's obligation to maintain group health benefits ceases after an employee's premium payment is more than 30 days late. The preamble explained that coverage had to be maintained during the 30-day grace period. If an employer chose to drop group health plan coverage because an employee failed to make timely premium payments, all other FMLA obligations continue to apply during the FMLA leave, including the requirement to restore the employee to an equivalent position after the leave with full coverage and benefits equivalent to what the employee would have had if leave had not been taken and the premium payment had not been missed. An employee returning from FMLA leave may not be required to meet any qualification requirements imposed by the plan, including any new preexisting condition waiting period, waiting for an open season, or passing a medical examination for coverage to be reinstated.

Acrux Investigation Agency, Austin Human Resource Management Association, HCMF (long term care facilities), K-Products, Inc., Pathology Medical Laboratories (Riordan & McKinzie), Equal Employment Advisory Council, and Society of Professional Benefit Administrators opposed requiring the employer to reinstate health coverage (or dependent family member coverage) when the employee failed to make timely premium payments. In effect, they argue, individuals who take FMLA leave receive preferential treatment over active employees who decide to drop coverage and then request reinstatement of coverage, who are then subject to pre-existing condition waiting periods.

FMLA § 104(a)(2) states clearly that the taking of FMLA leave shall not result in the loss of any employment benefit accrued prior to the date on which the leave commenced. To hold a returning employee to a requirement that he or she requalify (or possibly not qualify) for any benefits which were enjoyed before going on FMLA leave would result in the loss of an employment benefit as a result of taking the FMLA leave. Moreover, the employees would not be restored to an equivalent job with equivalent benefits upon their return from FMLA leave if they were made subject to pre-existing condition waiting periods. These results would clearly violate FMLA's statutory standards.

The Service Employees International Union and the AFL-CIO recommended a provision requiring the employer to give a notice of delinquency to the employee when group health plan premiums are late, which would give the employee a reasonable opportunity to cure the delinquency before coverage is dropped. The Women's Legal Defense Fund noted that under the interim rules, an employer could stop making premium

payments on the employee's behalf if the employee's check is lost in the mail. WLDF also suggested that the employer be required to notify the employee in writing and give the employee an additional 30 days in which to cure the delinquency, citing regulations promulgated by OPM to implement Title II of FMLA as a model (5 CFR § 890.502; 58 Fed. Reg. 39607 (July 23, 1993)). The California Department of Fair Employment and Housing also supported a bar against discontinuing coverage without notice to the employee.

The Department has decided to adopt the suggestions requiring notification to employees before an employer may drop group health plan coverage because of a lack of timely premium payments. Under the OPM regulations cited in the comments, the employing office must notify an employee if payment is not received by the due date that continuation of coverage depends upon receipt of premium payments within 15 days (longer for employees overseas) after receipt of the notice (or 60 days after the date of the notice if return receipt certification is not received by the employing office). DOL is adopting a similar requirement: 15 days notice must be given that coverage will cease if the employee's premium payment is more than 30 days late.

Pathology Medical Laboratories (Riordan & McKinzie) suggested that the rule should allow insurance coverage to be cancelled retroactively to the first date of the period to which the unpaid premium relates. Fisher & Phillips, Sommer & Barnard, William M. Mercer, Inc., and Florida Citrus Mutual filed similar objections to the 30-day grace period during which group health plan coverage must be maintained. The California Department of Fair Employment and Housing suggested a rule allowing employers to discontinue coverage when an employee is more than one regular pay period late, as most insurance is paid in advance on a monthly basis and the current 30-day rule could result in employers having to pay two months of free coverage when the employee fails to make the premium payments. The State of Nevada's Department of Personnel said it was unclear whether the employer's obligation to maintain coverage, and under a self-insurance plan to pay claims, only extends for the 30-day grace period, contending an inequity exists for an employer with a self-insured plan to pay claims despite the debt owed by a non-returning employee while not placing the same requirement on an employer with a fully-insured plan. Wessels & Pautsch suggested that a portion of the burden for maintaining health insurance should be shared by the insurance provider, *e.g.*, qualification requirements or preexisting condition waiting periods could be waived when an employee fails to make premium payments. Credit Union National Association, Inc. similarly suggested that insurance companies be mandated to waive these requirements. The American Apparel Manufacturers Association, Inc. expressed concern that the rule created an obvious disincentive for employees to maintain their portions of premiums during FMLA leave, because they know their coverage must be maintained by the employer, and suggested that employees be held accountable to their employers for reasonable administrative costs associated with reinstating employees' health coverage as an incentive to the employees to continue paying their share of premiums. The Chamber of Commerce of the USA concurred with the 30-day grace period but suggested clarification that the employer (or health plan insurer) may hold payment of claims under the health plan until the premium payment is made for the coverage period to which the claim relates. Equal Employment Advisory Council noted that some employees elect not to continue health premiums while on FMLA leave, and do not always want coverage reinstated on the first day of return because they would prefer not to incur the immediate cost of premium payments. They recommended that benefits be reinstated on the day of return if the employee resumes premium payments (if applicable); and, if the employee does not wish to resume coverage on the day of return, the employer should be allowed to reinstate coverage on the date the employee requests such reinstatement, provided the employee satisfies all the normal conditions that an employee not on FMLA leave would incur when initiating group health plan coverage.

As noted above, several revisions are included in the final rule in response to the comments received on this section. With respect to voluntary action by employees who

elect to withdraw from their group health plan coverage during FMLA leave, and request reinstatement at a desired future date, if their decisions are truly voluntary and future reinstatement on the requested date is not barred by the terms of the plan or the employer, FMLA would not prohibit such employee–employer arrangements. However, the employee may not be required to requalify for any benefits enjoyed prior to the start of FMLA leave without violating the express terms of FMLA § 104(a)(2).

Under the final rule as revised, in order to drop group health plan coverage for an employee whose premium payment is late, the employer must provide written notice to the employee that the payment has not been received 15 days before coverage will cease. If the employer has established policies regarding other forms of unpaid leave that permit the employer to cease coverage retroactively to the first date of the period to which the unpaid premium relates, the employer may cease the employee's coverage retroactively in accordance with that policy, provided the 15-day notice was given. In the absence of such a policy applicable to other forms of unpaid leave, coverage for the employee ceases at the end of the 30-day grace period after the payment was due, again only if the required 15-day notice has been provided. The same rules would apply to payment of claims under self-insurance plans.

With respect to the remaining comments on this section, the Department is making no further changes. FMLA regulates the maintenance of group health coverage by employers for periods of qualifying FMLA leave, but does not extend authority to DOL to enable requiring insurance carriers to waive provisions in their existing contracts with employers or to otherwise bear a portion of the burden for maintaining health insurance for employees who take FMLA leave. The suggestion that employees be held accountable to employers for reasonable administrative costs associated with reinstating employees' health coverage as an incentive for them to continue paying their share of premiums similarly cannot be adopted. Employees who return from FMLA leave are entitled to be restored to the same or an equivalent position with equivalent benefits. Requiring an employee to pay more for the same level of benefits enjoyed previously is not "equivalent" and would violate FMLA.

Recovery of Premiums (§ 825.213)

FMLA § 104(c)(2) allows employers in certain cases to recapture the premiums paid for maintaining employees' group health plan coverage during periods of *unpaid* leave under FMLA if the employees fail to return to work after the leave period to which the employee is entitled has expired. This recapture provision does not apply to "key" employees who are denied restoration under FMLA § 104(b), nor to any employee who cannot return to work because of the continuation, recurrence, or onset of a serious health condition — either the employee's own or that of an immediate family member (spouse, child, or parent) for whom they are needed to care, or due to other circumstances beyond the control of the employee. An employer may require medical certification to support an employee's claim that the qualifying serious health condition exists. This section of the regulations described the statutory provisions and provided examples of other circumstances beyond the control of the employee. Included was a provision that an employee must return to work for at least 30 calendar days to be considered to have "returned to work" for purposes of this provision. Because the statute specifies that the recovery of premiums applies to "any period of *unpaid* leave under § 102" when the circumstances permit, the rule stated that an employer may not recover its share of health insurance premiums for any period of FMLA leave covered by *paid* leave. Additional guidance was included in § 825.213(f) concerning "non-mandatory" (*i.e.*, other than "group health plan") benefits, *e.g.*, life and disability insurance, in an effort to alert employers of the possible adverse consequences of allowing such "non-mandatory" benefits to lapse during a period of unpaid FMLA leave and the employer's ability to meet FMLA's requirement to fully restore *all* employment benefits (*not* just group health plan coverage) to eligible employees who return from qualifying FMLA leave.

Several commenters took issue with the underlying statutory provisions discussed in

this section, over which DOL has no control. Those comments will not be addressed.

The ERISA Industry Committee commented that providing for employers to collect premiums from non-returning employees provides no practical benefit to employers, suggesting that alternatives be made available such as refundable deposits or advance payments to cover the leave period (advance or "pre-" payment was specifically prohibited by § 825.210(b)(4) of the Interim Final Rule). Pima Federal Credit Union similarly viewed the rule as unrealistic—an employee normally cannot or will not repay and legal action by the employer creates destructive, unfavorable publicity and "ill-will," harming employee morale. Loral Defense Systems — Arizona stated it is not feasible for most employers to recover their portions of health insurance premiums unless the employee voluntarily agrees to reimbursement arrangements.

Nationsbank Corporation (Troutman Sanders) commented that the interim rules do not state whether an employer may use a different option to recover premium payments for other welfare benefits, such as disability insurance, than the one selected for recovering health premiums, or whether it must choose one option for recovering all types of premiums. The commenter recommended that employers be allowed flexibility in seeking repayment, to maximize recovery potential. The FMLA regulations do not restrict the employer's available options for recovery. For example, a repayment schedule of partial payments stretched over extended pay periods to account for individual employee's needs and compensation arrangements would not be prohibited.

Six commenters (9 to 5, National Association of Working Women; Federally Employed Women; Women's Legal Defense Fund; Cumberland-Perry Association for Retarded Citizens; American Federation of Teachers/ National Education Association; and the Society for Human Resource Management) commented on the 30-day "returned to work" rule in this section. The American Federation of Teachers/National Education Association and the Women's Legal Defense Fund suggested a single workweek be used (WLDF stated that FMLA provides no basis to allow an employer to recover premiums when an employee returns to work for less than 30 days). In contrast, the Society for Human Resource Management said that 30 days were too short to determine whether an employee intends to return to work for the long term and recommended 60 days; Cumberland-Perry Association for Retarded Citizens also suggested 60 days, or some other demonstration of good faith attempt to return to work to protect employers from manipulative employees. Federally Employed Women, and 9 to 5, National Association of Working Women stated the 30-day period had no basis under the statute and recommended instead language that would create a rebuttable presumption that an employee's failure to return is *not* due to a serious health condition, which could then be overcome by a showing that the failure was due to a serious health condition or other circumstances beyond the employee's control. (WLDF suggested similar rebuttable presumption language.)

In spite of requests from both sides of this issue, the "returned to work" definition will remain at 30 days. As the discussion in the legislative history on maintenance of health benefits during FMLA leave suggests, the purpose of the Act is to provide "job-protected" leave to eligible employees for the reasons that qualify under the Act. Being restored to the original or an equivalent position of employment after returning from FMLA leave is central to the leave entitlement provisions, and suggests, in a temporal sense, long-term or "quasi-permanence." Thus, the 30-day requirement is not unreasonable. In addition, if an employee transfers directly from taking FMLA leave to retirement (or such a transfer occurs during the first 30 days after the employee returns to work), the employee is considered to have returned to work.

The Chamber of Commerce of the USA opposed the rule that prohibits an employer from recovering premiums paid to maintain group health coverage if the employee does not return to work for reasons beyond the employee's control, *e.g.,* the employee is needed to care for a relative or individual with a serious health condition other than an immediate family member. Lancaster Laboratories requested more definition of events that qualify as "other circumstances beyond the employee's control." The Women's Legal

Defense Fund also criticized the inclusion of examples in the negative, *i.e.*, ones that do *not* (or can never) qualify as circumstances beyond the employee's control.

Examples of "circumstances beyond the employee's control" have been clarified in the regulations. A mother's, or a father's, decision not to return to work to stay home with a healthy newborn child would not be considered a circumstance beyond the employee's control. On the other hand, if the newborn child has a serious health condition, such as serious birth defects requiring immediate surgery, a parent's decision not to return to work in such a case would be a circumstance beyond his or her control.

Kaiser Permanente noted the regulations referred only to situations involving *requalification* for benefits, but omitted situations where an event covered by a particular kind of insurance occurs while the employee is on unpaid FMLA leave and coverage has lapsed during the leave. The commenter requested further consideration be given to explaining this aspect of FMLA. In one example given by the commenter, an employee is on unpaid leave and there is no continuation of life insurance during the leave. The commenter asked what benefits, if any, the beneficiary would be entitled to if the employee died during the leave. In the second example, disability insurance is discontinued for an employee who takes unpaid FMLA leave to care for a spouse or parent with a serious health condition and the employee becomes disabled during the leave. Can the employee be denied any disability coverage for the condition?

Under FMLA's "restoration to position" employment and benefits protection provisions (§ 104 of the Act), there is no obligation to maintain "non-mandatory" (other than group health plan) benefits during a period of FMLA leave by operation of FMLA itself; therefore, an employer would not have to incur expenses or pay for the conditions occurring during the period of unpaid leave when coverage lapsed in the two examples given. However, an employer could not exclude any benefit previously enjoyed by the employee who returns to work after the leave. Accordingly, the returning employee in the second example could *not* be denied disability coverage because of any condition which arose during the leave and corresponding lapse of coverage. The employer would be responsible for providing benefits to the employee equivalent to the level enjoyed by the employee prior to starting the leave, regardless of any qualifications imposed by the plan.

Pathology Medical Laboratories (Riordan & McKinzie) questioned the intent of the provision in § 825.213(e) of the Interim Final Rule requiring a self-insured plan to provide benefits during periods in which the employee failed to pay the premium. In addition to being obligated for the payment of covered claims incurred during a period for which the employee paid the premiums, a self-insured plan cannot deny payment of claims during the applicable grace period provided by § 825.212(a), *i.e.*, in the absence of a specific policy for other forms of unpaid leave, coverage for the employee must be maintained during the grace period and may only cease at the *end* of the 30-day grace period (provided the required 15-day notice has been provided).

Fisher & Phillips noted that the definition of "employment benefits" in § 825.800 includes "non-ERISA" plans. If an employer makes premium payments on behalf of employees on FMLA leave who participate in a non-ERISA ,plan, the plan may be converted to ERISA status.

The definition of "employment benefits" contained in the interim rule was based on FMLA's statutory definition of the same term in § 101(5). However, as discussed above, plans meeting the specific criteria in § 825.209(a) will be excluded from FMLA's definition of covered "employment benefits," to be consistent with a similar narrow exception followed under ERISA. Maintenance of such individual health insurance policies which are not considered a part of the employer's group health plan (as newly defined) are the sole responsibility of the employee, who should make necessary arrangements directly with the insurer for payment of premiums during periods of unpaid FMLA leave. Notwithstanding these provisions, if an employer's payment of health or welfare benefit premiums (as required to comply with FMLA) changes the plan from a non-ERISA to an ERISA-covered plan, the result is unavoidable in light of the statutory provisions.

William M. Mercer, Inc. suggested that the rule specify more clearly that an employer's ability to recover premiums for non-health benefits includes both the employer and employee share, regardless of the reason for an employee's failure to return to work.

An employer may elect to pay premiums continuously (to avoid a lapse of coverage or otherwise) for "non-health" benefits (*e.g.,* life insurance, disability insurance, *etc.*). Like the provision in section 825.212(b) regarding health benefits, this section (as restructured and revised for clarity) provides in a new paragraph (b) that where such payments have been made, and the employee returns to work at the conclusion of leave, the employer is entitled to recover only the costs incurred for paying the *employee 's* share of any premiums (regardless of an employee's argument that he or she did not want coverage during the leave). If the employee fails to return to work for any reason, the employer may also recover only the employee's share of any non-health benefit costs incurred by the employer.

Rights on Returning to Work (§ 825.214)

FMLA's employment and benefits protection requires that an eligible employee be restored, upon return from FMLA leave, to the original position held by the employee when the leave commenced, or to an equivalent position with equivalent benefits, pay, and other terms and conditions of employment.

Equal Rights Advocates recommended that the regulations interpret FMLA's restoration rights to require that the employer first try to reinstate the employee to the *same* position, and, only if it is not available, restore the employee to an "equivalent" position. Women Employed Institute and Women's Legal Defense Fund suggested that employers be required to notify employees no later than the last day of leave if an employer does not intend to restore an employee to the same position.

The State of Oregon's Bureau of Labor and Industries asked if an employee's right to reinstatement under FMLA persists ad infinitum until the employee is offered an equivalent position, or if it is ever extinguished (*e.g.,* where the former job has been eliminated during the leave and no equivalent positions are available when the employee's leave ends). Fisher & Phillips suggested that the regulations should enable an employer to deny reinstatement to a returning employee if it can demonstrate that the job was eliminated for business reasons (citing, for example, where the employee's work can be performed by other workers) and no other "equivalent" job is available for the employee.

As explained in FMLA's legislative history, the standard for evaluating job "equivalence" under FMLA parallels Title VII's general prohibition against job discrimination (42 U.S.C. 2000e-2(a)(1)), which prohibits "discriminat[ion]. . .with respect to [an employee's] compensation, terms, conditions, or privileges of employment," and is intended to be interpreted similarly:

> The committee recognizes that it will not always be possible for an employer to restore an employee to the precise position held before taking leave. On the other hand, employees would be greatly deterred from taking leave without the assurance that upon return from leave, they will be reinstated to a genuinely equivalent position. Accordingly, the bill contains an appropriately stringent standard for assigning employees returning from leave to jobs other than the precise positions which they previously held.
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> First, the standard of "equivalence" — not merely "comparability" or "similarity" — necessarily requires a correspondence to the duties and other terms, conditions and privileges of an employee's previous position. Second, the standard encompasses all "terms and conditions" of employment, not just those specified. (Report from the Committee on Labor and Human Resources (S. 5), Report 103-3, January 27, 1993, p. 29.)

Given this history, DOL lacks authority to require an employer to first attempt to place a returning employee in the *same* position from which the employee commenced FMLA leave, and we do not see the utility of imposing additional notification requirements on employers when they simply exercise their statutory rights to place employees in equiva-

lent positions. If a position to which a returning employee is placed is equivalent, the employee has no right to obtain his or her original job back. On the other hand, as an enforcement matter, we recognize that restoring an employee to the same position presents strategic advantages to employers who attempt to meet their FMLA compliance objectives in this manner, because it avoids what may often become protracted disputes with employees over the exacting "equivalence" standards that must be applied. It should be noted, in response to the comments from the State of Oregon's Bureau of Labor and Industries and Fisher and Phillips, an employer has an obligation to place the employee in the same or an equivalent position even where no vacancy exists. The statute does not permit an employer to replace an employee who takes FMLA leave or restructure a position and then refuse to reinstate the returning employee on the ground that no position exists. Furthermore, an employee's acceptance of a different but allegedly equivalent job does not extinguish an employee's statutory rights to be restored to a truly equivalent job or to challenge an employer's placement decision. Enforcement actions may be brought within two years after the date of the last event constituting the alleged violation, unless the violation is willful, in which case a three year statute of limitations applies. Given the complexities involved, it may well be advantageous for employers to restore returning employees to their same positions, but it cannot be a requirement of compliance in the regulations. As explained elsewhere in the regulations, if, but for being on leave, an employee would have been laid off, the employee's right to reinstatement is whatever it would have been had the employee not been on leave when the layoff occurred. Note, too, however, that it is a violation of FMLA's prohibited acts (§ 105 of the Act) for an employer to discharge or otherwise discriminate against an employee for exercising rights under the Act. Thus, it would be a prohibited act to refuse to place an employee in the same position *because* the employee had taken FMLA leave. Similarly, an employer that eliminates the job of an employee who takes FMLA leave (for example, by redistributing the work to other employees) must bear the burden of establishing that the job would have been eliminated, and the employee would not otherwise have been employed at the time of restoration, if the employee had continued to work instead of taking the leave. (*See* § 825.216.)

Sommer & Barnard noted the regulations did not address an employer's obligation to reinstate an employee who returns to work before the planned expiration of the scheduled FMLA leave without advance notice to the employer, and suggested a minimum of two business days advance notice be required of the employee in such a case. (See also §§ 825.216 and 825.309.) On the one hand, an employee cannot be required to take more leave than is necessary to address the employee's FMLA need for leave (because it would not qualify as FMLA leave and, therefore, could not be charged against the employee's 12-week FMLA leave entitlement during the 12-month period). On the other hand, employees should be able to provide reasonable advance notice of changed circumstances affecting the employee's need for FMLA leave. The suggestion a minimum of two days advance notice be required has been adopted in § 825.309(c). Also, an employer may obtain such information in periodic status reports from the employee.

Wessels & Pautsch commented that employers who choose to accommodate individuals who are not protected by the ADA should not risk litigation by reinstating a returning employee to less than an equivalent position if the position offered is all that the employee can perform. They recommended that the final rule note that the right of reinstatement to the same or equivalent position is contingent upon the employee's continued ability to perform all of the essential functions of the job. (See also § 825.215.) This point has been clarified in this section.

The National Association of Temporary Services, in commenting on this section, supported adoption in the rule of a concept that temporary employees who find their spots filled upon return from leave would go to the "head of the line" for placement by the temporary help company under certain circumstances. There are limitations, however, in the application of this "head of the line" principle, because some circumstances of temporary

help employment would require immediate reinstatement under FMLA. If, for legitimate business reasons unrelated to the taking of FMLA leave, the client of a temporary help company discontinues the services of the temporary help company (*i.e.,* the contract under which the employee who took FMLA leave was working has ended), or discontinues the services formerly performed by the employee who took FMLA leave, *and* there are no available equivalent temporary help jobs at the same client of the temporary help company, then the obligation of the temporary help employer is to find an equivalent temporary help job to which to restore the returning employee at another client company. If no other equivalent positions are available with other clients, *and* if the returning employee typically experienced "waits" between jobs in the ordinary course of his or her employment with the temporary help placement company, then such an employee would be entitled to priority consideration for the next suitable placement with other customers. On the other hand, if the client is still using agency employees in the same or equivalent positions, the agency would be required to reinstate the employee immediately, even if it would be required to remove another employee. This concept has been clarified in § 825.106 in discussing joint employment responsibilities of temporary help companies and their client firms.

The Edison Electric Institute asked if an employer is obliged to hold a position open for a "contract" employee employed by a contractor if the contract was originally for a period longer than the employee's FMLA leave time would consume. In the Department's view the contractor would have the responsibility as the primary employer of the employee for job restoration at the conclusion of the employee's FMLA leave, provided the primary employer chooses to place the employee in that position, rather than in an equivalent position elsewhere. If the contract employee's services are still being provided by the contractor under contract to the secondary (customer or client) employer, the primary (contractor) employer could restore the contract employee to the previous contract in the same or an equivalent position. Furthermore, if the secondary (customer or client) employer attempted to interfere with or restrain the primary (contractor) employer's attempts to restore the contract employee to his or her previous position from the start of the leave, the secondary (client or customer) employer would be in violation of the "prohibited acts" section of the Act and regulations (*see* § 825.220). These principles are discussed in § 825.106.

The College and University Personnel Association recommended that colleges and universities be permitted to maintain flexibility to place a faculty member in a temporary position without equivalent duties and responsibilities when the faculty member returns during a term, suggesting that educational institutions are unique because they work on the semester or quarter system and it disrupts students' education if a professor is brought back to teach during the term. FMLA contains no authority to grant the requested exception by regulation. The Congress addressed to some extent the special circumstances of local education agencies under § 108 of FMLA, but chose not to include colleges and universities within the scope of the special rules.

Equivalent Position (§ 825.215)

An equivalent position is one that is virtually identical to the employee's former position in terms of pay, benefits, and working conditions, including perquisites and status. This section of the regulations, which attempted to articulate the various factors that have an impact on meeting the statutory standards for "equivalence" under FMLA and to present interpretations through examples, generated numerous comments.

Five commenters (Federally Employed Women; Women's Legal Defense Fund; Food & Allied Service Trades; International Brotherhood of Teamsters; and Service Employees International Union) objected to the discussion in paragraph (a) of this section that appeared to use the terms "equivalent" and "substantially similar" interchangeably, and they suggested that the regulations were confusing the applicable standards. The final rule has been clarified in response to these comments. As described in the legislative history noted above, the standard for evaluating job "equivalence" under FMLA parallels Title VII's

general prohibition against job discrimination, and is intended to be interpreted in a similar manner. "Equivalence" necessarily requires a correspondence to the duties and other terms, conditions and privileges of an employee's previous position, which is more than mere "comparability" or "similarity." Moreover, the intended standard encompasses all "terms and conditions" of employment, not just those specified. Thus, several of these commenters objected on these grounds to the exclusion in paragraph (f) of "perceived loss of potential for future promotional opportunities" and "any increased possibility of being subject to a future layoff" from what was encompassed by "equivalent pay, benefits and working conditions" under FMLA. As requested by these commenters, the final rule has been clarified to indicate that an equivalent position must have the same or substantially similar duties, conditions, responsibilities, privileges and status as the original position. The references to perceived loss of potential promotions and increased possibility of future layoff have been deleted from paragraph (f).

Eight commenters (Burroughs Wellcome Company; Southern Electric International, Inc. (Troutman Sanders); California Department of Fair Employment and Housing; William M. Mercer, Inc.; Chamber of Commerce of the USA; Society for Human Resource Management; and Timber Operators Council) raised questions or concerns on the regulatory guidance on the impact of unpaid FMLA leave on various forms of incentive pay plans and bonuses (*e.g.,* perfect attendance bonuses, sales bonuses based on calendar year productivity, and pay increases based on performance reviews). Bonuses for perfect attendance and safety do not require performance by the employee but rather contemplate the absence of occurrences. To the extent an employee who takes FMLA leave meets all the qualifications to receive these types of bonuses up to the point that FMLA leave begins, the employee must continue to qualify for this entitlement upon returning from FMLA leave. In other words, the employee may not be disqualified from perfect attendance, safety, or similar bonus(es) because of the taking of FMLA leave. (*See* § 825.220(b) and (c)). A monthly production bonus, on the other hand, does require performance by the employee. If the employee is on FMLA leave during the period for which the bonus is computed, the employee is not entitled to any greater consideration for the bonus than other employees receive while on paid or unpaid leave (as appropriate) during the period. Because restored employees are not entitled to accrue seniority during a period of FMLA leave, pay increases based on performance reviews conducted after 12 months of completed service with the employer may be delayed by the amount of unpaid FMLA leave an employee takes during the 12-month period (in the absence of policies that treat other forms of unpaid leave differently). In contrast, a pay increase based on annual performance reviews geared to an employee's "entry on board" anniversary date without regard to any unpaid leave taken during the period may not be denied or delayed (once the employee returns from FMLA leave) to an employee on FMLA leave on his or her anniversary date. The regulations have been clarified to include some of these principles.

Fourteen commenters (Alabama Power Company (Balch & Bingham); Pathology Medical Laboratories (Riordan & McKinzie); Department of Personnel, City of Dallas; New Hampshire Retirement System; University of California; Hill & Barlow; Morris R. Friedman; Willcox & Savage; McCready and Keene, Inc; William M. Mercer, Inc; Government Finance Officers Association; National Council on Teacher Retirement; National Restaurant Association; and Virginia Maryland Delaware Association of Electric Cooperatives) expressed various views on, and requested clarification of, provisions included in paragraph (d)(4) of this section that indicated periods of FMLA leave would be treated as "continuous service (*i.e.,* no break in service) for purposes of vesting and eligibility to participate" in pension and other retirement programs. To resolve the confusion created by this provision, several clarifications have been included in the final rule. Under the FMLA, *unpaid* leave does not constitute service credit — except for purposes of "break in service" rules because the taking of FMLA leave cannot ". . .result in the loss of any employment benefit accrued prior to the date on which the leave commenced" (§ 104(a)(2)). Thus, employ-

ees will not be deemed to accrue hours of service during periods of *unpaid* FMLA leave (*paid* leave *is* counted as service credit). Note, in addition, however, that if any FMLA leave is also covered by special maternity and paternity leave plan pension break in service rules under ERISA, the more generous rule would apply. Paragraph (d)(4) of this section is clarified to reflect this position.

Cincinnati Gas & Electric Company and Austin Human Resource Management Association asked that the requirement for an employee to be reinstated to the same or a "geographically proximate" worksite be further defined in paragraph (e)(1) of this section. In response, the rule is clarified to provide that a geographically proximate worksite is one that does not involve a significant increase in commuting time or distance.

Austin Human Resource Management Association also recommended that the rules clarify an employer's obligation to return an employee to an equivalent position following FMLA leave when the employee has medical limitations but is not a qualified individual with a disability under the ADA. An employee's right to restoration under FMLA is dependent upon the employee's ability to perform all of the essential functions of the employee's position. This is now addressed in § 825.214. (See also the discussion in § 825.702.) This commenter also suggested that the final rule expressly state that FMLA does not affect the employer's right to administer a light duty return to work program for employees off work due to injury or illness. This is an incorrect interpretation of FMLA's leave entitlement provisions and cannot be adopted in the regulations. See the discussion in § 825.702(d)(2). An employer may not require an employee to return to light duty. But the employer is not prohibited from providing a program under which an employee could voluntarily return to duty before he or she is able to perform all the essential functions of the job. In such a case, because an employee cannot waive his or her FMLA rights, the employee's right to be restored to his or her original or an equivalent position would continue until 12 weeks have passed in that 12-month period, including all FMLA leave and the light duty period for which the employee would otherwise have been on leave. See the revisions at §§ 825.220 and 825.702.

College and University Personnel Association commented that § 825.215(d)(2) appeared to prohibit employers from applying "use it or lose it" policies because an employee who takes FMLA leave is entitled to the same benefits upon return from leave as he/she was entitled to at the commencement of the leave, regardless of whether the "use it or lose it" date has passed. The commenter considered this interpretation inconsistent with § 825.216, which suggests an employee has no greater right to benefits than if the employee had been continuously employed during the FMLA leave. The commenter is correct that the FMLA extends no greater right or benefit to eligible employees than they would receive if they worked continuously during the FMLA leave. Consistent with this provision, if an employee would have "lost" the benefit if the employee had been continuously employed instead of taking FMLA leave, the employee is not entitled to "retain" the benefit simply because the employee took FMLA leave, regardless of whether the trigger date for "losing it" occurs during a period the employee is on FMLA leave.

The National Association of Plumbing-Heating-Cooling Contractors commented that for union-affiliated employers under a collective bargaining agreement, an eligible employee who requests FMLA leave will be replaced from the hiring hall. According to the commenter, the employer has no authority to recall a worker back to his or her original position at the end of the leave. As noted in § 825.700 of these regulations and § 402 of the FMLA, the rights established for eligible employees by FMLA may not be diminished by any collective bargaining agreement or any employment benefit program or plan. An employer under the circumstance described by this commenter would still be required to reinstate the eligible employee to the same or an equivalent position.

Limitations on Employer's Obligation to Reinstate (§ 825.216)

Section 104(a)(3) of FMLA limits the entitlement of any restored employee to no greater right, benefit, or position of employment than any right, benefit, or position of employment to which the employee would

have been entitled had the employee not taken the leave. An employer must demonstrate that the employee would not otherwise have been employed when reinstatement is requested to be able to deny restoring the employee (for example, in the case of a department-wide layoff affecting the employee's former position). Similarly, if a shift has been eliminated or overtime work has decreased, a returning employee would not be entitled to return to that shift or to work the same overtime hours as before. In addition, an employer may deny reinstatement to an eligible "key" employee if such reinstatement would cause substantial and grievous economic injury to the employer's operations and if the employer has complied with all the provisions of § 825.217; and, an employer may delay reinstatement of an employee who fails to furnish a fitness for duty certificate on return to work in the circumstances described in § 825.310, until the certificate is furnished.

The National Association of Computer Consultant Business commented that while this section referred to the task of the project being completed while an employee is on FMLA leave and the loss of reinstatement rights in that instance, it did not refer to other similar limitations, such as where a position is eliminated or resubcontracted. The same principles would apply in these other instances where the position of employment no longer exists and the change occurs during an employee's FMLA leave. An employee's rights to be restored are the same as if the employee had not taken the leave. The employer must establish that the employee who seeks reinstatement would not otherwise have been employed if leave had not been taken in order to deny reinstatement. See also § 825.312(d).

Employers Association of New Jersey asked, where an employee would have been laid off during a period of FMLA leave, at what point does the leave end and the employee's entitlement to maintenance of group health benefits cease? Or, where the employer makes a bona fide determination that, because of reduced workforce requirements, the services of the employee on FMLA leave will no longer be required? Similarly, Alabama Power Company (Balch & Bingham) requested more guidance be given on department-wide downsizing while an employee is on leave — must the employee still be kept on leave for the remainder of the planned FMLA leave if he or she would have been permanently laid off when the downsizing occurred? Fisher and Phillips also suggested the regulations clarify that an eligible employee's rights to group health plan benefits end after the date of a layoff affecting an employee on FMLA leave. The National Restaurant Association suggested that it would be helpful if more examples were included of circumstances where an employee's rights to job restoration and maintenance of health benefits are limited.

As explained in several sections of the regulations, an eligible employee under FMLA is entitled to no greater right of employment than if leave had not been taken. The legislative history points out that if, but for being on leave, an employee would have been laid off, the employee's right to reinstatement is whatever it would have been had the employee not been on leave at the time of the layoff. Thus, if an employee is laid off during an FMLA leave period, the employer's obligations to continue the employee on FMLA leave, maintain the employee's group health plan benefits, and restore the employee to a position of employment, all cease at the time the employee is laid off *provided* the employer has no such obligation under a collective bargaining agreement or otherwise, and the employer can demonstrate that the employee would not have been reinstated, reassigned, or transferred in the absence of the FMLA leave. This section has been so clarified. Note, too, however, an employer is prohibited from discharging or otherwise discriminating against an employee for exercising rights under the Act, and the employer that eliminates the job of an employee who takes FMLA leave (for example, by redistributing the work to other employees) bears the burden of establishing that the job would have been eliminated, and the employee would not otherwise have been employed by the employer, if the employee had continued to work instead of taking the leave. (See also the discussion of § 825.214, above.)

Employers Association of New Jersey also asked whether an employer is obligated to reinstate an employee if, during the leave, the employee engaged in conduct which would

have resulted in discharge if the conduct occurred while the employee was at work. If no such obligation exists, may the FMLA leave and maintenance of group health insurance be discontinued at the point in time that the misconduct took place? Again, an employee on FMLA leave is entitled to no greater right of employment than if the leave was not taken. Provided the employer's policies are non-discriminatory, are applied uniformly to similarly-situated employees, and violate no other laws, regulations, or collective bargaining agreements where applicable, sanctions such as discharge for misconduct may continue to be applied to the employee on FMLA leave for actionable offenses as if the employee had continued to work.

"Key" Employee Exemption (§ 825.217)

FMLA provides a limited exemption from an employer's requirement to restore an employee to employment after FMLA leave if certain factors are met: (1) denial of restoration to employment (but not the taking of the leave) must be necessary to prevent "substantial and grievous economic injury" to the employer's operations; (2) the employer must notify the employee of its intent to deny restoration under this exemption at the time the employer determines that such grievous economic injury would occur; (3) if the leave has already commenced, the employer must allow the employee an opportunity to elect to return to work after receiving the notice from the employer; and (4) the exemption is limited to a salaried eligible employee who is among the highest paid 10 percent of the employer's workforce within 75 miles of the facility where employed. These provisions are statutory, as set forth in § 104(b) of FMLA.

Several commenters suggested changes that would be inconsistent with the statutory terms of the exemption, such as increase the "top 10 percent" to "top 25 percent" or decrease it to "top five percent," or guarantee reinstatement rights to women who have achieved the top 10 percent status despite the terms of the exemption, or limit applicability of the exemption to private sector employers only. The Department cannot adopt regulatory provisions for the exemption that would run counter to the terms of the statute.

The National Association of Plumbing-Heating-Cooling Contractors questioned whether key employees had to be notified of their designation as "key" prior to requesting FMLA leave, suggesting that employers should be required to do this to prevent misunderstandings and abuses (*e.g.,* at the time of being hired). Under the terms of the statute, the employer must notify an employee "at the time the employer determines" that the requisite injury from restoration would occur. Under § 825.217(c)(2), the determination of whether a salaried employee is among the top 10 percent for purposes of the exemption is made at the time of a request for leave. Under the "notice to employee" provisions of § 825.301(c)(6), the employer must inform a "key" employee in response to a request for leave whether the employee is a "key" employee, and the potential consequence that restoration may be denied following the leave. As provided under § 825.219, if an employer believes reinstatement may be denied, such written notice must be provided to the employee at the time of the leave request, or when the FMLA leave commences, whichever is earlier. Failure to provide timely notice that the employee is a key employee and restoration may be denied will cause employers to lose their right to deny restoration, even where substantial and grievous economic injury will result from restoring the employee.

The Society for Human Resource Management asked whether overtime is included when computing the highest paid 10 percent of the workforce, and how the determination is made when there is a parent company and a subsidiary involved. As detailed in § 825.217 (c)(1), the earnings used for this computation include wages (which includes salaries), premium pay (which includes "overtime" premium pay), incentive pay (*e.g.,* commissions), and non-discretionary and discretionary bonuses. The definition of "employer" in § 825.104 would control in cases involving a parent and subsidiary. As provided in § 825.104(c), normally the legal entity which employs the employees is the employer, and a corporation is a single employer (rather than its separate establishments or divisions). Where one corporation has an ownership interest in another, it is a separate employer *unless* it meets the tests for "integrated

employer" (§ 825.104(c)(2)), in which case all employees of the integrated employer are considered.

Substantial and Grievous Economic Injury (§ 825.218)

To deny restoration to a "key" employee, the employer must establish that restoring the employee would cause "substantial and grievous economic injury" to the employer's operations. In explaining the conditions for applying the "key" employee exemption, the legislative history indicated, when measuring grievous economic harm, ". . .a factor to be considered is the cost of losing a key employee if the employee chooses to take the leave, notwithstanding the determination that restoration will be denied." Numerous commenters (Chicago Transit Authority; Nationsbank Corporation (Troutman Sanders) and Southern Electric International, Inc. (Troutman Sanders); Pima Federal Credit Union; United Federal Credit Union; Weinberg & Green; Wessels & Pautsch; Willcox & Savage; Credit Union National Association, Inc; National Association of Federal Credit Unions; and the National Restaurant Association) requested more specific guidelines and further regulatory definition of the statutory term "substantial and grievous economic injury." One commenter (IBM Endicott/Owego Employees Federal Credit Union) suggested further guidance was unnecessary. The National Association of Federal Credit Unions noted additionally that under the ADA, an employer's operations suffer an "undue hardship" if accommodation to an employee would be unduly costly, extensive, substantial, or disruptive or would fundamentally alter the nature or operation of the business. This commenter suggested these same factors under ADA could be applied in determining whether or not an employer's operations would suffer "substantial and grievous economic injury" by restoring a key employee to the position. The EEOC, on the other hand, which administers the ADA, recommended that the FMLA rules state that FMLA's standard for the "key" employee exemption is *different* from "undue hardship" under the ADA. The Department concurs with EEOC's suggestion that "substantial and grievous economic injury" under FMLA is different from "undue hardship" under the ADA. FMLA creates a narrow exception to the reinstatement rights of a key employee, whereas ADA's standard provides a measure of the reasonableness of any accommodation. Additionally, the definitions of the two terms suggest that "substantial and grievous economic injury" is more stringent than "undue hardship." The FMLA rules define "substantial and grievous economic injury" to include "substantial long-term injury." Undue hardship is defined as "significant difficulty or expense" (*see* Appendix to 29 CFR Part 1630.2(p)). Accordingly, the final rule is revised to clarify that the two standards are, in fact, different, and that FMLA's standard is more stringent than the ADA's "undue hardship" standard. Further regulatory guidelines, however, in the form of a more precise test, cannot be established due to the fact-specific circumstances that must be evaluated on a case-by-case basis.

Rights of a Key Employee (§ 825.219)

This section detailed the guidelines for applying the "key" employee exemption, and the requirements for employers to furnish proper and timely notice to "key" employees, informing them of the possibility that restoration to employment may be denied. A "key" employee must be given a reasonable period of time after receiving the employer's notice in which to elect whether to return to work. A key employee who takes leave is still eligible for maintenance of group health benefits, even after the employee has been notified that reinstatement will be denied. In those circumstances, the employer may not recover the premiums it paid to maintain such health benefits. An employee who continues on leave after receiving notice from the employer is still entitled to request reinstatement at the conclusion of the leave period, and the employer must again determine if substantial and grievous economic injury will result from reinstatement based on the facts existing *at that time.*

TRW Systems Federal Credit Union, Fisher & Phillips, and the National Restaurant Association considered the requirements to give written notices to key employees as provided in the regulations to be excessive and duplicative. The National Association of Federal Credit Unions opposed the require-

ment for a second determination to be made, after a key employee has already chosen to continue the leave after receiving the employer's first notice that restoration will be denied. The Chamber of Commerce recommended that the regulations require written notice but not mandate a specific form of delivery (either in person or by certified mail). The National Restaurant Association considered the obligations of the employer to be so burdensome under the regulations as to render the exception under the Act of no practical value.

After full consideration given to the comments received on this section, the Department continues to believe that the rule properly construes the rights intended by the Act for "key" employees; thus, no further modifications have been made in response to the comments. Section 104(b) of FMLA is intended as a narrow, limited exemption from the otherwise applicable restoration requirements of the Act. The procedural requirements set forth in the rule ensure that the standards for the exemption have been properly met, *i.e.,* based on facts existing at the time an employee seeks restoration to employment, the employer must establish that denial of restoration *at that time* is necessary to prevent substantial and grievous economic injury to the employer's operations.

Employee Protections and Prohibited Acts (§ 825.220)

Section 105 of FMLA makes it unlawful for an employer to interfere with or restrain or deny the exercise of any right provided by the Act. It also makes it unlawful for an employer to discharge or in any other manner discriminate against any individual for opposing any practice made unlawful by the Act. This opposition clause is derived from Title VII of the Civil Rights Act of 1964 and is intended, according to the legislative history, to be construed in the same manner. Thus, FMLA provides the same sorts of protections to workers who oppose, protest, or attempt to correct alleged violations of the FMLA as are provided to workers under Title VII. The regulations provided that any violation of the FMLA or its implementing regulations would constitute interfering with, restraining, or denying the exercise of rights under the Act. "Interfering with" the exercise of rights was defined to include not only denying authorization for or discouraging an employee to take FMLA leave, but manipulation by the employer to avoid responsibilities (such as unnecessarily transferring employees among worksites to avoid the 50-employee threshold for employees' eligibility). FMLA's antidiscrimination provisions were interpreted in the Interim Final Rule to prohibit an employer from requiring more of an employee who took FMLA leave than the employer requires of employees who take other forms of paid or unpaid leave (*e.g.,* requirements to furnish written notice or certification for use of leave). Also, employers were prohibited from considering an employee's use of FMLA leave as a negative factor in any employment actions (*e.g.,* promotions or discipline), and specifically in connection with "no fault" attendance policies. Finally, the regulations expressed DOL's view that employees cannot waive their rights under FMLA, nor can employers induce employees to waive their FMLA rights.

Ten commenters (Consolidated Edison Company of New York, Inc; Dopaco, Inc; Red Dot Corporation; Tax Collector, Palm Beach County, Florida; Austin Human Resource Management Association; Equal Employment Advisory Council; Florida Citrus Mutual; Food Marketing Institute; Greater Cincinnati Chamber of Commerce (Taft Stettinius Hollister); and the Society for Human Resource Management) opposed the prohibitions against counting FMLA-protected leaves of absence in disciplinary actions and under employers' attendance control policies. Some felt that FMLA should not invalidate legitimate attendance control programs, which are objective and nondiscriminatory as to the reason for a given absence, or that reasonable attendance requirements should still be available to employers and remain within their prerogatives as a condition of continued employment. Some asked whether a distinction could be made between counting FMLA absences negatively for purposes of discipline or other adverse action, and counting them under attendance programs that reward employees for good attendance (*e.g.,* attendance *bonus* programs). It was argued that

employers should still be allowed to reward employees positively for perfect attendance, and be permitted to exclude an employee from such an attendance award if the employee's FMLA absence makes him or her ineligible.

Employers pay bonuses in different forms to employees for job-related performance such as for perfect attendance, safety (absence of injuries or accidents on the job), and exceeding production goals. Bonuses for perfect attendance and safety do not require performance by the employee, but rather contemplate the absence of occurrences. To the extent an employee who takes FMLA leave meets all the requirements for these types of bonuses (which contemplate the absence of an event) before the FMLA leave begins, the employee is entitled to continue this accrued entitlement upon the employee's return from FMLA leave (the taking of FMLA leave cannot ". . .result in the loss of any employment benefit accrued prior to the date on which the leave commenced"). Thus, the employee may not be disqualified for such bonus(es) merely because the employee took FMLA leave during the period; to do so would discriminate against the employee for taking FMLA leave. A monthly production bonus, on the other hand, does require performance by the employee during the period of production. If the employee is on FMLA leave during the period for which the bonus is computed, the employee may be excluded from consideration for the bonus. These principles are discussed in new § 825.215(c)(2).

Nationsbank Corporation (Troutman Sanders) observed that the courts in recent years have found that some employees have abused or illegitimately sought the protection of antidiscrimination statutes to avoid legitimate discipline, and that the courts and some administrative agencies (including DOL) have developed decision rules to bar such use of the law by employees. The commenter recommended that DOL explicitly prohibit employee abuse or misuse of FMLA and include sanctions for such misconduct (*e.g.,* discharge, payment of attorneys' fees or other costs).

Sections 825.216 and 825.312 discuss at some length, as noted repeatedly throughout this preamble, that FMLA does not entitle any employee to any right, benefit, or position of employment other than any right, benefit, or position of employment to which the employee would have been entitled if the employee had not taken leave under the FMLA. Thus, FMLA cannot be used by employees as a "shield" to avoid legitimate discipline. As this basic tenet flows from FMLA's statutory provisions which have already been addressed in the regulations, it is unnecessary to include the particular suggested provisions to respond to these concerns.

Nationsbank Corporation (Troutman Sanders), Southern Electric International, Inc (Troutman Sanders), and Chamber of Commerce of the USA expressed concerns with the "no waiver of rights" provisions included in paragraph (d) of this section. They recommended explicit allowance of waivers and releases in connection with settlement of FMLA claims and as part of a severance package (as allowed under Title VII and ADEA claims, for example). The ERISA Industry Committee raised a similar concern with respect to the rule's impact on early retirement windows offered by employers. Such windows are typically open for a limited period of time and require all employees accepting the offer to be off the payroll by a certain date. If employees on FMLA leave have the right to participate in an early retirement program, but may continue to have and assert leave rights, the leave rights could adversely affect administration of the early retirement program.

The Department has given careful consideration to the comments received on this section and has concluded that prohibitions against employees waiving their rights and employers inducing employees to waive their rights constitute sound public policy under the FMLA, as is also the case under other labor standards statutes such as the FLSA. This does not prevent an individual employee on unpaid leave from returning to work quickly by accepting a "light duty" or different assignment. Accordingly, the final rule is revised to allow for an employee's voluntary and uncoerced acceptance of a "light duty" assignment. An employee's right to restoration to the same or an equivalent position would continue until 12 weeks have passed, including all periods of FMLA leave and the

"light duty" period. In this connection, see also § 825.702(d).

With respect to early-out windows for retirement purposes, an employee on FMLA leave may be required to give up his or her remaining FMLA leave entitlement to take an early-out offer from the employer. Under these circumstances, FMLA rights would cease because the employment relationship ceases, and the employee would not otherwise have continued employment. Further, although an employer need not extend the window for those employees who are out on FMLA leave, the employer must afford such employees the opportunity to avail themselves of any such offer which would have been available if they had not been on leave.

Florida Citrus Mutual and Fisher & Phillips took issue with the prohibition against an employer manipulating the size of the workforce for the purpose of precluding employee eligibility for FMLA leave. They suggested that employers cannot "interfere" with the rights of employees unless and until the employees have those rights.

We disagree with the views expressed in these comments. It is DOL's view that a *covered* employer that engages in the manipulative behavior prohibited by the regulatory provisions is depriving employees of rights and entitlements they would otherwise fully enjoy *but for* the manipulative actions by the covered employer, which is expressly prohibited. The rule is clarified to state that employers *covered by the FMLA* may not engage in such manipulation of the workforce for the purpose of avoiding FMLA obligations.

The California Department of Fair Employment and Housing recommended revisions to paragraph (c) of this section to reference the consequences of an employer asking a job applicant or the former employer of a job applicant questions which would reveal the employee's use of FMLA leave, and the consequences of making hiring decisions based on the use of FMLA leave. It was suggested that if hiring decisions are among the employment actions for which use of FMLA leave may not be a negative factor, then the regulations should incorporate guidance in this area. A reference to "prospective employees" has been included in paragraph (c) of this section.

III. Subpart C, §§ 825.300–825.312

Posting Requirements (§ 825.300)

Twenty commenters took exception to the regulatory requirement regarding the size of the notice (poster). They felt it was unnecessary and did not provide any substantive benefit to employees.

The Department has determined that it will not prescribe the precise size of the required poster. The regulation requires instead that the poster be large enough to be easily read. This requirement would be satisfied, for example, if the poster were at least the size of a standard 8½ x 11 inch piece of paper. The purpose of the poster is to call employees' attention to the basic requirements of FMLA and provide information where they may get additional information or file a complaint. In the past several years a number of commercial firms have reproduced other posters, having a number of posters in a single set or on a single display, and much of the information is not legible from any reasonable distance. If the poster does not inform, it serves no useful purpose.

Two commenters objected to having a provision in the regulation that allowed employees to circumvent their notice obligations to the employer if the employer failed to post the notice. The purpose of this provision is to encourage employers to post the notice; otherwise, how would employees know about FMLA and their basic rights and where to obtain additional information? The posting requirement is not difficult or overly burdensome for an employer, as the Department will furnish, free of charge, a copy of the poster which the employer may duplicate. The Department finds no basis to remove this provision from the Final Rule.

The Employers Association of Western Massachusetts, Inc., commented that references to applicants for employment should be deleted from the regulation as the statute applies only to eligible employees.

The statute, at § 109(a), requires the notice to be posted in conspicuous places on the premises where notices to employees and *applicants for employment* are customarily posted. The prohibited acts identified by the statute in § 105 state that it is unlawful for an employer and/or any person to interfere

with rights or discriminate *against any individual.* Clearly the prohibited acts are not limited in application to eligible employees. The Department is unable to make this change as it conflicts with the statutory language.

The Society for Human Resources Management asked if a contractor who has employees working at multiple sites of other employers is required to post the notice at each site when the employer who controls the site has already posted the notice. The contractor should ensure that a notice is posted in a conspicuous place on the worksite where his/her employees have access. If so, there is no need for the contractor to post additional notices.

The Tennessee Association of Business asked if posting the notice satisfies all notice requirements of the Act. The posting of the notice is but one of the notice requirements applicable to employers. For example, in § 825.301(b) the employer is required to provide written notice to an employee who provides notice of the need for FMLA leave regarding eight essential elements of information that are employee-specific. There are a number of other notice provisions throughout the regulations.

Other Employer Notices (§ 825.301)

Four commenters made observations regarding the requirements of § 825.301(a) for employers to include their policies regarding the taking of FMLA leave in employee handbooks, if they have such a publication. One commenter asked for the deadline by which the FMLA provisions should be included. Another objected to any requirement to include the process to file a complaint and advising employees of their right to file suit. Yet another urged the Department to provide an acceptable statement to be included in the employee handbook regarding FMLA. One commenter urged that this requirement be satisfied if the employer incorporated the Department's FMLA Fact Sheet in the handbook.

It was the intent of the regulations that if an employer provides a handbook of employer policies, the employer's FMLA policies would be included in the handbook by the effective date of FMLA. There is no requirement that an employer include information regarding filing complaints or private rights of action. The purpose of this provision is to provide employees the opportunity to learn from their employers of the manner in which that employer intends to implement FMLA and what company policies and procedures are applicable so that employees may make FMLA plans fully aware of their rights and obligations. It was anticipated that to some large degree these policies would be peculiar to that employer. Consequently, it would be of little use to incorporate the Department's Fact Sheet or a Departmental statement in the employer's handbook for employees.

Seven commenters stated that the notice requirements in § 825.301(c) are burdensome, not required by the statute and should be deleted from the regulations. One commenter urged that the notice required by this section should include the consequences of employees failing to give 30 days notice when leave is foreseeable. Three additional commenters urged there be one generic notice applicable to all employees except key employees.

The intent of this notice requirement is to insure employees receive the information necessary to enable them to take FMLA leave. The employee is entitled to know the arrangements for payment of health insurance premiums reached by agreement with the employer, whether the employee will be required to provide medical certification for leave or fitness to return to duty, *etc.* It would be inappropriate to use a generic notice as much of the information may be employee specific, particularly the arrangements for payment of insurance co-payments. The regulation suggests employers provide information to employees regarding consequences of inaction. There is nothing in the regulation that precludes the employer from providing more information than required, only from providing less. The Department finds no basis to change the requirements of this notice provision.

Three commenters objected to a requirement that a notice be provided each time an employee takes leave, especially when the employee is taking leave intermittently. The regulation has been amended to provide that in most circumstances notice need only be given once in each six-month period, on the

occasion of the first employee notice of the need for leave. However, if the specific information required to be furnished in the notice changes, notice of the changed information must be provided in response to a subsequent notice of need for leave. In addition, an employer will be required to give notice of a requirement for medical certification, or for a "fitness-for-duty" report upon the employee's return to work, each time the employer receives notice of a need for FMLA-qualifying leave. An exception will exist, however, if the notice given at the beginning of the six -month period, as well as any employee handbooks or other written documents regarding the employer's leave policies, make it clear that medical certification or a "fitness-for-duty" report will be required under the circumstances of the employee's leave. For example, the prior notice and handbook (if any) might state that certification will be required for all sick leave of any kind, for all unpaid sick leave, or for all sick leave longer than a specified period. Similarly, the notice and handbook might state that "fitness-for-duty" reports will be required for all employees with back injuries in a certain occupation.

The Women Employed Institute urged that the notice required by § 825.301(c) be in writing and that the notice should be furnished to the employee no later than the day before leave is to begin if leave is foreseeable or as soon as practicable if not foreseen.

The regulation has been changed to make it clear that the notice must be in writing. The interim final rule required the employer to provide the notice *at the time notice of need for leave is provided.* The Final Rule will require such notice to be provided as soon after notice of need for leave is given as practicable, usually one or two business days. The requirement for written notice simply ensures that the employee receives critical information and provides appropriate documentation of the information conveyed to the employee in the event of a dispute.

The Church of Jesus Christ of Latter-Day Saints commented that an employer should still be permitted to count an absence as FMLA leave even if an employee (who may be too ill) has not requested FMLA leave for the absence. An example was provided of an employee who has a heart attack and misses five weeks from work but does not request FMLA leave. The Church further observes that providing the employee with the required notice when the employee is so ill would be uncaring.

The regulations have been revised to permit the employer to mail the notice to the employee's address of record if leave has already begun. The regulations also provide that notice of need for leave may be given by the employee's spokesperson, (*e.g.*, spouse, adult relative, attorney, doctor).

The California Department of Fair Employment and Housing comments that the regulations should be more specific regarding the obligations of covered employers who have no eligible employees. Section 825.500 of the Final Rule has been revised to specify the obligations of covered employers who have no eligible employees.

The regulation has also been revised to make it clear that if an employer fails to provide the required information, it may not take action against an employee for failure to comply with the employee's obligations required to be set forth in the notice.

Employee Notices (to Employers)

When Leave is Foreseeable (§ 825.302)

Four commenters suggested that it be made clear that the employee is required to give notice of need for FMLA leave to the employee's supervisor or other appropriate person, and need not make the request to some top official of the company.

The employee is required to provide notice of need to take FMLA leave to the same person(s) within the company the employee ordinarily contacts to request other forms of leave, usually the employee's supervisor. It is the responsibility of the supervisor either to refer the employee who needs FMLA leave to the appropriate person, or to alert that person to the employee's notice. Once the employee has provided notice to the supervisor or other appropriate person in the usual manner, the employee's obligation to provide notice of the need for FMLA leave has been fulfilled.

The Nationsbank Corporation requested guidance as to the circumstances in which

an employer may choose to waive notice requirements. Throughout the regulations, reference is made to the employer's ability to waive notice and certification requirements. As long as the employer's discretion is applied in a nondiscriminatory manner, the employer will have complied with these requirements.

Fisher and Phillips observed that the regulations do not address the employee's obligation to provide notice of any needed extension to leave already requested and underway. Sommer and Barnard also took issue with the notice requirements regarding an extension of leave, and suggested that the regulations should be amended to provide that an employee on FMLA leave who fails to report to work at the expiration of the leave and fails to give FMLA notice of the need for extension of the leave prior to its expiration shall not be entitled to the job restoration protections of the Act or the regulations, unless it was impossible to give such notice prior to expiration of the leave and the employee thereafter gives the earliest and best notice possible. The regulation has been amended in § 825.309(c) to provide that an employee shall advise the employer if leave needs to be extended. In addition, the employer may obtain such information from employees through status reports.

Section 825.302(g) has also been revised to clarify employee notice obligations when the employer's paid leave plan contains lesser obligations and paid leave is substituted for unpaid FMLA leave. An employer may not impose FMLA's stricter notice requirements if the employer's applicable leave plan allows less advance notice for the type of leave being substituted. See, also, § 825.207(h).

The Department also notes that the regulations continue to provide that although an employee is only required by FMLA to give oral notice of the need for leave, an employer may require an employee to comply with its usual and customary notice requirements, including a requirement of written notice. If an employee fails to give written notice in these circumstances, an employer may not deny or delay leave, but may take appropriate disciplinary action.

Employee Notices (to Employer) When Leave is *Not* Foreseeable (§ 825.303)

The Women's Legal Defense Fund suggested that section (a) be amended to reflect that an employee may not be foreclosed from beginning leave even if one or two days' notice is not possible. The final rule has been amended to include guidance that notice should be given as soon as practicable.

Two commenters indicated that verbal notice is not sufficient and the employer should be permitted to require a written notice, requesting leave and providing a general reason for the leave if FMLA. They suggested that if an employee needs to request the leave in an emergency, oral notice should be sufficient but only if the employee confirms that request in writing within two working days.

Nothing in the regulations prohibits an employer from requiring written notice to take or request leave if this is the employer's usual procedure. The employer may request written notice for all leave. The employer, however, may not deny or delay FMLA-qualifying leave when the employee provides verbal notice as soon as practicable. Having a hard and fast rule that the employee must give written notice or confirm the verbal notification within one or two working days would work an unnecessary hardship on many employees who have taken leave for a medical emergency and are not in a position to provide written notice either due to their own serious health condition, or that of an immediate family member.

Employer's Recourse When Employee Fails to Provide Notice (§ 825.304)

Seven commenters provided observations regarding this section. Four of the commenters urged that an employer not be permitted to *deny* leave under any circumstances when the employee fails to provide adequate notice, but only delay the leave. They further stated that the employer should be permitted to delay the leave only if the employer can show that the activities of the business were prejudiced by the employee's failure to provide adequate notice. They questioned the extent of an employer's right to take disciplinary action in the event adequate notice is not provided and urged that the employer be prohibited from denying leave or discharging the employee for inadequate notice. One

commenter asked for a definition of the term *"as soon as practicable."*

Section 102(e) of the statute sets out obligations of the employee to provide notice to the employer of the need to take leave in both foreseeable and unforeseeable circumstances. As this is an affirmative responsibility of the employee it would be inappropriate to require the employer to show any prejudice resulting from an employee's failure to provide adequate notice. As used in the regulation, as soon as practicable is further explained as within one or two business days unless that is not feasible. The regulation is revised to provide that an employer may delay (rather than deny) leave where required notice has not been given.

Medical Certification of Serious Health Conditions (§ 825.305)

The Community Legal Services, Inc. commented that low income workers may be unable to persuade health care providers to provide medical certifications. They urge an exception for such workers if obtaining the certification is not practicable under the particular circumstances despite the employee's diligent, good faith efforts, and a similar exception that would excuse a person's inability to produce a certification or all the information requested by the employer because of non-cooperation by the health care provider. If an employee under these circumstances is unable to provide a complete certification, the employer could request a second opinion at the employer's expense, they suggest. Further, any employer that requires a certification should provide a copy to the employee.

The provision for medical certification at the request of the employer is a basic qualification for FMLA leave. It is the employee's responsibility to provide such certification. The Final Rule has been amended in § 825.311(b) to provide that if an employee never produces the requested certification, the leave is not FMLA leave. It is the employee's responsibility to find a health care provider that will provide a complete certification. As the employee is providing the certification to the employer, if the employee wishes to have a copy he/she may make a copy before submission to the employer. The regulation has been amended to provide for copies of a second or third opinion to be provided by the employer to the employee upon the employee's request.

Eight commenters observed that providing a minimum of 15 days for the employee to provide medical certification is unreasonable. In some cases the certification would not be provided until the leave is over if the leave is only for a short period of time, and the employee would have returned to work, thereby denying the employer the opportunity to obtain second and third opinions where appropriate and designating the leave as FMLA leave after the employee has returned to work. Several alternatives were proposed, from allowing the employer to define an acceptable time frame to allowing only one week to provide the certification.

The regulations have been amended in § 825.305(a)(2) to track the statute more closely. Ordinarily, when leave is foreseeable and at least 30 days notice has been provided, the employee should provide the medical certification *before* the commencement of leave. If the need for leave does not allow for this, the employee should provide the certification within the time frames established by the employer for submission of the certification, which must allow at least 15 days after the employer's request. Section 825.208 of the regulations has been amended to enable the employer to make a preliminary designation of leave when the certification was not provided prior to the commencement of leave, or the employer is awaiting a second or third opinion, and to confirm or withdraw the designation depending upon the results of the medical opinions even though the employee has returned to work. The Department believes that the requirement to provide the certification in no less than 15 days is reasonable as the employee has no control over the timing of the health care provider's completion of the certification form.

Two law firms, Fisher and Phillips and Sommer and Barnard, observed the regulations are silent regarding time frames for submission of recertifications. Section 825.308 has been amended to clarify that recertifications are subject to the same 15-day time frames as the original certification.

Section 825.305(e) has also been revised to clarify the certification requirements when the employer's paid leave plan contains lesser obligations and paid leave is substituted for unpaid FMLA leave. If the employer's sick or medical leave plan contains less stringent certification requirements than those of FMLA, and paid sick, vacation, personal or family leave is substituted for unpaid FMLA leave as provided in § 825.207, only the employer's less stringent sick leave certification requirements may be imposed. See, also, § 825.207(h).

Information Required in Medical Certifications (§ 825.306)

Ten commenters questioned the necessity for the health care provider to provide a diagnosis when providing a medical certification of the existence of a serious health condition, and suggested that providing appropriate medical facts is sufficient for this purpose. The Women's Legal Defense Fund comments were reasonably representative of these commenters. They observed that the optional certification form provides more information to the employer than statutorily required (for example, diagnosis and regimen of treatment), and that inquiries regarding such matters may be a violation of the ADA. They noted that health care providers may be reluctant to provide detailed medical information due to ethical and privacy concerns, and expressed concerns regarding confidentiality and employee waivers. They recommended that the form include space for an employee signature which would provide a limited waiver from the employee to release the information to the employer for purposes of FMLA leave only.

Other commenters questioned the absence of a box to check on the form to indicate that an employee has been prescribed medicine, an indication of continuing treatment under the Interim Final Rule. The Hyman Construction Co. observed that it would be helpful if the form provided space for the health care provider's address and telephone number. Still others wanted the health care provider's Employer Identification Number and Social Security Number.

After a review of these comments, and significant revisions to the definition of "serious health condition" in § 825.114 of the regulations, this section and Form WH-380 have been completely revised. In general, the purpose of the revisions is to allow employers to obtain information from a health care provider to verify that an employee in fact has a serious health condition, and the likely periods of absence by the employee, but no unnecessary information. The form has been revised, for example, to require certification as to which aspect of the definition applies, and to state the medical facts to support the definition. The regulation and form no longer provide for diagnosis, and make clear, consistent with the ADA and privacy concerns, that all information on the form relates only to the condition for which the employee is taking FMLA leave. However, it is considered necessary to include information regarding the regimen of treatment in general terms (*e.g.,* prescription drugs) since this is one of the specific requirements of a serious health condition under § 825.114(a)(2)(i)(B).

The suggestion that the health care provider be required to furnish an Employer Identification Number and/or Social Security Number has not been adopted. The optional medical certification form is not a substitute for an insurance claims form; its use is intended for purposes of confirming the existence of a serious health condition, and thus the need for FMLA leave. The information provided by the form is required to be kept confidential by the employer and it would be inappropriate for the employer to place this form into the ordinary business process for insurance claims.

The Department has not adopted the suggestion that a waiver by the employee is necessary for FMLA purposes. The process provides for the health care provider to release the information to the patient (employee or family member). The employee then releases the information (form) to the employer. There should be no concern regarding ethical or confidential considerations, as the health care provider's release is to the patient. The employee may choose to withhold the certification from the employer. In so doing, however, the opportunity to take FMLA leave is sacrificed, but that would be the employee's decision. In the more than 12 months that have elapsed since the In-

terim Final Rule became effective, the Department has received no feedback that the absence of an employee waiver on the optional medical certification form has created any difficulty for the health care community, employers, or employees.

The Equal Employment Opportunity Commission provided comments regarding the medical certification process. EEOC suggested that questions 5 and 6 of the form are too broad. Question 5 asks for the probable duration of a condition. EEOC recommended the question be revised to ask the probable duration of the condition for which the leave is requested, and suggested Question 6 is overly broad for the same reason, *i.e.,* asking about the regimen of treatment to be prescribed. Question 5 has been revised. Question 6 has not been deleted because the information is necessary to determine if a serious health condition exists. However, the form makes clear that all information relates to the condition for which leave is needed.

The Burroughs Wellcome Company and Joan L. Kalafatas observed that sometimes employers need other medical information for purposes other than FMLA leave, and suggested that the FMLA regulations indicate that other information may be requested although it may not be used to make decisions required under FMLA. The Department disagrees with this comment. If the employer needs medical information for some other purpose, the employer needs to make an additional, perhaps simultaneous, request.

Massmutual Life Insurance Company recommends an employer with a paid leave program be allowed to use a single certification form for FMLA and paid leave purposes, asking that the form be permitted to include information in addition to that identified by the FMLA regulations only if the additional information would be used to verify eligibility for paid leave. It would not be appropriate to permit employers to request additional medical information to support an employee's desire to substitute accrued paid leave for FMLA leave. The regulations provide that any such requirements may not be more stringent than those required by FMLA. If the commenter is referring to eligibility for *benefit plans* rather than paid leave, the Department has included a provision in the Final Rule that if an employee must meet higher standards to qualify for *payments* from an employee benefit plan, *e.g.,* a disability benefit plan, the employee is required to comply with the requirements of the benefit plan in order to receive payments. The employee may choose not to meet the higher standards of the benefit plan and thereby not receive payments from the plan; however, the employee continues to be entitled to FMLA leave. Section 825.207(d) has been amended to incorporate this guidance.

The California Department of Fair Employment and Housing urged that § 825.306(b) be amended to reflect that collection of this information by the employer is discretionary and that it is appropriate for the employer to comply with State or local law. California law does not permit an employer to require that the medical certification specify the serious health condition which led to the leave request. Section 825.701 of the regulations provides guidance to employers regarding the responsibility to comply with applicable State statutes. If the provisions of the State statute are more beneficial to the employee or more restrictive in terms of the rights of the employer (such as by prohibiting a requirement that more medical information be required), the employer must comply with that State statute.

The law firm of Fisher and Phillips contended that the provision that employers may use another type of medical certification only if no additional information is required is not supported by FMLA § 104(c)(3). The Department disagrees, with one exception. The provisions of § 104(c)(3) relate to the circumstances when an employee is unable to return from FMLA leave due to the onset or continuation of a serious health condition. The information required by this section of the statute and the regulations is the maximum which can be requested. Nothing in § 104(c)(3) implies that an employer may ask for more information than is required by § 825.306. Section 825.207(d) has been amended to permit the employer to request a greater amount of information if required in order for an employee to qualify for payments from an employer benefit plan, or in the event the employee is on a worker's compensation absence and the applicable worker's com-

pensation statute permits the employer to acquire additional information.

Michael Meaney suggested that certification of a disability should be strictly limited to medical doctors (M.D.s). The Department is unable to adopt this suggestion in light of the guidance provided by the Congress and the Department's deliberations over the definition of a health care provider. For example, FMLA's legislative history indicates clear Congressional intent that Christian Science Practitioners be included in the definition of health care provider. These individuals are clearly not M.D.s. In considering the types of health care providers available to the general population, particularly those who live in rural areas which do not have ready access to a doctor (MD), but regularly rely on nurse practitioners and midwives, the Department concluded that it is appropriate to include these professions in the definition of a health care provider. Rather than further limit the definition of a health care provider in § 825.118 of the regulations, the Final Rule expands the practitioners that may qualify as health care providers.

This section has also been revised to clarify the certification requirements when the employer's paid leave plan contains lesser obligations. Only the employer's lesser certification requirements may be imposed when paid leave is substituted for FMLA leave, as provided in § 825.306(c). See also § 825.207(h).

Adequacy of Medical Certification (§ 835.307)

Six commenters (four working women advocacy groups and two unions) urged that when an employer requires a second or third medical opinion, not only the costs of obtaining the opinion by the health care provider be at the employer's expense, but because the employee is expending time at the employer's direction, the employer should also be required to pay the employee for the time spent in acquiring the required medical opinions. The Department has considered these comments carefully but has concluded that Congress did not intend that employees on unpaid FMLA leave be paid for the time spent obtaining second and third medical opinions. Section 825.307(d) has been amended, however, to make it clear that an employer must in all cases reimburse an employee or family member for any reasonable "out-of-pocket" travel expenses incurred in obtaining the required second and third opinions.

The Equal Rights Advocates requested an exception be provided where obtaining the second or third opinion for an immediate family member would be onerous. Further, they suggest that when the employer requires a second or third medical opinion and the employee's leave has already begun, the employee should be allowed to continue on leave and the employer should be restrained from demanding reimbursement for insurance premiums. If the third opinion disputes the original medical certification, the employee may be required to return to work; the employer may not take any unfavorable action against the employee; the employer shall not be entitled to reimbursement for insurance premiums paid during the leave; and, the employee's FMLA leave entitlement shall be reduced by the period of leave actually taken.

The third medical opinion becomes necessary only when the second opinion disagrees with the original opinion. In the suggestion, the third opinion now agrees with the second, which means that either the employee or the employee's family member does not or did not have a serious health condition. If a serious health condition did not exist, the employee was not entitled to take *any* FMLA leave, as the absence was not for an FMLA reason. Thus, the employer is prohibited from charging or deducting the time of the absence from the employee's FMLA leave entitlement, and the employee does not have the rights and protections of the statute for that absence. The Department is unable to incorporate this suggestion in the regulations. The Department agrees, however, that pending the ultimate resolution of the employee's entitlement to leave through the certification process, the employee is provisionally entitled to the benefits of the Act, including maintenance of group health benefits. If the certifications do not ultimately establish the employee's entitlement to FMLA leave, the leave will not be counted as FMLA-qualifying and may be treated as paid or unpaid leave under the employer's established leave policies. This section is so revised.

The Equal Rights Advocates further suggest that the second and third medical opinion should only be allowed if it is not unduly burdensome to the family member. The right of the employer to require a second medical opinion when the employer has reason to question the validity of the original medical certification is statutory. Consequently, the employer is entitled to the second opinion, and the third opinion if the second opinion disagrees with the original opinion. The alternative is for the employee to forego FMLA leave. However, § 825.307 has been amended to provide that an employer may not ordinarily require an employee to travel outside normal commuting distances in obtaining the required opinions.

The Women Employed Institute and Women's Legal Defense Fund suggest that when an employer requires a second or third medical opinion, the employee should be provided a copy of the results. The Department agrees and has added § 825.307(c)(1) to require the employer, upon request from the employee, to provide copies within two business days.

Nineteen commenters commented on the provision that prohibits an employer from obtaining a second medical opinion from a health care provider that the employer employs or regularly utilizes. Several of the commenters are large hospital facilities or Health Maintenance Organizations (HMOs) who have large numbers of doctors either on the payroll or with whom they regularly contract to provide medical care to their patients. Kaiser Permanente suggested that only those health care providers whom the employer regularly employs to provide employee medical exams be excluded. Kennedy Memorial Hospitals suggested the regulations be changed to allow an employer-affiliated physician to render a second opinion and to require a neutral physician provide a third opinion if necessary. Koehler Manufacturing Company recommended that a health care provider regularly employed by the employer be allowed to provide the second medical opinion as this health care provider would be familiar with the job duties and responsibilities. Other commenters suggested that an employee be required to be examined by the employer's medical department. United Healthcare Corporation operates HMOs and has contractual relationships with the majority of physicians within a given area, and suggests it is virtually impossible to comply with this requirement. Section 103(c)(2) of the Act provides that a health care provider designated or approved to provide a second medical opinion shall not be employed on a regular basis by the employer, which is a statutory prohibition. The Department is unable to adopt the suggestions.

Ten commenters were critical of the provision in § 825.307(a) that prohibits an employer from making *any* contact with the employee's health care provider to obtain additional information, including the health care provider's address and telephone number. They indicated this prohibition worked against the interests of both the employee and the employer. The absence of the opportunity of the employer's health care provider contacting the employee's health care provider potentially creates additional, unnecessary costs for the employer and unnecessary discomfort for the employee who may be on leave for a serious health condition, leaving as the only recourse obtaining a second medical opinion. After review of these comments the Department agrees to some extent that a total prohibition on contact with the employee's health care provider is not in the best interests of both parties in many cases. Employers have observed that if they could only talk with the employee's health care provider to ask one or two clarifying questions, the initial medical certification could be accepted without resorting to a second, and maybe a third, opinion. The regulations have been amended in § 825.307(a) and in § 825.310(b) (certification of fitness-for-duty) to permit a health care provider representing the employer to contact the employee's health care provider for purposes of *clarifying* the information in the medical certification or confirming that it was provided by the health care provider. The inquiry may *not* seek *additional* information regarding the employee's condition. Such contact may only be made *with* the employee's or family member's permission as appropriate. If the employee refuses to give permission, the employer may then require certification from a second health care provider. The optional medical certification

form is being amended to include the health care provider's address and telephone number. Further, if the FMLA leave is running concurrently with a workers' compensation absence under State provisions that permit the employer or employer's representative to have direct contacts with the health care provider treating the workers' compensation injury or illness, such authorized direct contacts with the health care provider are not prohibited under FMLA (unless the employee chooses to forego the workers' compensation claim). This contact may only be made by a *health care provider* representing the employer, as most employers are not medically qualified to pose clarifying questions to the employee's health care provider. Further, a number of commenters have expressed concern regarding the privacy of the employee and the ethical considerations of the employee's health care provider furnishing information to a non-medical person (the employer). By requiring the employee's permission (or where following authorized procedures under workers' compensation laws) and limiting the contact to a health care provider, both these considerations and concerns will be addressed. It should be noted that although the regulations do not *require* that the employee's permission be obtained in writing, a prudent employer should follow such a practice.

Seventeen commenters addressed the issue of the third medical opinion. One commenter observed that the employer/employee should be able to use a health care provider (HCP) that is employed by the employer. Others suggested a number of processes to select the health care provider to provide the third opinion, such as: select the third health care provider on the basis of the worker's compensation statute; the choice should be the employer's alone as the opinion is obtained at the employer's expense; either the employee or employer submit a list of from three to five health care providers to the other and let the other party select one from the list; the selection should be made by the first and second health care providers; the local medical society should be allowed to make the selection; obtain a list of seven to 10 health care providers and let the employer and employee each strike names until only one is left. Two commenters stated that the provision currently in the Interim Final Rule is reasonable.

The Department has thoroughly reviewed the comments and finds there are a number of viable methods for selecting the third health care provider. The current regulations place no limitation on the method for selecting the third HCP and it seems appropriate to continue to provide the employer and employee flexibility to use any mutually agreeable method. The Final Rule will incorporate the provision of the current rule without change. It should be noted that the prohibition against using a health care provider regularly employed by the employer does not apply to the selection of the health care provider to render the third medical opinion (subject to the agreement of the employee).

Fisher and Phillips observed that the regulations are silent on medical certification when the health care provider is located in another country. The observation is accurate. Since the regulations became effective, a number of issues have arisen when the employee or a member of the employee's immediate family (*e.g.,* parent) is visiting or living in a country other than the United States. The Department has added a provision to § 825.305(a) to address this issue. In essence, the employer must accept a medical certification from a health care provider who is licensed to practice in that country, and make arrangements for second and third opinions, if required, with health care providers in that country.

The Edison Electric Institute asked when a second or third medical opinion is sought, what kind of information may the employer request? The Department has designed the optional medical form to be used for all three of the medical opinions as needed. If the employer chooses not to use the optional form for the second and third opinion, the information that may be requested is limited to that contained on the form and in § 825.306 of the regulations.

Subsequent Recertifications of Medical Conditions (§ 825.308)

Thirteen commenters addressed the request for comments in the Interim Final Rule regarding the appropriate length of time that a medical certification should be valid. Two

commenters suggested that no time frame should be established, but that it should be dictated by the nature of the employee's condition and any changes in the condition (*e.g.*, the employer should determine when another certification would be appropriate). Several commenters suggested that an employer should not be required to rely on any certification that was obtained over six months prior to the current notice of need for FMLA leave. Three of the commenters indicated that an employee should be able to use a medical certification that had been obtained within the past six months or a year. Another commenter observed that permitting the use of non-current certifications would provide the potential for abuse. The law firm of Sommer and Barnard suggested a maximum of 12 weeks for the life of the validity of the certification under any circumstances, including the taking of leave intermittently or on a reduced leave schedule. They referred to the provisions in this section that permit the employer to request recertification every 30 days. The longest time of validity of the certification suggested by any commenter was one year.

Seventeen commenters raised concerns on the particular circumstances that permit an employer to require recertifications. The majority of the commenters indicated that permitting a recertification every 30 days is not *reasonable* as contemplated by the statute. Others indicated that limiting the recertification to every 30 days was too long; some suggested 15 days instead of 30 days. Some urged that the recertification should be obtained at the employer's expense. One commenter asked what recourse the employer has when the employee does not provide the requested recertification.

After a review of all the comments the Department agrees that permitting the employer to routinely request recertification every 30 days is not reasonable in some circumstances. Section 825.308 has been changed to provide that where a certification provides a minimum duration of more than 30 days, the employer may not obtain recertification until that minimum period has passed unless the circumstances specified in the regulations are present. For chronic conditions, recertification is ordinarily permitted every 30 days, but only in connection with an absence. Exceptions are provided only if circumstances have changed significantly or the employer has reason to believe the employee was not absent for the reason indicated. Because the statute does not provide for second or third opinions for recertifications, no such opinions may be required. The recertification must be obtained at the employee's expense unless the employer voluntarily chooses to pay for the recertification itself. Congress specifically required the second and third opinions to be obtained at the employer's expense. Congress did not include such a requirement regarding recertifications; consequently, there is no basis for the Department to impose the costs on the employer by regulation. If the employee fails to provide the recertification within 15 days when it was practicable to do so, the employer may delay further FMLA leave until the recertification is provided.

Notice of Intent to Return to Work (§ 825.309)

Employees may be required to report periodically on their status and intent to return to work while on FMLA leave *provided* the employer's policy regarding such reports is not discriminatory. The Women's Legal Defense Fund asked that the term "discriminatory" be defined and that the regulations set out how often an employer may request status reports. They also urged that the regulations state that employers may not require reports in a manner that discriminates on the basis of gender, race, *etc.*

The statute already provides a prohibition regarding discrimination. There are a number of references in the regulations to Title VII of the Civil Rights Act which prohibits discrimination based on sex, race, *etc.*

Since the statute became effective there has been no feedback to the Department indicating difficulties with the aspect of discrimination pursuant to either FMLA or Title VII. The regulations presently state that, with regard to reasonableness, the employer must take into account all the relevant circumstances and facts related to the individual's leave situation.

Clearly, it is the intent of the statute and the regulations that employers not use the

entitlement to require status reports in a manner that is burdensome and disruptive to the employee while on FMLA leave. The intent is that such requests be reasonable under the existing circumstances. An employer who misuses or abuses this provision may be found to have engaged in prohibited acts under the statute. It does not seem appropriate or necessary to repeat the prohibitions of Title VII in these regulations. This section will remain unchanged in the Final Rule.

Three commenters requested clarification regarding the employee's status when the employee fails to return at the conclusion of the leave or after 12 weeks of absence.

If the employee does not return to work at the conclusion of the planned leave, the employee should give the employer reasonable notice of the need for an extension if less than 12 weeks of FMLA leave been exhausted in the 12-month period. If the employee is unable to or does not return to work at the end of 12 weeks of FMLA leave, all entitlements and rights under FMLA cease at that time; the employee is no longer entitled to any further restoration rights under FMLA, and the employer is no longer required to maintain group health benefits pursuant to FMLA.

The law firm of Black, McCluskey, Sourers and Arbaugh, suggest that an employee who does not provide a status report after being given notice should be considered not intending to return to work.

The determination would be dependent upon all the facts in the specific case. The commenter assumes that the employee has received the notice. Perhaps the employee is in another city caring for a parent and does not receive a request mailed to the employee's home. It is simply not possible to state a general rule regarding this circumstance; it is dependent on all the facts. Clearly, the failure to respond does not constitute unequivocal notice in all cases.

The Texas Department of Human Services asked for a definition of "unequivocal," and whether it meant a written statement. The definition of this term is that it is understandable in only one way with no expression of uncertainty, *i.e.,* distinct, plain, absolute, clear. It has nothing to do with whether the notice is written or verbal.

The law firm of Fisher and Phillips urges that the regulations should clarify whether employees who request FMLA leave in excess of 12 weeks are entitled to any FMLA leave and whether they are entitled to maintenance of group health coverage.

The fact that the employee requests a greater amount of leave than the 12-week entitlement under FMLA does not negate his/her right to FMLA leave. The employee would be entitled to take 12 weeks FMLA leave with full rights and protections including maintenance of group health insurance. The employee's status would be reexamined at the end of the 12-week FMLA entitlement.

The law firm of Sommer and Barnard urges that the regulations provide that, if an employee wishes to return to work prior to the anticipated end of the leave period, the employee be required to give the employer at least one or two days notice.

The Department agrees that an employee should give reasonable notice to the employer where early return to work is foreseeable, and the regulations have been revised in paragraph (c) of this section to provide for a minimum of two days notice from the employee. Employers may also obtain this information through status reports from employees.

The Society for Human Resource Management asked if an employer may require certification from an employee for adoption or birth of a child upon return to work? May an employer require certification from a father for bonding leave? The answer to both questions is affirmative; however, the employer's request for documentation must be reasonable, and should be obtained at the *beginning* of the leave rather than at the conclusion. The regulations have been changed in § 825.113 to provide for such reasonable documentation of the reason for FMLA leave.

Return to Work Medical Certification/ Fitness-for-Duty (§ 825.310)

Six commenters objected to the language of the regulations that provides for a fitness-to-return-to-work certification pursuant to an employer's uniformly-applied policy. They also expressed concern regarding the implications resulting from ADA requirements.

The Department agrees with some of these concerns. This section of the regulations

has been changed to make it clear that the requirement of uniformity applies only to employees in similar circumstances (*i.e.,* the same occupation, suffering from the same serious health condition). Furthermore, pursuant to ADA, the requirement for such a physical must be job-related and consistent with business necessity.

Two commenters urged that the fitness-for-duty certification be obtained at the employer's expense.

The statute clearly requires the employer to bear the costs of the second and third medical opinions. The Congress made no such provision for recertifications or fitness-for-duty certifications. The Department is unable to assign these costs to the employer in the absence of statutory language.

Four commenters urged that the regulations provide for second and third medical opinions on fitness-for-duty certifications as in the case of the original medical certification.

The statute expressly provides for second and third medical opinions regarding the original medical certification. No such provision is contained in the statute for the fitness-for-duty certification. The Department is unable to incorporate this suggestion in the Final Rule.

Four commenters urged that the employer be permitted to confirm the employee's fitness-for-duty with an examination by the in-house medical department. This may be particularly relevant with regard to an employee returning from drug abuse treatment who may be subject to periodic follow-up examinations after returning to work.

The regulations do not prohibit the employer from requiring the employee to submit to an examination after returning to work, provided such examination is job related and consistent with business necessity in accordance with ADA guidelines. However, an employer *may not* deny return to work to an employee who has been absent on FMLA leave pending such an "in-house" examination. The statute provides the employee must *only* provide the employer with certification from the *employee's health care provider* to qualify to return to work. Any examination by the employer's medical staff may take place the first day of the employee's return to work.

Failure to Satisfy Medical Certification Requirements (§ 825.311)

The law firm of Sommer and Barnard observes that the regulations provide that an employer may require that an employee's request for leave be supported by certification. If the employee fails to furnish certification then surely the employer should be able to deny the entire leave, not simply the continuation of leave. Two commenters urge that if an employee fails to provide the required certification, not only should continuation of leave be denied, but the employee should be subject to disciplinary action by the employer.

The Department agrees with this analysis, and has modified § 825.311 to state that if the employee never provides the certification then the leave is not FMLA leave. If the leave taken by the employee is not FMLA leave, the employee does not enjoy the protections of the statute.

The Society of Professional Benefit Administrators expressed concern regarding the relationship between worker's compensation statutes and FMLA. As discussed above, the Final Rule has been changed in § 825.207 to address worker's compensation absences and FMLA.

Refusal to Provide FMLA Leave or Reinstatement (§ 825.312)

The Department of Civil Service, State of New York comments that in the event the employee requests to return to work prior to the agreed date, the employer should not be required to reinstate the employee immediately but should be given a reasonable period to make the necessary arrangements.

The Department has clarified this issue in §§ 825.309(c) and 825.312(e) of the regulations. An employee may not be required to take more FMLA leave than necessary to address the circumstances for which leave was taken. If the employee finds the circumstance has been resolved more quickly than anticipated initially, the employee shall provide the employer reasonable notice — two business days if feasible. The employer is required to restore the employee where such notice is given, unless two days notice was not feasible — for example, where the employee receives a release from the health care provider to return to work immediately, and that release is obtained earlier than anticipated.

The law firm of Sommer and Barnard commented regarding the requirement that when taking intermittent leave for planned medical treatments the employee should make a reasonable effort to arrange the treatments so as not to unduly disrupt the employer's operations. Section 825.312 fails to recognize this employee obligation or assign a consequence for its breach.

The Department concurs to some degree. It should be kept in mind that the employee does not always have alternatives to the dates of planned medical treatment as this is largely in the control of the health care provider. Section 825.302(d) has been modified in a manner that should lead to greater communication between the employee and the employer regarding this issue.

The Employers Association of New Jersey asks if an eligible employee who has accumulated an unacceptable number of absences and has been given a final warning that provides that any absence within the next 30 days will result in immediate discharge may take FMLA leave to care for an ill spouse.

An eligible employee who has not exhausted his/her 12-week FMLA leave entitlement would be entitled to take leave under these circumstances if all the requirements of the statute are met. The employee would be required to provide adequate notice of the need for leave, 30 days in advance if foreseeable or as soon as practicable, and if required by the employer, medical certification confirming the existence of the spouse's serious health condition. The employer may not take adverse action against the employee by denying leave or taking other disciplinary actions for having taken FMLA leave. The taking of FMLA leave may not be counted against the employee under the employer's attendance policy. *See* § 825.220.

The Equal Employment Advisory Council suggests that it be made clear that employee misconduct prior, during or after FMLA leave that violates company policy is subject to the consequences of the employer's policies.

The Department wishes to make clear that FMLA is not a sanctuary for the employee who has violated or is in violation of company policies. A basic tenet of FMLA is that the employee who takes FMLA leave is to be treated no differently than if the employee had continued to work. For example, if the employer has a non-discriminatory policy that the second time the employer becomes aware that an employee has engaged in the illegal use of drugs, the employee will be terminated, the fact that the employee is on FMLA leave will not shield the employee from the continued application of that policy (*i.e.,* termination).

The Society for Human Resource Management (SHRM) asked whether an employee who is on FMLA leave and who resigns in the middle of the leave has to be kept on the payroll until the leave period is over.

No. The regulations provide that once an employee gives the employer unequivocal notice that the employee does not intend to return to work at the conclusion of leave, the employee may be terminated and FMLA leave ends, as well as the obligation for maintenance of health benefits, and the employer need not keep the employee on the payroll after receiving such notice.

SHRM asked where an employee who is pregnant requests FMLA leave, but the health care provider declines to certify that the employee is unable to work as a result of the serious health condition (ongoing pregnancy), what action should the employer take?

In this circumstance the employee does not qualify as being unable to work as a result of her condition, and the employer could deny the use of FMLA leave.

SHRM asked how an employer was supposed to manage absenteeism if the employee continues to claim leave taken is covered by FMLA?

The Final Rule attempts to address some of these issues. An employer is entitled to request medical certification and recertification in connection with serious health conditions. The Final Rule provides that, if an employee never provides the medical certification, the absence is not FMLA leave; consequently, the leave is not protected by the FMLA. The Final Rule further provides that the employer may require documentation from the employee to confirm family relationships, as in the case of leave for birth or placement of a child for adoption or foster care. The Department believes there are a number of tools available to employers under the regulations that will serve to discourage employee abuse of FMLA leave, in addition to the basic concept that the 12 weeks of leave mandated by FMLA are unpaid.

The Koehler Manufacturing Company comments that it is unclear whether an employee may earn W-2 wages with some other employer while on FMLA leave.

The Department addressed this issue in the Interim Final Rule. Section 825.312(h) provides that whether an employee may engage in outside employment during FMLA leave is dependent upon the employer's established policy regarding outside employment. For example, the employer may require that all outside employment be pre-approved by the employer. If so, employment while on FMLA leave would be subject to this policy. This provision will remain unchanged in the Final Rule.

The Service Employees International Union took issue with the provision in § 825.312(h) applying the employer's policy regarding outside employment to periods of FMLA leave. SEIU maintained that there is no statutory basis for this provision, and that it constitutes the imposition of additional requirements on the taking of FMLA leave.

The Department does not agree with this view. As noted previously, a basic tenet under FMLA is that an employee on FMLA leave is entitled to no greater right, benefit, or position of employment than if the employee continued to work and had not taken the leave (*see* § 104(a)(3)(B) of the Act). While an employee is on FMLA leave, there continues to be an employment relationship, the employer is maintaining group health benefits and possibly other benefits, and the employee is entitled to return to the same or an equivalent job. Consequently, the employer's employment policies continue to apply to an employee on FMLA leave in the same manner as they would apply to an employee who continues to work, or is absent while on some other form of leave.

It is important to point out that the regulations do not prohibit outside employment by the employee on FMLA leave except as a result of the employer's established policies. In the absence of such a policy the employee may do as he/she chooses. However, taking outside employment during a period of FMLA leave may in some cases cast doubt on the validity of an employee's need for leave, particularly if the leave was being taken for the employee's own serious health condition.

IV. Subpart D — Enforcement Mechanisms

Employee Rights When FMLA Has Been Violated (§§ 825.400–825.404)

Federally Employed Women, 9 to 5, National Association of Working Women, Women's Legal Defense Fund, the Food and Allied Service Trades (FAST) and the United Food and Commercial Workers International Union (UFCW), suggest that the Interim Final Rule fails to include a complaint procedure that provides expedited relief and that the rule does not include injunctive relief as one of the available remedies in an employee's private court action. The Women's Legal Defense Fund and FAST urge that § 825.400(c) be amended to include "other equitable relief as appropriate." FAST points out that the expedited procedure is important, particularly if the employer fails to maintain group health insurance and the employee has a serious health condition which heightens the need for medical benefits.

The provision for an expedited complaint procedure is not a regulatory issue, but rather is an internal agency administrative enforcement issue. In any event, such an expedited procedure was adopted under FMLA in appropriate circumstances, and will continue to be used as an effective enforcement tool in carrying out the Department's responsibilities pursuant to FMLA. The statute at § 107(a)(2) makes no provision for an eligible employee to seek equitable relief through an injunctive action. Such an action is available only for the Secretary in § 107(d). The suggestion will not be incorporated into the Final Rule, as it has no statutory basis.

In the event the employer violates FMLA by failing to maintain the group health benefits as required, and dropping the employee's coverage, the employer in effect becomes self-insured and liable for any medical expenses incurred by the employee that would have been covered by the group health plan. With respect to the comment that the rule be amended to include equitable relief, although the current rule, at § 825.400(c), includes such relief ("employment, reinstatement and promotion"), the language has been clarified.

The Personnel Management Systems, Inc., urges that an employee be permitted to file a civil suit only after the Department has had

an opportunity resolve the issue. The statute places no requirement that an employee exhaust administrative remedies before being authorized to file a private suit, as under Title VII. The legislative history confirms such a result. Therefore, no change will be made in the Final Rule.

The Chamber of Commerce of the USA questions the statutory basis for allowing an employee or *another person* to file a complaint with the Secretary of Labor, stating that only the affected employee should be permitted to file a complaint. The legislative history provides guidance on enforcement of the statute. FMLA's enforcement scheme is modeled after the FLSA, which has been in effect since 1938. Thus, FMLA creates no new agency or enforcement procedures, but instead relies on the time-tested FLSA procedures already established by the Department of Labor. Report from the Committee on Labor and Human Resources (S. 5), Report 103-3, January 27, 1993, pp. 35-36. The Department, in its enforcement of FLSA, has accepted complaints from employees as well as other persons who may have knowledge of the circumstances (*e.g.,* a relative of the employee, a Collective Bargaining Unit representative, a competitor, *etc.*).

The Nevada Power Company and the Edison Electric Institute suggest that punitive damages should be limited to those involving willful violations of the law. The statute does not explicitly provide for punitive damages, which would be available only if otherwise provided by law. Section 107(a)(1)(A)(iii) provides for an additional amount as liquidated damages to the amount awarded, including interest. An employer may avoid the liquidated damages if the employer can show to the satisfaction of the court that the violation was in good faith and the employer had, reasonable grounds for believing that the action taken was not a violation of the statute. The regulations cannot limit the employer's liability for violations of the statute, when no such limitation is provided under the law.

The United Paperworkers International Union urges that the regulations require employers to justify significant changes in employment levels, thereby discouraging such manipulations to avoid coverage. There is no basis in the statute for requiring such action on the part of employers. However, § 825.220(b)(1) of the regulation has been amended to advise covered employers that such manipulation will be viewed as a violation of the acts prohibited by the statute and the regulations.

V. Subpart E — Records (§ 825.500)

Nine commenters, including the Women's Legal Defense Fund (WLDF) and the EEOC, expressed concern about maintaining the confidentiality of medical records. WLDF urged that separate files be maintained to protect the confidentiality of ADA records, and EEOC said that having one confidential medical file for both laws (FMLA and ADA) may not always satisfy the ADA confidentiality requirements. EEOC stated that ADA protects all "information. . .regarding. . .medical condition or history of any employee," (*see* 29 CFR § 1630.14(c)(1)), which would include all employee medical information regardless of the form or manner in which it is provided, whereas the FMLA rule would be limited to "records and documents relating to medical certifications, recertifications or medical histories of employees or employees' family members." According to EEOC, if all medical information is kept confidential under FMLA like under ADA, maintaining only one confidential medical file would satisfy the ADA *provided* employers administer the exceptions to the confidentiality requirement in conformance with ADA requirements (*e.g.,* employers would have to provide supervisors or managers only with the specific information "regarding necessary restrictions on the work or duties of an employee" (§ 825.500(g)(1)), and deny them free access to the entire medical files of employees). Section 825.500(g) has been amended to require that medical records created for purposes of FMLA and ADA must be maintained in accordance with ADA's confidentiality rules on medical information.

Nine commenters expressed concern regarding the recordkeeping burden imposed by FMLA. The LaMotte Company specifically took issue with the estimate provided in the Interim Final Rule of 3 minutes per response, observing that, in their opinion, the requirements would take much longer. They estimate each certified letter would require one hour to prepare in addition to copying and sending. In addition, they experienced numerous telephone inquiries from employees

and pointed out that time is also necessary for training of supervisors and managers. The Human Resources Department, Village of Schaumberg, Illinois, also took issue with three-minute burden estimate. They observed that calculating hours of unpaid leave and the number of hours worked versus hours of FMLA leave, determination of FMLA versus other types of leave, and creating a system to collect employees' share of benefits all required significantly more time than three minutes. Most other commenters simply expressed the opinion that FMLA recordkeeping requirements are burdensome. The "three minutes per response" is an estimate of the annual *recordkeeping* burden per employee, to record and/or file records required by the regulations that are not otherwise required by law or would otherwise be kept as a customary prudent business practice. It does not include the preparation of employee notices required by the regulations, determination of employee eligibility, or procedures for payment of health benefits during FMLA leave.

The LaMotte Company observed that they had received statements from employees who believe that instead of making arrangements for others to take care of their children when they have minor colds, sore throats, or ear infections, they may now stay home with the child because they don't have to worry about saving sick leave for a truly serious health condition, and because FMLA may not be counted against their "point" system. Section 825.114 contains the definition of a serious health condition. The regulations provide that an employer may require an employee to provide a medical certification with regard to a serious health condition for a member of the employee's immediate family (child). If the certification does not confirm the existence of a serious health condition as defined under FMLA, or the employee fails to provide the certification when requested, the leave is not FMLA leave.

The California Department of Fair Employment and Housing and the Chesapeake Farm Credit object to the requirement for a covered employer who has no eligible employees to comply with the recordkeeping requirements of this section. Section 825.500(c) will be changed in the Final Rule to require the covered employer with no eligible employees to post the notice required in § 825.300 and to maintain only the basic payroll information (*i.e.,* name, address, occupation, rate or basis of pay, daily and weekly hours, *etc.*) already required under FLSA. These data are required to enable the covered employer to determine employee eligibility, when necessary. Once the covered employer has eligible employees, the additional records required by § 825.500(d) must be maintained.

Florida Citrus Mutual observes this section does not address the question of records to be maintained by joint employers. The records to be kept by primary employers and covered secondary employers in a joint employment situation should be listed separately, they contend.

The regulations have been revised to provide that a covered secondary employer in a joint employment situation need only keep basic payroll records with respect to its secondary employees. Other records are not necessary because the secondary employer's responsibilities in a joint employment relationship are only to reinstate the employee under the circumstances set forth in § 825.106(a) and to not violate any of the prohibited acts of the statute.

VI. Subpart F — Special Rules for Local Education Employees

Limitations on Intermittent Leave or Leave on a Reduced Leave Schedule (§ 825.601)

The Women's Legal Defense Fund and the American Federation of Teachers/National Education Association stated that the instructional employee who takes intermittent leave amounting to 20 percent or less of the working days during the period of leave should not be subject to the usual rules for taking intermittent leave in §§ 825.117 and 825.204. The employer does not have a right to transfer the employee to an alternative position under this circumstance. They suggest that the third sentence of paragraph (a)(2) of this section be deleted.

The statute at § 108(c)(1) gives the educational employer the right to require the employee either to take leave of a particular duration not to exceed the duration of planned medical treatment or to transfer to an alternative position that better accommodates recurring periods of leave. The statute is silent regarding the circumstances when the em-

ployee takes intermittent leave for 20 per cent or less of the total number of working days in the period during which the leave would extend. After further consideration the Department agrees that § 108 of the Act provides the only provision applicable to instructional employees and, therefore, an educational employer does not have the latitude to transfer an instructional employee to an alternative position in this circumstance. The Final Rule will reflect this change.

Leave Taken for "Periods of a Particular Duration" (§ 825.603)

Federally Employed Women, the Women's Legal Defense Fund and the American Federation of Teachers/National Education Association objected to the provision in paragraph (a) of this section which states that leave that is required by the employer for either a particular duration or until the end of the school term is to be counted as FMLA leave. They view this provision to be doubly penalizing when the employee is required to take more leave than desired or medically necessary, and then to have that "extra" leave count against his or her FMLA leave entitlement. They urge that this provision be changed to reflect that such leave is to be counted against the FMLA entitlement only if the employee chooses rather than is required to take additional leave.

The legislative history provides the following guidance: Whenever a teacher is required to extend his or her leave under section 108(c) or (d), such leave would be treated *as other leave under the act,* with the same rights to employment and benefits protection contained in section 104. Report from the Committee on Labor and Human Resources (S.5), Report 103-3, January 27, 1993, p. 37. However, the Department agrees that because the employer had the option of not requiring the employee to take leave until the end of the term, the leave should not count against the 12-week entitlement.

The Chicago land Chamber of Commerce, *et al.,* commented that all periods of leave taken by school employees should count as FMLA leave, including any period of leave that occurs outside the school term. For example, if an instructional employee begins a six-week leave two weeks before the school term ends, the entire six-week period should count as FMLA leave.

The Department disagrees. An absence taken when the employee would not otherwise be required to report for duty is not leave, FMLA or otherwise. For example, the regulations do not require an employee, who normally works Monday through Friday, and is taking intermittent leave, to have counted as leave the weekend days (*i.e.,* Saturday and Sunday). If the employee(s), absent FMLA, would not have otherwise been required to take some form of leave to cover the absence, then the absence is not to be counted against the employee's FMLA leave entitlement. Section 825.200(f) has been added to the Final Rule to clarify this issue.

Restoration to "Equivalent Position" (§ 825.604)

The Women's Legal Defense Fund and the American Federation of Teachers/National Education Association urged that this section be clarified in the Final Rule to make it clear that restoration of an employee at the conclusion of FMLA leave based on existing policies and practices of a school board must provide substantially the same protections as provided in the statute for other reinstated employees. Specifically, the school board may not restore the employee to a position which would require any additional licensure or certification, or would result in substantially increased commuting time.

The Department agrees with the suggestion that the regulation prohibit restoration to a position requiring additional licensure. While as a general matter restoration must be to a geographically proximate location, a school board policy may deviate from this requirement provided the deviation does not result in substantially less employee protections. Therefore, commuting time will not be mentioned in the rule.

VII. Subpart G — How Other Laws, Employer Practices, and Collective Bargaining Agreements Affect Employees' FMLA Rights

More Generous Employer Benefits Than FMLA Requires (§ 825.700)

Nothing in FMLA diminishes an employer's obligation under a collective bargaining agreement (CBA) or employment benefit

program or plan to provide *greater* family or medical leave rights to employees than the rights established under FMLA (FMLA § 402(a)), nor may the rights established under FMLA be diminished by any such CBA or plan (FMLA § 402(b)).

This section of the regulations described the interaction between FMLA and employer plans and CBAs. Included were provisions to describe FMLA's delayed effective date for CBAs in effect on August 5, 1993 — FMLA would not apply until February 5, 1994, or the expiration date of the CBA, whichever occurred earlier. For CBAs subject to the Railway Labor Act and other CBAs which have no expiration date for the general terms, but which may be reopened at specified times (*e.g.,* to amend wages and benefits), the date of the first amendment after August 5, 1993, and before February 5, 1994, was considered the effective date for purposes of FMLA.

The State of Oregon's Bureau of Labor and Industries, State of Oklahoma's Office of Personnel Management, Fisher & Phillips, and College and University Personnel Association raised questions or offered comments on whether "more generous" family or medical leave provided pursuant to contract or an employer policy may be counted against an employee's 12-week FMLA leave entitlement under circumstances where either the employees would not yet be eligible for FMLA leave, or the leave is for a reason that does not qualify as FMLA leave (*e.g.,* employers adopt leave policies that mirror FMLA but relax eligibility requirements or the definition of serious health condition, or expand the "family member" definition to include in-laws and domestic partners). To reduce the incentive for employers to eliminate such "more generous" policies, these commenters contend that DOL should allow employers to count such leave towards FMLA leave entitlements.

Leave granted under circumstances that do not meet FMLA's coverage, eligibility, or specified reasons for FMLA-qualifying leave may *not* be counted against FMLA's 12-week entitlement. However, employers may designate paid leave as FMLA leave and offset the maximum entitlements under the employer's more generous policies to the extent the leave qualifies as FMLA leave.

Sommer & Barnard questioned whether FMLA's 12 weeks of leave must be added to longer periods of employer-provided leave (*e.g.,* disability leave); or, alternatively, whether employers may offset FMLA's leave entitlement against the longer periods of employer-provided leave. To the extent that a particular absence recognized under the employer-provided plan also qualifies as FMLA leave, and the leave is designated by the employer in accordance with § 825.207 and § 825.208, the absence may be counted concurrently under both FMLA and the employer's plan (*e.g.,* a disability that is covered by the employer's disability leave plan which also meets FMLA's definition of "serious health condition that makes the employee unable to perform the functions of the position").

The Chamber of Commerce of the USA commented that the language in paragraph (c) of this section provided a reasonable construction of the Act's effective date for CBAs subject to the Railway Labor Act and other CBAs which do not have an expiration date for the general terms, but which may be reopened between August 5, 1993, and February 5, 1994, to amend wages and benefits. The example given, however, of a contract reopening to amend wages and benefits wrongly suggests that a contract reopened for any other reason also should be considered terminated for FMLA effective date purposes, the Chamber contended. Any reopening not pertaining to benefits should not be construed as a termination of the agreement according to this comment.

We disagree with the interpretation suggested by this comment. *Any* reopening of the CBAs subject to this rule, which is specifically limited to CBAs subject to the Railway Labor Act and other CBAs which do not have an expiration date for the general terms, for the first time after August 5, 1993, shall be considered the termination date of the CBA for purposes of FMLA's effective date.

The Contract Services Association of America questioned whether the costs associated with FMLA's requirements to maintain group health benefits during periods of FMLA leave could be credited by a contractor towards meeting its fringe benefit requirements under wage determinations issued pursuant to the McNamara-O'Hara Service Contract Act (SCA), or are they excluded as are other statutorily-mandated benefits such as FICA, workers' compensation, *etc.*? Because SCA excludes any benefit otherwise required by Federal, State, or local law to be provided by

the employer to an employee, such costs may not be claimed as a credit for purposes of meeting the contractor's fringe benefit obligations to employees under the SCA. In any event, SCA credit may only be taken for contributions that cover periods when work is performed.

The Contract Services Association also asked whether cash-equivalent payments made in lieu of furnishing bona fide health and welfare benefits to an SCA-covered employee have to continue when the employee is on FMLA leave. Such cash equivalent payments do not have to continue while the employee is on *unpaid* FMLA leave.

State Family and Medical Leave Laws and FMLA (§ 825.701)

Nothing in FMLA supersedes "any *provision* of any State or local law that provides greater family or medical leave rights" than the rights under FMLA (*see* FMLA § 401(b)). Because of this statutory "non-preemption" language, the determination of which law applies (State versus Federal) in a particular situation must be examined on a provision-by-provision basis. Where the requisite coverage or applicability standards of both laws are met and the laws contain differing provisions, an analysis must be made of both laws, provision-by-provision, to determine which standard(s) from each law will apply to the particular situation. The standard providing the greater right or more generous benefit to the employee from each law (provision-by-provision) will apply. Note, however, that leave taken for a reason specified in both the Federal and State law may be simultaneously counted against the employee's entitlement under both laws. This section of the regulations attempted to demonstrate the interaction between FMLA and State laws with examples. Numerous comments were received suggesting there may be considerable confusion over the "provision-by-provision" analysis that must be conducted in each particular case.

Employers Association of New Jersey recommended guidelines be included in the regulations for applying FMLA and State law in the following manner:

> If an employee takes leave for a purpose which is recognized under only one of the two laws, rights and obligations are governed by that law alone, and the amount of leave taken cannot be charged against the amount of leave which may be allowed under the other law.
>
> If an employee takes leave for a purpose which is recognized under both the FMLA and a State law, the employee is entitled to the benefits of whichever law is the most favorable to the employee and the amount of leave taken is charged against the amount which is allowed under each law.
>
> The availability of benefits under either law is subject to the limitations of that law with respect to the duration of leave, type of leave, *etc.*

The Equal Rights Advocates suggested additional examples where a State law is silent on an issue addressed by FMLA. If an employee is "eligible" under both FMLA and a State or local law, and the State or local law is silent on a provision contained in FMLA, and if the FMLA provision is restrictive (as to employee rights or benefits), then the State or local law would govern as to that provision. If the FMLA provision is *not* restrictive (or extends a right, benefit or privilege to employees), then the FMLA would govern as to that provision. For example, a State law that grants employers the right to deny the taking of leave to high-level executives could not be applied to any FMLA-eligible employees, because FMLA extends to all eligible employees the entitlement to leave for qualifying reasons. If the same State law contained a provision mandating that all employees who take leave be restored to employment when the leave ends, then FMLA's "key" employee exemption could not be applied to deny an employee reinstatement (*i.e.,* the Federal law would not apply at the time of reinstatement).

The guidelines and interpretations suggested above by the Employers Association of New Jersey and the Equal Rights Advocates correctly construe the relationship between FMLA and other State laws, which have been included here for guidance.

Chicagoland Chamber of Commerce commented that, with respect to substantive provisions such as eligibility and coverage requirements, amount of leave, benefits and employment protections, and substitution requirements, the more generous or expan-

sive provisions between the FMLA and the State law should apply and be considered to offset or simultaneously satisfy overlapping but less generous provisions. "More generous" should be determined on a "common sense, quantitative basis," they contend, such as where a State law allows up to 16 weeks of leave for a serious health condition in any year and FMLA allows 12 weeks, the State law maximum would apply. They recommended the regulations specify that differences in more generous substantive provisions in State law cannot be combined with other less restrictive provisions in FMLA, and vice versa. With respect to procedural provisions, such as notification of leave, certification requirements, and other procedural requirements, the commenter recommended that the provisions of FMLA and its implementing regulations should be applied in all cases because of the administrative difficulty in trying to determine if State or Federal provisions are more or less generous. The Louisiana Health Care Alliance (Phelps Dunbar) similarly suggested that any State law procedural regulations which are inconsistent with FMLA should be preempted.

FMLA provides that it shall not supersede "any provision" of any State or local law that provides greater family or medical leave "rights" than under FMLA. There is no basis under this language or the legislative history to distinguish between procedural provisions that extend greater rights to employees and substantive provisions that provide more generous family or medical leave benefits to employees.

The Women's Legal Defense Fund recommended the regulations address the interaction between FMLA and State workers' compensation laws. The State of Oregon's Bureau of Labor and Industries asked if State workers' compensation laws qualify under FMLA as a "State. . .law that provides greater . . .medical leave rights. . .."

If a State workers' compensation law provides a job guarantee to workers out of work temporarily due to occupational injuries that is more generous than FMLA's job restoration provisions, such law is a "State. . .law that provides greater. . .medical leave rights . . ." and would govern an employee's reinstatement. On the other hand, where such occupational injuries also meet FMLA' s definition of "serious health condition that makes the employee unable to perform the functions of the position," the employer would have to maintain the injured employee's group health benefits under the same terms and conditions as if the employee had continued to work during the workers' compensation-related leave of absence (at least for the duration of the employee's remaining FMLA leave entitlement in the 12-month period).

The Association of Washington Cities commented that an employee could take 12 weeks of FMLA-qualifying leave for a purpose other than the birth or adoption of a child and still be eligible under applicable State law to another (subsequent) 12 weeks of "parenting" leave, which could enable an employee to take 24 weeks of leave in a single year. Under the terms of the applicable statutes, this is true.

The State of Oregon's Bureau of Labor and Industries noted that Oregon's parental leave law provides a 12-week window following the birth of a child for the use of parental leave, and asked if an employee's use of 12 weeks of parental leave within the first 12 weeks following the birth exhausts the parent's Federal right to take parental leave within the first year. An employee "eligible" under both the Federal and State law would exhaust both entitlements simultaneously within that 12-week period. Note, however, that if the employee used fewer than 12 weeks during that initial 12-week period following the birth, the employee could use the remainder of his or her Federal leave entitlement under FMLA within one year after the birth. This commenter also pointed out that a parent must share a state leave entitlement with his or her spouse regardless of whether they work for separate employers. Under FMLA, each FMLA-"eligible" spouse would retain a Federal entitlement equal to 12 weeks minus their portion of the State leave taken.

The University of California observed that, under California law, employers may not obtain second or third opinions except in the case of an employee's own serious health condition. Thus, because FMLA was intended to permit Christian Science practitioner certification, employers would not be able to obtain second or third medical opinions in connection with the serious health condition of a spouse, child or parent. Under the applicable statutes, this would be true.

Downs Rachlin & Martin stated that, under Vermont's Parental and Family Leave Act, an employee may use accrued sick leave or

vacation leave, not to exceed six weeks, consistent with existing policy. "Utilization of accrued vacation leave shall not extend the leave provided therein." The commenter questioned whether the Federal law provided a more generous benefit. The answer is "Yes" with respect to FMLA's more generous substitution provisions and the length of the allowable leave period.

Hill & Barlow pointed out that the Massachusetts maternity leave statute entitles an eligible employee to up to eight weeks of leave for the purpose of giving birth or for adopting a child. They asked if an employee had used 12 weeks of FMLA leave earlier in the year for a purpose other than giving birth or adopting a child, would the employee still be eligible to the State leave entitlement? The answer is "Yes."

The Corporation for Public Broadcasting objected to having to comply with both FMLA and State law where one law's benefit is not clearly more generous than the other. They, together with the Equal Employment Advisory Council and the Electronics Industries Association, also questioned the provision entitling an employee to use leave under Federal and State or local law concurrently, and thus to take a total amount of leave which may exceed the already generous amount allowed by either law. The Corporation for Public Broadcasting suggested a Federal preemption if permitted or the lobbying of Congress to obtain such authority. California Bankers Association similarly suggested DOL include language to preempt all State law in this area or allow an employee to take only the greater of the leaves available (to prevent "piggybacking" leave under both FMLA and State law). National Association of Plumbing-Heating-Cooling Contractors suggested that "cafeteria-style" programs where different standards and/or benefits from each or both the Federal and State laws are selected to form a separate, hybrid leave plan should be strictly prohibited, and likewise urged that the issue of preemption be revisited.

Given the literal language of FMLA, DOL has no authority to preempt State laws to the extent they provide more generous leave rights to employees. The results about which the majority of the comments complained occur by operation of law (FMLA *and* State family and medical leave laws), and cannot be mitigated by regulation. Only editorial changes have been included in this section of the regulations in response to the comments, in order to clarify examples and provide additional guidance.

Federal and State Anti-discrimination Laws (§ 825.702)

Nothing in FMLA modifies or affects any Federal or State law prohibiting discrimination on the basis of race, religion, color, national origin, sex, age, or disability (*see* FMLA § 401(a)). The stated purpose of the FMLA in this regard, according to its legislative history, was to make leave available to eligible employees within its coverage, and not to limit already existing rights and protection under applicable anti-discrimination statutes (for example, Title VII of the Civil Rights Act of 1964, as amended by the Pregnancy Discrimination Act; and the Americans with Disabilities Act (ADA)). This section included examples of how FMLA would interact with the ADA with respect to a qualified individual with a disability as defined under that Act.

Comments from U.S. Senators Dodd and Kerry (sponsors of both FMLA and ADA), in a letter to the EEOC dated November 22, 1993, make clear that congressional intent was for both Acts to be applied simultaneously, and that an employer must comply with whichever statutory provision provides the greater rights to employees. In keeping with that statutory intent, FMLA § 401 should not be interpreted in any way as limiting or forcing an election of rights under FMLA or ADA. Similarly, comments from U.S. Representatives Williams and Ford (Committee on Education and Labor), in a letter to the EEOC dated November 19, 1993, explained that congressional intent, in the case of an employee with a serious health condition under FMLA who is also a qualified individual with a disability under ADA, was for the FMLA and ADA to be applied in a manner that assured the most generous provisions of both would apply. The statutes provide simultaneous protection and at all times an employer is required to comply with both laws. The Department concurs with this interpretation of the FMLA as it relates to the ADA and other discrimination laws. In summary, providing the "more beneficial" rights or protections does not undermine an employer's obligation to observe the requirements of both statutes.

Satisfying any or all FMLA requirements, including granting an employee 12 weeks of leave and restoring the employee to the same job, does not absolve an employer of any potential ADA responsibilities to that employee (and vice versa).

Several commenters (G.M. Smith Associates, Inc; Personnel Management Systems, Inc; Chamber of Commerce of the USA; Equal Employment Advisory Council; and Louisiana Health Care Alliance (Phelps Dunbar)) urged a contrary view, that compliance with FMLA should constitute or substitute for compliance with ADA, to simplify the burdens of multiple compliance obligations. Some stated that employers evaluating "undue hardship" under ADA need not disregard the cost and disruption of FMLA leave already taken by an employee. This point was also raised by Personnel Management Systems, Inc. and Chamber of Commerce of the USA. The Department has been advised by the EEOC that the *ADA,* unlike the FMLA, considers the burden on an employer for purposes of evaluating the feasibility of employee medical leave. Cost and disruption to the employer are directly relevant to the factors listed in ADA's regulatory definition of "undue hardship." Therefore, according to EEOC, employers may consider FMLA leave already taken when deciding whether ADA accommodation leave in excess of 12 weeks poses an undue hardship. This does *not* mean, however, that more than 12 weeks of leave automatically poses an undue hardship under the ADA. According to EEOC, employers must apply the full ADA undue hardship analysis to each individual case to determine whether or not leave in excess of 12 weeks poses an undue hardship.

An employee's right to be restored to the same or an equivalent position under FMLA applies to the job which the employee held at the time of the request for FMLA leave, even if that job differs from the job held previously due to a reasonable accommodation under ADA. (Ibis point was raised by the Chamber of Commerce of the USA.) The "essential functions" of the position would also be those of the position held at the time of the request for leave. An employer may not change the essential functions of an employee's job in order to deny the employee the taking of FMLA leave. However, this does not prevent an employee from voluntarily ending his or her leave and accepting an alternative position uncoerced and not as a condition of employment. The employee would then retain the right to be restored to the position held by the employee at the time the FMLA leave was requested (or commenced) until 12 weeks have passed, including all FMLA leave taken and the period the employee returned to "light duty." When an employer violates both FMLA and ADA, an employee may be able to recover under either or both statutes (but may not be awarded double relief for the same loss).

VIII. Subpart H — Definitions (§ 825.800)

The Women's Legal Defense Fund urges that all definitions that are modified in the text of the regulations be modified similarly in Subpart H. Certainly the Department intends to maintain the integrity of this Subpart, and any material modifications will be incorporated.

The law firm of Alston and Bird recommended that the term group health plan should not include non-employment related benefits paid by employees through voluntary deductions, *e.g.,* individual insurance policies. We agreed with the recommendation and language has been added to § 825.209(a)(1) to exclude such benefits from the definition of group health plan, and make clear an employer is not responsible for maintaining or restoring such benefits for employees who take FMLA leave.

The American Association of Retired Persons (AARP) took issue with the definition of "parent" in this section and stated there is nothing in the statutory language or the legislative history that required the exclusion of parents in-law. We disagree, as discussed above in connection with § 825.113. Section 101(7) of the statute defines parent as the biological parent of an employee or an individual who stood *in loco parentis* to an employee when the employee was a son or daughter. There is no language in the legislative history to indicate Congress contemplated expanding the definition beyond the plain meaning of the words. In the Final Rule, the sentence, "This term does not include parents 'in-law,'" will be removed from the definition of "parent" in § 825.800, but not from the explanatory guidance in § 825.113.

This is being done not because we agree with AARP but rather because the language in the statute and the regulation are clear regarding the term and the additional sentence is unnecessary.

The law firm of Fisher and Phillips urged that the Final Rule should clarify whether employees of a U.S. employer who are employed in the territories and possessions of the United States may be eligible employees. The law firm asks for the same clarification with regard to employees working in countries other than the United States. Sections 825.105 (a) and 825.800 in the Final Rule will be amended to reflect that employees employed within any State of the United States, the District of Columbia or any territory or possession of the United States are subject to FMLA and may be eligible employees. Employees employed outside these areas are not counted for purposes of determining employer coverage and may not become eligible employees as FMLA does not apply.

The Personnel Management Systems, Inc., and the Credit Union National Association, Inc., suggest that only eligible employees should be counted in determining whether an employer has 50 or more employees for FMLA coverage purposes. The language of the statute, in § 101(2) defines the term "Eligible Employee." In paragraph (3) of that section, the statute defines "Employee" as having the same meaning as the definition found in section 3 of the Fair Labor Standards Act. Section 101(4) of the statute defines "'Employer' as any person. . .who employs 50 or more *employees*. . ." (emphasis added). If Congress had intended to limit the count for determining coverage to *eligible* employees only, it could have included that language "50 or more *eligible* employees." The legislative history indicates clearly Congress' intent to count all employees. The Department is unable to incorporate the desired change.

The Medical Group Management Association recommends that the definition of employee should not include equity owners (partners) of corporations who are both employers and employees. These individuals should be excluded from the count of employees even though their names appear on the payroll.

Persons who are partners in a business are not employees for purposes of the FMLA because partners are not included within the definition of employee under the FLSA. The definition of "employer" in § 101(4) of the FMLA means any *person* engaged in commerce or in any industry or activity affecting commerce who employs 50 or more employees, *etc.,* and includes any *person* who acts, directly or indirectly, in the interest of an employer to any of the employees of the employer. Section 101(8) defines "person" to have the same meaning as in § 3(a) of the FLSA, which means an individual, *partnership,* association, corporation. . .*(etc.).* Partners are not to be included in the count of employees for coverage or eligibility, even if their names appear on the payroll. However, equity owners (*e.g.,* stockholders) of a corporation may also be employees of the corporation and, as such, when their names appear on the payroll, are included in such employee counts and they may also become eligible employees. No change will be made in the Final Rule in this regard as the determination of whether such an individual is an employee is case specific.

The National Community Mental Healthcare Council observes that the definition of an individual who is incapable of self-care is deficient in that it only addresses activities of daily living (ADLs), which relate to physical incapacity, but does not address those with mental illness. They recommend the definition be expanded to include "instrumental activities of daily living" (IADLs). Their recommendation is appropriate and the language in the Final Rule in § 825.113(c)(1) has been amended to include IADLs.

The Council also urges that the definition of health care provider (HCP) be expanded to mental health professionals and mental health services. The definition of HCP has been amended to include any HCP from whom the employer or a group health plan's benefits manager will accept certifications. This change should address this concern.

IX. Appendix B, Appendix C, and Appendix E

A number of comments which raised concerns about Form WH-380, the optional form to obtain medical certification, have been addressed above and will not be repeated herein.

Three commenters, including The First Church of Christ, Scientist, offered alternative forms to be used for the medical certification. The concern of the Christian Scientists was that they are unable to provide a medical diagnosis of the employee. As the Department has already decided to revise the medical certification form, the concerns of these commenters will be addressed by the revision to the extent appropriate in keeping with the statutory language. Further, we believe having separate or special forms for differing kinds of health care providers would prove confusing, and may, in fact, result in more requests for second and third medical opinions.

G.M. Smith Associates, Inc., recommends the form include a letter from the employee to the health care provider that requests referral to a board certified specialist if necessary. The form should ask the health care provider if going to work will harm the employee and whether the illness/injury precludes the employee from travel or being at work. If either of these questions are answered affirmatively, the health care provider would provide a date on which the employee will be available for limited duties.

There is no statutory basis for obtaining the additional information requested by this commenter. For example, § 825.702 provides that an employee may not be required to accept a light or limited duty position. The Department is unable to add the requested information to the form as it does not comport with the statutory provisions.

Appendix C

The Women's Legal Defense Fund points out that information is not included on the notice that notes potential application of either more beneficial State statutes or more beneficial provisions of a Collective Bargaining Agreement. They recommend separate notices for employers in each of the States that give broader rights. They suggest a statement in the notice that employees should consult with union representatives, that notices be provided to employers in Spanish, that the Department develop materials for employees on how to obtain FMLA leave, and that the Department install an 800-hotline number for FMLA inquiries and complaints.

The purpose of the notice is to outline the essential provisions and protections of FMLA to employees, much in the same manner as the notice for FLSA. The size of the poster, whether 8½ inches x 11 inches (the size of the FMLA poster) or 14 inches x 17 inches (the size of the FLSA poster), would not accommodate every possible nuance of the FMLA. Employees are advised to contact the nearest office of the Wage and Hour Division for additional or more specific information. The notice has been available in Spanish for some time. The Department has published State/Federal comparisons of family and medical leave statutes. These informational materials are available to employees as well as employers, thus, separate notices for each State are unnecessary. The Department has published a Fact Sheet and a Guide to Compliance with the FMLA for use by employees and employers alike to obtain more specific, non-technical information regarding the statute. Section 825.301(a)(2) instructs employers they may use the Department's Fact Sheet for general distribution to employees when the employer does not have an employee handbook in which FMLA policies have been incorporated. The Department has made no final decision on the viability of installing an 800 number.

Appendix E

The Department had promised earlier that if the IRS published guidance concerning the relationship between FMLA and certain aspects of the tax code, *e.g.,* COBRA, the Department would include the IRS guidance as an appendix to the final rule. IRS published guidance concerning COBRA in Notice 94-103, appearing in Internal Revenue Bulletin No. 1994-51, dated December 19, 1994. A copy of the notice is attached to the regulation as Appendix E.

X. Regulatory Flexibility Act

Under the Regulatory Flexibility Act, Public Law 96-354 (94 Stat. 1164; 5 U.S.C. 601 *et seq.*), Federal agencies are required to analyze the anticipated impact of proposed rules on small entities. Because FMLA applies only to private employers of 50 or more em-

ployees (and to all public agencies regardless of the number of employees employed), it covers only the larger private employers — in total, about five percent of all possible employers, or approximately 300,000. Also, FMLA requires covered employers to grant only *unpaid* leave to eligible employees for specified reasons. For these reasons, the Department concluded that the implementing rules likely would not have a "significant economic impact on a substantial number of small entities" within the meaning of the Regulatory Flexibility Act. The Acting Chief Counsel for Advocacy of the U.S. Small Business Administration (SBA) filed official comments on the interim final FMLA rules which disagreed with DOL's conclusion. SBA contended essentially that the FMLA regulations will have a significant impact on *all* businesses covered by the FMLA, the vast majority of which, SBA contends, are small.

The definition of "small" business varies considerably, depending upon the policy issues and circumstances under review, the industry being studied, and the measures used. SBA generally uses employment data as a basis for size comparisons, with firms having fewer than 100 employees or fewer than 500 employees defined as small.[1]

Statistics published by the Internal Revenue Service indicate that in 1990, of the estimated 20.4 million business tax returns that were filed (4.4 million for corporations, 1.8 million for partnerships, and 14.2 million for sole proprietorships), fewer than *7,000* would qualify as large businesses if an employment measure of 500 employees or less were used to define small and medium-sized businesses.[2] The SBA stated in its comments that, based upon 1990 Census tabulations, there are 105,720 firms which employ between 50 and 99 employees; 55,249 firms which employ between 100 and 249 employees; and 14,999 firms which employ between 250 and 499 employees, providing a total of 175,968 businesses with fewer than 500 employees.[3] Thus, the SBA suggests that if an employment measure of 500 employees is used to define "small" businesses, 92.4 percent of all those businesses which are affected by the FMLA and its implementing regulations are "small" businesses.[4] In fact, however, this analysis overstates the number of "small" businesses that are actually affected by FMLA's requirements because they must grant unpaid leave only to employees who are defined as "eligible" under the law. It is conceivable, for example, that a covered "small" business with 250 employees working at several geographically dispersed worksites would have no employees who are eligible to take FMLA leave (because there would be fewer than 50 employees working within 75 miles of each worksite). Similarly, an employer with a very transient workforce, with all part-time employees, may have no eligible employees.[5]

Assuming the appropriateness of the 500-employee criterion applied by SBA to define "small" businesses for purposes of FMLA, and acknowledging that there are a number of small businesses that would be

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[1] The State of Small Business: A Report of the President Transmitted to the Congress (1991), Together with The Annual Report on Small Business and Competition of the U.S. Small Business Administration (United States Government Printing Office, Washington, D.C., 1991), p. 19. A more detailed breakdown also used by SBA is: under 20 employees, very small; 20–99, small; 100–499, medium-sized; and over 500, large. On the other hand, the size standard established by SBA at 13 CFR § 121.601 is 500 employees for most industries.

[2] U.S. Department of the Treasury, Internal Revenue Service, *SOI Bulletin* (Spring 1990) Table 19; reprinted by SBA in The State of Small Business (1991), *Ibid.*, p. 21.

[3] U.S. Department of Commerce, Bureau of the Census, Current Population Survey, 1990. These tabulations contain firms with employees only; the self-employed were excluded. The self-employed would not constitute a covered "employer" for purposes of the FMLA and, therefore, these tabulations tend to understate the *actual* number of "small" businesses that are excluded from FMLA's coverage and overstate the *proportion* of small businesses that are covered by the FMLA.

[4] This 92.4 percent figure appears misleading to us for measuring the universe of employers at issue for purposes of this analysis in that it excludes the very substantial number of small businesses employing fewer than 50 employees which would not be covered by the FMLA and, therefore, would not be impacted by the role.

[5] Not every employee of a covered employer is eligible for FMLA leave. To be eligible, an employee must work for a covered employer and have worked for at least 12 months and 1,250 hours in the 12 months preceding the leave, and work at a location where the employer employs at least 50 employees within 75 miles of the worksite. § 101(2) of FMLA; 29 CFR § 825.110.

covered by the FMLA rules, we note that the Congress, in selecting the 50-employee coverage threshold, frequently characterized the new legislation as exempting smaller businesses and applying only to larger ones. We also note the overwhelming majority of small businesses that are not subject to the FMLA. Information compiled by the U.S. Department of Commerce and reported in County Business Patterns, 1990, indicates that there are 5,862,938 establishments employing between one and 49 employees; 175,375 establishments employing between 50 and 99 employees; 97,742 establishments employing between 100 and 249 employees; 24,334 establishments employing between 250 and 499 employees; 9,592 establishments employing between 500 and 999 employees; and 5,582 employing 1,000 or more employees.[6] These numbers confirm the Department's earlier estimates that roughly five percent (*i.e.,* 312,625) of *all* establishments would be covered by FMLA at the 50-employee coverage threshold. Moreover, these numbers suggest further that, if SBA's 500-employee threshold for defining "small" businesses is applied, *less than* five percent of *all small businesses* would be covered by the FMLA, while more than 95 percent of *all small businesses* would be exempted from FMLA coverage.

In addition, William M. Mercer, Incorporated and the Institute of Industrial Relations at the University of California, Berkeley jointly conducted a survey of nearly 300 employers on the FMLA in November 1993. This report notes that, before FMLA was passed, there was opposition to mandated leave based on the idea that small business would be negatively impacted by such leave. However, small employers (those with less than 200 employees) who responded to this survey were not significantly more likely to anticipate major financial costs or great administrative difficulty in complying with the FMLA than large employers. In response to questions on the California-mandated family leave law (in effect since January 1992), small employers reported the lowest level of utilization of family leave and no higher direct and indirect financial costs than did larger employers. In fact, the only employers that reported any "major costs" associated with California-mandated leave were those that employed 5,000 or more employees. A greater percentage of large employers had experienced disagreements with employees over family leave issues. Large employers, however, were also most likely to note a beneficial effect on absenteeism, employee morale, public relations, and supervisory relationships as a result of mandated leave. Small employers, in contrast, were most likely to note a beneficial effect on worker productivity and co-worker relationships.

For its part, the Department made a conscious effort to adopt the least burdensome regulatory alternatives (consistent with the statute) in order to reduce the burden on *all* employers, including small employers. In particular, recordkeeping requirements were kept to the minimum level necessary for confirming employer compliance with FMLA's statutory leave provisions. In addition, to ease administrative burdens on all employers, including small entities, employee notification requirements that apply when employees request FMLA leave were summarized in § 825.301(c) of the regulations, and DOL made available a prototype notice which employers could adapt for their own use to meet the specific notice requirements (*see* § 82S.301(c)(8)).

The Department also engaged in extensive education and outreach efforts. We prepared and made available a Fact Sheet and a Compliance Guide to the FMLA, to assist all employers in understanding and meeting their compliance obligations. Because FMLA does not diminish any greater family or medical leave rights provided by State or local law, DOL also prepared and distributed comparisons of State and Federal family and medical leave laws, indicating which law provided the greater employee rights or benefits for compliance purposes.[7]

Thus, DOL continues to believe that the extraordinary measures which it has taken

[6]U.S. Department of Commerce, Bureau of the Census, County Business Patterns, 1990 (CPB-90-1), issued January 1993, Table lb. These tabulations exclude most government and railroad employees, and self-employed persons.

[7]The Department's Women's Bureau has also distributed to the public a comparison of State maternity/family leave laws since June 1993.

in connection with the implementation of the FMLA will ease the burdens of compliance on all employers, including small employers, and that compliance with the FMLA will *not* have a significant economic impact on a substantial number of small entities. This conclusion is reinforced by available research which shows that costs associated with implementing the FMLA are not significant for covered businesses including covered "small" entities with eligible employees.

In conclusion, even assuming a 500-employee size standard, only 5 percent of small employers are covered by FMLA. Based on our review of the studies conducted, the Department concludes, therefore, that the FMLA rules would not likely have a significant economic impact on a substantial number of small entities.

Because of its belief that FMLA significantly impacts a substantial number of small entities, the SBA also suggested in its comments a number of regulatory alternatives in certain areas that it believed would ease the burden on small entities, as follows:

Exclude Part-time Employees When Determining Employer Coverage Under FMLA: The SBA suggested that DOL reduce the coverage of small businesses by changing the 50-employee threshold for coverage to exclude part-time workers from the count. Because small entities employ more part-time workers than larger firms, SBA stated that inclusion of part-time employees will increase the coverage of the FMLA to firms "that otherwise might not have been covered." FMLA's coverage criteria are statutory and, as specifically stated in the legislative history, it was the clear intention of the Congress that all employees of an employer are to be included in the count, including part-time employees. ("It is not necessary that every employee actually perform work on each working day to be counted for this purpose.*** Similarly, part-time employees and employees on leaves of absence would be counted as 'employed for each working day' so long as they are on the employer's payroll for each day of the workweek." Report of the Committee on Labor and Human Resources (S. 5), Senate Report 103-3 (January 27, 1993), p. 22.)

Clarify Definitions of "Serious Health Condition" and "Medical Necessity" for FMLA Leave: SBA observed that the definition of "serious health condition" (which is statutory) was broadly inclusive, and suggested that employers would be required to look to FMLA's legislative history in order to determine whether an employee's condition is considered a "medical necessity" that justifies FMLA leave. SBA mistakenly presumes that this is a judgment that the statute and regulations permit an employer to make. If the health condition meets the definition in the regulations at § 825.114 and, as provided in §§ 825.305–825.307, an employee furnishes a completed DOL-prescribed medical certification from the health care provider, the only recourse available to an employer that doubts the validity of the certification is to request a second medical opinion at the employer's expense. Employers may not substitute their personal judgments for the test in the regulations or the medical opinions of the health care providers of employees or their family members to determine whether an employee is entitled to FMLA leave for a serious health condition.

Expand the "Key Employee" Definition to Include Job Descriptions Instead of Salary: Under the "key employee" exception, employers may deny job restoration in certain cases (*see* §§ 825.217–825.219). SBA recommended that DOL expand the regulatory definition of "key employee" to include an employee's job description in lieu of salary, because there may be situations, particularly in small entities, where lower salaried employees perform on-going employment functions that are vital to the business and prevent economic injury to the employer's operation but must be reinstated due to the comparatively low salary that is paid. We note first that it seems unlikely that an employer would not want to restore such an employee to employment if the employee performs the vital role indicated, but that is beside the point. The provisions applicable to the "key employee" exception are statutory and state, specifically, that the employees affected must be ". . .a salaried eligible employee who is among the highest paid 10 percent of the employees employed by the employer within

75 miles of the facility at which the employee is employed" (*see* § 104(b)(2) of the FMLA). There is no authority under these provisions of the law to ignore the salary paid to "key employees." SBA's suggestion directly contravenes the statute and cannot be adopted by regulation.

Require a Four-Hour Minimum Absence for Intermittent (or Reduced Leave) Schedules: FMLA allows eligible employees to take leave intermittently or on a reduced leave schedule in certain cases. The regulations state that an employer may not limit the period of intermittent leave to a minimum number of hours. SBA stated that DOL could significantly reduce the impact of the FMLA on small entities by imposing a minimum leave requirement, and suggested a four-hour minimum would both enable an employee to work a half-day and permit the employer to ease administrative burdens in complying with the FMLA regulations. Permitting an employer to impose a four-hour minimum absence requirement would unnecessarily and impermissibly erode an employee's FMLA leave entitlement for reasons not contemplated under FMLA (*see* also the discussion of § 825.203, above). Section 102(b)(1) of the FMLA provides that ". . .[t]he taking of leave intermittently or on a reduced leave schedule pursuant to this paragraph shall not result in a reduction in the total amount of leave to which the employee is entitled. . . beyond the amount of leave actually taken." An employee may only take FMLA leave for reasons that qualify under the Act, and may not be charged more leave than is necessary to address the need for FMLA leave. Time that an employee is directed by the employer to be absent (and not requested or required by the employee) in excess of what the employee requires for an FMLA purpose would not qualify as FMLA leave and, therefore, may not be charged against the employee's FMLA leave entitlement.

"Small" Business Handbook: SBA also suggested that DOL consider providing a handbook detailing compliance requirements for small entities, *i.e.* , comparisons of State and Federal family and medical leave benefits and a summary of employee notification requirements, to ease administrative burdens on small entities. As noted above, we prepared and distributed comparisons of State and Federal family and medical leave laws, indicating which law provided the greater employee rights or benefits for compliance purposes, and distributed Fact Sheets and Compliance Guides which summarized compliance requirements.

In conclusion, the Department believes that the available data and studies on the cost impact of the FMLA generally support the Department's conclusion that the implementing regulations will likely not have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act. The regulatory revisions suggested by the SBA to ease compliance requirements for small entities are inconsistent with the statute or its legislative history and cannot be adopted by regulation.

XI. Executive Order 12866

The Department prepared an analysis of the anticipated cost impact of the FMLA rules to meet the regulatory impact analysis (cost/benefit) requirements of former Executive Order 12291 on Federal Regulations. The Department's analysis was principally based on previous analyses of the cost impact of prior versions of FMLA legislation pending before the U.S. Congress which were conducted by the U.S. General Accounting Office (GAO). The GAO's latest report on FMLA legislation, updated to reflect the 1993 enactment, estimated the cost to employers of maintaining health insurance coverage for workers on unpaid family and medical leave at $674 million per year (GAO/HRD-93-14R; February 1, 1993). The GAO's estimates assumed that employers would experience no measurable costs under the law beyond those of maintaining group health insurance during periods of permitted absences, based on a survey of selected firms in the Detroit, Michigan and Charleston, South Carolina areas. It was the GAO's view that its estimates likely overstated actual costs to employers for leave granted under the new law because the GAO could not adjust for the mitigating influence of pre-existing leave policies already provided by employers either voluntarily or to comply with other mandates such as State or local

laws or collective bargaining agreements (34 States, the District of Columbia, and Puerto Rico provide for some type of job-protected leave guarantee by law).

While several commenters expressed a general view that FMLA would have an adverse impact on business, or summarized previous studies that tried to measure the economic impact of FMLA, only one comment was received concerning DOL's impact analysis included in the preamble to the Interim Final Rule (the Department specifically requested comments on the estimates of the impact of the FMLA and the implementing regulations). The Los Angeles County Metropolitan Transportation Authority disagreed with GAO's estimates of cost to employers of complying with various FMLA provisions. This commenter believed the cost estimates are significantly understated because they do not take into account the productivity losses while employees are out on leave, and the costs of hiring and training temporary replacement workers. The Department pointed out in the preamble to the Interim Final Rule (58 FR 31811; June 4, 1993) that quantifying the impact of the FMLA is highly dependent on numerous assumptions which are severely constrained by limitations in available data. The regulatory impact analysis noted the existence of differing views on this issue, citing specifically the Minority Views contained in the House Report (H.R. Rept. 103-8, 103d Cong., 1st Sess., p. 60), which characterized the GAO estimates as understated either because assumptions were inconsistent with the legislative provisions or with the conclusions of other studies. The preamble to the Interim Final Rule noted in particular the issues of productivity losses and training costs for temporary replacements cited in studies by the former American Society for Personnel Administrators (now the Society for Human Resource Management) and the SBA. Furthermore, studies prepared subsequent to the June 1993 Interim Final FMLA rules suggest that our initial assessment of GAO's estimates as being reasonable remains valid.

The Senate Committee on Labor and Human Resources noted from testimony by the Commissioner of the Oregon Bureau of Labor and Industries that employers in the State of Oregon, when confronted with implementing similar requirements at the State level, reported little or no difficulty in implementing the law, and none had reduced other existing benefits to comply with the new statutory family leave requirements (Report of the Committee on Labor and Human Resources (S. 5), Report 103-3, January 27, 1993, p. 14).

Further, according to a three-year study conducted in Minnesota, Oregon, Rhode Island, and Wisconsin by the Families and Work Institute, sizable majorities of covered employers reported that the State laws were neither costly nor burdensome to implement *(Ibid.).* This study suggested that the availability of unpaid leave required by the new State laws had no impact on the length of leave taken by working mothers and only a slight impact on the length of leaves taken by fathers. The survey found that most companies, even the smallest, already offered considerable amounts of leave to working mothers. Small companies granted leave as often as larger companies. Even among companies with fewer than 10 employees, 79 percent indicated they guaranteed the jobs of women who took leave. The survey found that, *prior to passage of the State laws,* 83 percent of all employers surveyed provided job-guaranteed leave to biological mothers for childbirth, and 67 percent of those maintained health benefits during the maternity leave. Sixty percent of all employers similarly allowed fathers time off for newborns. Among other highlights from the survey, 91 percent of employers interviewed in the four States reported no difficulty with implementation of the State parental leave laws; the majority of employers reported no increase in costs for training, administration or unemployment insurance as a result of the State laws; 67 percent reported they most often relied on other employees to do the work of an employee on leave, while 23 percent reported they most often hired a temporary replacement; 94 percent reported that the leave laws had not forced them to reduce other benefits in order to pay for maintaining the health benefits of parents on leave; the percentage of working women who took unpaid leave for the birth of a child (78 percent) was unaffected by the enactment of the State laws; and the average duration of the leaves remained virtually unchanged by enactment of the State laws.

In a 1990 study by Professors Eileen Trzcinski and William Alpert commissioned by the SBA, a nation-wide survey of business executives examined the impact on businesses of providing family and medical leave. The SBA study found that the costs of permanently replacing an employee are significantly greater than the costs of granting an employee's request for leave — terminations due to illness, disability, pregnancy, and childbirth cost employers from $1,131 to $3,152 per termination, compared to $.97 to $97.78 per week for granting workers' requests for leave (dependent on size of employer and managerial status of employee). *Ibid.*, p. 17.

A 1992 study by the Families and Work Institute also concluded that providing unpaid parental leave is more cost-effective for employers than permanently replacing employees — 20 percent of the employee's annual salary, compared to 75 percent to 150 percent for permanently replacing an employee *(Ibid.).*

The Senate Committee Report concluded that additional costs to employers as a result of FMLA are minimal; that there is no evidence of greater business losses where State laws require similar family and medical leave; and, based on a 1989 GAO study of similar legislation, there would be no measurable net costs to business from replacing workers or lost productivity (costs result exclusively from continuation of health insurance coverage for employees on unpaid leave). *Ibid.,* p. 42.

In addition to the findings of the studies identified by the Senate committee report, according to a September 1993 survey of benefit managers by Hewitt Associates, an international consulting firm, most employers offer more generous leave policies than required by the FMLA. Nearly all (95 percent) of the 628 participants indicated that their policies go beyond the minimum requirements of the law. Nine of ten employers (92 percent) continue benefits other than health care for employees while on FMLA leave. Nearly half of the employers (45 percent) extend FMLA leave to employees at locations with fewer than 50 employees within 75 miles, 44 percent allow longer than 12 weeks of leave, and 30 percent allow FMLA leave for employees with less than 12 months of service. Most employers expect only a small percentage of employees to avail themselves of their FMLA policies in any given year. Nine of ten employers expect less than 5 percent of their employees to take FMLA leave in a given year; three of ten employers expect less than one percent of their employees to take FMLA leave in a year.

In addition, as discussed above, William M. Mercer, Incorporated and the Institute of Industrial Relations at the University of California, Berkeley jointly conducted a survey of nearly 300 employers on the FMLA in November 1993. The only employers that reported any "major costs" associated with California-mandated leave were those that employed 5,000 or more employees. A greater percentage of large employers had experienced disagreements with employees over family leave issues. Large employers, however, were also most likely to note a beneficial effect on absenteeism, employee morale, public relations, and supervisory relationships as a result of mandated leave. Small employers, in contrast, were most likely to note a beneficial effect on worker productivity and co-worker relationships.

A full discussion of alternatives considered is included in the preamble to the regulations, set forth above, under each of the relevant sections.

XI. Document Preparation

This document was prepared under the direction and control of Maria Echaveste, Administrator, Wage and Hour Division, Employment Standards Administration, U.S. Department of Labor.

XII. List of Subjects in 29 CFR Part 825

Employee benefit plans, Health, Health insurance, Labor management relations, Maternal and child health, Teachers.

Signed in Washington, DC, this 30th day of December, 1994.

Robert B. Reich
Secretary of Labor

Title 29, Chapter V, Subchapter C, "Other Laws," is amended by revising Part 825 to read as follows:

PART 825 — THE FAMILY AND MEDICAL LEAVE ACT OF 1993

Subpart A — What Is the Family and Medical Leave Act, and to Whom Does It Apply?

Sec.

Subpart B — What Leave Is an Employee Entitled to Take Under the Family and Medical Leave Act?

Sec.

Subpart C — How do Employees Learn of Their FMLA Rights and Obligations, and What Can an Employer Require of an Employee?

Sec.

Subpart D — What Enforcement Mechanisms Does FMLA Provide?

Sec.

Subpart E — What Records Must Be Kept to Comply With the FMLA?

Sec.

Subpart F — What Special Rules Apply to Employees of Schools?

Sec.

Subpart G — How Do Other Laws, Employer Practices, and Collective Bargaining Agreements Affect Employee Rights Under FMLA?

Sec.

Subpart H — Definitions

Sec.

Appendix A to Part 825 — Index

Appendix B to Part 825 — Certification of Health Care Provider

Appendix C to Part 825 — Notice to Employees of Rights under FMLA (WH Publication 1420)

Appendix D to Part 825 — Prototype Notice: Employer Response to Employee Request for Family and Medical Leave (Form WH-381)

Appendix E to Part 825 — IRS Notice Discussing Relationship Between FMLA and COBRA

Authority: 29 U.S.C. 2654; Secretary's Order 1-93 (58 FR 21190).

Source: 60 FR 2237, Jan. 6, 1995, unless otherwise noted.

I. Subpart A, What Is the Family and Medical Leave Act, and to Whom Does It Apply?

§ 825.100 — What Is the Family and Medical Leave Act?

(a) The Family and Medical Leave Act of 1993 (FMLA or Act) allows "eligible" employees of a covered employer to take job-protected, unpaid leave, or to substitute appropriate paid leave if the employee has earned or accrued it, for up to a total of 12 workweeks in any 12 months because of the birth of a child and to care for the newborn child, because of the placement of a child with the employee for adoption or foster care, because the employee is needed to care for a family member (child, spouse, or parent) with a serious health condition, or because the employee's own serious health condition makes the employee unable to perform the functions of his or her job (*see* § 825.306 (b)(4)). In certain cases, this leave may be taken on an intermittent basis rather than all at once, or the employee may work a part-time schedule.

(b) An employee on FMLA leave is also entitled to have health benefits maintained while on leave as if the employee had continued to work instead of taking the leave. If an employee was paying all or part of the premium payments prior to leave, the employee would continue to pay his or her share during the leave period. The employer may recover its share only if the employee does not return to work for a reason other than the serious health condition of the employee or the employee's immediate family member, or another reason beyond the employee's control.

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

(d) The employer has a right to 30 days advance notice from the employee where practicable. In addition, the employer may require an employee to submit certification from a health care provider to substantiate that the leave is due to the serious health condition of the employee or the employee's immediate family member. Failure to comply with these requirements may result in a delay in the start of FMLA leave. Pursuant to a uniformly applied policy, the employer may also require that an employee present a certification of fitness to return to work when the absence was caused by the employee's serious health condition (*see* § 825.311(c)). The employer may delay restoring the employee to employment without such certificate relating to the health condition which caused the employee's absence.

[60 FR 2237, Jan. 6, 1995; 60 FR 16383, Mar. 30, 1995]

§ 825.101 — What is the purpose of the Act?

(a) FMLA is intended to allow employees to balance their work and family life by taking reasonable unpaid leave for medical reasons, for the birth or adoption of a child, and for the care of a child, spouse, or parent who has a serious health condition. The Act is intended to balance the demands of the workplace with the needs of families, to promote the stability and economic security of families, and to promote national interests in preserving family integrity. It was intended that the Act accomplish these purposes in a manner that accommodates the legitimate interests of employers, and in a manner consistent with the Equal Protection Clause of the Fourteenth Amendment in minimizing the potential for employment discrimination on the basis of sex, while promoting equal employment opportunity for men and women.

(b) The enactment of FMLA was predicated on two fundamental concerns—the needs of the American workforce, and the development of high-performance organizations. Increasingly, America's children and elderly are dependent upon family members who must spend long hours at work. When a family emergency arises, requiring workers to attend to seriously-ill children or parents, or to newly-born or adopted infants, or even to their own serious illness, workers need reassurance that they will not be asked to choose between continuing their employment, and meeting their personal and family obligations or tending to vital needs at home.

(c) The FMLA is both intended and expected to benefit employers as well as their

employees. A direct correlation exists between stability in the family and productivity in the workplace. FMLA will encourage the development of high-performance organizations. When workers can count on durable links to their workplace they are able to make their own full commitments to their jobs. The record of hearings on family and medical leave indicate the powerful productive advantages of stable workplace relationships, and the comparatively small costs of guaranteeing that those relationships will not be dissolved while workers attend to pressing family health obligations or their own serious illness.

§ 825.102 — When was the Act effective?

(a) The Act became effective on August 5, 1993, for most employers. If a collective bargaining agreement was in effect on that date, the Act's effective date was delayed until February 5, 1994, or the date the agreement expired, whichever date occurred sooner. This delayed effective date was applicable only to employees covered by a collective bargaining agreement that was in effect on August 5, 1993, and not, for example, to employees outside the bargaining unit. Application of FMLA to collective bargaining agreements is discussed further in § 825.700(c).

(b) The period prior to the Act's effective date must be considered in determining employer coverage and employee eligibility. For example, as discussed further below, an employer with no collective bargaining agreements in effect as of August 5, 1993, must count employees/workweeks for calendar year 1992 and calendar year 1993. If 50 or more employees were employed during 20 or more workweeks in *either* 1992 or 1993 (through August 5, 1993), the employer was covered under FMLA on August 5, 1993. If not, the employer was not covered on August 5, 1993, but must continue to monitor employment levels each workweek remaining in 1993 and thereafter to determine if and when it might become covered.

§ 825.103 — How did the Act affect leave in progress on, or taken before, the effective date of the Act?

(a) An eligible employee's right to take FMLA leave began on the date that the Act went into effect for the employer (see the discussion of differing effective dates for collective bargaining agreements in §§ 825.102(a) and 825.700(c)). Any leave taken prior to the Act's effective date may not be counted for purposes of FMLA. If leave qualifying as FMLA leave was underway prior to the effective date of the Act and continued after the Act's effective date, only that portion of leave taken on or after the Act's effective date may be counted against the employee's leave entitlement under the FMLA.

(b) If an employer-approved leave was underway when the Act took effect, no further notice would be required of the employee unless the employee requested an extension of the leave. For leave which commenced on the effective date or shortly thereafter, such notice must have been given which was practicable, considering the foreseeability of the need for leave and the effective date of the statute.

(c) Starting on the Act's effective date, an employee is entitled to FMLA leave if the reason for the leave is qualifying under the Act, even if the event occasioning the need for leave (*e.g.*, the birth of a child) occurred before the effective date (so long as any other requirements are satisfied).

§ 825.104 — What employers are covered by the Act?

(a) An employer covered by FMLA is any person engaged in commerce or in any industry or activity affecting commerce, who employs 50 or more employees for each working day during each of 20 or more calendar workweeks in the current or preceding calendar year. Employers covered by FMLA also include any person acting, directly or indirectly, in the interest of a covered employer to any of the employees of the employer, any successor in interest of a covered employer, and any public agency. Public agencies are covered employers without regard to the number of employees employed. Public as well as private elementary and secondary schools are also covered employers without regard to the number of employees employed. (*See* § 825.600.)

(b) The terms "commerce" and "industry affecting commerce" are defined in accordance with section 501(1) and (3) of the

Labor Management Relations Act of 1947 (LMRA) (29 U.S.C. 142 (1) and (3)), as set forth in the definitions at section 825.800 of this part. For purposes of the FMLA, employers who meet the 50-employee coverage test are deemed to be engaged in commerce or in an industry or activity affecting commerce.

(c) Normally the legal entity which employs the employee is the employer under FMLA. Applying this principle, a corporation is a single employer rather than its separate establishments or divisions.

(1) Where one corporation has an ownership interest in another corporation, it is a separate employer unless it meets the "joint employment" test discussed in § 825.106, or the "integrated employer" test contained in paragraph (c)(2) of this section.

(2) Separate entities will be deemed to be parts of a single employer for purposes of FMLA if they meet the "integrated employer" test. Where this test is met, the employees of all entities making up the integrated employer will be counted in determining employer coverage and employee eligibility. A determination of whether or not separate entities are an integrated employer is not determined by the application of any single criterion, but rather the entire relationship is to be reviewed in its totality. Factors considered in determining whether two or more entities are an integrated employer include:

(i) Common management;

(ii) Interrelation between operations;

(iii) Centralized control of labor relations; and

(iv) Degree of common ownership/financial control.

(d) An "employer" includes any person who acts directly or indirectly in the interest of an employer to any of the employer's employees. The definition of "employer" in section 3(d) of the Fair Labor Standards Act (FLSA), 29 U.S.C. 203(d), similarly includes any person acting directly or indirectly in the interest of an employer in relation to an employee. As under the FLSA, individuals such as corporate officers "acting in the interest of an employer" are individually liable for any violations of the requirements of FMLA.

§ 825.105 — In determining whether an employer is covered by FMLA, what does it mean to employ 50 or more employees for each working day during each of 20 or more calendar workweeks in the current or preceding calendar year?

(a) The definition of "employ" for purposes of FMLA is taken from the Fair Labor Standards Act, § 3(g). The courts have made it clear that the employment relationship under the FLSA is broader than the traditional common law concept of master and servant. The difference between the employment relationship under the FLSA and that under the common law arises from the fact that the term "employ" as defined in the Act includes "to suffer or permit to work." The courts have indicated that, while "to permit" requires a more positive action than "to suffer," both terms imply much less positive action than required by the common law. Mere knowledge by an employer of work done for the employer by another is sufficient to create the employment relationship under the Act. The courts have said that there is no definition that solves all problems as to the limitations of the employer-employee relationship under the Act; and that determination of the relation cannot be based on "isolated factors" or upon a single characteristic or "technical concepts", but depends "upon the circumstances of the whole activity" including the underlying "economic reality." In general an employee, as distinguished from an independent contractor who is engaged in a business of his/her own, is one who "follows the usual path of an employee" and is dependent on the business which he/she serves.

(b) Any employee whose name appears on the employer's payroll will be considered employed each working day of the calendar week, and must be counted whether or not any compensation is received for the week. However, the FMLA applies only to employees who are employed within any State of the United States, the District of Columbia or any Territory or possession of the United States. Employees who are employed outside these areas are not counted for purposes of determining employer coverage or employee eligibility.

(c) Employees on paid or unpaid leave, including FMLA leave, leaves of absence, disciplinary suspension, *etc.*, are counted as long as the employer has a reasonable expectation that the employee will later return to active employment. If there is no employer/employee relationship (as when an employee is laid off, whether temporarily or permanently) such individual is not counted. Part-time employees, like full-time employees, are considered to be employed each working day of the calendar week, as long as they are maintained on the payroll.

(d) An employee who does not begin to work for an employer until after the first working day of a calendar week, or who terminates employment before the last working day of a calendar week, is not considered employed on each working day of that calendar week.

(e) A private employer is covered if it maintained 50 or more employees on the payroll during 20 or more calendar workweeks (not necessarily consecutive workweeks) in either the current or the preceding calendar year.

(f) Once a private employer meets the 50 employees/20 workweeks threshold, the employer remains covered until it reaches a future point where it no longer has employed 50 employees for 20 (nonconsecutive) workweeks in the current and preceding calendar year. For example, if an employer who met the 50 employees/20 workweeks test in the calendar year as of August 5, 1993, subsequently dropped below 50 employees before the end of 1993 and continued to employ fewer than 50 employees in all workweeks throughout calendar year 1994, the employer would continue to be covered throughout calendar year 1994 because it met the coverage criteria for 20 workweeks of the preceding (*i.e.*, 1993) calendar year.

§ 825.106 — How is "joint employment" treated under FMLA?

(a) Where two or more businesses exercise some control over the work or working conditions of the employee, the businesses may be joint employers under FMLA. Joint employers may be separate and distinct entities with separate owners, managers and facilities. Where the employee performs work which simultaneously benefits two or more employers, or works for two or more employers at different times during the workweek, a joint employment relationship generally will be considered to exist in situations such as:

(1) Where there is an arrangement between employers to share an employee's services or to interchange employees;

(2) Where one employer acts directly or indirectly in the interest of the other employer in relation to the employee; or,

(3) Where the employers are not completely disassociated with respect to the employee's employment and may be deemed to share control of the employee, directly or indirectly, because one employer controls, is controlled by, or is under common control with the other employer.

(b) A determination of whether or not a joint employment relationship exists is not determined by the application of any single criterion, but rather the entire relationship is to be viewed in its totality. For example, joint employment will ordinarily be found to exist when a temporary or leasing agency supplies employees to a second employer.

(c) In joint employment relationships, only the primary employer is responsible for giving required notices to its employees, providing FMLA leave, and maintenance of health benefits. Factors considered in determining which is the "primary" employer include authority/responsibility to hire and fire, assign/place the employee, make payroll, and provide employment benefits. For employees of temporary help or leasing agencies, for example, the placement agency most commonly would be the primary employer.

(d) Employees jointly employed by two employers must be counted by both employers, whether or not maintained on one of the employer's payroll, in determining employer coverage and employee eligibility. For example, an employer who jointly employs 15 workers from a leasing or temporary help agency and 40 permanent workers is covered by FMLA. An employee on leave who is working for a secondary employer is considered employed by the secondary employer, and must be counted for coverage and eligibility purposes, as long as the employer has a reasonable expectation that that employee will return to employment with that employer.

(e) Job restoration is the primary responsibility of the primary employer. The second-

ary employer is responsible for accepting the employee returning from FMLA leave in place of the replacement employee if the secondary employer continues to utilize an employee from the temporary or leasing agency, and the agency chooses to place the employee with the secondary employer. A secondary employer is also responsible for compliance with the prohibited acts provisions with respect to its temporary/leased employees, whether or not the secondary employer is covered by FMLA (*see* § 825.220(a)). The prohibited acts include prohibitions against interfering with an employee's attempt to exercise rights under the Act, or discharging or discriminating against an employee for opposing a practice which is unlawful under FMLA. A covered secondary employer will be responsible for compliance with *all* the provisions of the FMLA with respect to its regular, permanent workforce.

§ 825.107 — What is meant by "successor in interest"?

(a) For purposes of FMLA, in determining whether an employer is covered because it is a "successor in interest" to a covered employer, the factors used under Title VII of the Civil Rights Act and the Vietnam Era Veterans' Adjustment Act will be considered. However, unlike Title VII, whether the successor has notice of the employee's claim is not a consideration. Notice may be relevant, however, in determining successor liability for violations of the predecessor. The factors to be considered include:

(1) Substantial continuity of the same business operations;

(2) Use of the same plant;

(3) Continuity of the work force;

(4) Similarity of jobs and working conditions;

(5) Similarity of supervisory personnel;

(6) Similarity in machinery, equipment, and production methods;

(7) Similarity of products or services; and

(8) The ability of the predecessor to provide relief.

(b) A determination of whether or not a "successor in interest" exists is not determined by the application of any single criterion, but rather the entire circumstances are to be viewed in their totality.

(c) When an employer is a "successor in interest," employees' entitlements are the same as if the employment by the predecessor and successor were continuous employment by a single employer. For example, the successor, whether or not it meets FMLA coverage criteria, must grant leave for eligible employees who had provided appropriate notice to the predecessor, or continue leave begun while employed by the predecessor, including maintenance of group health benefits during the leave and job restoration at the conclusion of the leave. A successor which meets FMLA's coverage criteria must count periods of employment and hours worked for the predecessor for purposes of determining employee eligibility for FMLA leave.

§ 825.108 — What is a "public agency"?

(a) An "employer" under FMLA includes any "public agency," as defined in section 3(x) of the Fair Labor Standards Act, 29 U.S.C. 203(x). Section 3(x) of the FLSA defines "public agency" as the government of the United States; the government of a State or political subdivision of a State; or an agency of the United States, a State, or a political subdivision of a State, or any interstate governmental agency. "State" is further defined in Section 3(c) of the FLSA to include any State of the United States, the District of Columbia, or any Territory or possession of the United States.

(b) The determination of whether an entity is a "public" agency, as distinguished from a private employer, is determined by whether the agency has taxing authority, or whether the chief administrative officer or board, *etc.*, is elected by the voters-at-large or their appointment is subject to approval by an elected official.

(c)(1) A State or a political subdivision of a State constitutes a single public agency and, therefore, a single employer for purposes of determining employee eligibility. For example, a State is a single employer; a county is a single employer; a city or town is a single employer. Where there is any question about whether a public entity is a public agency as distinguished from a part of another public agency, the U.S. Bureau of the Census' "Census of Governments" will be determinative, except for new entities formed since

the most recent publication of the "Census." For new entities, the criteria used by the Bureau of Census will be used to determine whether an entity is a public agency or a part of another agency, including existence as an organized entity, governmental character, and substantial autonomy of the entity.

(2) The Census Bureau takes a census of governments at 5-year intervals. Volume I, Government Organization, contains the official counts of the number of State and local governments. It includes tabulations of governments by State, type of government, size, and county location. Also produced is a universe list of governmental units, classified according to type of government. Copies of Volume I, Government Organization, and subsequent volumes are available from the Superintendent of Documents, U.S. Government Printing Office, Washington, D.C., 20402, U.S. Department of Commerce District Offices, or can be found in Regional and selective depository libraries. For a list of all depository libraries, write to the Government Printing Office, 710 N. Capitol St., NW, Washington, D.C. 20402.

(d) All public agencies are covered by FMLA regardless of the number of employees; they are not subject to the coverage threshold of 50 employees carried on the payroll each day for 20 or more weeks in a year. However, employees of public agencies must meet all of the requirements of eligibility, including the requirement that the employer (*e.g.*, State) employ 50 employees at the worksite or within 75 miles.

§ 825.109 — Are Federal agencies covered by these regulations?

(a) Most employees of the government of the United States, if they are covered by the FMLA, are covered under Title II of the FMLA (incorporated in Title V, Chapter 63, Subchapter 5 of the United States Code) which is administered by the U.S. Office of Personnel Management (OPM). OPM has separate regulations at 5 CFR Part 630, Subpart L. In addition, employees of the Senate and House of Representatives are covered by Title V of the FMLA.

(b) The Federal Executive Branch employees within the jurisdiction of these regulations include:

(1) Employees of the Postal Service;

(2) Employees of the Postal Rate Commission;

(3) A part-time employee who does not have an established regular tour of duty during the administrative workweek; and,

(4) An employee serving under an intermittent appointment or temporary appointment with a time limitation of one year or less.

(c) Employees of other Federal executive agencies are also covered by these regulations if they are not covered by Title II of FMLA.

(d) Employees of the legislative or judicial branch of the United States are covered by these regulations only if they are employed in a unit which has employees in the competitive service. Examples include employees of the Government Printing Office and the U.S. Tax Court.

(e) For employees covered by these regulations, the U.S. Government constitutes a single employer for purposes of determining employee eligibility. These employees must meet all of the requirements for eligibility, including the requirement that the Federal Government employ 50 employees at the worksite or within 75 miles.

§ 825.110 — Which employees are "eligible" to take leave under FMLA?

(a) An "eligible employee" is an employee of a *covered* employer who:

(1) Has been employed by the employer for at least 12 months, and

(2) Has been employed for at least 1,250 hours of service during the 12-month period immediately preceding the commencement of the leave, and

(3) Is employed at a worksite where 50 or more employees are employed by the employer within 75 miles of that worksite. (*See* § 825.105(a) regarding employees who work outside the U.S.)

(b) The 12 months an employee must have been employed by the employer need not be consecutive months. If an employee is maintained on the payroll for any part of a week, including any periods of paid or unpaid leave (sick, vacation) during which other benefits or compensation are provided by the employer (*e.g.*, workers' compensation, group health plan benefits, *etc.*), the week counts as a week

of employment. For purposes of determining whether intermittent/occasional/casual employment qualifies as "at least 12 months," 52 weeks is deemed to be equal to 12 months.

(c) Whether an employee has worked the minimum 1,250 hours of service is determined according to the principles established under the Fair Labor Standards Act (FLSA) for determining compensable hours of work (*see* 29 CFR Part 785). The determining factor is the number of hours an employee has worked for the employer within the meaning of the FLSA. The determination is not limited by methods of recordkeeping, or by compensation agreements that do not accurately reflect all of the hours an employee has worked for or been in service to the employer. Any accurate accounting of actual hours worked under FLSA's principles may be used. In the event an employer does not maintain an accurate record of hours worked by an employee, including for employees who are exempt from FLSA's requirement that a record be kept of their hours worked (*e.g.*, bona fide executive, administrative, and professional employees as defined in FLSA Regulations, 29 CFR Part 541), the employer has the burden of showing that the employee has not worked the requisite hours. In the event the employer is unable to meet this burden the employee is deemed to have met this test. See also § 825.500(f). For this purpose, full-time teachers (*see* § 825.800 for definition) of an elementary or secondary school system, or institution of higher education, or other educational establishment or institution are deemed to meet the 1,250 hour test. An employer must be able to clearly demonstrate that such an employee did not work 1,250 hours during the previous 12 months in order to claim that the employee is not "eligible" for FMLA leave.

(d) The determinations of whether an employee has worked for the employer for at least 1,250 hours in the past 12 months and has been employed by the employer for a total of at least 12 months must be made as of the date leave commences. If an employee notifies the employer of need for FMLA leave before the employee meets these eligibility criteria, the employer must either confirm the employee's eligibility based upon a projection that the employee will be eligible on the date leave would commence or must advise the employee when the eligibility requirement is met. If the employer confirms eligibility at the time the notice for leave is received, the employer may not subsequently challenge the employee's eligibility. In the latter case, if the employer does not advise the employee whether the employee is eligible as soon as practicable (*i.e.*, two business days absent extenuating circumstances) after the date employee eligibility is determined, the employee will have satisfied the notice requirements and the notice of leave is considered current and outstanding until the employer does advise. If the employer fails to advise the employee whether the employee is eligible prior to the date the requested leave is to commence, the employee will be deemed eligible. The employer may not, then, deny the leave. Where the employee does not give notice of the need for leave more than two business days prior to commencing leave, the employee will be deemed to be eligible if the employer fails to advise the employee that the employee is not eligible within two business days of receiving the employee's notice.

(e) The period prior to the FMLA's effective date must be considered in determining employee's eligibility.

(f) Whether 50 employees are employed within 75 miles to ascertain an employee's eligibility for FMLA benefits is determined when the employee gives notice of the need for leave. Whether the leave is to be taken at one time or on an intermittent or reduced leave schedule basis, once an employee is determined eligible in response to that notice of the need for leave, the employee's eligibility is not affected by any subsequent change in the number of employees employed at or within 75 miles of the employee's worksite, for that specific notice of the need for leave. Similarly, an employer may not terminate employee leave that has already started if the employee-count drops below 50. For example, if an employer employs 60 employees in August, but expects that the number of employees will drop to 40 in December, the employer must grant FMLA benefits to an otherwise eligible employee who gives notice of the need for leave in August for a period of leave to begin in December.

[60 FR 2237, Jan. 6, 1995; 60 FR 16383, Mar. 30, 1995]

§ 825.111 — In determining if an employee is "eligible" under FMLA, how is the determination made whether the employer employs 50 employees within 75 miles of the worksite where the employee needing leave is employed?

(a) Generally, a worksite can refer to either a single location or a group of contiguous locations. Structures which form a campus or industrial park, or separate facilities in proximity with one another, may be considered a single site of employment. On the other hand, there may be several single sites of employment within a single building, such as an office building, if separate employers conduct activities within the building. For example, an office building with 50 different businesses as tenants will contain 50 sites of employment. The offices of each employer will be considered separate sites of employment for purposes of FMLA. An employee's worksite under FMLA will ordinarily be the site the employee reports to or, if none, from which the employee's work is assigned.

(1) Separate buildings or areas which are not directly connected or in immediate proximity are a single worksite if they are in reasonable geographic proximity, are used for the same purpose, and share the same staff and equipment. For example, if an employer manages a number of warehouses in a metropolitan area but regularly shifts or rotates the same employees from one building to another, the multiple warehouses would be a single worksite.

(2) For employees with no fixed worksite, *e.g.*, construction workers, transportation workers (*e.g.*, truck drivers, seamen, pilots), salespersons, *etc.*, the "worksite" is the site to which they are assigned as their home base, from which their work is assigned, or to which they report. For example, if a construction company headquartered in New Jersey opened a construction site in Ohio, and set up a mobile trailer on the construction site as the company's on-site office, the construction site in Ohio would be the worksite for any employees hired locally who report to the mobile trailer/company office daily for work assignments, *etc.* If that construction company also sent personnel such as job superintendents, foremen, engineers, an office manager, *etc.*, from New Jersey to the job site in Ohio, those workers sent from New Jersey continue to have the headquarters in New Jersey as their "worksite." The workers who have New Jersey as their worksite would not be counted in determining eligibility of employees whose home base is the Ohio worksite, but would be counted in determining eligibility of employees whose home base is New Jersey. For transportation employees, their worksite is the terminal to which they are assigned, report for work, depart, and return after completion of a work assignment. For example, an airline pilot may work for an airline with headquarters in New York, but the pilot regularly reports for duty and originates or begins flights from the company's facilities located in an airport in Chicago and returns to Chicago at the completion of one or more flights to go off duty. The pilot's worksite is the facility in Chicago. An employee's personal residence is not a worksite in the case of employees such as salespersons who travel a sales territory and who generally leave to work and return from work to their personal residence, or employees who work at home, as under the new concept of flexiplace. Rather, their worksite is the office to which the report and from which assignments are made.

(3) For purposes of determining that employee's eligibility, when an employee is jointly employed by two or more employers (*see* § 825.106), the employee's worksite is the primary employer's office from which the employee is assigned or reports. The employee is also counted by the secondary employer to determine eligibility for the secondary employer's full-time or permanent employees.

(b) The 75-mile distance is measured by surface miles, using surface transportation over public streets, roads, highways and waterways, by the shortest route from the facility where the eligible employee needing leave is employed. Absent available surface transportation between worksites, the distance is measured by using the most frequently utilized mode of transportation (*e.g.*, airline miles).

(c) The determination of how many employees are employed within 75 miles of the worksite of an employee is based on the num-

ber of employees maintained on the payroll. Employees of educational institutions who are employed permanently or who are under contract are "maintained on the payroll" during any portion of the year when school is not in session. *See* § 825.105(c).

[60 FR 2237, Jan. 6, 1995; 60 FR 16383, Mar. 30, 1995]

§ 825.112 — Under what kinds of circumstances are employers required to grant family or medical leave?

(a) Employers covered by FMLA are required to grant leave to eligible employees:

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

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

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

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

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

(c) Circumstances may require that FMLA leave begin before the actual date of birth of a child. An expectant mother may take FMLA leave pursuant to paragraph (a)(4) of this section before the birth of the child for prenatal care or if her condition makes her unable to work.

(d) Employers covered by FMLA are required to grant FMLA leave pursuant to paragraph (a)(2) of this section before the actual placement or adoption of a child if an absence from work is required for the placement for adoption or foster care to proceed. For example, the employee may be required to attend counselling sessions, appear in court, consult with his or her attorney or the doctor(s) representing the birth parent, or submit to a physical examination. The source of an adopted child (*e.g.*, whether from a licensed placement agency or otherwise) is not a factor in determining eligibility for leave for this purpose.

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

(f) In situations where the employer/employee relationship has been interrupted, such as an employee who has been on layoff, the employee must be recalled or otherwise be re-employed before being eligible for FMLA leave. Under such circumstances, an eligible employee is immediately entitled to further FMLA leave for a qualifying reason.

(g) FMLA leave is available for treatment for substance abuse provided the conditions of § 825.114 are met. However, treatment for substance abuse does not prevent an employer from taking employment action against an employee. The employer may not take action against the employee because the employee has exercised his or her right to take FMLA leave for treatment. However, if the employer has an established policy, applied in a non-discriminatory manner that has been communicated to all employees, that provides under certain circumstances an employee may be terminated for substance abuse, pursuant to that policy the employee may be terminated whether or not the employee is presently taking FMLA leave. An employee may also take FMLA leave to care for an immediate family member who is receiving treatment for substance abuse. The employer may not take action against an employee who is providing care for an immediate family member receiving treatment for substance abuse.

§ 825.113 — What do "spouse," "parent," and "son or daughter" mean for purposes of an employee qualifying to take FMLA leave?

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

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

(c) Son or daughter means a biological, adopted, or foster child, a stepchild, a legal ward, or a child of a person standing *in loco parentis*, who is either under age 18, or age 18 or older and "incapable of self-care because of a mental or physical disability."

(1) "Incapable of self-care" means that the individual requires active assistance or supervision to provide daily self-care in three or more of the "activities of daily living" (ADLs) or "instrumental activities of daily living" (IADLs). Activities of daily living include adaptive activities such as caring appropriately for one's grooming and hygiene, bathing, dressing and eating. Instrumental activities of daily living include cooking, cleaning, shopping, taking public transportation, paying bills, maintaining a residence, using telephones and directories, using a post office, *etc.*

(2) "Physical or mental disability" means a physical or mental impairment that substantially limits one or more of the major life activities of an individual. Regulations at 29 CFR § 1630.2(h), (i), and (j), issued by the Equal Employment Opportunity Commission under the Americans with Disabilities Act (ADA), 42 U.S.C. 12101 *et seq.*, define these terms.

(3) Persons who are "*in loco parentis*" include those with day-to-day responsibilities to care for and financially support a child or, in the case of an employee, who had such responsibility for the employee when the employee was a child. A biological or legal relationship is not necessary.

(d) For purposes of confirmation of family relationship, the employer may require the employee giving notice of the need for leave to provide reasonable documentation or statement of family relationship. This documentation may take the form of a simple statement from the employee, or a child's birth certificate, a court document, *etc.* The employer is entitled to examine documentation such as a birth certificate, *etc.*, but the employee is entitled to the return of the official document submitted for this purpose.

§ 825.114 — What is a "serious health condition" entitling an employee to FMLA leave?

(a) For purposes of FMLA, "serious health condition" entitling an employee to FMLA leave means an illness, injury, impairment, or physical or mental condition that involves:

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

(2) ***Continuing treatment*** by a health care provider. A serious health condition involving continuing treatment by a health care provider includes any one or more of the following:

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

(A) Treatment two or more times by a health care provider, by a nurse or physician's assistant under direct supervision of a health care provider, or by a provider of health care services (*e.g.*, physical therapist) under orders of, or on referral by, a health care provider; or

(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.

(ii) Any period of incapacity due to pregnancy, or for prenatal care.

(iii) Any period of incapacity or treatment for such incapacity due to a chronic serious health condition. A chronic serious health condition is one which:

(A) Requires periodic visits for treatment by a health care provider, or by a nurse or physician's assistant under direct supervision of a health care provider;

(B) Continues over an extended period of time (including recurring episodes of a single underlying condition); and

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

(iv) A period of incapacity which is permanent or long-term due to a condition for which treatment may not be effective. The employee or family member must be under the continuing supervision of, but need not be receiving active treatment by, a health care provider. Examples include Alzheimer's, a severe stroke, or the terminal stages of a disease.

(v) Any period of absence to receive multiple treatments (including any period of recovery therefrom) by a health care provider or by a provider of health care services under orders of, or on referral by, a health care provider, either for restorative surgery after an accident or other injury, or for a condition that would likely result in a period of incapacity of more than three consecutive calendar days in the absence of medical intervention or treatment, such as cancer (chemotherapy, radiation, *etc.*), severe arthritis (physical therapy), kidney disease (dialysis).

(b) Treatment for purposes of paragraph (a) of this section includes (but is not limited to) examinations to determine if a serious health condition exists and evaluations of the condition. Treatment does not include routine physical examinations, eye examinations, or dental examinations. Under paragraph (a)(2)(i)(B), a regimen of continuing treatment includes, for example, a course of prescription medication (*e.g.*, an antibiotic) or therapy requiring special equipment to resolve or alleviate the health condition (*e.g.*, oxygen). A regimen of continuing treatment that includes the taking of over-the-counter medications such as aspirin, antihistamines, or salves; or bed-rest, drinking fluids, exercise, and other similar activities that can be initiated without a visit to a health care provider, is not, by itself, sufficient to constitute a regimen of continuing treatment for purposes of FMLA leave.

(c) Conditions for which cosmetic treatments are administered (such as most treatments for acne or plastic surgery) are not "serious health conditions" unless inpatient hospital care is required or unless complications develop. Ordinarily, unless complications arise, the common cold, the flu, ear aches, upset stomach, minor ulcers, headaches other than migraine, routine dental or orthodontia problems, periodontal disease, *etc.*, are examples of conditions that do not meet the definition of a serious health condition and do not qualify for FMLA leave. Restorative dental or plastic surgery after an injury or removal of cancerous growths are serious health conditions provided all the other conditions of this regulation are met. Mental illness resulting from stress or allergies may be serious health conditions, but only if all the conditions of this section are met.

(d) Substance abuse may be a serious health condition if the conditions of this section are met. However, FMLA leave may only be taken for treatment for substance abuse by a health care provider or by a provider of health care services on referral by a health care provider. On the other hand, absence because of the employee's use of the substance, rather than for treatment, does not qualify for FMLA leave.

(e) Absences attributable to incapacity under paragraphs (a)(2) (ii) or (iii) qualify for FMLA leave even though the employee or the immediate family member does not receive treatment from a health care provider during the absence, and even if the absence does not last more than three days. For example, an employee with asthma may be unable to report for work due to the onset of an asthma attack or because the employee's health care provider has advised the employee to stay home when the pollen count exceeds a certain level. An employee who is pregnant may be unable to report to work because of severe morning sickness.

§ 825.115 — What does it mean that "the employee is unable to perform the functions of the position of the employee"?

An employee is "unable to perform the functions of the position" where the health care provider finds that the employee is unable to work at all or is unable to perform any one of the essential functions of the employee's position within the meaning of the Americans with Disabilities Act (ADA), 42 USC 12101 *et seq.*, and the regulations at 29 CFR § 1630.2(n). An employee who must be absent from work to receive medical

treatment for a serious health condition is considered to be unable to perform the essential functions of the position during the absence for treatment. An employer has the option, in requiring certification from a health care provider, to provide a statement of the essential functions of the employee's position for the health care provider to review. For purposes of FMLA, the essential functions of the employee's position are to be determined with reference to the position the employee held at the time notice is given or leave commenced, whichever is earlier.

§ 825.116 — What does it mean that an employee is "needed to care for" a family member?

(a) The medical certification provision that an employee is "needed to care for" a family member encompasses both physical and psychological care. It includes situations where, for example, because of a serious health condition, the family member is unable to care for his or her own basic medical, hygienic, or nutritional needs or safety, or is unable to transport himself or herself to the doctor, *etc.* The term also includes providing psychological comfort and reassurance which would be beneficial to a child, spouse or parent with a serious health condition who is receiving inpatient or home care.

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

(c) An employee's intermittent leave or a reduced leave schedule necessary to care for a family member includes not only a situation where the family member's condition itself is intermittent, but also where the employee is only needed intermittently—such as where other care is normally available, or care responsibilities are shared with another member of the family or a third party.

§ 825.117 — For an employee seeking intermittent FMLA leave or leave on a reduced leave schedule, what is meant by "the medical necessity for" such leave?

For intermittent leave or leave on a reduced leave schedule, there must be a medical need for leave (as distinguished from voluntary treatments and procedures) and it must be that such medical need can be best accommodated through an intermittent or reduced leave schedule. The treatment regimen and other information described in the certification of a serious health condition (*see* § 825.306) meets the requirement for certification of the medical necessity of intermittent leave or leave on a reduced leave schedule. Employees needing intermittent FMLA leave or leave on a reduced leave schedule must attempt to schedule their leave so as not to disrupt the employer's operations. In addition, an employer may assign an employee to an alternative position with equivalent pay and benefits that better accommodates the employee's intermittent or reduced leave schedule.

§ 825.118 — What is a "health care provider"?

(a) The Act defines "health care provider" as:

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

(2) Any other person determined by the Secretary to be capable of providing health care services.

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

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

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

(3) Christian Science practitioners listed with the First Church of Christ, Scientist in Boston, Massachusetts. Where an employee or family member is receiving treatment from a Christian Science practitioner, an employee may not object to any requirement from an employer that the employee or family member submit to examination (though not

treatment) to obtain a second or third certification from a health care provider other than a Christian Science practitioner except as otherwise provided under applicable State or local law or collective bargaining agreement.

(4) Any health care provider from whom an employer or the employer's group health plan's benefits manager will accept certification of the existence of a serious health condition to substantiate a claim for benefits; and

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

(c) The phrase "authorized to practice in the State" as used in this section means that the provider must be authorized to diagnose and treat physical or mental health conditions without supervision by a doctor or other health care provider.

II. Subpart B, What Leave Is an Employee Entitled to Take Under the Family and Medical Leave Act?

§ 825.200 — How much leave may an employee take?

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

(1) The birth of the employee's son or daughter, and to care for the newborn child;

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

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

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

(b) An employer is permitted to choose any one of the following methods for determining the "12-month period" in which the 12 weeks of leave entitlement occurs:

(1) The calendar year;

(2) Any fixed 12-month "leave year," such as a fiscal year, a year required by State law, or a year starting on an employee's "anniversary" date;

(3) The 12-month period measured forward from the date any employee's first FMLA leave begins; or,

(4) A "rolling" 12-month period measured backward from the date an employee uses any FMLA leave (except that such measure may not extend back before August 5, 1993).

(c) Under methods in paragraphs (b)(1) and (b)(2) of this section an employee would be entitled to up to 12 weeks of FMLA leave at any time in the fixed 12-month period selected. An employee could, therefore, take 12 weeks of leave at the end of the year and 12 weeks at the beginning of the following year. Under the method in paragraph (b)(3) of this section, an employee would be entitled to 12 weeks of leave during the year beginning on the first date FMLA leave is taken; the next 12-month period would begin the first time FMLA leave is taken after completion of any previous 12-month period. Under the method in paragraph (b)(4) of this section, the "rolling" 12-month period, each time an employee takes FMLA leave the remaining leave entitlement would be any balance of the 12 weeks which has not been used during the immediately preceding 12 months. For example, if an employee has taken eight weeks of leave during the past 12 months, an additional four weeks of leave could be taken. If an employee used four weeks beginning February 1, 1994, four weeks beginning June 1, 1994, and four weeks beginning December 1, 1994, the employee would not be entitled to any additional leave until February 1, 1995. However, beginning on February 1, 1995, the employee would be entitled to four weeks of leave, on June 1 the employee would be entitled to an additional four weeks, *etc.*

(d)(1) Employers will be allowed to choose any one of the alternatives in paragraph (b) of this section provided the alternative chosen is applied consistently and uniformly to all employees. An employer wishing to change to another alternative is required to give at least 60 days notice to all employees,

and the transition must take place in such a way that the employees retain the full benefit of 12 weeks of leave under whichever method affords the greatest benefit to the employee. Under no circumstances may a new method be implemented in order to avoid the Act's leave requirements.

(2) An exception to this required uniformity would apply in the case of a multi-State employer who has eligible employees in a State which has a family and medical leave statute. The State may require a single method of determining the period during which use of the leave entitlement is measured. This method may conflict with the method chosen by the employer to determine "any 12 months" for purposes of the Federal statute. The employer may comply with the State provision for all employees employed within that State, and uniformly use another method provided by this regulation for all other employees.

(e) If an employer fails to select one of the options in paragraph (b) of this section for measuring the 12-month period, the option that provides the most beneficial outcome for the employee will be used. The employer may subsequently select an option only by providing the 60-day notice to all employees of the option the employer intends to implement. During the running of the 60-day period any other employee who needs FMLA leave may use the option providing the most beneficial outcome to that employee. At the conclusion of the 60-day period the employer may implement the selected option.

(f) For purposes of determining the amount of leave used by an employee, the fact that a holiday may occur within the week taken as FMLA leave has no effect; the week is counted as a week of FMLA leave. However, if for some reason the employer's business activity has temporarily ceased and employees generally are not expected to report for work for one or more weeks (*e.g.*, a school closing two weeks for the Christmas/New Year holiday or the summer vacation or an employer closing the plant for retooling or repairs), the days the employer's activities have ceased do *not* count against the employee's FMLA leave entitlement. Methods for determining an employee's 12-week leave entitlement are also described in § 825.205.

§ 825.201 — If leave is taken for the birth of a child, or for placement of a child for adoption or foster care, when must the leave be concluded?

An employee's entitlement to leave for a birth or placement for adoption or foster care expires at the end of the 12-month period beginning on the date of the birth or placement, unless state law allows, or the employer permits, leave to be taken for a longer period. Any such FMLA leave must be concluded within this one-year period. However, see § 825.701 regarding non-FMLA leave which may be available under applicable State laws.

§ 825.202 — How much leave may a husband and wife take if they are employed by the same employer?

(a) A husband and wife who are eligible for FMLA leave and are employed by the same covered employer may be limited to a combined total of 12 weeks of leave during any 12-month period if the leave is taken:

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

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

(3) to care for the employee's parent with a serious health condition.

(b) This limitation on the total weeks of leave applies to leave taken for the reasons specified in paragraph (a) of this section as long as a husband and wife are employed by the "same employer." It would apply, for example, even though the spouses are employed at two different worksites of an employer located more than 75 miles from each other, or by two different operating divisions of the same company. On the other hand, if one spouse is ineligible for FMLA leave, the other spouse would be entitled to a full 12 weeks of FMLA leave.

(c) Where the husband and wife both use a portion of the total 12-week FMLA leave entitlement for one of the purposes in paragraph (a) of this section, the husband and wife would each be entitled to the difference between the amount he or she has taken individually and 12 weeks for FMLA leave for a purpose other than those contained in paragraph (a) of this section. For example, if

each spouse took 6 weeks of leave to care for a healthy, newborn child, each could use an additional 6 weeks due to his or her own serious health condition or to care for a child with a serious health condition. Note, too, that many State pregnancy disability laws specify a period of disability either before or after the birth of a child; such periods would also be considered FMLA leave for a serious health condition of the mother, and would not be subject to the combined limit.

[60 FR 2237, Jan. 6, 1995; 60 FR 16383, Mar. 30, 1995]

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

(a) FMLA leave may be taken "intermittently or on a reduced leave schedule" under certain circumstances. Intermittent leave is FMLA leave taken in separate blocks of time due to a single qualifying reason. A reduced leave schedule is a leave schedule that reduces an employee's usual number of working hours per workweek, or hours per workday. A reduced leave schedule is a change in the employee's schedule for a period of time, normally from full-time to part-time.

(b) When leave is taken after the birth or placement of a child for adoption or foster care, an employee may take leave intermittently or on a reduced leave schedule only if the employer agrees. Such a schedule reduction might occur, for example, where an employee, with the employer's agreement, works part-time after the birth of a child, or takes leave in several segments. The employer's agreement is not required, however, for leave during which the mother has a serious health condition in connection with the birth of her child or if the newborn child has a serious health condition.

(c) Leave may be taken intermittently or on a reduced leave schedule when medically necessary for planned and/or unanticipated medical treatment of a related serious health condition by or under the supervision of a health care provider, or for recovery from treatment or recovery from a serious health condition. It may also be taken to provide care or psychological comfort to an immediate family member with a serious health condition.

(1) Intermittent leave may be taken for a serious health condition which requires treatment by a health care provider periodically, rather than for one continuous period of time, and may include leave of periods from an hour or more to several weeks. Examples of intermittent leave would include leave taken on an occasional basis for medical appointments, or leave taken several days at a time spread over a period of six months, such as for chemotherapy. A pregnant employee may take leave intermittently for prenatal examinations or for her own condition, such as for periods of severe morning sickness. An example of an employee taking leave on a reduced leave schedule is an employee who is recovering from a serious health condition and is not strong enough to work a full-time schedule.

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

(d) There is no limit on the size of an increment of leave when an employee takes intermittent leave or leave on a reduced leave schedule. However, an employer may limit leave increments to the shortest period of time that the employer's payroll system uses to account for absences or use of leave, provided it is one hour or less. For example, an employee might take two hours off for a medical appointment, or might work a reduced day of four hours over a period of several weeks while recuperating from an illness. An employee may not be required to take more FMLA leave than necessary to address the circumstance that precipitated the need for the leave, except as provided in §§ 825.601 and 825.602.

§ 825.204 — May an employer transfer an employee to an "alternative position" in order to accommodate intermittent leave or a reduced leave schedule?

(a) If an employee needs intermittent leave or leave on a reduced leave schedule that is foreseeable based on planned medical treatment for the employee or a family member, including during a period of recovery from a

serious health condition, or if the employer agrees to permit intermittent or reduced schedule leave for the birth of a child or for placement of a child for adoption or foster care, the employer may require the employee to transfer temporarily, during the period the intermittent or reduced leave schedule is required, to an available alternative position for which the employee is qualified and which better accommodates recurring periods of leave than does the employee's regular position. *See* § 825.601 for special rules applicable to instructional employees of schools.

(b) Transfer to an alternative position may require compliance with any applicable collective bargaining agreement, federal law (such as the Americans with Disabilities Act), and State law. Transfer to an alternative position may include altering an existing job to better accommodate the employee's need for intermittent or reduced leave.

(c) The alternative position must have equivalent pay and benefits. An alternative position for these purposes does not have to have equivalent duties. The employer may increase the pay and benefits of an existing alternative position, so as to make them equivalent to the pay and benefits of the employee's regular job. The employer may also transfer the employee to a part-time job with the same hourly rate of pay and benefits, provided the employee is not required to take more leave than is medically necessary. For example, an employee desiring to take leave in increments of four hours per day could be transferred to a half-time job, or could remain in the employee's same job on a part-time schedule, paying the same hourly rate as the employee's previous job and enjoying the same benefits. The employer may not eliminate benefits which otherwise would not be provided to part-time employees; however, an employer may proportionately reduce benefits such as vacation leave where an employer's normal practice is to base such benefits on the number of hours worked.

(d) An employer may not transfer the employee to an alternative position in order to discourage the employee from taking leave or otherwise work a hardship on the employee. For example, a white collar employee may not be assigned to perform laborer's work; an employee working the day shift may not be reassigned to the graveyard shift; an employee working in the headquarters facility may not be reassigned to a branch a significant distance away from the employee's normal job location. Any such attempt on the part of the employer to make such a transfer will be held to be contrary to the prohibited acts of the FMLA.

(e) When an employee who is taking leave intermittently or on a reduced leave schedule and has been transferred to an alternative position, no longer needs to continue on leave and is able to return to full-time work, the employee must be placed in the same or equivalent job as the job he/she left when the leave commenced. An employee may not be required to take more leave than necessary to address the circumstance that precipitated the need for leave.

§ 825.205 — How does one determine the amount of leave used where an employee takes leave intermittently or on a reduced leave schedule?

(a) If an employee takes leave on an intermittent or reduced leave schedule, only the amount of leave actually taken may be counted toward the 12 weeks of leave to which an employee is entitled. For example, if an employee who normally works five days a week takes off one day, the employee would use 1/5 of a week of FMLA leave. Similarly, if a full-time employee who normally works 8-hour days works 4-hour days under a reduced leave schedule, the employee would use 1/2 week of FMLA leave each week.

(b) Where an employee normally works a part-time schedule or variable hours, the amount of leave to which an employee is entitled is determined on a pro rata or proportional basis by comparing the new schedule with the employee's normal schedule. For example, if an employee who normally works 30 hours per week works only 20 hours a week under a reduced leave schedule, the employee's ten hours of leave would constitute one-third of a week of FMLA leave for each week the employee works the reduced leave schedule.

(c) If an employer has made a permanent or long-term change in the employee's schedule (for reasons other than FMLA, and prior

to the notice of need for FMLA leave), the hours worked under the new schedule are to be used for making this calculation.

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

§ 825.206 — May an employer deduct hourly amounts from an employee's salary, when providing unpaid leave under FMLA, without affecting the employee's qualification for exemption as an executive, administrative, or professional employee, or when utilizing the fluctuating workweek method for payment of overtime, under the Fair Labor Standards Act?

(a) Leave taken under FMLA may be unpaid. If an employee is otherwise exempt from minimum wage and overtime requirements of the Fair Labor Standards Act (FLSA) as a salaried executive, administrative, or professional employee (under regulations issued by the Secretary), 29 CFR Part 541, providing unpaid FMLA-qualifying leave to such an employee will not cause the employee to lose the FLSA exemption. This means that under regulations currently in effect, where an employee meets the specified duties test, is paid on a salary basis, and is paid a salary of at least the amount specified in the regulations, the employer may make deductions from the employee's salary for any hours taken as intermittent or reduced FMLA leave within a workweek, without affecting the exempt status of the employee. The fact that an employer provides FMLA leave, whether paid or unpaid, and maintains records required by this part regarding FMLA leave, will not be relevant to the determination whether an employee is exempt within the meaning of 29 CFR Part 541.

(b) For an employee paid in accordance with the fluctuating workweek method of payment for overtime (*see* 29 CFR 778.114), the employer, *during the period* in which intermittent or reduced schedule FMLA leave is scheduled to be taken, may compensate an employee on an hourly basis and pay only for the hours the employee works, including time and one-half the employee's regular rate for overtime hours. The change to payment on an hourly basis would include the entire period during which the employee is taking intermittent leave, including weeks in which no leave is taken. The hourly rate shall be determined by dividing the employee's weekly salary by the employee's normal or average schedule of hours worked during weeks in which FMLA leave is not being taken. If an employer chooses to follow this exception from the fluctuating workweek method of payment, the employer must do so uniformly, with respect to all employees paid on a fluctuating workweek basis for whom FMLA leave is taken on an intermittent or reduced leave schedule basis. If an employer does not elect to convert the employee's compensation to hourly pay, no deduction may be taken for FMLA leave absences. Once the need for intermittent or reduced scheduled leave is over, the employee may be restored to payment on a fluctuating work week basis.

(c) This special exception to the "salary basis" requirements of the FLSA exemption or fluctuating workweek payment requirements applies only to employees of covered employers who are eligible for FMLA leave, and to leave which qualifies as (one of the four types of) FMLA leave. Hourly or other deductions which are not in accordance with 29 CFR Part 541 or 29 CFR § 778.114 may *not* be taken, for example, from the salary of an employee who works for an employer with fewer than 50 employees, or where the employee has not worked long enough to be eligible for FMLA leave without potentially affecting the employee's eligibility for exemption. Nor may deductions which are not permitted by 29 CFR Part 541 or 29 CFR § 778.114 be taken from such an employee's salary for any leave which does not qualify as FMLA leave, for example, deductions from an employee's pay for leave required under State law or under an employer's policy or practice for a reason which does not qualify as FMLA leave, *e.g.*, leave to care for a grandparent or for a medical condition which does not qualify as a serious health condition; or for leave which is more generous than provided by FMLA, such as leave in excess of 12 weeks in a year. Employers may comply with State law or the employer's own policy/practice under these circumstances and maintain

the employee's eligibility for exemption or for the fluctuating workweek method of pay by not taking hourly deductions from the employee's pay, in accordance with FLSA requirements, or may take such deductions, treating the employee as an "hourly" employee and pay overtime premium pay for hours worked over 40 in a workweek.

§ 825.207 — Is FMLA leave paid or unpaid?

(a) Generally, FMLA leave is unpaid. However, under the circumstances described in this section, FMLA permits an eligible employee to choose to substitute paid leave for FMLA leave. If an employee does not choose to substitute accrued paid leave, the employer may require the employee to substitute accrued paid leave for FMLA leave.

(b) Where an employee has earned or accrued paid vacation, personal or family leave, that paid leave may be substituted for all or part of any (otherwise) unpaid FMLA leave relating to birth, placement of a child for adoption or foster care, or care for a spouse, child or parent who has a serious health condition. The term "family leave" as used in FMLA refers to paid leave provided by the employer covering the particular circumstances for which the employee seeks leave for either the birth of a child and to care for such child, placement of a child for adoption or foster care, or care for a spouse, child or parent with a serious health condition. For example, if the employer's leave plan allows use of family leave to care for a child but not for a parent, the employer is not required to allow accrued family leave to be substituted for FMLA leave used to care for a parent.

(c) Substitution of paid accrued vacation, personal, or medical/sick leave may be made for any (otherwise) unpaid FMLA leave needed to care for a family member or the employee's own serious health condition. Substitution of paid sick/medical leave may be elected to the extent the circumstances meet the employer's usual requirements for the use of sick/medical leave. An employer is not required to allow substitution of paid sick or medical leave for unpaid FMLA leave "in any situation" where the employer's uniform policy would not normally allow such paid leave. An employee, therefore, has a right to substitute paid medical/sick leave to care for a seriously ill family member only if the employer's leave plan allows paid leave to be used for that purpose. Similarly, an employee does not have a right to substitute paid medical/sick leave for a serious health condition which is not covered by the employer's leave plan.

(d)(1) Disability leave for the birth of a child would be considered FMLA leave for a serious health condition and counted in the 12 weeks of leave permitted under FMLA. Because the leave pursuant to a temporary disability benefit plan is not unpaid, the provision for substitution of paid leave is inapplicable. However, the employer may designate the leave as FMLA leave and count the leave as running concurrently for purposes of both the benefit plan and the FMLA leave entitlement. If the requirements to qualify for payments pursuant to the employer's temporary disability plan are more stringent than those of FMLA, the employee must meet the more stringent requirements of the plan, or may choose not to meet the requirements of the plan and instead receive no payments from the plan and use unpaid FMLA leave or substitute available accrued paid leave.

(2) The Act provides that a serious health condition may result from injury to the employee "on or off" the job. If the employer designates the leave as FMLA leave in accordance with § 825.208, the employee's FMLA 12-week leave entitlement may run concurrently with a workers' compensation absence when the injury is one that meets the criteria for a serious health condition. As the workers' compensation absence is not unpaid leave, the provision for substitution of the employee's accrued paid leave is not applicable. However, if the health care provider treating the employee for the workers' compensation injury certifies the employee is able to return to a "light duty job" but is unable to return to the same or equivalent job, the employee may decline the employer's offer of a "light duty job." As a result the employee may lose workers' compensation payments, but is entitled to remain on unpaid FMLA leave until the 12-week entitlement is exhausted. As of the date workers' compensation benefits cease, the substitution provision becomes applicable and either the employee may elect or the employer may

require the use of accrued paid leave. See also §§ 825.210(f), 825.216(d), 825.220(d), 825.307(a)(1) and 825.702(d) (1) and (2) regarding the relationship between workers' compensation absences and FMLA leave.

(e) Paid vacation or personal leave, including leave earned or accrued under plans allowing "paid time off," may be substituted, at either the employee's or the employer's option, for any qualified FMLA leave. No limitations may be placed by the employer on substitution of paid vacation or personal leave for these purposes.

(f) If neither the employee nor the employer elects to substitute paid leave for unpaid FMLA leave under the above conditions and circumstances, the employee will remain entitled to all the paid leave which is earned or accrued under the terms of the employer's plan.

(g) If an employee uses paid leave under circumstances which do not qualify as FMLA leave, the leave will not count against the 12 weeks of FMLA leave to which the employee is entitled. For example, paid sick leave used for a medical condition which is not a serious health condition does not count against the 12 weeks of FMLA leave entitlement.

(h) When an employee or employer elects to substitute paid leave (of any type) for unpaid FMLA leave under circumstances permitted by these regulations, and the employer's procedural requirements for taking that kind of leave are less stringent than the requirements of FMLA (*e.g.*, notice or certification requirements), only the less stringent requirements may be imposed. An employee who complies with an employer's less stringent leave plan requirements in such cases may not have leave for an FMLA purpose delayed or denied on the grounds that the employee has not complied with stricter requirements of FMLA. However, where accrued paid vacation or personal leave is substituted for unpaid FMLA leave for a serious health condition, an employee may be required to comply with any less stringent medical certification requirements of the employer's sick leave program. *See* §§ 825.302(g), 825.305(e) and 825.306(c).

(i) Section 7(o) of the Fair Labor Standards Act (FLSA) permits public employers under prescribed circumstances to substitute compensatory time off accrued at one and one-half hours for each overtime hour worked in lieu of paying cash to an employee when the employee works overtime hours as prescribed by the Act. There are limits to the amounts of hours of compensatory time an employee may accumulate depending upon whether the employee works in fire protection or law enforcement (480 hours) or elsewhere for a public agency (240 hours). Compensatory time off is not a form of accrued paid leave that an employer may require the employee to substitute for unpaid FMLA leave. The employee may request to use his/her balance of compensatory time for an FMLA reason. If the employer permits the accrual to be used in compliance with regulations, 29 CFR 553.25, the absence which is paid from the employee's accrued compensatory time "account" may not be counted against the employee's FMLA leave entitlement.

[60 FR 2237, Jan. 6, 1995; 60 FR 16383, Mar. 30, 1995]

§ 825.208 — Under what circumstances may an employer designate leave, paid or unpaid, as FMLA leave and, as a result, count it against the employee's total FMLA leave entitlement?

(a) In all circumstances, it is the employer's responsibility to designate leave, paid or unpaid, as FMLA-qualifying, and to give notice of the designation to the employee as provided in this section. In the case of intermittent leave or leave on a reduced schedule, only one such notice is required unless the circumstances regarding the leave have changed. The employer's designation decision must be based only on information received from the employee or the employee's spokesperson (*e.g.*, if the employee is incapacitated, the employee's spouse, adult child, parent, doctor, *etc.*, may provide notice to the employer of the need to take FMLA leave). In any circumstance where the employer does not have sufficient information about the reason for an employee's use of paid leave, the employer should inquire further of the employee or the spokesperson to ascertain whether the paid leave is potentially FMLA-qualifying.

(1) An employee giving notice of the need for unpaid FMLA leave must explain the rea-

sons for the needed leave so as to allow the employer to determine that the leave qualifies under the Act. If the employee fails to explain the reasons, leave may be denied. In many cases, in explaining the reasons for a request to use paid leave, especially when the need for the leave was unexpected or unforeseen, an employee will provide sufficient information for the employer to designate the paid leave as FMLA leave. An employee using accrued paid leave, especially vacation or personal leave, may in some cases not spontaneously explain the reasons or their plans for using their accrued leave.

(2) As noted in § 825.302(c), an employee giving notice of the need for unpaid FMLA leave does not need to expressly assert rights under the Act or even mention the FMLA to meet his or her obligation to provide notice, though the employee would need to state a qualifying reason for the needed leave. An employee requesting or notifying the employer of an intent to use accrued paid leave, even if for a purpose covered by FMLA, would not need to assert such right either. However, if an employee requesting to use paid leave for an FMLA-qualifying purpose does not explain the reason for the leave—consistent with the employer's established policy or practice—and the employer denies the employee's request, the employee will need to provide sufficient information to establish an FMLA-qualifying reason for the needed leave so that the employer is aware of the employee's entitlement (*i.e.*, that the leave may not be denied) and, then, may designate that the paid leave be appropriately counted against (substituted for) the employee's 12-week entitlement. Similarly, an employee using accrued paid vacation leave who seeks an extension of unpaid leave for an FMLA-qualifying purpose will need to state the reason. If this is due to an event which occurred during the period of paid leave, the employer may count the leave used after the FMLA-qualifying event against the employee's 12-week entitlement.

(b)(1) Once the employer has acquired knowledge that the leave is being taken for an FMLA required reason, the employer must promptly (within two business days absent extenuating circumstances) notify the employee that the paid leave is designated and will be counted as FMLA leave. If there is a dispute between an employer and an employee as to whether paid leave qualifies as FMLA leave, it should be resolved through discussions between the employee and the employer. Such discussions and the decision must be documented.

(2) The employer's notice to the employee that the leave has been designated as FMLA leave may be orally or in writing. If the notice is oral, it shall be confirmed in writing, no later than the following payday (unless the payday is less than one week after the oral notice, in which case the notice must be no later than the subsequent payday). The written notice may be in any form, including a notation on the employee's pay stub.

(c) If the employer requires paid leave to be substituted for unpaid leave, or that paid leave taken under an existing leave plan be counted as FMLA leave, this decision must be made by the employer within two business days of the time the employee gives notice of the need for leave, or, where the employer does not initially have sufficient information to make a determination, when the employer determines that the leave qualifies as FMLA leave if this happens later. The employer's designation must be made before the leave starts, unless the employer does not have sufficient information as to the employee's reason for taking the leave until after the leave commenced. If the employer has the requisite knowledge to make a determination that the paid leave is for an FMLA reason at the time the employee either gives notice of the need for leave or commences leave and fails to designate the leave as FMLA leave (and so notify the employee in accordance with paragraph (b)), the employer may not designate leave as FMLA leave retroactively, and may designate only prospectively as of the date of notification to the employee of the designation. In such circumstances, the employee is subject to the full protections of the Act, but none of the absence preceding the notice to the employee of the designation may be counted against the employee's 12-week FMLA leave entitlement.

(d) If the employer learns that leave is for an FMLA purpose after leave has begun, such as when an employee gives notice of the need for an extension of the paid leave with un-

paid FMLA leave, the entire or some portion of the paid leave period may be retroactively counted as FMLA leave, to the extent that the leave period qualified as FMLA leave. For example, an employee is granted two weeks paid vacation leave for a skiing trip. In mid-week of the second week, the employee contacts the employer for an extension of leave as unpaid leave and advises that at the beginning of the second week of paid vacation leave the employee suffered a severe accident requiring hospitalization. The employer may notify the employee that both the extension and the second week of paid vacation leave (from the date of the injury) is designated as FMLA leave. On the other hand, when the employee takes sick leave that turns into a serious health condition (*e.g.*, bronchitis that turns into bronchial pneumonia) and the employee gives notice of the need for an extension of leave, the entire period of the serious health condition may be counted as FMLA leave.

(e) Employers may not designate leave as FMLA leave after the employee has returned to work with two exceptions:

(1) If the employee was absent for an FMLA reason and the employer did not learn the reason for the absence until the employee's return (*e.g.*, where the employee was absent for only a brief period), the employer may, upon the employee's return to work, promptly (within two business days of the employee's return to work) designate the leave retroactively with appropriate notice to the employee. If leave is taken for an FMLA reason but the employer was not aware of the reason, and the employee desires that the leave be counted as FMLA leave, the employee must notify the employer within two business days of returning to work of the reason for the leave. In the absence of such timely notification by the employee, the employee may not subsequently assert FMLA protections for the absence.

(2) If the employer knows the reason for the leave but has not been able to confirm that the leave qualifies under FMLA, or where the employer has requested medical certification which has not yet been received or the parties are in the process of obtaining a second or third medical opinion, the employer should make a preliminary designation, and so notify the employee, at the time leave begins, or as soon as the reason for the leave becomes known. Upon receipt of the requisite information from the employee or of the medical certification which confirms the leave is for an FMLA reason, the preliminary designation becomes final. If the medical certifications fail to confirm that the reason for the absence was an FMLA reason, the employer must withdraw the designation (with written notice to the employee).

[60 FR 2237, Jan. 6, 1995; 60 FR 16383, Mar. 30, 1995]

§ 825.209 — Is an employee entitled to benefits while using FMLA leave?

(a) During any FMLA leave, an employer must maintain the employee's coverage under any group health plan (as defined in the Internal Revenue Code of 1986 at 26 U.S.C. 5000(b)(1)) on the same conditions as coverage would have been provided if the employee had been continuously employed during the entire leave period. All employers covered by FMLA, including public agencies, are subject to the Act's requirements to maintain health coverage. The definition of "group health plan" is set forth in § 825.800. For purposes of FMLA, the term "group health plan" shall not include an insurance program providing health coverage under which employees purchase individual policies from insurers provided that:

(1) no contributions are made by the employer;

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

(3) the sole functions of the employer with respect to the program are, without endorsing the program, to permit the insurer to publicize the program to employees, to collect premiums through payroll deductions and to remit them to the insurer;

(4) the employer receives no consideration in the form of cash or otherwise in connection with the program, other than reasonable compensation, excluding any profit, for administrative services actually rendered in connection with payroll deduction; and,

(5) the premium charged with respect to such coverage does not increase in the event the employment relationship terminates.

(b) The same group health plan benefits provided to an employee prior to taking

FMLA leave must be maintained during the FMLA leave. For example, if family member coverage is provided to an employee, family member coverage must be maintained during the FMLA leave. Similarly, benefit coverage during FMLA leave for medical care, surgical care, hospital care, dental care, eye care, mental health counseling, substance abuse treatment, *etc.*, must be maintained during leave if provided in an employer's group health plan, including a supplement to a group health plan, whether or not provided through a flexible spending account or other component of a cafeteria plan.

(c) If an employer provides a new health plan or benefits or changes health benefits or plans while an employee is on FMLA leave, the employee is entitled to the new or changed plan/benefits to the same extent as if the employee were not on leave. For example, if an employer changes a group health plan so that dental care becomes covered under the plan, an employee on FMLA leave must be given the same opportunity as other employees to receive (or obtain) the dental care coverage. Any other plan changes (*e.g.*, in coverage, premiums, deductibles, *etc.*) which apply to all employees of the workforce would also apply to an employee on FMLA leave.

(d) Notice of any opportunity to change plans or benefits must also be given to an employee on FMLA leave. If the group health plan permits an employee to change from single to family coverage upon the birth of a child or otherwise add new family members, such a change in benefits must be made available while an employee is on FMLA leave. If the employee requests the changed coverage it must be provided by the employer.

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

(f) Except as required by the Consolidated Omnibus Budget Reconciliation Act of 1986 (COBRA) and for "key" employees (as discussed below), an employer's obligation to maintain health benefits during leave (and to restore the employee to the same or equivalent employment) under FMLA ceases if and when the employment relationship would have terminated if the employee had not taken FMLA leave (*e.g.*, if the employee's position is eliminated as part of a nondiscriminatory reduction in force and the employee would not have been transferred to another position); an employee informs the employer of his or her intent not to return from leave (including before starting the leave if the employer is so informed before the leave starts); or the employee fails to return from leave or continues on leave after exhausting his or her FMLA leave entitlement in the 12-month period.

(g) If a "key employee" (*see* § 825.218) does not return from leave when notified by the employer that substantial or grievous economic injury will result from his or her reinstatement, the employee's entitlement to group health plan benefits continues unless and until the employee advises the employer that the employee does not desire restoration to employment at the end of the leave period, or FMLA leave entitlement is exhausted, or reinstatement is actually denied.

(h) An employee's entitlement to benefits other than group health benefits during a period of FMLA leave (*e.g.*, holiday pay) is to be determined by the employer's established policy for providing such benefits when the employee is on other forms of leave (paid or unpaid, as appropriate).

[60 FR 2237, Jan. 6, 1995; 60 FR 16383, Mar. 30, 1995]

§ 825.210 — How may employees on FMLA leave pay their share of group health benefit premiums?

(a) Group health plan benefits must be maintained on the same basis as coverage would have been provided if the employee had been continuously employed during the FMLA leave period. Therefore, any share of group health plan premiums which had been paid by the employee prior to FMLA leave must continue to be paid by the employee during the FMLA leave period. If premiums are raised or lowered, the employee would be required to pay the new premium rates. Maintenance of health insurance policies which are not a part of the employer's group health plan, as

described in § 825.209(a)(1), are the sole responsibility of the employee. The employee and the insurer should make necessary arrangements for payment of premiums during periods of unpaid FMLA leave.

(b) If the FMLA leave is substituted paid leave, the employee's share of premiums must be paid by the method normally used during any paid leave, presumably as a payroll deduction.

(c) If FMLA leave is unpaid, the employer has a number of options for obtaining payment from the employee. The employer may require that payment be made to the employer or to the insurance carrier, but no additional charge may be added to the employee's premium payment for administrative expenses. The employer may require employees to pay their share of premium payments in any of the following ways:

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

(2) Payment would be due on the same schedule as payments are made under COBRA;

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

(4) The employer's existing rules for payment by employees on "leave without pay" would be followed, provided that such rules do not require prepayment (*i.e.*, prior to the commencement of the leave) of the premiums that will become due during a period of unpaid FMLA leave or payment of higher premiums than if the employee had continued to work instead of taking leave; or,

(5) Another system voluntarily agreed to between the employer and the employee, which may include prepayment of premiums (*e.g.*, through increased payroll deductions when the need for the FMLA leave is foreseeable).

(d) The employer must provide the employee with advance written notice of the terms and conditions under which these payments must be made. (*See* § 825.301.)

(e) An employer may not require more of an employee using FMLA leave than the employer requires of other employees on "leave without pay."

(f) An employee who is receiving payments as a result of a workers' compensation injury must make arrangements with the employer for payment of group health plan benefits when simultaneously taking unpaid FMLA leave. See paragraph (c) of this section and § 825.207(d)(2).

[60 FR 2237, Jan. 6, 1995; 60 FR 16383, Mar. 30, 1995]

§ 825.211 — What special health benefits maintenance rules apply to multi-employer health plans?

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

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

(c) During the duration of an employee's FMLA leave, coverage by the group health plan, and benefits provided pursuant to the plan, must be maintained at the level of coverage and benefits which were applicable to the employee at the time FMLA leave commenced.

(d) An employee using FMLA leave cannot be required to use "banked" hours or pay a greater premium than the employee would have been required to pay if the employee had been continuously employed.

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

(1) the employee's FMLA leave entitlement is exhausted;

(2) the employer can show that the employee would have been laid off and the employment relationship terminated; or,

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

§ 825.212 — What are the consequences of an employee's failure to make timely health plan premium payments?

(a)(1) In the absence of an established employer policy providing a longer grace period, an employer's obligations to main-

tain health insurance coverage cease under FMLA if an employee's premium payment is more than 30 days late. In order to drop the coverage for an employee whose premium payment is late, the employer must provide written notice to the employee that the payment has not been received. Such notice must be mailed to the employee at least 15 days before coverage is to cease, advising that coverage will be dropped on a specified date at least 15 days after the date of the letter unless the payment has been received by that date. If the employer has established policies regarding other forms of unpaid leave that provide for the employer to cease coverage retroactively to the date the unpaid premium payment was due, the employer may drop the employee from coverage retroactively in accordance with that policy, provided the 15-day notice was given. In the absence of such a policy, coverage for the employee may be terminated at the end of the 30-day grace period, where the required 15-day notice has been provided.

(2) An employer has no obligation regarding the maintenance of a health insurance policy which is not a "group health plan." *See* § 825.209(a).

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

(b) The employer may recover the employee's share of any premium payments missed by the employee for any FMLA leave period during which the employer maintains health coverage by paying the employee's share after the premium payment is missed.

(c) If coverage lapses because an employee has not made required premium payments, upon the employee's return from FMLA leave the employer must still restore the employee to coverage/benefits equivalent to those the employee would have had if leave had not been taken and the premium payment(s) had not been missed, including family or dependent coverage. *See* § 825.215(d)(1)-(5). In such case, an employee may not be required to meet any qualification requirements imposed by the plan, including any new preexisting condition waiting period, to wait for an open season, or to pass a medical examination to obtain reinstatement of coverage.

§ 825.213 — May an employer recover costs it incurred for maintaining "group health plan" or other non-health benefits coverage during FMLA leave?

(a) In addition to the circumstances discussed in § 825.212(b), an employer may recover its share of health plan premiums during a period of unpaid FMLA leave from an employee if the employee fails to return to work after the employee's FMLA leave entitlement has been exhausted or expires, *unless* the reason the employee does not return is due to:

(1) The continuation, recurrence, or onset of a serious health condition of the employee or the employee's family member which would otherwise entitle the employee to leave under FMLA; or

(2) Other circumstances beyond the employee's control. Examples of "other circumstances beyond the employee's control" are necessarily broad. They include such situations as where a parent chooses to stay home with a newborn child who has a serious health condition; an employee's spouse is unexpectedly transferred to a job location more than 75 miles from the employee's worksite; a relative or individual other than an immediate family member has a serious health condition and the employee is needed to provide care; the employee is laid off while on leave; or, the employee is a "key employee" who decides not to return to work upon being notified of the employer's intention to deny restoration because of substantial and grievous economic injury to the employer's operations and is not reinstated by the employer. Other circumstances beyond the employee's control would not include a situation where an employee desires to remain with a parent in a distant city even though the parent no longer requires the employee's care, or a parent chooses not to return to work to stay home with a well, newborn child.

(3) When an employee fails to return to work because of the continuation, recurrence, or onset of a serious health condition, thereby precluding the employer from recovering its (share of) health benefit premium payments made on the employee's behalf during a period of unpaid FMLA leave, the employer may require medical certification of the employee's or the family member's serious

health condition. Such certification is not required unless requested by the employer. The employee is required to provide medical certification in a timely manner which, for purposes of this section, is within 30 days from the date of the employer's request. For purposes of medical certification, the employee may use the optional DOL form developed for this purpose (*see* § 825.306(a) and Appendix B of this part). If the employer requests medical certification and the employee does not provide such certification in a timely manner (within 30 days), or the reason for not returning to work does not meet the test of other circumstances beyond the employee's control, the employer may recover 100% of the health benefit premiums it paid during the period of unpaid FMLA leave.

(b) Under some circumstances an employer may elect to maintain other benefits, *e.g.*, life insurance, disability insurance, *etc.*, by paying the employee's (share of) premiums during periods of unpaid FMLA leave. For example, to ensure the employer can meet its responsibilities to provide equivalent benefits to the employee upon return from unpaid FMLA leave, it may be necessary that premiums be paid continuously to avoid a lapse of coverage. If the employer elects to maintain such benefits during the leave, at the conclusion of leave, the employer is entitled to recover only the costs incurred for paying the employee's share of any premiums whether or not the employee returns to work.

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

(d) When an employee elects or an employer requires paid leave to be substituted for FMLA leave, the employer may not recover its (share of) health insurance or other non-health benefit premiums for any period of FMLA leave covered by paid leave. Because paid leave provided under a plan covering temporary disabilities (including workers' compensation) is not unpaid, recovery of health insurance premiums does not apply to such paid leave.

(e) The amount that self-insured employers may recover is limited to only the employer's share of allowable "premiums" as would be calculated under COBRA, excluding the 2 percent fee for administrative costs.

(f) When an employee fails to return to work, any health and non-health benefit premiums which this section of the regulations permits an employer to recover are a debt owed by the non-returning employee to the employer. The existence of this debt caused by the employee's failure to return to work does not alter the employer's responsibilities for health benefit coverage and, under a self-insurance plan, payment of claims incurred during the period of FMLA leave. To the extent recovery is allowed, the employer may recover the costs through deduction from any sums due to the employee (*e.g.*, unpaid wages, vacation pay, profit sharing, *etc.*), provided such deductions do not otherwise violate applicable Federal or State wage payment or other laws. Alternatively, the employer may initiate legal action against the employee to recover such costs.

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

(a) On return from FMLA leave, an employee is entitled to be returned to the same position the employee held when leave commenced, or to an equivalent position with equivalent benefits, pay, and other terms and conditions of employment. An employee is entitled to such reinstatement even if the employee has been replaced or his or her position has been restructured to accommodate the employee's absence. See also § 825.106(e) for the obligations of joint employers.

(b) If the employee is unable to perform an essential function of the position because of a physical or mental condition, including the continuation of a serious health condition, the employee has no right to restoration to another position under the FMLA. However, the employer's obligations may be governed by the Americans with Disabilities Act (ADA). *See* § 825.702.

[60 FR 2237, Jan. 6, 1995; 60 FR 16383, Mar. 30, 1995]

§ 825.215 — What is an equivalent position?

(a) An equivalent position is one that is virtually identical to the employee's former

position in terms of pay, benefits and working conditions, including privileges, perquisites and status. It must involve the same or substantially similar duties and responsibilities, which must entail substantially equivalent skill, effort, responsibility, and authority.

(b) If an employee is no longer qualified for the position because of the employee's inability to attend a necessary course, renew a license, fly a minimum number of hours, *etc.*, as a result of the leave, the employee shall be given a reasonable opportunity to fulfill those conditions upon return to work.

(c) ***Equivalent Pay***. (1) An employee is entitled to any unconditional pay increases which may have occurred during the FMLA leave period, such as cost of living increases. Pay increases conditioned upon seniority, length of service, or work performed would not have to be granted unless it is the employer's policy or practice to do so with respect to other employees on "leave without pay." In such case, any pay increase would be granted based on the employee's seniority, length of service, work performed, *etc.*, excluding the period of unpaid FMLA leave. An employee is entitled to be restored to a position with the same or equivalent pay premiums, such as a shift differential. If an employee departed from a position averaging ten hours of overtime (and corresponding overtime pay) each week, an employee is ordinarily entitled to such a position on return from FMLA leave.

(2) Many employers pay bonuses in different forms to employees for job-related performance such as for perfect attendance, safety (absence of injuries or accidents on the job) and exceeding production goals. Bonuses for perfect attendance and safety do not require performance by the employee but rather contemplate the absence of occurrences. To the extent an employee who takes FMLA leave had met all the requirements for either or both of these bonuses before FMLA leave began, the employee is entitled to continue this entitlement upon return from FMLA leave, that is, the employee may not be disqualified for the bonus(es) for the taking of FMLA leave. *See* § 825.220 (b) and (c). A monthly production bonus, on the other hand does require performance by the employee. If the employee is on FMLA leave during any part of the period for which the bonus is computed, the employee is entitled to the same consideration for the bonus as other employees on paid or unpaid leave (as appropriate). See paragraph (d)(2) of this section.

(d) ***Equivalent Benefits***. "Benefits" include all benefits provided or made available to employees by an employer, including group life insurance, health insurance, disability insurance, sick leave, annual leave, educational benefits, and pensions, regardless of whether such benefits are provided by a practice or written policy of an employer through an employee benefit plan as defined in Section 3(3) of the Employee Retirement Income Security Act of 1974, 29 U.S.C. 1002(3).

(1) At the end of an employee's FMLA leave, benefits must be resumed in the same manner and at the same levels as provided when the leave began, and subject to any changes in benefit levels that may have taken place during the period of FMLA leave affecting the entire workforce, unless otherwise elected by the employee. Upon return from FMLA leave, an employee cannot be required to requalify for any benefits the employee enjoyed before FMLA leave began (including family or dependent coverages). For example, if an employee was covered by a life insurance policy before taking leave but is not covered or coverage lapses during the period of unpaid FMLA leave, the employee cannot be required to meet any qualifications, such as taking a physical examination, in order to requalify for life insurance upon return from leave. Accordingly, some employers may find it necessary to modify life insurance and other benefits programs in order to restore employees to equivalent benefits upon return from FMLA leave, make arrangements for continued payment of costs to maintain such benefits during unpaid FMLA leave, or pay these costs subject to recovery from the employee on return from leave. *See* § 825.213(b).

(2) An employee may, but is not entitled to, accrue any additional benefits or seniority during unpaid FMLA leave. Benefits accrued at the time leave began, however, (*e.g.*, paid vacation, sick or personal leave to the extent not substituted for FMLA leave)

must be available to an employee upon return from leave.

(3) If, while on unpaid FMLA leave, an employee desires to continue life insurance, disability insurance, or other types of benefits for which he or she typically pays, the employer is required to follow established policies or practices for continuing such benefits for other instances of leave without pay. If the employer has no established policy, the employee and the employer are encouraged to agree upon arrangements before FMLA leave begins.

(4) With respect to pension and other retirement plans, any period of unpaid FMLA leave shall not be treated as or counted toward a break in service for purposes of vesting and eligibility to participate. Also, if the plan requires an employee to be employed on a specific date in order to be credited with a year of service for vesting, contributions or participation purposes, an employee on unpaid FMLA leave on that date shall be deemed to have been employed on that date. However, unpaid FMLA leave periods need not be treated as credited service for purposes of benefit accrual, vesting and eligibility to participate.

(5) Employees on unpaid FMLA leave are to be treated as if they continued to work for purposes of changes to benefit plans. They are entitled to changes in benefits plans, except those which may be dependent upon seniority or accrual during the leave period, immediately upon return from leave or to the same extent they would have qualified if no leave had been taken. For example if the benefit plan is predicated on a pre-established number of hours worked each year and the employee does not have sufficient hours as a result of taking unpaid FMLA leave, the benefit is lost. (In this regard, § 825.209 addresses health benefits.)

(e) ***Equivalent Terms and Conditions of Employment***. An equivalent position must have substantially similar duties, conditions, responsibilities, privileges and status as the employee's original position.

(1) The employee must be reinstated to the same or a geographically proximate worksite (*i.e.*, one that does not involve a significant increase in commuting time or distance) from where the employee had previously been employed. If the employee's original worksite has been closed, the employee is entitled to the same rights as if the employee had not been on leave when the worksite closed. For example, if an employer transfers all employees from a closed worksite to a new worksite in a different city, the employee on leave is also entitled to transfer under the same conditions as if he or she had continued to be employed.

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

(3) The employee must have the same or an equivalent opportunity for bonuses, profit-sharing, and other similar discretionary and non-discretionary payments.

(4) FMLA does not prohibit an employer from accommodating an employee's request to be restored to a different shift, schedule, or position which better suits the employee's personal needs on return from leave, or to offer a promotion to a better position. However, an employee cannot be induced by the employer to accept a different position against the employee's wishes.

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

§ 825.216 — Are there any limitations on an employer's obligation to reinstate an employee?

(a) An employee has no greater right to reinstatement or to other benefits and conditions of employment than if the employee had been continuously employed during the FMLA leave period. An employer must be able to show that an employee would not otherwise have been employed at the time reinstatement is requested in order to deny restoration to employment. For example:

(1) If an employee is laid off during the course of taking FMLA leave and employment is terminated, the employer's responsibility to continue FMLA leave, maintain group

health plan benefits and restore the employee cease at the time the employee is laid off, provided the employer has no continuing obligations under a collective bargaining agreement or otherwise. An employer would have the burden of proving that an employee would have been laid off during the FMLA leave period and, therefore, would not be entitled to restoration.

(2) If a shift has been eliminated, or overtime has been decreased, an employee would not be entitled to return to work that shift or the original overtime hours upon restoration. However, if a position on, for example, a night shift has been filled by another employee, the employee is entitled to return to the same shift on which employed before taking FMLA leave.

(b) If an employee was hired for a specific term or only to perform work on a discrete project, the employer has no obligation to restore the employee if the employment term or project is over and the employer would not otherwise have continued to employ the employee. On the other hand, if an employee was hired to perform work on a contract, and after that contract period the contract was awarded to another contractor, the successor contractor may be required to restore the employee if it is a successor employer. *See* § 825.107.

(c) In addition to the circumstances explained above, an employer may deny job restoration to salaried eligible employees ("key employees," as defined in paragraph (c) of § 825.217) if such denial is necessary to prevent substantial and grievous economic injury to the operations of the employer; or may delay restoration to an employee who fails to provide a fitness for duty certificate to return to work under the conditions described in § 825.310.

(d) If the employee has been on a workers' compensation absence during which FMLA leave has been taken concurrently, and after 12 weeks of FMLA leave the employee is unable to return to work, the employee no longer has the protections of FMLA and must look to the workers' compensation statute or ADA for any relief or protections.

§ 825.217 — What is a "key employee"?

(a) A "key employee" is a salaried FMLA-eligible employee who is among the highest paid 10 percent of all the employees employed by the employer within 75 miles of the employee's worksite.

(b) The term "salaried" means "paid on a salary basis," as defined in 29 CFR 541.118. This is the Department of Labor regulation defining employees who may qualify as exempt from the minimum wage and overtime requirements of the FLSA as executive, administrative, and professional employees.

(c) A "key employee" must be "among the highest paid 10 percent" of all the employees—both salaried and non-salaried, eligible and ineligible—who are employed by the employer within 75 miles of the worksite.

(1) In determining which employees are among the highest paid 10 percent, year-to-date earnings are divided by weeks worked by the employee (including weeks in which paid leave was taken). Earnings include wages, premium pay, incentive pay, and non-discretionary and discretionary bonuses. Earnings do not include incentives whose value is determined at some future date, *e.g.*, stock options, or benefits or perquisites.

(2) The determination of whether a salaried employee is among the highest paid 10 percent shall be made at the time the employee gives notice of the need for leave. No more than 10 percent of the employer's employees within 75 miles of the worksite may be "key employees."

§ 825.218 — What does "substantial and grievous economic injury" mean?

(a) In order to deny restoration to a key employee, an employer must determine that the restoration of the employee to employment will cause "substantial and grievous economic injury" to the operations of the employer, not whether the absence of the employee will cause such substantial and grievous injury.

(b) An employer may take into account its ability to replace on a temporary basis (or temporarily do without) the employee on FMLA leave. If permanent replacement is unavoidable, the cost of then reinstating the employee can be considered in evaluating whether substantial and grievous economic injury will occur from restoration; in other words, the effect on the operations of the company of reinstating the employee in an equivalent position.

(c) A precise test cannot be set for the level of hardship or injury to the employer which must be sustained. If the reinstatement of a "key employee'' threatens the economic viability of the firm, that would constitute "substantial and grievous economic injury." A lesser injury which causes substantial, long-term economic injury would also be sufficient. Minor inconveniences and costs that the employer would experience in the normal course of doing business would certainly not constitute "substantial and grievous economic injury."

(d) FMLA's "substantial and grievous economic injury" standard is different from and more stringent than the "undue hardship" test under the ADA. (See, also § 825.702.)

§ 825.219 — What are the rights of a key employee?

(a) An employer who believes that reinstatement may be denied to a key employee, must give written notice to the employee at the time the employee gives notice of the need for FMLA leave (or when FMLA leave commences, if earlier) that he or she qualifies as a key employee. At the same time, the employer must also fully inform the employee of the potential consequences with respect to reinstatement and maintenance of health benefits if the employer should determine that substantial and grievous economic injury to the employer's operations will result if the employee is reinstated from FMLA leave. If such notice cannot be given immediately because of the need to determine whether the employee is a key employee, it shall be given as soon as practicable after being notified of a need for leave (or the commencement of leave, if earlier). It is expected that in most circumstances there will be no desire that an employee be denied restoration after FMLA leave and, therefore, there would be no need to provide such notice. However, an employer who fails to provide such timely notice will lose its right to deny restoration even if substantial and grievous economic injury will result from reinstatement.

(b) As soon as an employer makes a good faith determination, based on the facts available, that substantial and grievous economic injury to its operations will result if a key employee who has given notice of the need for FMLA leave or is using FMLA leave is reinstated, the employer shall notify the employee in writing of its determination, that it cannot deny FMLA leave, and that it intends to deny restoration to employment on completion of the FMLA leave. It is anticipated that an employer will ordinarily be able to give such notice prior to the employee starting leave. The employer must serve this notice either in person or by certified mail. This notice must explain the basis for the employer's finding that substantial and grievous economic injury will result, and, if leave has commenced, must provide the employee a reasonable time in which to return to work, taking into account the circumstances, such as the length of the leave and the urgency of the need for the employee to return.

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

(d) After notice to an employee has been given that substantial and grievous economic injury will result if the employee is reinstated to employment, an employee is still entitled to request reinstatement at the end of the leave period even if the employee did not return to work in response to the employer's notice. The employer must then again determine whether there will be substantial and grievous economic injury from reinstatement, based on the facts at that time. If it is determined that substantial and grievous economic injury will result, the employer shall notify the employee in writing (in person or by certified mail) of the denial of restoration.

§ 825.220 — How are employees protected who request leave or otherwise assert FMLA rights?

(a) The FMLA prohibits interference with an employee's rights under the law, and with legal proceedings or inquiries relating to an employee's rights. More specifically, the law contains the following employee protections:

(1) An employer is prohibited from interfering with, restraining, or denying the exercise of (or attempts to exercise) any rights provided by the Act.

(2) An employer is prohibited from discharging or in any other way discriminating against any person (whether or not an employee) for opposing or complaining about any unlawful practice under the Act.

(3) All persons (whether or not employers) are prohibited from discharging or in any other way discriminating against any person (whether or not an employee) because that person has—

(i) Filed any charge, or has instituted (or caused to be instituted) any proceeding under or related to this Act;

(ii) Given, or is about to give, any information in connection with an inquiry or proceeding relating to a right under this Act;

(iii) Testified, or is about to testify, in any inquiry or proceeding relating to a right under this Act.

(b) Any violations of the Act or of these regulations constitute interfering with, restraining, or denying the exercise of rights provided by the Act. "Interfering with" the exercise of an employee's rights would include, for example, not only refusing to authorize FMLA leave, but discouraging an employee from using such leave. It would also include manipulation by a covered employer to avoid responsibilities under FMLA, for example:

(1) transferring employees from one worksite to another for the purpose of reducing worksites, or to keep worksites, below the 50-employee threshold for employee eligibility under the Act;

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

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

(c) An employer is prohibited from discriminating against employees or prospective employees who have used FMLA leave. For example, if an employee on leave without pay would otherwise be entitled to full benefits (other than health benefits), the same benefits would be required to be provided to an employee on unpaid FMLA leave. By the same token, employers cannot use the taking of FMLA leave as a negative factor in employment actions, such as hiring, promotions or disciplinary actions; nor can FMLA leave be counted under "no fault" attendance policies.

(d) Employees cannot waive, nor may employers induce employees to waive, their rights under FMLA. For example, employees (or their collective bargaining representatives) cannot "trade off" the right to take FMLA leave against some other benefit offered by the employer. This does not prevent an employee's voluntary and uncoerced acceptance (not as a condition of employment) of a "light duty" assignment while recovering from a serious health condition (*see* § 825.702(d)). In such a circumstance the employee's right to restoration to the same or an equivalent position is available until 12 weeks have passed within the 12-month period, including all FMLA leave taken and the period of "light duty."

(e) Individuals, and not merely employees, are protected from retaliation for opposing (*e.g.*, file a complaint about) any practice which is unlawful under the Act. They are similarly protected if they oppose any practice which they reasonably believe to be a violation of the Act or regulations.

III. Subpart C — How do Employees Learn of Their FMLA Rights and Obligations, and What Can an Employer Require of an Employee?

§ 825.300 — What posting requirements does the Act place on employers?

(a) Every employer covered by the FMLA is required to post and keep posted on its premises, in conspicuous places where employees are employed, whether or not it has any "eligible" employees, a notice explaining the Act's provisions and providing information concerning the procedures for filing complaints of violations of the Act with the Wage and Hour Division. The notice must be posted prominently where it can be readily seen by employees and applicants for employment. Employers may duplicate the text of the notice contained in Appendix C of this part, or copies of the required notice may be obtained from local offices of the Wage and Hour Division. The poster and the text must be large enough to be easily read and contain fully legible text.

(b) An employer that willfully violates the posting requirement may be assessed a civil money penalty by the Wage and Hour Division not to exceed $100 for each separate offense. Furthermore, an employer that fails to post the required notice cannot take any adverse action against an employee, including denying FMLA leave, for failing to furnish the employer with advance notice of a need to take FMLA leave.

(c) Where an employer's workforce is comprised of a significant portion of workers who are not literate in English, the employer shall be responsible for providing the notice in a language in which the employees are literate.

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(c) Where an employer's workforce is comprised of a significant portion of workers who are not literate in English, the employer shall be responsible for providing the notice in a language in which the employees are literate.

§ 825.302 — What notice does an employee have to give an employer when the need for FMLA leave is foreseeable?

(a) An employee must provide the employer at least 30 days advance notice before FMLA leave is to begin if the need for the leave is foreseeable based on an expected birth, placement for adoption or foster care, or planned medical treatment for a serious health condition of the employee or of a family member. If 30 days notice is not practicable, such as because of a lack of knowledge of approximately when leave will be required to begin, a change in circumstances, or a medical emergency, notice must be given as soon as practicable. For example, an employee's health condition may require leave to commence earlier than anticipated before the birth of a child. Similarly, little opportunity for notice may be given before placement for adoption. Whether the leave is to be continuous or is to be taken intermittently or on a reduced schedule basis, notice need only be given one time, but the employee shall advise the employer as soon as practicable if dates of scheduled leave change or are extended, or were initially unknown.

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

(c) An employee shall provide at least verbal notice sufficient to make the employer aware that the employee needs FMLA-qualifying leave, and the anticipated timing and duration of the leave. The employee need not expressly assert rights under the FMLA or even mention the FMLA, but may only state that leave is needed for an expected birth or adoption, for example. The employer should inquire further of the employee if it is necessary to have more information about whether FMLA leave is being sought by the employee, and obtain the necessary details of the leave to be taken. In the case of medical conditions, the employer may find it necessary to inquire further to determine if the leave is because of

a serious health condition and may request medical certification to support the need for such leave (*see* § 825.305).

(d) An employer may also require an employee to comply with the employer's usual and customary notice and procedural requirements for requesting leave. For example, an employer may require that written notice set forth the reasons for the requested leave, the anticipated duration of the leave, and the anticipated start of the leave. However, failure to follow such internal employer procedures will not permit an employer to disallow or delay an employee's taking FMLA leave if the employee gives timely verbal or other notice.

(e) When planning medical treatment, the employee must consult with the employer and make a reasonable effort to schedule the leave so as not to disrupt unduly the employer's operations, subject to the approval of the health care provider. Employees are ordinarily expected to consult with their employers prior to the scheduling of treatment in order to work out a treatment schedule which best suits the needs of both the employer and the employee. If an employee who provides notice of the need to take FMLA leave on an intermittent basis for planned medical treatment neglects to consult with the employer to make a reasonable attempt to arrange the schedule of treatments so as not to unduly disrupt the employer's operations, the employer may initiate discussions with the employee and require the employee to attempt to make such arrangements, subject to the approval of the health care provider.

(f) In the case of intermittent leave or leave on a reduced leave schedule which is medically necessary, an employee shall advise the employer, upon request, of the reasons why the intermittent/reduced leave schedule is necessary and of the schedule for treatment, if applicable. The employee and employer shall attempt to work out a schedule which meets the employee's needs without unduly disrupting the employer's operations, subject to the approval of the health care provider.

(g) An employer may waive employees' FMLA notice requirements. In addition, an employer may not require compliance with stricter FMLA notice requirements where the provisions of a collective bargaining agreement, State law, or applicable leave plan allow less advance notice to the employer. For example, if an employee (or employer) elects to substitute paid vacation leave for unpaid FMLA leave (*see* § 825.207), and the employer's paid vacation leave plan imposes no prior notification requirements for taking such vacation leave, no advance notice may be required for the FMLA leave taken in these circumstances.

On the other hand, FMLA notice requirements would apply to a period of unpaid FMLA leave, unless the employer imposes lesser notice requirements on employees taking leave without pay.

§ 825.303 — What are the requirements for an employee to furnish notice to an employer where the need for FMLA leave is not foreseeable?

(a) When the approximate timing of the need for leave is not foreseeable, an employee should give notice to the employer of the need for FMLA leave as soon as practicable under the facts and circumstances of the particular case. It is expected that an employee will give notice to the employer within no more than one or two working days of learning of the need for leave, except in extraordinary circumstances where such notice is not feasible. In the case of a medical emergency requiring leave because of an employee's own serious health condition or to care for a family member with a serious health condition, written advance notice pursuant to an employer's internal rules and procedures may not be required when FMLA leave is involved.

(b) The employee should provide notice to the employer either in person or by telephone, telegraph, facsimile ("fax") machine or other electronic means. Notice may be given by the employee's spokesperson (*e.g.*, spouse, adult family member or other responsible party) if the employee is unable to do so personally. The employee need not expressly assert rights under the FMLA or even mention the FMLA, but may only state that leave is needed. The employer will be expected to obtain any additional required information through informal means. The employee or spokesperson will be expected to provide more information when it can readily be accomplished as a practical matter, taking into consideration the exigencies of the situation.

§ 825.304 — What recourse do employers have if employees fail to provide the required notice?

(a) An employer may waive employees' FMLA notice obligations or the employer's own internal rules on leave notice requirements.

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

(c) In all cases, in order for the onset of an employee's FMLA leave to be delayed due to lack of required notice, it must be clear that the employee had actual notice of the FMLA notice requirements. This condition would be satisfied by the employer's proper posting of the required notice at the worksite where the employee is employed. Furthermore, the need for leave and the approximate date leave would be taken must have been clearly foreseeable to the employee 30 days in advance of the leave. For example, knowledge that an employee would receive a telephone call about the availability of a child for adoption at some unknown point in the future would not be sufficient.

§ 825.305 — When must an employee provide medical certification to support FMLA leave?

(a) An employer may require that an employee's leave to care for the employee's seriously-ill spouse, son, daughter, or parent, or due to the employee's own serious health condition that makes the employee unable to perform one or more of the essential functions of the employee's position, be supported by a certification issued by the health care provider of the employee or the employee's ill family member. An employer must give notice of a requirement for medical certification each time a certification is required; such notice must be written notice whenever required by § 825.301. An employer's oral request to an employee to furnish any subsequent medical certification is sufficient.

(b) When the leave is foreseeable and at least 30 days notice has been provided, the employee should provide the medical certification before the leave begins. When this is not possible, the employee must provide the requested certification to the employer within the time frame requested by the employer (which must allow at least 15 calendar days after the employer's request), unless it is not practicable under the particular circumstances to do so despite the employee's diligent, good faith efforts.

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

(d) At the time the employer requests certification, the employer must also advise an employee of the anticipated consequences of an employee's failure to provide adequate certification. The employer shall advise an employee whenever the employer finds a certification incomplete, and provide the employee a reasonable opportunity to cure any such deficiency.

(e) If the employer's sick or medical leave plan imposes medical certification requirements that are less stringent than the certification requirements of these regulations, and the employee or employer elects to substitute paid sick, vacation, personal or family leave for unpaid FMLA leave where authorized (*see* § 825.207), only the employer's less stringent sick leave certification requirements may be imposed.

§ 825.306 — How much information may be required in medical certifications of a serious health condition?

(a) DOL has developed an optional form (Form WH-380, as revised) for employees' (or their family members') use in obtaining medical certification, including second and third opinions, from health care providers that meets FMLA's certification requirements. (See Appendix B to these regulations.) This optional form reflects certification requirements so as to permit the health care provider to furnish appropriate medical information within his or her knowledge.

(b) Form WH-380, as revised, or another form containing the same basic information, may be used by the employer; however, no additional information may be required. In all instances the information on the form must relate only to the serious health condition for which the current need for leave exists. The form identifies the health care provider and type of medical practice (including pertinent specialization, if any), makes maximum use of checklist entries for ease in completing the form, and contains required entries for:

(1) A certification as to which part of the definition of "serious health condition" (*see* § 825.114), if any, applies to the patient's condition, and the medical facts which support the certification, including a brief statement as to how the medical facts meet the criteria of the definition.

(2)(i) The approximate date the serious health condition commenced, and its probable duration, including the probable duration of the patient's present incapacity (defined to mean inability to work, attend school or perform other regular daily activities due to the serious health condition, treatment therefor, or recovery therefrom) if different.

(ii) Whether it will be necessary for the employee to take leave intermittently or to work on a reduced leave schedule basis (*i.e.*, part-time) as a result of the serious health condition (*see* § 825.117 and § 825.203), and if so, the probable duration of such schedule.

(iii) If the condition is pregnancy or a chronic condition within the meaning of § 825.114(a)(2)(iii), whether the patient is presently incapacitated and the likely duration and frequency of episodes of incapacity.

(3)(i)(A) If additional treatments will be required for the condition, an estimate of the probable number of such treatments.

(B) If the patient's incapacity will be intermittent, or will require a reduced leave schedule, an estimate of the probable number and interval between such treatments, actual or estimated dates of treatment if known, and period required for recovery if any.

(ii) If any of the treatments referred to in subparagraph (i) will be provided by another provider of health services (*e.g.*, physical therapist), the nature of the treatments.

(iii) If a regimen of continuing treatment by the patient is required under the supervision of the health care provider, a general description of the regimen (*see* § 825.114(b)).

(4) If medical leave is required for the employee's absence from work because of the employee's own condition (including absences due to pregnancy or a chronic condition), whether the employee:

(i) Is unable to perform work of any kind;

(ii) Is unable to perform any one or more of the essential functions of the employee's position, including a statement of the essential functions the employee is unable to perform (*see* § 825.115), based on either information provided on a statement from the employer of the essential functions of the position or, if not provided, discussion with the employee about the employee's job functions; or

(iii) Must be absent from work for treatment.

(5)(i) If leave is required to care for a family member of the employee with a serious health condition, whether the patient requires assistance for basic medical or personal needs or safety, or for transportation; or if not, whether the employee's presence to provide psychological comfort would be beneficial to the patient or assist in the patient's recovery. The employee is required to indicate on the form the care he or she will provide and an estimate of the time period.

(ii) If the employee's family member will need care only intermittently or on a reduced leave schedule basis (*i.e.*, part-time), the probable duration of the need.

(c) If the employer's sick or medical leave plan requires less information to be furnished in medical certifications than the certification requirements of these regulations, and the employee or employer elects to substitute paid sick, vacation, personal or family leave for unpaid FMLA leave where authorized (*see* § 825.207), only the employer's lesser sick leave certification requirements may be imposed.

§ 825.307 — What may an employer do if it questions the adequacy of a medical certification?

(a) If an employee submits a complete certification signed by the health care provider,

the employer may not request additional information from the employee's health care provider. However, a health care provider representing the employer may contact the employee's health care provider, with the employee's permission, for purposes of clarification and authenticity of the medical certification.

(1) If an employee is on FMLA leave running concurrently with a workers' compensation absence, and the provisions of the workers' compensation statute permit the employer or the employer's representative to have direct contact with the employee's workers' compensation health care provider, the employer may follow the workers' compensation provisions.

(2) An employer who has reason to doubt the validity of a medical certification may require the employee to obtain a second opinion at the employer's expense. Pending receipt of the second (or third) medical opinion, the employee is provisionally entitled to the benefits of the Act, including maintenance of group health benefits. If the certifications do not ultimately establish the employee's entitlement to FMLA leave, the leave shall not be designated as FMLA leave and may be treated as paid or unpaid leave under the employer's established leave policies. The employer is permitted to designate the health care provider to furnish the second opinion, but the selected health care provider may not be employed on a regular basis by the employer. See also paragraphs (e) and (f) of this section.

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

(c) If the opinions of the employee's and the employer's designated health care providers differ, the employer may require the employee to obtain certification from a third health care provider, again at the employer's expense. This third opinion shall be final and binding. The third health care provider must be designated or approved jointly by the employer and the employee. The employer and the employee must each act in good faith to attempt to reach agreement on whom to select for the third opinion provider. If the employer does not attempt in good faith to reach agreement, the employer will be bound by the first certification. If the employee does not attempt in good faith to reach agreement, the employee will be bound by the second certification. For example, an employee who refuses to agree to see a doctor in the specialty in question may be failing to act in good faith. On the other hand, an employer that refuses to agree to any doctor on a list of specialists in the appropriate field provided by the employee and whom the employee has not previously consulted may be failing to act in good faith.

(d) The employer is required to provide the employee with a copy of the second and third medical opinions, where applicable, upon request by the employee. Requested copies are to be provided within two business days unless extenuating circumstances prevent such action.

(e) If the employer requires the employee to obtain either a second or third opinion the employer must reimburse an employee or family member for any reasonable "out of pocket" travel expenses incurred to obtain the second and third medical opinions. The employer may not require the employee or family member to travel outside normal commuting distance for purposes of obtaining the second or third medical opinions except in very unusual circumstances.

(f) In circumstances when the employee or a family member is visiting in another country, or a family member resides in another country, and a serious health condition develops, the employer shall accept a medical certification as well as second and third opinions from a health care provider who practices in that country.

[60 FR 2237, Jan. 6, 1995; 60 FR 16383, Mar. 30, 1995]

§ 825.308 — Under what circumstances may an employer request subsequent recertifications of medical conditions?

(a) For pregnancy, chronic, or permanent/long-term conditions under continuing supervision of a health care provider (as defined in § 825.114(a)(2)(ii), (iii) or (iv)), an employer

may request recertification no more often than every 30 days and only in connection with an absence by the employee, unless:

(1) Circumstances described by the previous certification have changed significantly (*e.g.*, the duration or frequency of absences, the severity of the condition, complications); or

(2) The employer receives information that casts doubt upon the employee's stated reason for the absence.

(b)(1) If the minimum duration of the period of incapacity specified on a certification furnished by the health care provider is more than 30 days, the employer may not request recertification until that minimum duration has passed unless one of the conditions set forth in paragraph (c)(1), (2) or (3) of this section is met.

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

(c) For circumstances not covered by paragraphs (a) or (b) of this section, an employer may request recertification at any reasonable interval, but not more often than every 30 days, unless:

(1) The employee requests an extension of leave;

(2) Circumstances described by the previous certification have changed significantly (*e.g.*, the duration of the illness, the nature of the illness, complications); or

(3) The employer receives information that casts doubt upon the continuing validity of the certification.

(d) The employee must provide the requested recertification to the employer within the time frame requested by the employer (which must allow at least 15 calendar days after the employer's request), unless it is not practicable under the particular circumstances to do so despite the employee's diligent, good faith efforts.

(e) Any recertification requested by the employer shall be at the employee's expense unless the employer provides otherwise. No second or third opinion on recertification may be required.

§ 825.309 — What notice may an employer require regarding an employee's intent to return to work?

(a) An employer may require an employee on FMLA leave to report periodically on the employee's status and intent to return to work. The employer's policy regarding such reports may not be discriminatory and must take into account all of the relevant facts and circumstances related to the individual employee's leave situation.

(b) If an employee gives unequivocal notice of intent not to return to work, the employer's obligations under FMLA to maintain health benefits (subject to COBRA requirements) and to restore the employee cease. However, these obligations continue if an employee indicates he or she may be unable to return to work but expresses a continuing desire to do so.

(c) It may be necessary for an employee to take more leave than originally anticipated. Conversely, an employee may discover after beginning leave that the circumstances have changed and the amount of leave originally anticipated is no longer necessary. An employee may not be required to take more FMLA leave than necessary to resolve the circumstance that precipitated the need for leave. In both of these situations, the employer may require that the employee provide the employer reasonable notice (*i.e.*, within two business days) of the changed circumstances where foreseeable. The employer may also obtain information on such changed circumstances through requested status reports.

§ 825.310 — Under what circumstances may an employer require that an employee submit a medical certification that the employee is able (or unable) to return to work (*i.e.*, a "fitness-for-duty" report)?

(a) As a condition of restoring an employee whose FMLA leave was occasioned by the employee's own serious health condition that made the employee unable to perform the employee's job, an employer may have a uniformly-applied policy or practice that requires all similarly-situated employees (*i.e.*, same occupation, same serious health condition) who take leave for such conditions to obtain and present certification from the employee's health care provider that the employee is able to resume work.

(b) If State or local law or the terms of a collective bargaining agreement govern an employee's return to work, those provisions shall be applied. Similarly, requirements under the Americans with Disabilities Act (ADA) that any return-to-work physical be job-related and consistent with business necessity apply. For example, an attorney could not be required to submit to a medical examination or inquiry just because her leg had been amputated. The essential functions of an attorney's job do not require use of both legs; therefore such an inquiry would not be job related. An employer may require a warehouse laborer, whose back impairment affects the ability to lift, to be examined by an orthopedist, but may not require this employee to submit to an HIV test where the test is not related to either the essential functions of his/her job or to his/her impairment.

(c) An employer may seek fitness-for-duty certification only with regard to the particular health condition that caused the employee's need for FMLA leave. The certification itself need only be a simple statement of an employee's ability to return to work. A health care provider employed by the employer may contact the employee's health care provider with the employee's permission, for purposes of clarification of the employee's fitness to return to work. No additional information may be acquired, and clarification may be requested only for the serious health condition for which FMLA leave was taken. The employer may not delay the employee's return to work while contact with the health care provider is being made.

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

(e) The notice that employers are required to give to each employee giving notice of the need for FMLA leave regarding their FMLA rights and obligations (*see* § 825.301) shall advise the employee if the employer will require fitness-for-duty certification to return to work. If the employer has a handbook explaining employment policies and benefits, the handbook should explain the employer's general policy regarding any requirement for fitness-for-duty certification to return to work. Specific notice shall also be given to any employee from whom fitness-for-duty certification will be required either at the time notice of the need for leave is given or immediately after leave commences and the employer is advised of the medical circumstances requiring the leave, unless the employee's condition changes from one that did not previously require certification pursuant to the employer's practice or policy. No second or third fitness-for-duty certification may be required.

(f) An employer may delay restoration to employment until an employee submits a required fitness-for-duty certification unless the employer has failed to provide the notices required in paragraph (e) of this section.

(g) An employer is not entitled to certification of fitness to return to duty when the employee takes intermittent leave as described in § 825.203.

(h) When an employee is unable to return to work after FMLA leave because of the continuation, recurrence, or onset of the employee's or family member's serious health condition, thereby preventing the employer from recovering its share of health benefit premium payments made on the employee's behalf during a period of unpaid FMLA leave, the employer may require medical certification of the employee's or the family member's serious health condition. (*See* § 825.213(a)(3).) The cost of the certification shall be borne by the employee and the employee is not entitled to be paid for the time or travel costs spent in acquiring the certification.

[60 FR 2237, Jan. 6, 1995; 60 FR 16383, Mar. 30, 1995]

§ 825.311 — What happens if an employee fails to satisfy the medical certification and/or recertification requirements?

(a) In the case of foreseeable leave, an employer may delay the taking of FMLA leave to an employee who fails to provide timely certification after being requested by the employer to furnish such certification (*i.e.*, within 15 calendar days, if practicable), until the required certification is provided.

(b) When the need for leave is not foreseeable, or in the case of recertification, an employee must provide certification (or recertification) within the time frame requested by the employer (which must allow at least

15 days after the employer's request) or as soon as reasonably possible under the particular facts and circumstances. In the case of a medical emergency, it may not be practicable for an employee to provide the required certification within 15 calendar days. If an employee fails to provide a medical certification within a reasonable time under the pertinent circumstances, the employer may delay the employee's continuation of FMLA leave. If the employee never produces the certification, the leave is not FMLA leave.

(c) When requested by the employer pursuant to a uniformly applied policy for similarly-situated employees, the employee must provide medical certification at the time the employee seeks reinstatement at the end of FMLA leave taken for the employee's serious health condition, that the employee is fit for duty and able to return to work (*see* § 825.310(a)) if the employer has provided the required notice (*see* § 825.301(c); the employer may delay restoration until the certification is provided. In this situation, unless the employee provides either a fitness-for-duty certification or a new medical certification for a serious health condition at the time FMLA leave is concluded, the employee may be terminated. See also § 825.213(a)(3).

§ 825.312 — Under what circumstances may a covered employer refuse to provide FMLA leave or reinstatement to eligible employees?

(a) If an employee fails to give timely advance notice when the need for FMLA leave is foreseeable, the employer may delay the taking of FMLA leave until 30 days after the date the employee provides notice to the employer of the need for FMLA leave. (*See* § 825.302.)

(b) If an employee fails to provide in a timely manner a requested medical certification to substantiate the need for FMLA leave due to a serious health condition, an employer may delay continuation of FMLA leave until an employee submits the certificate. (See §§ 825.305 and 825.311.) If the employee never produces the certification, the leave is not FMLA leave.

(c) If an employee fails to provide a requested fitness-for-duty certification to return to work, an employer may delay restoration until the employee submits the certificate. (*See* §§ 825.310 and 825.311.)

(d) An employee has no greater right to reinstatement or to other benefits and conditions of employment than if the employee had been continuously employed during the FMLA leave period. Thus, an employee's rights to continued leave, maintenance of health benefits, and restoration cease under FMLA if and when the employment relationship terminates (*e.g.*, layoff), unless that relationship continues, for example, by the employee remaining on *paid* FMLA leave. If the employee is recalled or otherwise re-employed, an eligible employee is immediately entitled to further FMLA leave for an FMLA-qualifying reason. An employer must be able to show, when an employee requests restoration, that the employee would not otherwise have been employed if leave had not been taken in order to deny restoration to employment. (*See* § 825.216.)

(e) An employer may require an employee on FMLA leave to report periodically on the employee's status and intention to return to work. (*See* § 825.309.) If an employee unequivocally advises the employer either before or during the taking of leave that the employee does not intend to return to work, and the employment relationship is terminated, the employee's entitlement to continued leave, maintenance of health benefits, and restoration ceases unless the employment relationship continues, for example, by the employee remaining on *paid* leave. An employee may not be required to take more leave than necessary to address the circumstances for which leave was taken. If the employee is able to return to work earlier than anticipated, the employee shall provide the employer two business days notice where feasible; the employer is required to restore the employee once such notice is given, or where such prior notice was not feasible.

(f) An employer may deny restoration to employment, but not the taking of FMLA leave and the maintenance of health benefits, to an eligible employee only under the terms of the "key employee" exemption. Denial of reinstatement must be necessary to prevent "substantial and grievous economic injury" to the employer's operations. The employer

must notify the employee of the employee's status as a "key employee" and of the employer's intent to deny reinstatement on that basis when the employer makes these determinations. If leave has started, the employee must be given a reasonable opportunity to return to work after being so notified. (*See* § 825.219.)

(g) An employee who fraudulently obtains FMLA leave from an employer is not protected by FMLA's job restoration or maintenance of health benefits provisions.

(h) If the employer has a uniformly-applied policy governing outside or supplemental employment, such a policy may continue to apply to an employee while on FMLA leave. An employer which does not have such a policy may not deny benefits to which an employee is entitled under FMLA on this basis unless the FMLA leave was fraudulently obtained as in paragraph (g) of this section.

[60 FR 2237, Jan. 6, 1995; 60 FR 16383, Mar. 30, 1995]

IV. Subpart D — What Enforcement Mechanisms Does FMLA Provide?

§ 825.400 — What can employees do who believe that their rights under FMLA have been violated?

(a) The employee has the choice of:

(1) Filing, or having another person file on his or her behalf, a complaint with the Secretary of Labor, or

(2) Filing a private lawsuit pursuant to section 107 of FMLA.

(b) If the employee files a private lawsuit, it must be filed within two years after the last action which the employee contends was in violation of the Act, or three years if the violation was willful.

(c) If an employer has violated one or more provisions of FMLA, and if justified by the facts of a particular case, an employee may receive one or more of the following: wages, employment benefits, or other compensation denied or lost to such employee by reason of the violation; or, where no such tangible loss has occurred, such as when FMLA leave was unlawfully denied, any actual monetary loss sustained by the employee as a direct result of the violation, such as the cost of providing care, up to a sum equal to 12 weeks of wages for the employee. In addition, the employee may be entitled to interest on such sum, calculated at the prevailing rate. An amount equalling the preceding sums may also be awarded as liquidated damages unless such amount is reduced by the court because the violation was in good faith and the employer had reasonable grounds for believing the employer had not violated the Act. When appropriate, the employee may also obtain appropriate equitable relief, such as employment, reinstatement and promotion. When the employer is found in violation, the employee may recover a reasonable attorney's fee, reasonable expert witness fees, and other costs of the action from the employer in addition to any judgment awarded by the court.

§ 825.401 — Where may an employee file a complaint of FMLA violations with the Federal government?

(a) A complaint may be filed in person, by mail or by telephone, with the Wage and Hour Division, Employment Standards Administration, U.S. Department of Labor. A complaint may be filed at any local office of the Wage and Hour Division; the address and telephone number of local offices may be found in telephone directories.

(b) A complaint filed with the Secretary of Labor should be filed within a reasonable time of when the employee discovers that his or her FMLA rights have been violated. In no event may a complaint be filed more than two years after the action which is alleged to be a violation of FMLA occurred, or three years in the case of a willful violation.

(c) No particular form of complaint is required, except that a complaint must be reduced to writing and should include a full statement of the acts and/or omissions, with pertinent dates, which are believed to constitute the violation.

§ 825.402 — How is an employer notified of a violation of the posting requirement?

Section 825.300 describes the requirements for covered employers to post a notice for employees that explains the Act's provisions. If a representative of the Department of Labor determines that an employer has

committed a willful violation of this posting requirement, and that the imposition of a civil money penalty for such violation is appropriate, the representative may issue and serve a notice of penalty on such employer in person or by certified mail. Where service by certified mail is not accepted, notice shall be deemed received on the date of attempted delivery. Where service is not accepted, the notice may be served by regular mail.

§ 825.403 — How may an employer appeal the assessment of a penalty for willful violation of the posting requirement?

(a) An employer may obtain a review of the assessment of penalty from the Wage and Hour Regional Administrator for the region in which the alleged violation(s) occurred. If the employer does not seek such a review or fails to do so in a timely manner, the notice of the penalty constitutes the final ruling of the Secretary of Labor.

(b) To obtain review, an employer may file a petition with the Wage and Hour Regional Administrator for the region in which the alleged violations occurred. No particular form of petition for review is required, except that the petition must be in writing, should contain the legal and factual bases for the petition, and must be mailed to the Regional Administrator within 15 days of receipt of the notice of penalty. The employer may request an oral hearing which may be conducted by telephone.

(c) The decision of the Regional Administrator constitutes the final order of the Secretary.

§ 825.404 — What are the consequences of an employer not paying the penalty assessment after a final order is issued?

The Regional Administrator may seek to recover the unpaid penalty pursuant to the Debt Collection Act (DCA), 31 U.S.C. 3711 *et seq.*, and, in addition to seeking recovery of the unpaid final order, may seek interest and penalties as provided under the DCA. The final order may also be referred to the Solicitor of Labor for collection. The Secretary may file suit in any court of competent jurisdiction to recover the monies due as a result of the unpaid final order, interest, and penalties.

V. Subpart E, What Records Must Be Kept to Comply With the FMLA?

§ 825.500 — What records must an employer keep to comply with the FMLA?

(a) FMLA provides that covered employers shall make, keep, and preserve records pertaining to their obligations under the Act in accordance with the recordkeeping requirements of section 11(c) of the Fair Labor Standards Act (FLSA) and in accordance with these regulations. FMLA also restricts the authority of the Department of Labor to require any employer or plan, fund or program to submit books or records more than once during any 12-month period unless the Department has reasonable cause to believe a violation of the FMLA exists or the DOL is investigating a complaint. These regulations establish no requirement for the submission of any records unless specifically requested by a Departmental official.

(b) ***Form of records***. No particular order or form of records is required. These regulations establish no requirement that any employer revise its computerized payroll or personnel records systems to comply. However, employers must keep the records specified by these regulations for no less than three years and make them available for inspection, copying, and transcription by representatives of the Department of Labor upon request. The records may be maintained and preserved on microfilm or other basic source document of an automated data processing memory provided that adequate projection or viewing equipment is available, that the reproductions are clear and identifiable by date or pay period, and that extensions or transcriptions of the information required herein can be and are made available upon request. Records kept in computer form must be made available for transcription or copying.

(c) ***Items required***. Covered employers who have eligible employees must maintain records that must disclose the following:

(1) Basic payroll and identifying employee data, including name, address, and occupation; rate or basis of pay and terms of compensation; daily and weekly hours worked per pay period; additions to or deductions from wages; and total compensation paid.

(2) Dates FMLA leave is taken by FMLA eligible employees (*e.g.*, available from time records, requests for leave, *etc.*, if so designated). Leave must be designated in records as FMLA leave; leave so designated may not include leave required under State law or an employer plan which is not also covered by FMLA.

(3) If FMLA leave is taken by eligible employees in increments of less than one full day, the hours of the leave.

(4) Copies of employee notices of leave furnished to the employer under FMLA, if in writing, and copies of all general and specific written notices given to employees as required under FMLA and these regulations (*see* § 825.301(b)). Copies may be maintained in employee personnel files.

(5) Any documents (including written and electronic records) describing employee benefits or employer policies and practices regarding the taking of paid and unpaid leaves.

(6) Premium payments of employee benefits.

(7) Records of any dispute between the employer and an eligible employee regarding designation of leave as FMLA leave, including any written statement from the employer or employee of the reasons for the designation and for the disagreement.

(d) Covered employers with no eligible employees must maintain the records set forth in paragraph (c)(1) above.

(e) Covered employers in a joint employment situation (*see* § 825.106) must keep all the records required by paragraph (c) of this section with respect to any primary employees, and must keep the records required by paragraph (c)(1) with respect to any secondary employees.

(f) If FMLA-eligible employees are not subject to FLSA's recordkeeping regulations for purposes of minimum wage or overtime compliance (*i.e.*, not covered by or exempt from FLSA), an employer need not keep a record of actual hours worked (as otherwise required under FLSA, 29 CFR 516.2(a)(7)), provided that:

(1) eligibility for FMLA leave is presumed for any employee who has been employed for at least 12 months; and

(2) with respect to employees who take FMLA leave intermittently or on a reduced leave schedule, the employer and employee agree on the employee's normal schedule or average hours worked each week and reduce their agreement to a written record maintained in accordance with paragraph (b) of this section.

(g) Records and documents relating to medical certifications, recertifications or medical histories of employees or employees' family members, created for purposes of FMLA, shall be maintained as confidential medical records in separate files/records from the usual personnel files, and if ADA is also applicable, such records shall be maintained in conformance with ADA confidentiality requirements (*see* 29 CFR § 1630.14(c)(1)), except that:

(1) Supervisors and managers may be informed regarding necessary restrictions on the work or duties of an employee and necessary accommodations;

(2) First aid and safety personnel may be informed (when appropriate) if the employee's physical or medical condition might require emergency treatment; and

(3) Government officials investigating compliance with FMLA (or other pertinent law) shall be provided relevant information upon request.

(Approved by the Office of Management and Budget under control number 1215-0181.)

[60 FR 2237, Jan. 6, 1995; 60 FR 16383, Mar. 30, 1995]

VI. Subpart F, What Special Rules Apply to Employees of Schools?

§ 825.600 — To whom do the special rules apply?

(a) Certain special rules apply to employees of "local educational agencies," including public school boards and elementary and secondary schools under their jurisdiction, and private elementary and secondary schools. The special rules do not apply to other kinds of educational institutions, such

as colleges and universities, trade schools, and preschools.

(b) Educational institutions are covered by FMLA (and these special rules) and the Act's 50-employee coverage test does not apply. The usual requirements for employees to be "eligible" do apply, however, including employment at a worksite where at least 50 employees are employed within 75 miles. For example, employees of a rural school would not be eligible for FMLA leave if the school has fewer than 50 employees and there are no other schools under the jurisdiction of the same employer (usually, a school board) within 75 miles.

(c) The special rules affect the taking of intermittent leave or leave on a reduced leave schedule, or leave near the end of an academic term (semester), by instructional employees. "Instructional employees" are those whose principal function is to teach and instruct students in a class, a small group, or an individual setting. This term includes not only teachers, but also athletic coaches, driving instructors, and special education assistants such as signers for the hearing impaired. It does not include, and the special rules do not apply to, teacher assistants or aides who do not have as their principal job actual teaching or instructing, nor does it include auxiliary personnel such as counselors, psychologists, or curriculum specialists. It also does not include cafeteria workers, maintenance workers, or bus drivers.

(d) Special rules which apply to restoration to an equivalent position apply to all employees of local educational agencies.

§ 825.601 — What limitations apply to the taking of intermittent leave or leave on a reduced leave schedule?

(a) Leave taken for a period that ends with the school year and begins the next semester is leave taken consecutively rather than intermittently. The period during the summer vacation when the employee would not have been required to report for duty is not counted against the employee's FMLA leave entitlement. An instructional employee who is on FMLA leave at the end of the school year must be provided with any benefits over the summer vacation that employees would normally receive if they had been working at the end of the school year.

(1) If an eligible instructional employee needs intermittent leave or leave on a reduced leave schedule to care for a family member, or for the employee's own serious health condition, which is foreseeable based on planned medical treatment, and the employee would be on leave for more than 20 percent of the total number of working days over the period the leave would extend, the employer may require the employee to choose either to:

(i) Take leave for a period or periods of a particular duration, not greater than the duration of the planned treatment; or

(ii) Transfer temporarily to an available alternative position for which the employee is qualified, which has equivalent pay and benefits and which better accommodates recurring periods of leave than does the employee's regular position.

(2) These rules apply only to a leave involving more than 20 percent of the working days during the period over which the leave extends. For example, if an instructional employee who normally works five days each week needs to take two days of FMLA leave per week over a period of several weeks, the special rules would apply. Employees taking leave which constitutes 20 percent or less of the working days during the leave period would not be subject to transfer to an alternative position. "Periods of a particular duration" means a block, or blocks, of time beginning no earlier than the first day for which leave is needed and ending no later than the last day on which leave is needed, and may include one uninterrupted period of leave.

(b) If an instructional employee does not give required notice of foreseeable FMLA leave (*see* § 825.302) to be taken intermittently or on a reduced leave schedule, the employer may require the employee to take leave of a particular duration, or to transfer temporarily to an alternative position. Alternatively, the employer may require the employee to delay the taking of leave until the notice provision is met. *See* § 825.207(h).

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

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

(1) An instructional employee begins leave more than five weeks before the end of a term. The employer may require the employee to continue taking leave until the end of the term if—

(i) The leave will last at least three weeks, and

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

(2) The employee begins leave for a purpose other than the employee's own serious health condition *during* the five-week period before the end of a term. The employer may require the employee to continue taking leave until the end of the term if—

(i) The leave will last more than two weeks, and

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

(3) The employee begins leave for a purpose other than the employee's own serious health condition during the three-week period before the end of a term, and the leave will last more than five working days. The employer may require the employee to continue taking leave until the end of the term.

(b) For purposes of these provisions, "academic term" means the school semester, which typically ends near the end of the calendar year and the end of spring each school year. In no case may a school have more than two academic terms or semesters each year for purposes of FMLA. An example of leave falling within these provisions would be where an employee plans two weeks of leave to care for a family member which will begin three weeks before the end of the term. In that situation, the employer could require the employee to stay out on leave until the end of the term.

§ 825.603 — Is all leave taken during "periods of a particular duration" counted against the FMLA leave entitlement?

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

(b) In the case of an employee who is required to take leave until the end of an academic term, only the period of leave until the employee is ready and able to return to work shall be charged against the employee's FMLA leave entitlement. The employer has the option not to require the employee to stay on leave until the end of the school term. Therefore, any additional leave required by the employer to the end of the school term is not counted as FMLA leave; however, the employer shall be required to maintain the employee's group health insurance and restore the employee to the same or equivalent job including other benefits at the conclusion of the leave.

§ 825.604 — What special rules apply to restoration to "an equivalent position?"

The determination of how an employee is to be restored to "an equivalent position" upon return from FMLA leave will be made on the basis of "established school board policies and practices, private school policies and practices, and collective bargaining agreements." The "established policies" and collective bargaining agreements used as a basis for restoration must be in writing, must be made known to the employee prior to the taking of FMLA leave, and must clearly explain the employee's restoration rights upon return from leave. Any established policy which is used as the basis for restoration of an employee to "an equivalent position" must provide substantially the same protections as provided in the Act for reinstated employees. *See* § 825.215. In other words, the policy or collective bargaining agreement must provide for restoration to an "equivalent position" with equivalent employment benefits, pay, and other terms and conditions of employment. For example, an employee may not be restored to a position requiring additional licensure or certification.

VII. Subpart G, How Do Other Laws, Employer Practices, and Collective Bargaining Agreements Affect Employee Rights Under FMLA?

§ 825.700 — What if an employer provides more generous benefits than required by FMLA?

(a) An employer must observe any employment benefit program or plan that provides greater family or medical leave rights to employees than the rights established by the FMLA. Conversely, the rights established by the Act may not be diminished by any employment benefit program or plan. For example, a provision of a CBA which provides for reinstatement to a position that is not equivalent because of seniority (*e.g.*, provides lesser pay) is superseded by FMLA. If an employer provides greater unpaid family leave rights than are afforded by FMLA, the employer is not required to extend additional rights afforded by FMLA, such as maintenance of health benefits (other than through COBRA), to the additional leave period not covered by FMLA. If an employee takes paid or unpaid leave and the employer does not designate the leave as FMLA leave, the leave taken does not count against an employee's FMLA entitlement.

(b) Nothing in this Act prevents an employer from amending existing leave and employee benefit programs, provided they comply with FMLA. However, nothing in the Act is intended to discourage employers from adopting or retaining more generous leave policies.

(c)(1) The Act does not apply to employees under a collective bargaining agreement (CBA) in effect on August 5, 1993, until February 5, 1994, or the date the agreement terminates (*i.e.*, its expiration date), whichever is earlier. Thus, if the CBA contains family or medical leave benefits, whether greater or less than those under the Act, such benefits are not disturbed until the Act's provisions begin to apply to employees under that agreement. A CBA which provides no family or medical leave rights also continues in effect. For CBAs subject to the Railway Labor Act and other CBAs which do not have an expiration date for the general terms, but which may be reopened at specified times, *e.g.*, to amend wages and benefits, the first time the agreement is amended after August 5, 1993, shall be considered the termination date of the CBA, and the effective date for FMLA.

(2) As discussed in § 825.102(b), the period prior to the Act's delayed effective date must be considered in determining employer coverage and employee eligibility for FMLA leave.

§ 825.701 — Do State laws providing family and medical leave still apply?

(a) Nothing in FMLA supersedes any provision of State or local law that provides greater family or medical leave rights than those provided by FMLA. The Department of Labor will not, however, enforce State family or medical leave laws, and States may not enforce the FMLA. Employees are not required to designate whether the leave they are taking is FMLA leave or leave under State law, and an employer must comply with the appropriate (applicable) provisions of both. An employer covered by one law and not the other has to comply only with the law under which it is covered. Similarly, an employee eligible under only one law must receive benefits in accordance with that law. If leave qualifies for FMLA leave and leave under State law, the leave used counts against the employee's entitlement under both laws. Examples of the interaction between FMLA and State laws include:

(1) If State law provides 16 weeks of leave entitlement over two years, an employee would be entitled to take 16 weeks one year under State law and 12 weeks the next year under FMLA. Health benefits maintenance under FMLA would be applicable only to the first 12 weeks of leave entitlement each year. If the employee took 12 weeks the first year, the employee would be entitled to a maximum of 12 weeks the second year under FMLA (not 16 weeks). An employee would not be entitled to 28 weeks in one year.

(2) If State law provides half-pay for employees temporarily disabled because of pregnancy for six weeks, the employee would be entitled to an additional six weeks of unpaid FMLA leave (or accrued paid leave).

(3) A shorter notice period under State law must be allowed by the employer unless an employer has already provided, or the em-

ployee is requesting, more leave than required under State law.

(4) If State law provides for only one medical certification, no additional certifications may be required by the employer unless the employer has already provided, or the employee is requesting, more leave than required under State law.

(5) If State law provides six weeks of leave, which may include leave to care for a seriously-ill grandparent or a "spouse equivalent," and leave was used for that purpose, the employee is still entitled to 12 weeks of FMLA leave, as the leave used was provided for a purpose not covered by FMLA. If FMLA leave is used first for a purpose also provided under State law, and State leave has thereby been exhausted, the employer would not be required to provide additional leave to care for the grandparent or "spouse equivalent."

(6) If State law prohibits mandatory leave beyond the actual period of pregnancy disability, an instructional employee of an educational agency subject to special FMLA rules may not be required to remain on leave until the end of the academic term, as permitted by FMLA under certain circumstances. (*See* Subpart F of this part.)

§ 825.702 — How does FMLA affect Federal and State anti-discrimination laws?

(a) Nothing in FMLA modifies or affects any Federal or State law prohibiting discrimination on the basis of race, religion, color, national origin, sex, age, or disability (*e.g.*, Title VII of the Civil Rights Act of 1964, as amended by the Pregnancy Discrimination Act). FMLA's legislative history explains that FMLA is "not intended to modify or affect the Rehabilitation Act of 1973, as amended, the regulations concerning employment which have been promulgated pursuant to that statute, or the Americans with Disabilities Act of 1990, or the regulations issued under that act. Thus, the leave provisions of the [FMLA] are wholly distinct from the reasonable accommodation obligations of employers covered under the [ADA], employers who receive Federal financial assistance, employers who contract with the Federal government, or the Federal government itself. The purpose of the FMLA is to make leave available to eligible employees and employers within its coverage, and not to limit already existing rights and protection." S. Rep. No. 3, 103d Cong., 1st Sess. 38 (1993). An employer must therefore provide leave under whichever statutory provision provides the greater rights to employees. When an employer violates both FMLA and a discrimination law, an employee may be able to recover under either or both statutes (double relief may not be awarded for the same loss; when remedies coincide a claimant may be allowed to utilize whichever avenue of relief is desired (*Laffey v. Northwest Airlines, Inc.*, 567 F.2d 429, 445 (D.C. Cir. 1976), *cert. denied*, 434 U.S. 1086 (1978))).

(b) If an employee is a qualified individual with a disability within the meaning of the Americans with Disabilities Act (ADA), the employer must make reasonable accommodations, *etc.*, barring undue hardship, in accordance with the ADA. At the same time, the employer must afford an employee his or her FMLA rights. ADA's "disability" and FMLA's "serious health condition" are different concepts, and must be analyzed separately. FMLA entitles eligible employees to 12 weeks of leave in any 12-month period, whereas the ADA allows an indeterminate amount of leave, barring undue hardship, as a reasonable accommodation. FMLA requires employers to maintain employees' group health plan coverage during FMLA leave on the same conditions as coverage would have been provided if the employee had been continuously employed during the leave period, whereas ADA does not require maintenance of health insurance unless other employees receive health insurance during leave under the same circumstances.

(c)(1) A reasonable accommodation under the ADA might be accomplished by providing an individual with a disability with a part-time job with no health benefits, assuming the employer did not ordinarily provide health insurance for part-time employees. However, FMLA would permit an employee to work a reduced leave schedule until the equivalent of 12 workweeks of leave were used, with group health benefits maintained during this period. FMLA permits an employer to temporarily transfer an employee who is taking leave intermittently or on a reduced leave schedule to an alternative position, whereas the ADA allows an accommodation of reassign-

ment to an equivalent, vacant position only if the employee cannot perform the essential functions of the employee's present position and an accommodation is not possible in the employee's present position, or an accommodation in the employee's present position would cause an undue hardship. The examples in the following paragraphs of this section demonstrate how the two laws would interact with respect to a qualified individual with a disability.

(2) A qualified individual with a disability who is also an "eligible employee" entitled to FMLA leave requests 10 weeks of medical leave as a reasonable accommodation, which the employer grants because it is not an undue hardship. The employer advises the employee that the 10 weeks of leave is also being designated as FMLA leave and will count towards the employee's FMLA leave entitlement. This designation does not prevent the parties from also treating the leave as a reasonable accommodation and reinstating the employee into the *same* job, as required by the ADA, rather than an equivalent position under FMLA, if that is the greater right available to the employee. At the same time, the employee would be entitled under FMLA to have the employer maintain group health plan coverage during the leave, as that requirement provides the greater right to the employee.

(3) If the same employee needed to work part-time (a reduced leave schedule) after returning to his or her same job, the employee would still be entitled under FMLA to have group health plan coverage maintained for the remainder of the two-week equivalent of FMLA leave entitlement, notwithstanding an employer policy that part-time employees do not receive health insurance. This employee would be entitled under the ADA to reasonable accommodations to enable the employee to perform the essential functions of the part-time position. In addition, because the employee is working a part-time schedule as a reasonable accommodation, the employee would be shielded from FMLA's provision for temporary assignment to a different alternative position. Once the employee has exhausted his or her remaining FMLA leave entitlement while working the reduced (part-time) schedule, if the employee is a qualified individual with a disability, and if the employee is unable to return to the same full-time position at that time, the employee might continue to work part-time as a reasonable accommodation, barring undue hardship; the employee would then be entitled to only those employment benefits ordinarily provided by the employer to part-time employees.

(4) At the end of the FMLA leave entitlement, an employer is required under FMLA to reinstate the employee in the same or an equivalent position, with equivalent pay and benefits, to that which the employee held when leave commenced. The employer's FMLA obligations would be satisfied if the employer offered the employee an equivalent full-time position. If the employee were unable to perform the essential functions of that equivalent position even with reasonable accommodation, because of a disability, the ADA may require the employer to make a reasonable accommodation at that time by allowing the employee to work part-time or by reassigning the employee to a vacant position, barring undue hardship.

(d)(1) If FMLA entitles an employee to leave, an employer may not, in lieu of FMLA leave entitlement, *require* an employee to take a job with a reasonable accommodation. However, ADA may require that an employer offer an employee the opportunity to take such a position. An employer may not change the essential functions of the job in order to deny FMLA leave. *See* § 825.220(b).

(2) An employee may be on a workers' compensation absence due to an on-the-job injury or illness which also qualifies as a serious health condition under FMLA. The workers' compensation absence and FMLA leave may run concurrently (subject to proper notice and designation by the employer). At some point the health care provider providing medical care pursuant to the workers' compensation injury may certify the employee is able to return to work in a "light duty" position. If the employer offers such a position, the employee is permitted but not required to accept the position (*see* § 825.220(d)). As a result, the employee may no longer qualify for payments from the workers' compensation benefit plan, but the employee is entitled to continue on unpaid FMLA leave either until the employee is able to return to the same or equivalent job the employee left or until the 12-week FMLA leave entitlement

is exhausted. *See* § 825.207(d)(2). If the employee returning from the workers' compensation injury is a qualified individual with a disability, he or she will have rights under the ADA.

(e) If an employer requires certifications of an employee's fitness for duty to return to work, as permitted by FMLA under a uniform policy, it must comply with the ADA requirement that a fitness for duty physical be job-related and consistent with business necessity.

(f) Under Title VII of the Civil Rights Act of 1964, as amended by the Pregnancy Discrimination Act, an employer should provide the same benefits for women who are pregnant as the employer provides to other employees with short-term disabilities. Because Title VII does not require employees to be employed for a certain period of time to be protected, an employee employed for less than 12 months by the employer (and, therefore, not an "eligible" employee under FMLA) may not be denied maternity leave if the employer normally provides short-term disability benefits to employees with the same tenure who are experiencing other short-term disabilities.

(g) For further information on Federal antidiscrimination laws, including Title VII and the ADA, individuals are encouraged to contact the nearest office of the U.S. Equal Employment Opportunity Commission.

[60 FR 2237, Jan. 6, 1995; 60 FR 16383, Mar. 30, 1995]

VIII. Subpart H, Definitions

§ 825.800 — Definitions.

For purposes of this part:

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

ADA means the Americans With Disabilities Act (42 USC 12101 *et seq.*)

Administrator means the Administrator of the Wage and Hour Division, Employment Standards Administration, U.S. Department of Labor, and includes any official of the Wage and Hour Division authorized to perform any of the functions of the Administrator under this part.

COBRA means the continuation coverage requirements of Title X of the Consolidated Omnibus Budget Reconciliation Act of 1986, As Amended (Pub.L. 99-272, title X, section 10002; 100 Stat 227; 29 U.S.C. 1161-1168).

Commerce and ***industry or activity affecting commerce*** mean any activity, business, or industry in commerce or in which a labor dispute would hinder or obstruct commerce or the free flow of commerce, and include "commerce" and any "industry affecting commerce" as defined in sections 501(1) and 501(3) of the Labor Management Relations Act of 1947, 29 U.S.C. 142(1) and (3).

Continuing treatment means: A serious health condition involving continuing treatment by a health care provider includes any one or more of the following:

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

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

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

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

(3) Any period of incapacity or treatment for such incapacity due to a chronic serious health condition. A chronic serious health condition is one which:

(i) Requires periodic visits for treatment by a health care provider, or by a nurse or physician's assistant under direct supervision of a health care provider;

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

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

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

(5) Any period of absence to receive multiple treatments (including any period of recovery therefrom) by a health care provider or by a provider of health care services under orders of, or on referral by, a health care provider, either for restorative surgery after an accident or other injury, or for a condition that would likely result in a period of incapacity of more than three consecutive calendar days in the absence of medical intervention or treatment, such as cancer (chemotherapy, radiation, *etc.*), severe arthritis (physical therapy), kidney disease (dialysis).

Eligible employee means:

(1) An employee who has been employed for a total of at least 12 months by the employer on the date on which any FMLA leave is to commence; and

(2) Who, on the date on which any FMLA leave is to commence, has been employed for at least 1,250 hours of service with such employer during the previous 12-month period; and

(3) Who is employed in any State of the United States, the District of Columbia or any Territories or possession of the United States.

(4) Excludes any Federal officer or employee covered under subchapter V of chapter 63 of title 5, United States Code; and

(5) Excludes any employee of the U.S. Senate or the U.S. House of Representatives covered under title V of the FMLA; and

(6) Excludes any employee who is employed at a worksite at which the employer employs fewer than 50 employees if the total number of employees employed by that employer within 75 miles of that worksite is also fewer than 50.

(7) Excludes any employee employed in any country other than the United States or any Territory or possession of the United States.

Employ means to suffer or permit to work.

Employee has the meaning given the same term as defined in section 3(e) of the Fair Labor Standards Act, 29 U.S.C. 203(e), as follows:

(1) The term "employee" means any individual employed by an employer;

(2) In the case of an individual employed by a public agency, "employee" means—

(i) Any individual employed by the Government of the United States—

(A) As a civilian in the military departments (as defined in section 102 of Title 5, United States Code),

(B) In any executive agency (as defined in section 105 of Title 5, United States Code), excluding any Federal officer or employee covered under subchapter V of chapter 63 of Title 5, United States Code,

(C) In any unit of the legislative or judicial branch of the Government which has positions in the competitive service, excluding any employee of the U.S. Senate or U.S. House of Representatives who is covered under Title V of FMLA,

(D) In a nonappropriated fund instrumentality under the jurisdiction of the Armed Forces, or

(ii) Any individual employed by the United States Postal Service or the Postal Rate Commission; and

(iii) Any individual employed by a State, political subdivision of a State, or an interstate governmental agency, other than such an individual —

(A) Who is not subject to the civil service laws of the State, political subdivision, or agency which employs the employee; and

(B) Who—

(1) Holds a public elective office of that State, political subdivision, or agency,

(2) Is selected by the holder of such an office to be a member of his personal staff,

(3) Is appointed by such an officeholder to serve on a policymaking level,

(4) Is an immediate adviser to such an officeholder with respect to the constitutional or legal powers of the office of such officeholder, or

(5) Is an employee in the legislative branch or legislative body of that State, political subdivision, or agency and is not employed by the legislative library of such State, political subdivision, or agency.

Employee employed in an instructional capacity. See ***Teacher***.

Employer means any person engaged in commerce or in an industry or activity affecting commerce who employs 50 or more employees for each working day during each of 20 or more calendar workweeks in the current or preceding calendar year, and includes—

(1) Any person who acts, directly or indirectly, in the interest of an employer to any of the employees of such employer;

(2) Any successor in interest of an employer; and

(3) Any public agency.

Employment benefits means all benefits provided or made available to employees by an employer, including group life insurance, health insurance, disability insurance, sick leave, annual leave, educational benefits, and pensions, regardless of whether such benefits are provided by a practice or written policy of an employer or through an "employee benefit plan" as defined in section 3(3) of the Employee Retirement Income Security Act of 1974, 29 U.S.C. 1002(3). The term does not include non-employment related obligations paid by employees through voluntary deductions such as supplemental insurance coverage. (*See* § 825.209(a)).

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

Group health plan means any plan of, or contributed to by, an employer (including a self-insured plan) to provide health care (directly or otherwise) to the employer's employees, former employees, or the families of such employees or former employees. For purposes of FMLA the term "group health plan" shall not include an insurance program providing health coverage under which employees purchase individual policies from insurers provided that:

(1) No contributions are made by the employer;

(2) Participation in the program is completely voluntary for employees;

(3) The sole functions of the employer with respect to the program are, without endorsing the program, to permit the insurer to publicize the program to employees, to collect premiums through payroll deductions and to remit them to the insurer;

(4) The employer receives no consideration in the form of cash or otherwise in connection with the program, other than reasonable compensation, excluding any profit, for administrative services actually rendered in connection with payroll deduction; and,

(5) the premium charged with respect to such coverage does not increase in the event the employment relationship terminates.

Health care provider means:

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

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

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

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

(5) Any health care provider from whom an employer or a group health plan's benefits manager will accept certification of the existence of a serious health condition to substantiate a claim for benefits.

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

"Incapable of self-care" means that the individual requires active assistance or supervision to provide daily self-care in several of the "activities of daily living" (ADLs) or "instrumental activities of daily living" (IADLs). Activities of daily living include adaptive activities such as caring appropriately for one's grooming and hygiene, bathing, dressing and eating. Instrumental activities of daily living include cooking, cleaning, shopping, taking public transportation, paying bills, maintaining a residence, using telephones and directories, using a post office, *etc.*

Instructional employee: See ***Teacher***.

Intermittent leave means leave taken in separate periods of time due to a single illness or injury, rather than for one continuous period of time, and may include leave of periods from an hour or more to several weeks. Examples of intermittent leave would include leave taken on an occasional basis for medical appointments, or leave taken several days at a time spread over a period of six months, such as for chemotherapy.

Mental disability: See ***Physical or mental disability***.

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

Person means an individual, partnership, association, corporation, business trust, legal representative, or any organized group of persons, and includes a public agency for purposes of this part.

Physical or mental disability means a physical or mental impairment that substantially limits one or more of the major life activities of an individual. Regulations at 29 CFR Part 1630.2(h), (i), and (j), issued by the Equal Employment Opportunity Commission under the Americans with Disabilities Act (ADA), 42 U.S.C. 12101 *et seq.*, define these terms.

Public agency means the government of the United States; the government of a State or political subdivision thereof; any agency of the United States (including the United States Postal Service and Postal Rate Commission), a State, or a political subdivision of a State, or any interstate governmental agency. Under section 101(5)(B) of the Act, a public agency is considered to be a "person" engaged in commerce or in an industry or activity affecting commerce within the meaning of the Act.

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

Secretary means the Secretary of Labor or authorized representative.

Serious health condition entitling an employee to FMLA leave means:

(1) an illness, injury, impairment, or physical or mental condition that involves:

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

(ii) ***Continuing treatment*** by a health care provider. A serious health condition involving continuing treatment by a health care provider includes:

(A) A period of *incapacity* (*i.e.*, inability to work, attend school or perform other regular daily activities due to the serious health condition, treatment therefore, or recovery therefrom) of more than three consecutive calendar days, including any subsequent treatment or period of incapacity relating to the same condition, that also involves:

(1) Treatment two or more times by a health care provider, by a nurse or physician's assistant under direct supervision of a health care provider, or by a provider of health care services (*e.g.*, physical therapist) under orders of, or on referral by, a health care provider; or

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

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

(C) Any period of incapacity or treatment for such incapacity due to a chronic serious health condition. A chronic serious health condition is one which:

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

(2) Continues over an extended period of time (including recurring episodes of a single underlying condition); and

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

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

(E) Any period of absence to receive multiple treatments (including any period of recovery therefrom) by a health care provider or by a provider of health care services under orders of, or on referral by, a health care provider, either for restorative surgery after an accident or other injury, or for a condition that would likely result in a period of incapacity of more than three consecutive calendar days in the absence of medical intervention or treatment, such as cancer (chemotherapy, radiation, *etc.*), severe arthritis (physical therapy), kidney disease (dialysis).

(2) Treatment for purposes of paragraph (1) of this definition includes (but is not limited to) examinations to determine if a serious health condition exists and evaluations of the condition. Treatment does not include routine physical examinations, eye examinations, or dental examinations. Under paragraph (1)(ii)(A)(2) of this definition, a regimen of continuing treatment includes, for example, a course of prescription medication (*e.g.*, an antibiotic) or therapy requiring special equipment to resolve or alleviate the health condition (*e.g.*, oxygen). A regimen of continuing treatment that includes the taking of over-the-counter medications such as aspirin, antihistamines, or salves; or bed-rest, drinking fluids, exercise, and other similar activities that can be initiated without a visit to a health care provider, is not, by itself, sufficient to constitute a regimen of continuing treatment for purposes of FMLA leave.

(3) Conditions for which cosmetic treatments are administered (such as most treatments for acne or plastic surgery) are not "serious health conditions" unless inpatient hospital care is required or unless complications develop. Ordinarily, unless complications arise, the common cold, the flu, ear aches, upset stomach minor, ulcers, headaches other than migraine, routine dental or orthodontia problems, periodontal disease, *etc.*, are examples of conditions that do not meet the definition of a serious health condition and do not qualify for FMLA leave. Restorative dental or plastic surgery after an injury or removal of cancerous growths are serious health conditions provided all the other conditions of this regulation are met. Mental illness resulting from stress or allergies may be serious health conditions, but only if all the conditions of this section are met.

(4) Substance abuse may be a serious health condition if the conditions of this section are met. However, FMLA leave may only be taken for treatment for substance abuse by a health care provider or by a provider of health care services on referral by a health care provider. On the other hand, absence because of the employee's use of the substance, rather than for treatment, does not qualify for FMLA leave.

(5) Absences attributable to incapacity under paragraphs (1)(ii) (B) or (C) of this definition qualify for FMLA leave even though the employee or the immediate family member does not receive treatment from a health care provider during the absence, and even if the absence does not last more than three days. For example, an employee with asthma may be unable to report for work due to the onset of an asthma attack or because the employee's health care provider has advised the employee to stay home when the pollen count exceeds a certain level. An employee who is pregnant may be unable to report to work because of severe morning sickness.

Son or ***daughter*** means a biological, adopted, or foster child, a stepchild, a legal ward, or a child of a person standing *in loco parentis*, who is under 18 years of age or 18 years of age or older and incapable of self-care because of a mental or physical disability.

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

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

Teacher (or ***employee employed in an instructional capacity***, or ***instructional employee***) means an employee employed principally in an instructional capacity by an educational agency or school whose principal function is to teach and instruct students in a class, a small group, or an individual setting, and includes athletic coaches, driving instructors, and special education assistants such as signers for the hearing impaired. The term does not include teacher assistants or aides who do not have as their principal function actual teaching or instructing, nor auxiliary personnel such as counselors, psychologists, curriculum specialists, cafeteria workers, maintenance workers, bus drivers, or other primarily non-instructional employees.

Appendix A to Part 825 — Index

The citations listed in this Appendix are to sections in 29 CFR Part 825.

Appendix B to Part 825 — Certification of Health Care Provider (Optional Form WH-380)

Certification of Health Care Provider
(Family and Medical Leave Act of 1993)

U.S. Department of Labor
Employment Standards Administration
Wage and Hour Division

1. Employee's Name

2. Patient's Name (if different from employee)

3. The attached sheet describes what is meant by a **"serious health condition"** under the Family and Medical Leave Act. Does the patient's condition[1] qualify under any of the categories described? If so, please check the applicable category.

(1) ____ (2) ____ (3) ____ (4) ____ (5) ____ (6) ____, or None of the above ____

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

5.a. State the approximate **date** the condition commenced, and the probable **duration** of the condition (and also the probable duration of the patient's present **incapacity**[2] if different):

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

If yes, give the probable duration:

c. If the condition is a **chronic condition** (condition #4) or **pregnancy**, state whether the patient is presently incapacitated[2] and the likely duration and frequency of **episodes of incapacity**[2]:

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

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

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

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

[2] **"Incapacity,"** for purposes of FMLA, is defined to mean inability to work, attend school or perform other regular daily activities due to the serious health condition, treatment therefor, or recovery therefrom.

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

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

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

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

_____

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

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

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

_____ _____

(Signature of Health Care Provider) (Type of Practice)

_____ _____

(Address) (Telephone number)

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

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

_____ _____

(Employee Signature) (Date)

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

1. Hospital Care

Inpatient care (*i.e.*, an overnight stay) in a hospital, hospice, or residential medical care facility, including any period of incapacity[2] or subsequent treatment in connection with or consequent to such inpatient care.

2. Absence Plus Treatment

(a) A period of incapacity[2] of **more than three consecutive calendar days** (including any subsequent treatment or period of incapacity[2] relating to the same condition), that also involves:

(1) **Treatment[3] two or more times** by a health care provider, by a nurse or physician's assistant under direct supervision of a health care provider, or by a provider of health care services (*e.g.*, physical therapist) under orders of, or on referral by, a health care provider; *or*

(2) **Treatment** by a health care provider on **at least one occasion** which results in a **regimen of continuing treatment[4]** under the supervision of the health care provider.

3. Pregnancy

Any period of incapacity due to **pregnancy,** or for **prenatal care.**

4. Chronic Conditions Requiring Treatments

A **chronic condition** which:

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

(2) Continues over an **extended period of time** (including recurring episodes of a single underlying condition); and

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

5. Permanent/Long-term Conditions Requiring Supervision

A period of **incapacity[2]** which is **permanent or long-term** due to a condition for which treatment may not be effective. The employee or family member must be **under the continuing supervision of, but need not be receiving active treatment by, a health care provider.** Examples include Alzheimer's, a severe stroke, or the terminal stages of a disease.

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

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

Appendix B

6. Multiple Treatments (Non-Chronic Conditions)

Any period of absence to receive **multiple treatments** (including any period of recovery therefrom) by a health care provider or by a provider of health care services under orders of, or on referral by, a health care provider, either for **restorative surgery** after an accident or other injury, **or** for a condition that **would likely result in a period of incapacity[2] of more than three consecutive calendar days in the absence of medical intervention or treatment,** such as cancer (chemotherapy, radiation, etc.), severe arthritis (physical therapy), kidney disease (dialysis).

Your Rights
Under The
Family and Medical Leave Act of 1993

FMLA requires covered employers to provide up to 12 weeks of unpaid, job-protected leave to "eligible" employees for certain family and medical reasons. Employees are eligible if they have worked for a covered employer for at least one year, and for 1,250 hours over the previous 12 months, and if there are at least 50 employees within 75 miles.

Reasons For Taking Leave:

Unpaid leave must be granted for *any* of the following reasons:

- to care for the employee's child after birth, or placement for adoption or foster care;
- to care for the employee's spouse, son or daughter, or parent, who has a serious health condition; or
- for a serious health condition that makes the employee unable to perform the employee's job.

At the employee's or employer's option, certain kinds of *paid* leave may be substituted for unpaid leave.

Advance Notice and Medical Certification:

The employee may be required to provide advance leave notice and medical certification. Taking of leave may be denied if requirements are not met.

- The employee ordinarily must provide 30 days advance notice when the leave is "foreseeable."
- An employer may require medical certification to support a request for leave because of a serious health condition, and may require second or third opinions (at the employer's expense) and a fitness for duty report to return to work.

Job Benefits and Protection:

- For the duration of FMLA leave, the employer must maintain the employee's health coverage under any "group health plan."
- Upon return from FMLA leave, most employees must be restored to their original or equivalent positions with equivalent pay, benefits, and other employment terms.
- The use of FMLA leave cannot result in the loss of any employment benefit that accrued prior to the start of an employee's leave.

Unlawful Acts By Employers:

FMLA makes it unlawful for any employer to:

- interfere with, restrain, or deny the exercise of any right provided under FMLA:
- discharge or discriminate against any person for opposing any practice made unlawful by FMLA or for involvement in any proceeding under or relating to FMLA.

Enforcement:

- The U.S. Department of Labor is authorized to investigate and resolve complaints of violations.
- An eligible employee may bring a civil action against an employer for violations.

FMLA does not affect any Federal or State law prohibiting discrimination, or supersede any State or local law or collective bargaining agreement which provides greater family or medical leave rights.

For Additional Information:

Contact the nearest office of the Wage and Hour Division, listed in most telephone directories under U.S. Government, Department of Labor.

U.S. Department of Labor
Employment Standards Administration
Wage and Hour Division
Washington, D.C. 20210

WH Publication 1420
June 1993

* U S G.P.O.: 353-606

Appendix D to Part 825 - Prototype Notice: Employer Response to Employee Request for FMLA Leave (Form WH-381)

Employer Response to Employee
Request for Family or Medical Leave
(Optional use form - see 29 CFR § 825.301

U.S. Department of Labor
Employment Standards Administration
Wage and Hour Division

(Family and Medical Leave Act of 1993)

(Date)

TO: _____
(Employee's Name)

FROM: _____
(Name of appropriate employer representative)

SUBJECT: Request for Family/Medical Leave

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

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

☐ a serious health condition that makes you unable to perform the essential functions of your job; or

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

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

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

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

1. You are ☐ eligible ☐ not eligible for leave under the FMLA.

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

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

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

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

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

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

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

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

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

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

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

Appendix E to Part 825 - IRS Notice Discussing Relationship Between FMLA and COBRA

Internal Revenue Bulletin No. 1994-51 (December 19, 1994), pp. 10-11.

Part III. Administrative, Procedural, and Miscellaneous

Effect of the Family and Medical Leave Act on COBRA Continuation Coverage

Notice 94-103

The Family and Medical Leave Act of 1993 ("FMLA"), P.L. 103-3, imposes certain requirements on employers regarding coverage, including family coverage, under group health plans for employees taking FMLA leave. Many employers have raised questions about how the requirements under FMLA affect their obligation to provide COBRA continuation coverage in accordance with the requirements of section 4980B of the Internal Revenue Code. This notice addresses a number of the principal questions that have been raised.

The requirements pertaining to FMLA leave, including the employer's obligation to maintain coverage under a group health plan during FMLA leave, are established under FMLA, not under the Internal Revenue Code. The U.S. Department of Labor has published rules interpreting the requirements of FMLA in part 825 of title 29 of the Code of Federal Regulations. The determination of when FMLA leave ends is relevant to the guidance provided in this notice. Although this notice makes several references to the first day or the last day of FMLA leave, the notice does not purport to provide guidance on when FMLA leave begins or ends or on any other aspect of FMLA leave; instead, the notice provides guidance on the COBRA continuation coverage requirements that may arise once FMLA leave has ended (as determined under FMLA and the Labor Regulations thereunder). *See, e.g.*, 29 C.F.R. § 825.209(f) and (g).

Q-1: *In What Circumstances Does a COBRA Qualifying Event Occur If an Employee Does Not Return from FMLA Leave?*

A-1: The taking of leave under FMLA does not constitute a qualifying event under section 4980B of the Code. A qualifying event under section 4980B(f)(3)(B) occurs, however, if (1) an employee (or the spouse or a dependent child of the employee) is covered on the day before the first day of FMLA leave (or becomes covered during the FMLA leave) under a group health plan of the employee's employer, (2) the employee does not return to employment with the employer at the end of the FMLA leave, and (3) the employee (or the spouse or a dependent child of the employee) would, in the absence of COBRA continuation coverage, lose coverage under the group health plan (*i.e.*, cease to be covered under the same terms and conditions as in effect for similarly situated active employees and their spouses and dependent children) before the end of what would be the maximum coverage period. However, the satisfaction of the three conditions in the preceding sentence does not constitute a qualifying event if the employer eliminates, on or before the last day of the employee's FMLA leave, coverage under a group health plan for the class of employees (while continuing to employ that class of employees) to which the employee would have belonged if the employee had not taken FMLA leave.

Q-2: *When Does the COBRA Qualifying Event Occur, and How is the Maximum Coverage Period Measured?*

A qualifying event described in Q&A-1 occurs on the last day of FMLA leave. The maximum coverage period is measured from the date of the qualifying event (*i.e.*, the last day of FMLA leave). If, however, coverage under the group health plan is lost at a later date and the plan provides for the extension of the required periods, as permitted under section 4980B(f)(8) of the Code, then the maximum coverage period is measured from the date when coverage is lost.

Example 1: Employee *A* is covered under the group health plan of Employer *X* on January 31, 1995. *A* takes FMLA leave beginning February 1, 1995. *A*'s last day of FMLA leave is 12 weeks later, on April 25, 1995, and *A* does not return to work with *X* at the end of the FMLA leave. If *A* does not elect COBRA continuation coverage, *A* will lose coverage under the group health plan of *X* on April 26, 1995.

A experiences a qualifying event on April 25, 1995, and the maximum coverage period (generally 18 months) is measured from that date. (This is the case even if, for part or all of the FMLA leave, *A* fails to pay the employee portion of premiums for coverage under the group health plan of *X* and is not covered under *X*'s plan. *See* Q&A-3 below.)

Example 2: Employee *B* and *B*'s spouse are covered under the group health plan of Employer *Y* on August 15, 1995. *B* takes FMLA leave beginning August 16, 1995. *B* informs *Y* less than 7 weeks later, on September 28, 1995, that *B* will not be returning to work. Under the FMLA regulations published by the Department of Labor in part 825 of title 29 of the Code of Federal Regulations, *B*'s last day of FMLA leave is September 28, 1995. *B* does not return to work with *Y* at the end of the FMLA leave. If *B* and *B*'s spouse do not elect COBRA continuation coverage, they will lose coverage under the group health plan of *Y* on September 29, 1995.

B and B's spouse experience a qualifying event on September 28, 1995, and the maximum coverage period (generally 18 months) is measured from that date. (This is the case even if, for part or all of the FMLA leave, *B* fails to pay the employee portion of premiums for coverage under the group health plan of *Y* and *B* or *B*'s spouse is not covered under *Y*'s plan. *See* Q&A-3 below.)

Q-3: *Can a COBRA Qualifying Event Occur If an Employee Failed to Pay the Employee Portion of Premiums for Coverage Under a Group Health Plan During FMLA Leave or Declined Coverage Under a Group Health Plan During FMLA Leave?*

A-3: Yes. Any lapse of coverage under a group health plan during FMLA leave is irrelevant in determining whether a set of circumstances constitutes a qualifying event under Q&A-1 of this notice or when such a qualifying event occurs under Q&A-2.

Q-4: *Are the Foregoing Rules Affected by a Requirement of State or Local Law to Provide a Longer Period of Coverage Than That Required Under FMLA?*

A-4: No. Any State or local law that requires coverage under a group health plan to be maintained during a leave of absence for a period longer than that required under FMLA (for example, for 16 weeks of leave rather

than for the 12 weeks required under FMLA) is disregarded for purposes of determining when a qualifying event occurs under section 4980B of the Code.

Q-5: *May COBRA Continuation Coverage Be Conditioned Upon Reimbursement of the Premiums Paid by the Employer for Coverage Under a Group Health Plan During FMLA Leave?*

A-5: No. The U.S. Department of Labor has published rules describing the circumstances in which an employer may recover premiums it pays to maintain coverage, including family coverage, under a group health plan during FMLA leave from an employee who fails to return from leave. *See* 29 CFR § 825.213. Even if recovery of premiums is permitted under those rules, the right to COBRA continuation coverage cannot be conditioned upon the employee's reimbursement of the employer for premiums the employer paid to maintain coverage under a group health plan during FMLA leave.

Q-6: *How Is the COBRA Notice Period for Employers Satisfied?*

A-6: In the case of an employee (or the spouse or a dependent child of an employee) who experiences a qualifying event described in Q&A-1 of this notice, the usual notice rules of section 4980B(f)(6) of the Code apply. Thus, the employer must notify the plan administrator of the qualifying event within 30 days (or, in the case of a group health plan which is a multiemployer plan, such longer period of time as may be provided in the terms of the plan) of the last day of FMLA leave. If, however, coverage under the group health plan is lost after the last day of FMLA leave and the plan provides for the extension of the required periods, as permitted under section 4980B(f)(8), then the applicable notice period of section 4980B(f)(6)(B) commences on the date coverage is lost.

Q-7: *What is the Effect of This Notice?*

A-7: Before the effective date of final regulations under section 4980B of the Code, employers and group health plans must operate in good faith compliance with a reasonable interpretation of the statutory requirements for COBRA continuation coverage. Whether there has been good faith compliance with a reasonable interpretation will be determined based on all the facts and circumstances of each case; however, the Service will consider compliance with the terms of this notice to constitute good faith compliance with a reasonable interpretation of the COBRA continuation coverage requirements of section 4980B of the Code as they apply to FMLA leave situations, but only to the extent that this notice addresses the COBRA continuation coverage requirements in such situations.

DRAFTING INFORMATION

The principal author of this notice is Russ Weinheimer of the Office of the Associate Chief Counsel (Employee Benefits and Exempt Organizations). For further information regarding this notice, contact Mr. Weinheimer at (202) 622-4695 (not a toll-free number).

☆ U. S. G. P. O. 2003-300-725/90008