

VIII. Transfer to an Alternative Position

The RFI did not specifically ask questions about an employer's ability to transfer an employee to an "alternative position" but the Department received many unsolicited comments on this topic. Under the Act, an employer may transfer an employee to an "alternative position" with equivalent pay and benefits when the employee needs to take intermittent or reduced schedule leave "that is foreseeable based on planned medical treatment[.]" 29 U.S.C. § 2612(b)(2). This statutory 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." 60 Fed. Reg. 2180, 2202 (Jan. 6, 1995).

Section 825.204 of the regulations explains more fully when an employer may transfer an employee to an alternative position in order to accommodate intermittent leave or a reduced leave schedule. Section 825.204(a) sets the general parameters for the transfer: "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, . . . 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." 29 C.F.R. § 825.204(a).

Section 825.204(d) prohibits an employer from "transfer[ing] the employee to an alternative position in order to discourage the employee from taking leave or otherwise work a hardship on the employee." Section 825.204(e) limits the length and circumstances of the transfer: "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." 29 C.F.R. § 825.204(e). Unlike a "light duty" assignment under section 825.220 of the regulations, a transfer to an alternative position does not require the employee's consent. *Cf.* 29 C.F.R. § 825.220(d) (light duty) ("[Regulations do] 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[.]").

A. Department's Regulations Only Permit Transfer Where Employee Needs Intermittent Leave or Leave on a Reduced Leave Schedule that is Foreseeable Based on Planned Medical Treatment

A significant number of commenters questioned why the regulations permit an employer to transfer an employee only when the employee's need for leave is *foreseeable* based on planned medical treatment as opposed to a chronic need for *unforeseeable* leave. These stakeholders noted as an initial matter that the statute is silent on the issue. "We recognize that while the statute allows an employer to transfer an employee taking intermittent or reduced schedule leave for planned medical treatment, . . . it is silent on taking unforeseeable intermittent leave or foreseeable leave unrelated to treatment." Seyfarth Shaw LLP (on behalf of a not-for-profit health care organization), Doc. 10132A, at 3. It is the regulations, commenters contended, that prohibit a transfer in the unforeseeable intermittent context. "As presently drafted, § 825.204 only

permits employers to transfer an employee to an alternative equivalent position where the employee's need for intermittent leave is "foreseeable based on planned medical treatment." United Parcel Service, Doc. 10276A, at 5. "Section 825.204 allows an employer to transfer an employee to an alternative position where the leave is foreseeable based on planned medical treatment for the employee or a family member." Seyfarth Shaw LLP (on behalf of a not-for-profit health care organization), Doc. 10132A, at 3. Moreover, Ford & Harrison noted a recent Sixth Circuit case, which stated that the Department's regulations allow "an employer [to] . . . transfer an employee only when the need for the intermittent leave is foreseeable." Doc. 10226A, at 6. See *Hoffman v. Professional Med Team*, 394 F.3d 414, 421, n.11 (6th Cir. 2005) (transfer of employee with chronic condition requiring *unforeseeable* leave likely prohibited by sections 825.204(a), (c), and (d)).

Many commenters saw no practical basis for differentiating between foreseeable and unforeseeable need for leave in this context. "We do not see any basis for distinguishing between foreseeable vs. unforeseeable leaves for purposes of such temporary transfers." United Parcel Service, Doc. 10276A, at 5. Similarly, another commenter stated:

[Section 825.204 provides n]o similar option . . . for employers to transfer or otherwise alter the duties of an employee who needs unscheduled or unforeseeable intermittent leave. Even if the employee's unscheduled intermittent absences may result in substantial safety risks to the public or co-employees, or could cause serious disruption to the operations of the employer, such employee's duties or position cannot be altered as a result of the unscheduled intermittent leave.

The Southern Company, Doc. 10293A, at 3. Another company echoed the same concern that under the current regulatory scheme "[e]mployers do not have [the option] to transfer or otherwise alter the

duties of an employee who needs unscheduled or unforeseeable intermittent leave." Edison Electric Institute, Doc. 10128A, at 6.

In fact, many employers reported that the underlying rationale for the transfer provision—to provide "greater staffing flexibility" while maintaining the employee's same pay and benefits—is best served where the employee's need for leave is *unforeseeable*. "[I]f there is to be such a distinction, then a strong argument can be made that the DOL and Congress got it exactly backwards. Indeed, it is much easier for employers to arrange temporary coverage of an employee's normal job duties where the intermittent leaves occurs on a regular and foreseeable schedule, than it is to accommodate an employee with a chronic condition with unforeseeable flare-ups[.]" United Parcel Service, Doc. 10276A, at 5. Other commenters agreed:

Employers report that it is most often the employees whose intermittent or reduced leave schedule is *unforeseeable* who cause the most disruption in the workplace. For example, an employee works on an assembly line in a factory that runs on a 24-hour basis in three shifts. The employee has been approved to take intermittent leave to accommodate migraines and has been calling in sick on a relatively frequent, but unforeseeable basis (*e.g.*, approximately three times a month), giving only about an hour notice before the start of his shift. Good attendance is essential to this position because an absence can hold up the entire production line.

Ford & Harrison LLP, Doc. 10226A, at 6. "The most complicated part of intermittent leave . . . occurs with unplanned intermittent leave. . . . [A]ccommodating late arrivals or even early departures to satisfy the requirements of an intermittent leave can create problems in the workplace, including overburdening other workers and creating a sense of inequity and frustration." Leonard, Street and Deinard, Doc. 10330A, at 2.

Other commenters criticized the entire idea of “alternative positions” as unrealistic and/or problematic. For example, one law firm stated that “alternative positions” are a fiction:

Alternative positions do not exist in the real world. [The regulations] provide that in a reduced schedule situation, “an [employer] may assign an employee to an alternate position with equivalent pay and benefits that better accommodate the employee’s intermittent or reduced leave schedule.” When this provision is pointed out, the overwhelming majority of employers I work with just laugh. Employers simply do not have “alternative positions” hanging around which they can simply slot someone into. Most FMLA-covered companies are small and medium sized. They do not have hundreds of positions. This was a regulatory provision written without understanding of the real world. Real companies are trying to run lean. They do not [have], and cannot afford to create, an extra position which is not needed. So, the “alternative position” provision is generally useless.

Boardman Law Firm, Doc. FL4, at 2.

Even where an alternative position exists to which an employee on intermittent leave may be assigned, problems can arise. “Employees on unpredictable intermittent leave who have been placed in lower-level positions on a temporary basis can degrade morale of other employees in the same positions. The other employees in the same positions may earn lower wages than the employees on FMLA leave, but those other employees are held to higher attendance standards, absent their own need for FMLA leave.” North Dakota Society for Human Resource Management State Council, Doc. FL90 at 3. “[T]he regulation that permits an employer to transfer an employee to another position which better accommodates the intermittent leave is inherently unrealistic. Is there any doubt that an employee would always prefer to be transferred to a position with less responsibility and less duties, but with

equal pay and benefits? And, would an employee placed into such a position of equal pay and benefits, but with less responsibilities and duties, have any motivation to get better?” Pilchak Cohen & Tice, P.C., Doc. 10155A, at 12.

B. Recommendations from the Regulated Community

Most stakeholders who submitted comments on this subject agreed that the regulations should be revised to permit employee transfers in the case of *either* foreseeable or unforeseeable leave: “This section should be amended to permit the transfer to an alternative position for unforeseen intermittent absences or foreseen intermittent absences unrelated to medical treatment. . . . In the absence of such an amendment, prohibiting such transfers often creates undue hardship to our organization’s ability to provide patient care or other services and does not further the purposes of the FMLA.” Seyfarth Shaw LLP (on behalf of a not-for-profit health care organization), Doc. 10132A, at 3. “The FMLA regulations should be clarified to ensure that the employer may transfer the employee to a position that better accommodates an unforeseeable intermittent leave schedule.” Ford & Harrison LLP, Doc. 10226A, at 6. “DOL should revise § 825.204 to permit temporary transfer in all cases involving intermittent leave or reduced leave schedules.” United Parcel Service, Doc. 10276A, at 5. “Section 825.204 should be modified to allow an employer to transfer an employee who requires unscheduled intermittent leave to an alternative position with equivalent pay and benefits or to otherwise alter such employee’s job duties (e.g., assign to another shift) in order to better accommodate the periods of intermittent leave. Such a modification would allow an employer to determine how to best accommodate the employee’s periodic and unforeseen absences to minimize the disruption in the workplace and perhaps avoid a safety risk to others, while at the same time allow the employee to perform the

essential functions of the position to the best of his or her ability.” The Southern Company, Doc. 10293A, at 3. “Employers should be provided with greater flexibility to temporarily transfer employees to positions that better accommodate intermittent and reduced schedule absences.” Taft, Stettinius & Hollister LLP, Doc. FL107, at 3. “The employer should be permitted to move an employee on intermittent leave . . . to another position with the same salary and benefits, if in such a position the leave would be less disruptive. . . . [P]ermitting the employer flexibility to relocate an employee at the same salary and benefits . . . would help to address the difficulties employers have in addressing demands for intermittent leave for chronic illnesses.” Leonard, Street and Deinard, Doc. 10330A, at 2. “[T]he employer should be able to place employees whose restrictions only require some additional rest periods, or less strenuous work, into other slots, without requiring time off.” Indiana Chamber of Commerce, Doc. 10170A, at 3. “Employers should be able to reassign an employee on intermittent leave, without loss to the hourly pay rate or degradation in assignment, to a position schedule that would be more conducive to an intermittent schedule without fear of retaliation claims. Employees would still be returned to the same or similar job assignment at the end of the FMLA leave.” County of Placer, Doc. 10067A, at 3.

Some employers felt the move should be potentially permanent where the employee’s schedule cannot meet the employer’s need:

Where regular and predictable attendance is an essential function of a position, and the employee occupying that position has a chronic medical condition that the physician has determined will *never* allow regular and predictable attendance, the Employer should be allowed to accommodate that employee by permanently transferring him/her to an alternative position or, if no alternative is available, to separate the employee from the position that requires

regular and predictable attendance, *even* if the employee has not exhausted the 12 weeks of FMLA leave.

Betsy Sawyers, Director, Human Resources Department, Pierce County, Washington, Doc. FL97, at 4. The Fairfax County Public Schools echoed this theme: “[I]t would be helpful if the regulations would allow the employer to reassign the employee after a specified period of unscheduled intermittent leave, such as two or three months. Reassignment could be conditioned on the employer’s determination that unscheduled leave could not be continued without jeopardizing the essential functions of the job. After making such a determination, the employer could reassign the employee to a position that better accommodated intermittent attendance.” Doc. 10134A, at 3. In a different but related context, Ford & Harrison made the same suggestion: “[An] employee works in [a] position at the . . . factory. The employee sees a posting for an opening for the assembly line position for which good attendance is essential and requests a promotion or transfer to that position. If the employee is otherwise qualified for the position, but for the employee’s attendance issues due to the intermittent FMLA leave, the regulations should be clarified to ensure that the employer be allowed to deny the promotion/transfer without risking a claim of FMLA retaliation or interference with the employee’s FMLA rights on the grounds that the employee’s current position better accommodates an unforeseeable intermittent leave schedule.” Ford & Harrison LLP, Doc. 10226A, at 6.

The Southern Company noted that permitting transfers of employees who need unforeseeable leave would be consistent with the spirit of the FMLA, given the pay and benefits safeguards built into the transfer provision. “All the safeguards that currently exist in Section 825.204 (i.e., equivalent pay and benefits, transfer may not work a hardship on employee, and restoration rights at the end of the necessity of the leave) would be applicable to ensure that the employee’s rights to take FMLA

leave will not be deterred in any way. Accordingly, modifying Section 825.204 to encompass intermittent unscheduled leave would be consistent with the FMLA's stated purpose 'to entitle employees to take reasonable leaves for medical reasons . . . in a manner that accommodates the legitimate interests of employers.'" The Southern Company, Doc. 10293A, at 3. Edison Electric agreed that this was a reasonable solution under the Act: "Such a modification [to the regulations for unscheduled intermittent leave] would allow an employer to determine how to best accommodate the employee's periodic and unforeseen absences to minimize the disruption in the workplace and perhaps avoid a safety risk to others, while at the same time allowing the employee to perform the essential functions of the position to the best of his or her ability." Doc. 10128A, at 7. *But see* Brian T. Farrington, Esq., Doc. 5196, at 1 ("Th[e] [intermittent absence] problem is particularly acute when the employee performs an important or unique function, and repeated absences can put the employer in a very difficult situation. In such a case, transferring the employee to another position . . . doesn't solve the problem. The employee is needed in his/her principal position, not some alternative job.").

On the other hand, some commenters pointed out the potential downside of permitting employers to unilaterally modify jobs. "Allowing employers to modify employee's job duties to temporarily meet limitations may be acceptable until the employee recovers fully. However, the potential for employer's modification being sub-par, demoralizing and unfair is very, very high." An Employee Comment, Doc. 10336A at 26. The AFL-CIO, moreover, encouraged employers to use the tools they currently have to reach a mutually agreeable solution: "We encourage employers to consider whether job modifications will permit employees to remain at the workplace under mutually agreeable arrangements." Doc. R329A, at 36.