

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