

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 may or 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)

Administrative staff, 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.