

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 (E.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 Questioners 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