

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 1, 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 available 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