

actual hours worked. The Edison Electric Institute made the same observation but noted that the standard in § 825.105 for determining coverage—50-employee test—is based on employees appearing on the employer's payroll. In addition to vacation time, the Society for Human Resource Management asked whether overtime hours worked are to be included in the calculation. The Air Line Pilots Association also urged inclusion of all compensated hours (vacation, holiday, illness, incapacity, lay-off, jury duty, military duty, official company business, leave of absence or official union business) in determining the 1,250 hours of service. Finally, the Tennessee Association of Business requested clarification of the status of employees who are temporarily laid off for 2 or 3 weeks because of a plant shutdown.

The eligibility criteria are set forth in § 101(2) of FMLA as a statutory definition of "eligible employee." One component of the definition (§ 101(2)(C)) states that for purposes of determining whether an employee meets the hours of service requirement, the legal standards established under § 7 of the FLSA shall apply. The legislative history explains that the minimum hours of service requirement is meant to be construed in a manner consistent with the legal principles established for determining hours of work for payment of overtime compensation under § 7 of the FLSA and regulations under that act, citing specifically 29 CFR Part 785 (Hours Worked [Under the FLSA]) and referencing 29 CFR 778.103 (which in turn states that the principles for determining what hours are hours worked within the meaning of the FLSA are discussed in 29 CFR Part 785). "Hours worked" does not include time paid but not "worked" (paid vacation, personal or sick leave, holidays), nor does it include unpaid leave (of any kind) or periods of layoff. Whether the hours are compensated or uncompensated is not determinative for purposes of FMLA's 1,250-hours-of-service test. The determining factor in all cases is whether the time constitutes hours of work under FLSA. Because overtime hours worked are "hours worked" within the meaning of FLSA, they are included.

The National Restaurant Association noted that the determination of the 1,250 hour/12 months test must be made as of the date leave commences; whereas the 50 employee within 75 miles test is to be determined when the employee requests FMLA leave. The Association argued that the same date should be used for determining all

eligibility requirements. The USA Chamber of Commerce argued that § 825.110(d) as written forces an employer to avoid providing an ineligible employee with an estimated date of eligibility, a potential benefit for both employee and employer, because the employer that makes such an estimate is precluded from later challenging the employee's eligibility. This, according to the Chamber, ignores the very real possibility that an employee may reach the projected date and still not be eligible.

As explained in the preamble of the Interim Final Rule, the purpose and structure of FMLA's notice provisions intentionally encourage as much advance notice of an employee's need for leave as possible, to enable both the employer to plan for the absence and the employee to make necessary arrangements for the leave. Both parties are served by making this determination when the employee requests leave. Tying the worksite employee-count to the date leave commences as suggested could create the anomalous result of both the employee and employer planning for the leave, only to have it denied at the last moment before it starts if fewer than 50 employees are employed within 75 miles of the worksite at that time. This would entirely defeat the notice and planning aspects that are so integral and indispensable to the FMLA leave process. Accordingly, no changes have been made in response to the comments received from the National Restaurant Association and the Chamber of Commerce of the USA.

Several commenters (Nationsbank Corporation and South Coast Air Quality Management District) indicated that the terms "employee" and "eligible employee" required clarification regarding independent contractors, contract employees, and consultants. The Dow Chemical Company suggested that students working in co-op programs approved by their schools should not be deemed an employee eligible for FMLA benefits.

FMLA's definitions of "employ" and "employee" are "borrowed" from the FLSA. If a particular arrangement in fact constitutes an employee-employer relationship within the meaning of the FLSA (and case law thereunder) as contemplated by the statutory definitions, and the "employee" satisfies FMLA's eligibility criteria, the employee is entitled to FMLA's benefits. A true independent contractor relationship within the meaning of the FLSA would not constitute an employee-employer relationship. Thus, an independent consultant operating his

or her own business ordinarily would not be considered an "employee" of the business that hires the consultant's services. Employees hired for a specified term to perform services under contract ("contract employees") would ordinarily be subject to FMLA if they otherwise meet FMLA's 12 months and 1,250-hours-of-service (with the "employer") eligibility criteria. It has been our experience that such persons rarely qualify as independent contractors under the FLSA, and, therefore, they would rarely qualify as independent contractors under FMLA. There would be no authority under the statute to exclude students working in co-op programs approved by their schools if the arrangement otherwise meets the criteria for an employee-employer relationship. Many such students, however, may not be "eligible" under FMLA if they have not worked for the employer for at least 12 months and for at least 1,250 hours.

With respect to the 1,250 hours of service test, the California Rural Legal Assistance, Inc. expressed concern about situations where employers fail to keep required records of hours worked, and urged a reference to the "Mt. Clemens Pottery rule" as being applicable to such situations.

This comment refers to the U.S. Supreme Court's decision in *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680 (1946), which provided a lighter burden of proof for employees where employers failed to maintain required records. The regulations already provide that eligibility is presumed for FLSA-exempt employees who have worked at least 12 months. The regulations have been revised in this section to provide the same presumption where FMLA-covered employers with 50 or more employees fail to keep records required for purposes of establishing employee eligibility for FMLA leave.

The American Federation of Teachers and the National Education Association expressed concern that employers may intentionally reduce or otherwise manipulate an employee's hours to avoid FMLA eligibility, and urged that such conduct be treated as a violation of the Act. This matter will be addressed in § 825.220(b) (the "prohibited acts" section of the regulations) by providing that FMLA-covered employers that intentionally limit or manipulate employees' work schedules to foreclose their eligibility for FMLA leave will be held in violation of the provisions of FMLA and these regulations which prohibit interfering with employees' exercise of rights.

The Air Line Pilots Association (ALPA) requested clarification of the