

the employer from which the job assignment originates, and the United Paperworkers International Union stated that, in the case of workers without a fixed worksite, the reference point should be those employees defined in the bargaining unit by any applicable collective bargaining agreement. For employees who typically have no fixed worksite, the USA Chamber of Commerce urged a provision that makes clear that an employee has only one worksite for purposes of making eligibility and coverage determinations.

In the case of pilots and flight crew members, the Air Line Pilots Association, Association of Professional Flight Attendants and Independent Federation of Flight Attendants contend that the characterization of a home base as an employee's worksite would be inappropriate in the airline industry because the actual "worksite" ranges across a particular carrier's entire route system due to the availability and flexibility of the large number of employees employed in such job categories. They argue that employees at worksites with less than 50 employees within 75 miles should be eligible for FMLA leave if the employer (airline) employs more than 50 employees at all of its worksites and such employer can replace the employee on leave with another current employee through an employer-wide seniority system in the affected job classification.

Many of the comments reflect a misunderstanding of the "worksite" concept under the FMLA regulations. FMLA's legislative history explains that when determining if 50 employees are employed by the employer within 75 miles of the worksite of the employee intending to take leave, the term "worksite" is intended to be construed in the same manner as the term "single site of employment" under the WARN Act regulations (20 CFR Part 639). The legislative history further states that where employees have no fixed worksite, as is the case for many construction workers, transportation workers, and salespersons, such employees' "worksite" should be construed to mean the single site of employment to which they are assigned as their home base, from which their work is assigned, or to which they report. The regulations included these concepts.

Accordingly, salespersons who work out of their homes have as their single site of employment the site "from which their work is assigned or to which they report" (for example, the corporate or regional office). Their homes are not their "single site of employment" in any case. Tracking the number of employees

in a collective bargaining unit, or defining the worksite for flight crew members as a carrier's entire route system, would deviate significantly from the legislative history's discussion of the applicable principles and cannot be adopted as suggested in the comments. (Members of flight crews thus have as their "worksite" the "site to which they are assigned as their home base, from which their work is assigned, or to which they report.")

One commenter, Employers Association of New Jersey, indicated that more guidance was needed on what employees are to be counted. The commenter asked whether only eligible employees as defined in § 825.110 are counted, or are temporarily inactive employees counted, such as those on leave of absence, strike, *etc.* As noted above, the employee count must include all employees of the employer who are "maintained on the payroll," including part-time, full-time, eligible and non-eligible employees. It must also include employees on paid or unpaid leaves of absence. Employees who have been laid off (whether temporary, indefinite, or long-term) are *not* included. (See the discussion of related issues under § 825.105.) In effect, the test of whether an individual is counted as an "employee" depends upon whether there is a continuing employment relationship, and being "maintained on the payroll" is used as a proxy for establishing the continuing nature of the relationship.

#### Leave Entitlement (§ 825.112)

Section 825.112 sets forth the basic statutory circumstances for which employers must grant FMLA leave. A number of commenters addressed these circumstances with suggestions, recommendations, or requests for clarifications. For example, Lancaster Laboratories suggested that an employer should not be required to approve prenatal care visits if such appointments could be scheduled outside of normal working hours. United Federal Credit Union felt that employers should be able to place a cap on how many employees may be on FMLA leave at any one time, with discretion linked to business needs. Another commenter indicated that FMLA leave should be allowed for a sister or brother living with the employee. The Society for Human Resource Management asked whether the terms "placement \* \* \* for adoption" covered the situation where a child was placed in a new home for adoption and time was needed for bonding between the new parent and the child. The Society also asked if a pregnant employee were well enough to

return to work after six weeks, but had requested 12 weeks, could the employer require the employee to return to work after six weeks. Oregon Bureau of Labor and Industries observed that § 825.112(d) states there is no age limit on a child being adopted or placed for foster care, but § 825.113(c) defines "son or daughter" to be a person *under* the age 18, or *18 or older and incapable of self-care*, and questioned whether FMLA leave was available for adoption of a child age 18 or older who is *capable* of self-care. The Equal Employment Advisory Council argued, with respect to an employee who marries and requests FMLA leave to be with new stepchildren, that such leave should be explicitly prohibited unless the employee formally adopts the stepchildren.

California Department of Fair Employment and Housing and the law firm of Fisher and Phillips urged § 825.112 be expanded to incorporate provisions stated elsewhere in the regulations. Specifically, they argued that the definition of "son or daughter" in § 825.113 as it relates to the availability of FMLA leave to an employee who stands *in loco parentis* to a child should be added to § 825.112(a)(1), and that § 825.112(d) should be amended to reference the limitation in § 825.203 on the use of intermittent leave for purposes of birth, adoption or placement of a foster child that such leave is available only if the employer agrees. Sommer & Barnard noted that while an employee may be eligible for FMLA leave before "the actual date of birth" or "actual placement," there is no provision in the regulations that would permit an employer to require verification that leave requested for such purposes is for a statutory purpose.

With respect to scheduling prenatal care doctor's visits, the Act and regulations require that in any case where the need for leave is foreseeable based on planned medical care, the employee shall make a bona fide, reasonable effort to schedule the leave in a manner that does not unduly disrupt the employer's operations (subject to the approval of the employee's (or family member's) health care provider). However, it would be contrary to the statute for an employer to place any cap on the number of employees who could be eligible for FMLA leave at any one time, or for the regulations to require employers to grant the same type of leave entitlement for a sister or brother living with the employee as FMLA provides for a spouse (although employers could adopt more generous leave policies than the