

\* \* \* This is the same definition that appears in Title 10 of the United States Code (10 U.S.C. 101).

Under this amendment, an employer would be required to give an eligible female employee unpaid leave to care for her husband and an eligible male employee unpaid leave to care for his wife. No employer would be required to grant an eligible employee unpaid leave to care for an unmarried domestic partner.

This simple definition will spare us a great deal of costly and unnecessary litigation. Without this amendment, the bill would invite lawsuits by workers who unsuccessfully seek leave on the basis of their unmarried adult companions. (Cong. Rec. (S 1347), Feb. 4, 1993.)

Accordingly, given this legislative history, the recommendations that the definition of "spouse" be broadened cannot be adopted. The definition is clarified, however, to reference the State "in which the employee resides" as being controlling for purposes of an employee qualifying to take FMLA leave to care for the employee's "spouse" with a serious health condition.

Section 825.113(b) of the regulations defined "parent," as provided in § 101(7) of the FMLA, to mean a biological parent or an individual who stands or stood in loco parentis to an employee when the employee was a child. The regulatory definition noted that the term did not include a parent "in-law." Several commenters (City of Alexandria, Virginia; Fairfax Area Commission on Aging; Northern Virginia Aging Network; the Brooklyn and Green Mountain Chapters of the Older Women's League; Sisters of Charity of Nazareth; Retail, Wholesale and Department Store Union; and University of Vermont) viewed the regulatory definition as too restrictive, recommending in some instances that the term "parent" be broadened to specifically include parents "in-law." (An additional 107 cards or letters were received from individuals endorsing this view.)

Standard rules of statutory construction require that we interpret the availability of FMLA leave for a "parent" in a manner consistent with FMLA's definition of "parent," which is limited to the employee's biological parent or an individual who stood *in loco parentis* to the employee when the employee was a child, and does not extend to a parent "in-law." Moreover, the leave entitlement under § 102(a)(1)(C) of FMLA is expressly limited to "\* \* \* care for the \* \* \* parent, of the employee, if such \* \* \* parent has a serious health condition." Thus, each eligible spouse may take qualifying FMLA leave to care for his or her own biological (or *in loco parentis*)

"parent" who has a serious health condition, but the leave entitlement cannot be extended by regulation to parents "in-law."

FMLA § 101(12) defines "son or daughter" in part as one who is under age 18, or age 18 or older and "incapable of self-care because of a mental or physical disability." The Older Women's League, in commenting on the "incapable of self-care" provisions defined in § 825.113(c)(1), was concerned that requiring that an individual need active assistance or supervision to provide daily self-care in "several" of the "activities of daily living" would be interpreted to mean *three* or more, absent clarification, which they believe would unduly restrict eligibility for FMLA leave. The Consortium for Citizens With Disabilities, the Epilepsy Foundation of America, and the United Cerebral Palsy Association recommended that the definition of "incapable of self-care" be supplemented with additional criteria which more accurately reflect the needs of all people with disabilities, suggesting that "instrumental activities of daily living" or IADL's (activities necessary to remain independent) should be added to address the needs of people with mental and cognitive impairments.

In response to the comments received on this section, "incapable of self-care" is defined in the final rule to include, in addition to the "activities of daily living," the "instrumental activities of daily living," as recommended. We interpret "several" to mean more than two but fewer than many, i.e., three or more (see *Webster's; Black's Law*).

The Equal Employment Opportunity Commission (EEOC), in commenting on "physical or mental disability" in § 825.113(c)(2), noted that the DOL rule cited, as a cross-reference, EEOC's entire regulatory part under the Americans with Disabilities Act (ADA), 29 CFR 1630, for defining "physical or mental disability." Because the current illegal use of drugs is not a disability within the meaning of the ADA, EEOC expressed concern that the broader cross-reference to the entire regulatory part could create confusion over whether an adult child currently engaging in the illegal use of drugs would be "disabled" for purposes of a parent qualifying to take FMLA leave. EEOC suggested that DOL be more specific in citing to the pertinent ADA regulations to foreclose the argument that "physical" or "mental" disability in this context would not include the current illegal use of drugs. We have adopted EEOC's suggestion in the final rule. An eligible employee's son or

daughter who illegally uses drugs may be disabled for purposes of an eligible parent (employee) taking FMLA leave.

The University of Michigan includes in-laws, domestic partners, and other relatives within a broader definition of "family" for purposes of its family leave policies. The University suggested that the regulations enable employers that have extended their family leave policies to such "non-traditional" families to count as part of an employee's FMLA leave entitlement leave that is taken to care for such broader definitions of "family." This issue is addressed in § 825.700 of the regulations, which discusses the effect of employer policies that provide greater benefits than those required by FMLA. We interpret the statute as prohibiting an employer from counting as a part of an employee's FMLA leave entitlement leave granted for a reason that does not qualify under FMLA.

The law firm of Orr and Reno, and the Chicagoland Chamber of Commerce, *et al.*, urged that in addition to medical certifications presently required, the regulations should include provision for requests relating to child care because it is not always obvious that the leave is justified, particularly with respect to a father or in foster care situations.

Although leave to provide "child care" would not ordinarily qualify as FMLA leave if the child is not a newborn (in the first year after the birth) and is otherwise healthy, FMLA leave is "justified" (*and* may not be denied by the employer) if it is taken for one of FMLA's qualifying reasons, including where a father wants to stay home with a healthy newborn child in the first year after the birth, or needs to be home to care for a child with a serious health condition, or for placement with the employee of a child for foster care. The regulations have been amended in § 825.113(d) to permit employers to require reasonable documentation from the employee for confirmation of family relationships.

#### Definition of "Serious Health Condition" (§ 825.114)

Section 101(11) of FMLA defines "serious health condition" to mean \* \* \* an illness, injury, impairment, or physical or mental condition that involves—

(A) inpatient care in a hospital, hospice, or residential medical care facility; or

(B) continuing treatment by a health care provider.

This scant statutory definition is further clarified by the legislative history. The congressional reports did indicate that the term was not intended