

to cover short-term conditions for which treatment and recovery are very brief, as Congress expected that such conditions would be covered by even the most modest of employer sick leave policies. While the meaning of inpatient care is evident (*i.e.*, an overnight stay in the hospital, *etc.*), the concept of "continuing treatment" presents more difficult issues. Under the Interim Final Rule, "continuing treatment" required two or more visits to a health care provider or a single visit followed by a prescribed regimen of treatment, or a serious, incurable condition which existed over a prolonged period of time under the continuing supervision of a health care provider. When deciding upon the regulatory guidance for the definition in the Interim Final Rule, the Department relied heavily upon definitions and concepts from the Office of Workers' Compensation Programs. For example, under many State workers' compensation laws and the Federal Employees' Compensation Act (FECA), a three-day waiting period is applied before compensation is paid to an employee for a temporary disability. A similar provision was included in the FMLA rules; a period of incapacity of "more than three days" was used as a "bright line" test based on the references in the legislative history to serious health conditions lasting "more than a few days."

Eighty-eight comments were received on the regulatory definition of "serious health condition." Many commenters objected to the language in § 825.114(a)(3), which provided that a period of incapacity of more than three calendar days was an indicator of a serious health condition, and § 825.114(b)(2), which defined continuing treatment as including one visit to a health care provider which results in a regimen of continuing treatment under the supervision of the health care provider, *e.g.*, a course of medication or therapy to resolve the health condition. Some contended that the "more than three days" test encouraged employees to remain absent from work longer than necessary for the absence to qualify as FMLA leave, or that the duration of the absence was not a valid indicator of serious health conditions that are very brief (*e.g.*, a severe asthma attack that is disabling but requires fewer than three days for treatment and recovery to permit the employee's return to work). Some commenters felt the three-day rule was unreasonably low and trivialized the concept of seriousness, suggesting it more appropriately defined a "health

condition" rather than a "serious health condition."

Nine commenters (9 to 5, National Association of Working Women; Federally Employed Women; Women's Legal Defense Fund; Federal Express; Linda Garcia; Kerry M. Laumer; Epilepsy Foundation of America; International Ladies' Garment Workers' Union; Service Employees International Union) stated that the three-day rule was contrary to the statute and legislative history. The Women's Legal Defense Fund and the Epilepsy Foundation of America pointed out that the House Education and Labor Committee specifically rejected a minimum durational limit during a markup of the bill. These commenters, together with the Consortium for Citizens with Disabilities, National Community Mental HealthCare Council, and United Cerebral Palsy Associations, contended that seriousness and duration do not necessarily correlate, particularly for people with disabilities; that a fixed time limit fails to recognize that some illnesses and conditions are episodic or acute emergencies which may require only brief but essential health care to prevent aggravation into a longer term illness or injury, and thus do not easily fit into a specified linear time requirement; and that establishing arbitrary time lines in the definition only creates ambiguity and discriminates against those conditions that do not fit the average. The Women's Legal Defense Fund made the observation from the legislative history that Congress intended the severity and normal length of disabling conditions to be used as "general tests," not bright-line rules, and suggested that if a condition is sufficiently severe or threatening, duration is irrelevant.

The 9 to 5, National Association of Working Women, Los Angeles County Metropolitan Transportation Authority, Baptist Health Care, St. Vincent Medical Center, Chamber of Commerce of the USA, Chicagoland Chamber of Commerce, and Service Employees International Union, contended that a three-day absence requirement will inevitably result in employees with minor short-term afflictions unnecessarily extending their absences just to qualify for FMLA leave.

Fifteen commenters suggested extending the three-day absence requirement to a longer period, such as 5, 6, 7, or 10 days (Care Providers of Minnesota, Cincinnati Gas & Electric Company, Chicagoland Chamber of Commerce, Nevada Power Company, Federal Express, Chevron, PARC, Consolidated Edison Company of New York, Inc., Village of Schaumburg

(Illinois) Human Resources, Food Marketing Institute, Society for Human Resource Management, Southwestern Bell Corporation, New York State Metropolitan Transportation Authority), two weeks (United HealthCare Corporation), or 31 days (the American Apparel Manufacturers Association, Inc., suggested that the definition should reflect the initial study by the U.S. General Accounting Office that estimated FMLA's cost impact, noting further that the three-day rule is significantly more lenient than the "31 days or more of bed rest required to remedy the condition" used by GAO).

The Ohio Public Employer Relations Association strongly objected to the three-calendar-day rule on the grounds that a single workday absence on Friday followed by a weekend would qualify (or a Monday absence following a weekend). The law firm of Sommer and Barnard stated that it was not clear from the regulations or comments in the preamble whether the three days are consecutive or non-consecutive calendar days of work. The Chamber of Commerce of the USA questioned whether the rule, as drafted, could be construed as requiring three cumulative days in a calendar year as opposed to three consecutive calendar days.

Several additional commenters urged that the period be measured by business or working days in lieu of calendar days, while still others distinguished "consecutive" calendar days of absence from "consecutive" work days of absence as alternative suggestions (*i.e.*, more than five consecutive work days or seven consecutive calendar days). The Hospital Council of Western Pennsylvania argued that the standard should be one of incapacity requiring absence from work for more than three "consecutively scheduled workdays," as a workday standard is compatible with other sick leave and short-term disability programs and removes any doubt as to whether an employee was otherwise incapacitated and unable to work during days the employee was not scheduled to work. Chicagoland Chamber of Commerce commented that, with respect to an employee's own serious health condition, the qualifying standard pertains to work days and not calendar days, and yet the regulatory language would allow one to argue that an inability to carry out regular daily activities over the weekend counts toward the qualifying period. The Burroughs Wellcome Company emphasized that the committee reports clearly state that an employee must be absent *from work* for the required number of days and that absence from "school or other regular daily activities"