

Equal Rights Advocates suggested that continuing treatment include situations where a serious health condition exists that, if left unattended, would result in a hospital stay of more than three days.

Burroughs Wellcome stated that because the committee reports make it clear that "continuing treatment" involves absences from work, the regulation misses the mark by including one visit to a physician plus medication. Sommer and Barnard was concerned that the discussion on continuing treatment lacked clarity due to the lack of a clearly defined time frame for multiple treatments; further, that a typical employer could not determine from the information in the medical certification whether a condition is "so serious that, if not treated, it would likely result in a period of incapacity of more than three calendar days." This application does not call for a medical judgment and the "likely" standard cannot possibly be administered. Sommer and Barnard also stated the regulations lack a meaningful definition of what constitutes a regimen of continuing treatment—would it include bed rest, home exercise, or instructions to use a non-prescription drug or medication? SESCO Management Consultants suggested the definition invalidly broadens the concept of continuing treatment by allowing "following courses of medication and therapy" to qualify, which could thus include taking aspirin for a few days while staying home, getting bed rest and stretching limbs, drinking liquids, *etc.*, which, this commenter contends, the Congress did not remotely suggest would qualify under FMLA.

Chicagoland Chamber of Commerce also considered the "continuing supervision" concept too vague, questioning whether "supervision" required the individual to actually be examined by the health care provider or to report in on some regular basis, or whether instructions to report in if the condition changes were sufficient. It considered treatment a definitive concept which could be proven, whereas "supervision" could not which would invite abuse and litigation.

The Food Marketing Institute commented that the Act defines a serious health condition to require continuing treatment by a health care provider, which necessarily means at least two visits to the health care provider. Conditions which result in self-treatment (*e.g.*, taking medication) "under the supervision of" a doctor are typically not serious health conditions as contemplated by the FMLA, according to this commenter. Similarly, the Society for Human Resource

Management recommended that "continuing treatment" be redefined so that taking medications does not count the same as an office visit.

The Ohio Public Employer Labor Relations Association noted that while stress may contribute to illness in some persons, it is not an illness or a medical condition. The commenter recommended that treatment for stress without a commonly accepted and recognized medical diagnosis should not be included in the definition of a serious health condition.

Ten commenters raised various concerns regarding the availability of FMLA leave for treatment for substance abuse. The Epilepsy Foundation of America stated that substance abuse programs and mental health services must be included in the definition of serious health condition. William M. Mercer, Inc., suggested that the preamble discussion from the Interim Final Rule on treatment for substance abuse should be set forth in the rule itself. Consolidated Edison Company of New York, Inc. commented that employees should be allowed FMLA leave for substance abuse treatment only if they are not current users of illegal drugs, consistent with the approach followed under the ADA's protections. Consumers Power Company (Michigan) also recommended excluding absences for an employee's illegal use of drugs, and limiting FMLA leaves to inpatient substance abuse treatment programs with durations of no less than 14, or preferably, 28 days. Nationsbank Corporation (Troutman Sanders) suggested the regulations specifically state: (1) FMLA does not prohibit discipline for an employee's drug use in violation of the employer's policy; (2) an employee may not use FMLA to avoid potential discipline or drug testing; and (3) an employee returning from FMLA leave for substance abuse may be drug tested as a condition of return to work and following return to work, pursuant to an employer's post-treatment drug policy. Nevada Power Company suggested that an employer should not have to offer more than one leave of absence for drug or alcohol rehabilitation; and that employers which expend funds to reform substance abusers should be allowed to terminate employees if they begin to abuse drugs or alcohol again. Edison Electric Institute also suggested employers should only have to provide professional rehabilitative service and support to drug abusers one time.

The American Trucking Association, in contrast, advocated eliminating substance abuse from the definition of serious health condition, because

protection of substance abusers jeopardizes efforts by the trucking industry and the U.S. Department of Transportation to eradicate substance abusers from the nation's highways. Federal Highway Administration regulations require trucking companies to conduct substance abuse testing, but do not permit a motor carrier to test a driver who voluntarily admits to abuse because such an admission, without more, fails to trigger the duty to test under any of the five categories, in essence enabling the employee to "beat the system" by triggering FMLA rights before a drug test could be conducted. It was unclear to the Association under FMLA whether such an admission would preclude a motor carrier's ability to test a driver scheduled for a random drug test. The Association recommended changing the regulations to either totally exclude substance abuse from the definition of serious health condition, or exclude those persons who are subject to FHWA drug testing requirements from FMLA protections insofar as those protections include treatment for substance abuse. This commenter would also support an exclusion limited to those persons in the transportation industry subject to federal drug testing requirements, and also suggested the regulations make clear that persons currently engaged in illegal use of drugs have no FMLA protections, consistent with the provisions of the ADA.

The Chamber of Commerce of the USA recommended clarifications to provide that current illegal use of drugs during treatment for illegal drug use, or resumption of the illegal use of drugs following completion of treatment, removes such treatment from the category of "serious health condition" under FMLA, and that an employee who fails a drug test would be subject to the employer's normal disciplinary procedures and would not be protected by FMLA.

Louisiana Health Care Alliance (Phelps Dunbar) suggested that clarification be provided to ensure that employers have the continued right to enforce legitimate policies for drug- and alcohol-free workplaces, by explicitly stating in the regulations that nothing in FMLA prohibits an employer from terminating or otherwise disciplining an employee pursuant to a legitimate drug testing program.

The Department has carefully reviewed the comments and re-examined the legislative history and the definition of "serious health condition" in an attempt to assure that it is consistent with Congressional intent, and that FMLA leave is available in