

serious illnesses, the regulatory procedures in § 825.208 prescribe the method for an employer to designate FMLA leave. Under this procedure, an employee has an opportunity to counter an employer's designation of leave and resolve the dispute. See § 825.208(b).

As suggested, the reference in the interim final rule to stress as a possible serious health condition has been revised to mental illness resulting from stress.

Unable To Perform the Functions of the Position (§ 825.115)

An eligible employee may take FMLA leave due to a "serious health condition" that makes the employee "unable to perform the functions" of the employee's position. Section 825.115 of the Interim Final Rule states that an employee is "unable to perform the functions of the position" where the health care provider has found the employee either unable to work at all, or unable to perform any of the essential functions of the position within the meaning of the ADA and its implementing regulations (29 CFR Part 1630). For employers that request employees to furnish medical certification from the employee's health care provider to support the leave request, the regulations provide the employer the option of furnishing a statement (list) of the employee's essential functions for the health care provider to review when certifying to the employee's condition.

The Women's Legal Defense Fund, California Department of Fair Employment and Housing, and Consumers Power Company, Michigan commented that this section was unclear as to whether an employee must be found unable to perform each and every essential function (*i.e.*, all), or only any single one, or some of several of the essential functions. Several commenters (Alabama Power Company (Balch & Bingham); Chamber of Commerce of the USA; Credit Union National Association, Inc.; National Restaurant Association; Society for Human Resource Management; William M. Mercer, Inc.) either questioned the effect of "reasonable accommodations" and "job restructuring" or modified "light duty assignments" on FMLA leave requests, or suggested that the FMLA regulations be interpreted to mean "unable to perform any of the essential functions with or without reasonable accommodation within the meaning of the ADA." Thus, under this latter view, FMLA leave could be denied to an employee with a serious health condition who, although unable to perform the essential job functions,

would be able, despite the condition, to perform those functions if offered "reasonable accommodation." Some commenters noted the utility of creating "light duty" assignments for employees who suffer on-the-job injuries, and the impact on State workers' compensation benefits which can be suspended if an employee refuses to accept a medically-approved "light duty" assignment. The Consortium for Citizens with Disabilities, Epilepsy Foundation of America, and United Cerebral Palsy Associations noted a difference in the language in this section of the regulations and that of § 825.306(b) (discussing medical certifications) and suggested conforming changes so that both sections would be interpreted to mean "any one (or more) of the essential functions" (not all of the essential functions). The EEOC noted once again that the DOL rule cited to the entire body of the ADA regulations in the cross-reference and suggested refining the cite to the specific ADA rule that defines "essential functions" (29 CFR 1630.2(n)).

This section was intended to reflect that an employee would be considered "unable to perform the functions of the position" within the meaning of the regulations if the employee could not perform any *one* (or more) of the essential functions of the job held by the employee at the time the need for FMLA leave arose, and the final rule is so clarified (in §§ 825.115 and 825.306). EEOC's recommendation to cite to the specific ADA rule defining "essential functions" has also been adopted. The cite has been so revised, to make it clear that reasonable accommodation is irrelevant for purposes of FMLA.

The relationship between FMLA's leave provisions and other laws like the ADA and State workers' compensation laws is addressed under Title IV of the FMLA and in Subpart G of the FMLA regulations (§§ 825.700-825.702). As will be discussed further in connection with §§ 825.701 and 825.702 below, FMLA entitles an employee to take up to 12 weeks of *job-protected* leave, from the position of employment of the employee when the employee gives notice or when leave commences (whichever is earlier), for a serious health condition that makes the employee unable to perform any one of the essential functions of the employee's position (the position held by the employee when the notice was given or the leave commenced). FMLA also entitles such an employee to be restored to that same position of employment (the one held by the employee when notice was given or the leave commenced), or to an equivalent

position with equivalent employment benefits, pay, and other terms and conditions of employment. Under these statutory terms, if an employee qualifies under FMLA for job-protected leave, the employee may not be forced, before the employee's FMLA job-protected leave entitlement has expired, to return to work in a "light duty" (*i.e.*, an unequal, modified, or restructured) position, instead of continuing FMLA leave until the entitlement has been exhausted. To do so would violate an employee's job-protected rights to be restored to the *same or an equivalent* position. Furthermore, the circumstances in which an employer is permitted to place an employee in an alternative position are explicitly addressed in the Act (§ 102(b)(2)).

Regarding the comment that worker's compensation benefits may be suspended if an employee refuses a light duty assignment, we do not interpret the FMLA as prohibiting that result under applicable State workers' compensation statutes. In our view, where an employee is injured on the job and the injury also results in a serious health condition that makes the employee unable to perform any one of the essential functions of the employee's position within the meaning of FMLA, the employee effectively qualifies for *both* workers' compensation benefits and job-protected leave under the FMLA. This would mean that, in addition to the employee receiving payments from the workers' compensation fund for replacement of lost wages, the employer would be obligated to maintain (at least until the employee's FMLA leave entitlement is exhausted) any of the employee's pre-existing health benefits coverage under the same terms and conditions as if the employee had continued to work. If, as part of the workers' compensation claim process, the employee is offered a medically-approved "light duty" assignment, the employee may decline the assignment offer and instead choose to begin or continue to exercise FMLA rights and remain on leave for the remaining portion of the employee's FMLA leave entitlement. As discussed in § 825.220(d), if the employee freely accepts the "light duty" assignment offer in lieu of FMLA leave or returns to work before exhausting his or her FMLA leave entitlement, the employee would retain his or her right to the original or an equivalent position until 12 weeks have passed, including all FMLA leave taken that year. At the conclusion of the 12-week period, if the employee is not able to perform the essential functions of the original