

resolution of the leave schedule, however, always remains subject to the approval of the health care provider and the schedule established for the planned medical treatments. It should be noted that under this section, the health care provider either already has, or will, establish the medical necessity for the intermittent leave schedule; it is a prerequisite for the leave. Thus, denial of the leave would be out of the question. Even delay of the leave would be inappropriate unless the health care provider agreed to reschedule the medical treatments. What would be a "reasonable effort" by the employee and an "undue disruption" of the employer's operations are fact-specific in each case. Requesting that an employee attempt to schedule planned medical treatments outside the normal work hours when scheduling them during work hours would not unduly disrupt the employer's operations would not be "reasonable" or consistent with FMLA's requirements.

Definition of "Health Care Provider"
(§ 825.118)

FMLA entitles eligible employees to take leave for a serious health condition (of either the employee or an immediate family member). "Serious health condition" is defined to include an injury, illness, impairment, or physical or mental condition involving either inpatient care or "continuing treatment by a health care provider." In addition, FMLA's medical certification provisions allow an employer to request that leave for a serious health condition "* * * be supported by a certification issued by the health care provider * * *" of the employee or family member. Section 101(6) of the Act defines "health care provider" as a doctor of medicine or osteopathy authorized in the State to practice medicine or surgery (as appropriate) or "any other person determined by the Secretary [of Labor] to be capable of providing health care services."

After reviewing definitions under several programs, including rules of the U.S. Office of Personnel Management and Medicare, DOL developed FMLA's regulatory definition of "health care provider" by beginning with the definition of "physician" under the Federal Employees' Compensation Act (5 U.S.C. 8101(2)), which also includes podiatrists, dentists, clinical psychologists, optometrists, and chiropractors (limited to treatment consisting of manual manipulation of the spine to correct a subluxation as demonstrated by X-ray to exist) authorized to practice in the State and performing within the scope of their

practice as defined under State law, and by adding nurse practitioners and nurse-midwives (who provide diagnosis and treatment of certain conditions, especially at health maintenance organizations and in rural areas where other health care providers may not be available) if performing within the scope of their practice as allowed by State law. Finally, the definition included Christian Science Practitioners to reflect the Congressional intent that such practitioners be included (as expressed in colloquies on the floors of both the House and Senate, and as reflected in the Committee report accompanying Title II of FMLA applicable to Federal civil service employees).

Fifty-seven commenters submitted views on the regulatory definition of "health care provider." Most advocacy groups and various trade and professional associations viewed the definition as too restrictive and suggested that it be expanded to include a broad range of additional providers of health care and related services.

Federally Employed Women and the Women's Legal Defense Fund noted that OPM's definition for Federal civil service employees under Title II of FMLA includes those providers recognized by the Federal Employee's Health Benefits Program, and suggested a similar approach be used by DOL for Title I. They contended that including any providers covered by the employers health insurance plan avoids confusion as to whether the services would be reimbursed and ensures ease of administration.

Alabama Power Company (Balch & Bingham) considered the definition as written too broad and suggested DOL follow the lead of the States with FMLA-type laws, confining the definition to doctors and osteopaths. The ERISA Industry Committee felt that employers should not be required to recognize service providers not recognized by their health plans. Burroughs Wellcome Company suggested that Christian Science Practitioners not be included.

The American Association for Marriage and Family Therapy, 14 State Associations for Marriage and Family Therapy, Teton Youth & Family Services, and the Women's Legal Defense Fund suggested that marriage and family therapists be included in the definition. Fourteen organizations (American Board of Examiners in Clinical Social Work; California Society for Clinical Social Work; Catholic Charities, Inc.; Council on Social Work Education; the Maryland, Mississippi, New Hampshire, New York State, Ohio,

Rhode Island, Texas and Utah Chapters of the National Association of Social Workers; Women's Legal Defense Fund; and 9 to 5, National Association of Working Women), the Personnel Department of the City of Newport News, and five Members of Congress recommended that "clinical social workers" be added to the definition of "health care providers." In addition, 436 cards/letters (generally uniform in style and content) were received from practicing social workers also urging that "clinical social workers" be added.

The Consortium for Citizens with Disabilities, Epilepsy Foundation of America, and United Cerebral Palsy Associations suggested that the regulations include providers of specialized health-related services for the disabled, health care providers licensed by States or accredited by national certification organizations, a non-exclusive list of types of providers (whether or not licensed or accredited), and a procedure for applying to DOL to add "emerging" health care provider services. The Service Employees International Union also supported flexibility in the regulations to include other types of providers of services as new roles evolve with changes in the health care system.

The American Academy of Physician Assistants, Community Legal Services, Inc., Equal Rights Advocates, Hospital Council of Western Pennsylvania, 9 to 5, National Association of Working Women, and Older Women's League recommended that physician assistants be included. The National Acupuncture and Oriental Medicine Alliance recommended including Acupuncturists and Oriental Medicine Practitioners. Employee Assistance Professional Association, Inc. recommended that Certified Employee Assistance Professionals be recognized as "providers" capable of making determinations of whether an employee is able to work or unable to return to work.

The American Chiropractic Association and William M. Mercer, Inc. objected to the parenthetical phrase concerning chiropractors that limited treatment to manual manipulation of the spine to correct a subluxation demonstrated by X-ray to exist. The American Psychological Association recommended replacing "clinical psychologist" with "doctorally trained psychologist whose scope of competence includes clinical activities."

The American Psychiatric Association suggested that a distinction should be maintained between doctors of medicine or osteopathy and non-