

physician health care professionals, and that certification for intermittent or reduced leave schedules should be accepted only from doctors of medicine or osteopathy, not non-physician health care providers. The Consortium for Citizens with Disabilities, on the other hand, suggested that the medical certification form be revised so that it does not appear that only a medical doctor or osteopath can sign off on the form.

California Rural Legal Assistance, Inc., Equal Rights Advocates, and William M. Mercer, Inc. recommended that foreign-certified or foreign-licensed health care providers should be recognized under FMLA, to account for the fact that many workers' parents, spouses or children do not reside in the U.S. or that such family members may become ill while abroad. (California Rural Legal Assistance, Inc. stated that many U.S. residents rely on Mexican doctors for health care.)

The law firm of Fisher & Phillips recommended that DOL delay exercising its authority to designate health care providers until there is an opportunity to determine the impact on the President's health care proposal.

After giving careful consideration to the numerous suggestions for changes in the definition of "health care provider," we have revised the final rule in the following respects. The definition will be expanded to include any health care provider that is recognized by the employer or accepted by the group health plan (or equivalent program) of the employer. To the extent that the employers or the employers' group health plans recognize any such individuals for certification of the existence of a health condition to substantiate a claim for health care and related services that are provided, they would be included in the revised definition of "health care provider" for purposes of FMLA. Clinical social workers will also be included because our review reveals that they are ordinarily authorized to diagnose and treat without supervision under State law. Physician's assistants are not included as health care providers under the regulations because they are ordinarily only permitted to practice under a doctor's supervision. An employee, however, may receive treatment by a physician's assistant or other health care professional under the supervision of a doctor or other health care provider without first seeing the health care provider and obtaining a referral. In addition, any services recognized by the plan which are furnished as a result of a referral while under the continuing supervision of a

health care provider would qualify as medical treatment for purposes of FMLA leave (see § 825.114(c)(2)(i)(A)).

II. Subpart B, §§ 825.200–825.220

Amount of Leave (§ 825.200)

Employers must choose from among four options a single uniform method for calculating the 12-month period for determining "12 workweeks of leave during any 12-month period." The choice of options was intended to give maximum flexibility for ease in administering FMLA in conjunction with other ongoing employer leave plans, given that some employers establish a "leave year" and because of State laws that may require a particular result.

The California Department of Fair Employment and Housing recommended this section include cautionary advice to employers that the availability of options may be limited by State law (the California Family Rights Act starts the 12-month period with the date the employee first uses qualifying leave). William M. Mercer, Inc. questioned whether State family leave laws would control the employer's administration of FMLA, and also whether leave accrues under the backward rolling method on a daily basis. The State of New York's Department of Civil Service and the State of Nevada's Department of Personnel recommended that each agency or department within a State government be allowed to select a separate (*i.e.*, different) 12-month period.

The State of South Carolina's Division of Human Resource Management, the State of South Dakota's Bureau of Personnel, and the Edison Electric Institute recommended provisions be added to limit the amount of FMLA leave available to an employee for the birth or adoption of a child to a single 12-week period per event (*e.g.*, under the calendar year method, an employee who adopts or gives birth to a child late in the year would not be entitled to take additional leave in the second calendar year period because of the adoption or birth of that child). Similarly, Cincinnati Gas and Electric Company recommended the final rules prohibit an employee from receiving 24 weeks of protected leave for a single FMLA-covered event (*e.g.*, where the initial 12-week absence ends at the same time the next annual 12-week allotment begins). (See also the discussion of similar comments received on the section that follows, § 825.201.)

The Women's Legal Defense Fund recommended that DOL explicitly

define the method rather than allowing employer choices, to prevent manipulation, and suggested the period be calculated as the 12-month period following commencement of an employee's first FMLA leave (§ 825.200(b)(3)). If choices are allowed, they urge that the 12-month period rolling backward method (paragraph (b)(4)) be rejected because it curbs employee flexibility and is confusing to them. The American Federation of Teachers/National Education Association concurred with WLDF's comments. The AFL-CIO and Service Employees International Union submitted similar views. (SEIU also suggested clarifying that employers may not switch methods to deny employees leave, and that such action would violate FMLA's anti-interference provisions.) The United Paperworkers International Union suggested that the 12-month period be calculated by using each individual employee's anniversary date, as employees are not eligible until they have worked for at least 12 months, and this would prevent employers from manipulating the 12-month period to avoid FMLA obligations.

Fisher & Phillips suggested that the regulations refer to the 12-month "rolling period" as the default method for employers that have not designated a 12-month period.

The Society for Human Resource Management questioned whether the 12-week entitlement was for each separate reason specified under FMLA (12 weeks for childbirth, plus 12 weeks for a sick parent, plus 12 weeks for the employee's serious health condition, *etc.*, all in the same 12-month period), or for all reasons (total for all events in a 12-month period limited to 12 weeks). This commenter also questioned whether an employer must allow an employee to return to work early in the situation where the employee requested 12 weeks of leave and, three weeks into the leave, the employee asks to return to work.

Black, McCuskey, Sourers & Arbaugh stated that employees of employers who selected the calendar year should be entitled to only five weeks of FMLA leave for the period between August 5, 1993, and December 31, 1993. The Department cannot agree with this line of reasoning, which would suggest that employees of employers who select the calendar year would be entitled to less leave other employees. Nor do we believe that Congress intended that an employee be entitled to one week of leave for each remaining month of the year after eligibility is established.

The final rule has been clarified in response to several of the comments