

birth or placement prior to the actual birth of placement. Nor is there authority to limit an employee's entitlement to a "per event" standard.

Limitation for Spouses Employed by the Same Employer (§ 825.202)

Section 102(f) of FMLA specifically limits the total aggregate number of workweeks of leave to which an "eligible" husband and wife are both entitled if they work for the same employer to 12 workweeks of leave (combined between the two spouses) if the leave is taken for: (1) the birth of a child; (2) the placement of a child for adoption or foster care; or (3) to care for a sick parent. The regulations specified which FMLA-covered purposes for taking leave were subject to the special limitation, and gave examples of how the limitation would apply when leave taken during the 12-month period is for both a reason subject to the limitation and one that is not (leave for an employee's own serious health condition, and "family" leave if it is for care of a spouse, son, or daughter, is not subject to the statutory limitation).

Twelve comments were received on this section. Many commenters misunderstood the relationship under the statute between leave taken for a reason subject to the combined limit of 12 weeks, and leave taken for reasons not within the limitation. Several commenters took issue with the reasoning for limiting leave entitlements for spouses employed by the same employer. Two individuals opposed the limitations as being discriminatory against spouses.

Martin, Pringle, Oliver, Wallace & Swartz and the Virginia Maryland Delaware Association of Electric Cooperatives both noted that the regulations provide no guidance in connection with siblings employed by the same employer. The Society for Human Resource Management noted that two employees living together but not legally married can each take 12 weeks for the birth or placement of a child, and recommended revising the regulations to provide that the 12-week-total limitation would also apply where both parents of a child work for the same employer. The Ohio Public Employer Labor Relations Association felt that employers should be able to limit the leave of spouses for the care of a seriously-ill child for the same reason spouses are limited for the birth or adoption of a child. George Washington University felt that care for a seriously-ill parent should entitle each spouse to 12 weeks of FMLA leave. Because FMLA does not cover care of a parent in-law, the Women Employed Institute

felt that both the husband and wife should be entitled to 12 weeks of leave in order to care for their own parent, just as they are entitled to 12 weeks of leave for their own illness.

Fisher & Phillips noted that when a female employee takes leave for the birth of a child, the leave may have a dual purpose under FMLA. One purpose relates to the employee's own serious health condition for childbirth and recovery (§ 102(a)(1)(D) of FMLA). The other relates to the birth and care of a newborn child (§ 102(a)(1)(A) of FMLA). They recommended revising the rule to state that such "dual purpose" leave would always be treated as being subject to the limitation for purposes of the husband taking FMLA leave. Fisher & Phillips suggested further that the reference in the Act to "parent" must be an error, that the word "child" must have been intended (recommending such a revision be made through regulatory interpretation).

According to the legislative history, the limitation on leave taken by spouses who work for same employer is intended to eliminate any employer incentive to refuse to hire married couples. It is our view that the statutory provisions must be interpreted literally, and we do not agree that the legislative result is an error that should be altered by regulation. DOL lacks the authority to either add to, or subtract from, the circumstances that are subject to the statutory limitation of spouses who work for the same employer. The examples given in the regulation have been clarified in an effort to reduce the confusion that is apparent from the comments received on this section of the regulations. With respect to the comment by Fisher & Phillips on "dual purpose" leave, FMLA lacks any "dual purpose" concept. Further, the statutory limitation must be applied literally, and only to leave that is taken for a purpose that is expressly subject to the limitation. Clearly there is a period of disability following the birth of a child, as explicitly recognized under State pregnancy disability laws. Disability leave recognized under such State laws for the birth of a child would also be considered FMLA leave for a serious health condition. Such leave, for one's own serious health condition, is not subject to the limitation for spouses who work for the same employer. Nor does the limitation apply to unmarried parents or to siblings employed by the same employer. The regulations have been clarified in response to the comments received.

Intermittent and Reduced Leave Schedules (§ 825.203)

FMLA permits eligible employees to take leave "intermittently or on a reduced leave schedule" under certain conditions. Intermittent leave is not available for the birth or adoption of a child unless the employee and employer agree otherwise. Subject to compliance with FMLA's "notice" and medical certification provisions, and the right of an employer to transfer an employee temporarily to an alternative position with equivalent pay and benefits that better accommodates recurring periods of leave, leave for a serious health condition (either the employee's or family member's) may be taken intermittently or on a reduced leave schedule when medically necessary.

The Women's Legal Defense Fund and the Service Employees International Union commented that intermittent leave should be permitted to accomplish a placement for adoption or for foster care prior to the actual placement without requiring the agreement of the employer. Section 825.112(d) of the Interim Final Rule provides for the taking of FMLA leave for purposes of adoption or foster care prior to the actual placement in situations when the employee may be required to attend counselling sessions, appear in court, etc. Unlike the circumstances in § 825.112(c) which provide for an expectant mother to take leave prior to the birth of a child for prenatal care or for her own condition, both of which are specifically identified as being a serious health condition, placement for adoption or foster care is not so identified. To provide intermittent leave without the employer's agreement prior to the actual placement would be contrary to the language contained in § 102(b)(1) of the statute, "In General—Leave under subparagraph (A) (*birth of a child*) or (B) (*placement for adoption of foster care*) of subsection (a)(1) shall not be taken by an employee intermittently or on a reduced leave schedule unless the employee and the employer of the employee agree otherwise." We are unable to make the suggested change in the Final Rule.

Fifteen commenters, including public employers, public utilities, educators, health care industry employers and manufacturers urged that the taking of intermittent leave in increments of one hour or less was too burdensome. Many recommended that leave taken intermittently should be limited to half-days (four hours) or full days as a minimum. The legislative history provides that only the time actually taken is charged against the employee's