

entitlement (Senate Committee on Labor and Human Resources (S. 5), Report 103-3, January 27, 1993, pp. 27 & 29). Otherwise, the statute and the legislative history are silent regarding increments of time related to intermittent leave. In providing guidance on this issue in the Interim Final Rule, it seemed appropriate to relate the increments of leave to the employer's own recordkeeping system in accounting for other forms of leave or absences. Section 825.203(d) tracks that decision and provides that the employer's established recordkeeping system controls with regard to increments of FMLA leave of less than one hour. (The employer may not require leave to be taken in increments of more than one hour.) The guidance in the Interim Final Rule continues to be appropriate; otherwise employees could be required to take leave in amounts greater than necessary, thereby eroding the 12-week leave entitlement unnecessarily. The Final Rule will contain the same guidance; however, this section will be clarified to provide explicitly that the phrase "one hour or less" is dispositive.

Five commenters expressed concern that an employee taking intermittent leave could spread the 12-week leave entitlement over an extended period, up to the full 12 month leave period. The Equal Employment Advisory Council suggests that the amount of intermittent leave available be limited to four weeks of the 12 week total available in any 12 months. The Kennedy Memorial Hospitals suggests that a limit of six months be placed on the period over which intermittent leave can be extended. The Koehler Manufacturing Company suggests that employees requesting intermittent leave should be eligible for a shorter time period. Care Providers of Minnesota point out there is no statutory prohibition for reasonably limiting the period of time for intermittent leave.

The statute makes no provision for limiting the time period over which an employee may take leave intermittently or on a reduced leave schedule. To the contrary, § 102(b)(1) of the statute provides that the taking of such leave "\* \* \* shall not result in a reduction in the total amount of leave to which the employee is entitled under subsection (a) beyond the amount of leave actually taken." After due consideration, the Department finds that making such a change would be contrary to the statute and the intent of Congress.

Blue Cross and Blue Shield of Texas, Inc. asks if due to a medical certification an employee is limited to working eight hours per day, and thus is unable to

work mandatory overtime hours, may the employee be subject to disciplinary action or may the employer charge the unworked overtime to the employee's FMLA leave entitlement. The question to be answered would be whether the employer's policy requires the taking of other forms of leave (*i.e.*, vacation or sick leave) to cover unworked overtime. The taking of FMLA leave is predicated on the employee's normal workweek (see § 825.205 of the Interim Final Rule). The definition of reduced leave schedule in § 101(9) of the statute speaks of *usual* number of hours per workweek, or hours per workday (emphasis added). If the employee's usual or normal workweek is greater than 40 hours or workday is greater than eight hours, the days or hours the employee does not work may be charged against the FMLA leave entitlement if the absence is for an FMLA qualifying reason. If, however, the overtime is assigned/required on an "as needed" basis, not a part of the employee's usual or normal work time, or is voluntary, the unworked overtime may not be charged to the employee's FMLA leave entitlement. The employee is not subject to disciplinary action for being unable to work overtime as a result of limitations contained in a medical certification obtained for purposes of FMLA.

The law firm of Sommer and Barnard urges that an employee be required to furnish evidence satisfactory to the employer that periods of intermittent leave requested for birth or placement of a child before the actual birth or placement will be used for the required reason, and that all the leave requested/approved will be devoted to the purposes for which the employee was eligible for such leave. The Final Rule has been amended in § 825.113(d) to permit an employer to require reasonable documentation of a family relationship for purposes of FMLA leave. It would be unreasonable, however, to expect an employee to predict with any precision the amount of leave that will be required in conjunction with a birth or placement when time spent in these activities is largely outside the employee's control (*e.g.*, attorneys, doctors, the courts, social workers, *etc.*). The possibility, moreover, that employees would lie to their employer and not use leave for the purposes indicated is not unique to leave taken prior to the birth or placement for adoption or foster care. Such fraud should be treated like any other fraud in connection with leave. See also § 825.312(g). In any event, employer permission is required for an

employee to take intermittent FMLA leave for birth (other than medically-necessary leave) or placement for adoption or foster care. Consequently, the suggested change will not be made.

Massmutual Life Insurance Company recommends that reduced schedule leave and intermittent leave for personal medical leave should be limited solely to those times which are scheduled for treatment, recovery from treatment or recovery from illness. The definition of leave which may be taken intermittently or on a reduced leave schedule basis for an employee's own serious condition or the serious health condition of an immediate family member has been changed in § 825.203 of the Final Rule to incorporate this suggestion. The employee will also be entitled to take leave intermittently or on a reduced leave schedule for periods of disability due to a chronic serious health condition or to provide needed care for an immediate family member with a serious health condition, including psychological care when such care would prove beneficial to the patient.

#### Temporary Transfers to Alternative Positions (§ 825.204)

If an employee needs to take intermittent leave (*e.g.*, for medical treatment) or leave on a reduced leave schedule, the employer may temporarily transfer the employee to an available alternative position for which the employee is qualified and which better accommodates recurring periods of leave than the employee's regular position. The alternative position must have equivalent pay and benefits; it need not have equivalent duties. The conditions of a temporary transfer may not violate any applicable collective bargaining agreement containing higher standards or more generous provisions for employees than those required by FMLA, and employers must observe any other applicable standards under Federal or State laws (*e.g.*, the ADA).

As the legislative history explains, this provision was intended to give greater staffing flexibility to employers by enabling them temporarily to transfer employees who need intermittent leave or leave on a reduced leave schedule to positions more suitable for recurring periods of leave. At the same time, it ensures that employees will not be penalized for their need for leave by requiring that they receive equivalent pay and benefits during the temporary transfer. Congress anticipated that a reduced leave schedule would often be perceived as desirable by employers who would prefer to retain a trained and experienced employee part-time for the weeks that the employee is on leave