

(subject to the employee satisfying the certification process).

Sommer & Barnard recommended the regulations be amended to provide that when an employer policy requires an employee to designate paid leave as FMLA leave, the employee shall provide FMLA notice and certification (if applicable). They noted that when § 825.207(g) (which exempts an employee using paid leave that is *not* followed by unpaid FMLA leave from FMLA's notice and certification requirements) and § 825.208(a)(1) (relieves an employee using paid leave from any obligation to explain the reason for the leave unless the employer denies the request) are linked with § 825.208(b) (FMLA determinations to be based only on information furnished directly by the employee), the rules effectively deprive an employer of the opportunity to make an informed determination that paid leave will be used for FMLA-qualifying reasons and should be counted as FMLA unless the employee volunteers sufficient accurate information. Moreover, this structure could encourage employees to withhold information and misrepresent facts to expand the aggregate of employer-paid leave and FMLA's unpaid leave entitlement.

After careful consideration of the many comments and objections received on this section, the Department has revised the regulations along the following lines. Designation of leave as being FMLA-qualifying is still expected to take place "up front" whenever possible. The employer's notification to the employee of the designation may be oral, but must be confirmed in writing, no later than the next regular payday (unless less than a week remains until the next payday). The written notice may be in any form, including a notation on the pay stub.

If the employer has the requisite knowledge to determine that a leave is for an FMLA reason at the time the employee either gives notice of the need for leave or it commences, and the employer does not notify the employee as required at that time that the leave is being designated as FMLA leave, the employer may not then designate the leave as FMLA leave retroactively; it may designate only prospectively, as of the date of notification to the employee of the designation, that the time is being charged against the employee's FMLA leave entitlement. The employer may not designate leave that has already been taken as FMLA leave after the employee returns to work, with two exceptions: (1) if an employee is out for an FMLA-qualifying reason and the employer does not learn of the reason

for the leave until the employee returns to work, the employer may designate the leave as FMLA leave promptly (within two business days) upon the employee's return to work (including a provisional designation based on information from the employee, subject to confirmation upon the employer's receipt of medical certification if the employer requires it and has previously notified the employee of the requirement); or (2) if the employer has provisionally designated the leave under FMLA and is awaiting receipt from the employee of medical certification or other "reasonable documentation" allowed by this amended rule to confirm that the leave was FMLA-qualifying, or the employer and employee are in the process of obtaining second or third medical opinions. If the employer does not designate leave as FMLA leave in a timely manner as required by the regulations, the employer may not later designate the absence as FMLA leave absent the circumstances specified above. Similarly, the employee is not entitled to the protections of the FMLA if the employee gives notice of the reason for the leave later than two days after returning to work. The regulations are also clarified that if an absence which begins as other than FMLA leave later develops into an FMLA-qualifying absence (e.g., employee takes a two-week vacation for a ski trip and suffers a severe accident requiring hospitalization beginning the second week), the entire portion of the leave period that qualifies under FMLA may be counted as FMLA leave (e.g., the second week). Employers must still base their designations of FMLA leave on information obtained directly from the employee or the employee's spokesperson (in the event the employee is incapacitated or otherwise designates a point of contact, e.g., an immediate family member). If an employee does not provide information regarding the reason for the leave, leave may be denied.

Designating leave as FMLA-qualifying does not block greater ADA rights. See § 825.702.

#### Benefit Entitlements During FMLA Leave (§ 825.209)

Eligible employees who take FMLA leave are entitled to be restored, at the end of their leave, to the same jobs they held when the leave commenced, or to an equivalent job with equivalent employment benefits, pay, and other terms and conditions of employment. The taking of FMLA leave cannot result in the loss of any employment benefit accrued before the leave began; however, nothing in FMLA entitles

restored employees to the accrual of seniority or employment benefits during the leave, or to any right, benefit, or position of employment other than what they would have been entitled to had they not taken the leave. (§§ 104(a)(1), (2), and (3) of FMLA.) In addition, during a period of FMLA leave, the employer must maintain coverage under any "group health plan" at the level and under the conditions coverage would have been provided if the employee had continued to be employed continuously during the leave. (§ 104(c)) The legislative history explains that this is strictly a maintenance of benefits provision. FMLA does not require an employer to provide health benefits if it does not do so at the time the employee commences leave. The legislative history notes further, however, that if an employer establishes a health benefits plan during an employee's leave, FMLA's provisions should be read to mean that the entitlement to health benefits would commence at the same point during the leave that employees would have become entitled to such benefits if still on the job.

Several commenters requested further clarification in this section on the impact on continued FMLA leave rights, maintenance of health benefits, and restoration to employment when the job of an employee on FMLA leave is eliminated, such as through a department-wide downsizing or layoff. FMLA's legislative history explains that the explicit limitation in FMLA § 104(a)(3) means that if, but for being on leave, an employee would have been laid off, the employee's right to reinstatement is whatever it would have been had the employee not been on leave when the layoff occurred. In order to clarify this point, the regulations are revised at § 825.211(c) to provide that, except as required by COBRA and for "key" employees, an employer's obligation to maintain health benefits during FMLA leave and to restore an employee after the planned leave under FMLA ceases if and when the employee's employment relationship would have terminated (e.g., the employee's position is eliminated as part of a nondiscriminatory reduction in force, *i.e.*, no transfer or reassignment option is available to similarly-affected employees not on FMLA leave); the employee informs the employer unequivocally of the employee's intent not to return from leave (including when the leave would have begun if the employee so informs the employer before the leave begins—unless the employee is on *paid* leave during the period); the employee fails to return