

from leave, and thereby terminates employment; or the employee stays on leave (*i.e.*, is unable to return to work) after exhausting his or her FMLA leave entitlement in the 12-month period.

The Chamber of Commerce of the USA suggested clarifications to unambiguously state that plan changes such as premium increases, increased deductibles, *etc.*, which apply to active employees also apply to employees who are on FMLA leave. This requirement has been clarified.

A number of commenters requested specific guidance in this section regarding how particular fringe benefit plans or practices with respect to "cafeteria plans," "flexible spending accounts," and the "continuation of health benefits provisions" of title X of the Consolidated Omnibus Budget Reconciliation Act of 1985 (COBRA) interact with FMLA, particularly in regard to the tax implications of such programs. These issues cannot be resolved through FMLA's implementing regulations, because they are within the authority of the Internal Revenue Service (IRS). Questions regarding these matters should be directed to the IRS. (See Notice 94-103 in Internal Revenue Bulletin No. 1994-51, dated December 19, 1994.)

Nationsbank Corporation (Troutman Sanders) and Southern Electric International, Inc. (Troutman Sanders) stated that the rule failed to specify whether family members whose coverage is dropped at the employee's election during FMLA leave may be required to requalify for coverage upon the employee's return to work, and suggested that FMLA was not intended to exempt non-employee insureds from requalification. An employee is entitled to be restored to the same level of benefits which the employee received prior to starting the leave, including family or dependent coverages, without any qualifying period, physical examination, exclusion of pre-existing conditions, *etc.*, and the regulations are clarified to reflect this requirement.

The UAW International Union recommended that this section be amended to state that an employer may not treat workers who take FMLA leave in a manner that discriminates against them—*e.g.*, if workers on other forms of paid or unpaid leave are entitled to have coverage maintained for other, non-health plan benefits (life insurance, disability insurance, *etc.*), then the employer is required to follow its established practice or policy for maintaining these benefits for workers on paid or unpaid FMLA leave. This is addressed under the "prohibited acts" section of the regulations, at § 825.220.

This section has been clarified to address employees' entitlements to holiday pay and other benefits while on FMLA leave.

The law firm of Alston and Bird recommended that the term group health plan should not include non-employment related health benefits paid directly by employees through voluntary deductions, *e.g.*, individual insurance policies. We agree with the recommendation, and language has been added to § 825.209(a) to exclude such benefits from the definition of group health plan, and to make clear that an employer is not responsible for maintaining or restoring such benefits for employees who take FMLA leave.

#### Employee Payments of Health Benefit Premiums (§ 825.210)

Because health benefits must be maintained during FMLA leave at the level and under the conditions coverage would have been provided if the employee had continued to work, any share of group health plan premiums which the employee had paid before starting FMLA leave must continue to be paid by the employee during the leave. Any changes to premium rates and levels of coverages or other conditions of the plan that apply to the employer's active workforce also apply to eligible employees on FMLA leave. The regulations discuss options available to employers for collecting premium payments from employees on FMLA leave. Employers must give employees advance written notice of the terms for payment of such premiums during FMLA leave, and an employer may not apply more stringent requirements to an employee on FMLA leave than required of employees on other forms of unpaid leave under the terms of the Interim Final Rule.

One option referenced in § 825.210(b)(4) provided that an employer's existing rules for payment by employees on "leave without pay" could be followed, provided prepayment (before the leave commenced) was not required. The State of Oregon's Bureau of Labor and Industry questioned whether existing employer policies that formerly required an employee to assume responsibility for payment of all premiums for group health plan coverage during unpaid leave (both employer and employee shares) could continue to operate under FMLA, as § 825.210(b)(4) appeared to imply, or did §§ 825.210 (b)(4) and (e) refer only to the manner of payment rather than the duty to pay the premiums itself? The payment obligations of employers for group health plan premiums during FMLA

leave are subject to the same conditions that coverage would have been provided if the employee had continued to work; thus, employers cannot increase the employee's share of premiums during unpaid FMLA leave. The rules referred only to the manner of collecting premium payments.

Nationsbank Corporation and Southern Electric International, Inc. (Troutman Sanders) questioned whether an employer may use different options with different employees on a case-by-case basis for recovery of premiums from employees during unpaid FMLA leave or whether the employer must choose one option and apply it uniformly. The rules do not prohibit an employer from using different options on a case-by-case approach to meet the particular needs of employees and the employer, provided the employer does not act in a discriminatory manner.

The Chamber of Commerce of the USA opposed the requirement that employer policies on FMLA leave be equal to other leaves without pay provided by the employer, suggesting there is no statutory basis for this rule. Under the Interim Final Rule, sections 105 and 402 of the Act were construed in § 825.210(e) of these regulations and elsewhere to prohibit an employer from requiring more of employees (or providing less to employees) who take unpaid FMLA leave than the employer's policies require of (or provide to) employees on other forms of unpaid leave. We continue to believe that this regulation represents the proper construction of the Act.

#### Multi-employer Health Plans (§ 825.211)

Seven comments were received on this section, which describes special rules for maintenance of group health benefits under multi-employer health plans. The Associated General Contractors of America (AGC) contended that DOL wrongly concluded that employers under multi-employer plans must continue to make contributions during FMLA leave and that the legislative history, on which DOL relies, is internally inconsistent. AGC also urged that DOL clarify the FMLA rights of an employee who would have been laid off by a contributing employer during a period of FMLA leave but who might also have found employment with another contributing employer during the same period. Even if the individual might have found other employment with another contributing employer, AGC contends that the employer of the employee when the FMLA leave commenced has no further obligations under FMLA beyond the date on which he or she would have