

been laid off. Constructors Association of Western Pennsylvania filed similar views on this point.

These last comments reflect a proper interpretation of FMLA, as reflected throughout the regulations. Coverage by the group health plan must be maintained at the level coverage would have been provided if the employee continued to be employed instead of taking FMLA leave. As discussed elsewhere in these regulations, this means, for example, that if, but for being on leave, an employee would have been laid off, the employee's rights under FMLA, including the requirements to maintain group health plan coverage, are whatever they would have been had the employee not been on leave when the layoff occurred. And, of course, these FMLA obligations apply only with respect to an "eligible employee" who has met the length of employment and hours of service tests. Neither the employer nor the multiemployer plan has any obligation under FMLA with respect to persons who are not "eligible employees." The regulations are revised to clarify that group health coverage under a multiemployer plan must be maintained for an employee on FMLA leave at the same level coverage was provided when the leave commenced until either: (1) the FMLA leave entitlement is exhausted; (2) the employer can show that the employee would have been laid off and the employment relationship terminated; or, (3) the employee provides unequivocal notice of an intent not to return to work. With respect to the remaining comments on this section, we consider that the legislative history, as well as the regulations, accurately reflect the intent of the Congress that multiemployer plans must receive contributions during the period of an employee's FMLA leave, and that the rate of contribution is the same amount as if the employee were continuously employed, at the same schedule, at the same wage or salary, and otherwise under the same terms and conditions as he or she normally worked before going on leave, unless a contrary result can be clearly demonstrated by the employer (or by the plan, where appropriate).

#### Failure to Timely Pay Health Plan Premiums (§ 825.212)

This section provided that an employer's obligation to maintain group health benefits ceases after an employee's premium payment is more than 30 days late. The preamble explained that coverage had to be maintained during the 30-day grace period. If an employer chose to drop group health plan coverage because an

employee failed to make timely premium payments, all other FMLA obligations continue to apply during the FMLA leave, including the requirement to restore the employee to an equivalent position after the leave with full coverage and benefits equivalent to what the employee would have had if leave had not been taken and the premium payment had not been missed. An employee returning from FMLA leave may not be required to meet any qualification requirements imposed by the plan, including any new preexisting condition waiting period, waiting for an open season, or passing a medical examination for coverage to be reinstated.

Acruz Investigation Agency, Austin Human Resource Management Association, HCMF (long term care facilities), K-Products, Inc., Pathology Medical Laboratories (Riordan & McKinzie), Equal Employment Advisory Council, and Society of Professional Benefit Administrators opposed requiring the employer to reinstate health coverage (or dependent family member coverage) when the employee failed to make timely premium payments. In effect, they argue, individuals who take FMLA leave receive preferential treatment over active employees who decide to drop coverage and then request reinstatement of coverage, who are then subject to pre-existing condition waiting periods.

FMLA § 104(a)(2) states clearly that the taking of FMLA leave shall not result in the loss of any employment benefit accrued prior to the date on which the leave commenced. To hold a returning employee to a requirement that he or she requalify (or possibly not qualify) for any benefits which were enjoyed before going on FMLA leave would result in the loss of an employment benefit as a result of taking the FMLA leave. Moreover, the employees would not be restored to an equivalent job with equivalent benefits upon their return from FMLA leave if they were made subject to pre-existing condition waiting periods. These results would clearly violate FMLA's statutory standards.

The Service Employees International Union and the AFL-CIO recommended a provision requiring the employer to give a notice of delinquency to the employee when group health plan premiums are late, which would give the employee a reasonable opportunity to cure the delinquency before coverage is dropped. The Women's Legal Defense Fund noted that under the interim rules, an employer could stop making premium payments on the employee's behalf if the employee's check is lost in

the mail. WLDF also suggested that the employer be required to notify the employee in writing and give the employee an additional 30 days in which to cure the delinquency, citing regulations promulgated by OPM to implement Title II of FMLA as a model (5 CFR § 890.502; 58 *Fed. Reg.* 39607 (July 23, 1993)). The California Department of Fair Employment and Housing also supported a bar against discontinuing coverage without notice to the employee.

The Department has decided to adopt the suggestions requiring notification to employees before an employer may drop group health plan coverage because of a lack of timely premium payments. Under the OPM regulations cited in the comments, the employing office must notify an employee if payment is not received by the due date that continuation of coverage depends upon receipt of premium payments within 15 days (longer for employees overseas) after receipt of the notice (or 60 days after the date of the notice if return receipt certification is not received by the employing office). DOL is adopting a similar requirement: 15 days notice must be given that coverage will cease if the employee's premium payment is more than 30 days late.

Pathology Medical Laboratories (Riordan & McKinzie) suggested that the rule should allow insurance coverage to be cancelled retroactively to the first date of the period to which the unpaid premium relates. Fisher & Phillips, Sommer & Barnard, William M. Mercer, Inc., and Florida Citrus Mutual filed similar objections to the 30-day grace period during which group health plan coverage must be maintained. The California Department of Fair Employment and Housing suggested a rule allowing employers to discontinue coverage when an employee is more than one regular pay period late, as most insurance is paid in advance on a monthly basis and the current 30-day rule could result in employers having to pay two months of free coverage when the employee fails to make the premium payments. The State of Nevada's Department of Personnel said it was unclear whether the employer's obligation to maintain coverage, and under a self-insurance plan to pay claims, only extends for the 30-day grace period, contending an inequity exists for an employer with a self-insured plan to pay claims despite the debt owed by a non-returning employee while not placing the same requirement on an employer with a fully-insured plan. Wessels & Pautsch suggested that a portion of the burden for maintaining health insurance should be shared by