

the insurance provider, *e.g.*, qualification requirements or preexisting condition waiting periods could be waived when an employee fails to make premium payments. Credit Union National Association, Inc. similarly suggested that insurance companies be mandated to waive these requirements. The American Apparel Manufacturers Association, Inc. expressed concern that the rule created an obvious disincentive for employees to maintain their portions of premiums during FMLA leave, because they know their coverage must be maintained by the employer, and suggested that employees be held accountable to their employers for reasonable administrative costs associated with reinstating employees' health coverage as an incentive to the employees to continue paying their share of premiums. The Chamber of Commerce of the USA concurred with the 30-day grace period but suggested clarification that the employer (or health plan insurer) may hold payment of claims under the health plan until the premium payment is made for the coverage period to which the claim relates. Equal Employment Advisory Council noted that some employees elect not to continue health premiums while on FMLA leave, and do not always want coverage reinstated on the first day of return because they would prefer not to incur the immediate cost of premium payments. They recommended that benefits be reinstated on the day of return if the employee resumes premium payments (if applicable); and, if the employee does not wish to resume coverage on the day of return, the employer should be allowed to reinstate coverage on the date the employee requests such reinstatement, provided the employee satisfies all the normal conditions that an employee not on FMLA leave would incur when initiating group health plan coverage.

As noted above, several revisions are included in the final rule in response to the comments received on this section. With respect to voluntary action by employees who elect to withdraw from their group health plan coverage during FMLA leave, and request reinstatement at a desired future date, if their decisions are truly voluntary and future reinstatement on the requested date is not barred by the terms of the plan or the employer, FMLA would not prohibit such employee-employer arrangements. However, the employee may not be required to requalify for any benefits enjoyed prior to the start of FMLA leave without violating the express terms of FMLA § 104(a)(2).

Under the final rule as revised, in order to drop group health plan coverage for an employee whose premium payment is late, the employer must provide written notice to the employee that the payment has not been received 15 days before coverage will cease. If the employer has established policies regarding other forms of unpaid leave that permit the employer to cease coverage retroactively to the first date of the period to which the unpaid premium relates, the employer may cease the employee's coverage retroactively in accordance with that policy, provided the 15-day notice was given. In the absence of such a policy applicable to other forms of unpaid leave, coverage for the employee ceases at the end of the 30-day grace period after the payment was due, again only if the required 15-day notice has been provided. The same rules would apply to payment of claims under self-insurance plans.

With respect to the remaining comments on this section, the Department is making no further changes. FMLA regulates the maintenance of group health coverage by employers for periods of qualifying FMLA leave, but does not extend authority to DOL to enable requiring insurance carriers to waive provisions in their existing contracts with employers or to otherwise bear a portion of the burden for maintaining health insurance for employees who take FMLA leave. The suggestion that employees be held accountable to employers for reasonable administrative costs associated with reinstating employees' health coverage as an incentive for them to continue paying their share of premiums similarly cannot be adopted. Employees who return from FMLA leave are entitled to be restored to the same or an equivalent position with equivalent benefits. Requiring an employee to pay more for the same level of benefits enjoyed previously is not "equivalent" and would violate FMLA.

Recovery of Premiums (§ 825.213)

FMLA § 104(c)(2) allows employers in certain cases to recapture the premiums paid for maintaining employees' group health plan coverage during periods of *unpaid* leave under FMLA if the employees fail to return to work after the leave period to which the employee is entitled has expired. This recapture provision does not apply to "key" employees who are denied restoration under FMLA § 104(b), nor to any employee who cannot return to work because of the continuation, recurrence, or onset of a serious health condition—

either the employee's own or that of an immediate family member (spouse, child, or parent) for whom they are needed to care, or due to other circumstances beyond the control of the employee. An employer may require medical certification to support an employee's claim that the qualifying serious health condition exists. This section of the regulations described the statutory provisions and provided examples of other circumstances beyond the control of the employee. Included was a provision that an employee must return to work for at least 30 calendar days to be considered to have "returned to work" for purposes of this provision. Because the statute specifies that the recovery of premiums applies to "any period of *unpaid* leave under § 102" when the circumstances permit, the rule stated that an employer may not recover its share of health insurance premiums for any period of FMLA leave covered by *paid* leave. Additional guidance was included in § 825.213(f) concerning "non-mandatory" (*i.e.*, other than "group health plan") benefits, *e.g.*, life and disability insurance, in an effort to alert employers of the possible adverse consequences of allowing such "non-mandatory" benefits to lapse during a period of unpaid FMLA leave and the employer's ability to meet FMLA's requirement to fully restore *all* employment benefits (*not* just group health plan coverage) to eligible employees who return from qualifying FMLA leave.

Several commenters took issue with the underlying statutory provisions discussed in this section, over which DOL has no control. Those comments will not be addressed.

The ERISA Industry Committee commented that providing for employers to collect premiums from non-returning employees provides no practical benefit to employers, suggesting that alternatives be made available such as refundable deposits or advance payments to cover the leave period (advance or "pre-" payment was specifically prohibited by § 825.210(b)(4) of the Interim Final Rule). Pima Federal Credit Union similarly viewed the rule as unrealistic—an employee normally cannot or will not repay and legal action by the employer creates destructive, unfavorable publicity and "ill-will," harming employee morale. Loral Defense Systems—Arizona stated it is not feasible for most employers to recover their portions of health insurance premiums unless the employee voluntarily agrees to reimbursement arrangements.