

“employment benefits,” to be consistent with a similar narrow exception followed under ERISA. Maintenance of such individual health insurance policies which are not considered a part of the employer’s group health plan (as newly defined) are the sole responsibility of the employee, who should make necessary arrangements directly with the insurer for payment of premiums during periods of unpaid FMLA leave.

Notwithstanding these provisions, if an employer’s payment of health or welfare benefit premiums (as required to comply with FMLA) changes the plan from a non-ERISA to an ERISA-covered plan, the result is unavoidable in light of the statutory provisions.

William M. Mercer, Inc. suggested that the rule specify more clearly that an employer’s ability to recover premiums for non-health benefits includes both the employer and employee share, regardless of the reason for an employee’s failure to return to work.

An employer may elect to pay premiums continuously (to avoid a lapse of coverage or otherwise) for “non-health” benefits (e.g., life insurance, disability insurance, etc.). Like the provision in section 825.212(b) regarding health benefits, this section (as restructured and revised for clarity) provides a new paragraph (b) that where such payments have been made, and the employee returns to work at the conclusion of leave, the employer is entitled to recover only the costs incurred for paying the *employee’s* share of any premiums (regardless of an employee’s argument that he or she did not want coverage during the leave). If the employee fails to return to work for any reason, the employer may also recover only the employee’s share of any non-health benefit costs incurred by the employer.

#### Rights on Returning to Work (§ 825.214)

FMLA’s employment and benefits protection requires that an eligible employee be restored, upon return from FMLA leave, to the original position held by the employee when the leave commenced, or to an equivalent position with equivalent benefits, pay, and other terms and conditions of employment.

Equal Rights Advocates recommended that the regulations interpret FMLA’s restoration rights to require that the employer first try to reinstate the employee to the *same* position, and, only if it is not available, restore the employee to an “equivalent” position. Women Employed Institute and Women’s Legal Defense Fund suggested that employers be required to notify

employees no later than the last day of leave if an employer does not intend to restore an employee to the same position.

The State of Oregon’s Bureau of Labor and Industries asked if an employee’s right to reinstatement under FMLA persists ad infinitum until the employee is offered an equivalent position, or if it is ever extinguished (e.g., where the former job has been eliminated during the leave and no equivalent positions are available when the employee’s leave ends). Fisher & Phillips suggested that the regulations should enable an employer to deny reinstatement to a returning employee if it can demonstrate that the job was eliminated for business reasons (citing, for example, where the employee’s work can be performed by other workers) and no other “equivalent” job is available for the employee.

As explained in FMLA’s legislative history, the standard for evaluating job “equivalence” under FMLA parallels Title VII’s general prohibition against job discrimination (42 U.S.C. 2000e-2(a)(1)), which prohibits “discriminat[ion] \* \* \* with respect to [an employee’s] compensation, terms, conditions, or privileges of employment,” and is intended to be interpreted similarly:

The committee recognizes that it will not always be possible for an employer to restore an employee to the precise position held before taking leave. On the other hand, employees would be greatly deterred from taking leave without the assurance that upon return from leave, they will be reinstated to a genuinely equivalent position. Accordingly, the bill contains an appropriately stringent standard for assigning employees returning from leave to jobs other than the precise positions which they previously held.

First, the standard of “equivalence”—not merely “comparability” or “similarity”—necessarily requires a correspondence to the duties and other terms, conditions and privileges of an employee’s previous position. Second, the standard encompasses all “terms and conditions” of employment, not just those specified. (Report from the Committee on Labor and Human Resources (S.5), Report 103-3, January 27, 1993, p. 29.)

Given this history, DOL lacks authority to require an employer to first attempt to place a returning employee in the *same* position from which the employee commenced FMLA leave, and we do not see the utility of imposing additional notification requirements on employers when they simply exercise their statutory rights to place employees in equivalent positions. If a position to which a returning employee is placed is equivalent, the employee has no right to obtain his or her original job back. On the other hand, as an enforcement

matter, we recognize that restoring an employee to the same position presents strategic advantages to employers who attempt to meet their FMLA compliance objectives in this manner, because it avoids what may often become protracted disputes with employees over the exacting “equivalence” standards that must be applied. It should be noted, in response to the comments from the State of Oregon’s Bureau of Labor and Industries and Fisher and Phillips, an employer has an obligation to place the employee in the same or an equivalent position even where no vacancy exists. The statute does not permit an employer to replace an employee who takes FMLA leave or restructure a position and then refuse to reinstate the returning employee on the ground that no position exists. Furthermore, an employee’s acceptance of a different but allegedly equivalent job does not extinguish an employee’s statutory rights to be restored to a truly equivalent job or to challenge an employer’s placement decision. Enforcement actions may be brought within two years after the date of the last event constituting the alleged violation, unless the violation is willful, in which case a three year statute of limitations applies. Given the complexities involved, it may well be advantageous for employers to restore returning employees to their same positions, but it cannot be a requirement of compliance in the regulations. As explained elsewhere in the regulations, 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. Note, too, however, that it is a violation of FMLA’s prohibited acts (§ 105 of the Act) for an employer to discharge or otherwise discriminate against an employee for exercising rights under the Act. Thus, it would be a prohibited act to refuse to place an employee in the same position *because* the employee had taken FMLA leave. Similarly, an employer that eliminates the job of an employee who takes FMLA leave (for example, by redistributing the work to other employees) must bear the burden of establishing that the job would have been eliminated, and the employee would not otherwise have been employed at the time of restoration, if the employee had continued to work instead of taking the leave. (See § 825.216.)

Sommer & Barnard noted the regulations did not address an employers’s obligation to reinstate an employee who returns to work before