

the planned expiration of the scheduled FMLA leave without advance notice to the employer, and suggested a minimum of two business days advance notice be required of the employee in such a case. (See also §§ 825.216 and 825.309.) On the one hand, an employee cannot be required to take more leave than is necessary to address the employee's FMLA need for leave (because it would not qualify as FMLA leave and, therefore, could not be charged against the employee's 12-week FMLA leave entitlement during the 12-month period). On the other hand, employees should be able to provide reasonable advance notice of changed circumstances affecting the employee's need for FMLA leave. The suggestion a minimum of two days advance notice be required has been adopted in § 825.309(c). Also, an employer may obtain such information in periodic status reports from the employee.

Wessels & Pautsch commented that employers who choose to accommodate individuals who are not protected by the ADA should not risk litigation by reinstating a returning employee to less than an equivalent position if the position offered is all that the employee can perform. They recommended that the final rule note that the right of reinstatement to the same or equivalent position is contingent upon the employee's continued ability to perform all of the essential functions of the job. (See also § 825.215.) This point has been clarified in this section.

The National Association of Temporary Services, in commenting on this section, supported adoption in the rule of a concept that temporary employees who find their spots filled upon return from leave would go to the "head of the line" for placement by the temporary help company under certain circumstances. There are limitations, however, in the application of this "head of the line" principle, because some circumstances of temporary help employment would require immediate reinstatement under FMLA. If, for legitimate business reasons unrelated to the taking of FMLA leave, the client of a temporary help company discontinues the services of the temporary help company (*i.e.*, the contract under which the employee who took FMLA leave was working has ended), or discontinues the services formerly performed by the employee who took FMLA leave, *and* there are no available equivalent temporary help jobs at the same client of the temporary help company, then the obligation of the temporary help employer is to find an equivalent temporary help job to which to restore the returning employee at another client

company. If no other equivalent positions are available with other clients, *and* if the returning employee typically experienced "waits" between jobs in the ordinary course of his or her employment with the temporary help placement company, then such an employee would be entitled to priority consideration for the next suitable placement with other customers. On the other hand, if the client is still using agency employees in the same or equivalent positions, the agency would be required to reinstate the employee immediately, even if it would be required to remove another employee. This concept has been clarified in § 825.106 in discussing joint employment responsibilities of temporary help companies and their client firms.

The Edison Electric Institute asked if an employer is obliged to hold a position open for a "contract" employee employed by a contractor if the contract was originally for a period longer than the employee's FMLA leave time would consume. In the Department's view the contractor would have the responsibility as the primary employer of the employee for job restoration at the conclusion of the employee's FMLA leave, provided the primary employer chooses to place the employee in that position, rather than in an equivalent position elsewhere. If the contract employee's services are still being provided by the contractor under contract to the secondary (customer or client) employer, the primary (contractor) employer could restore the contract employee to the previous contract in the same or an equivalent position. Furthermore, if the secondary (customer or client) employer attempted to interfere with or restrain the primary (contractor) employer's attempts to restore the contract employee to his or her previous position from the start of the leave, the secondary (client or customer) employer would be in violation of the "prohibited acts" section of the Act and regulations (see § 825.220). These principles are discussed in § 825.106.

The College and University Personnel Association recommended that colleges and universities be permitted to maintain flexibility to place a faculty member in a temporary position without equivalent duties and responsibilities when the faculty member returns during a term, suggesting that educational institutions are unique because they work on the semester or quarter system and it disrupts students' education if a professor is brought back to teach during the term. FMLA contains no authority to grant the requested

exception by regulation. The Congress addressed to some extent the special circumstances of local education agencies under § 108 of FMLA, but chose not to include colleges and universities within the scope of the special rules.

Equivalent Position (§ 825.215)

An equivalent position is one that is virtually identical to the employee's former position in terms of pay, benefits, and working conditions, including perquisites and status. This section of the regulations, which attempted to articulate the various factors that have an impact on meeting the statutory standards for "equivalence" under FMLA and to present interpretations through examples, generated numerous comments.

Five commenters (Federally Employed Women; Women's Legal Defense Fund; Food & Allied Service Trades; International Brotherhood of Teamsters; and Service Employees International Union) objected to the discussion in paragraph (a) of this section that appeared to use the terms "equivalent" and "substantially similar" interchangeably, and they suggested that the regulations were confusing the applicable standards. The final rule has been clarified in response to these comments. As described in the legislative history noted above, the standard for evaluating job "equivalence" under FMLA parallels Title VII's general prohibition against job discrimination, and is intended to be interpreted in a similar manner. "Equivalence" necessarily requires a correspondence to the duties and other terms, conditions and privileges of an employee's previous position, which is more than mere "comparability" or "similarity." Moreover, the intended standard encompasses all "terms and conditions" of employment, not just those specified. Thus, several of these commenters objected on these grounds to the exclusion in paragraph (f) of "perceived loss of potential for future promotional opportunities" and "any increased possibility of being subject to a future layoff" from what was encompassed by "equivalent pay, benefits and working conditions" under FMLA. As requested by these commenters, the final rule has been clarified to indicate that an equivalent position must have the same or substantially similar duties, conditions, responsibilities, privileges and status as the original position. The references to perceived loss of potential promotions and increased possibility of future layoff have been deleted from paragraph (f).