

properly met, *i.e.*, based on facts existing at the time an employee seeks restoration to employment, the employer must establish that denial of restoration *at that time* is necessary to prevent substantial and grievous economic injury to the employer's operations.

Employee Protections and Prohibited Acts (§ 825.220)

Section 105 of FMLA makes it unlawful for an employer to interfere with or restrain or deny the exercise of any right provided by the Act. It also makes it unlawful for an employer to discharge or in any other manner discriminate against any individual for opposing any practice made unlawful by the Act. This opposition clause is derived from Title VII of the Civil Rights Act of 1964 and is intended, according to the legislative history, to be construed in the same manner. Thus, FMLA provides the same sorts of protections to workers who oppose, protest, or attempt to correct alleged violations of the FMLA as are provided to workers under Title VII. The regulations provided that any violation of the FMLA or its implementing regulations would constitute interfering with, restraining, or denying the exercise of rights under the Act. "Interfering with" the exercise of rights was defined to include not only denying authorization for or discouraging an employee to take FMLA leave, but manipulation by the employer to avoid responsibilities (such as unnecessarily transferring employees among worksites to avoid the 50-employee threshold for employees' eligibility). FMLA's anti-discrimination provisions were interpreted in the Interim Final Rule to prohibit an employer from requiring more of an employee who took FMLA leave than the employer requires of employees who take other forms of paid or unpaid leave (*e.g.*, requirements to furnish written notice or certification for use of leave). Also, employers were prohibited from considering an employee's use of FMLA leave as a negative factor in any employment actions (*e.g.*, promotions or discipline), and specifically in connection with "no fault" attendance policies. Finally, the regulations expressed DOL's view that employees cannot waive their rights under FMLA, nor can employers induce employees to waive their FMLA rights.

Ten commenters (Consolidated Edison Company of New York, Inc.; Dopaco, Inc.; Red Dot Corporation; Tax Collector, Palm Beach County, Florida; Austin Human Resource Management Association; Equal Employment Advisory Council; Florida Citrus

Mutual; Food Marketing Institute; Greater Cincinnati Chamber of Commerce (Taft Stettinius Hollister); and the Society for Human Resource Management) opposed the prohibitions against counting FMLA-protected leaves of absence in disciplinary actions and under employers' attendance control policies. Some felt that FMLA should not invalidate legitimate attendance control programs, which are objective and nondiscriminatory as to the reason for a given absence, or that reasonable attendance requirements should still be available to employers and remain within their prerogatives as a condition of continued employment. Some asked whether a distinction could be made between counting FMLA absences negatively for purposes of discipline or other adverse action, and counting them under attendance programs that reward employees for good attendance (*e.g.*, attendance *bonus* programs). It was argued that employers should still be allowed to reward employees positively for perfect attendance, and be permitted to exclude an employee from such an attendance award if the employee's FMLA absence makes him or her ineligible.

Employers pay bonuses in different forms to employees for job-related performance such as for perfect attendance, safety (absence of injuries or accidents on the job), and exceeding production goals. Bonuses for perfect attendance and safety do not require performance by the employee, but rather contemplate the absence of occurrences. To the extent an employee who takes FMLA leave meets all the requirements for these types of bonuses (which contemplate the absence of an event) before the FMLA leave begins, the employee is entitled to continue this accrued entitlement upon the employee's return from FMLA leave (the taking of FMLA leave cannot "* * *" result in the loss of any employment benefit accrued prior to the date on which the leave commenced"). Thus, the employee may not be disqualified for such bonus(es) merely because the employee took FMLA leave during the period; to do so would discriminate against the employee for taking FMLA leave. A monthly production bonus, on the other hand, does require performance by the employee during the period of production. If the employee is on FMLA leave during the period for which the bonus is computed, the employee may be excluded from consideration for the bonus. These principles are discussed in new § 825.215(c)(2).

Nationsbank Corporation (Troutman Sanders) observed that the courts in

recent years have found that some employees have abused or illegitimately sought the protection of anti-discrimination statutes to avoid legitimate discipline, and that the courts and some administrative agencies (including DOL) have developed decision rules to bar such use of the law by employees. The commenter recommended that DOL explicitly prohibit employee abuse or misuse of FMLA and include sanctions for such misconduct (*e.g.*, discharge, payment of attorneys' fees or other costs).

Sections 825.216 and 825.312 discuss at some length, as noted repeatedly throughout this preamble, that FMLA does not entitle any employee to any right, benefit, or position of employment other than any right, benefit, or position of employment to which the employee would have been entitled if the employee had not taken leave under the FMLA. Thus, FMLA cannot be used by employees as a "shield" to avoid legitimate discipline. As this basic tenet flows from FMLA's statutory provisions which have already been addressed in the regulations, it is unnecessary to include the particular suggested provisions to respond to these concerns.

Nationsbank Corporation (Troutman Sanders), Southern Electric International, Inc (Troutman Sanders), and Chamber of Commerce of the USA expressed concerns with the "no waiver of rights" provisions included in paragraph (d) of this section. They recommended explicit allowance of waivers and releases in connection with settlement of FMLA claims and as part of a severance package (as allowed under Title VII and ADEA claims, for example). The ERISA Industry Committee raised a similar concern with respect to the rule's impact on early retirement windows offered by employers. Such windows are typically open for a limited period of time and require all employees accepting the offer to be off the payroll by a certain date. If employees on FMLA leave have the right to participate in an early retirement program, but may continue to have and assert leave rights, the leave rights could adversely affect administration of the early retirement program.

The Department has given careful consideration to the comments received on this section and has concluded that prohibitions against employees waiving their rights and employers inducing employees to waive their rights constitute sound public policy under the FMLA, as is also the case under other labor standards statutes such as the FLSA. This does not prevent an individual employee on unpaid leave