

from returning to work quickly by accepting a "light duty" or different assignment. Accordingly, the final rule is revised to allow for an employee's voluntary and uncoerced acceptance of a "light duty" assignment. An employee's right to restoration to the same or an equivalent position would continue until 12 weeks have passed, including all periods of FMLA leave and the "light duty" period. In this connection, see also § 825.702(d).

With respect to early-out windows for retirement purposes, an employee on FMLA leave may be required to give up his or her remaining FMLA leave entitlement to take an early-out offer from the employer. Under these circumstances, FMLA rights would cease because the employment relationship ceases, and the employee would not otherwise have continued employment. Further, although an employer need not extend the window for those employees who are out on FMLA leave, the employer must afford such employees the opportunity to avail themselves of any such offer which would have been available if they had not been on leave.

Florida Citrus Mutual and Fisher & Phillips took issue with the prohibition against an employer manipulating the size of the workforce for the purpose of precluding employee eligibility for FMLA leave. They suggested that employers cannot "interfere" with the rights of employees unless and until the employees have those rights.

We disagree with the views expressed in these comments. It is DOL's view that a covered employer that engages in the manipulative behavior prohibited by the regulatory provisions is depriving employees of rights and entitlements they would otherwise fully enjoy *but for* the manipulative actions by the covered employer, which is expressly prohibited. The rule is clarified to state that employers covered by the FMLA may not engage in such manipulation of the workforce for the purpose of avoiding FMLA obligations.

The California Department of Fair Employment and Housing recommended revisions to paragraph (c) of this section to reference the consequences of an employer asking a job applicant or the former employer of a job applicant questions which would reveal the employee's use of FMLA leave, and the consequences of making hiring decisions based on the use of FMLA leave. It was suggested that if hiring decisions are among the employment actions for which use of FMLA leave may not be a negative factor, then the regulations should incorporate guidance in this area. A

reference to "prospective employees" has been included in paragraph (c) of this section.

### III. Subpart C, §§ 825.300–825.312

#### Posting Requirements (§ 825.300)

Twenty commenters took exception to the regulatory requirement regarding the size of the notice (poster). They felt it was unnecessary and did not provide any substantive benefit to employees.

The Department has determined that it will not prescribe the precise size of the required poster. The regulation requires instead that the poster be large enough to be easily read. This requirement would be satisfied, for example, if the poster were at least the size of a standard 8½×11 inch piece of paper. The purpose of the poster is to call employees' attention to the basic requirements of FMLA and provide information where they may get additional information or file a complaint. In the past several years a number of commercial firms have reproduced other posters, having a number of posters in a single set or on a single display, and much of the information is not legible from any reasonable distance. If the poster does not inform, it serves no useful purpose.

Two commenters objected to having a provision in the regulation that allowed employees to circumvent their notice obligations to the employer if the employer failed to post the notice. The purpose of this provision is to encourage employers to post the notice; otherwise, how would employees know about FMLA and their basic rights and where to obtain additional information? The posting requirement is not difficult or overly burdensome for an employer, as the Department will furnish, free of charge, a copy of the poster which the employer may duplicate. The Department finds no basis to remove this provision from the Final Rule.

The Employers Association of Western Massachusetts, Inc., commented that references to applicants for employment should be deleted from the regulation as the statute applies only to eligible employees.

The statute, at § 109(a), requires the notice to be posted in conspicuous places on the premises where notices to employees and *applicants for employment* are customarily posted. The prohibited acts identified by the statute in § 105 state that it is unlawful for an employer and/or any person to interfere with rights or discriminate *against any individual*. Clearly the prohibited acts are not limited in application to eligible employees. The Department is unable to make this

change as it conflicts with the statutory language.

The Society for Human Resources Management asked if a contractor who has employees working at multiple sites of other employers is required to post the notice at each site when the employer who controls the site has already posted the notice. The contractor should ensure that a notice is posted in a conspicuous place on the worksite where his/her employees have access. If so, there is no need for the contractor to post additional notices.

The Tennessee Association of Business asked if posting the notice satisfies all notice requirements of the Act. The posting of the notice is but one of the notice requirements applicable to employers. For example, in § 825.301(b) the employer is required to provide written notice to an employee who provides notice of the need for FMLA leave regarding eight essential elements of information that are employee-specific. There are a number of other notice provisions throughout the regulations.

#### Other Employer Notices (§ 825.301)

Four commenters made observations regarding the requirements of § 825.301(a) for employers to include their policies regarding the taking of FMLA leave in employee handbooks, if they have such a publication. One commenter asked for the deadline by which the FMLA provisions should be included. Another objected to any requirement to include the process to file a complaint and advising employees of their right to file suit. Yet another urged the Department to provide an acceptable statement to be included in the employee handbook regarding FMLA. One commenter urged that this requirement be satisfied if the employer incorporated the Department's FMLA Fact Sheet in the handbook.

It was the intent of the regulations that if an employer provides a handbook of employer policies, the employer's FMLA policies would be included in the handbook by the effective date of FMLA. There is no requirement that an employer include information regarding filing complaints or private rights of action. The purpose of this provision is to provide employees the opportunity to learn from their employers of the manner in which that employer intends to implement FMLA and what company policies and procedures are applicable so that employees may make FMLA plans fully aware of their rights and obligations. It was anticipated that to some large degree these policies would be peculiar to that employer. Consequently, it would be of little use