

to incorporate the Department's Fact Sheet or a Departmental statement in the employer's handbook for employees.

Seven commenters stated that the notice requirements in § 825.301(c) are burdensome, not required by the statute and should be deleted from the regulations. One commenter urged that the notice required by this section should include the consequences of employees failing to give 30 days notice when leave is foreseeable. Three additional commenters urged there be one generic notice applicable to all employees except key employees.

The intent of this notice requirement is to insure employees receive the information necessary to enable them to take FMLA leave. The employee is entitled to know the arrangements for payment of health insurance premiums reached by agreement with the employer, whether the employee will be required to provide medical certification for leave or fitness to return to duty, *etc.* It would be inappropriate to use a generic notice as much of the information may be employee specific, particularly the arrangements for payment of insurance co-payments. The regulation suggests employers provide information to employees regarding consequences of inaction. There is nothing in the regulation that precludes the employer from providing more information than required, only from providing less. The Department finds no basis to change the requirements of this notice provision.

Three commenters objected to a requirement that a notice be provided each time an employee takes leave, especially when the employee is taking leave intermittently.

The regulation has been amended to provide that in most circumstances notice need only be given once in each six-month period, on the occasion of the first employee notice of the need for leave. However, if the specific information required to be furnished in the notice changes, notice of the changed information must be provided in response to a subsequent notice of need for leave. In addition, an employer will be required to give notice of a requirement for medical certification, or for a "fitness-for-duty" report upon the employee's return to work, each time the employer receives notice of a need for FMLA-qualifying leave. An exception will exist, however, if the notice given at the beginning of the six-month period, as well as any employee handbooks or other written documents regarding the employer's leave policies, make it clear that medical certification or a "fitness-for-duty" report will be required under the circumstances of the

employee's leave. For example, the prior notice and handbook (if any) might state that certification will be required for all sick leave of any kind, for all unpaid sick leave, or for all sick leave longer than a specified period. Similarly, the notice and handbook might state that "fitness-for-duty" reports will be required for all employees with back injuries in a certain occupation.

The Women Employed Institute urged that the notice required by § 825.301(c) be in writing and that the notice should be furnished to the employee no later than the day before leave is to begin if leave is foreseeable or as soon as practicable if not foreseen.

The regulation has been changed to make it clear that the notice must be in writing. The interim final rule required the employer to provide the notice *at the time notice of need for leave is provided*. The Final Rule will require such notice to be provided as soon after notice of need for leave is given as practicable, usually one or two business days. The requirement for written notice simply ensures that the employee receives critical information and provides appropriate documentation of the information conveyed to the employee in the event of a dispute.

The Church of Jesus Christ of Latter-Day Saints commented that an employer should still be permitted to count an absence as FMLA leave even if an employee (who may be too ill) has not requested FMLA leave for the absence. An example was provided of an employee who has a heart attack and misses five weeks from work but does not request FMLA leave. The Church further observes that providing the employee with the required notice when the employee is so ill would be uncaring.

The regulations have been revised to permit the employer to mail the notice to the employee's address of record if leave has already begun. The regulations also provide that notice of need for leave may be given by the employee's spokesperson, (*e.g.*, spouse, adult relative, attorney, doctor).

The California Department of Fair Employment and Housing comments that the regulations should be more specific regarding the obligations of covered employers who have no eligible employees. Section 825.500 of the Final Rule has been revised to specify the obligations of covered employers who have no eligible employees.

The regulation has also been revised to make it clear that if an employer fails to provide the required information, it may not take action against an employee for failure to comply with the

employee's obligations required to be set forth in the notice.

Employee Notices (to Employers) When Leave is Foreseeable (§ 825.302)

Four commenters suggested that it be made clear that the employee is required to give notice of need for FMLA leave to the employee's supervisor or other appropriate person, and need not make the request to some top official of the company.

The employee is required to provide notice of need to take FMLA leave to the same person(s) within the company the employee ordinarily contacts to request other forms of leave, usually the employee's supervisor. It is the responsibility of the supervisor either to refer the employee who needs FMLA leave to the appropriate person, or to alert that person to the employee's notice. Once the employee has provided notice to the supervisor or other appropriate person in the usual manner, the employee's obligation to provide notice of the need for FMLA leave has been fulfilled.

The Nationsbank Corporation requested guidance as to the circumstances in which an employer may choose to waive notice requirements. Throughout the regulations, reference is made to the employer's ability to waive notice and certification requirements. As long as the employer's discretion is applied in a nondiscriminatory manner, the employer will have complied with these requirements.

Fisher and Phillips observed that the regulations do not address the employee's obligation to provide notice of any needed extension to leave already requested and underway. Sommer and Barnard also took issue with the notice requirements regarding an extension of leave, and suggested that the regulations should be amended to provide that an employee on FMLA leave who fails to report to work at the expiration of the leave and fails to give FMLA notice of the need for extension of the leave prior to its expiration shall not be entitled to the job restoration protections of the Act or the regulations, unless it was impossible to give such notice prior to expiration of the leave and the employee thereafter gives the earliest and best notice possible. The regulation has been amended in § 825.309(c) to provide that an employee shall advise the employer if leave needs to be extended. In addition, the employer may obtain such information from employees through status reports.

Section 825.302(g) has also been revised to clarify employee notice obligations when the employer's paid