

leave plan contains lesser obligations and paid leave is substituted for unpaid FMLA leave. An employer may not impose FMLA's stricter notice requirements if the employer's applicable leave plan allows less advance notice for the type of leave being substituted. See, also, § 825.207(h).

The Department also notes that the regulations continue to provide that although an employee is only required by FMLA to give oral notice of the need for leave, an employer may require an employee to comply with its usual and customary notice requirements, including a requirement of written notice. If an employee fails to give written notice in these circumstances, an employer may not deny or delay leave, but may take appropriate disciplinary action.

Employee Notices (to Employer) When Leave is *Not* Foreseeable (§ 825.303)

The Women's Legal Defense Fund suggested that section (a) be amended to reflect that an employee may not be foreclosed from beginning leave even if one or two days' notice is not possible. The final rule has been amended to include guidance that notice should be given as soon as practicable.

Two commenters indicated that verbal notice is not sufficient and the employer should be permitted to require a written notice, requesting leave and providing a general reason for the leave if FMLA. They suggested that if an employee needs to request the leave in an emergency, oral notice should be sufficient but only if the employee confirms that request in writing within two working days.

Nothing in the regulations prohibits an employer from requiring written notice to take or request leave if this is the employer's usual procedure. The employer may request written notice for all leave. The employer, however, may not deny or delay FMLA-qualifying leave when the employee provides verbal notice as soon as practicable. Having a hard and fast rule that the employee must give written notice or confirm the verbal notification within one or two working days would work an unnecessary hardship on many employees who have taken leave for a medical emergency and are not in a position to provide written notice either due to their own serious health condition, or that of an immediate family member.

Employer's Recourse When Employee Fails To Provide Notice (§ 825.304)

Seven commenters provided observations regarding this section. Four

of the commenters urged that an employer not be permitted to *deny* leave under any circumstances when the employee fails to provide adequate notice, but only delay the leave. They further stated that the employer should be permitted to delay the leave only if the employer can show that the activities of the business were prejudiced by the employee's failure to provide adequate notice. They questioned the extent of an employer's right to take disciplinary action in the event adequate notice is not provided and urged that the employer be prohibited from denying leave or discharging the employee for inadequate notice. One commenter asked for a definition of the term *as soon as practicable*.

Section 102(e) of the statute sets out obligations of the employee to provide notice to the employer of the need to take leave in both foreseeable and unforeseeable circumstances. As this is an affirmative responsibility of the employee it would be inappropriate to require the employer to show any prejudice resulting from an employee's failure to provide adequate notice. As used in the regulation, as soon as practicable is further explained as within one or two business days unless that is not feasible. The regulation is revised to provide that an employer may delay (rather than deny) leave where required notice has not been given.

Medical Certification of Serious Health Conditions (§ 825.305)

The Community Legal Services, Inc. commented that low income workers may be unable to persuade health care providers to provide medical certifications. They urge an exception for such workers if obtaining the certification is not practicable under the particular circumstances despite the employee's diligent, good faith efforts, and a similar exception that would excuse a person's inability to produce a certification or all the information requested by the employer because of non-cooperation by the health care provider. If an employee under these circumstances is unable to provide a complete certification, the employer could request a second opinion at the employer's expense, they suggest. Further, any employer that requires a certification should provide a copy to the employee.

The provision for medical certification at the request of the employer is a basic qualification for FMLA leave. It is the employee's responsibility to provide such certification. The Final Rule has been amended in § 825.311(b) to provide that

if an employee never produces the requested certification, the leave is not FMLA leave. It is the employee's responsibility to find a health care provider that will provide a complete certification. As the employee is providing the certification to the employer, if the employee wishes to have a copy he/she may make a copy before submission to the employer. The regulation has been amended to provide for copies of a second or third opinion to be provided by the employer to the employee upon the employee's request.

Eight commenters observed that providing a minimum of 15 days for the employee to provide medical certification is unreasonable. In some cases the certification would not be provided until the leave is over if the leave is only for a short period of time, and the employee would have returned to work, thereby denying the employer the opportunity to obtain second and third opinions where appropriate and designating the leave as FMLA leave after the employee has returned to work. Several alternatives were proposed, from allowing the employer to define an acceptable time frame to allowing only one week to provide the certification.

The regulations have been amended in § 825.305(a)(2) to track the statute more closely. Ordinarily, when leave is foreseeable and at least 30 days notice has been provided, the employee should provide the medical certification before the commencement of leave. If the need for leave does not allow for this, the employee should provide the certification within the time frames established by the employer for submission of the certification, which must allow at least 15 days after the employer's request. Section 825.208 of the regulations has been amended to enable the employer to make a preliminary designation of leave when the certification was not provided prior to the commencement of leave, or the employer is awaiting a second or third opinion, and to confirm or withdraw the designation depending upon the results of the medical opinions even though the employee has returned to work. The Department believes that the requirement to provide the certification in no less than 15 days is reasonable as the employee has no control over the timing of the health care provider's completion of the certification form.

Two law firms, Fisher and Phillips and Sommer and Barnard, observed the regulations are silent regarding time frames for submission of recertifications. Section 825.308 has been amended to clarify that recertifications are subject to the same