

suggested that only those health care providers whom the employer regularly employs to provide employee medical exams be excluded. Kennedy Memorial Hospitals suggested the regulations be changed to allow an employer-affiliated physician to render a second opinion and to require a neutral physician provide a third opinion if necessary. Koehler Manufacturing Company recommended that a health care provider regularly employed by the employer be allowed to provide the second medical opinion as this health care provider would be familiar with the job duties and responsibilities. Other commenters suggested that an employee be required to be examined by the employer's medical department. United Healthcare Corporation operates HMOs and has contractual relationships with the majority of physicians within a given area, and suggests it is virtually impossible to comply with this requirement. Section 103(c)(2) of the Act provides that a health care provider designated or approved to provide a second medical opinion shall not be employed on a regular basis by the employer, which is a statutory prohibition. The Department is unable to adopt the suggestions.

Ten commenters were critical of the provision in § 825.307(a) that prohibits an employer from making *any* contact with the employee's health care provider to obtain additional information, including the health care provider's address and telephone number. They indicated this prohibition worked against the interests of both the employee and the employer. The absence of the opportunity of the employer's health care provider contacting the employee's health care provider potentially creates additional, unnecessary costs for the employer and unnecessary discomfort for the employee who may be on leave for a serious health condition, leaving as the only recourse obtaining a second medical opinion. After review of these comments the Department agrees to some extent that a total prohibition on contact with the employee's health care provider is not in the best interests of both parties in many cases. Employers have observed that if they could only talk with the employee's health care provider to ask one or two clarifying questions, the initial medical certification could be accepted without resorting to a second, and maybe a third, opinion. The regulations have been amended in § 825.307(a) and in § 825.310(b) (certification of fitness-for-duty) to permit a health care provider representing the employer to contact the

employee's health care provider for purposes of *clarifying* the information in the medical certification or confirming that it was provided by the health care provider. The inquiry may *not* seek *additional* information regarding the employee's condition. Such contact may only be made *with* the employee's or family member's permission as appropriate. If the employee refuses to give permission, the employer may then require certification from a second health care provider. The optional medical certification form is being amended to include the health care provider's address and telephone number. Further, if the FMLA leave is running concurrently with a workers' compensation absence under State provisions that permit the employer or employer's representative to have direct contacts with the health care provider treating the workers' compensation injury or illness, such authorized direct contacts with the health care provider are not prohibited under FMLA (unless the employee chooses to forego the workers' compensation claim). This contact may only be made by a *health care provider* representing the employer, as most employers are not medically qualified to pose clarifying questions to the employee's health care provider. Further, a number of commenters have expressed concern regarding the privacy of the employee and the ethical considerations of the employee's health care provider furnishing information to a non-medical person (the employer). By requiring the employee's permission (or where following authorized procedures under workers' compensation laws) and limiting the contact to a health care provider, both these considerations and concerns will be addressed. It should be noted that although the regulations do not *require* that the employee's permission be obtained in writing, a prudent employer should follow such a practice.

Seventeen commenters addressed the issue of the third medical opinion. One commenter observed that the employer/employee should be able to use a health care provider (HCP) that is employed by the employer. Others suggested a number of processes to select the health care provider to provide the third opinion, such as: select the third health care provider on the basis of the worker's compensation statute; the choice should be the employer's alone as the opinion is obtained at the employer's expense; either the employee or employer submit a list of from three to five health care providers to the other and let the other party select

one from the list; the selection should be made by the first and second health care providers; the local medical society should be allowed to make the selection; obtain a list of seven to 10 health care providers and let the employer and employee each strike names until only one is left. Two commenters stated that the provision currently in the Interim Final Rule is reasonable.

The Department has thoroughly reviewed the comments and finds there are a number of viable methods for selecting the third health care provider. The current regulations place no limitation on the method for selecting the third HCP and it seems appropriate to continue to provide the employer and employee flexibility to use any mutually agreeable method. The Final Rule will incorporate the provision of the current rule without change. It should be noted that the prohibition against using a health care provider regularly employed by the employer does not apply to the selection of the health care provider to render the third medical opinion (subject to the agreement of the employee).

Fisher and Phillips observed that the regulations are silent on medical certification when the health care provider is located in another country. The observation is accurate. Since the regulations became effective, a number of issues have arisen when the employee or a member of the employee's immediate family (e.g., parent) is visiting or living in a country other than the United States. The Department has added a provision to § 825.305(a) to address this issue. In essence, the employer must accept a medical certification from a health care provider who is licensed to practice in that country, and make arrangements for second and third opinions, if required, with health care providers in that country.

The Edison Electric Institute asked when a second or third medical opinion is sought, what kind of information may the employer request? The Department has designed the optional medical form to be used for all three of the medical opinions as needed. If the employer chooses not to use the optional form for the second and third opinion, the information that may be requested is limited to that contained on the form and in § 825.306 of the regulations.

Subsequent Recertifications of Medical Conditions (§ 825.308)

Thirteen commenters addressed the request for comments in the Interim Final Rule regarding the appropriate length of time that a medical