

certification should be valid. Two commenters suggested that no time frame should be established, but that it should be dictated by the nature of the employee's condition and any changes in the condition (e.g., the employer should determine when another certification would be appropriate). Several commenters suggested that an employer should not be required to rely on any certification that was obtained over six months prior to the current notice of need for FMLA leave. Three of the commenters indicated that an employee should be able to use a medical certification that had been obtained within the past six months or a year. Another commenter observed that permitting the use of non-current certifications would provide the potential for abuse. The law firm of Sommer and Barnard suggested a maximum of 12 weeks for the life of the validity of the certification under any circumstances, including the taking of leave intermittently or on a reduced leave schedule. They referred to the provisions in this section that permit the employer to request recertification every 30 days. The longest time of validity of the certification suggested by any commenter was one year.

Seventeen commenters raised concerns on the particular circumstances that permit an employer to require recertifications. The majority of the commenters indicated that permitting a recertification every 30 days is not *reasonable* as contemplated by the statute. Others indicated that limiting the recertification to every 30 days was too long; some suggested 15 days instead of 30 days. Some urged that the recertification should be obtained at the employer's expense. One commenter asked what recourse the employer has when the employee does not provide the requested recertification.

After a review of all the comments the Department agrees that permitting the employer to routinely request recertification every 30 days is not reasonable in some circumstances. Section 825.308 has been changed to provide that where a certification provides a minimum duration of more than 30 days, the employer may not obtain recertification until that minimum period has passed unless the circumstances specified in the regulations are present. For chronic conditions, recertification is ordinarily permitted every 30 days, but only in connection with an absence. Exceptions are provided only if circumstances have changed significantly or the employer has reason to believe the employee was not absent for the reason indicated.

Because the statute does not provide for second or third opinions for recertifications, no such opinions may be required. The recertification must be obtained at the employee's expense unless the employer voluntarily chooses to pay for the recertification itself. Congress specifically required the second and third opinions to be obtained at the employer's expense. Congress did not include such a requirement regarding recertifications; consequently, there is no basis for the Department to impose the costs on the employer by regulation. If the employee fails to provide the recertification within 15 days when it was practicable to do so, the employer may delay further FMLA leave until the recertification is provided.

#### Notice of Intent To Return to Work (§ 825.309)

Employees may be required to report periodically on their status and intent to return to work while on FMLA leave *provided* the employer's policy regarding such reports is not discriminatory. The Women's Legal Defense Fund asked that the term "discriminatory" be defined and that the regulations set out how often an employer may request status reports. They also urged that the regulations state that employers may not require reports in a manner that discriminates on the basis of gender, race, etc.

The statute already provides a prohibition regarding discrimination. There are a number of references in the regulations to Title VII of the Civil Rights Act which prohibits discrimination based on sex, race, etc.

Since the statute became effective there has been no feedback to the Department indicating difficulties with the aspect of discrimination pursuant to either FMLA or Title VII. The regulations presently state that, with regard to reasonableness, the employer must take into account all the relevant circumstances and facts related to the individual's leave situation. Clearly, it is the intent of the statute and the regulations that employers not use the entitlement to require status reports in a manner that is burdensome and disruptive to the employee while on FMLA leave. The intent is that such requests be reasonable under the existing circumstances. An employer who misuses or abuses this provision may be found to have engaged in prohibited acts under the statute. It does not seem appropriate or necessary to repeat the prohibitions of Title VII in these regulations. This section will remain unchanged in the Final Rule.

Three commenters requested clarification regarding the employee's status when the employee fails to return at the conclusion of the leave or after 12 weeks of absence.

If the employee does not return to work at the conclusion of the planned leave, the employee should give the employer reasonable notice of the need for an extension if less than 12 weeks of FMLA leave been exhausted in the 12-month period. If the employee is unable to or does not return to work at the end of 12 weeks of FMLA leave, all entitlements and rights under FMLA cease at that time; the employee is no longer entitled to any further restoration rights under FMLA, and the employer is no longer required to maintain group health benefits pursuant to FMLA.

The law firm of Black, McCluskey, Sourers and Arbaugh, suggest that an employee who does not provide a status report after being given notice should be considered not intending to return to work.

The determination would be dependent upon all the facts in the specific case. The commenter assumes that the employee has received the notice. Perhaps the employee is in another city caring for a parent and does not receive a request mailed to the employee's home. It is simply not possible to state a general rule regarding this circumstance; it is dependent on all the facts. Clearly, the failure to respond does not constitute unequivocal notice in all cases.

The Texas Department of Human Services asked for a definition of "unequivocal," and whether it meant a written statement. The definition of this term is that it is understandable in only one way with no expression of uncertainty, *i.e.*, distinct, plain, absolute, clear. It has nothing to do with whether the notice is written or verbal.

The law firm of Fisher and Phillips urges that the regulations should clarify whether employees who request FMLA leave in excess of 12 weeks are entitled to any FMLA leave and whether they are entitled to maintenance of group health coverage.

The fact that the employee requests a greater amount of leave than the 12-week entitlement under FMLA does not negate his/her right to FMLA leave. The employee would be entitled to take 12 weeks FMLA leave with full rights and protections including maintenance of group health insurance. The employee's status would be reexamined at the end of the 12-week FMLA entitlement.

The law firm of Sommer and Barnard urges that the regulations provide that, if an employee wishes to return to work prior to the anticipated end of the leave