

serious health condition. The employer may not take adverse action against the employee by denying leave or taking other disciplinary actions for having taken FMLA leave. The taking of FMLA leave may not be counted against the employee under the employer's attendance policy. See § 825.220.

The Equal Employment Advisory Council suggests that it be made clear that employee misconduct prior, during or after FMLA leave that violates company policy is subject to the consequences of the employer's policies.

The Department wishes to make clear that FMLA is not a sanctuary for the employee who has violated or is in violation of company policies. A basic tenet of FMLA is that the employee who takes FMLA leave is to be treated no differently than if the employee had continued to work. For example, if the employer has a non-discriminatory policy that the second time the employer becomes aware that an employee has engaged in the illegal use of drugs, the employee will be terminated, the fact that the employee is on FMLA leave will not shield the employee from the continued application of that policy (*i.e.*, termination).

The Society for Human Resource Management (SHRM) asked whether an employee who is on FMLA leave and who resigns in the middle of the leave has to be kept on the payroll until the leave period is over.

No. The regulations provide that once an employee gives the employer unequivocal notice that the employee does not intend to return to work at the conclusion of leave, the employee may be terminated and FMLA leave ends, as well as the obligation for maintenance of health benefits, and the employer need not keep the employee on the payroll after receiving such notice.

SHRM asked where an employee who is pregnant requests FMLA leave, but the health care provider declines to certify that the employee is unable to work as a result of the serious health condition (ongoing pregnancy), what action should the employer take?

In this circumstance the employee does not qualify as being unable to work as a result of her condition, and the employer could deny the use of FMLA leave.

SHRM asked how an employer was supposed to manage absenteeism if the employee continues to claim leave taken is covered by FMLA?

The Final Rule attempts to address some of these issues. An employer is entitled to request medical certification and recertification in connection with

serious health conditions. The Final Rule provides that, if an employee never provides the medical certification, the absence is not FMLA leave; consequently, the leave is not protected by the FMLA. The Final Rule further provides that the employer may require documentation from the employee to confirm family relationships, as in the case of leave for birth or placement of a child for adoption or foster care. The Department believes there are a number of tools available to employers under the regulations that will serve to discourage employee abuse of FMLA leave, in addition to the basic concept that the 12 weeks of leave mandated by FMLA are unpaid.

The Koehler Manufacturing Company comments that it is unclear whether an employee may earn W-2 wages with some other employer while on FMLA leave.

The Department addressed this issue in the Interim Final Rule. Section 825.312(h) provides that whether an employee may engage in outside employment during FMLA leave is dependent upon the employer's established policy regarding outside employment. For example, the employer may require that all outside employment be pre-approved by the employer. If so, employment while on FMLA leave would be subject to this policy. This provision will remain unchanged in the Final Rule.

The Service Employees International Union took issue with the provision in § 825.312(h) applying the employer's policy regarding outside employment to periods of FMLA leave. SEIU maintained that there is no statutory basis for this provision, and that it constitutes the imposition of additional requirements on the taking of FMLA leave.

The Department does not agree with this view. As noted previously, a basic tenet under FMLA is that an employee on FMLA leave is entitled to no greater right, benefit, or position of employment than if the employee continued to work and had not taken the leave (see § 104(a)(3)(B) of the Act). While an employee is on FMLA leave, there continues to be an employment relationship, the employer is maintaining group health benefits and possibly other benefits, and the employee is entitled to return to the same or an equivalent job. Consequently, the employer's employment policies continue to apply to an employee on FMLA leave in the same manner as they would apply to an employee who continues to work, or is absent while on some other form of leave.

It is important to point out that the regulations do not prohibit outside employment by the employee on FMLA leave except as a result of the employer's established policies. In the absence of such a policy the employee may do as he/she chooses. However, taking outside employment during a period of FMLA leave may in some cases cast doubt on the validity of an employee's need for leave, particularly if the leave was being taken for the employee's own serious health condition.

#### IV. Subpart D—Enforcement Mechanisms

##### Employee Rights When FMLA Has Been Violated (§§ 825.400–825.404)

Federally Employed Women, 9 to 5, National Association of Working Women, Women's Legal Defense Fund, the Food and Allied Service Trades (FAST) and the United Food and Commercial Workers International Union (UFCW), suggest that the Interim Final Rule fails to include a complaint procedure that provides expedited relief and that the rule does not include injunctive relief as one of the available remedies in an employee's private court action. The Women's Legal Defense Fund and FAST urge that § 825.400(c) be amended to include "other equitable relief as appropriate." FAST points out that the expedited procedure is important, particularly if the employer fails to maintain group health insurance and the employee has a serious health condition which heightens the need for medical benefits.

The provision for an expedited complaint procedure is not a regulatory issue, but rather is an internal agency administrative enforcement issue. In any event, such an expedited procedure was adopted under FMLA in appropriate circumstances, and will continue to be used as an effective enforcement tool in carrying out the Department's responsibilities pursuant to FMLA. The statute at § 107(a)(2) makes no provision for an eligible employee to seek equitable relief through an injunctive action. Such an action is available only for the Secretary in § 107(d). The suggestion will not be incorporated into the Final Rule, as it has no statutory basis.

In the event the employer violates FMLA by failing to maintain the group health benefits as required, and dropping the employee's coverage, the employer in effect becomes self-insured and liable for any medical expenses incurred by the employee that would have been covered by the group health plan. With respect to the comment that