

the rule be amended to include equitable relief, although the current rule, at § 825.400(c), includes such relief ("employment, reinstatement and promotion"), the language has been clarified.

The Personnel Management Systems, Inc., urges that an employee be permitted to file a civil suit only after the Department has had an opportunity resolve the issue. The statute places no requirement that an employee exhaust administrative remedies before being authorized to file a private suit, as under Title VII. The legislative history confirms such a result. Therefore, no change will be made in the Final Rule.

The Chamber of Commerce of the USA questions the statutory basis for allowing an employee or *another person* to file a complaint with the Secretary of Labor, stating that only the affected employee should be permitted to file a complaint. The legislative history provides guidance on enforcement of the statute. FMLA's enforcement scheme is modeled after the FLSA, which has been in effect since 1938. Thus, FMLA creates no new agency or enforcement procedures, but instead relies on the time-tested FLSA procedures already established by the Department of Labor. Report from the Committee on Labor and Human Resources (S. 5), Report 103-3, January 27, 1993, pp. 35-36. The Department, in its enforcement of FLSA, has accepted complaints from employees as well as other persons who may have knowledge of the circumstances (*e.g.*, a relative of the employee, a Collective Bargaining Unit representative, a competitor, *etc.*).

The Nevada Power Company and the Edison Electric Institute suggest that punitive damages should be limited to those involving willful violations of the law. The statute does not explicitly provide for punitive damages, which would be available only if otherwise provided by law. Section 107(a)(1)(A)(iii) provides for an additional amount as liquidated damages to the amount awarded, including interest. An employer may avoid the liquidated damages if the employer can show to the satisfaction of the court that the violation was in good faith and the employer had reasonable grounds for believing that the action taken was not a violation of the statute. The regulations cannot limit the employer's liability for violations of the statute, when no such limitation is provided under the law.

The United Paperworkers International Union urges that the regulations require employers to justify significant changes in employment levels, thereby discouraging such

manipulations to avoid coverage. There is no basis in the statute for requiring such action on the part of employers. However, § 825.220(b)(1) of the regulation has been amended to advise covered employers that such manipulation will be viewed as a violation of the acts prohibited by the statute and the regulations.

V. Subpart E—Records (§ 825.500)

Nine commenters, including the Women's Legal Defense Fund (WLDF) and the EEOC, expressed concern about maintaining the confidentiality of medical records. WLDF urged that separate files be maintained to protect the confidentiality of ADA records, and EEOC said that having one confidential medical file for both laws (FMLA and ADA) may not always satisfy the ADA confidentiality requirements. EEOC stated that ADA protects all "information * * * regarding * * * medical condition or history of any employee," (see 29 CFR § 1630.14(c)(1)), which would include all employee medical information regardless of the form or manner in which it is provided, whereas the FMLA rule would be limited to "records and documents relating to medical certifications, recertifications or medical histories of employees or employees' family members." According to EEOC, if all medical information is kept confidential under FMLA like under ADA, maintaining only one confidential medical file would satisfy the ADA *provided* employers administer the exceptions to the confidentiality requirement in conformance with ADA requirements (*e.g.*, employers would have to provide supervisors or managers only with the specific information "regarding necessary restrictions on the work or duties of an employee" (§ 825.500(g)(1)), and deny them free access to the entire medical files of employees). Section 825.500(g) has been amended to require that medical records created for purposes of FMLA and ADA must be maintained in accordance with ADA's confidentiality rules on medical information.

Nine commenters expressed concern regarding the recordkeeping burden imposed by FMLA. The LaMotte Company specifically took issue with the estimate provided in the Interim Final Rule of 3 minutes per response, observing that, in their opinion, the requirements would take much longer. They estimate each certified letter would require one hour to prepare in addition to copying and sending. In addition, they experienced numerous telephone inquiries from employees and pointed out that time is also necessary

for training of supervisors and managers. The Human Resources Department, Village of Schaumburg, Illinois, also took issue with three-minute burden estimate. They observed that calculating hours of unpaid leave and the number of hours worked versus hours of FMLA leave, determination of FMLA versus other types of leave, and creating a system to collect employees' share of benefits all required significantly more time than three minutes. Most other commenters simply expressed the opinion that FMLA recordkeeping requirements are burdensome. The "three minutes per response" is an estimate of the annual *recordkeeping* burden per employee, to record and/or file records required by the regulations that are not otherwise required by law or would otherwise be kept as a customary prudent business practice. It does not include the preparation of employee notices required by the regulations, determination of employee eligibility, or procedures for payment of health benefits during FMLA leave.

The LaMotte Company observed that they had received statements from employees who believe that instead of making arrangements for others to take care of their children when they have minor colds, sore throats, or ear infections, they may now stay home with the child because they don't have to worry about saving sick leave for a truly serious health condition, and because FMLA may not be counted against their "point" system. Section 825.114 contains the definition of a serious health condition. The regulations provide that an employer may require an employee to provide a medical certification with regard to a serious health condition for a member of the employee's immediate family (child). If the certification does not confirm the existence of a serious health condition as defined under FMLA, or the employee fails to provide the certification when requested, the leave is not FMLA leave.

The California Department of Fair Employment and Housing and the Chesapeake Farm Credit object to the requirement for a covered employer who has no eligible employees to comply with the recordkeeping requirements of this section. Section 825.500(c) will be changed in the Final Rule to require the covered employer with no eligible employees to post the notice required in § 825.300 and to maintain only the basic payroll information (*i.e.*, name, address, occupation, rate or basis of pay, daily and weekly hours, *etc.*) already required under FLSA. These data are required to