

enable the covered employer to determine employee eligibility, when necessary. Once the covered employer has eligible employees, the additional records required by § 825.500(d) must be maintained.

Florida Citrus Mutual observes this section does not address the question of records to be maintained by joint employers. The records to be kept by primary employers and covered secondary employers in a joint employment situation should be listed separately, they contend.

The regulations have been revised to provide that a covered secondary employer in a joint employment situation need only keep basic payroll records with respect to its secondary employees. Other records are not necessary because the secondary employer's responsibilities in a joint employment relationship are only to reinstate the employee under the circumstances set forth in § 825.106(a) and to not violate any of the prohibited acts of the statute.

VI. Subpart F—Special Rules for Local Education Employees

Limitations on Intermittent Leave or Leave on a Reduced Leave Schedule (§ 825.601)

The Women's Legal Defense Fund and the American Federation of Teachers/National Education Association stated that the instructional employee who takes intermittent leave amounting to 20 percent or less of the working days during the period of leave should not be subject to the usual rules for taking intermittent leave in §§ 825.117 and 825.204. The employer does not have a right to transfer the employee to an alternative position under this circumstance. They suggest that the third sentence of paragraph (a)(2) of this section be deleted.

The statute at § 108(c)(1) gives the educational employer the right to require the employee either to take leave of a particular duration not to exceed the duration of planned medical treatment or to transfer to an alternative position that better accommodates recurring periods of leave. The statute is silent regarding the circumstances when the employee takes intermittent leave for 20 per cent or less of the total number of working days in the period during which the leave would extend. After further consideration the Department agrees that § 108 of the Act provides the only provision applicable to instructional employees and, therefore, an educational employer does not have the latitude to transfer an instructional employee to an alternative

position in this circumstance. The Final Rule will reflect this change.

Leave Taken for "Periods of a Particular Duration" (§ 825.603)

Federally Employed Women, the Women's Legal Defense Fund and the American Federation of Teachers/National Education Association objected to the provision in paragraph (a) of this section which states that leave that is required by the employer for either a particular duration or until the end of the school term is to be counted as FMLA leave. They view this provision to be doubly penalizing when the employee is required to take more leave than desired or medically necessary, and then to have that "extra" leave count against his or her FMLA leave entitlement. They urge that this provision be changed to reflect that such leave is to be counted against the FMLA entitlement only if the employee chooses rather than is required to take additional leave.

The legislative history provides the following guidance: Whenever a teacher is required to extend his or her leave under section 108(c) or (d), such leave would be treated as *other leave under the act*, with the same rights to employment and benefits protection contained in section 104. Report from the Committee on Labor and Human Resources (S. 5), Report 103-3, January 27, 1993, p. 37. However, the Department agrees that because the employer had the option of not requiring the employee to take leave until the end of the term, the leave should not count against the 12-week entitlement.

The Chicagoland Chamber of Commerce, *et al.*, commented that all periods of leave taken by school employees should count as FMLA leave, including any period of leave that occurs outside the school term. For example, if an instructional employee begins a six-week leave two weeks before the school term ends, the entire six-week period should count as FMLA leave.

The Department disagrees. An absence taken when the employee would not otherwise be required to report for duty is not leave, FMLA or otherwise. For example, the regulations do not require an employee, who normally works Monday through Friday, and is taking intermittent leave, to have counted as leave the weekend days (*i.e.*, Saturday and Sunday). If the employee(s), absent FMLA, would not have otherwise been required to take some form of leave to cover the absence, then the absence is not to be counted against the employee's FMLA leave

entitlement. Section 825.200(f) has been added to the Final Rule to clarify this issue.

Restoration to "Equivalent Position" (§ 825.604)

The Women's Legal Defense Fund and the American Federation of Teachers/National Education Association urged that this section be clarified in the Final Rule to make it clear that restoration of an employee at the conclusion of FMLA leave based on existing policies and practices of a school board must provide substantially the same protections as provided in the statute for other reinstated employees. Specifically, the school board may not restore the employee to a position which would require any additional licensure or certification, or would result in substantially increased commuting time.

The Department agrees with the suggestion that the regulation prohibit restoration to a position requiring additional licensure. While as a general matter restoration must be to a geographically proximate location, a school board policy may deviate from this requirement provided the deviation does not result in substantially less employee protections. Therefore, commuting time will not be mentioned in the rule.

VII. Subpart G—How Other Laws, Employer Practices, and Collective Bargaining Agreements Affect Employees' FMLA Rights

More Generous Employer Benefits Than FMLA Requires (§ 825.700)

Nothing in FMLA diminishes an employer's obligation under a collective bargaining agreement (CBA) or employment benefit program or plan to provide *greater* family or medical leave rights to employees than the rights established under FMLA (FMLA § 402(a)), nor may the rights established under FMLA be diminished by any such CBA or plan (FMLA § 402(b)).

This section of the regulations described the interaction between FMLA and employer plans and CBAs. Included were provisions to describe FMLA's delayed effective date for CBAs in effect on August 5, 1993—FMLA would not apply until February 5, 1994, or the expiration date of the CBA, whichever occurred earlier. For CBAs subject to the Railway Labor Act and other CBAs which have no expiration date for the general terms, but which may be reopened at specified times (*e.g.*, to amend wages and benefits), the date of the first amendment after August 5, 1993, and before February 5, 1994, was