

considered the effective date for purposes of FMLA.

The State of Oregon's Bureau of Labor and Industries, State of Oklahoma's Office of Personnel Management, Fisher & Phillips, and College and University Personnel Association raised questions or offered comments on whether "more generous" family or medical leave provided pursuant to contract or an employer policy may be counted against an employee's 12-week FMLA leave entitlement under circumstances where either the employees would not yet be eligible for FMLA leave, or the leave is for a reason that does not qualify as FMLA leave (e.g., employers adopt leave policies that mirror FMLA but relax eligibility requirements or the definition of serious health condition, or expand the "family member" definition to include in-laws and domestic partners). To reduce the incentive for employers to eliminate such "more generous" policies, these commenters contend that DOL should allow employers to count such leave towards FMLA leave entitlements.

Leave granted under circumstances that do not meet FMLA's coverage, eligibility, or specified reasons for FMLA-qualifying leave may *not* be counted against FMLA's 12-week entitlement. However, employers may designate paid leave as FMLA leave and offset the maximum entitlements under the employer's more generous policies to the extent the leave qualifies as FMLA leave.

Sommer & Barnard questioned whether FMLA's 12 weeks of leave must be added to longer periods of employer-provided leave (e.g., disability leave); or, alternatively, whether employers may offset FMLA's leave entitlement against the longer periods of employer-provided leave. To the extent that a particular absence recognized under the employer-provided plan also qualifies as FMLA leave, and the leave is designated by the employer in accordance with § 825.207 and § 825.208, the absence may be counted concurrently under both FMLA and the employer's plan (e.g., a disability that is covered by the employer's disability leave plan which also meets FMLA's definition of "serious health condition that makes the employee unable to perform the functions of the position").

The Chamber of Commerce of the USA commented that the language in paragraph (c) of this section provided a reasonable construction of the Act's effective date for CBAs subject to the Railway Labor Act and other CBAs which do not have an expiration date for the general terms, but which may be reopened between August 5, 1993, and

February 5, 1994, to amend wages and benefits. The example given, however, of a contract reopening to amend wages and benefits wrongly suggests that a contract reopened for any other reason also should be considered terminated for FMLA effective date purposes, the Chamber contended. Any reopening not pertaining to benefits should not be construed as a termination of the agreement according to this comment.

We disagree with the interpretation suggested by this comment. Any reopening of the CBAs subject to this rule, which is specifically limited to CBAs subject to the Railway Labor Act and other CBAs which do not have an expiration date for the general terms, for the first time after August 5, 1993, shall be considered the termination date of the CBA for purposes of FMLA's effective date.

The Contract Services Association of America questioned whether the costs associated with FMLA's requirements to maintain group health benefits during periods of FMLA leave could be credited by a contractor towards meeting its fringe benefit requirements under wage determinations issued pursuant to the McNamara-O'Hara Service Contract Act (SCA), or are they excluded as are other statutorily-mandated benefits such as FICA, workers' compensation, *etc.*? Because SCA excludes any benefit otherwise required by Federal, State, or local law to be provided by the employer to an employee, such costs may not be claimed as a credit for purposes of meeting the contractor's fringe benefit obligations to employees under the SCA. In any event, SCA credit may only be taken for contributions that cover periods when work is performed.

The Contract Services Association also asked whether cash-equivalent payments made in lieu of furnishing bona fide health and welfare benefits to an SCA-covered employee have to continue when the employee is on FMLA leave. Such cash equivalent payments do not have to continue while the employee is on *unpaid* FMLA leave.

State Family and Medical Leave Laws and FMLA (§ 825.701)

Nothing in FMLA supersedes "any provision of any State or local law that provides greater family or medical leave rights" than the rights under FMLA (see FMLA § 401(b)). Because of this statutory "non-preemption" language, the determination of which law applies (State versus Federal) in a particular situation must be examined on a provision-by-provision basis. Where the requisite coverage or applicability standards of both laws are met and the

laws contain differing provisions, an analysis must be made of both laws, provision-by-provision, to determine which standard(s) from each law will apply to the particular situation. The standard providing the greater right or more generous benefit to the employee from each law (provision-by-provision) will apply. Note, however, that leave taken for a reason specified in both the Federal and State law may be simultaneously counted against the employee's entitlement under both laws. This section of the regulations attempted to demonstrate the interaction between FMLA and State laws with examples. Numerous comments were received suggesting there may be considerable confusion over the "provision-by-provision" analysis that must be conducted in each particular case.

Employers Association of New Jersey recommended guidelines be included in the regulations for applying FMLA and State law in the following manner:

If an employee takes leave for a purpose which is recognized under only one of the two laws, rights and obligations are governed by that law alone, and the amount of leave taken cannot be charged against the amount of leave which may be allowed under the other law.

If an employee takes leave for a purpose which is recognized under both the FMLA and a State law, the employee is entitled to the benefits of whichever law is the most favorable to the employee and the amount of leave taken is charged against the amount which is allowed under each law.

The availability of benefits under either law is subject to the limitations of that law with respect to the duration of leave, type of leave, *etc.*

The Equal Rights Advocates suggested additional examples where a State law is silent on an issue addressed by FMLA. If an employee is "eligible" under both FMLA and a State or local law, and the State or local law is silent on a provision contained in FMLA, and if the FMLA provision is restrictive (as to employee rights or benefits), then the State or local law would govern as to that provision. If the FMLA provision is not restrictive (or extends a right, benefit or privilege to employees), then the FMLA would govern as to that provision. For example, a State law that grants employers the right to deny the taking of leave to high-level executives could not be applied to any FMLA-eligible employees, because FMLA extends to all eligible employees the entitlement to leave for qualifying reasons. If the same State law contained a provision mandating that all