

possessions of the United States may be eligible employees. The law firm asks for the same clarification with regard to employees working in countries other than the United States. Sections 825.105(a) and 825.800 in the Final Rule will be amended to reflect that employees employed within any State of the United States, the District of Columbia or any territory or possession of the United States are subject to FMLA and may be eligible employees. Employees employed outside these areas are not counted for purposes of determining employer coverage and may not become eligible employees as FMLA does not apply.

The Personnel Management Systems, Inc., and the Credit Union National Association, Inc., suggest that only eligible employees should be counted in determining whether an employer has 50 or more employees for FMLA coverage purposes. The language of the statute, in § 101(2) defines the term "Eligible Employee." In paragraph (3) of that section, the statute defines "Employee" as having the same meaning as the definition found in section 3 of the Fair Labor Standards Act. Section 101(4) of the statute defines "'Employer' as any person \* \* \* who employs 50 or more *employees* \* \* \*'" (emphasis added). If Congress had intended to limit the count for determining coverage to *eligible* employees only, it could have included that language "50 or more *eligible* employees." The legislative history indicates clearly Congress' intent to count all employees. The Department is unable to incorporate the desired change.

The Medical Group Management Association recommends that the definition of employee should not include equity owners (partners) of corporations who are both employers and employees. These individuals should be excluded from the count of employees even though their names appear on the payroll.

Persons who are partners in a business are not employees for purposes of the FMLA because partners are not included within the definition of employee under the FLSA. The definition of "employer" in § 101(4) of the FMLA means any *person* engaged in commerce or in any industry or activity affecting commerce who employs 50 or more employees, *etc.*, and includes any *person* who acts, directly or indirectly, in the interest of an employer to any of the employees of the employer. Section 101(8) defines "person" to have the same meaning as in § 3(a) of the FLSA, which means an individual, *partnership*, association, corporation

\* \* \* (*etc.*). Partners are not to be included in the count of employees for coverage or eligibility, even if their names appear on the payroll. However, equity owners (*e.g.*, stockholders) of a corporation may also be employees of the corporation and, as such, when their names appear on the payroll, are included in such employee counts and they may also become eligible employees. No change will be made in the Final Rule in this regard as the determination of whether such an individual is an employee is case specific.

The National Community Mental Healthcare Council observes that the definition of an individual who is incapable of self-care is deficient in that it only addresses activities of daily living (ADLs), which relate to physical incapacity, but does not address those with mental illness. They recommend the definition be expanded to include "instrumental activities of daily living" (IADLs). Their recommendation is appropriate and the language in the Final Rule in § 825.113(c)(1) has been amended to include IADLs.

The Council also urges that the definition of health care provider (HCP) be expanded to mental health professionals and mental health services. The definition of HCP has been amended to include any HCP from whom the employer or a group health plan's benefits manager will accept certifications. This change should address this concern.

#### *IX. Appendix B, Appendix C, and Appendix E*

A number of comments which raised concerns about Form WH-380, the optional form to obtain medical certification, have been addressed above and will not be repeated herein.

Three commenters, including The First Church of Christ, Scientist, offered alternative forms to be used for the medical certification. The concern of the Christian Scientists was that they are unable to provide a medical diagnosis of the employee. As the Department has already decided to revise the medical certification form, the concerns of these commenters will be addressed by the revision to the extent appropriate in keeping with the statutory language. Further, we believe having separate or special forms for differing kinds of health care providers would prove confusing, and may, in fact, result in more requests for second and third medical opinions.

G.M. Smith Associates, Inc., recommends the form include a letter from the employee to the health care provider that requests referral to a board

certified specialist if necessary. The form should ask the health care provider if going to work will harm the employee and whether the illness/injury precludes the employee from travel or being at work. If either of these questions are answered affirmatively, the health care provider would provide a date on which the employee will be available for limited duties.

There is no statutory basis for obtaining the additional information requested by this commenter. For example, § 825.702 provides that an employee may not be required to accept a light or limited duty position. The Department is unable to add the requested information to the form as it does not comport with the statutory provisions.

#### **Appendix C**

The Women's Legal Defense Fund points out that information is not included on the notice that notes potential application of either more beneficial State statutes or more beneficial provisions of a Collective Bargaining Agreement. They recommend separate notices for employers in each of the States that give broader rights. They suggest a statement in the notice that employees should consult with union representatives, that notices be provided to employers in Spanish, that the Department develop materials for employees on how to obtain FMLA leave, and that the Department install an 800-hotline number for FMLA inquiries and complaints.

The purpose of the notice is to outline the essential provisions and protections of FMLA to employees, much in the same manner as the notice for FLSA. The size of the poster, whether 8½ inches x 11 inches (the size of the FMLA poster) or 14 inches x 17 inches (the size of the FLSA poster), would not accommodate every possible nuance of the FMLA. Employees are advised to contact the nearest office of the Wage and Hour Division for additional or more specific information. The notice has been available in Spanish for some time. The Department has published State/Federal comparisons of family and medical leave statutes. These informational materials are available to employees as well as employers, thus, separate notices for each State are unnecessary. The Department has published a Fact Sheet and a Guide to Compliance with the FMLA for use by employees and employers alike to obtain more specific, non-technical information regarding the statute. Section 825.301(a)(2) instructs employers they may use the