

V. Notice: Employee Rights and Responsibilities

The Department noted in its Request for Information that one consistent concern expressed by the employee representatives during stakeholder meetings was that employees need to be better aware of their rights under the FMLA. Awareness of FMLA rights and responsibilities is critical to fulfilling the goals of the statute, yet it has been a challenge since the inception of the FMLA. Employees learn of their rights and responsibilities through the notice provisions of the FMLA and its implementing regulations. The Department sought information in response to several questions concerning the notice provisions and how those provisions relate to employee awareness of their rights and responsibilities:

- Whether employees continue to be unaware of their rights under the Act and, if so, what steps could be taken to improve this situation.
- The Department noted that employers have reported that some employees do not promptly notify their employers when they take unforeseeable FMLA leave and requested information on the prevalence and causes of employees failing to notify their employers promptly that they are taking FMLA leave and suggestions as to how to improve this situation.
- What methods are used to notify employees that their leave has been designated as FMLA leave? What improvements can be made so that employees have more accurate information on their FMLA balances?
- Does the two-day timeframe for providing notification to employees that their FMLA leave request has been approved or denied provide adequate time for employers to review sufficiently and make a determination?

A. Background

The Act places notice obligations on both employers and employees. The notice provisions are scattered throughout the regulations, which further define the statutory requirements and also include additional notice obligations.

1. Employer Notice Requirements

The FMLA mandates that covered employers affirmatively notify their employees of their rights under the Act:

Each employer shall post and keep posted, in conspicuous places on the premises of the employer where notices to employees and applicants for employment are customarily posted, a notice, to be prepared or approved by the Secretary, setting forth excerpts from, or summaries of, the pertinent provisions of this title and information pertaining to the filing of a charge.

29 U.S.C. § 2619(a). “Any employer that willfully violates this section may be assessed a civil money penalty not to exceed \$100 for each separate offense.”
29 U.S.C. § 2619(b).

In addition to the statutory posting requirement, the Department of Labor regulations flesh out employers’ obligations to inform employees of their FMLA rights and responsibilities. *See generally* 29 C.F.R. §§ 825.300-.301. In addition to repeating the statutory requirements, section 825.300 of the regulations requires some degree of bilingual or multilingual notice: “Where an employer’s workforce is comprised of a significant portion of workers who are not literate in English, the employer shall be responsible for providing the notice in a language in which the employees are literate.” 29 C.F.R. § 825.300(c).

Section 825.301 sets forth additional employer notice requirements, requiring the inclusion of information on the employee’s FMLA rights and responsibilities and the employer’s policies regarding the FMLA in the pertinent employee handbook

or through other means if the employer does not have such formal written policies. 29 C.F.R. §§ 825.301(a)(1)-(2).

The notice requirements set forth in section 825.301 derive from notice provisions found throughout the regulations. Within a reasonable time after the employee has provided notice of the need for leave, the employer shall provide the employee with written notice detailing the specific expectations and obligations of the employee and explaining the consequences of a failure to meet these obligations. The written notice must be provided in a language in which the employee is literate and must include, as appropriate:

- (i) that the leave will be counted against the employee's annual FMLA leave entitlement (see § 825.208);
- (ii) any requirements for the employee to furnish medical certification of a serious health condition and the consequences of failing to do so (see § 825.305);
- (iii) the employee's right to substitute paid leave and whether the employer will require the substitution of paid leave, and the conditions related to any substitution;
- (iv) any requirement for the employee to make any premium payments to maintain health benefits and the arrangements for making such payments (see § 825.210), and the possible consequences of failure to make such payments on a timely basis (i.e., the circumstances under which coverage may lapse);
- (v) any requirement for the employee to present a fitness-for-duty certificate to be restored to employment (see § 825.310);
- (vi) the employee's status as a "key employee" and the potential consequence that restoration may be denied following FMLA leave, explaining the conditions required for such denial (see Sec. 825.218);

(vii) the employee's right to restoration to the same or an equivalent job upon return from leave (see § 825.214 and 825.604); and

(viii) the employee's potential liability for payment of health insurance premiums paid by the employer during the employee's unpaid FMLA leave if the employee fails to return to work after taking FMLA leave (see § 825.213).

29 C.F.R. § 825.301(b)(1). "The specific notice may include other information--*e.g.*, whether the employer will require periodic reports of the employee's status and intent to return to work, but is not required to do so." 29 C.F.R. § 825.301(b)(2). "The notice shall be given within a reasonable time after notice of the need for leave is given by the employee - within one or two business days if feasible." 29 C.F.R. § 825.301(c). The written notification to the employee that the leave has been designated as FMLA leave "may be in any form, including a notation on the employee's pay stub." 29 C.F.R. § 825.208(b)(2).

2. Employee Notice Requirements

The FMLA also imposes a requirement on employees to notify their employers of the need for FMLA leave. The statute requires that in the case of foreseeable leave due to the birth of a son or daughter or the placement of a son or daughter with the employee for adoption or foster care, "the employee shall provide the employer with not less than 30 days notice before the date the leave is to begin . . . except that if the date of birth or placement requires leave to begin in less than 30 days, the employee shall provide such notice as is practicable." 29 U.S.C. § 2612(e)(1). The same standard applies to foreseeable leave based on planned medical treatment for a serious health condition of the employee or the employee's spouse, son, daughter, or parent. 29 U.S.C. § 2612(e)(2).

"When the approximate timing of the need for leave is not foreseeable, an employee should give notice to the employer of the need for FMLA leave as soon as practicable under the facts and circumstances

of the particular case. It is expected that an employee will give notice to the employer within no more than one or two working days of learning of the need for leave, except in extraordinary circumstances.” 29 C.F.R. § 825.303(a). “An employer may also require an employee to comply with the employer’s usual and customary notice and procedural requirements for requesting leave. . . . However, failure to follow such internal employer procedures will not permit an employer to disallow or delay an employee’s taking FMLA leave if the employee gives timely verbal or other notice.” 29 C.F.R. § 825.302(d).

While the statute and its implementing regulations require the employee to provide notice of the need for leave, employees are not required to specifically request FMLA leave. The “employee need not expressly assert rights under the FMLA or even mention the FMLA, but may only state that leave is needed[.]” 29 C.F.R. §§ 825.302(c), .303(b). However, the regulations also state that “[a]n employee giving notice of the need for unpaid FMLA leave must explain the reasons for the needed leave so as to allow the employer to determine the leave qualifies under the Act. . . . In many cases, in explaining the reasons for a request to use paid leave, especially when the need for the leave was unexpected or unforeseen, an employee will provide sufficient information for the employer to designate the paid leave a FMLA leave.” 29 C.F.R. § 825.208(a)(1).

B. Awareness of Rights

The 1995 Commission on Leave Report found that 41.9% of employees at covered establishments had not heard of the FMLA. The 2000 Westat Report found that 40.7 % of covered employees had not heard of the FMLA and nearly half the employees did not know whether the law applied to them. *See* 2000 Westat Report, at 3-8 and 3-9. One commenter cited these percentages and expressed a continuing concern that employees are not aware of their rights.

National Partnership for Women & Families, Doc. 10204A, at 17.

Increasing employee and employer awareness of FMLA rights and responsibilities continues to be a challenge. *See* Madison Gas and Electric Company, Doc. 10288, at 3 (“Employees tend to be uninformed about many legal rights or employer benefit provisions. Employees seek ‘just in time’ information when they really need it.”). *See also* An Employee Comment, Doc. 10336A, at 12 (“People generally do not understand the law. If you address an employer’s human resources department, you can leave even more confused. . . . Overall, employee rights are not disclosed clearly to employees.”); Zimbrick Inc., Doc. FL125, at 9 (“Some employees are aware and others are not. However, this is no different than any other areas.”); An Employee Comment, Doc. 4646, at 1 (“[I]f my coworker did not inform me of FMLA I know I would have lost my job.”). One employer suggested that employees may be unaware of their FMLA rights due to the timing of when they receive information about FMLA. “If employees continue to be unaware of their FMLA rights, it may be because most employers will cover this at orientation. On the first day of the job, new employees are nervous and are overwhelmed with paperwork and work rules. Since FMLA won’t affect them until they have in the requisite 12 months with the company, they may shove that information to the back burner.” Elaine G. Howell, H.R. Specialist, International Auto Processing, Inc., Doc. 4752, at 1.

It appears that employees are not the only ones who could benefit from increased awareness of FMLA. An employee who took FMLA leave for the adoption of a daughter and later sued his employer for interfering with his FMLA rights and terminating his employment in violation of the FMLA stated that “Not only was I unaware of my [FMLA] protected status, but neither was my management as they testified in court. [Company Name] did not meet their obligation to thoroughly explain FMLA leave to management and therefore they failed to provide

adequate protection to their employees.” An Employee Comment, Doc. 167A, at 2. The Legal Aid Society-Employer Law Center commented:

Awareness of one’s FMLA’s rights in the workplace is woefully absent. In my experience, most litigation has been the result of supervisors who are simply ignorant about FMLA, its intended purpose and basic protections, and then, with no training or information, improperly deny FMLA leave to eligible employees with a legitimate serious health condition. Invariably, in every case that I have litigated, the key supervisor did not know that: (1) FMLA provides 12 weeks of leave for an eligible employee; (2) the leave can be taken on an intermittent basis; (3) existing health care coverage continues while an employee is on leave; (4) an employee has the right to be reinstated to her same or comparable job upon expiration of the leave; and (5) an employee who exercises their right to take FMLA leave may not [be] subject to retaliation.

Doc. 10199A, at 3-4. *See also* Center for WorkLife Law, Doc. FL64, at 6 (“Some employers fail to inform eligible employees about their right to take FMLA leave because of the employers’ or their managers’

¹¹ Private sector supervisors are subject to individual liability under the FMLA and therefore may be held liable if they violate an employee’s FMLA rights. *See* 29 U.S.C. § 2611(4)(A)(ii)(I); 29 C.F.R. 825.104(d). The Department is aware, however, that there is a conflict in the circuits and in the lower courts regarding whether public agency supervisors can also be held individually liable under the FMLA. *Compare Modica v. Taylor*, 465 F.3d 174, 186 (5th Cir. 2006) (“The most straightforward reading of the text compels the conclusion that a public employee may be held individually liable under the FMLA.”) and *Darby v. Bratch*, 287 F.3d 673, 681 (8th Cir. 2002) (“It seems to us that the plain language of the statute decides this question . . . This language plainly includes persons other than the employer itself. We see no reason to distinguish employers in the public sector from those in the private sector.”) *with Mitchell v. Chapman*, 343 F.3d 881, (6th Cir. 2003) (“Our independent examination of the FMLA’s text and structure reveals that the statute does not impose individual liability on public agency employers.”), cert. denied, 124 S. Ct. 2908 (2004) and *Wascura v. Carver* 169 F.3d 683, 686 (11th Cir. 1999) (holding based on the similarity of the definition of “employer” under the FMLA and the FLSA, and circuit precedent interpreting the term under the FLSA, that public officials are not individually liable under the FMLA).

own lack of knowledge or understanding of the law.”).¹¹

Other comments from employees and employee groups reported that many employees have some general awareness of the FMLA but do not know what the law is (*e.g.*, whether it extends beyond leave for birth of a child) or whether it applies to them. A survey conducted by AARP of workers age 50 and over revealed that, although 91 percent were generally aware of the FMLA, only 50 percent of those workers reported that they first learned of the FMLA through their employer, suggesting that “more can be done to improve employer-employee communication[.]” AARP, Doc. 10228A, at 3. A survey of Working America members by the AFL-CIO similarly showed that 53.9 percent of respondents were informed about their FMLA rights by their employers. *See* Doc. R329A, at 7. The survey also showed that 68 percent of the respondents had taken unpaid leave to care for themselves or a spouse, child, or parent during an illness, but did not know whether it was considered FMLA leave. *Id.* at 40.

Still other stakeholders report that employees’ awareness of their FMLA rights is not lacking. For example, the National Coalition to Protect Family Leave stated that “Coalition members believe that, in many cases, employees are well aware of their FMLA leave rights. Among unionized employers, coalition members report that unions routinely inform their members of their FMLA rights.” Doc. 10172A, at 39. One law firm representing employers agreed. Porter, Wright, Morris & Arthur LLP, Doc. 10124B, at 5 (“Today, 13 years after the Act’s passage, employees are very savvy about their FMLA rights – it’s the rare employee who does not know of the FMLA.”). Other stakeholders echoed the sentiment: “As indicated by the high usage of FMLA by employees at most of our member airlines, employees are fully aware of the rights available to them under this popular Act.” *See* Air Transport Association of America, Inc., and Airline Industrial Relations Conference, Doc. FL29,

at 9. *See also* MedStar Health Inc., Doc. 10144, at 15 (asserting that “employees are not only aware of but, also, well educated on their FMLA rights”); National Association of Convenience Stores, Doc. 10256A, at 8 (“today’s employees are aware of their rights and obligations under FMLA long before they are hired”).

Suggestions we received for increased awareness include outreach efforts, public campaigns, increased dissemination of materials in both English and Spanish, on-line tools, and development of user-friendly FMLA materials that could be widely disseminated. *See* National Partnership for Women & Families, Doc. 10204A, at 17; Families USA, Doc. 10327A, at 4. One union stated that the “posting requirements for employers under FMLA do not go far enough in that they do not actively educate employees on their rights under FMLA. In addition to posting FMLA basic facts as required by the regulation, employers should be required to give the information to employees, in writing, once they become eligible under the regulations with that employer. Contact phone numbers for the employer as well as detailed appeals process afforded to the employee should be provided, as well as recourse information for possible retaliatory practices by the employer.” United Transportation Union, Doc. 10022A, at 2.

Another union recommended that “employees should be expressly notified of their right to take intermittent leave.” International Association of Machinists and Aerospace Workers, Doc. 10269A, at 2. “This has proven a real problem for some of our members. . . . An employee who suffers from a condition that is still being diagnosed, but doctors believe it is either lupus, a connective tissue disorder or rheumatoid arthritis, arrived late to work due to her condition on a number of occasions. This employee was completely unaware that she could take FMLA on an intermittent basis. She thought if she took any FMLA leave, she would have to stop working altogether, something her illness did not necessitate and something she could not

afford to do.” *Id.* at 2-3. The Legal Aid Society-Employment Law Center also stated that few employers effectively advise employees about their rights and options under the FMLA. *See* Doc. 10199A, at 4. Therefore, when “a supervisor denies a legitimate leave, uninformed employees must make the difficult decision to take the leave in spite of the supervisor’s denial and risk losing their jobs.” *Id.* This commenter suggested that employers provide employee training so that the workers understand their rights.

The AFL-CIO suggested that the Department should consider regulations that require “employers to provide an individualized notice provision to employees on an annual basis,” and referred to another commentator who suggested requiring notice to employees at the point of hiring and annually thereafter. Doc. R329A, at 40. The Communication Workers of America reiterated that employees should receive documents that “explain their annual leave entitlement and the process for making application for FMLA leave.” Doc. R346A, at 9. It suggested that employers could improve employees’ awareness of their rights, as well as inform them of their individual eligibility status, by taking steps such as producing an annual FMLA document for them. One employee recommended that a “manager and/or HR should formally contact the employee and notify them of the options available under FMLA. This should include a description of the protection and a review of what the employee needs to do to qualify for this protection (if anything). Employees should be clearly made aware of their obligations to the employer. Employees should be instructed when protection begins, when paid leave begins and ends (ie. paid vacation until it is used up), and protection should be defined.” An Employee Comment, Doc. 167A, at 2-3.

The National Employment Lawyers Association similarly asserted that the regulations should require employers to take steps to provide workers with adequate information regarding their rights

and responsibilities. *See* Doc. 10265A, at 4. One of its members suggested requiring employers to have such information in their handbooks and/or requiring employers “to produce a written statement of rights and responsibilities to an employee upon that employee’s first anniversary (if no handbook is issued).” *Id.* *See also* Coalition of Labor Union Women, Doc. R352A, at 2-3 (noting that many employees are not aware of their FMLA rights, and that employers do not provide them with the required information).

C. Employee Notice

As previously explained, employees have the responsibility to notify their employers of the need for FMLA leave; however employees are not required to expressly request FMLA leave or invoke their FMLA rights. A great deal of anecdotal information was provided concerning notices provided by employees as well as several suggestions on this subject.

1. Notice of the Need for Leave: Timing and Information Provided

Stakeholders offered several possible explanations for employees failing to provide notice of their need for leave, ranging from the employee’s relationship with his/her supervisor to not wanting the absence to count as FMLA:

It appears that reasons for employees failing to notify their employer in advance of FMLA leave-qualifying events vary depending upon the medical situation and the employee’s personality and relationship with his/her supervisor. For example, some employees discuss the possibility of surgery or childbirth informally with co-workers and then neglect to submit formal documentation in a timely manner perhaps assuming that the informal break room discussions are sufficient; other employees do not want supervisors or management to be aware of medical issues until the very

last minute and then provide only a bare minimum of information.

Another reason for delays is that employees seem to think that they can retroactively document most absences, whether foreseeable or not, and frequently submit the documentation after their return to work. Since in many cases these employees used accrued leave to cover their absences, it is often in the employer’s interest to also designate the absence as FMLA leave whenever the employee provides the documentation of qualification.

It also appears that employees who have the option of using other accrued paid leave often do not mention the reason for that leave in order to avoid the absence being charged concurrently to FMLA leave. Employees without other leave options are very quick to request FMLA leave even for doubtful absences.

Sally L. Burnell, Program Director, Indiana State Personnel Department, Doc. 10244C, at 5. *See also* Elaine G. Howell, H.R. Specialist, International Auto Processing, Inc., Doc. 4752, at 1 (“As an H.R. Specialist that handles FMLA, I can tell you that we have had employees with a *foreseeable* leave that did not notify us of their need for leave. Some employees have scheduled surgery and used vacation time. We are unaware of it unless there are complications. . . . Many of our employees are very private of their medical needs, as they should be.”); Zimbrick Inc., Doc. FL125, at 10 (“We see several causes [for employee’s failing to notify employer]: (1) employees’ lack of knowledge about FMLA; (2) employees don’t anticipate the need (for example:] employee takes off on Friday to have surgery but due to medical complications can’t return to work on Monday); [and] (3) employees who know FMLA is 12 weeks and they try to scam the system by using vacation and sick time up first and then want 12 more weeks off.”). One stakeholder cited the need to provide medical certification of the serious health

condition as a reason employees do not request FMLA leave. *See* FNG Human Resources, Doc. FL13, at 3 (“Employees refuse to request FMLA because some medical providers either refuse to complete the paperwork, complete it incorrectly or incompletely, or charge the patient up to \$50 to complete the required certification. Employees would rather do without the hassle, request sick pay for the days they are out, regardless of severity of their illnesses.”).

Some commenters do not see problems with employee notification as mentioned in the RFI and suggested maintaining the status quo. “Clearly, employees should notify their employers about their need for leave as quickly as is reasonably possible, but it also is important to ensure that employees are not penalized unfairly when confronted with unexpected emergencies. We believe the regulations strike an appropriate balance to allow employees to take leave in emergency situations, and also to provide employers with information about the need for leave in a prompt manner.” National Partnership for Women and Families, Doc. 10204A, at 19. *See also* OWL, The Voice of Midlife and Older Women, Doc. FL180, at 2 (“OWL believes that the current notice from employee to employer in unforeseeable leave situations is adequate.”).

The majority of stakeholders offering information on this topic, though, highlighted the problems they see with the sufficiency of information provided by employees in notifying employers of the need for FMLA leave. “[E]mployees who call in because of their own or a family member’s medical condition do not necessarily provide sufficient information for an employer to make such a determination. Since what constitutes ‘sufficient’ information is not clearly defined anywhere in the regulations, both employees and employers face difficulties in meeting their rights and responsibilities under the FMLA.” National Coalition to Protect Family Leave, Doc. 10172A, at 39-40. *See also* National Retail Federation, Doc. 10186A, at 16 (“Certain retailers report that paperwork is often not provided in a timely manner because the

employee has failed to adequately communicate the reason prompting the leave request or has not shared the information with an appropriate manager.”); Jackson Lewis LLP, Doc. FL71, at 9 (“Much of the frustration employers experience in administering FMLA leaves stems from the difficulty employers have in ‘spotting’ FMLA qualifying absences. Employers are not ‘mind readers’ and they often refrain from asking employees why they are absent for fear that they may invade an employee’s medical privacy. It also is naive to think that employers can effectively train front line supervisors on the myriad of health conditions and personal family emergencies that might qualify for FMLA protection.”); Porter, Wright, Morris & Arthur LLP, Doc. 10124B, at 4 (“The first concern in this area relates to the type of notice an employee must provide to obtain FMLA leave. . . . Instead, they simply need to request time off and provide a reason for their request.”); National Association of Convenience Stores, Doc. 10256A, at 5 (“Employee notice is often vague or non-existent, forcing employer representatives to make a discretionary ‘judgment call’ in questionable situations time and time again.”).

The timing of employee notification of the need for leave was also mentioned by employers and employer representatives as a problem in their administration of the FMLA, particularly—as discussed in greater detail in Chapter IV—employee notice with respect to intermittent leave. “The last issue has to do with the fact that we are often not notified that an employee is out for a serious health condition until after they return to work and then we are unable to ask for medical documentation.” Jan M. Gray, Benefits Coordinator, Spokane County, Doc. 5441A, at 1. *See also* Suzanne Kilts, Doc. 5204, at 1 (“On our intermittent FMLA employees, we have had several occasions where the employee does not call in for his FMLA absence until minutes before their shift start. . . . Just last week I had an FMLA call off at 9:05AM in the morning. That’s 2 hours and five minutes after their shift is to start.”); The

Pennsylvania Turnpike Commission, Doc. 10092, at 6 (“The issue of [employees] failing to notify their supervisors promptly that they are taking FMLA leave is very prevalent in our company. Some employees that are approved for intermittent FMLA simply don’t show up for work, and then email or call their supervisor when the work day is almost over to inform them that they are taking FMLA. This is extremely frustrating as an employer, and there does not ever seem to be a valid reason that the employee could not notify the supervisor earlier.”).

2. Commenter Recommendations

The Department also asked for suggestions on how to improve the reported situation of employees not promptly providing notice to their employers of their need for unforeseeable FMLA leave. One commenter suggested “shifting the burden to the employee to request the leave be designated as FMLA leave in writing.” *See* Miles & Stockbridge, P.C., Doc. FL79, at 5. Other commenters suggested not only written leave requests but also that leave requests specifically mention FMLA. “It would eliminate many disputes if an employee were required to request leave in writing or to follow up an oral request with a written request within a reasonable time (such as within two work days after returning to work in the case of intermittent leave, or five work days after requesting leave in the event of unforeseen continuous leave). . . . It would help both parties immensely if the employee were required to mention the FMLA when making such a request.” South Central Human Resource Management Association, Doc. 10136A, at 14; *see also* Spencer Fane Britt & Browne LLP, Doc. 10133C, at 39 (same). “Especially for intermittent use, require that employee provide specific FMLA notice when absences are necessary, relieving employer from identifying possible need of FMLA with timely designation based on limited information provided by employee[.]” DST Systems, Inc., Doc. 10222A, at 4.

Other stakeholders expressed a desire for more information from employees, but stopped short of

suggesting a requirement that the employee must specifically ask for FMLA leave. “Employees should be required to specify the purpose of any instance of FMLA leave, such as a doctor’s appointment, physical treatment, etc. so employers can assess veracity when employees appear to be abusing the leave policy.” U.S. Chamber of Commerce, Doc. 10142A, at 11. *See also* Williams Mullen, Doc. FL124, at 2 (“DOL should implement detailed regulations which provide necessary language or actions that must be taken by employees to put their employers on notice of their intent to take FMLA leave.”); Association of Corporate Counsel, Doc. FL31, at 8 (“The DOL should revise its regulations . . . by making clear that an employee’s notice to the employer must go beyond merely requesting leave and must provide a basis for the employer to conclude that the requested leave is covered by the FMLA.”). However, some employers advocated for a requirement that employees specifically request FMLA leave, suggesting that the regulations should apply “to only those employees who request FML coverage.” Edison Electric Institute, Doc. 10010A, at 3. *See also* Spencer Fane Britt & Browne LLP, Doc. 10133C, at 42 (employers who have a written FMLA policy should receive “safe harbor” protection and be permitted to enforce procedural requirements such as that FMLA leave requests be in writing, that the FMLA be specifically mentioned, and that the requests go to a particular centralized source).

Several stakeholders recommended allowing employers to enforce employee compliance with established attendance and leave notification procedures, particularly with respect to intermittent unscheduled FMLA leave. “The regulations should expressly provide that the employer may enforce any generally applicable leave notification or call-off requirements, even if the FMLA is also involved.” Ohio Public Employer Labor Relations Association, Doc. FL93, at 4. *See also* Association of Corporate Counsel, Doc. FL31, at 10 (“DOL should . . . make clear that an employee may be subject to an

employer's disciplinary process for failure to provide timely notice or to comply with the employer's written notification policy."); Miles & Stockbridge, P.C., Doc. FL79, at 4 ("A possible remedy . . . would be to require an employee taking intermittent leave to provide notice of the need to take intermittent leave consistent with the employer's call out procedures and/or sick leave/absentee policy. Additionally, at the time of the employee's call, the employee should be required to indicate that the reason for the absence is because of the FMLA qualifying chronic condition."); National Association of Convenience Stores, Doc. 10256A, at 5 ("Employers should also have the flexibility to impose more stringent internal notice requirements upon employees, and to impose leave forfeiture provisions for their non-compliance."); University of Wisconsin-Milwaukee, Doc. 10098A, at 4 ("Requiring employees to comply with regular attendance policies unless there is a 'medical' emergency would be one way to rectify the problem of employees failing to notify the employer of the need for unforeseeable leave. Intermittent, unscheduled FMLA does not necessarily imply a 'medical emergency' which

¹² In general, employers are required to designate leave as FMLA within two days of learning that the leave is being taken for an FMLA-covered purpose. See 29 C.F.R. § 825.208(b)(1). The regulations prohibit employers from retroactively designating leave as FMLA if they could have properly determined the status of the leave at the time the employee either requested or commenced the leave. See 29 C.F.R. § 825.208(c); but see supra Chapter II (discussing status of penalty provision of section 825.208(c) in light of the Supreme Court's decision in *Ragsdale*). The regulations do allow for retroactive designation, however, if the employer learns after an employee's leave has begun that the leave is for an FMLA-covered purpose. See 29 C.F.R. § 825.208(d). Similarly, if an employer knows the reason for the leave but is unsure whether it qualifies for FMLA protection, or if the employer has requested but not yet received certification of the need for leave, the employer may preliminarily designate the leave as FMLA-covered. See 29 C.F.R. § 825.208(e)(2). If upon receipt of the requested information the employer determines that the leave is FMLA protected, the preliminary designation becomes final. *Id.* If the additional information does not confirm that the absence was for an FMLA-covered reason, the employer must withdraw the preliminary designation and notify the employee. *Id.* Finally, if the employer does not learn that leave was taken for an FMLA-covered purpose until the employee returns from leave, the employer may, within two business days of the employee's return, designate the leave retroactively as covered by the FMLA. See 29 C.F.R. § 825.208(e)(1).

makes regular notification impossible."); American Electric Power, Doc. FL28, at 2-3 ("The regulations should be reformed to allow employers to enforce attendance policies that require employees to observe reasonable reporting-off protocols, including policies that require employees to report off to their direct supervisors or to a designated person in human resources.").

D. Employer Notification that Leave is FMLA-Qualifying

In order to allow employees to know when they are using their FMLA-protected leave, the regulations state that "it is the employer's responsibility to designate leave, paid or unpaid, as FMLA-qualifying, and to give notice of the designation to the employee." 29 C.F.R. § 825.208(a). It is the Department's intent that such designation occur "up front" whenever possible, to eliminate protracted "after the fact" disputes. See 60 Fed. Reg. 2180, 2207-08 (January 6, 1995).¹² Notification that the leave is FMLA-qualifying and the specific notice required to be provided by employers are essential means by which employees learn of their FMLA rights and obligations. Several employers provided information on this topic.

With regard to the notice procedures employers actually use, one commenter stated that its notification procedures are "working quite well," because it includes FMLA information during new employee orientation and has trained its supervisory workforce to recognize potential covered absences. FNG Human Resources, Doc. FL13, at 4. It stated that supervisors notify the personnel office, which mails out contingent FMLA notices and certification paperwork with instructions on how to have it completed, and the notice includes a statement of all employee rights and responsibilities. This employer allows employees 20 days to return the certification forms (more than the required 15 days), in order to cover mailing time and because some medical providers have a slow completion rate. Once the

paperwork is received, “we keep both the employee and supervisory personnel abreast of updates and approvals.” *Id.*

The Pennsylvania Turnpike Commission stated that its “process works great for our company and everyone is kept abreast of their FMLA status.” The Pennsylvania Turnpike Commission, Doc. 10092A, at 5-6. It described that when it receives a certification form, employees are sent a letter stating whether the leave is approved or denied, with a starting date and expiration date if approved. It reminds the employee’s supervisor a week prior to the expiration date, who reminds the employee that the leave is expiring. If the employee needs additional leave, the employee recertifies.

The Ohio Department of Administrative Services similarly noted that it understands that an employee’s awareness of FMLA rights and responsibilities “is critical to fulfilling the goals of the statute,” and therefore employees are given notice of the State’s FMLA policy upon their hire and notices also are posted. Doc. 10205A, at 4. The State also notifies employees of their rights verbally within two days of designating leave as FMLA leave, and confirms the designation in writing by the following payday. Employees receive notice the first time they are granted FMLA leave in each six-month period. The State noted that sending a letter to employees with chronic conditions every time they request FMLA leave for such a condition could “serve as an additional opportunity for communication,” but it believes that such notice would be very burdensome. *Id.* at 5. The State also supported eliminating the requirement to notify employees that their leave will be counted as FMLA leave when an employee has requested FMLA leave in writing or a verbal request has been appropriately documented. *See id.*

One commenter stated that it also advises employees verbally that their leave is FMLA-qualifying and then follows up with a letter. “If they have already used some FMLA in the last 12 months, I will include in the letter the amount of leave still

available to them. In the case of intermittent leave I will carefully explain our rolling 12 month period and give them a copy of the attendance controller on which I recorded their leave and, again, carefully explain that on the anniversary date of time used, that amount will become available for them to use.” Elaine G. Howell, H.R. Specialist, International Auto Processing, Inc., Doc. 4752, at 1.

Another commenter stated that it notifies employees that their leave has been designated as FMLA leave by sending the employees a letter confirming that their rights under the FMLA have been reviewed and the leave conditionally designated, pending proper doctor certification. Franklin County Human Resources Department, Doc. FL59, at 7. The University of Washington noted that it mails a written notification to eligible employees after a health-related three-day absence. *See* University of Washington, Doc. FL17, at 2-3,

The National Coalition to Protect Family Leave stated that many of its members follow the regulations for designating leave at sections 825.301(b) (specific notice of rights and responsibilities) and 825.208(b)(2) (payroll stub or other written designation). However, it stated that some employers are not aware of both provisions, and that the designation process is confusing when an employer provisionally designates leave when the employer does not have sufficient information to make a final determination within two days. The Coalition suggested that the regulations should allow the “official ‘designation’ notice to be sent to employees after sufficient information is received from the employee to make a determination whether the leave qualifies for FMLA protections as part of the section 825.301 notice obligations (rights and responsibilities requirement). No further designation should be required. Employers should simply have the obligation to provide the employees with FMLA usage information on request[.]” National Coalition to Protect Family Leave, Doc. 10172A, at 42.

One commenter suggested, as a possible improvement that would allow employees to receive more accurate information on their FMLA leave balances, that employees should keep their own records and also ask “the employer for a copy of their FMLA records and report any discrepancies within a specified amount of time to be resolved.” Bendix Commercial Vehicle Systems LLC, Doc. 10079A, at 9. Another commenter similarly suggested that employers should be required “to make a good faith effort to provide employees with information about their eligibility status and FMLA leave balances within a reasonable amount of time, upon request by an employee[,]” but employees also should be required to track their own hours and notify the employer if they dispute the employer’s data. Spencer Fane Britt & Browne LLP, Doc. 10133C, at 43. This commenter contended that an employee’s FMLA rights should be “no greater than they would otherwise be if the employer either fails to provide the information or inadvertently provides inaccurate information.” *Id.*

E. Timing Issues

The Request for Information sought comments on whether the two day time frame for employers to notify employees that their request for FMLA leave has been approved or denied was adequate.

The majority of comments on this topic indicated that the current two-day time frame was too restrictive. *See, e.g.*, United Parcel Service, Doc. 10276A, at 10 (“In most cases, the initial notification of an absence or need for leave is received by front-line management, who conveys the information up the chain of command and to the local HR representative, who notifies the FMLA administrator, who is ultimately responsible for making a determination. It is not unusual for it to take one to two business days just for the right personnel to receive the information, much less make a determination and communicate it back to the employee.”); Courier Corporation, Doc.

10018A, at 4 (“The two-day timeframe is way too short for notifying employees about their leave request, since as employers we are often chasing information from the employee or physician.”); Spencer Fane Britt & Browne LLP, Doc. 10133C, at 42 (“For most employers, this is virtually impossible. Although most employers designate leave within a reasonable time frame, it is usually well outside the two-day time frame, thus creating a risk that the designation will be ineffective.”). Employers suggested varying timeframes to replace the two-day limit. *See, e.g.*, Fisher & Phillips LLP, Doc. 10262A, at 15 (fifteen days from receipt of a certification form); National Coalition to Protect Family Leave, Doc. 10172A, at 48 (ten business days); Association of Corporate Counsel, Doc. FL31, at 11 (five working days); Courier Corporation, Doc. 10018A, at 4 (five days); United States Postal Service, Doc. 10184A, at 5 (same); Northrop Grumman Newport News Shipbuilding and Dry Dock Company, Doc. FL92, at 3 (same); Spencer Fane Britt & Browne LLP, Doc. 10133, at 42 (suggesting a reasonableness standard).

One employer stated that while some decisions can be made in two days, even a week might not be sufficient in other cases, depending upon the amount of information supplied by an employee and whether clarification is needed from the health care provider. *See* Elaine G. Howell, H.R. Specialist, International Auto Processing, Inc., Doc. 4752, at 1. Other commenters similarly stated that the two-day time frame for providing notification to employees that FMLA leave has been approved or denied is inadequate, “as there are many factors which result in delays in both obtaining information and processing requests.” Hinshaw & Culbertson LLP, Doc. 10075A, at 5.

With regard to possible alternative requirements, Jackson Lewis suggested employers should not be required to designate absences as FMLA-qualifying within two days, “as long as the employee is receiving the protections of the FMLA[,]” and that a regulation could allow employers to preliminarily

designate absences as FMLA-qualifying, subject to the “employees ‘opting out’ of FMLA leave” or the employer establishing that the condition does not qualify. Doc. FL71, at 8. The commenter stated this “would bring greater certainty and closure to absence management for absences by imposing a periodic ‘employee-employer’ reconciliation of FMLA leave.” *Id.* at 9. Alternatively, Jackson Lewis suggested that a regulation could “require that employers advise employees in general notices that they must specifically request FMLA leave for all absences of less than one week in duration,” and that employers should be allowed “to designate retroactively absences that initially were not classified by either the employer or employee as FMLA but would, in retrospect, qualify as intermittent leave under the FMLA.” *Id.* See also Fairfax County Public Schools, Doc. 10134A, at 3-4 (in order to focus on the outcome [12 weeks of leave] rather than the application process, employers could be required to notify employees annually that, if they have one year of service and 1,250 hours, they are entitled to FMLA leave and then the burden should be on employees to contact the designated official to apply).

Another commenter suggested that, because employers experience problems with giving proper notice when employees do not provide prompt and proper notice of their need for leave, “DOL should implement detailed regulations which provide necessary language or actions that must be taken by employees to put their employers on notice of their intent to take FMLA leave. As a result, employers will be significantly better equipped to execute their responsibilities under the Act, including, but not limited to notifying employees that the leave in question will count as FMLA leave.” Williams Mullen, Doc. FL124, at 2. See also Miles & Stockbridge, P.C., Doc. FL79, at 5 (designation difficulties could be eliminated by requiring employees “to request the leave be designated as FMLA leave in writing” either prior to or within three days of the absence); Betsy Sawyers, Director, Human

Resources Department, Pierce County, Washington, Doc. FL97, at 4 (responsibility for requesting FMLA leave should be shifted to employee so employer does not have to “second guess or request additional explanation from the employee” or, alternatively, broaden an employer’s ability to retroactively designate FMLA leave to include entire period of leave). Another commenter noted that it would like the regulations to provide further guidance on making retroactive FMLA designations when an employee has initial absences that do not qualify for FMLA leave, but the health condition develops over a period of time. City of Eugene Human Resource & Risk Services, Doc. 10069A, at 1.

Another commenter emphasized the hardships employees suffer when they do not know promptly whether the employer believes they are entitled to protected leave. The commenter stated that companies do not respond within the required two business days, so employees either do not take the time off that they (or their family members) need, or else they take off but are afraid because they do not know whether they will be subject to discipline for being off work. Frasier, Frasier & Hickman, LLP, Doc. FL60, at 1-3. The commenter gave an example of an employee who was not advised of his FMLA leave status until approximately 60 days after he submitted a certification form. This commenter suggested finding some means of making employers respond timely to requests for leave. Similarly, the International Association of Machinists and Aerospace Workers suggested that employers should be “required to promptly inform workers when they are using their FMLA leave, and to provide copies of FMLA leave balances,” rather than putting this burden on employees, because employees can be confused as to which days their employer has counted as FMLA leave and which it has not. Doc. 10269A, at 3. See also 9to5, National Association of Working Women, Doc. 10210A, at 3 (same).

One commenter noted that “[m]istakes about an employee’s eligibility under the FMLA can be

costly for both employers and employees. Certainty in this area is critical.” National Multi Housing Council and National Apartment Association, Doc. 10219A, at 2. However, other comments indicate that certainty may be difficult to achieve promptly. For example, the Ohio Department of Administrative Services noted that, because the 1,250 hours of work test involves distinguishing between active work and paid time off, such as vacation time, sick leave, bereavement leave, holidays, personal leave, etc., “eligibility determinations continue to bring confusion to employers and their managers. In light of the difficult fact patterns that oftentimes accompany eligibility determinations, the State of Ohio recommends that the Department implement a ‘safe harbor’ provision to exempt employers from penalties when employers follow the regulatory requirements and make a good faith eligibility determination that is later overturned by a court or other authoritative body.” Ohio Department of Administrative Services, Doc. 10205A, at 1. (Penalties arising from an employer’s failure to follow the regulatory requirements concerning notice are addressed in Chapter II of the Report.).

AVAYA Communication similarly noted that calculating the 1,250 hours of work is a time consuming process for employers, and that “it is difficult to obtain an accurate number of hours worked in time for the notification letter to go out promptly.” Doc. FL33, at 1. Therefore, the commenter recommended allowing employers a grace period within which to determine whether employees are eligible for leave. Another commenter believed that employers should simply have to advise an employee who does not have the requisite 1,250 hours of service of that conclusion, and the employer should not be required to advise the employee when s/he will be eligible for FMLA leave because that timing is difficult to predict. Pilchak Cohen & Tice, P.C., Doc. 10155A, at 5. *See also* United Parcel Service, Doc. 10276A, at 7-8 (objecting to any revision to the regulations that would require

“employers to provide periodic or on-demand updates about the amount of FMLA leave remaining to employees”).

On the other hand, another commenter noted that it uses a tracking program related to its payroll system that tells it whether “the employee has been employed one year, worked 1250 hours in the prior twelve months, and the number of weeks they are eligible [based on] any previous leaves associated with FMLA. A notice is sent to the employee within 48 hours of their request.” AM General LLC, Doc. 10073A, at 2. Another employer similarly stated that it determines whether employees are eligible by running a report through the payroll system to track the number of hours worked in the past 12 months, but then spends “an unusual amount of time” determining how much FMLA leave the employee already has used. Elaine G. Howell, H.R. Specialist, International Auto Processing, Inc., Doc. 4752, at 1.

One law firm suggested that the Department’s regulations may be the cause of employer confusion over their notice responsibilities. “The Regulations include several notice obligations, which we believe are not all necessary and have simply created more FMLA paperwork than is really necessary.” Spencer Fane Britt & Browne LLP, Doc. 10133C at 41. “The Regulations do not include in one provision all of the applicable time frames and when they apply. Employers struggle over provisions requiring preliminary designations, final designations, when designations can be made retroactively, whether to designate leave as FMLA leave when an incomplete certification is returned, and when the ‘two-day’ designation rule applies.” *Id.* at 41-42.

Finally, 53 Democratic Members of Congress recognized the potential for confusion concerning employer notice obligations.

The Department mentions a few of the notice issues that have arisen under the FMLA. While it is true that the statute is not perfectly clear in elaborating the notice obligations of employees and employers under the FMLA, it is not

clear that the Department can fully resolve the issues through revisions in regulation alone. It would be helpful for the Department to ask Congress to clarify how the notice motions of the Act apply. The law or the regulations should put forth a clear and commonsense regime by which employers would notify workers of their rights and responsibilities under the Act, workers would be required to notify their employers of their need to take FMLA leave, and employers would be required to notify workers of their approval or denial of FMLA leave as well as the term of any approval or reasons for any denial and appeal rights. Clearer notice requirements would also resolve any issues related to the 'duration' of leave.

Federal and state FMLA administration services, stated that "[t]he two-day timeframe for providing notice to an employee of his/her eligibility for FMLA leave is sufficient." *See* Doc. 10008A, at 3. At the end of 2006, Unum Group reported having 95 customers located throughout all 50 states and administering leaves for a total employee population of 585,157. *Id.* at 1.

Letter from 53 Democratic Members of Congress, Doc. FL184, at 3.

On the other hand, a few commenters indicated that the two-day time frame is adequate. One commenter stated that the "two-day rule is not an issue when you are aware of a possible FMLA event on the first day of eligibility[,] because the contingent notice can be mailed or handed to the employee immediately, but problems arise when the possible FMLA coverage is not known until later, such as when the employee returns to work. FNG Human Resources, Doc. FL13, at 5. However, this employer allows the employee to apply at that time and gives them the paperwork immediately. The National Partnership for Women & Families noted the current data does not support an increase in the time period beyond the two days provided. *See* National Partnership for Women & Families, Doc. 10204A, at 21 ("Most organizations spend only between thirty and 120 minutes of administrative time per FMLA leave episode to provide notice, determine eligibility, request and review documentation, and request a second opinion. Therefore, no change to the current two-day rule response requirement is warranted.") (footnote omitted). Notably, Unum Group, a provider of