Furthermore, it is the employment agency which is responsible for the employee's pay and benefits, and is in the best position to provide the rights and benefits of the Act.

FMLA does not entitle a restored employee to any right, benefit, or position of employment other than any right, benefit, or position which the employee would have held or been entitled to had the employee not taken leave. This means, for example, that if, but for being on leave, an employee would have been laid off, the employee's right to reinstatement is whatever it would have been had the employee not been on leave when the layoff occurred. Thus, if a client employer of a temporary help agency discontinued the services of the temporary help agency altogether, or discontinued contracting for the particular services that were being furnished by the temporary employee who took FMLA leave, during the employee's FMLA leave period, following a "head of the line" approach for giving the returning employee priority consideration for possible placement in assignments with other client employers for which the employee is qualified would appear to be entirely consistent with the intent of the FMLA in those circumstances. As provided in §825.216, an employer must show that an employee would not otherwise have been employed in order to deny restoration to employment in the same or an equivalent position. Failure to promptly restore a returning employee to employment at the conclusion of the leave where the client employer continues to utilize the same services as were previously furnished by the employee who took leave would be a violation of FMLA's job restoration requirements.

Two commenters (William M. Mercer, Inc. and Chamber of Commerce of the USA) noted that subsection (f) could be construed as requiring the secondary or client employer to restore the jobs of temporary or leased employees, which is disruptive to business and the contractual relationship between temporary or leasing agencies and the client employers. They felt that job restoration obligations should be the responsibility of the temporary or leasing agency (the primary employer).

The primary employer (temporary placement firm or leasing agency) is responsible for furnishing eligible employees with all FMLA-required notices, providing FMLA leave, maintaining health benefits during FMLA leave, and restoring employees to employment upon return from leave. In addition, although job restoration is the

responsibility of the primary employer, the purposes of the Act would be thwarted if the secondary employer is able to prevent an employee from returning to employment. Accordingly, the regulations are revised to provide that the secondary employer is responsible for accepting an employee returning from leave in place of any replacement employee. Furthermore, the secondary employer (client employer) must observe FMLA's prohibitions in  $\S105(a)(1)$ , including the prohibition against interfering with, restraining, or denying the exercise of or attempt to exercise any rights provided under the FMLA. It would be an unlawful practice, in the Department's view, if a secondary employer interfered with or attempted to restrain efforts by the primary (temporary help) employer to restore an employee who was returning from FMLA leave to his or her previous position of employment with the secondary (client) employer (where the primary (temporary help) employer is still furnishing the same services to the secondary (client) employer). Because the secondary employer is acting in the interest of the primary employer within the meaning of §101(4)(A)(ii)(I) of the Act, the secondary employer has these responsibilities, regardless of the number of employees employed.

The National Association of Plumbing-Heating-Cooling Contractors noted a potential for misunderstandings of the "joint employment" criteria and the Chamber of Commerce of the USA, for similar reasons, urged that DOL reconsider the requirement in subsection (d) that jointly-employed employees are counted by both employers in determining employer coverage and employee eligibility. This requirement, according to the Chamber, was of particular concern to small businesses. To minimize the risk of unintentional violations of the Act, the Chamber recommended against a requirement to count employees jointly for purposes of determining eligibility status, and urged adoption of "good faith" defense provisions for employers confronted with joint employment quandaries.

In joint employment relationships, an individual employee's eligibility to take FMLA leave is determined from counting the employees employed by *that* employee's *primary* employer (*i.e.*, the one responsible for granting FMLA leave), and would exclude any "permanent" employees "primarily employed" by any secondary (joint) employer of that same employee. Thus, in practical effect, the employee is only counted once for purposes of

determining his or her own individual eligibility to take FMLA leave. In the example of 15 employees from a temporary help agency working with 40 "permanent" employees employed by an employer, the eligibility of any one of the 15 temporary help agency employees to take FMLA leave from their primary employer (the temporary help agency) is determined by counting only the temporary help agency employees assigned (outplaced) from or working at the temporary help agency's "single site of employment" (*i.e.*, most likely the main placement or corporate office). Excluded from this count is any "permanent" employee of any of the temporary help agency's client employers. On the other hand, the client employer with 40 "permanent" employees is responsible for granting FMLA leave to its "permanent" employees because it employs a total of more than 50 employees when including the jointly-employed employees, but its obligation to grant FMLA leave extends to only its 40 'permanent'' employees. Notwithstanding the complexities that arise in administering the law in joint employment contexts, there is no authority to adopt by regulation any "good faith" defense provisions that would take away employees' statutory rights.

William M. Mercer, Inc. noted that the requirement in subsection (d) relating to counting jointly-employed employees for coverage and eligibility purposes "whether or not maintained on a payroll" differed from § 825.111(c), which limits the employee count at a worksite to employees maintained on the payroll. The commenter urged clarification of "joint employment" principles in the case of worksite determinations and, also, in determinations of whether or not 1,250 hours have been worked for eligibility (§ 825.110(d)).

As noted above, §825.106 provides particularized guidance that addresses the special circumstances of joint employment. Because in most joint employment situations there may be only one payroll, maintained by only the primary employer, the guidance in §§ 825.105 and 825.111, standing alone, would not be sufficient to address joint employment. Section 825.106 is revised to further clarify application, as the employee is maintained on only one payroll. In addition, in order to clarify and prevent misunderstandings, §825.111 is revised to add similar guidance from §825.106 on joint employment "worksite" determinations for purposes of determining employee eligibility. With respect to counting the