discussion in the preamble about determining 1,250 hours of service, specifically the statement that on-call time includes "\* \* \* hours of service where it meets the FLSA hours-worked requirements (29 CFR Part 785.17), as would ground time for flight crews.' According to the ALPA, the term "ground time" requires clarification as applied in the airline industry, which typically distinguishes between "flight" time (time an airplane is actually in the air from take-off to landing), "duty" time (hours a pilot is on duty beginning with checkin for departure until returning to the domicile) and "reserve" time (designated on-call period when pilot must be available to be reached by phone, and must be able to report to the airport within one to three hours' notice). Pilots typically receive different rates of pay for the reserve time, the flight time and an hourly per-diem for all duty time. The commenter argues that all hours credited for such pay should be credited for hours of service.

Crediting the time attributable to all such pay would exceed the number of actual hours worked within the meaning of the FLSA and thus be contrary to FMLA's provisions on crediting hours of service based on FLSA "hours worked" principles. Hours of service would normally include all "duty" time. "Reserve" time would not be included unless employees have further restrictions on their time so that they would be unable to use the time for their own purposes.

The International Brotherhood of Teamsters argued that the 1,250 hours of service test as currently defined effectively precludes coverage of airline crew members under FMLA. While §825.110(c) applies FLSA principles for determining hours of service, the commenter notes that section 13(b) of the FLSA excludes any employee of a carrier by air subject to the provisions of Title II of the Railway Labor Act from the Act's provisions in section 207. According to the commenter, airline crew members' work schedules and pay formulas are predicated on "flight hours,"-generally amounting to onethird of the hours of employees covered by the FLSA—and flight crew members are prohibited by regulation from exceeding 1,000 flight hours in a 12month period. The commenter contends that it is improper to compare flight crew "hours of service" with the "hours of service" performed by FLSA-covered employees and that airline crew members should be specifically exempted from the minimum hours of service requirement.

Section 13(b) of the FLSA provides exemptions from FLSA's requirement to

pay overtime compensation in certain cases; they are not exemptions from the rules on what constitutes "hours worked" within the meaning of the FLSA. The fact that a particular class of employee is exempt from overtime under FLSA §13(b) has no impact on the applicability of FLSA's "hours worked" rules under 101(2)(C) of the FMLA. Because the eligibility criteria are statutory, DOL lacks the authority to exempt airline crew members from the minimum hours of service criteria. As pointed out above, however, other 'duty'' time would normally be hours of service, in addition to the flight time.

## 50 Employees within 75 Miles (§ 825.111)

One of the tests for employee eligibility for FMLA leave requires that there be 50 employees employed by the employer within 75 miles of the worksite. This section described how "worksite" is construed and how to measure the 75 miles under this test.

The Equal Rights Advocates questioned measuring the 75 mile requirement by road miles and advocated a broader interpretation such as actual mileage between two employment facilities. The Medical Group Management Association stated that measuring a radius around a single point using road miles was very difficult and suggested a standard of traveling "75 miles in any direction using public surface transportation."

The regulations have been clarified by deleting the reference to "radius," a term not found in the statute. The 75mile distance will be measured by surface miles using available transportation by the most direct route between worksites.

The Institute of Real Estate Management and 29 other associated real estate management companies complained that the 75-mile rule for determining employee eligibility creates unique hardships for most property management companies and could cause serious economic harm in the absence of industry-specific modifications.

The National Association of Temporary Services was also concerned over the impact of the 50-employee/75mile eligibility test on temporary help offices, noting that most temporary help offices operate with very small office staffs but on any given day may have a significant number of temporary employees assigned to customer worksites. Because temporaries assigned to customers within 75 miles of the office are included in the eligibility determination, staff employees of two or three person offices become eligible for

FMLA leave, which, according to the commenter, works a hardship on small temporary help offices. The commenter urged an exception which would permit such offices to exclude from the eligibility test those temporary employees assigned out of any particular office-temporaries would still be eligible if secondary employers have a total of 50 employees within 75 miles of their worksite. In support of this position, the commenter points to a colloquy between Congressman Derrick and Congressman Ford on H.R. 1 (Cong. Rec. 139, H396-7 (Feb. 3, 1993)) in which Congressman Ford indicated that the matter of temporary help offices with small staffs would be an appropriate subject for rulemaking and his hope that implementing regulations would address such situations taking into account the broad purpose of the Act to provide protection to as many employees as possible and, at the same time, the legitimate concerns of small businesses.

Employees employed by a temporary help office have, as their "single site of employment" worksite under FMLA, the site from which their work is assigned (*i.e.*, the temporary help office). Thus, all temporary employees assigned from the temporary help office, regardless of whether the customers' worksites are within 75 miles of the temporary help office, are included in the employee count for the temporary help office in determining if staff employees are eligible for FMLA leave. This provision, in our judgment, is required by the express intention of the Congress in the committee reports that the WARN Act regulations be used to determine "worksite." We believe that the implementing regulations accurately reflect, consistent with the express confines of the statute itself, the Congress' broad purpose to provide FMLA's protection to as many employees as possible while, at the same time, considering the legitimate concerns of small businesses.

Section 825.111(d) provides that eligibility determinations are to be made by employers when the employee requests the leave; once eligibility has been established in response to the request, subsequent changes in the number of employees employed at or within 75 miles of the employee's worksite will not affect the employee's eligibility or leave once commenced. These provisions attracted considerable comment.

The California Rural Legal Assistance, Inc. argued that using the date the employee requests leave as the "trigger" date will deprive eligibility to many seasonal employees, especially if they