give the requisite 30-days notice, because the 50-employee threshold may not be reached until the peak employment season. The commenter urges an alternate test for seasonal and other employers whose workforce varies greatly during the year, in particular that the test should allow a determination of eligibility at the time of the request if the employer can be expected to have at least 50 employees during any period in which FMLA leave is to be taken. This commenter would also apply such a test for teachers because many teachers are not actually under contract until just before or even after the school year has begun. In the alternative, the commenter suggested a position that an employee should be considered on the payroll as long as he or she is on an involuntary layoff with a reasonable expectation of returning to work within a reasonable period of time.

The Women's Legal Defense Fund, the Service Employees International Union, and the United Paperworkers International Union also expressed concern about determining eligibility from an employee count on a single day, *i.e.,* date of request, stating that such a test is arbitrary and subject to wide variation due to workforce fluctuations. They urged adoption of the counting method in the Act for determining employer coverage on the grounds that it is the only counting method statutorily based and is consistent with the legislative history. Thus, under this position, an employee would be eligible for FMLA leave if the employer has employed 50 or more employees within 75 miles of the employee's worksite for each working day during each of 20 or more calendar workweeks in the current or preceding calendar year.

A number of commenters stated that the ''date of request'' as a trigger date would be burdensome for employers in cyclical industries. Several commenters (California Department of Fair Employment and Housing and the Greater Cincinnati Chamber of Commerce) endorsed the option discussed in the preamble to the interim final rule: ''* * * where notice is given 30 or more days prior to the commencement of leave, the count would be made on the 30th day preceding the start of leave, or, at the employer's option, as of the date leave is requested; where 30 days notice is not given, the count would be made at the time notice is given or the date leave begins, whichever is earlier.'' The Society of Human Resource Management supported a trigger date of ''30 days prior to the onset of leave.'' To accommodate the particular needs of seasonal employers under the ''date of request'' trigger date, Southern Electric International, Inc. suggested that employers be permitted to cancel or reduce requested leave if the employee count falls below some reasonable number, *i.e.,* 40, by the time the leave is to be taken. The National Restaurant Association argued that the same date should be used for determining all eligibility requirements and the law firm of Sommer & Barnard also recommended a uniform eligibility criteria determination date, endorsing the ''date of commencement of leave.'' The United Paperworkers International Union also endorsed uniformity in the methods of counting eligible employees and covered employers.

The USA Chamber of Commerce noted that under § 825.111(d) eligibility is a continuing, day-to-day determination, even during FMLA leave, and that an employee who is initially ineligible can subsequently become eligible. The commenter argues that the rationale should be consistent: if an ineligible employee can become eligible, then an eligible employee should be able to subsequently become ineligible and, thus, not be entitled to continue FMLA leave.

The Department has given careful consideration to all of the comments submitted in connection with the rule for determining employee eligibility based on the number of employees maintained on the payroll as of the date that an employee requests leave. We see no justifiable basis for altering our earlier policy decisions as reflected in the Interim Final Rule. In our view, none of the recommendations suggest a course that would be entirely consistent with the literal language of the FMLA, its remedial purpose, or the expressions of Congressional intent contained in the legislative history. Congress directly addressed the treatment to be accorded seasonal, temporary and part-time employees by establishing statutory employer coverage and employee eligibility criteria. The Act exempts smaller and certain seasonal businesses by limiting coverage to employers with 50 or more employees in 20 or more calendar weeks of the year. It does not cover part-time or seasonal employees working less than 1,250 hours a year. To be eligible for leave, an employee must have worked for the employer for at least 12 months and for at least 1,250 hours during the 12-month period preceding the commencement of the leave. The employer must also employ at least 50 employees within 75 miles of the employee's worksite. Given Congress' specific treatment of these issues in the legislation, DOL lacks authority to write special rules for determining employee eligibility for seasonal workers in ways that depart from the statutory standards adopted in the legislation.

As explained in the preamble of the Interim Final Rule (and as noted above), the purpose and structure of FMLA's notice provisions intentionally encourage as much advance notice of an employee's need for leave as possible, to enable both the employer to plan for the absence and the employee to make necessary arrangements for the leave. Both parties are served by making this determination when the employee requests leave. But, at the same time, both parties need to be able to rely on the commitments they are making. Tying the worksite employee-count to the date leave commences as suggested could result in both the employee and the employer planning for the leave, only to have it denied at the last moment before it starts if fewer than 50 employees are employed within 75 miles of the worksite at that time. This would entirely defeat the notice and planning aspects that are an integral part of the FMLA leave process. The same would be true if employers were permitted to cancel or reduce requested leave if the employee count fell below some arbitrary number (*e.g.,* 40) at the time leave was being taken. As explained in the preamble to the Interim Final Rule, use of both a fixed date and the same date for determining employer coverage were previously considered and rejected as being inconsistent with the literal language of the Act and the legislative history, which both use the present tense in describing ''eligible'' employees (*i.e.,* employee is eligible if employed at least 12 months by the employer ''* * * with respect to whom leave *is* requested * * *''; but excludes any employee ''* * * *at* a worksite at which such employer *employs* less than 50 employees if the total * * * [within 75 miles] *is* less than 50.'').

Accordingly, while clarifications are included to more carefully explain the applicable principles, no significant changes are included in this section to alter the policy on the timing of determining employee eligibility.

The term ''worksite'' also generated considerable comment. The Los Angeles County Metropolitan Transportation Authority and Society for Human Resource Management stated that additional guidance was needed to determine eligibility, particularly with respect to salespersons who work out of their homes. The International Organization of Masters, Mates & Pilots stated that the applicable ''worksite'' in the case of maritime employment should be defined as the home office of