relates only to a child's, spouse's, or parent's serious health condition.

The Chamber of Commerce of the USA and the National Association of Manufacturers recommended that DOL's definition of serious health condition adopt each State's waiting period for qualifying for workers' compensation benefits, noting that many States use as much as seven work days. As an alternative, the Chamber of Commerce and Consumers Power Company (Michigan) suggested that the ADA's definition of "disability" could be used—a mental or physical impairment that substantially limits a major life activity. EEOC, which enforces the ADA, has advised that ADA "disability" and FMLA "serious health condition" are different, and that they should be analyzed separately.

Massmutual noted that while the one incentive in FMLA to limit employee abuse of FMLA leave was the stipulation that leave is unpaid, some companies (like Massmutual) provide fully paid sick leave for short-term absences. Thus, for companies with similar programs, there is no incentive for employees not to abuse sick leave because they would always be paid and could not be disciplined for the abuse due to FMLA's employment protections. Massmutual recommended that the definition of serious health condition be limited to a period of incapacity requiring an absence of at least five working days or to those days when an employee is scheduled for actual treatment and/or recovery from a treatment.

The Burroughs Wellcome Company observed that the definition does not refer at all to the types of health conditions involved, as does the legislative history, but instead focuses only on what the committee reports call the "general test" of incapacity for more than a few days and continuing medical treatment or supervision. Thus, the understanding of the test that Congress provided by listing examples of conditions that meet the test is lost. The **Equal Employment Advisory Council** recommended that the regulations include as serious health conditions all the conditions enumerated in the legislative history and, for those not enumerated, apply the general test. Federal Express similarly argued that a fixed number of consecutive absences and visits to a health care provider do not accurately reflect Congressional intent, as colds and flu could be included as "serious health conditions." Federal Express recommended the definition focus on the seriousness of the illness rather than on an arbitrary time period, and that the health

conditions listed in the legislative history be used in conjunction with the general test in the legislative history for determining whether an illness constitutes a serious health condition. Chicagoland Chamber of Commerce presented similar views, arguing that it is contrary to obvious legislative intent (and grossly over-inclusive) for the regulation to focus on the extent to which medical consultation is sought rather than on the degree of incapacitation.

Several employers and law firms contended in their comments that the definition was too broad and inconsistent with the purpose of the Act, in that a common cold (or any particular illness) which incapacitates an employee for more than three days and involves two visits to a health care provider could be considered within the definition of "serious health condition." Giant Food Inc., Kennedy Memorial Hospitals, and LaMotte Company recommended clarifications to exclude from the definition minor, short-term, remedial or self-limiting conditions, and normal childhood or adult diseases (e.g., colds, flu, ear infections, strep throat, bronchitis, upper respiratory infections, sinusitis, rhinitis, allergies, muscle strain, measles, even broken bones). Southwestern Bell Corporation likewise requested that the regulations distinguish routine illness (measles, chicken pox, common ear infections) from serious health conditions by providing a sample list of health conditions which are not considered serious unless complications arise. Fisher and Phillips stated that predelivery maternity leave should not be available where the pregnancy does not render the employee unable to perform the functions of the job. Nevada Power Company recommended excluding: Routine preventive physical examinations; illnesses and injuries which require less than six visits to a health care provider; conditions relating to transvestism, transsexualism, pedophilia, exhibitionism, voyeurism, gender disorders, or other sexual behavior disorders, kleptomania, pyromania or substance abuse disorders resulting from illegal use of drugs; other conditions which are neither lifethreatening nor prolonged.

A number of commenters (City of Alexandria (Virginia), Fairfax Area Commission on Aging, Federally Employed Women, Northern Virginia Aging Network, the Brooklyn and Green Mountain Chapters of the Older Women's League, and Sisters of Charity of Nazareth) stated that the definition was too restrictive and recommended that it be expanded to specifically

include chronic illnesses and long-term conditions which may not require inpatient care or treatment by a health care provider. The University of Vermont suggested that illnesses requiring respite care also be included. The LaMotte Company asked whether it would matter if an absence for a chronic illness (such as asthma) occurs infrequently—e.g., would the absences have to be consecutive days or could they be one day this week and one the next, or one every month?

Blue Cross and Blue Shield of Texas, Inc., posed the issue as a quandary faced by employees and employers over the lack of definitive guidelines as follows: Is there a liability in covering less serious illnesses (such as chicken pox or a broken leg) as FMLA leave? If the employer does count time toward the 12-week entitlement, can the decision be challenged if, later in the year, a more severe condition arises and the employee has less than sufficient

entitlement remaining?

Five commenters (Older Women's League, Women's Legal Defense Fund, Consortium for Citizens with Disabilities, Epilepsy Foundation of America, and United Cerebral Palsy Associations) took issue with the provisions in the definition which characterized "continuing treatment" for a chronic or long-term condition that is "incurable." These commenters contended that curability is not a proper test for either a serious health condition or for continuing treatment, is ambiguous and subject to change over time, and should be deleted, noting that many incurable disabilities require continuing treatment that has nothing to do with curing the condition. Some pointed out that conditions such as epilepsy, traumatic brain injury, and cerebral palsy are typically conditions which are not "curable" in the generally accepted sense, but are conditions for which training and therapy can help restore, maintain or develop function or prevent deterioration, and noted that people with disabilities have struggled for a generation or more to overcome the image that disabilities are, or should be viewed as, curable or incurable. United Cerebral Palsy Associations noted that cerebral palsy is a term used to describe a group of chronic conditions affecting body movement and muscle coordination that are neither progressive nor communicable; that it is not a disease and should never be referred to as such, although training and therapy and assistive technology may help to restore, maintain or increase function.

Several commenters raised additional concerns on various aspects of the "continuing treatment" definition. The