those situations where it is really needed. As a result of this review, the regulation has been significantly recrafted, as discussed below.

As summarized above, comments were submitted opposing any duration limit, and equally strong comments suggested the standard was much too short. Upon review, the Department has concluded that the "more than three days" test continues to be appropriate. The legislative history specifically provides that conditions lasting only a few days were not intended to be included as serious health conditions, because such conditions are normally covered by employers' sick leave plans. The Department has also concluded that it is not appropriate to change the standard to working days rather than calendar days because the severity of the illness is better captured by its duration rather than the length of time necessary to be absent from work. Furthermore, a working days standard would be difficult to apply to serious health conditions of family members or to part-time workers. (It is noted that throughout the regulations, where a number of days is prescribed, calendar days is intended unless the regulation explicitly states business days.) The regulation has been revised, however, to make it clear that the absence must be a period of incapacity of more than three consecutive calendar days. "Incapacity," for purposes of this definition, means inability to work, attend school or perform other regular daily activities due to the serious health condition, treatment therefor, or recovery therefrom. Any subsequent treatment or incapacity relating to the same condition would also be included.

The regulation also retains the concept that continuing treatment includes either two visits to a health care provider (or to a provider of health care services on referral of a health care provider) or one visit followed by a regimen of continuing treatment under supervision of the health care provider. Regimen of continuing treatment is clarified in paragraph (b) of this section to make it clear that the taking of overthe-counter medications, bed-rest, drinking fluids, exercises, and other similar activities that can be initiated without a visit to a health care provider is not, by itself, sufficient to constitute a regimen of continuing treatment for purposes of FMLA leave. Prescription drugs or therapy requiring special equipment, for example, would be included. It is envisioned that a patient would be under continuing supervision in this context, for example, where the patient is advised to call if the condition is not improved.

The Department concurs with the comments that suggested that special recognition should be given to chronic conditions. The Department recognizes that certain conditions, such as asthma and diabetes, continue over an extended period of time (*i.e.*, from several months to several years), often without affecting day-to-day ability to work or perform other activities but may cause episodic periods of incapacity of less than three days. Although persons with such underlying conditions generally visit a health care provider periodically, when subject to a flare-up or other incapacitating episode, staying home and self-treatment are often more effective than visiting the health care provider (e.g., the asthma-sufferer who is advised to stay home and inside due to the pollen count being too high). The definition has, therefore, been revised to include such conditions as serious health conditions, even if the individual episodes of incapacity are not of more than three days duration. Pregnancy is similar to a chronic condition in that the patient is periodically visiting a health care provider for prenatal care, but may be subject to episodes of severe morning sickness, for example, which may not require an absence from work of more than three days. It is clear from FMLA's legislative history that pregnancy was intended to be treated as a serious health condition entitling an individual to leave under the Act, and the definition therefore includes any period of incapacity due to pregnancy, or for prenatal care.

The Department has also included a definition to deal with serious health conditions which are not ordinarily incapacitating (at least at the current state of the patient's condition), but for which treatments are being given because the condition would likely result in a period of incapacity of more than three consecutive calendar days in the absence of medical intervention or treatment. The regulation requires multiple treatments, and includes as examples patients receiving chemotherapy or radiation for cancer, dialysis for kidney disease, or physical therapy for severe arthritis. Multiple treatments for restorative surgery after an accident or other injury is also specifically included. The previous requirement that the condition be chronic or long-term has been deleted because cancer treatments, for example, might not meet that test if immediate intervention occurs.

The portion of the definition dealing with long-term, chronic conditions such as Alzheimer's or a severe stroke has been modified to delete the reference to the condition being incurable, and to require instead that the condition involve a period of incapacity which is permanent or long-term and for which treatment may not be effective. Therefore, in this situation, as under the interim final rule, it is only necessary that the patient be under the supervision of a health care provider, rather than receiving active treatment.

The Department did not consider it appropriate to include in the regulation the "laundry list" of serious health conditions listed in the legislative history because their inclusion may lead employers to recognize only conditions on the list or to second-guess whether a condition is equally "serious", rather than apply the regulatory standard. However, the regulation does provide, as examples, that, unless complications arise, the common cold, the flu, earaches, upset stomach, minor ulcers, headaches other than migraine, routine dental or orthodontia problems, and periodontal disease are not ordinarily serious health conditions. In addition, the regulation specifically states that routine physicals, eye examinations and dental examinations are not considered treatment, although examinations to determine if a serious health condition exists and evaluations of the condition are considered treatment.

The regulation has also been revised in paragraph (c) to delete the reference to "voluntary" treatments for which treatment is not medically necessary, and restrict the exclusion to cosmetic treatments (unless inpatient care is required or complications develop). The term "voluntary" was considered inappropriate because all treatments and surgery are voluntary. Furthermore, the Department did not wish to encourage employers to second-guess a health care provider's judgment that a treatment is advisable (*e.g.*, orthoscopic knee surgery on an out-patient basis) by questioning whether it is "necessary".

The regulation continues to recognize that substance abuse may be a serious health condition if the criteria of the regulation are met. However, the regulation is revised to make it clear that an absence because of the employee's use of the substance, rather than for treatment, is not protected. See also §825.112(g) of the regulations, which has been revised to make it clear that an employer may take disciplinary action against an employee pursuant to a uniformly applied policy regarding substance abuse, provided the action is not being taken because the employee has exercised his or her right to take FMLA leave.

In response to the question by Blue Cross and Blue Shield of Texas regarding liability in covering less