position, the employee's right to restoration ceases. The relationship between State workers' compensation laws and FMLA will be discussed in further detail in connection with § 825.702.

It should be noted that FMLA does not modify or affect any law prohibiting discrimination on the basis of disability, such as the ADA. Thus, if a "qualified individual with a disability" within the meaning of the ADA is also an "eligible employee" entitled to take FMLA leave, an employer has multiple compliance obligations under both the ADA and the FMLA. When one of these laws offers a superior right to an employee on a particular issue, the employer must provide that superior right to the employee. These issues will be discussed in further detail in connection with § 825.702.

This section is also revised to make it clear, as stated in the legislative history and in the preamble to the Interim Final Rule, an employee who is absent to receive medical treatment for a serious health condition is unable to perform the essential functions of the employee's job while absent for treatment.

Needed To Care for a Family Member (§ 825.116)

An eligible employee may take FMLA leave "in order to care for" an immediate family member (spouse, son, daughter, or parent) with a serious health condition. This section, in discussing what was meant by "needed to care for" a family member, provided that both physical and psychological care or comfort were contemplated under this provision of FMLA. Giant Food. Inc. recommended that a distinction be made between physical and psychological care and supervisory care, suggesting also that reasonable efforts should be made by employees to develop alternate day care plans in the event of a childhood illness to lessen the impact that excessive absenteeism can have on an employer's operations. The Ohio Public Employer Labor Relations Association objected to allowing FMLA leave solely to provide psychological comfort for a family member rather than actual physical assistance and care, and suggested that employers should have discretion to consider whether other care is being provided to the family member through health-care services as well as other family members. The Women's Legal Defense Fund, Consortium for Citizens with Disabilities, Epilepsy Foundation of America, National Community Mental Healthcare Council, and United Cerebral Palsy Associations objected to the reference to individuals "receiving

inpatient care" in paragraph (a), because many individuals are in other situations, such as in the home, which require this type of care and assistance from family members. Several of these commenters also objected to use of the phrase "seriously-ill" as too limiting and recommended replacing it with the statutory term "serious health condition" for consistency with other sections of the regulations. Some of these commenters, in addition to the Food and Allied Service Trades, also recommended that "spouse" be added to the list of family members in this section.

The final rule has been revised to add "spouse" to the last sentence of paragraph (a), to delete "inpatient care," and to replace "seriously-ill" with "serious health condition." No further changes have been made in response to the remaining comments. The legislative history clearly reflects the intent of the Congress that providing psychological care and comfort to family members with serious health conditions would be a legitimate use of FMLA's leave entitlement provisions. Because FMLA grants to eligible employees the absolute right to take FMLA leave for qualifying reasons under the law, employers have no discretion in this area and cannot deny the legitimate use of FMLA leave for such purposes without violating the prohibited acts section of the statute. See § 105 of FMLA.

Medical Need for Intermittent/Reduced Schedule Leave (§ 825.117)

FMLA permits eligible employees to take leave "intermittently or on a reduced leave schedule" under certain conditions. Intermittent leave may be taken for the birth of a child (and to care for such child) and for the placement of a child for adoption or foster care if the employer and employee agree to such a schedule. Leave for a serious health condition (either the employee's or family member's) may be taken intermittently or on a reduced leave schedule when "medically necessary" (§ 102(b)(1) of FMLA). An employer may request that an employee support an intermittent leave request for a serious health condition with certification from the health care provider of the employee or family member of the medical necessity of the intermittent leave schedule and its expected duration. Employees must make a reasonable effort to schedule their intermittent leave that is foreseeable based on planned medical treatments so as not to unduly disrupt the employer's operations (subject to the approval of the health care provider), and employers may assign employees temporarily to

alternative positions with equivalent pay and benefits that better accommodate such recurring periods of intermittent leave. (See also § 825.203.)

The Employee Assistance Professional Association, Inc. commented that no rationale was provided for why intermittent leave or reduced leave schedules are not available to an employee seeking to take leave to care for a family member. Intermittent leave to care for an immediate family member is allowed, as discussed in § 825.116.

The Women's Legal Defense Fund recommended that the regulations state explicitly that the determination of medical necessity for intermittent or reduced leave schedules is made only by the health care provider of the employee, in consultation with the employee. The Department's medical certification form, as discussed in § 825.306, is the vehicle for obtaining certification of the medical necessity of intermittent leave or leave on a reduced leave schedule, and such determinations are made exclusively by the health care provider of the employee or employee's family member (subject to an employer's right to request a second opinion at its own expense if it has reason to doubt the validity of the certification provided).

HCMF (long term care facilities) questioned what reasonable efforts are required by employees to consult with the employer and attempt to schedule intermittent leave so as not to unduly disrupt the employer's operations. Cincinnati Gas & Electric Company suggested that it would be reasonable for an employer to request that an employee attempt to schedule planned medical treatment outside normal work hours. The Equal Employment Advisory Council recommended the rules state that an employer may deny intermittent or reduced leave schedules when the reason for the leave can be accommodated during non-work hours, because the need for leave in such circumstances is not "medically necessary." Gray, Harris & Robinson asked what would constitute an undue disruption, if it were analogous to ADA's "undue hardship" standard, and to what extent could an employer deny the leave. The Chamber of Commerce of the USA also recommended clarifications in the rules of the impact of an employee's failure to satisfy the obligation to avoid disruptions to the employer's operations.

As discussed in §§ 825.302 (e) and (f), the employee and employer should attempt to work out a schedule which meets the employee's FMLA leave needs without unduly disrupting the employer's operations. The ultimate