rather than hire a full-time temporary replacement.

The Women Employed Institute and Women's Legal Defense Fund suggested revisions to the regulations to clarify that temporary transfers should last only as long as an employee needs to take leave intermittently or on a reduced leave schedule; once the leave need ends, the employer must then restore the employee to his or her original or an equivalent position.

Kaiser Permanente questioned whether an employer could provide "pay in lieu of benefits" if that is the general practice for employees who work less than 20 hours per week. William M. Mercer, Inc. asked if, when a full-time employee is temporarily transferred to a part-time reduced leave schedule, and part-time employees ordinarily have either reduced health care coverage or pay higher premiums, can the transferred employee's benefits be similarly reduced? Van Hoy, Reutlinger & Taylor noted that an employer is required to maintain the employee's full-time benefits (e.g., life and disability insurance) while the employee is working part-time on intermittent leave but questioned, where such policies are based on pay, whether the employer may reduce such benefits—if not, the regulations should contain a stronger warning so employers do not inadvertently reduce such benefits. The University of California asked for clarification of whether only health benefits are required to be maintained for employees who take FMLA leave, whether they are on full leave, reduced leave schedule, intermittent leave, or while in an alternative position. The ERISA Industry Committee requested additional clarification on the treatment of annual bonuses, particularly whether they may be prorated for time on leave (a pro rata reduction would impact the calculation of other benefits).

An employee may not be required to take more leave than is necessary to satisfy the employee's need for FMLA leave. If a full-time employee switches to a part-time or reduced leave schedule under FMLA, the employee must continue to receive the same (full) level of benefits which the employee enjoyed before starting the FMLA leave, and may not be required to pay more to maintain that same level of benefits enjoyed prior to the start of the FMLA reduced leave schedule, regardless of any employer policy applicable to its part-time employees that would suggest a different result. To permit otherwise would result in the employee not receiving equivalent pay and benefits as required by FMLA. An employer may

only proportionately reduce the kinds of benefits that are computed on the basis of the number of hours worked during the period, e.g., vacation or sick leave, insurance or other benefits that are determined by the amount of earnings. Once an employee's need for a reduced leave schedule under FMLA has ended, the employer must restore that employee to his or her original position or to a position that is equivalent to the original position (with equivalent benefits, pay, etc.). An employer may not transfer an employee to an alternative position in order to discourage the employee from taking the leave or otherwise create a hardship for the employee (e.g., transfer to the ʻgraveyard'' shift; assigning an administrative employee to perform laborer's work; reassigning a headquarters staff employee to a remote branch site, etc.). This section has been so clarified. The relationship between FMLA's provisions and collective bargaining agreements containing greater employee rights or more generous provisions for employees is discussed in §825.700.

Determining the Amount of Intermittent/Reduced Leave (§ 825.205)

Only the amount of leave actually taken while on an intermittent or reduced leave schedule may be charged as FMLA leave. This means, for example, that if a full-time employee who normally worked eight-hour days switched to a half-time (four hours per day) reduced leave schedule, only ½ week of FMLA leave could be charged each week (and, at that rate, it would take 24 weeks to exhaust the employee's FMLA leave entitlement if no other FMLA leave were taken during the 12month period). For employees working part-time or variable hours, the amount of leave entitlement is determined on a proportional basis by comparing the new schedule (after starting FMLA leave) to the normal schedule (before starting FMLA leave). If an employee's schedule varies week-to-week, a weekly average over the 12 weeks prior to starting FMLA leave is used for establishing the "normal" schedule.

California Rural Legal Assistance, Inc. suggested that the regulations make clear that FMLA leave may not be charged during a week when work would not otherwise be available. The Society for Human Resource Management questioned how a week of FMLA leave would be counted for employees who work seven days and then are off for seven days.

An employee's FMLA leave entitlement may only be reduced for time which the employee would otherwise be required to report for duty, but for the taking of the leave. If the employee is not scheduled to report for work, the time period involved may not be counted as FMLA leave. See § 825.200(f).

The American Compensation Association was not clear on how to calculate the pro rata depletion of FMLA leave time for an employee presently on a reduced leave schedule due to a disability who needs intermittent leave, perhaps one day per week, and asked if it would be based on the pre-disability schedule or the current work schedule. Chicagoland Chamber of Commerce expressed concern that this section might be construed to allow an exempt employee who normally works more than 40 hours per week to receive FMLA leave on an intermittent or reduced leave schedule basis in excess of his or her 12week entitlement, suggesting the greatest number of hours any employee should be entitled to receive for intermittent or reduced leave schedule purposes is 480 (12 weeks \times 40 hours). The Chamber of Commerce of the USA suggested the regulation make clear that the 12-week average rule is applied only if an employee's normal schedule fluctuates, and not if it fluctuates due to overtime hours of work.

Section 102 of FMLA states that an eligible employee is entitled to "a total of 12 workweeks of leave" during the 12-month period. The statute uses the ''workweek'' as the basis for leave entitlement, and an employee's normal "workweek" prior to the start of FMLA leave is the controlling factor for determining how much leave an employee uses when switching to a reduced leave schedule. Nothing in the Act or its legislative history suggests that the maximum amount of leave available to an employee is 480 hours. If an employee's normal workweek exceeds 40 hours, the calculation of total FMLA leave available for pro rata reduction of total leave entitlement during intermittent leave or reduced leave schedules should be based on the employee's normal workweek-even if it exceeds 40 hours.

If an employee with a disability has already switched to a *permanently* reduced work schedule for reasons other than FMLA, and needs leave on an intermittent basis, the hours worked under the current schedule would be used for making the calculation as provided in § 825.205(c).

"541" Exemption (§ 825.206)

FMLA leave may be unpaid. Section 102(c) of FMLA expressly provides that where an employee is otherwise exempt