terms of the statute, the employer must notify an employee "at the time the employer determines" that the requisite injury from restoration would occur. Under § 825.217(c)(2), the determination of whether a salaried employee is among the top 10 percent for purposes of the exemption is made at the time of a request for leave. Under the "notice to employee" provisions of §825.301(c)(6), the employer must inform a "key" employee in response to a request for leave whether the employee is a "key" employee, and the potential consequence that restoration may be denied following the leave. As provided under §825.219, if an employer believes reinstatement may be denied, such written notice must be provided to the employee at the time of the leave request, or when the FMLA leave commences, whichever is earlier. Failure to provide timely notice that the employee is a key employee and restoration may be denied will cause employers to lose their right to deny restoration, even where substantial and grievous economic injury will result from restoring the employee.

The Society for Human Resource Management asked whether overtime is included when computing the highest paid 10 percent of the workforce, and how the determination is made when there is a parent company and a subsidiary involved. As detailed in §825.217(c)(1), the earnings used for this computation include wages (which includes salaries), premium pay (which includes "overtime" premium pay), incentive pay (e.g., commissions), and non-discretionary and discretionary bonuses. The definition of "employer" in §825.104 would control in cases involving a parent and subsidiary. As provided in §825.104(c), normally the legal entity which employs the employees is the employer, and a corporation is a single employer (rather than its separate establishments or divisions). Where one corporation has an ownership interest in another, it is a separate employer unless it meets the tests for "integrated employer" (§825.104(c)(2)), in which case all employees of the integrated employer are considered.

Substantial and Grievous Economic Injury (§ 825.218)

To deny restoration to a "key" employee, the employer must establish that restoring the employee would cause "substantial and grievous economic injury" to the employer's operations. In explaining the conditions for applying the "key" employee exemption, the legislative history indicated, when measuring grievous economic harm,

"* * * a factor to be considered is the cost of losing a key employee if the employee chooses to take the leave, notwithstanding the determination that restoration will be denied." Numerous commenters (Chicago Transit Authority; Nationsbank Corporation (Troutman Sanders) and Southern Electric International, Inc (Troutman Sanders); Pima Federal Credit Union; United Federal Credit Union; Weinberg & Green; Wessels & Pautsch; Willcox & Savage; Credit Union National Association, Inc; National Association of Federal Credit Unions; and the National Restaurant Association) requested more specific guidelines and further regulatory definition of the statutory term "substantial and grievous economic injury." One commenter (IBM Endicott/Owego Employees Federal Credit Union) suggested further guidance was unnecessary. The National Association of Federal Credit Unions noted additionally that under the ADA, an employer's operations suffer an "undue hardship" if accommodation to an employee would be unduly costly, extensive, substantial, or disruptive or would fundamentally alter the nature or operation of the business. This commenter suggested these same factors under ADA could be applied in determining whether or not an employer's operations would suffer "substantial and grievous economic injury" by restoring a key employee to the position. The EEOC, on the other hand, which administers the ADA, recommended that the FMLA rules state that FMLA's standard for the "key" employee exemption is *different* from "undue hardship" under the ADA. The Department concurs with EEOC's suggestion that "substantial and grievous economic injury" under FMLA is different from "undue hardship" under the ADA. FMLA creates a narrow exception to the reinstatement rights of a key employee, whereas ADA's standard provides a measure of the reasonableness of any accommodation. Additionally, the definitions of the two terms suggest that "substantial and grievous economic injury" is more stringent than "undue hardship." The FMLA rules define "substantial and grievous economic injury" to include 'substantial long-term injury." Undue hardship is defined as "significant difficulty or expense" (see Appendix to 29 CFR Part 1630.2(p)). Accordingly, the final rule is revised to clarify that the two standards are, in fact, different, and that FMLA's standard is more stringent than the ADA's "undue hardship' standard. Further regulatory guidelines, however, in the form of a more precise

test, cannot be established due to the fact-specific circumstances that must be evaluated on a case-by-case basis.

Rights of a Key Employee (§825.219)

This section detailed the guidelines for applying the "key" employee exemption, and the requirements for employers to furnish proper and timely notice to "key" employees, informing them of the possibility that restoration to employment may be denied. A "key" employee must be given a reasonable period of time after receiving the employer's notice in which to elect whether to return to work. A key employee who takes leave is still eligible for maintenance of group health benefits, even after the employee has been notified that reinstatement will be denied. In those circumstances, the employer may not recover the premiums it paid to maintain such health benefits. An employee who continues on leave after receiving notice from the employer is still entitled to request reinstatement at the conclusion of the leave period, and the employer must again determine if substantial and grievous economic injury will result from reinstatement based on the facts existing at that time.

TRW Systems Federal Credit Union, Fisher & Phillips, and the National Restaurant Association considered the requirements to give written notices to key employees as provided in the regulations to be excessive and duplicative. The National Association of Federal Credit Unions opposed the requirement for a second determination to be made, after a key employee has already chosen to continue the leave after receiving the employer's first notice that restoration will be denied. The Chamber of Commerce recommended that the regulations require written notice but not mandate a specific form of delivery (either in person or by certified mail). The National Restaurant Association considered the obligations of the employer to be so burdensome under the regulations as to render the exception under the Act of no practical value.

After full consideration given to the comments received on this section, the Department continues to believe that the rule properly construes the rights intended by the Act for "key" employees; thus, no further modifications have been made in response to the comments. Section 104(b) of FMLA is intended as a narrow, limited exemption from the otherwise applicable restoration requirements of the Act. The procedural requirements set forth in the rule ensure that the standards for the exemption have been