period, the employee be required to give the employer at least one or two days notice.

The Department agrees that an employee should give reasonable notice to the employer where early return to work is foreseeable, and the regulations have been revised in paragraph (c) of this section to provide for a minimum of two days notice from the employee. Employers may also obtain this information through status reports from employees.

The Society for Human Resource Management asked if an employer may require certification from an employee for adoption or birth of a child upon return to work? May an employer require certification from a father for bonding leave? The answer to both questions is affirmative; however, the employer's request for documentation must be reasonable, and should be obtained at the *beginning* of the leave rather than at the conclusion. The regulations have been changed in § 825.113 to provide for such reasonable documentation of the reason for FMLA leave.

Return to Work Medical Certification/ Fitness-for-Duty (§ 825.310)

Six commenters objected to the language of the regulations that provides for a fitness-to-return-to-work certification pursuant to an employer's uniformly-applied policy. They also expressed concern regarding the implications resulting from ADA requirements.

The Department agrees with some of these concerns. This section of the regulations has been changed to make it clear that the requirement of uniformity applies only to employees in similar circumstances (*i.e.*, the same occupation, suffering from the same serious health condition). Furthermore, pursuant to ADA, the requirement for such a physical must be job-related and consistent with business necessity.

Two commenters urged that the fitness-for-duty certification be obtained at the employer's expense.

The statute clearly requires the employer to bear the costs of the second and third medical opinions. The Congress made no such provision for recertifications or fitness-for-duty certifications. The Department is unable to assign these costs to the employer in the absence of statutory language.

Four commenters urged that the regulations provide for second and third medical opinions on fitness-for-duty certifications as in the case of the original medical certification.

The statute expressly provides for second and third medical opinions

regarding the original medical certification. No such provision is contained in the statute for the fitness-for-duty certification. The Department is unable to incorporate this suggestion in the Final Rule.

Four commenters urged that the employer be permitted to confirm the employee's fitness-for-duty with an examination by the in-house medical department. This may be particularly relevant with regard to an employee returning from drug abuse treatment who may be subject to periodic follow-up examinations after returning to work.

The regulations do not prohibit the employer from requiring the employee to submit to an examination after returning to work, provided such examination is job related and consistent with business necessity in accordance with ADA guidelines. However, an employer may not deny return to work to an employee who has been absent on FMLA leave pending such an "in-house" examination. The statute provides the employee must only provide the employer with certification from the employee's health care provider to qualify to return to work. Any examination by the employer's medical staff may take place the first day of the employee's return to work.

Failure To Satisfy Medical Certification Requirements (§ 825.311)

The law firm of Sommer and Barnard observes that the regulations provide that an employer may require that an employee's request for leave be supported by certification. If the employee fails to furnish certification then surely the employer should be able to deny the entire leave, not simply the continuation of leave. Two commenters urge that if an employee fails to provide the required certification, not only should continuation of leave be denied, but the employee should be subject to disciplinary action by the employer.

The Department agrees with this analysis, and has modified § 825.311 to state that if the employee never provides the certification then the leave is not FMLA leave. If the leave taken by the employee is not FMLA leave, the employee does not enjoy the protections of the statute.

The Society of Professional Benefit Administrators expressed concern regarding the relationship between worker's compensation statutes and FMLA. As discussed above, the Final Rule has been changed in § 825.207 to address worker's compensation absences and FMLA.

Refusal to Provide FMLA Leave or Reinstatement (§ 825.312)

The Department of Civil Service, State of New York comments that in the event the employee requests to return to work prior to the agreed date, the employer should not be required to reinstate the employee immediately but should be given a reasonable period to make the necessary arrangements.

The Department has clarified this issue in §§ 825.309(c) and 825.312(e) of the regulations. An employee may not be required to take more FMLA leave than necessary to address the circumstances for which leave was taken. If the employee finds the circumstance has been resolved more quickly than anticipated initially, the employee shall provide the employer reasonable notice-two business days if feasible. The employer is required to restore the employee where such notice is given, unless two days notice was not feasible-for example, where the employee receives a release from the health care provider to return to work immediately, and that release is obtained earlier than anticipated.

The law firm of Sommer and Barnard commented regarding the requirement that when taking intermittent leave for planned medical treatments the employee should make a reasonable effort to arrange the treatments so as not to unduly disrupt the employer's operations. Section 825.312 fails to recognize this employee obligation or assign a consequence for its breach.

The Department concurs to some degree. It should be kept in mind that the employee does not always have alternatives to the dates of planned medical treatment as this is largely in the control of the health care provider. Section 825.302(d) has been modified in a manner that should lead to greater communication between the employee and the employer regarding this issue.

The Employers Association of New Jersey asks if an eligible employee who has accumulated an unacceptable number of absences and has been given a final warning that provides that any absence within the next 30 days will result in immediate discharge may take FMLA leave to care for an ill spouse.

An eligible employee who has not exhausted his/her 12-week FMLA leave entitlement would be entitled to take leave under these circumstances if all the requirements of the statute are met. The employee would be required to provide adequate notice of the need for leave, 30 days in advance if foreseeable or as soon as practicable, and if required by the employer, medical certification confirming the existence of the spouse's