employees who take leave be restored to employment when the leave ends, then FMLA's "key" employee exemption could not be applied to deny an employee reinstatement (*i.e.*, the Federal law would not apply at the time of reinstatement).

The guidelines and interpretations suggested above by the Employers Association of New Jersey and the Equal Rights Advocates correctly construe the relationship between FMLA and other State laws, which have been included here for guidance.

Chicagoland Chamber of Commerce commented that, with respect to substantive provisions such as eligibility and coverage requirements, amount of leave, benefits and employment protections, and substitution requirements, the more generous or expansive provisions between the FMLA and the State law should apply and be considered to offset or simultaneously satisfy overlapping but less generous provisions. "More generous" should be determined on a 'common sense, quantitative basis,' they contend, such as where a State law allows up to 16 weeks of leave for a serious health condition in any year and FMLA allows 12 weeks, the State law maximum would apply. They recommended the regulations specify that differences in more generous substantive provisions in State law cannot be combined with other less restrictive provisions in FMLA, and vice versa. With respect to procedural provisions, such as notification of leave, certification requirements, and other procedural requirements, the commenter recommended that the provisions of FMLA and its implementing regulations should be applied in all cases because of the administrative difficulty in trying to determine if State or Federal provisions are more or less generous. The Louisiana Health Care Alliance (Phelps Dunbar) similarly suggested that any State law procedural regulations which are inconsistent with FMLA should be preempted.

FMLA provides that it shall not supersede "any provision" of any State or local law that provides greater family or medical leave "rights" than under FMLA. There is no basis under this language or the legislative history to distinguish between procedural provisions that extend greater rights to employees and substantive provisions that provide more generous family or medical leave benefits to employees.

The Women's Legal Defense Fund recommended the regulations address the interaction between FMLA and State workers' compensation laws. The State of Oregon's Bureau of Labor and Industries asked if State workers' compensation laws qualify under FMLA as a "State * * * law that provides greater * * * medical leave rights * * *"

If a State workers' compensation law provides a job guarantee to workers out of work temporarily due to occupational injuries that is more generous than FMLA's job restoration provisions, such law is a "State * * * law that provides greater * * * medical leave rights * *" and would govern an employee's reinstatement. On the other hand, where such occupational injuries also meet FMLA's definition of "serious health condition that makes the employee unable to perform the functions of the position," the employer would have to maintain the injured employee's group health benefits under the same terms and conditions as if the employee had continued to work during the workers' compensation-related leave of absence (at least for the duration of the employee's remaining FMLA leave entitlement in the 12-month period).

The Association of Washington Cities commented that an employee could take 12 weeks of FMLA-qualifying leave for a purpose other than the birth or adoption of a child and still be eligible under applicable State law to another (subsequent) 12 weeks of "parenting" leave, which could enable an employee to take 24 weeks of leave in a single year. Under the terms of the applicable statutes, this is true.

The State of Oregon's Bureau of Labor and Industries noted that Oregon's parental leave law provides a 12-week window following the birth of a child for the use of parental leave, and asked if an employee's use of 12 weeks of parental leave within the first 12 weeks following the birth exhausts the parent's Federal right to take parental leave within the first year. An employee "eligible" under both the Federal and State law would exhaust both entitlements simultaneously within that 12-week period. Note, however, that if the employee used fewer than 12 weeks during that initial 12-week period following the birth, the employee could use the remainder of his or her Federal leave entitlement under FMLA within one year after the birth. This commenter also pointed out that a parent must share a state leave entitlement with his or her spouse regardless of whether they work for separate employers. Under FMLA, each FMLA-''eligible'' spouse would retain a Federal entitlement equal to 12 weeks minus their portion of the State leave taken.

The University of California observed that, under California law, employers

may not obtain second or third opinions except in the case of an employee's own serious health condition. Thus, because FMLA was intended to permit Christian Science practitioner certification, employers would not be able to obtain second or third medical opinions in connection with the serious health condition of a spouse, child or parent. Under the applicable statutes, this would be true.

Downs Rachlin & Martin stated that, under Vermont's Parental and Family Leave Act, an employee may use accrued sick leave or vacation leave, not to exceed six weeks, consistent with existing policy. "Utilization of accrued vacation leave shall not extend the leave provided therein." The commenter questioned whether the Federal law provided a more generous benefit. The answer is "Yes" with respect to FMLA's more generous substitution provisions and the length of the allowable leave period.

Hill & Barlow pointed out that the Massachusetts maternity leave statute entitles an eligible employee to up to eight weeks of leave for the purpose of giving birth or for adopting a child. They asked if an employee had used 12 weeks of FMLA leave earlier in the year for a purpose other than giving birth or adopting a child, would the employee still be eligible to the State leave entitlement? The answer is "Yes."

The Corporation for Public Broadcasting objected to having to comply with both FMLA and State law where one law's benefit is not clearly more generous than the other. They, together with the Equal Employment Advisory Council and the Electronics Industries Association, also questioned the provision entitling an employee to use leave under Federal and State or local law concurrently, and thus to take a total amount of leave which may exceed the already generous amount allowed by either law. The Corporation for Public Broadcasting suggested a Federal preemption if permitted or the lobbying of Congress to obtain such authority. California Bankers Association similarly suggested DOL include language to preempt all State law in this area or allow an employee to take only the greater of the leaves available (to prevent "piggybacking" leave under both FMLA and State law). National Association of Plumbing-Heating-Cooling Contractors suggested that "cafeteria-style" programs where different standards and/or benefits from each or both the Federal and State laws are selected to form a separate, hybrid leave plan should be strictly prohibited, and likewise urged that the issue of preemption be revisited.