Given the literal language of FMLA, DOL has no authority to preempt State laws to the extent they provide more generous leave rights to employees. The results about which the majority of the comments complained occur by operation of law (FMLA *and* State family and medical leave laws), and cannot be mitigated by regulation. Only editorial changes have been included in this section of the regulations in response to the comments, in order to clarify examples and provide additional guidance.

Federal and State Anti-discrimination Laws (§ 825.702)

Nothing in FMLA modifies or affects any Federal or State law prohibiting discrimination on the basis of race, religion, color, national origin, sex, age, or disability (*see* FMLA § 401(a)). The stated purpose of the FMLA in this regard, according to its legislative history, was to make leave available to eligible employees within its coverage, and not to limit already existing rights and protection under applicable anti-discrimination statutes (for example, Title VII of the Civil Rights Act of 1964, as amended by the Pregnancy Discrimination Act; and the Americans with Disabilities Act (ADA)). This section included examples of how FMLA would interact with the ADA with respect to a qualified individual with a disability as defined under that Act.

Comments from U.S. Senators Dodd and Kerry (sponsors of both FMLA and ADA), in a letter to the EEOC dated November 22, 1993, make clear that congressional intent was for both Acts to be applied simultaneously, and that an employer must comply with whichever statutory provision provides the greater rights to employees. In keeping with that statutory intent, FMLA § 401 should not be interpreted in any way as limiting or forcing an election of rights under FMLA or ADA. Similarly, comments from U.S. Representatives Williams and Ford (Committee on Education and Labor), in a letter to the EEOC dated November 19, 1993, explained that congressional intent, in the case of an employee with a serious health condition under FMLA who is also a qualified individual with a disability under ADA, was for the FMLA and ADA to be applied in a manner that assured the most generous provisions of both would apply. The statutes provide simultaneous protection and at all times an employer is required to comply with both laws. The Department concurs with this interpretation of the FMLA as it relates to the ADA and other discrimination laws. In summary, providing the ''more beneficial'' rights or protections does not undermine an employer's obligation to observe the requirements of both statutes. Satisfying any or all FMLA requirements, including granting an employee 12 weeks of leave and restoring the employee to the same job, does not absolve an employer of any potential ADA responsibilities to that employee (and vice versa).

Several commenters (G.M. Smith Associates, Inc; Personnel Management Systems, Inc; Chamber of Commerce of the USA; Equal Employment Advisory Council; and Louisiana Health Care Alliance (Phelps Dunbar)) urged a contrary view, that compliance with FMLA should constitute or substitute for compliance with ADA, to simplify the burdens of multiple compliance obligations. Some stated that employers evaluating ''undue hardship'' under ADA need not disregard the cost and disruption of FMLA leave already taken by an employee. This point was also raised by Personnel Management Systems, Inc. and Chamber of Commerce of the USA. The Department has been advised by the EEOC that the *ADA*, unlike the FMLA, considers the burden on an employer for purposes of evaluating the feasibility of employee medical leave. Cost and disruption to the employer are directly relevant to the factors listed in ADA's regulatory definition of ''undue hardship.'' Therefore, according to EEOC, employers may consider FMLA leave already taken when deciding whether ADA accommodation leave in excess of 12 weeks poses an undue hardship. This does *not* mean, however, that more than 12 weeks of leave automatically poses an undue hardship under the ADA. According to EEOC, employers must apply the full ADA undue hardship analysis to each individual case to determine whether or not leave in excess of 12 weeks poses an undue hardship.

An employee's right to be restored to the same or an equivalent position under FMLA applies to the job which the employee held at the time of the request for FMLA leave, even if that job differs from the job held previously due to a reasonable accommodation under ADA. (This point was raised by the Chamber of Commerce of the USA.) The ''essential functions'' of the position would also be those of the position held at the time of the request for leave. An employer may not change the essential functions of an employee's job in order to deny the employee the taking of FMLA leave. However, this does not prevent an employee from voluntarily ending his or her leave and accepting an alternative position uncoerced and not as a condition of employment. The employee would then retain the right to be restored to the position held by the employee at the time the FMLA leave was requested (or commenced) until 12 weeks have passed, including all FMLA leave taken and the period the employee returned to ''light duty.'' When an employer violates both FMLA and ADA, an employee may be able to recover under either or both statutes (but may not be awarded double relief for the same loss).

VIII. Subpart H—Definitions (§ 825.800)

The Women's Legal Defense Fund urges that all definitions that are modified in the text of the regulations be modified similarly in Subpart H. Certainly the Department intends to maintain the integrity of this Subpart, and any material modifications will be incorporated.

The law firm of Alston and Bird recommended that the term group health plan should not include non-employment related benefits paid by employees through voluntary deductions, *e.g.*, individual insurance policies. We agreed with the recommendation and language has been added to § 825.209(a)(1) to exclude such benefits from the definition of group health plan, and make clear an employer is not responsible for maintaining or restoring such benefits for employees who take FMLA leave.

The American Association of Retired Persons (AARP) took issue with the definition of ''parent'' in this section and stated there is nothing in the statutory language or the legislative history that required the exclusion of parents in-law. We disagree, as discussed above in connection with § 825.113. Section 101(7) of the statute defines parent as the biological parent of an employee or an individual who stood *in loco parentis* to an employee when the employee was a son or daughter. There is no language in the legislative history to indicate Congress contemplated expanding the definition beyond the plain meaning of the words. In the Final Rule, the sentence, ''This term does not include parents 'in-law' '', will be removed from the definition of ''parent'' in § 825.800, but not from the explanatory guidance in § 825.113. This is being done not because we agree with AARP but rather because the language in the statute and the regulation are clear regarding the term and the additional sentence is unnecessary.

The law firm of Fisher and Phillips urged that the Final Rule should clarify whether employees of a U.S. employer who are employed in the territories and