responded to this survey were not significantly more likely to anticipate major financial costs or great administrative difficulty in complying with the FMLA than large employers. In response to questions on the Californiamandated family leave law (in effect since January 1992), small employers reported the lowest level of utilization of family leave and no higher direct and indirect financial costs than did larger employers. In fact, the only employers that reported any "major costs" associated with California-mandated leave were those that employed 5,000 or more employees. A greater percentage of large employers had experienced disagreements with employees over family leave issues. Large employers, however, were also most likely to note a beneficial effect on absenteeism, employee morale, public relations, and supervisory relationships as a result of mandated leave. Small employers, in contrast, were most likely to note a beneficial effect on worker productivity and co-worker relationships.

For its part, the Department made a conscious effort to adopt the least burdensome regulatory alternatives (consistent with the statute) in order to reduce the burden on *all* employers, including small employers. In particular, recordkeeping requirements were kept to the minimum level necessary for confirming employer compliance with FMLA's statutory leave provisions. In addition, to ease administrative burdens on all employers, including small entities, employee notification requirements that apply when employees request FMLA leave were summarized in §825.301(c) of the regulations, and DOL made available a prototype notice which employers could adapt for their own use to meet the specific notice requirements (see § 825.301 (c)(8)).

The Department also engaged in extensive education and outreach efforts. We prepared and made available a Fact Sheet and a Compliance Guide to the FMLA, to assist all employers in understanding and meeting their compliance obligations. Because FMLA does not diminish any greater family or medical leave rights provided by State or local law, DOL also prepared and distributed comparisons of State and Federal family and medical leave laws, indicating which law provided the greater employee rights or benefits for compliance purposes.⁷

compliance purposes.⁷
Thus, DOL continues to believe that the extraordinary measures which it has

taken in connection with the implementation of the FMLA will ease the burdens of compliance on all employers, including small employers, and that compliance with the FMLA will *not* have a significant economic impact on a substantial number of small entities. This conclusion is reinforced by available research which shows that costs associated with implementing the FMLA are not significant for covered businesses including covered "small" entities with eligible employees.

In conclusion, even assuming a 500employee size standard, only 5 percent of small employers are covered by FMLA. Based on our review of the studies conducted, the Department concludes, therefore, that the FMLA rules would not likely have a significant economic impact on a substantial number of small entities.

Because of its belief that FMLA significantly impacts a substantial number of small entities, the SBA also suggested in its comments a number of regulatory alternatives in certain areas that it believed would ease the burden on small entities, as follows:

Exclude Part-time Employees When Determining Employer Coverage Under FMLA: The SBA suggested that DOL reduce the coverage of small businesses by changing the 50-employee threshold for coverage to exclude part-time workers from the count. Because small entities employ more part-time workers than larger firms, SBA stated that inclusion of part-time employees will increase the coverage of the FMLA to firms "that otherwise might not have been covered." FMLA's coverage criteria are statutory and, as specifically stated in the legislative history, it was the clear intention of the Congress that all employees of an employer are to be included in the count, including parttime employees. ("It is not necessary that every employee actually perform work on each working day to be counted for this purpose. * * * Similarly, parttime employees and employees on leaves of absence would be counted as 'employed for each working day' so long as they are on the employer's payroll for each day of the workweek." Report of the Committee on Labor and Human Resources (S.5), Senate Report 103-3 (January 27, 1993), p. 22.)

Clarify Definitions of "Serious Health Condition" and "Medical Necessity" for FMLA Leave: SBA observed that the definition of "serious health condition" (which is statutory) was broadly inclusive, and suggested that employers would be required to look to FMLA's legislative history in order to determine whether an employee's condition is considered a "medical necessity" that

justifies FMLA leave. SBA mistakenly presumes that this is a judgment that the statute and regulations permit an employer to make. If the health condition meets the definition in the regulations at § 825.114 and, as provided in §§ 825.305–825.307, an employee furnishes a completed DOLprescribed medical certification from the health care provider, the only recourse available to an employer that doubts the validity of the certification is to request a second medical opinion at the employer's expense. Employers may not substitute their personal judgments for the test in the regulations or the medical opinions of the health care providers of employees or their family members to determine whether an employee is entitled to FMLA leave for a serious health condition.

Expand the "Key Employee" Definition to Include Job Descriptions Instead of Salary: Under the "key employee" exception, employers may deny job restoration in certain cases (see §§ 825.217–825.219). SBA recommended that DOL expand the regulatory definition of "key employee" to include an employee's job description in lieu of salary, because there may be situations, particularly in small entities, where lower salaried employees perform on-going employment functions that are vital to the business and prevent economic injury to the employer's operation but must be reinstated due to the comparatively low salary that is paid. We note first that it seems unlikely that an employer would not want to restore such an employee to employment if the employee performs the vital role indicated, but that is beside the point. The provisions applicable to the "key employee" exception are statutory and state, specifically, that the employees affected must be "* * * a salaried eligible employee who is among the highest paid 10 percent of the employees employed by the employer within 75 miles of the facility at which the employee is employed" (see § 104(b)(2) of the FMLA). There is no authority under these provisions of the law to ignore the salary paid to "key employees." SBA's suggestion directly contravenes the statute and cannot be adopted by regulation.

Require a Four-Hour Minimum
Absence for Intermittent (or Reduced
Leave) Schedules: FMLA allows eligible
employees to take leave intermittently
or on a reduced leave schedule in
certain cases. The regulations state that
an employer may not limit the period of
intermittent leave to a minimum
number of hours. SBA stated that DOL
could significantly reduce the impact of

⁷ The Department's Women's Bureau has also distributed to the public a comparison of State maternity/family leave laws since June 1993.