reasoning for selecting a different date,'' and it simply sought clarification that the employer could reevaluate the 50/75 determination at the beginning of each new FMLA leave year, consistent with other provisions.

Finally, a number of commenters applauded the Department for the deletions from existing § 825.110(c) and (d) in response to the Supreme Court's decision in *Ragsdale. See, e.g.*, EEAC; HR Policy Association; and Association of Corporate Counsel's Employment and Labor Law Committee. The National Association of Letter Carriers, however, objected to the deletion of the requirement that the employer must project when an employee will become eligible for leave or advise the employee when the employee becomes eligible, stating that the requirement minimizes disputes.

With regard to the cap in proposed § 825.110(b)(1) on gaps in service in order for the prior employment to count toward an employee's 12-month requirement, the final rule modifies the proposal by extending the permissible gap to seven years. The court in *Rucker* v. *Lee Holding Co.*, 471 F.3d 6 (1st Cir. 2006), in permitting the five year gap at issue in that case, recognized that the statutory language is ambiguous as to whether previous periods of employment count toward the 12-month requirement, and it stated that the appropriate way to resolve this important policy issue was through agency rulemaking. The Department believes that a seven-year cap draws an appropriate balance between the interests of employers and employees. It recognizes and gives effect to the legislative history's clear statement that the 12 months of employment need not be consecutive, while limiting the burden on employers of attempting to verify an employee's claims regarding prior employment in the distant past. In light of the legislative history, the Department rejects the comments suggesting that no gap should be permitted. By allowing a gap of up to seven years, the rule takes account of the comments noting that employees sometimes take extended leaves from the workforce to raise children or to care for ill family members and emphasizing that women are particularly likely to fill this role. The final rule also recognizes that many employers keep records for seven years for tax or other standard business reasons; thus, allowing a seven-year gap will not impose a burden on those employers. The FMLA, however, only requires employers to keep records for three years, and the burden of proving eligibility is always on the employee. Accordingly, if an employer retains records only for the required three years, it may base its initial determination of the employee's eligibility for leave on those records. If it therefore advises the employee in the eligibility notice that the employee is not eligible for FMLA leave, the employee will have to submit sufficient proof of his or her periods of employment in years four through seven to demonstrate eligibility. Such proof might include W–2 forms; pay stubs; a statement identifying the dates of prior employment, the position the employee held, the name of the employee's supervisor, and the names of co-workers; or any similar information that would allow the employer to verify the dates of the employee's prior service. Any application for employment the employee had completed also might provide additional relevant information.

The final rule also adopts the two exceptions to the cap set forth in paragraph (b)(2) for breaks in service resulting from an employee's fulfillment of National Guard or Reserve military service obligations and breaks where a written agreement exists concerning the employer's intention to rehire the employee after the break in service. The final rule also adopts the provision in paragraph (b)(4) stating that an employer may consider prior employment falling outside the cap, provided that it does so uniformly with respect to all employees with similar breaks. There were very few comments addressing these provisions and they generally were supportive. The Department believes these exceptions are quite limited and will not impose any burden on employers. The final rule does make conforming changes in paragraphs (b)(2) and (b)(4) to reflect the change from five years to seven years.

The final rule also includes the proposed provisions regarding counting the time an employee would have worked for the employer but for the employee's fulfillment of National Guard or Reserve military obligations toward the 12-month and 1,250-hour requirements. USERRA requires that service members who conclude their tours of duty and are reemployed by their employer must receive all benefits of employment that they would have obtained if they had remained continuously employed, except those benefits that are considered a form of short-term compensation, such as accrued paid vacation. Therefore, the Department believes that USERRA requires this outcome.

The final rule clarifies in § 825.110(d), as did the proposed rule, that an employee may attain FMLA eligibility while out on a block of leave when the employee satisfies the requirement for 12 months of employment. Some commenters indicated that this would result in newly-hired employees being treated more favorably than long-term employees. Any such peculiar situations that may occur, however, are not the result of the FMLA, but rather would result from the employer's own policies. An employer that voluntarily allows a new employee with no FMLA rights to go out on leave for a family or medical condition could similarly voluntarily allow a more senior employee with the same condition to extend a leave beyond the legally required 12 weeks. Nothing in the FMLA prohibits an employer from treating employees who have exhausted their FMLA rights more favorably than the law requires. Moreover, the Department believes that this clarification of the current rule is the best interpretation of the statutory language, which defines an ''eligible employee'' as one ''who has been employed for at least 12 months.'' 29 U.S.C. 2611(2)(A). Because an employee remains employed while out on employer-provided leave, the employee becomes eligible under the statutory definition upon reaching the 12-month threshold. Of course, as the proposed and final rules also clarify, any leave that employers voluntarily provide before an employee attains eligibility under the FMLA is not FMLA leave. Therefore, the FMLA protections do not apply to such leave, and employers may apply their normal policies to such leave. Employers may not, however, count any such non-FMLA leave toward the employee's 12-week FMLA entitlement. Finally, as the Department explained in Opinion Letter FMLA2006–4–A (Feb. 13, 2006), the FMLA only requires an employer to ''maintain'' group health insurance coverage at the same level and under the same conditions as prior to the FMLA leave; it does not require an employer to provide insurance if it did not do so at the commencement of the FMLA leave.

The final rule also adopts the proposed changes in paragraphs (c) and (d), deleting the ''deeming'' provisions. In light of the Supreme Court's decision in *Ragsdale*, the Department believes that it does not have regulatory authority to deem employees eligible for FMLA leave who do not meet the 12-month/1,250-hour requirements, even where the employer fails to provide the required eligibility notices to employees or provides incorrect information. As noted in § 825.300(e), however, such failures may have the effect of interfering with, restraining or denying the employee the exercise of FMLA