



November 30, 1995

FMLA-76

Dear *Name**,

This is in response to your letter of January 9, 1995, on behalf of your constituent, *Name**. *Name** is concerned with the applicability of the Family and Medical Leave Act (FMLA) to religious institutions as employers. He is also concerned with whether his church's policy regarding maternity/pregnancy leave complies with the FMLA. I regret that the high volume of inquiries received by the Wage and Hour Division and ongoing workloads caused a delay in our response.

The Wage and Hour Division of the U.S. Department of Labor is responsible for the enforcement and administration of the FMLA for all private, state and local government employees and some federal employees. The FMLA entitles eligible employees of covered employers to take up to 12 weeks of unpaid, job-protected leave in any 12 months—with continued group health insurance coverage—for specified family and medical reasons.

Private employers are covered under FMLA if they have employed at least 50 employees during 20 or more calendar workweeks in the current or preceding calendar year; all public agencies are covered regardless of the number of employees employed. Employees are eligible under FMLA if they have worked for a covered employer for at least 12 months, have worked at least 1,250 hours during the 12 months preceding the start of leave, and are employed at a worksite where the employer employs at least 50 employees within 75 miles. The 12 months the employee has to have worked do not have to be consecutive.

Unpaid leave must be granted to an eligible employee for any of the following reasons: (1) for birth of a child, and to care for the newborn child; (2) for placement with the employee of a child for adoption or foster care; (3) to care for the employee's spouse, child, or parent, who has a serious health condition; and (4) for a serious health condition that makes the employee unable to perform his/her job.

Title I, section 101(4)(A) of FMLA defines employer as "any person engaged in commerce or in any industry or activity affecting commerce who employs 50 or more employees for each working day during each of 20 or more calendar workweeks in the current or preceding calendar year...."

There is nothing elsewhere in the legislation or in the legislative history to suggest that Congress intended religious institutions to be excluded from this definition. The FMLA uses the "affecting commerce" test under the Labor Management Relations Act, rather than the narrower standard of the Fair Labor Standards Act. When determining if activities affect "commerce," courts interpret this test very broadly, in effect finding that coverage coincides with the full scope of Congressional power to regulate commerce under the Constitution. Under Title VII of the Civil Rights Act of 1964 (Title VII), the U.S. Court of Appeals for the Ninth Circuit stated that it is difficult to imagine any activities, businesses or industries employing 15 or more employees (the Title VII threshold) that do not affect commerce among the States in some degree. Because FMLA has an even higher coverage threshold than Title VII, any employer with 50 or more employees will be deemed to be an employer "... engaged in commerce or in any industry or activity affecting commerce..." within the meaning of FMLA.

Section 825.104(b) of the Regulations provides for a presumption that employers who meet the fifty-employee coverage test "are deemed to be engaged in commerce or in an industry or activity affecting commerce." FMLA coverage of church employees may be found only if the Church meets the fifty-employee coverage test. There may be some cases, however, in which the First Amendment could affect statutory coverage of an otherwise covered religious institution. C.f. Catholic Bishop of Chicago, 440 U.S. 490 (1979) (lay teachers in church-operated schools actively propagating religious faith in the classrooms are exempt from NLRB jurisdiction) and NLRB v. St. Louis Christian Home, 663 F. 2d 60 (8th Cir. 1981) (NLRB jurisdiction extends to church-affiliated child care institution maintaining a commercial relationship with its employees in the same way as a secular child care institution).



Section 825.207 of the Regulations provides that an eligible employee may elect, or an employer may require the employee to substitute any of the accrued paid vacation leave, personal or family leave, or medical or sick leave for any part of the 12-week FMLA leave period under certain conditions. Paid vacation leave, personal leave, or family leave may be substituted for all or part of any unpaid FMLA leave for the birth and care of the employee's child after birth, or placement for adoption or foster care, or for the care of the seriously ill family member. Paid vacation leave, personal leave, or medical or sick leave may be used and counted as FMLA leave for the employee's own serious health condition (pregnancy included). Paid medical or sick leave may be substituted for FMLA leave for the care of a seriously ill family member only to the extent that the employer's leave plan allows paid leave to be used for that purpose. The use of paid family leave as FMLA leave is also limited by the normal use of the employer's plan.

Because of the principles of law involved, whether your constituent's church is covered by the FMLA is a complex question which needs to be analyzed in considerable detail based on the particular facts surrounding all of the church's activities. Unfortunately, there is not enough information included in your correspondence for us to determine whether your constituent's church is covered by the FMLA or whether its maternity/pregnancy leave complies fully with the statute. We, therefore, suggest that, if has additional questions in this regard that cannot be answered based on the foregoing analysis, that he provide additional information concerning the nature of the activity performed by the church as an employer and a more detailed explanation of the leave policy.

Sincerely,

Richard M. Brennan
Deputy Director

Office of Enforcement Policy

cc: Washington, D.C., Office

** Note: The actual name(s) was removed to preserve privacy in accordance with 5 U.S.C. 552 (b)(7).*