



February 7, 1994

FMLA-29

Dear *Name**,

We regret the delay in responding to your comments regarding the Family and Medical Leave Act (FMLA) regulations. Your letter was included in our official rulemaking record on the interim final FMLA regulations.

You asked if the intermittent leave provisions of FMLA supersede the Americans with Disabilities Act's (ADA) "essential functions" and "undue hardship" provisions. Initially, we would note that nothing in FMLA modifies or affects any Federal or State law prohibiting discrimination on the basis of disability, including the ADA. See § 825.702 of the FMLA regulations, 29 CFR 825. An employer covered by both statutes (FMLA and ADA) must, therefore, comply with whichever statute provides the greater rights to employees.

In your example, a full-time employee is diagnosed with a kidney disease. All health care providers determine that the employee needs dialysis treatments each Monday and Friday afternoon, which cannot be rescheduled. Attending to the dialysis treatments would make the employee unable to perform an essential job function (e.g., serve as security guard; take a machine reading; etc.), which duties also cannot be rescheduled or reassigned. The employer has no alternative job in which to place this employee that would better accommodate the employee's need for intermittent leave. You suggest that if the employee requests FMLA leave every Monday and Friday afternoon for the dialysis treatments and incurs no other need for FMLA qualifying leave, the employee's right to take job-protected leave under FMLA could last forever because the employee would never use 12 weeks of leave in any 12-month period.

You are correct in your analysis of FMLA's job protections in this case. FMLA entitles eligible employees to take leave because of a "serious health condition," as defined in § 825.114, that makes the employee unable to perform the functions of the employee's job. As discussed in § 825.117, employees who need to take FMLA leave intermittently or on a reduced leave schedule for such purposes must attempt to schedule their leave so as not to disrupt the employer's operations. In addition, an employer may assign an employee to an alternative position with equivalent pay and benefits that better accommodates the employee's need for intermittent leave or leave on a reduced leave schedule. If an employee is temporarily transferred to an alternative position to better accommodate the intermittent leave, the employee cannot be required to take more leave than is medically necessary. The rules for determining the amount of leave used when an employee takes leave intermittently or on a reduced leave schedule are discussed in § 825.205.

If the employee in your example is eligible for leave and cannot reschedule the leave because of medical necessity, and the employer has no alternative position available, the employee is entitled to take job-protected leave on an intermittent basis under FMLA until 12 workweeks of leave have been used in a 12-month period. If the employee never uses as much as 12 workweeks of FMLA leave in a 12-month period, the employee would never exhaust his or her statutory entitlement to take FMLA leave. As discussed in §825.220 of the FMLA regulations, an employer is prohibited from interfering with, restraining, or denying the exercise (or attempts to exercise) any rights provided by FMLA, and from discriminating against employees who use FMLA leave.

We hope that the foregoing information satisfactorily responds to your inquiry. Please note, however, that the FMLA does not diminish any greater family or medical leave rights that apply to employees under the terms of an applicable collective bargaining agreement or employer plan or policy, or applicable State law, nor does FMLA diminish an employer's obligations to comply with applicable Federal or State anti-discrimination laws. The above information is based strictly on our reading of the without regard to the possible applicability of any greater family or medical leave rights or anti-discrimination protections available under other Federal or State laws or employer plans or policies. The FMLA was not intended to discourage employers from adopting policies that provide greater family or medical leave benefits than



those provided by the FMLA. To obtain further information on Federal anti discrimination laws such as the ADA, we would encourage you to contact the nearest office of the U.S. Equal Employment Opportunity Commission.

Sincerely,

J. DEAN SPEER
Director, Division of Policy and Analysis

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