



April 7, 1995

FMLA-57

***This letter has been superseded by FMLA-86, dated December 12, 1996.**

Dear *Name**,

This is in response to your letter of March 14 forwarding a copy of a letter from your constituent, *Name** regarding the Family and Medical Leave Act of 1993 (FMLA). *Name** expresses two concerns: that the Department's interpretation of the term serious health condition does not reflect the intent of the Act's authors and is being applied inconsistently; and, that FMLA leave absences may not be counted against an employee for purposes of perfect attendance bonuses or other disciplinary actions. The FMLA defines serious health condition to mean either "inpatient care in a hospital, hospice, or residential medical care facility" or "continuing treatment by a health care provider." Regulations, 29 CFR Part 825, published as a Final Rule on January 6, 1995 and effective April 6, 1995, state that, unless complications arise, the common cold, the flu, ear aches, upset stomach, minor ulcers, headaches other than migraine, routine dental or orthodontia problems, periodontal disease, etc., are examples of conditions that do not meet the definition of a serious health condition and therefore do not qualify for FMLA leave. The fact that an employee is incapacitated for more than three days, has been treated by a health care provider on at least one occasion which has resulted in a regimen of continuing treatment prescribed by the health care provider does not convert minor illnesses such as the common cold into serious health conditions in the ordinary case (absent complications.) See § 825.114(c) of the final FMLA Regulations, 29 CFR Part 825.

With regard to incentive plans rewarding attendance, an employee may not be disqualified solely for having taken bona fide FMLA leave. The statute states that the taking of leave shall not result in the loss of any employment benefit accrued prior to the date the FMLA leave commences. To the extent an employee had perfect attendance before the FMLA leave begins, the employee is entitled to continue eligibility for perfect attendance upon return from leave and may not be disqualified from the bonus because of taking leave. Illnesses that do not meet the definition of a serious health condition do not enjoy FMLA's protection in this regard.

I hope that the above addresses your constituent's concerns and conveys fully the Department's position with respect to these concerns. I would be glad to address any further questions you or your constituent may have.

Sincerely,

Daniel F. Sweeney
Deputy Assistant Administrator

Enclosure

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