



February 23, 1996

FMLA-79

Dear *Name**,

This is in further response to your letter requesting an opinion as to whether the Safety Incentive Program rewarding employees for perfect attendance on an individual and team basis complied with the requirements of section 541.118 of Regulations, 29 CFR Part 541. Our initial response was dated January 13, 1994.

While our initial response correctly construed the requirements of 29 CFR Section 541.118, it has come to our attention that it did not address the impact of the Family and Medical Leave Act of 1993 (FMLA) on attendance bonus plans. The FMLA provides that an employee taking leave under the Act shall be restored to the same position of employment held prior to commencing leave or to an equivalent position with equivalent employment benefits, pay, and other terms and conditions of employment. Additionally, FMLA provides that the taking of FMLA leave shall not result in the loss of any employment benefit accrued prior to the date on which the leave commenced. (See Section 104(a)(1) and (2)).

Generally speaking, bonuses for perfect attendance are rewards for compliance with rules or the absence of "occurrences" (i.e., absences) and would be subject to the requirements of Section 104(a)(1) and (2). If an employee was eligible for such a bonus prior to taking FMLA leave, the employee would be eligible for the bonus upon returning to work because the taking of FMLA leave may not be used as a negative factor in employment actions. (See 29 CFR Section 825.220(e)) The employee with an otherwise perfect attendance record may not, as a result of the FMLA leave, be deemed ineligible for the bonus.

On the other hand, FMLA states that nothing in Section 104 shall be construed to entitle any restored employee to the accrual of any seniority or employment benefit during any period of leave or any right, benefit, or position of employment other than any right, benefit, or position to which the employee would have been entitled had the employee not taken the leave. (See Section 104(a)(3) and (4))

Bonuses based on some positive action required by the employee such as production bonuses would be governed by the terms of Section 104(a)(3) and (4). The employee would not be entitled to accrue any additional seniority or other employment benefit during the time spent on FMLA leave. Depending on the terms and conditions governing the production award program, such an employee may be awarded a reduced bonus or be deemed ineligible as a result of having been on FMLA leave and not having had the opportunity to continue to produce during the award period.

It should also be noted that FMLA makes it unlawful for any employer to interfere with the exercise of an employee's rights under the Act or to discharge or in any other manner discriminate against any employee for opposing any practice made unlawful by the Act. An employer's denial of a bonus to an employee, who otherwise would be qualified for the bonus except for taking FMLA leave, would be considered to be a violation of FMLA requirements that prohibit interfering with the exercise of the employee's FMLA rights and those prohibiting discrimination. It would also be considered a violation to grant more favorable considerations to employees on other types of unpaid leave.

I hope that this clarifies our earlier response in connection with attendance bonus plans and requirements under FMLA. Please contact me at (202) 219-8412 if you have any questions regarding the issues addressed in this letter.

Sincerely,

Howard B. Ostmann
Office of Enforcement Policy
Family and Medical Leave Act Team

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