



April 24, 1996

FMLA-80

Dear *Name **,

This is in response to your request for an opinion with respect to the application of the Family and Medical Leave Act of 1993 (FMLA) and the implementing regulations, 29 CFR Part 825, to probationary teachers who take unpaid leave subject to FMLA. I regret that the volume of work associated with administering FMLA has delayed this response.

Statements made in this letter with regard to the applicable collective bargaining agreement (CBA) or provisions of state law are not meant as interpretations but rather as summaries to frame our response. We will assume that there are no questions with regard to the FMLA issues of employer coverage, employee eligibility, and whether the reason for the leave is covered by FMLA.

Illinois State law provides in part that a "teacher who has been employed in any district as a full-time teacher for a probationary period of 2 consecutive school terms shall enter upon contractual continued service unless given written notice of dismissal stating the specific reason therefore, by certified mail, return receipt requested, by the employing board at least 60 days before the end of such period." The CBA provides that, should a teacher experience a "break in service" during this probationary period before either being recommended for reemployment for the second year or contractual continued service or tenure after the second year, the teacher will return to work the following year as a first year probationary teacher and be required to complete two years of uninterrupted service. A break in service for this purpose would include any period of unpaid leave.

Your specific concern is whether a probationary teacher who takes FMLA-qualifying leave that would otherwise be considered a break in service as defined in the CBA can be returned to work as a first year probationary teacher without violating FMLA's provisions for restoration to an equivalent position with equivalent employment benefits, pay, and other terms and conditions of employment.

After carefully reviewing your questions and comments, it is the position of the Department that a probationary teacher who takes a period of unpaid leave subject to FMLA may not be required, upon returning to work, to begin the probationary period again. To do so would result in an employee losing an earned benefit that accrued prior to when the leave began, contrary to FMLA.

Section 2614(a) of FMLA requires, in part, that an employee who has taken FMLA leave must be returned to either the same position or an equivalent position with equivalent employment, benefits, pay, and other terms and conditions of employment. This section also requires that the taking of FMLA leave shall not result in the loss of any employment benefit accrued prior to the date the leave began. A position as a first-year probationary employee is not equivalent to a position as a second-year probationary employee because additional time must be served before being granted tenure and whatever privileges attend thereto. Prior to beginning leave, the employee had accrued at least one year of service towards the completion of the two-year probationary period. Returning to a position as a first-year probationary employee constitutes the loss of this benefit. With respect to the limitation in this section that the employee is not entitled to accrue seniority during any leave period, our interpretation does not require the accrual of any additional seniority or employment benefit during the period of unpaid leave; it prevents the loss of those benefits already earned.

You also ask about the application of section 2618(e) that provides in part that restorations of eligible employees of local educational agencies or private elementary or secondary schools shall be made on the basis of established school board policies and practices, private school policies and practices, and collective bargaining agreements. Section 825.604 of the regulations points out, in part, that any restoration under such policies or practices "must provide substantially the same protections as provided in the Act for reinstated employees." Section 825.215, the section regarding the restoration of employees generally under FMLA, is specifically referenced. Having to return to a position as a first year probationary employee would be less protection than otherwise provided in FMLA for reinstated employees.



You also ask that if we determine that the use of unpaid leave does not permit the reclassification of the individual as a first year employee can the probationary period be extended for one additional school term. In this particular situation, our answer would be no. It appears that the attaining of contractual continued service is based on an employee's anniversary date, not the accumulation of a certain number of hours or days of work, and the current CBA recognizes certain situations wherein a probationary employee who takes unpaid leave would still attain contractual continued service status after the end of the second year. Were the system based on the completion of a certain number of hours or days worked, however, the employer could delay granting contractual continued service by an amount reflecting the amount of unpaid FMLA leave. This is similar to the interpretation of FMLA the Department takes with respect to production bonuses and pensions as stated in sections 825.215(c)(2) and (d)(4), respectively.

I will be glad to address any further concerns you may have if the above has not been fully responsive.

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).*