U.S. Department of Labor
Employment Standards Administration
Wage and Hour Division
Washington, D.C. 20210

December 9, 1997 **FMLA-91**

Dear ***Name****,*

This is in response to your request for guidance under the Family and Medical Leave Act of 1993 (FMLA) as it relates to the Oregon Family Leave Act and the Fair Labor Standards Act (FLSA) exemption for executive, administration and professional employees. I apologize that the volume of work involved with administering the FMLA has delayed this response.

We regret the delay in our response to your letter of May 17, 1996, regarding the Family and Medical Leave Act of 1993 (FMLA). You specifically request an opinion as to the interaction of FMLA with employer benefit programs or plans that provide more generous leave benefits than those provided under this law.

In enacting FMLA (29 U.S.C. 2601 et seq.), Congress stated that one of the purposes of this law is to entitle employees to take reasonable leave for medical reasons, for the birth or adoption of a child, and for the care of a child, spouse, or parent who has a serious health condition. The FMLA allows up to 12 weeks of job-protected leave in any 12 months – with group health insurance coverage maintained during the leave – to eligible employees for the above mentioned family and medical reasons. Upon completion of the leave, the employee must be returned to work to the same or an equivalent position with equivalent pay, benefits and other terms and conditions of employment. It is unlawful for any employer to interfere with or restrain or deny the exercise of any right provided under this Act, or to discharge or in any other manner discriminate against an employee for opposing or complaining about any unlawful practice related to this law.

Section 402 of FMLA, 29 U.S.C. 2652, and the regulations at § 29 CFR 825.700 describe the interaction between FMLA and employer plans and provide that nothing in FMLA diminishes an employer's obligation under a collective bargaining agreement (CBA) or employment benefit program or plan to provide greater family or medical leave rights to employees than the rights established under FMLA, nor may the rights established under FMLA be diminished by any such CBA or plan.

In your letter, you give an example of a more generous employment leave plan that provides job protected leave of 12 weeks plus one week for every full year of service as the maximum leave of absence, except maternity. Normally, employees will be terminated from their jobs, if they do not return to work within the prescribed period of their leave of absence as based upon the above formula. You pose three questions with respect to the interaction between FMLA and the employer's more generous leave policy:

First Question: Can an employer, who grants more than twelve weeks of leave for reasons including, but not limited to, FMLA qualifying reasons, run the twelve weeks of FMLA leave concurrently with the leave of absence?

Leave granted under circumstances that qualify as FMLA leave can be counted against the 12-week entitlement so long as the employee is FMLA-eligible and is notified in writing that the leave is designated as FMLA leave. (See § 29 CFR 825.208.) Employers are permitted to designate paid leave as FMLA leave and offset the maximum entitlements under the employer's more generous policies to the extent that the leave qualifies as FMLA leave. (See §§ 29 CFR 825.700 and 825.207.) Leave granted for reasons not covered by FMLA, however, cannot be counted against FMLA's 12-week entitlement.

Second Question: Can an employer terminate the employment of an employee who has worked less than a year and does not return to work after 12 weeks of leave?

To be eligible for FMLA leave, an employee must meet three tests, i.e., must work for an employer for at least 12 months, which need not be consecutive months, and work at least 1,250 hours over the 12 months preceding the taking of FMLA leave, and work at a worksite where the employer employs 50 or

more employees within 75 miles. (See § 29 CFR 825.110.) If the employee had less than one year of service with the employer at the time the leave in question commenced, the employee would not have been eligible for FMLA leave nor entitled to its protection and benefits. During this period of non-eligibility, any employment actions taken by the employer in granting leave, maintaining health care benefits and providing job protection would have been determined by the employer's plan rather than the provisions of FMLA. Any leave taken before the employee meets all of the FMLA employee eligibility tests cannot be counted against the employee's FMLA 12-week leave entitlement. If FMLA-qualifying leave continues after the employee becomes FMLA-eligible, only that portion of leave taken after the employee becomes FMLA-eligible may be counted against the employee's 12-week leave entitlement, and only so long as the employer has designated in writing the leave as FMLA leave.

Third Question: Can an employer terminate the employment of a two-year employee if the employee does not return after fourteen weeks of leave?

The FMLA requires covered employers to provide eligible employees with up to 12 workweeks of leave in a 12-month period for any one or more of the specified family or medical reasons. If the employee is unable to or does not return to work at the end of 12 weeks of FMLA leave (provided the employer designated the leave as FMLA leave and so notified the employee in writing), all entitlements and rights under FMLA cease at that time. The employee is no longer entitled to any further job restoration rights under FMLA and may be terminated.

An employer, however, must observe any employment benefit program or plan or CBA that provides greater family or medical leave rights to employees than the rights established by the FMLA. (See § 29 CFR 825.700.) Thus, an employer under your example would have an obligation under its own "leave of absence" policies to extend leave benefits, health care benefits, and job protection for up to 14 weeks, but not beyond 14 weeks. You also should be aware that the discrimination prohibition in FMLA (Section 105) would prevent an employer from terminating such employees who have used FMLA leave and do not return after 14 weeks if the employer does not treat similarly situated employees who have not used FMLA leave (for example, employees on leave to care for an ill grandparent or parent-in-law) the same.

The above information should be viewed as general guidance based upon the limited information contained in your letter. If we may be of further assistance to you, please do not hesitate to contact me.

Sincerely,

Michelle M. Bechtoldt
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).*