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

January 20, 2006 **FMLA2006-2**

Dear ***Name****:

This responds to your request for an advisory opinion under the Family and Medical Leave Act of 1993 (FMLA), 29 U.S.C. § 2601 et seq., with regard to the requirement for employer contributions to a multi-employer health plan.

You represent a multi-employer health plan that provides a "Disability Extension of Coverage" to participants whose "disability prevents [them] from engaging in any occupation or employment for remuneration or profit." Benefits for disabled participants are funded entirely from the plan's general reserves rather than from employer contributions during the period of disability. You state that the benefits provided by the health plan to disabled participants meet the requirements of 29 C.F.R. § 825.211(c), (d), and (e), relating to the continuation of employees' group health coverage while on FMLA leave, because coverage and benefits are maintained at the same level "for a period greater than the duration of any FMLA leave." However, the plan contains no provisions that explicitly address the FMLA or participants who are on FMLA leave. You inquire whether current employer contributions are required for a plan participant on FMLA leave due to the employee's own serious health condition who is provided with health benefits under the plan's "Disability Extension of Coverage" provision.

The FMLA regulations require an employer to continue contributing to a multi-employer health plan on behalf of an employee on FMLA leave, "unless the plan contains an explicit FMLA provision for maintaining coverage such as through pooled contributions by all employers party to the plan." See 29 C.F.R. § 825.211(b). The FMLA legislative history – on which the Department of Labor relied in drafting 29 C.F.R. § 825.211(b) – indicates that Congress expected employers to continue contributing to multi-employer health plans for the duration of an employee's FMLA leave, "unless the plan expressly provides for some other method of maintaining coverage . . . notwithstanding any terms of any collective bargaining or other agreement to the contrary." See H.R. Rep. No. 103-8, Pt. 1, at 44-45 (1993).

Your question assumes: (1) that the multi-employer health plan you describe continues to provide group health insurance coverage for all employees who take FMLA-covered leave for their own serious health conditions, as if they had been continuously employed during the FMLA leave period; and (2) the health plan provides benefits through its Disability Extension of Coverage rules, which require no current employer contributions. In this particular situation, if these rules do apply to all employees taking FMLA-covered leave for any condition that meets FMLA's definition of a serious health condition, 29 C.F.R. § 825.211(b) would not require the employer to make contributions on behalf of the employee using FMLA leave. This is because the multi-employer plan expressly provides a method of maintaining health insurance coverage during the FMLA leave through payments from the plan's reserves.

However, the FMLA would require that continued employer contributions be made to the multi-employer plan for employees with a qualifying FMLA serious health condition who would not meet the plan's Disability Extension of Coverage rules' definition of "disability" and would fall outside the plan's method for continuation of group health benefits. Additionally, employers would be required to make contributions to the plan for employees who take FMLA-qualifying leave for the birth and care of a newborn; for adoption or for placement of a son or daughter in foster care; and in order to care for a spouse, son or daughter, or parent with a serious health condition. This is because the plan would have no method for expressly maintaining group health insurance coverage for employees during their FMLA leave for these qualifying reasons. See 29 U.S.C. § 2612(a)(1); 29 C.F.R. §§ 825.112, -.114.

You also inquire whether an employer's failure to designate leave as FMLA leave under 29 C.F.R. § 825.700(a) affects the employer's duty to contribute to the plan during the leave. Although we do not believe it relevant to the answer of this specific question, you should be aware the U.S. Supreme Court invalidated the FMLA regulations at § 825.700(a), which provides categorical sanctions against employers who fail to designate FMLA-qualifying leave as FMLA leave. *See Ragsdale v. Wolverine Worldwide, Inc., 535 U.S. 81 (2002).*

An employee who is entitled to FMLA leave also is entitled to have his or her group health benefits continue in effect, whether the employer has properly designated the leave or not. See 29 U.S.C. § 2614(c)(1) ("[d]uring any period that an eligible employee takes leave under [the FMLA], the employer shall maintain coverage under any 'group health plan'… for the duration of such leave at the level and under the conditions coverage would have been provided if the employee had continued in employment continuously for the duration of such leave"). Therefore, the employer's failure to designate leave as FMLA leave would not affect the employer's obligation under the FMLA to make contributions to the multi-employer plan for employees taking FMLA-qualifying leave.

This opinion is based exclusively on the facts and circumstances described in your request and is given based on your representation, express or implied, that you have provided a full and fair description of all the facts and circumstances that would be pertinent to our consideration of the question presented. Existence of any other factual or historical background not contained in your letter might require a conclusion different from the one expressed herein. You have represented that this opinion is not sought by a party to pending private litigation concerning the issue addressed herein. You have also represented that this opinion is not sought in connection with an investigation or litigation between a client or firm and the Wage and Hour Division or the Department of Labor.

Sincerely,

Rosemary E. Sumner
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).*