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

November 17, 2005 **FMLA2005-3-A**

Dear ***Name****

This is in response to your request for clarification of a Family and Medical Leave Act (FMLA) opinion letter (FMLA-112, enclosed). Specifically, you wish to confirm that your method of tracking an employee's leave balance when taking intermittent FMLA leave during the "rolling" 12-month leave period complies with the Family and Medical Leave Act of 1993, 29 U.S.C. § 2601 *et seq*. Secondly, you ask whether employees may be disciplined under your attendance policy for absences that occur after they have exhausted their 12-week FMLA entitlement in the 12-month period. Finally, you question whether FMLA-112 allows the employee to have eligibility "renewed" and a "full new bank of annual FMLA hours" reissued every year. For the purposes of this letter, we assume that your company uses the "rolling" 12-month period to determine employee eligibility and track the amount of FMLA leave available for employee use.

The FMLA entitles eligible employees of covered employers to take up to 12 weeks of unpaid, job-protected leave each year – with continuation of group health insurance coverage under the same conditions as prior to leave and reinstatement to the same or equivalent position – for specified family and medical reasons. In answering your inquiry, we assume you refer to a covered employer, an eligible employee and that all other applicable criteria for FMLA leave have been met. *See* 29 U.S.C. §§ 2611; 2612(a); 29 C.F.R. §§ 825.104-.112, 825.114.

The leave entitlement requirements of the Act are found at 29 U.S.C.
§ 2612(a)(1) and state that eligible employees are entitled to 12 workweeks of leave in any 12-month period for specified qualifying medical conditions. "Any 12-month period" is defined in the regulations at 29 C.F.R. § 825.200(b), and allows an employer to elect:

- a calendar year,
- a fixed 12-month "leave year,"
- a 12-month period rolled forward from the date any employee's first FMLA leave begins, or
- a "rolling" 12-month period measured backward from the date an employee uses any FMLA leave.

Your questions pertain to the last option – the "rolling" 12-month period. Under the rolling 12-month period, "each time an employee takes FMLA leave the remaining leave entitlement would be any balance of the 12 weeks which has not been used during the immediately preceding 12 months." *See* 29 C.F.R. § 825.200(c).

Question #1: You state that an employee's leave was approved and first used on April 3 through May 12, a period of 6 weeks. The same employee then applied and was approved for intermittent leave for the same qualifying health condition for absences on July 17, August 8 and 9, November 14, and January 12, bringing the total leave used to 7 weeks (280 hours). On April 3 of the next year, the company began adding back FMLA hours used the previous year, with the balance updated daily. If no additional FMLA leave is used by May 12, the employee would have a leave balance of 11 weeks (440 hours), with an additional 8 hours added back on July 17, 16 hours added back for August 8 and 9, and so on. You ask whether this method is correct for tracking the usage and remaining FMLA leave entitlement under the "rolling" 12-month period.

Answer #1: Yes. The company is properly applying the rolling 12-month period for purposes of calculating the appropriate FMLA leave balances for this employee. Each time the employee takes FMLA leave, the remaining leave entitlement is the balance of the 12 weeks that has not been used during the immediately preceding 12 months.

Question #2: During the initial 12-month leave period, an employee used all but 16 hours of FMLA leave. This initial rolling 12-month period ends, and the employee is recertified for the same condition. In

time, a total of 24 hours is added to the employee's leave balance of 16 hours, giving the employee 40 hours of available FMLA leave. The next pay period the employee is absent a total of 56 hours, 2 days of which are unscheduled, and after the total available FMLA hours were exhausted. You ask whether the employee's absence on the two unprotected days can be subject to discipline under the employer's attendance policy if that policy normally issues occurrences for unscheduled absences.

Answer #2: Yes. As stated above, under the FMLA, an eligible employee is entitled to a *total* of 12 weeks of job-protected leave. Once those 12 weeks are exhausted, the employee is no longer eligible for the protections afforded by the Act.

Your summary paragraph indicates some potential confusion concerning the difference between the application of the rolling 12-month period used for entitlement purposes and the 1,250 hours of work in the preceding 12 months test used for eligibility purposes. As outlined in Opinion Letter FMLA-112, the rolling 12-month period applied to determining whether an eligible employee's leave entitlement has been exhausted is separate and distinct from testing an employee's **eligibility** for FMLA leave under the 1,250 hours of service test. The statute at 29 U.S.C. § 2611 and regulations at 29 C.F.R. § 825.110 require that eligibility for FMLA leave must be tested immediately preceding the commencement of leave for each qualifying condition. In other words, the employee maintains eligibility for 12 months **forward** from the point that it is established. In contrast, entitlement under the rolling 12-month period is measured **backward** from the date an employee uses any FMLA leave. The fact that an employee may be eligible for and takes leave for more than one FMLA-qualifying condition does not change the fact that an employee is entitled to a **total** of 12 weeks of FMLA leave within the rolling 12-month period. Thus, as you correctly noted, the number of available hours remaining in the employee's 12-week leave entitlement can change daily by adding back 12 months later any hours used on that particular date in the prior year.

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,

Alfred B. Robinson, Jr.
Deputy Administrator

Enclosure: Opinion Letter FMLA-112

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