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

October 5, 2006 **FMLA2006-6-A**

Dear ***Name****:

This is in response to a letter on behalf of a local union representing teachers (the Union), a similar letter on behalf of the respective school district (the District), and a question raised during a follow-up telephone conversation between the Union and a member of my staff. Both the Union and the District have requested an interpretation regarding the application of the Family and Medical Leave Act of 1993 (FMLA), 29 U.S.C. § 2601 *et seq*.,[1] to a group dental plan provided by the District to employees who belong to the bargaining unit served by the Union. The Union, in a telephone conversation with a member of my staff, has also requested clarification regarding the application of the FMLA regulations at 29 C.F.R. § 825.601(a) to the maintenance of dental health benefits over the summer vacation for instructional employees who take FMLA leave at the end of the school year. For the sake of clarity, this letter responds to the requests from both the Union and the District.

The letters sent by the Union and the District and subsequent telephone conversations provide the basis for the following assumptions that we have used in answering this inquiry. The District offers a group health insurance plan that provides medical care coverage for instructional employees and separately offers a group dental insurance plan for these employees. The District pays 100% of the dental insurance premiums up to a maximum amount per month for 12 months, although the teachers' work year starts in late August and ends in early June.

We also assume, based on representations made by both the District and the Union, that the medical health plan is a group health plan benefit that must be maintained during FMLA leave. The Union believes that the dental plan is also a group health plan that must be maintained during FMLA leave; however, the District believes that the dental plan is not a group health plan under the FMLA. The District argues that the dental plan is not a part of, or a supplement to, its "group health plan," but rather, is a separate group dental program. Therefore, the District does not maintain the dental insurance coverage for employees during FMLA leave or during summer break if FMLA leave is taken near the end of the school year.

The FMLA refers to section 5000(b)(1) of the Internal Revenue Code of 1986 (the Code) for the definition of the term "group health plan." *See* 29 U.S.C. § 2614(c)(1). Section 5000(b)(1) of the Code states:

> The term "group health plan" means a plan (including a self-insured plan) of, or contributed to by, an employer (including a self-employed person) or employee organization to provide health care (directly or otherwise) to employees, former employees, the employer, or others associated or formerly associated with the employer in a business relationship, or their families.

The District's dental plan indicates that it pays percentages of the treatment cost for dental care for plan participants (District employees), including diagnostic and preventive oral services, basic dental services, endodontics, periodontics, oral surgery, major restorative services, prosthetic repairs and adjustments, prosthetics, and orthodontics. The plan appears to come within the broad definition of "group health plan."

[1] Unless otherwise noted, any statutes, regulations, opinion letters, or other interpretive material cited in this letter can be found at www.wagehour.dol.gov.

Pursuant to the regulations at 29 C.F.R. §§ 825.800 and 825.209(a), an insurance program providing health coverage under which employees purchase individual policies is excluded from the FMLA definition of a "group health plan" if:

(1) the employer makes no contribution to the plan;
(2) participation in the program by employees is completely voluntary;
(3) the sole functions of the employer with regard to the program are, without endorsing the program, to permit the insurer to publicize the program to employees, to collect premiums paid by the employees through payroll deductions and to remit these premiums to the insurer;
(4) the employer receives no consideration in cash or otherwise in connection with the program, other than reasonable compensation for administrative services; and
(5) the premium charged to the employee does not increase in the event the employment relationship ends.

In a telephone conversation with a member of my staff, counsel for the District has stated that the District's dental insurance plan is a benefit provided by the District to both union and non-union employees and that the plan is self-insured. The District negotiates a contract with another organization to serve as the plan's third party administrator. Plan premiums are negotiated based, in part, on a review of past claims. The District generally pays 100% of insurance premiums and employs a plan administrator who assists employees in the handling of disputed claims. The District may grant exceptions for a claim that is denied by the plan administrator.

The disputed dental plan provides for dental health care and, as previously stated, appears to come within the Code's broad definition of "group health plan." The summary plan description the District provides describes the plan as a group benefit plan. The information provided to us indicates the plan would not meet certain FMLA regulatory criteria for exclusion from the definition of a group health plan. Specifically, employees do not purchase individual policies under this plan, and the District contributes 100% of the plan premiums. In order to qualify for the exclusion, however, employees would need to purchase individual policies, and the employer could not contribute to the plan. With respect to the employer's functions under the plan, the District's negotiation for the cost of premiums and the employment of a claims administrator to assist employees in handling disputed claims goes beyond the employer involvement allowed for a plan that meets the exclusion. The District's authority to grant exceptions for denied claims also would be in excess of the involvement an employer could have under a plan meeting the regulatory exception. *See* 29 C.F.R. § 825.209(a).

Because the plan description submitted by the Union and the District does not qualify for the exception listed in 29 C.F.R. § 825.209(a), the District, as the employer, must conform to the regulations governing group benefit plans. The FMLA regulations at 29 C.F.R. § 825.209(b) state that the same group health plan benefits provided to an employee before taking FMLA leave must be maintained during the FMLA leave. Similarly, "benefit coverage during FMLA leave for medical care, surgical care, hospital care, dental care, eye care, mental health counseling, substance abuse treatment, etc., must be maintained during leave if provided in a group health plan, including a supplement to a group health plan." 29 C.F.R. § 825.209(b). The dental care plan meets the definition of a group health plan, just as the medical health care plan meets that definition.

We believe that, in order to comply with the FMLA, the District must maintain the dental insurance coverage for employees who take FMLA-qualifying leave. *See* 29 U.S.C. § 2614(c)(1). The District may be interpreting "group health plan" to mean a "major medical plan." The FMLA and its regulations require employers to maintain any "group health plan" coverage "on the same conditions as coverage would have been provided if the employee had been continuously employed during the entire leave period." 29 C.F.R. § 825.209(a); 29 U.S.C. § 2614. The Department interprets this to mean that all "group health plans" provided by FMLA-covered employers to FMLA-eligible employees must be maintained during FMLA-qualifying leave. Therefore, we must conclude that the District is required to maintain coverage under its group dental care plan for employees on FMLA leave as though the employees were continuously employed during the period of FMLA leave.

With regard to the Union's question concerning FMLA leave by instructional employees near the end of the school year, the regulations at 29 C.F.R. § 825.601(a) require that instructional employees on FMLA leave at the end of the school year must be provided with any benefits over the summer vacation that employees would normally receive if they had been working at the end of the school year. This means that all benefits, including the group dental plan benefits discussed above, must be provided to those instructional employees on FMLA-qualifying leave at the end of a school 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,

Paul DeCamp
Administrator

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