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

February 13, 2006 **FMLA2006-4-A**

Dear ***Name****:

This is in response to your letter requesting an advisory opinion under the Family and Medical Leave Act of 1993 (FMLA), 29 U.S.C. § 2601 *et seq*. Your letter concerns a client company that is subject to collective bargaining agreements (CBAs), many of which stipulate that in order for an employee to maintain group health insurance benefits for the following calendar year, the employee must work a specified number of hours in the preceding calendar year. You inquire whether FMLA leave taken during the year must be credited towards qualification for the following year's group health insurance benefits for employees subject to these agreements, or whether the employer can lawfully deny these employees' group health insurance benefits if the required hours are not worked because of FMLA leave. You do not specify whether the CBAs treat other types of paid or unpaid leave as hours worked.

In the scenario you describe, employees of your client are subject to CBAs that require at least 1500 hours of work in a calendar year in order to maintain group health insurance benefits for the following year. You ask us to assume that these employees currently have group health insurance benefits and that those benefits have been maintained for employees taking FMLA-qualifying leave in the current calendar year. Because of the FMLA leave taken, however, these employees will not work the 1500 hours required under the CBAs to qualify for the following year's benefits.

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 – for specified family and medical reasons. We assume your inquiry relates to a company that is covered by the Act and to eligible employees taking FMLA leave for a qualifying reason under the Act. *See* 29 U.S.C. §§ 2611-2612(a); 29 C.F.R. §§ 825.104-.112, 825.114.

The FMLA requires an employer to maintain coverage under any group health plan (as defined in 26 U.S.C. § 5000(b)(1)) for the duration of the eligible employee's FMLA leave at the level and under the conditions coverage would have been provided if the employee had been employed continuously for the duration of such leave. *See* 29 U.S.C. § 2614(c). The legislative history further explains that "[n]othing in [2614(c)] requires an employer to provide health benefits if it does not do so at the time the employee commences leave. [Section 2614(c)] is strictly a maintenance of benefits provision."
S. Rep. 103-3 at 31 (1993).

Pursuant to 29 U.S.C. § 2614(a)(2), "[t]he taking of leave under section [2612] shall not result in the loss of any employment benefit accrued **prior** to the date on which the leave commenced." (Emphasis added.) The FMLA goes on to clarify that a restored employee is not entitled to "the **accrual** of any seniority or employment benefits during any period of leave." *Id.* § 2614(a)(3)(A) (emphasis added). The regulations provide that "if the benefit plan is predicated on a pre-established number of hours worked each year and the employee does not have sufficient hours as a result of taking unpaid FMLA leave, the benefit is lost." 29 C.F.R. § 825.215(d)(5).

Where an employee is covered by a group health insurance plan at the time FMLA leave commences, the employer "shall maintain coverage … for the duration of such leave." 29 U.S.C. § 2614(c)(1). However, the FMLA does not require an employer to provide health insurance coverage if such coverage is not provided to the employee when the leave commences. As such, if the eligible employee is not entitled to group health insurance coverage prior to the start of FMLA-qualifying leave because he or she has not worked 1500 hours in the previous calendar year as required by the CBA, the employer is not required to provide health insurance coverage during the FMLA leave. Nor is the employer required to provide insurance coverage to an employee who does not meet the 1500 hours requirement due to FMLA leave the employee took in the prior year.

Moreover, the FMLA and its regulations prohibit employers from interfering with, restraining, or denying an employee's rights under this law. *See* 29 U.S.C. § 2615; 29 C.F.R. § 825.220. Specifically, 29 U.S.C.

§ 2652 and 29 C.F.R. § 825.700 describe the interaction between the FMLA and employer plans and provide that nothing in the FMLA diminishes an employer's obligation under a CBA to provide greater family or medical leave rights to employees than the rights established under the FMLA, nor may the rights established under the FMLA be diminished by a CBA. Therefore, if the contract provides that other types of leave, paid or unpaid, count as hours worked for purposes of determining eligibility for health insurance in the following year, the FMLA leave of an equivalent type would need to be treated in the same manner.

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.
Acting Administrator

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