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

January 12, 1999 **FMLA-100**

Dear ***Name****,*

Thank you for your letter of August 17, 1998, seeking information on the Family and Medical Leave Act as it would relate to no fault attendance policies.

In enacting FMLA (29 U.S.C. 2601 et seq.), the 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.

In your letter, you state that your employer has a no fault attendance policy whereby an employee's employment may be terminated for exceeding seven attendance points within 180 days. This policy, however, allows a point to drop off if an employee goes 90 days without a recordable incident, or points to drop off after 180 days if the employee does not go to the next step during that time period. You cite an employee who was terminated for reaching seven points in a 180 day period even though six weeks of that time were designated as FMLA leave. You asked whether the employer treated the FMLA leave as a negative factor by not crediting the leave towards the 90-day time period for purposes of removing points.

The FMLA (§ 105) and Regulations (§ 825.220) set forth certain protection to employees who exercise their rights to take FMLA leave. The FMLA prohibits employers from interfering with, restraining, or denying an employee's rights under this law. Further, it is unlawful for any employer to discharge or in any other manner discriminate against any employee for opposing any unlawful practice under this law. Employers may not use the taking of FMLA leave as a negative factor in any employment action or decision, such as promotions or disciplinary actions; nor can FMLA leave be counted under "no fault" attendance policies. 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.

While the statute (§ 102(a)(2)) provides that the taking of FMLA leave shall not result in the loss of any employment benefit accrued prior to the date the FMLA leave commenced, the Act does not provide for the accrual of benefits or seniority during an unpaid leave of absence. Moreover, the Act does not provide an employee greater rights to reinstatement or to other benefits and conditions of employment than if the employee had been continuously working during the FMLA leave period.

Based on the limited information contained in your letter, we cannot determine if the employer has discriminated against the employee in question. The following examples, however, should provide sufficient guidance for you and the employee in question to determine if an FMLA violation may have occurred. In the first example, if the employee was on unpaid FMLA leave and the employer's policy does not permit the accrual of benefits or seniority during any unpaid leave, upon return to work the employer would only be obligated to restore the employee to the same or an equivalent position to what the employee had prior to the start of leave. If the employee had 45 days without a recordable incident at the time the unpaid FMLA leave commenced, the employer would be obligated to restore the employee to this number of days credited without an incident. The employer could neither count the FMLA leave period towards an attendance control policy for potential termination, nor credit the unpaid FMLA leave towards the recordable time for dropping such points. In the second example, if the FMLA leave was covered by paid leave (or unpaid leave) that provides for the accrual of benefits and seniority, then the FMLA leave could be credited towards the time free of a recordable incident.

The above information should be viewed as general guidance. If, after reading this letter, you believe that the employer may have violated the employee's rights under the FMLA, the employee, or you with the employee's permission, may file a complaint with the nearest Wage and Hour District Office at ***Name****, telephone number **********.

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).*