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

January 15, 1999 **FMLA-101**

Dear ***Name****,*

This is in response to your letter of September 16, 1996, concerning the Family and Medical Leave Act of 1993 (FMLA) and attendance control policies as they relate to employee notification. I apologize that, because of the volume of work associated with administering FMLA, we were not able to respond sooner to your request.

In enacting FMLA, 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. It is unlawful for any employer to interfere with or restrain or deny the exercise of any right provided under this Act, or to discharge or in any other manner discriminate against an employee for opposing or complaining about any unlawful practice related to this law.

In your letter, you ask to what extent an employer may enforce its attendance policy reporting requirements against employees, who are eligible for intermittent FMLA leave. The company is proposing to modify its attendance control policy by assessing points against an employee who fails to report within one hour after the start of the employee's shift that the employee is taking FMLA intermittent leave, unless the employee is unable to report the absence due to circumstances beyond the employee's control. You indicate that the company has had problems with employees eligible for intermittent FMLA leave who miss work without reporting the absence in accordance with the attendance policy's one hour notification rule. You further state that the company's attendance control policies for reporting leave would operate independently from FMLA's notification requirements and would not be used to grant or deny FMLA leave, but would negate the application of § 825.302(d) of the FMLA Regulations, 29 CFR Part 825, to these attendance policies.

Section 102(e) of the statute sets out obligations of the employee to provide notice to the employer of the need to take leave in both foreseeable, and unforeseeable circumstances. Employees must give 30 days advance notice to employers of the need to take unpaid FMLA leave when it is foreseeable for the birth or placement of a child for adoption or foster care, or for planned medical treatment. When it is not practicable under the circumstances to provide such advance notice, e.g., premature birth, such notice must be given "as soon as practicable," ordinarily within one or two business days of when the employee learns of the need for the leave. Whether leave is taken all at once or intermittently, the employee is only required to give notice one time, but must advise as soon as practicable if dates of scheduled leave change, or are extended, or were initially unknown. Verbal notice sufficient to inform the employer that the employee will need FMLA leave satisfies the FMLA notice requirement. (§§ 825.302 and 825.303)

An employer may require an employee to comply with the employer's usual and customary notice and procedural requirements for requesting leave that qualifies as FMLA leave. For instance, an employer may require an advance written notice specifying the reason(s) for leave, start of leave and the anticipated duration of leave. Written advance notice pursuant to the employer's internal rules and procedures may not be required when FMLA leave is needed for a medical emergency of either the employee or the employee's immediate family member. An employee's failure to follow such internal employer notification procedures will not permit an employer to disallow or delay an employee taking FMLA leave if the employee gives timely verbal or other notice. (§ 825.302(d))

We do not agree with your interpretation that the provisions of § 825.302(d) would not apply with respect to the company's attendance policy. This section of the regulations governs notification procedures under FMLA and is contingent upon an employee providing timely notice pursuant to FMLA's requirements, i.e., within two business days of learning of the need for leave. The company's attendance policy imposes more stringent notification requirements than those of FMLA and assigns points to an employee who fails

to provide such "timely" notice of the need for FMLA intermittent leave. Clearly, this policy is contrary to FMLA's notification procedures which provide that an employer may not impose stricter notification requirements than those required under the Act (§ 825.302(g)) and that FMLA leave cannot be denied or delayed if the employee provides timely notice (under FMLA), but did not follow the company's internal procedures for requesting leave.

Moreover, as previously mentioned in this letter, an employer is prohibited under the Act (§ 105) and Regulations (§ 825.220) from interfering with, restraining, or denying the exercise of (or attempts to exercise) any rights provided by the Act. "Interfering with" the exercise of an employee's rights would include, for example, not only refusing to authorize FMLA leave, but discouraging an employee from using such leave (§ 825.220(a)). We would construe an employer's attendance control policies that require more stringent notification requirements than those already established in the FMLA regulations and which would assign points to FMLA leave takers who failed to follow the company's more stringent notice policies to be an attempt to interfere with or to discourage an employee's attempt to exercise rights under the FMLA to take leave for a qualifying reason. We would view these policies to be in direct violation of the Act and regulations.

The employer, however, could impose a penalty, i.e., assign points under its customary attendance control policy, in a situation where the employee was in the position of providing advance notice, absent extenuating circumstances, of the need for FMLA leave and failed to provide the notice in accordance with FMLA's requirements and the company's notification policy, if less stringent than FMLA's. Under this circumstance, the provisions of § 825.302(d) would not apply because of the employee's failure to provide timely notice based upon FMLA's requirements (§§ 825.302(a) and (b)).

For example, an employee receives notice on Monday that his/her therapy session for a seriously injured back, which normally is scheduled for Fridays, must be rescheduled for Thursday. If the employee failed to provide the employer notice of this scheduling change by close of business Wednesday (as would be required under FMLA's two-day notification rule), the employer could take an adverse action against the employee for failure to provide timely notice under the company's attendance control policy. In another example, an employee receives notice after work on Wednesday that the therapy session has been rescheduled for Thursday morning instead of Friday, to start at 7:00AM, an hour before start of work at 8:00AM, and will last until 4:00PM. The health care provider advises the employee that he/she must attend the session. The employee, who lives alone and is unable to contact anyone from work about this scheduling change, attends the therapy session as recommended by the health care provider and notifies the employer on Friday morning that FMLA leave was taken on Thursday. Under FMLA's two-day rule, the employee would be deemed to have provided a timely notice, and the employer, notwithstanding the company's notification requirements under its attendance control policy, could not take adverse action against the employee.

With regard to your concerns about managing the intermittent leave provision under FMLA, we wish to point out that an employee is entitled to intermittent leave or leave on a reduced leave schedule only in cases of medical necessity (as distinguished from voluntary treatments and procedures). It must be demonstrated that the regimen of medical treatment needed can best be accommodated through an intermittent or reduced leave schedule. The employee needing intermittent FMLA leave or leave on a reduced leave schedule for planned medical treatment must attempt to work out a schedule with the employer, and, based on input from the health care provider, that meets the employee's needs without unduly disrupting the employer's operations. An additional option for managing intermittent leave allows an employer to assign an employee to an alternative position with equivalent pay and benefits that better accommodates the employee's intermittent or reduced leave schedule for planned medical treatment, including during a period of recovery from a serious health condition. (§§ 825.117, 825.203, 825.204, and 825.302(e))

If we may of further assistance, please do not hesitate to contact us.

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).*