



September 8, 2000

FMLA-109

Dear *Name**,

Thank you for your letter requesting guidance on the accrual of seniority during paid and unpaid leave under the Family and Medical Leave Act (FMLA). Please accept my apologies for not responding sooner to your request.

As you have correctly noted in your letter, the FMLA does not entitle an employee to the accrual of any seniority (or employment benefits) during any period of FMLA leave; nor to any right, benefit or position of employment, other than that to which the employee would have been entitled, had the employee not taken the leave. By operation of the FMLA, an employee on covered leave does not accrue seniority (or employment benefits) during the absence. An employee's entitlement to the accrual of seniority (or employment benefits) during FMLA leave, whether paid or unpaid, will be strictly based upon the employer's established policies for accruing seniority (or employment benefits) during any absence where paid or unpaid leave applies. (See 29 USC § 2614(3) and 29 CFR §§ 825.215(d)(2) and (5).)

The following examples will illustrate this position:

Example One: If the employer's established leave policies do not permit the accrual of seniority during an unpaid leave of absence, this same policy would apply to unpaid leave covered by the FMLA leave. The employer in this example would be in compliance so long as the returning employee is restored to the same level of seniority that the employee accrued prior to the commencement of FMLA leave.

Example Two: If the employer's established leave policies provide for the accrual of seniority during an absence where paid leave benefits have been applied, then the employer must permit, consistent with its policies, the accrual of seniority during the portion of FMLA leave where paid leave benefits (i.e., vacation, personal, sick/medical leave, or family) are substituted for unpaid FMLA leave.

Example Three: If the employer's established policies do not permit the accrual of seniority during an absence covered by a State workers' compensation plan, nothing in the FMLA will require the employer to modify its policies to permit the accrual of seniority during the workers' compensation absence that also qualifies for and is designated as FMLA leave. This position would also apply where an employee on FMLA leave receives concurrently paid disability leave benefits and the accrual of seniority under the employer's established policies is not permitted.

Section 29 CFR 825.209(h) pertains to an employee's entitlement to benefits, other than group health insurance benefits, while using FMLA leave, and provides that such benefits will be determined by the employer's established policies when an employee is on other forms of paid or unpaid leave. Thus, an employer may not treat employees who take FMLA leave in a manner that discriminates against them. For example, if employees on other forms of paid or unpaid leave are entitled to have coverage maintained for other, non-health plan benefits (such as life insurance), then employers are required to follow its established policies for maintaining those "other" benefits for employees on paid or unpaid FMLA leave. (See also 29 CFR § 825.220(c).)

I trust this letter has responded to your concerns. If we may be 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).