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

September 11, 2000 **FMLA-110**

Dear ***Name****,

This is in response to your letter seeking clarification of the Family and Medical Leave Act of 1993 (FMLA) as applied to a company bonus incentive program.

You described a company bonus incentive program that is offered to all production employees in a particular department on a monthly basis. Employees are eligible for the bonus if they work at least 80 percent of the time the shift is scheduled to work during the month. Paid time off for witness and jury duty, bereavement leave, military leave of absence, weather days declared by the company, vacation days, and holidays not scheduled as work days by the company are counted as regular work days and credited towards meeting the 80 percent work hours test for bonus eligibility. Leave without pay for any reason is not counted towards meeting the 80 percent work hours test. In addition, while paid leave (whether or not substituted for unpaid FMLA leave) is counted towards meeting the 80 percent work test for bonus eligibility, it is not included in computing the amount of the bonus. Only the gross pay for time actually worked is used in calculating the bonus. Although you do not mention whether this incentive program is a non-discretionary bonus where employees know in advance of how they would qualify, we are assuming that employees are aware of this bonus and that they would automatically receive the bonus if they qualify.

Under the FMLA, while an employee is not automatically entitled to accrue additional seniority or benefits during unpaid FMLA leave, an employer cannot use unpaid FMLA leave as a negative factor in employment actions. For example, in the case of a monthly "perfect" attendance bonus that tracks absences rather than performance, an employee who had not missed any time before taking unpaid FMLA leave would continue to be eligible for the bonus upon returning from FMLA leave. Where the amount of the bonus is calculated from hours worked, the FMLA leave taker would naturally receive a lesser amount than an employee who had not been on leave.

The incentive program you have described appears to determine qualifications for and the amount of a bonus based upon compensated hours, i.e., "an employee must work or be on paid leave for at least 80 percent of the time." Thus, an employee who takes unpaid FMLA leave for greater than 20 percent of the rating period who was eligible for the bonus prior to starting the leave would no longer be eligible for the bonus. To disqualify an employee who takes unpaid FMLA leave for greater than 20 percent of the rating period (or whose unpaid FMLA leave in conjunction with other unpaid absences exceed 20 percent) would not be in compliance with FMLA's employment and benefits protections. These protections guarantee that an employee must be restored to the same or to an equivalent job with equivalent pay, benefits and other terms and conditions of employment. For the incentive program to be in compliance with the FMLA, it would have to allow an employee, who met all the requirements for the bonus prior to the start of the leave, to continue to accrue entitlement to the bonus upon returning from FMLA leave. In other words, the taking of unpaid FMLA leave cannot be the basis, in whole or in part, for disqualifying an employee's entitlement to the bonus. For example, an employee during a rating period that consists of 20 eight-hour workdays for a total of 160 hours takes unpaid FMLA leave for five consecutive workdays (40 hours) midway through rating period. Prior to the start of FMLA leave, the employee had perfect attendance. Upon return from FMLA leave, the employee would continue to be eligible for the bonus. At the conclusion of the rating period, if the employee did not take any other leave, the employee would be entitled to a bonus calculated on the actual hours worked (which, of course, would not include the 40 hours of unpaid FMLA leave). (See sections 825.215 (c)(2) and (d)(2), and section 825.220(c) of the Regulations and Preamble, 29 CFR Part 825.)

In response to your question about whether the reference to production bonuses in the regulations (section 825.215(c) and the Preamble to section 825.220) pertains to the performance of one employee or to a group of employees, this reference, including the reference to "perfect attendance" and "safety" bonuses, pertains to an individual employee. With respect to your question about whether the employer must count time off on unpaid FMLA leave as days worked in determining bonus eligibility, the answer is

provided above. The FMLA does not entitle an employee to the accrual of seniority or benefits during unpaid leave, but does require any benefit accrued prior to the start of FMLA leave to be available to the employee upon return from leave. In response to your question for determining the amount of the bonus, since bonuses may be pro-rated based upon hours worked, it would not be a violation under FMLA to determine the bonus percentage based only upon the actual hours of work during the monthly rating period. The employer should treat FMLA leave taken intermittently or on a reduced leave schedule no differently than FMLA leave taken in a continuous block of time.

Notwithstanding your reference to “production incentives” in your letter, the information you provided for the incentive program in question describes only attendance qualifications, as opposed to performance qualifications, that production employees must meet in order to receive a bonus. Our response is based solely upon the information contained in your letter. If any other factual or historical background exists that was not included with your request, a different conclusion might be required than the one we have expressed above.

I trust that our reply is helpful, and apologize for any inconvenience caused by our delay in not being able to respond sooner to your letter. Should you require further assistance, please do not hesitate to contact me.

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).*