



March 28, 1995

FMLA-56

Dear *Name \**,

This is in response to your letter, transmitted by facsimile to Mr. Richard Brennan of my staff, regarding your client's attendance bonus accrual policy under the Family and Medical Leave Act of 1993 (FMLA).

You state that your client has a policy under which employees accrue a weekly bonus if they work each day in the workweek. Failure to work the entire workweek for any reason causes forfeiture of the bonus entitlement except for employees on vacation or absent due to FMLA-qualifying conditions or events. Employees on vacation or absent for FMLA-qualifying events are entitled to a pro-rata share of the bonus based on the number of days worked. Thus, for example, if an employee missed one day of the week for an FMLA-qualifying condition, the employee would receive the amount of the bonus otherwise accrued for the workweek, i.e., 4/5 of the weekly amount. An employee who misses one day for a reason other than an FMLA-qualifying event or vacation time would not receive any bonus for that week. An employee who works no days in the week (whether due to an FMLA reason or otherwise) accrues none of the bonus, having performed no work during the workweek.

Under FMLA, an employee may, but is not entitled to, accrue additional benefits or seniority during periods of unpaid FMLA leave. Any benefits accrued at the time leave begins must be available to the employee upon return from leave. By the same token, an employer may not discriminate against employees who use FMLA leave. If, for example, an employee on leave without pay would otherwise be entitled to a particular benefit, that same benefit would be required to be provided to an employee on unpaid FMLA leave. Thus, an employee's entitlement to benefits other than group health benefits during a period of FMLA leave is determined by the employer's established policy for providing such benefits when the employee is on other forms of leave (paid or unpaid, as appropriate). See 29 CFR §§ 825.215(d)(2), 825.220(c), and 825.209(h).

It is our view that your client's policy is consistent with the requirements of FMLA. As your analysis points out, § 104 of FMLA provides:

- (1) Eligible employees who take FMLA leave are entitled, upon return from leave, to be restored to equivalent employment benefits (§ 104 (a)(1)(B) ) ;
- (2) The taking of FMLA leave may not result in the loss of any employment benefit accrued prior to the date FMLA leave commenced (§ 104(a)(2)); and
- (3) Nothing in § 104 shall be construed to entitle any restored employee to the accrual of any seniority or employment benefits during periods of FMLA leave (§ 104(a)(3)(A)).

Because FMLA leaves are not disqualifying events under the employer's bonus policy, employees who take FMLA leave do not forfeit bonus amounts accrued prior to the start of their FMLA leave. Employees who take FMLA leave under this bonus policy are entitled to a pro-rata share of a benefit that employees absent for other reasons do not receive (such other absences result in forfeiture of the entitlement, while FMLA absences do not). Thus, because employees on forms of leave other than FMLA or vacation are not otherwise entitled to the bonus, the policy does not unfairly discriminate against employees who use FMLA leave.

I hope that this has been responsive to your request. If further information is required, please do not hesitate to contact this office again.

Sincerely,

J. Dean Speer  
Director, Division of Policy and Analysis

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