



January 14, 1994

FMLA-26

Dear *Name\**,

This is in reply to a request from *Name\** for clarification of provisions under the Family and Medical Leave Act of 1993 (FMLA), that allow an employer to recoup group health plan premiums in certain cases from employees who take FMLA leave.

The request for clarification states that a city employee was disabled from a work related injury and began receiving workers compensation benefits for an extended period before FMLA's August 5 effective date. Once those benefits ended, the employee applied for a disability pension. While the disability pension request was pending, the employee requested and was granted FMLA leave that commenced on FMLA's August 5 effective date. Before the 12 week FMLA leave entitlement was exhausted, the City granted the disability pension request, with benefits payable retroactive to May 17, 1993, the day after the workers' compensation benefits expired.

Under City policy, an employee receiving a disability pension does not qualify for a health insurance subsidy until reaching minimum age and length of service criteria, which this particular employee did not meet. The City is not sure if the individual was even eligible for FMLA leave while the disability retirement application was pending. However, inasmuch as FMLA leave was granted, the City believes that it is entitled to recover the health premiums paid for this individual for the FMLA leave period because the subsequent determination to grant pension benefits "preempts" the employee's FMLA leave. The City's view is that the FMLA leave retroactively becomes inoperative on the effective date assigned to the pension benefits, and that a pension and FMLA leave cannot overlap. The employee's union challenges the City's interpretation on the basis that the employee had a serious health condition that precluded return to work when the employee requested, and was granted, FMLA leave, and on the basis that the employee's FMLA leave request was granted by the City while it considered the employee to still be on active status.

Initially, we must point out that if a collective bargaining agreement (CBA) in effect on August 5, 1993, covered this particular employee, FMLA does not take effect with respect to this employee until the date the CBA expires or February 5, 1994, whichever is earlier. (See § 405(b)(2) of the FMLA and § 825.700(c) of the FMLA regulations, 29 CFR Part 825). This statutory delay in FMLA's effective date applies only to employees covered by a CBA that is in effect on August 5, 1993.

If we assume that FMLA's effective date provisions result in FMLA applying to the fact situation described, we would answer your questions in the following manner. An employee is "eligible" for FMLA leave and other benefits if, on the date the employee requests FMLA leave, the employee: (1) works for a covered employer; (2) has worked for the employer for at least 12 months; (3) has worked for the employer for at least 1,250 hours in the previous 12 months; and (4) works at a location where at least 50 employees are employed by the employer within 75 miles. City governments are public agencies and "covered employers" under FMLA regardless of the number of employees employed, and all employees employed by the City government are included when determining if the 50-employees-employed within 75 miles test is met.

The period before FMLA's effective date must be considered when determining if an employee is "eligible." Under § 825.110(c) of the regulations, however, if an employee notifies an employer of the need for FMLA leave before the employee becomes eligible and the employer agrees to the request based on an assumption that the eligibility criteria will be met (or otherwise), the employer may not subsequently challenge the employee's eligibility. Further, under § 825.111(d), once the employer commits to an employee's eligibility after requesting FMLA leave, subsequent changes under the employer coverage or employee eligibility tests will not affect the employee's right to take FMLA leave (e.g., an employer cannot terminate employee leave that has already started if the number of employees employed later drops below 50). As discussed in the accompanying explanation included in the preamble to the Department's FMLA regulations published in the Federal Register on June 4, an employee



requesting FMLA leave needs the opportunity to make plans regarding the leave and both employer and employee benefit from knowing early whether or not an employee is going to be entitled to leave so that each can make appropriate plans. It is in their mutual interest to make this determination when the employee requests leave. (See 58 Fed. Reg. 31798; June 4, 1993). Once decisions are reached in this area, the regulations regard the parties bound by their commitments.

Accordingly, a City employee who is on a leave of absence pending a disability retirement who otherwise meets FMLA's eligibility criteria and who has a serious health condition that makes the employee unable to perform his or her job is eligible for FMLA's leave entitlements, including having their group health benefits maintained under the same terms and conditions as if the employee continued to work for the duration of the protected leave period. If the employee fails to return to work at the end of the employee's FMLA leave entitlement because of the continuation, recurrence, or onset of a serious health condition (or other circumstance beyond the employee's control), the employer cannot recover the premium paid (employer portion) for maintaining the employee's group health coverage during the FMLA leave. A decision subsequent to the granting of an FMLA leave request to grant pension benefits with a retroactive effective date for purposes of receiving pension benefits does not, in our view, "preempt" or extinguish in any way an employee's statutory rights under the FMLA.

I hope that this is responsive to your request. If additional information is required, please do not hesitate to contact me.

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).*