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

March 21, 1994 **FMLA-31**

Dear ***Name****,

This is in response to your letter forwarding correspondence from ***Name**** regarding the Family and Medical Leave Act of 1993 (FMLA). Specifically, ***Name**** is concerned with the Department's position with respect to an employee's entitlement to attendance, safety, or production bonuses upon returning to work after taking leave under the FMLA.

Name* begins her analysis with the question of the definition of employment benefits. Section 101(5) of the FMLA defines employment benefits to include "all benefits provided or made available to employees by an employer, including group life insurance, health insurance, disability insurance, sick leave, annual leave, educational benefits, and pensions..." The Department has found nothing in the legislation or the legislative history to indicate that this definition should be interpreted narrowly or that Congress intended the list in the statute to be exhaustive. Thus, the Department interprets this definition broadly to include all benefits, including attendance, safety, or production bonuses to which the employee would be entitled.

In enacting FMLA, Congress stated in Section 2, 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. Section 105 of FMLA and section 825.220 of FMLA Regulations, 29 CFR Part 825, set forth certain protection to employees who exercise their rights under this law. The FMLA prohibits employers from interfering with, restraining, or denying an employee's rights under this law. Further, it is unlawful for any employer to discharge or in any other manner discriminate against any employee for opposing any practice made unlawful by this law. "Interfering with" the exercise of an employee's rights would include refusal to grant FMLA leave, or discouraging an employee from taking FMLA leave. An employer's denial of a bonus to an employee, who otherwise was qualified for the bonus except for taking FMLA leave, would be considered to be a violation of FMLA requirements pursuant to the referenced sections of the statute and regulations.

Bonuses premised on "perfect attendance" or "perfect safety," are rewards not for work or production, but for compliance with rules; i.e., they are the obverse of penalties for infractions of attendance or safety rules. These bonuses can be distinguished from bonuses tied to production, which require some positive effort on the employee's part at the workplace. To deny such bonuses to an employee returning from FMLA leave has the effect of interfering with the exercise of the employee's rights by discouraging the use of FMLA leave (Regulation 29 CFR 825.220(b)), as well as discriminating against such an employee (29 CFR 825.220(c)).

Name* expresses concerns with respect to the requirements of section 825.220(c) which states in part that "employers cannot use the taking of FMLA leave as a negative factor in employment actions, such as promotions or disciplinary actions; nor can FMLA leave be counted under "no fault" attendance policies." The Department does not find any conflict with this provision of the regulations and the position outlined by ***Name**** with respect to equivalent pay and benefits, i.e., sections 825.215(c) and (d). An employee is not automatically entitled to accrue benefits while on FMLA leave, nor can an employer use FMLA leave as a negative factor in employment actions.[1]

To better illustrate how this policy would apply, each of ***Name**** examples are addressed below.

Example 1 - Upon return to work, which for purposes of FMLA would be an employee who returns to work from FMLA leave for at least 30 calendar days (section 825.213(b)), the employee in this example would

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[1] If a bonus is calculated based on hours worked or yearly or monthly earnings, the FMLA leave taker would naturally receive a lesser amount. Conversely, any methodology for calculating bonuses that are not based on worktime or accrued earnings cannot be reduced at all for FMLA leave takers who qualified for the bonus before they started FMLA leave and return to work and continue an otherwise perfect record for the remainder of the bonus period.

be entitled to the full amount of the perfect attendance bonus provided that the employee prior to taking unpaid FMLA leave met all of the perfect attendance bonus requirements. (See sections 825.220 (b) and (c).)

Example 2 - The employer cannot disqualify or reduce an award (bonus) for perfect attendance to an employee who has taken unpaid FMLA leave over the 12-month period (see 29 CFR 825.220(b) and (c)).

Example 3 - Employees would not be entitled to production bonuses which require the employee to perform his or her job in the workplace, on the basis that they have been assigned to the department but performed no work during the bonus period. In this instant case, the employee would not be entitled to the monthly production bonuses during the three months on FMLA leave because the employee did not work during this period of time, did not qualify for the production bonus prior to taking FMLA leave, and may, but was not entitled to accrue benefits during the FMLA leave period.

Example 4 - Upon return to work, the employee would be entitled to the entire safety bonus, provided that the employee prior to taking FMLA leave met all of the safety bonus requirements. (See sections 825.220 (b) and (c).)

We trust this information will be helpful and we apologize for any inconvenience caused by our delay in responding. If we may be of further assistance, please do not hesitate to contact me.

Sincerely,

Maria Echaveste
Administrator

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