



January 31, 2006

FMLA2006-3-A

Dear **Name***:

Both the City and the Union have requested an interpretation regarding the application of the Family and Medical Leave Act of 1993 (FMLA), 29 U.S.C. § 2601 *et seq.*, to a “cafeteria plan” under which the City allocates all or a portion of an employee’s benefit plan allotment to pay for group health insurance. Based on the information you have provided, the Department’s opinion is that those employees taking unpaid FMLA leave must have that portion of their cafeteria plan allotment allocated to group health insurance (including dental) premiums paid by the City in the same amount as paid prior to the start of FMLA leave.

You represent that the City allocates to each employee \$452.08 per month under the cafeteria plan. From this sum, each employee must pay the premium for one of the City’s group health plans with the balance of the allotment to be used, at the employee’s option, to provide dental/disability/life insurance or compensation. You ask whether the FMLA requires the City to continue cafeteria plan health payments for an employee on unpaid FMLA leave if City policy requires all employees on unpaid leave of any kind to make their own group health coverage payments. City policy precludes accrual of additional benefits during unpaid leave. Although the City pays the group health insurance premium during a period of unpaid leave, it requires employees to repay the City for the premium payments upon the employee’s return to work. City policy also requires that employees exhaust all accrued paid leave before taking unpaid FMLA leave. When FMLA leave is unpaid leave, no cafeteria plan allotment is provided during the leave. The City believes that it complies with the FMLA and thinks that if it paid the cafeteria plan allotment for an employee on unpaid FMLA leave, it would be discriminating against employees on other types of unpaid leave whose cafeteria plan allotments are not paid.

The Union disagrees with the City and believes that the portion of the allotment paying for an employee’s group health insurance must be maintained during unpaid FMLA-qualifying leave. In practice, according to a telephone conversation a member of my staff had with the Union’s representative, the City has agreed to pay this portion of the allotment until this office issues an opinion letter.

The FMLA provides that “during any period that an eligible employee takes leave under section 102, the employer shall maintain coverage under any ‘group health plan’ (as defined in section 5000(b)(1) of the Internal Revenue Code of 1986) for the duration of such leave at the level and under the conditions coverage would have been provided if the employee had continued in employment continuously for the duration of such leave.” 29 U.S.C. § 2614(c)(1). The FMLA regulations state that the “benefit coverage during FMLA leave for medical care, surgical care, hospital care, dental care, eye care, mental health counseling, substance abuse treatment, etc., must be maintained during leave if provided in an employer’s group health plan, including a supplement to a group health plan, whether or not provided through a flexible spending account or other component of a cafeteria plan.” 29 C.F.R. § 825.209(b).

Consequently, as the FMLA and its regulations require maintenance on the same conditions of any group health plan coverage (whether or not provided through a flexible spending account or other component of a cafeteria plan), the Department takes the position that employees taking unpaid FMLA leave must have that portion of their cafeteria plan allotment allocated to group health insurance (including dental) premiums paid by the City in the same amount as paid prior to the start of FMLA leave. See 29 U.S.C. § 2614(c)(1); 29 C.F.R. § 825.209(a). Moreover, because the City provides the money for the group health insurance coverage when employees are working, it may not recover such payments for periods of FMLA leave. See 29 U.S.C. § 2614(c)(1).

An employee’s entitlement to benefits other than group health insurance during a period of FMLA leave (e.g., holiday pay) is to be 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). Although the FMLA does not require the maintenance of benefits other than group health insurance during the period of the leave, at the end of an employee’s FMLA leave “benefits must be resumed in the same manner and at the same levels as provided when the leave began, and subject to any changes in benefit levels that may have taken place during the period of FMLA leave.” 29 C.F.R. § 825.215(d)(1). For example, if an employee



was covered by a life/disability insurance policy before taking leave but is not covered or coverage lapses during the period of unpaid FMLA leave, the employee cannot be required to meet any qualifications, such as taking a physical examination, in order to requalify for life/disability insurance upon return from leave. Accordingly, some employers may find it necessary to arrange for continued payment of costs to maintain such benefits or to pay the costs of these benefits during the period of FMLA leave in order to restore employees to equivalent benefits upon return from FMLA leave. However, the employer may recover the employee's share of those payments when the employee returns from leave. See 29 C.F.R. §§ 825.213(b), -.215(d)(1).

This opinion is based exclusively on the facts and circumstances described in your request and is given based on your representation, express or implied, that you have provided a full and fair description of all the facts and circumstances that would be pertinent to our consideration of the question presented. Existence of any other factual or historical background not contained in your letter might require a conclusion different from the one expressed herein. You have represented that this opinion is not sought by a party to pending private litigation concerning the issue addressed herein. You have also represented that this opinion is not sought in connection with an investigation or litigation between a client or firm and the Wage and Hour Division or the Department of Labor.

Sincerely,

Alfred B. Robinson, Jr.
Deputy Administrator

Enclosures:

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