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

May 24, 2006 **FMLA2006-5-A**

Dear ***Name***:

This is in response to your letter and subsequent telephone conversation with a member of our staff, as well as a telephone conversation between our staff and the manager of your benefits trust fund. You request an opinion about how the McNamara-O'Hara Service Contract Act (SCA), 41 U.S.C. § 351 *et seq*., health and welfare benefits provisions affect Family and Medical Leave Act (FMLA), 29 U.S.C. § 2601 *et seq*., requirements for employers to maintain group health insurance coverage when employees take FMLA leave. Specifically, you ask whether it is the employee or the employer who is responsible for payment of health insurance when an employee takes such leave.

The SCA requires contractors and subcontractors performing services on prime contracts in excess of $2500 to pay service employees in various classes no less than the wage rates and fringe benefits found prevailing in the locality or, under special circumstances, the rates (including prospective increases) contained in a predecessor contractor's collective bargaining agreement (CBA). The Department of Labor issues wage determinations (specifying wages and fringe benefits to be paid) on a contract-by-contract basis in response to specific requests from contracting agencies. Contracting agencies incorporate these determinations into federal contracts procuring services.

The FMLA entitles eligible employees of covered employers to take up to 12 weeks of unpaid, job-protected leave each year – with continuation of group health insurance coverage under the same conditions as prior to leave – for specified family and medical reasons. We assume your inquiry relates to a company that is covered by the FMLA and an eligible employee taking unpaid leave for a reason protected by the Act.

Your letter and the subsequent telephone conversations provide information regarding the provisions of the group health plan in question; this information forms the basis for certain additional assumptions we will use in this letter. Specifically, we assume that the contractor, at least in part, meets its SCA fringe benefit obligations by adhering to the health and welfare terms of a CBA. At the time of your request, the CBA generally required the employer to pay health and welfare fringe benefits of at least $2.42 per paid hour, up to a maximum of 40 hours per week.

According to the information provided by the fund manager via telephone, the employer discharges the SCA fringe benefit obligations in the following manner. Each month the employer calculates the number of hours paid, up to 40 hours per week, for each employee who had worked on the SCA contract and who was eligible to receive health and welfare payments. Those hours are multiplied by the applicable CBA rate (in this case $2.42 per hour), and that amount is deposited into a Department of Labor-approved, self-funded trust for each individual. The employees then have several benefit options to choose from, including group health insurance, life insurance, and a 401(k) savings plan.

Employees who opt for group health insurance benefits submit their medical claims to the trust. The trust pays all claims submitted by the employee, even if the total amount of such claims exceeds the amount of health and welfare fringe benefits earned and paid into the trust for the particular individual. If the SCA fringe benefit amounts paid into the trust on behalf of the individual employee do not cover all of the medical claims submitted by the employee, the trust pays the difference. In other words, employees never pay any out-of-pocket expense for their health insurance. To ensure that each employee receives the full fringe benefit payments, the trust reviews each employee's account at the end of the year and any monies remaining after all health insurance claims have been paid are deposited into a retirement account for the employee.

Notwithstanding that the CBA only requires employer contributions to the benefit plan based on an employee's paid hours, FMLA section 104(c) states that during any FMLA leave an employer must "maintain coverage under any 'group health plan' (as defined in section 5000(b)(1) of the Internal Revenue Service 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) (Emphasis added.) Regulation 29 C.F.R. § 825.209 contains a similar provision that implements the statutory requirement. You have confirmed that the group health plan provided by the employer is a group health plan as defined by the FMLA.[i]

It is our opinion that the employer described in your letter must continue to pay for group health insurance while an employee is out on FMLA leave. Our previous opinion letter, FMLA-1 (June 15, 1993), (copy enclosed) supports this conclusion. It also addresses the interaction between the SCA and FMLA and states that if "the employer is providing health insurance to discharge the health and welfare benefits requirement of the wage determination, that benefit must continue during the entire period of the unpaid FMLA leave."

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.
Acting Administrator

Enclosures: SCA sections 2(a) and (2), FMLA section 104(c)
29 C.F.R. § 4.171, 29 C.F.R. § 825.209, 29 C.F.R. § 825.800, definition of "group health plan"
Opinion Letter, FMLA-1

[i] Regulation 29 C.F.R. § 825.800 defines "group health plan" as "any plan of, or contributed to by, an employer (including a self-insured plan) to provide health care (directly or otherwise) to the employer's employees, former employees, or the families of such employees or former employees. For purposes of FMLA the term 'group health plan' shall not include an insurance program providing health coverage under which employees purchase individual policies from insurers provided that: (1) No contributions are made by the employer; (2) Participation in the program is completely voluntary for employees; (3) The sole functions of the employer with respect to the program are, without endorsing the program, to permit the insurer to publicize the program to employees, to collect premiums through payroll deductions and to remit them to the insurer; (4) The employer receives no consideration in the form of cash or otherwise in connection with the program, other than reasonable compensation, excluding any profit, for administrative services actually rendered in connection with payroll deduction; and, (5) The premium charged with respect to such coverage does not increase in the event the employment relationship terminates." (Emphasis added.)

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