



April 28, 1995

FMLA-59

Dear *Name\**,

This is in response to your inquiry under the Family and Medical Leave Act of 1993 (FMLA) concerning the immediate job termination provision of a Narcotic and Alcohol Testing Policy for employees of the *Name\**.

FMLA leave is available for treatment for substance abuse provided the conditions described in the definition of "serious health condition" are met (see 29 CFR § 825.114(d) ). Such treatment, however, does not prevent an employer from taking employment action against an employee if the employer has an established policy applied in a non-discriminatory manner that has been communicated to all employees. If the employer has such a policy that provides under certain circumstances an employee may be terminated for substance abuse, the employee may be terminated pursuant to that policy whether or not the employee is presently taking FMLA leave. See 29 CFR § 825.112(g).

You requested an opinion on the possible impact of FMLA in four scenarios. In responding to each instance, we will assume that the County's policy meets the conditions described in 29 CFR §825.112(g) of the FMLA regulations, namely, that the employer has established a non-discriminatory policy which has been communicated to all employees.

1. An employee comes up for random testing and tests positive for illegal narcotics and the employee has never requested FMLA. Under the county's policy this employee is subject to immediate termination. FMLA does not require the County to allow the employee the opportunity to seek treatment and be reinstated.

2. Either the Sheriff or the State's Attorney receives information that an employee is using illegal narcotics. As a result, the employee is requested to submit to a drug test under the "for cause" provisions of the testing policy. The employee tests positive for illegal narcotics and the employee has never requested FMLA. Under the provisions of the testing policy, the employee is subject to immediate termination. FMLA does not require the County to allow the employee the opportunity to seek treatment and be reinstated.

3. An employee comes forward and admits to the employer that he or she is addicted to drugs and indicates that a doctor is placing the employee in rehabilitative treatment. You state that there is an ongoing debate within your office as to whether such an employee should be subject to immediate termination under the County's policy. In any event, you ask if the County's policy so provides for immediate termination in this instance, would FMLA require the County to allow the employee the opportunity to seek treatment and be reinstated. The answer is "no."

4. An employee who tests positive for the presence of an illegal narcotic is granted FMLA leave and the terms and conditions of reinstatement include a requirement that the employee submit to weekly testing. If the employee tests positive a second time and has either not used all of his or her allotted FMLA leave time or has used all the allotted FMLA leave time, you ask if FMLA requires that the County allow the employee the opportunity to seek treatment and be reinstated for a second time. The County's policy could provide for termination of employment in either case, whether or not the employee has exhausted his or her FMLA leave allotment in the 12-month period.

I hope that this is responsive to your inquiry. If additional information is required, please do not hesitate to contact this office again.

Sincerely,

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).*