



July 21, 1995

FMLA-68

Dear *Name**,

This is in response to your letter asking two question regarding the application of the Family and Medical Leave Act of 1993 (FMLA).

The first question is whether an employer can count an absence for sickness or injury as an FMLA absence if the employee does not request that it be counted as such. So long as the employer is a covered employer, the employee is an eligible employee, and the reason for the absence meets one of the conditions described in the definitions of "serious health conditions" under FMLA, the employer may designate (and so advise the employee) and count the absence against the employee's 12-week FMLA entitlement even if the employee has not requested that it be counted as such.

Your second question concerns a negotiated leave of absence policy that was in effect prior to FMLA. Under this policy, employees are not required to use up all of their accrued vacation, sick time, personal time, and any other compensated time before their leave begins. You indicate that, especially in maternity situations, employees may consider this leave preferable to FMLA leave. The FMLA Regulations, 29 CFR Part 825, provide that an employer must observe any employment benefit program or plan that provides greater family or medical leave rights to employees than the rights established by FMLA. (See Regulations 825.700) There is not enough information in your letter to determine conclusively if the negotiated leave of absence policy provides a greater benefit. If in fact it does, the employer may not cite FMLA as a reason not to adhere to the employer's established policy.

As discussed in Regulations 825.207(h), an employee who complies with an employer's less stringent leave plan requirements may not be denied leave for an FMLA purpose on the grounds that the stricter requirements of FMLA have not been met.

The above answers are based on the limited information provided in your letter and assume that no other compliance issues exist. The application of FMLA in any particular situation will of course be affected by the facts in that situation.

If you have specific questions not addressed by the above, you may contact the office of the Wage and Hour Division responsible for enforcing FMLA in your area located at the U.S. Courthouse and Federal Building, 15 Henry Street, Room 101 K, Binghamton, New York 13901, telephone: (607) 773-2609.

Sincerely,

Daniel F. Sweeney
Deputy Assistant Administrator

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