



July 21, 1995

FMLA-69

Dear *Name**,

This is in response to your letter regarding the application of the provisions of the Family and Medical Leave Act of 1993 (FMLA) to absences due to alcohol abuse or for treatment of alcohol abuse.

Treatment for substance abuse may be a serious health condition for purposes of FMLA if the applicable conditions defining a serious health condition set forth in Regulations, 29 CFR Part 825.114 are met. FMLA leave, however, may only be taken for treatment for substance abuse that is provided by a health care provider or by a provider of health care services on referral by a health care provider. (See section 825.118.) On the other hand, absence because of the employee's use of the substance, rather than for treatment, does not qualify for FMLA leave. (See section 825.114(d).)

Treatment for substance abuse, however, does not necessarily prevent an employer from taking employment action against an employee. The employer may not take action against the employee because the employee has exercised the right to take FMLA leave for treatment. If, however, the employer has an established policy, applied in a nondiscriminatory manner that has been communicated to all employees, that provides that under certain circumstances, including enrolling in a substance abuse program, an employee may be terminated for substance abuse, pursuant to that policy an employee may be terminated whether or not the employee is presently taking FMLA leave. (See section 825.112(g).)

With respect to the first example cited in your letter, the employer apparently did not have an established policy with respect to leaves for substance abuse or treatment for substance abuse. Absent such a policy, the employee would be entitled to intermittent leave for such absences while enrolled in in-patient rehabilitation programs at local hospitals.

With respect to the second situation, the termination was apparently based on the employee's absence due to substance abuse and occurred prior to the employee's entry into a substance abuse program. The employer would not, in that situation, be required to reinstate the employee and provide FMLA leave.

With respect to what FMLA permits when the employer's actions are improper, an employee may be entitled to, as a minimum, reinstatement to the employee's former position or an equivalent position or to FMLA leave status if the employee is not yet able to return to work, an amount equal to any wages lost because of the termination, and any losses due to the loss of benefits. The FMLA also provides a private right of action that, in addition to the above, may result in an additional amount equal to the above as liquidated damages. The actual amount due as well as any other remedial action will depend on the facts and circumstances in each situation.

When employees are absent without advance notice for rehabilitation treatment for substance abuse and the conditions of the FMLA regulations are met as noted above, such absences may be counted against an employee's FMLA leave entitlement as provided in section 825.208. Such an absence may be counted as FMLA leave from the first date of the absence if the employer promptly within two business days of learning of the reason for the absence notifies the employee that the absence is designated and will be counted as FMLA leave. See section 825.208(b)(1).

The above is intended as general guidance and assumes that no other compliance questions are at issue. Please contact this office if you have further questions.

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).