



October 25, 1996

FMLA-84

Dear *Name**,

This is in response to your letter of August 8, 1996, forwarding correspondence from *Name** concerning the Family and Medical Leave Act of 1993 (FMLA) and the response of her employer, the United States Postal Service (USPS), to her request for leave under the Act.

In her letter, *Name** states that she was denied FMLA leave to provide foster care for approximately two weeks to a newborn child placed with her by the Vermont Children's Aid Society, Winooski, Vermont. She reports that the Society is licensed and regulated by the State of Vermont to place children in the homes of licensed foster families pending adoption.

Generally, FMLA allows up to 12 workweeks of unpaid, job-protected leave in any 12-month period—with group health insurance coverage maintained during the leave—to eligible employees for specified family and medical leave reasons. Upon return to work, the employer is obligated to restore the employee to the same position or an equivalent position with equivalent pay, benefits and other terms and conditions of employment. To be an FMLA-eligible employee, the employee must have worked for the employer for at least 12 months, for at least 1,250 hours over the 12 months immediately preceding the commencement of leave, and at a worksite where 50 or more employees are employed by the employer within 75 miles of that worksite.

The statute (§102(a)(1)(B)) and implementing regulations (29 FR 825.112(a)(2)) entitle an FMLA-eligible employee to FMLA leave for placement with the employee of a son or daughter "for adoption or foster care." The only statutory or regulatory requirement pertaining to such leave is that it must be concluded within 12 months of the placement. (FMLA §102(a)(2) and 29 CFR 825.112 and 825.201) The regulations also provide that an employee may take FMLA leave not only for the placement of a child for foster care or adoption but also "to care for the newly placed child." (29 CFR 825.200(a)(2))

The implementing regulations (29 CFR 825.112(e)) define "foster care" for purposes of FMLA leave to be "24-hour care for children in substitution for, and away from, their parents or guardian". Such placements involve State action, voluntary or involuntary removal of the child from the parents or guardian, and an agreement between the State and foster family that the foster family will take care of the child.

Neither the statute nor implementing regulations imposes a minimum period of time or permanency in connection with a foster care placement for FMLA leave purposes. So long as the placement is the result of a foster care agreement between the foster parents and the State, leave to care for the newly placed foster child would be considered FMLA leave. This would include placements made by the State through a State-approved agency such as the Vermont Children's Aid Society.

Moreover, the placement with an employee of each child for foster care would be considered a separate FMLA-qualifying event. Subsequent placements would not be subject to the restrictions on intermittent leave for adoption or foster care. (FMLA §102(b) and 29 CFR 825.203(b)) Intermittent FMLA leave is leave taken in separate blocks of time for the same event and is available to care for a newborn or for a newly adopted or placed foster child only with the employer's agreement. By treating each foster care placement as a separate event, the employer does not have the discretion to deny the leave, but would be required to grant FMLA leave to an eligible employee for each placement until such time as the 12 workweek leave entitlement is exhausted in the designated 12-month period. (29 CFR 825.112(a)(2) and 825.203(b))

Employers are permitted to require reasonable documentation from the employee for confirmation of "family relationships." This documentation may take the form of a simple statement from the employee, or a child's birth certificate, a court document, etc. The employer may examine documentation such as a birth certificate or court document, but the employee is entitled to the return of the official document submitted to the employer for this purpose. (29 CFR 825.113(d)) In so far as a foster care placement for



purposes of FMLA leave involves a formal agreement between the State and the foster family, the employer would be permitted to examine, but must return to the employee, the documentation connected with the foster care placement of the child with the family.

An employee may, in addition to leave related to the placement of a son or daughter for adoption or foster care and assuming the employee has not exhausted his or her 12 weeks of FMLA leave, also be entitled to leave to provide care to such a child with a serious health condition. The FMLA defines son or daughter, in part, as "as a biological, adopted, or foster child, a stepchild, a legal ward, or a child of a person standing in loco parentis" (FMLA §101.(12)) Leave to provide care to a child with a serious health condition is not subject to the employer's agreement but is subject to the medical certification requirements of FMLA and the implementing regulations.

We have confirmed that adoption and foster care placements by the Vermont Children's Aid Society require action by the State of Vermont before any such placement is finalized. Based on the provisions of FMLA and the facts as they have been presented in this case, we have concluded that **Name *** leave to care for a newly placed foster child qualifies as FMLA leave. Because the USPS is an FMLA-covered employer, and if **Name *** is an FMLA-eligible employee, she would be entitled to FMLA leave to care for the newly placed foster child in question for the period of time requested and to receive all of the protections and benefits provided under this law for the duration of the leave. The fact that she may receive some compensation or other consideration for her services is not material.

This response is based on the information that was provided in the letter from your constituent and obtained from the State of Vermont. Any determination in a specific situation will depend on the facts unique to that situation.

Sincerely,

Maria Echaveste
Administrator

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