



August 16, 1993

FMLA-2

Dear *Name*\*,

This is in response to your letter in which you pose a number of questions regarding the provisions of the Family and Medical Leave Act of 1993 (FMLA) and the implementing regulations at 29 CFR Part 825.

Leave taken for a FMLA required reason (i.e., birth or placement of a child for adoption or foster care, to care for a family member with a serious health condition or for the employee's own serious health condition) may not be counted in any manner under "no fault" attendance policies. See § 825.220(c).

The issue regarding the manner in which paid vacation is accrued is not clear. If the issue is accrual of vacation time (pay) the employee is not entitled to accrue benefits or seniority during periods of unpaid FMLA leave. Consequently, there would be no accrual of vacation pay during a period of unpaid FMLA leave. See §825.215(d)(2).

The Fair Labor Standards Act requires an employer to include nondiscretionary bonuses in the calculation of an employee's regular rate before computing statutory overtime pay due. One method of calculating the overtime pay due as the result of paying a bonus, would be to express the bonus as a percentage of the total earnings of the employee(s) including regular and overtime earnings. Such a calculation would not be contrary to the provisions of the FMLA.

With regard to attendance incentive plans rewarding perfect attendance, an employee may not be disqualified nor may any award be reduced for having taken unpaid FMLA leave. In a case where the bonus is expressed as an amount per hour worked, the employee on unpaid FMLA leave would receive a lesser amount than an employee who had not been on FMLA leave, as the employee on FMLA Leave is not entitled to accrue benefits during FMLA leave. See § 825.220 (c).

Sincerely,

J. 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).*