

ATTENDANCE POLICIES **DOL Topic: E¹**

PART ONE OF THIS MEMORANDUM PROVIDES A SUMMARY OF QUESTIONS ASKED AND COMMENTS SUBMITTED IN RESPONSE TO THE DOL REQUEST FOR INFORMATION (“RFI”) ABOUT ATTENDANCE POLICIES.²

PART TWO OF THIS MEMORANDUM CONTAINS THE RELEVANT STATUTORY AND REGULATORY TEXT. PART TWO ALSO LISTS OTHER SOURCES CITED IN THE COMMENTS ABOUT THIS TOPIC.

PART ONE

The DOL requested information on the FMLA’s effect on employer attendance policies, including attendance-based bonuses. The following provisions of the statute and regulations are relevant to this inquiry: The FMLA protects employees from “the loss of any employment benefit accrued prior to the date on which [FMLA] leave commenced.”³ Similarly, the regulations protect employees from the loss of employment benefits or bonuses accrued prior to the commencement of FMLA leave.⁴ Employers are also precluded by the regulations from penalizing employees for FMLA absences, including considering those absences in calculating attendance bonuses.⁵

With regard to the regulations governing attendance policies, the DOL asked for comments on the following topic:

- The Impact of FMLA Regulations on Employers’ Attendance Policies

¹ This topic is discussed in the Family and Medical Leave Act Regulations: A Report on the Department of Labor’s Request For Information, 72 Fed. Reg. 35550 (June 28, 2007), *available at* <http://www.dol.gov/esa/whd/FMLA2007FederalRegisterNotice/07-3102.pdf>, partially in Chapter IV.

² The comments reviewed herein are from employers, employer organizations, employees, employee organizations, health care providers, and health care provider organizations. They reflect all comments posted on regulations.gov or available via a Google search as of May 8, 2007. More detailed descriptions of these comments are found in the “Digest of Comments Submitted in Response to the Department of Labor’s Request for Information on the Family and Medical Leave Act,” *available at* <http://www.law.georgetown.edu/workplaceflexibility2010/law/fmla.cfm>.

³ 29 U.S.C. § 2614(a)(2).

⁴ 29 C.F.R. §§ 825.215(c)(2), 825.220(c).

⁵ *Id.*

ISSUE: Impact of FMLA Regulations on Employer Attendance Policies

- **The RFI asked: Does the FMLA impact an employer's ability to create, maintain, and/or enforce attendance policies? If so, how?**
- **The RFI asked: Does 29 C.F.R. § 825.215(c)(2) impact employers' use of "perfect attendance awards" and other attendance incentives? If so, how?** The employer commentary cited by the DOL states that many employers have scaled back their attendance incentive programs, especially perfect attendance awards, in light of this regulation.
- **The RFI asked: Can employers structure attendance awards in a way that complies with the regulations while maintaining their effectiveness as attendance incentives?**

EMPLOYER-SIDE COMMENTS

Many individual employers and employer groups addressed this topic. Each bold-faced heading below sets forth a particular subject of commentary from employers or employer organizations, and is followed by explanatory text describing the comment in more detail.

- **Impact of FMLA Regulations on Employer Attendance Policies**
 - **Attendance Policies** – Employers report that complying with 29 C.F.R. § 825.215(c)(2) makes it difficult for employers to enforce their own attendance control policies.
 - Some commenters note that the FMLA interferes with attendance control policies negotiated in collective bargaining agreements.
 - Employers state that employer sick leave and absence policies that do not single out FMLA leave-takers for worse treatment should be enforceable.
 - **Attendance Bonuses** – Employers express the view that they ought to be able to count FMLA absences when calculating their employees' total number of absences for purposes of distributing attendance-based bonuses.
 - Employers report that the effectiveness of such bonuses is undercut by those employees whom employers believe are misusing the FMLA to cover absences that are not legitimately FMLA-qualifying and who thereby remain eligible for attendance awards. A few employers also

EMPLOYER-SIDE COMMENTS

comment that even employees who have legitimate FMLA-qualifying absences should not be able to exclude these from a calculation of their total absences for bonus purposes. As a result of the number of cases of perceived abuse, many employers report having eliminated attendance or safety bonuses since the FMLA was enacted.

- Employers state that they should be able to prorate a production and/or performance bonus based on the number of hours an employee worked.⁶ Specifically, the National Association of Manufacturers (“NAM”) rejects the DOL’s distinction between “performance” bonuses that can be prorated and “attendance” bonuses that cannot be pro-rated to account for FMLA absences, arguing that attendance at work is a form of “performance.”
- Employers state that 29 C.F.R. § 825.215(c)(2) conflicts with the ADA, because under an ADA analysis, attendance is usually an “essential function” of the job. Thus, under the ADA, even if the reason an employee cannot meet the employer’s attendance requirements is because of a disability, the employee may still be terminated for absence if attendance is an “essential function.”⁷ In addition, the EEOC recognizes that the ADA should not supersede uniformly applied employer absenteeism policies. In contrast, employers argue that the FMLA effectively prohibits them from taking attendance into account, even where attendance is an “essential function” of the job.
- Employers’ Suggested Changes: (1) Modify 29 C.F.R. § 825.215(c)(2) to allow employers to include FMLA absences when calculating bonuses based on attendance. One suggested change to the regulation is to keep the first sentence of § 825.215(c)(2) and delete the remainder. (2) Another suggestion is to modify 29 C.F.R. § 825.220(c) to state that employers will not violate the FMLA by disqualifying employees on FMLA leave from attendance bonuses, provided that employers treats employees on non-FMLA leave in the same manner.

⁶ Jackson Lewis LLP, a management-side law firm, submitted a detailed discussion of how the DOL categorizes various performance and attendance bonuses.

⁷ See Topic H for a discussion on essential functions.

EMPLOYEE-SIDE COMMENTS

As reflected below, there were very few comments from employees or employee organizations on this topic. Each bold-faced heading below sets forth a particular subject of commentary from employee organizations, and is followed by explanatory text describing the comments about this subject in more detail.

- **Impact of FMLA Regulations on Employer Attendance Policies** – Employees state that the regulations appropriately recognize that employees should not be penalized for exercising their rights under the FMLA. One commenter, The Coalition of Labor Union Women, reports that employers’ attendance policies have become more restrictive in reaction to the FMLA.
 - Employee advocates express the view that 29 C.F.R. §§ 825.215(c)(2) and 825.220(c) properly prohibit employers from counting FMLA leave toward employee absences for purposes of determining eligibility for attendance-based bonuses. The National Partnership for Women and Families (“the Partnership”) states that if employers are permitted to count absences for FMLA leave toward employees’ overall absence records, and to use these records to determine attendance-based bonuses, employees will be discouraged from exercising their rights under the FMLA. The Partnership suggests that employers should be encouraged to implement other bonus programs that are based on performance, rather than attendance.

PART TWO

THE APPLICABLE STATUTORY SECTIONS AND REGULATORY PROVISIONS RELATED TO TOPIC E HAVE BEEN EXCERPTED BELOW. THESE PROVISIONS WERE NOT NECESSARILY CITED IN THE RFI.

STATUTE

29 U.S.C. § 2614(a) Restoration to position

(1) In general

Except as provided in subsection (b) of this section, any eligible employee who takes leave under section 2612⁸ of this title for the intended purpose of the leave shall be entitled, on return from such leave--

(A) to be restored by the employer to the position of employment held by the employee when the leave commenced; or

(B) to be restored to an equivalent position with equivalent employment benefits, pay, and other terms and conditions of employment.

(2) Loss of benefits

The taking of leave under section 2612 of this title shall not result in the loss of any employment benefit accrued prior to the date on which the leave commenced.

REGULATIONS

29 C.F.R. § 825.215(c)(2)

Many employers pay bonuses in different forms to employees for job-related performance such as for perfect attendance,

⁸ 29 U.S.C. § 2612 identifies the criteria under which an employee can qualify for FMLA leave and the type of leave that may be taken.

safety (absence of injuries or accidents on the job) and exceeding production goals. Bonuses for **perfect attendance and safety** do not require performance by the employee but rather contemplate the absence of occurrences. **To the extent an employee who takes FMLA leave had met all the requirements for either or both of these bonuses before FMLA leave began, the employee is entitled to continue this entitlement upon return from FMLA leave, that is, the employee may not be disqualified for the bonus(es) for the taking of FMLA leave.** See § 825.220 (b) and (c). A monthly production bonus, on the other hand does require performance by the employee. If the employee is on FMLA leave during any part of the period for which the bonus is computed, the employee is entitled to the same consideration for the bonus as other employees on paid or unpaid leave (as appropriate). See paragraph (d)(2) of this section.

29 C.F.R. § 825.220

. . .

(b) Any violations of the Act or of these regulations constitute interfering with, restraining, or denying the exercise of rights provided by the Act. "Interfering with" the exercise of an employee's rights would include, for example, not only refusing to authorize FMLA leave, but discouraging an employee from using such leave. It would also include manipulation by a covered employer to avoid responsibilities under FMLA . . .

(c) An employer is prohibited from discriminating against employees or prospective employees who have used FMLA leave. For example, if an employee on leave without pay would otherwise be entitled to full benefits (other than health benefits), the same benefits would be required to be provided to an employee on unpaid FMLA leave. By the same token, employers cannot use the taking of FMLA leave as a negative factor in employment actions, such as hiring, promotions or disciplinary actions; nor can FMLA leave be counted under "no fault" attendance policies . . .

MATERIALS CITED IN COMMENTS RESPONDING TO THE RFI⁹

Cases

- *Sommer v. The Vanguard Group*, 461 F.3d 397 (3d Cir. 2006).
- *Chubb v. City of Omaha*, 424 F.3d 831 (8th Cir. 2005).
- *Navarro v. Pfizer*, 261 F.3d 90 (1st Cir. 2001).
- *Dierlam v. Wesley Jessen Corp.*, 222 F. Supp. 2d 1052 (N.D. Ill. 2002).

DOL Opinion Letters & Guidance

- Dep't of Labor Opinion Letter, FMLA-110 (Sep. 11, 2000),
<http://www.dol.gov/esa/whd/opinion/FMLA/prior2002/FMLA-110.htm>.
- Dep't of Labor Opinion Letter, FMLA-79 (Feb. 23, 1996),
<http://www.dol.gov/esa/whd/opinion/FMLA/prior2002/FMLA-79.htm>.
- Dep't of Labor Opinion Letter, FMLA-56 (March 28, 1995),
<http://www.dol.gov/esa/whd/opinion/FMLA/prior2002/FMLA-56.htm>.
- Dep't of Labor Opinion Letter, FMLA-31 (March 21, 1994),
<http://www.dol.gov/esa/whd/opinion/fmla/prior2002/FMLA-31.htm>.

⁹ Cases and materials cited in the RFI are excluded from this list. This list does not include surveys cited in reviewed comments.