LABOR RELATIONS

UNITED STATES
POSTAL SERVICE

November 14, 2000

MANAGERS, HUMAN RESOURCES (AREA)

SUBJECT: Family Medical Leave Act - Eligibility

Based on the recently issued Department of Labor (DOL) Opinion Letter, the USPS is amending its position on FMLA eligibility. The DOL Opinion Letter addresses the question of eligibility for intermittent or reduced schedule leave for a serious health condition.

First, DOL has not endorsed lifetime eligibility. Instead, there is a one-year limitation placed upon eligibility for a given condition. The 1250-work hour eligibility test is applied only once, at the beginning of a series of intermittent absences, if all absences are for the same FMLA-qualifying condition during the same 12-month leave year. The employee remains eligible throughout that leave year even if subsequent absences bring the employee below the 1250-work hour requirement.

The employer defines the FMLA leave year. In the Postal Service, FMLA leave is calculated on the basis of the postal leave year.

Example: If an employee meets the 1250 work hour requirement for Multiple Sclerosis (MS), in May 2000, the employee is eligible for FMLA protection for absences due to the MS throughout the remainder of the 2000 postal leave year. The employee would not have to establish eligibility again for absences due to the MS condition in the 2000 leave year, even if the employee falls below the 1250 work hour requirement in December 2000. However, in January 2001, when the new postal leave year begins, the employee will have to meet the 1250 work hour requirement to be eligible for FMLA protection of MS related absences which occur in the 2001 leave year.

It is important to note that if this same employee has a different serious health condition (e.g., hospitalization for and recovery from a hysterectomy) during the 2000 leave year, the employee must meet the 1250 work hour eligibility test at the commencement of the leave for the second condition. If the employee does so, they are eligible for FMLA protection of absences for both conditions. Consequently, the leave for hospitalization is protected and leave for the MS condition continues to be protected for the remainder of the 2000 leave year, or until the 12 week entitlement has been exhausted.

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However, if the employee is unable to meet the 1250 work hour requirement for the second condition in the 2000 leave year, the employee is NOT entitled to FMLA protection for their hospitalization and recovery, but absences in the 2000 leave year for the MS condition continue to be protected. Therefore, it is possible for this employee to be eligible for FMLA protection of one qualifying condition (MS), but not for the second and different condition. The 1250 work hour eligibility requirement must be recalculated at the commencement of each subsequent and separate condition for which the employee needs leave, in order to determine eligibility for each condition in each leave year.

The United States Postal Service is in the process of revising Publication 71 to reflect this change. Once we have met our Article 19 obligations with the unions, the revised Publication 71 will be issued.

Cases pending adjudication on this issue that do not reflect this amended position should be resolved.

If you have any questions contact Charles Baker at 202-268-3832 or Sandra Savoie at 202-268-3823.

Sincerely,

Doug A. Tulino
Manager
Labor Relations Policies and Programs

U.S. Department of Labor

Employment Standards Administration
Wage and Hour Division
Washington, D.C. 20210

September 11, 2000

FMLA – 112

Thank you for your letter seeking an opinion on how the *1,250* hours of service test applies under the Family and Medical Leave Act of 1993 (FMCA) in determining an employee's eligibility for leave taken intermittently or on a reduced leave schedule due to a qualifying serious health condition.

You specifically inquired about determining the eligibility of a part-time employee who used intermittent FMLA leave on a number of occasions due to a chronic serious health condition (multiple sclerosis or MS). Later in the same year, the employee took six weeks of FMLA leave for another serious heatth condition (a hysterectomy). Although she had worked 1,356.75 hours in 12 months preceding the commencement of this leave, by the conclusion of the leave, she had dropped below 1,250 hours of service in the preceding year (1,195.25). After her return to work, she again needed leave for her MS. Because she only worked a part-time schedule, she had worked fewer than the required 1,250 hours in the 12 months preceding this latest leave. You cited the decision in *Barron v. Runyon,* 11 F. Supp. 2d 676 (E.D. Va. 1998), and asked how this court decision would apply in determining this employee's eligibility for FMLA leave for her MS.

The statute defines an eligible employee in Section 101(2)(A)(i) and (ii) as one who has "... been employed . . . for at least 12 months by the employer with respect to whom leave is requested . . . and .. . for at least *1,250* hours of service with such employer during the previous 12-month period." The FMLA Regulations, at 29 CFR § 825.110 (a)(2), provide that the employee must have performed "at least 1,250 hours of service during the 12-month period ***immediately preceding the commencement*** of leave." This regulation is consistent with both the Senate and House Committee Reports, which state that Yhe employee must . . . have worked for the employer for at least 1,250 hours of service during the 1 2 months period ***immediately preceding the commencement of the leave."*** [1] In addition, § 825.11 O(d) expressly states that

[1] *Report from the Committee on Labor and Human Resources (S. 5), Report 703-3,* January 27, 1993, p. *23; Report from the Committee on Education and Labor (H.R. I), Report 103-8, Part* I, February 2, 1993, p. 35; emphasis added.

determinations of whether an employee has worked for the employer for at least 12 months and for 1,250 hours in the past 12 months must be made "as of the date leave commences." The issue, then, is what the term "leave" means -- whether it encompasses all leave for the same serious health condition, or whether each intermittent leave absence for the same condition is considered separate leave under the Act and regulations.

The FMLA regulations define intermittent leave as "leave taken in separate blocks of time due to a single qualifying reason" (§§ 825.203 and 825.800; emphasis added). This definition is based upon the statutory provisions and the legislative history pertaining to intermittent leave. The FMLA authorizes employees to take intermittent leave or leave on a reduced schedule "when medically necessary." Section 102(b)(l).

The Congressional Committee Reports recognize that some serious health conditions require that an employee be "absent from work on a recurring basis" rather than for a single block of time, and that "continuing treatment or supervision may sometimes take the form of intermittent visits to the doctor."[2] Intermittent leave may be medically necessary for planned and/or unanticipated medical treatment, or for recovery from a *serious* health condition. Intermittent leave may be taken for an employee's own or a family member's serious health condition. Congress confirmed that, when an employee uses intermittent leave, only the amount of time actually used may be counted against the 12 weeks of leave to which an employee is entitled. Section 102(b)(l).

The intermittent leave concept assumes alternating periods of absence from and presence at work for the same FMLA-qualifying reason. If each such absence were treated as a separate period of FMLA leave, requiring an employee to reestablish eligibility with each absence, there would have been no need for Congress to codify the concept of intermittent leave. Thus, it is our position that the 1,250-hour eligibility test is applied only once, on the commencement of a series of Intermittent absences, if all involve the same FMLA-qualifying serious health condition during the same 12-month FMLA leave year. The employee in such a case remains entitled to FMLA leave for that

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[2] *Report from the* Committee on *Labor* and Human *Resources (S. 5), Report* 103-3, January 27, 1993, pp. 27-29; *Report from the Committee on Education and Labor (H.R. 1), Report 103-8, Part* 7, February 2, 1993, pp. 27 & 40-41.

FMLA - 112

FMLA reason throughout that 1 Z-month period, even if the 1,250-hour calculation is not met at some later point in the 12-month period during the series of related intermittent absences.

Once an employee is determined to be eligible for FMLA leave, whether the leave is taken continuously or intermittently, the statute (§ 102(a)) provides for "...a total of 12 workweeks of leave during any 1 Z-month period for one or more.. ." qualifying reasons. The regulations (29 CFR §§ 825.200(b) through (e)) permit an employer to choose from four different methods for determining the 12-month period that will be used to calculate an employee's FMLA leave entitlement. The four methods are the calendar year, any fixed 12-month "leave year," a 12-month period measured forward from the date any employee's first FMLA leave begins, and a "rolling" 12-month period measured backward from the date an employee uses any FMLA leave. [3] Where an employer has selected either the calendar year, fixed year, or the 12-month period measured forward, it is our position that an employee's eligibility, once satisfied, for intermittent FMLA leave for a particular condition would last through the entire current 12-month period as designated by the employer for FMLA leave purposes. If an employer uses the rolling backward method, an employee's eligibility for absence due to a particular condition would continue for 12 months from the date of the first FMLA absence for the condition. Under all of these methods. eligibility could be re-calculated at the time of the first absence for the condition after the conclusion of the 12-month period. Furthermore, it is important to realize that this analysis is separate and distinct from determining whether an eligible employee's leave entitlement has been exhausted.

In *Barron v. Runyon*, the court considered these questions under the FMLA and rendered a decision consistent with our analysis set forth above. In *Barron*, the court held that an employee need only establish eligibility once at the beginning of the intermittent leave, and "an employee who requests several distinct periods of absence for 'a single qualifying reason' is seeking only one period of Intermittent leave.' 11 F. Supp. 2d at 662. *The* court o&served that the rule for determining employee eligibility

[3] If an employer fails to designate the 12-month period from one of the regulatory options, the option that provides the most beneficial outcome for the employee must be used. See 29 CFR § 825200(e).

based on whether 50 employees are employed within 75 miles (29 CFR § 825.1 10(f)) is determined when the employee gives notice of the need for leave and, once eligible, the employee's eligibility is not affected by any subsequent changes in the number of employees employed at or within 75 miles of the employee's worksite, for that specific notice of the need for leave. An employer, for instance, could not terminate FMLA leave after it has commenced if the employee-count drops below 50. The court found this regulation "directly analogous to the situation [that] once an employee is determined eligible based on the number of hours he has worked in the twelve months preceding the first date of the leave, 'the employee's eligibility is not affected by any subsequent change in the number' of hours he worked in the twelve months prior to any subsequent date on which he takes an absence pursuant to his intermittent leave for the same medical condition." Id. The court also concluded that FMLA leave "cannot be taken 'forever' on the basis of one leave request. instead, the statute grants an employee twelve weeks of leave per twelve-month period, not Indefinitely." 11 F. Supp. 2d at 683. See also *Butler v. Owens-Brockway* Plastic *Products, Inc.* 5WH Cases 2d 1281 (6th Circuit 1999), in which the court held that the 1.250 hours of service must be computed from the date of commencement of leave rather than the date of the adverse action that violated the Act.

The following three examples will help to illustrate how an employee's eiiglbliity is determined by FMLA's 1,250-hour test:

1. Assume an employee is diagnosed with an FMLA-qualifying chronic condition, such as MS as in your example, that results in an employ88 needing intermittent leave due to the episodic nature of the condition. For example, if an employee with MS who was eligible to take intermittent FMLA leave in April and May needed leave again when the episodes of incapacity recurred in July and again in October, the employee would be entitled to FMLA leave without having to requalify under the 1,250-hour eligibility test so long as the absences occurred within the same 12-month period and the employee had not exhausted the 12-week leave entitlement for this or any other FMLA-qualifying reason. if the employee needed leave for MS again in a new 12-month period, the employee would have to re-qualify under the 1,250-hour eligibility test to be entitled to take FMLA leave for the same chronic condition in the new 12-month period.

2. Assume the same facts as in the first example and, in addition, assume that the employee request6 FMLA leave for up to six week6 for another serious health condition that requires major surgery and a subsequent period of recovery (e.g., a hysterectomy). If, at the time of this second and different FMLA-qualifying circumstance, the employee met the 1,250-hour eligibility test, the employee would be entitled to FMLA leave for *that* (i.e., second) reason. In addition, the employee would also continue to be eligible for intermittent FMLA leave for the chronic serious health condition (i.e., MS) for the remainder of the current 12-month period or until the 12-week leave entitlement has been exhausted.

3. Assume the same facts as in the second example except, at the time of the second and different FMLA-qualifying circumstance, the employee does not meet the 1,250-hour eligibility test. In this situation, the employee would not be entitled to FMLA leave for *that* (i.e., second) reason. Thus, it is possible that an employee could remain eligible for leave for one FMLA-qualifying reason for which prior notice had been given when the employee met the 1,250-hour test (i.e., MS), but not be eligible for FMLA leave for a different FMLA-qualifying reason (i.e., surgery and recovery), due to the 1,250-hour test being m-calculated at the commencement of the subsequent and separate need for leave.

Our response is based solely upon the information contained in your letter and addresses only the application of the 1,250-hour eligibility test in the context of intermittent leave. We have assumed that all other FMLA requirements are satisfied, or are otherwise not an issue.

I trust that our reply is responsive to your request, and apologize for any inconvenience caused by our delay in not being able to respond sooner to your letter. Please contact this office if you have any questions or require further assistance.

Sincerely,

T. Michael Kerr
Administrator