



**FAMILY AND MEDICAL LEAVE ACT OF 1993
SUBSTANCE ABUSE POLICY RULING LETTERS**

The following text comprises Opinion Letters issued by the Wage and Hour Division of the U.S. Department of Labor which is responsible for administering the Family and Medical Leave Act of 1993 (FMLA). The complete text of the FMLA may be found at 29 U.S.C. § 2601 *et seq.* and the regulations adopted are codified at 29 CFR Part 825.

The Opinion Letters provided herein were written in response to specific situations for specific employers and *may* be applicable to many employers covered by the FMLA and may address concerns of employers. These Opinion Letters are provided for your convenience, but if you have specific questions on interpretation or FMLA regulations, you are advised to consult with legal counsel.

OPINION FMLA-69 (July 21, 1995)

This is in response to your letter regarding the application of the provisions of the Family and Medical Leave Act of 1993 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 inpatient 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.

OPINION FMLA-59 (April 28, 1995)

This is in response to your inquiry under the Family and Medical Leave Act of 1993 (FMLA) concerning the immediate job termination provision of a Narcotic and Alcohol Testing Policy for employees of [company name deleted].

FMLA leave is available for treatment for substance abuse provided the conditions described in the definition of "serious health condition" are met (see 29 CFR §825.114(d)), such treatment, however, does not prevent an employer from taking employment action against an employee if the employer has an established policy applied in a non-discriminatory manner that has been communicated to all employees. If the employer has such a policy that provides under certain circumstances an employee may be terminated for substance abuse, the employee may be terminated pursuant to that policy whether or not the employee is presently taking FMLA leave. See 29 CFR § 825.112(g).

You requested an opinion on the possible impact of FMLA in four scenarios. In responding to each instance, we will assume that the County's policy meets the conditions described in 29 CFR

§ 825.112(c,) of the FMLA regulations, namely, that the employer has established a non-discriminatory policy which has been communicated to all employees.

An employee comes up for random testing and tests positive for illegal narcotics and the employee has never requested FMLA. Under the county's policy this employee is subject to immediate termination. FMLA does *not* require the County to allow the employee the opportunity to seek treatment and be reinstated.

Either the Sheriff or the State's Attorney receives information that an employee is using illegal narcotics. As a result, the employee is requested to submit to a drug test under the "for cause" provisions of the testing policy. The employee tests positive for illegal narcotics and the employee has never requested FMLA. Under the provisions of the testing policy, the employee is subject to immediate termination. FMLA does *not* require the County to allow the employee the opportunity to seek treatment and be reinstated.

An employee comes forward and admits to the employer that he or she is addicted to drugs and indicates that a doctor is placing the employee in rehabilitative treatment. You state that there is an ongoing debate within your office as to whether such an employee should be subject to immediate termination under the County's policy. In any event, you ask if the County's policy so provides for immediate termination in this instance, would FMLA require the County to allow the employee the opportunity to seek treatment and be reinstated? The answer is "no."

An employee who tests positive for the presence of an illegal narcotic is granted FMLA leave and the terms and conditions of reinstatement include a requirement that the employee submit to weekly testing. If the employee tests positive a second time and has either not used all of his or her allotted FMLA leave time *or* has used all the allotted FMLA leave time, you ask if FMLA requires that the County allow the employee the opportunity to seek treatment and be reinstated for a second time? The County's policy could provide for termination of employment in either case, whether or not the employee has exhausted his or her FMLA leave allotment in the 12-month period.

I hope that this is responsive to your inquiry. If additional information is required, please do not hesitate to contact this office again.

OPINION FMLA-27 (January 31, 1994)

This is in response to your inquiry to Mr. Ray Kamrath of my staff regarding return to work agreements following substance abuse rehabilitation treatment and whether they conflict with provisions of the Family and Medical Leave Act of 1993 (FMLA).

You indicate that the State of Texas requires all employers subject to the State's Workers' Compensation Act to maintain a substance abuse policy that provides, among other things, a description of any available treatment

programs and how they may be requested by the employee, such as employer-sponsored programs or assistance provided under health care insurance programs. Policies must also indicate any drug testing that may be undertaken by the employer.

You stated that many employers include a requirement that employees undergo mandatory drug testing. Some have established mechanisms for voluntary disclosure of personal substance abuse conditions by employees, which may result in the employer offering the employee assistance in obtaining rehabilitation or treatment, including taking time off from work. Additionally, some employers require employees who have disclosed their conditions and obtained rehabilitation treatment to execute a return to work agreement, which requires additional substance abuse testing for a period of time following treatment and return to work. These testing requirements are in addition to the testing program in place for all employees. You state that these procedures appear to be specifically authorized under the Americans with Disabilities Act (ADA), but question whether the ADA and FMLA are in conflict insofar as FMLA entitles an employee upon return from FMLA leave to be restored to the same or equivalent position without any modifications to the terms and conditions of the former employment as a result of the leave.

We do not interpret the FMLA as creating a conflict with employers' substance abuse policies required under State workers' compensation laws. For example, under § 104(a)(4) of the FMLA, as a condition of restoring an eligible employee who takes leave for a personal serious illness, an employer may have a uniformly-applied practice or policy that requires each such employee to receive certification from the employee's health care provider that the employee is able to resume work, "... except that nothing in this paragraph shall supersede a valid State or local law or a collective bargaining agreement that governs the return to work of such employees." Furthermore, in addressing the effect of FMLA on other laws, and particularly Federal and State anti-discrimination laws (such as the ADA), § 401(a) of the FMLA provides that "nothing in this Act or any amendment made by this Act shall be construed to modify or affect any Federal or State law prohibiting discrimination on the basis of race, religion, color, national origin, sex, age, or disability." The legislative history accompanying this provision makes it clear that the FMLA was not intended to modify or affect the ADA, or any regulations issued under that Act. Accordingly, the rights of employers to maintain a substance abuse policy as required by State workers' compensation laws and in accordance with ADA provisions and regulations are not affected by the enactment of the FMLA.

I hope that this is responsive to your inquiry. If we may be of further assistance, please do not hesitate to contact us again.