

**FMLA2018-1-A**

August 28, 2018

Dear **Name\***:

This letter responds to your request for an opinion concerning whether an employer's no-fault attendance policy violates the Family and Medical Leave Act (FMLA). The policy effectively freezes, throughout the duration of an employee's FMLA leave, the number of attendance points that the employee accrued prior to taking his or her leave. As explained below, such a policy does not violate the FMLA, provided it is applied in a nondiscriminatory manner. This opinion is based exclusively on the facts you have presented. You have represented that you do not seek this opinion for any party that the Wage and Hour Division (WHD) is currently investigating, or for use in any litigation that commenced prior to your request.

**BACKGROUND**

Under your employer's attendance policy, employees accrue points for tardiness and absences. Employees do not accrue points for certain absences, however, including absences that are FMLA-protected, as well as absences for workers' compensation, vacation, and other specified reasons. An employee is automatically discharged if he or she accrues eighteen points.

Points remain on an employee's record for twelve months of "active service" after accrual, although the policy does not define "active service." According to your letter, an employee's points are extended for the duration of his or her FMLA leave. Thus, an employee returns from FMLA leave with the same number of points that he or she accrued prior to the leave, and the points may remain on his or her record for more than twelve months. Your letter indicates that the same is true concerning other types of leave for which employees do not accrue points, such as workers' compensation-related leave.

**GENERAL LEGAL PRINCIPLES**

The FMLA prohibits employers from "interfering with, restraining, or denying" an employee's exercise of FMLA rights. 29 U.S.C. § 2615(a)(1); 29 C.F.R. § 825.220(a)(1). It also prohibits employers from "discriminating or retaliating against an employee... for having exercised or attempted to exercise FMLA rights." 29 C.F.R. § 825.220(c). Employers, therefore, cannot consider "FMLA leave as a negative factor in employment actions" and must provide an employee who takes FMLA leave with the same benefits that "an employee on leave without pay would otherwise be entitled to [receive]." *Id.* Similarly, "FMLA leave [cannot] be counted under no-fault attendance policies," meaning employees cannot accrue points for taking FMLA leave under a no-fault attendance policy. *Id.*; see also [WHD Opinion Letter FMLA2003-4](#), 2003 WL 25739620 (July 29, 2003). "[N]o-fault' attendance policies [] do not necessarily violate the FMLA as long as points are not assessed for employees who are absent due to any FMLA qualifying reason." WHD Opinion Letter FMLA2003-4, 2003 WL 25739620, at \*1.

The FMLA does not, however, entitle an employee to superior benefits or position simply because he or she took FMLA leave. *Cf., e.g.*, 29 C.F.R. § 825.214 (stating, with respect to reinstatement, that “an employee is entitled . . . to the same position the employee held when leave commenced, or to an equivalent position with equivalent benefits, pay and other terms and conditions of employment”). Likewise, an employee “may, but is not entitled to, accrue any additional benefits or seniority during unpaid FMLA leave.” 29 C.F.R. § 825.215(d)(2); *see also* [WHD Opinion Letter FMLA-100](#), 1999 WL 1002428, at \*2 (Jan. 12, 1999). An employee is also not entitled to additional benefits or payments that are contingent on achieving a specified goal that the employee was unable to achieve because he or she took FMLA leave. 29 C.F.R. § 825.215(d)(5); *see also* Preamble to the Final Rule, 73 Fed. Reg. 67934, 67985 (Nov. 17, 2008). An employee’s entitlement to benefits (other than group health benefits) is “determined by the employer’s established policy for providing such benefits when the employee is on other forms of leave (paid or unpaid, as appropriate).” 29 C.F.R. § 825.209(h); *see also* 29 C.F.R. § 825.215(d)(1); [WHD Opinion Letter FMLA-56](#), 1995 WL 1036727, \*1 (Mar. 28, 1995) (“If, for example, an employee on leave without pay would otherwise be entitled to a particular benefit, that same benefit would be required to be provided to an employee on unpaid FMLA leave.”).

## OPINION

Removal of absenteeism points is a reward for working and therefore an employment benefit under the FMLA. *Bailey v. Pregis Innovative Packaging, Inc.*, 600 F.3d 748, 750-51 (7th Cir. 2010); [WHD Opinion Letter FMLA-100](#), 1999 WL 1002428, at \*2 (Jan. 12, 1999). As you describe in your letter, the number of accrued points remains effectively frozen during FMLA leave under your employer’s attendance policy. An employee neither loses a benefit that accrued prior to taking the leave nor accrues any additional benefit to which he or she would not otherwise be entitled. WHD’s longstanding position is that such practices do not violate the FMLA, as long as employees on equivalent types of leave receive the same treatment. [WHD Opinion Letter FMLA-100](#), 1999 WL 1002428, at \*2 (Jan. 12, 1999) (stating that the FMLA would permit an employer to “neither count the FMLA leave period towards an attendance control policy for potential termination, nor credit the unpaid FMLA leave towards the recordable time for dropping such points,” as long as the employer treated other equivalent types of leave in the same manner).

If the employer, however, counts equivalent types of leave as “active service” under the no-fault attendance policy—meaning the employer counts such leave toward the twelve months necessary to remove points—then the employer may be unlawfully discriminating against employees who take FMLA leave. 29 C.F.R. § 825.220(c) (requiring that employees who take FMLA leave accrue the same benefits as employees who take equivalent non-FMLA leave). The

information you provided did not suggest that the employer treats equivalent types of leave as “active service,” so we have no indication that the above-described policy violates the FMLA.

We trust that this letter is responsive to your inquiry.

Sincerely,

A handwritten signature in black ink, appearing to read "Bryan Jarrett". The signature is fluid and cursive, with a long horizontal stroke extending to the right.

Bryan Jarrett  
Acting Administrator

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