

WAYNE STATE UNIVERSITY

MEMORANDUM

TO: XXXXXXXXXX
FROM: Michelle Fecteau, Labor Studies Center
DATE: July 7, 2003
RE: FMLA question

The purpose of this memo is to address your question:

When on FMLA leave is an individual entitled to all benefits of the contract? Our contract provides four days pay for loss of a parent, the company has denied this benefit, stating that they were not active at the time of their parent's death. Is this allowed?

I am assuming the employees in question are eligible for FMLA coverage. You may want to review whether the employee actually is eligible. The requirements are: 1) he has completed 12 months of service; 2) worked at least 1250 hours in the 12 months before each FMLA absence; 3) works for a covered employer (more than 50 people on the payroll); and 4) there are at least 50 county employees within a 75 mile radius). To access the FMLA regulations governing eligibility go to FMLA Regulation.825.110 at:
www.dol.gov/dol/allcfr/ESA/Title_29/Part_825/29CFR825.110.htm

Review of Applicable FMLA Regulations

With regard to continuing benefits while on FMLA Leave the FMLA Regulation 825.209 speaks to this issue. It states in paragraph (a):

During any FMLA leave, an employer must maintain the employee's coverage under any **group health plan** (as defined in the Internal Revenue Code of 1986 at 26 U.S.C. 5000(b)(1)) on the same conditions as coverage would have been provided if the employee had been continuously employed during the entire leave period. All employers covered by FMLA, including public agencies, are subject to the Act's requirements to maintain health coverage. The definition of "group health plan" is set forth in Sec. 825.800.

Section 825.800 contains a definition of "group health plan" which states:

Group health plan means any plan of, or contributed to by, an employer (including a self-insured plan) to provide health care (directly or otherwise) to the employer's employees, former employees, or the families of such employees or former employees

Section 825.209 also states in paragraph (h):

An employee's entitlement to benefits other than group health benefits during a period of FMLA leave (e.g., holiday pay) is to be 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).

FMLA regulations also state that an employer cannot discriminate against an employee who uses FMLA leave. Section 825.220(c) of the FMLA Regulations states:

"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 be counted under “no fault” attendance policies.” (emphasis added).

Answer Regarding Your Question

Employees on FMLA leave are clearly entitled to group health benefits while on FMLA leave. With regard to other forms of benefits, such as four paid days of bereavement pay, whether the employee would be entitled to this benefit depends on the contract language and the accepted practice in your workplace. Keep in mind FMLA regulation 825.700 (a) states that employees are entitled to policies or practices that provide employees more favorable benefits than the FMLA’s minimum requirements. Section 825.700(a) specifically states:

(a) An employer must observe any employment benefit program or plan that provides greater family or medical leave rights to employees than the rights established by the FMLA. Conversely, the rights established by the Act may not be diminished by any employment benefit program or plan.

If the contract language clearly and unambiguously states that employees are entitled to four days of bereavement pay upon death of a parent, most arbitrators would go with enforcing the employees clearly expressed right to this benefit. If the contract language leaves questions regarding the interpretation or intent of the language, the issue is what is the accepted practice and whether the employee “would be otherwise entitled” to such benefits. This means asking, “Would the employee be entitled to this benefit if he or she were on a non-FMLA leave?” For example, if your employer has granted bereavement pay for employees on an unpaid personal leave they should treat employees on an unpaid FMLA leave similarly. If a person on a paid union leave is entitled to bereavement pay, the union could argue that a person on a paid FMLA leave should be treated the same. The point is the employer cannot discriminate against a person because it is an FMLA leave. FMLA leave should be treated as other forms of leaves with regard to receiving a particular benefit.

Enforcing FMLA Rights through the Grievance procedure

The union may enforce FMLA rights by filing a grievance citing any contract language, or accepted policy incorporating the FMLA. If this is not in your contract you can use language that states the employer will comply with federal law. If the union decides to take this case to arbitration it is highly recommended the union select an arbitrator familiar with the FMLA, perhaps an employment attorney (without strong management connections).

Also, Robert Schwartz, the attorney who wrote the FMLA Handbook advises that if the case goes to arbitration, the employer may argue that the arbitrator should not consider “external law.” He states that this argument clearly fails if the FMLA is referenced in the union contract or employer’s attendance control policy. See *Tenneco Packaging* 112 Lab.Arb.Rep. 761 (1999); *ATC/Vancom*, 111 Lab.Arb.Rep. 268 (1998). If the contract is silent on the FMLA, an arbitrator can apply the act unless expressly prohibited from considering federal law. *Laidlaw Transit, Inc.*, 109 Lab.Arb.Rep. 647 (1997); *Ohio Valley Coal Co.*, 110 Lab.Arb.Rep. 859 (1998); *Aerospace Center Support*, 112 Lab.Arb.Rep. 108 (1999).

Using Your Rights under Labor Law

Labor law requires that employers bargain in good faith with the union over mandatory subjects of bargaining. This includes bargaining over matters connected with the FMLA. Labor law also prohibits the employer from making unilateral changes without first giving the union a chance to bargain.

I hope this information is useful to you in deciding what direction to take with the pending grievances. Keep in mind that since I am not an attorney, you may want to have this information reviewed by one.

Please feel free to contact me with any questions or if I can provide further information.

Best Wishes,
Michelle

FMLA regulations can be access through the following U.S. Dept. of Labor website: http://www.dol.gov/dol/allcfr/ESA/Title_29/Part_825/toc.htm