

Eight commenters (Burroughs Wellcome Company; Southern Electric International, Inc. (Troutman Sanders); California Department of Fair Employment and Housing; William M. Mercer, Inc.; Chamber of Commerce of the USA; Society for Human Resource Management; and Timber Operators Council) raised questions or concerns on the regulatory guidance on the impact of unpaid FMLA leave on various forms of incentive pay plans and bonuses (e.g., perfect attendance bonuses, sales bonuses based on calendar year productivity, and pay increases based on performance reviews. 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 meets all the qualifications to receive these types of bonuses up to the point that FMLA leave begins, the employee must continue to qualify for this entitlement upon returning from FMLA leave. In other words, the employee may not be disqualified from perfect attendance, safety, or similar bonus(es) because of 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 the period for which the bonus is computed, the employee is not entitled to any greater consideration for the bonus than other employees receive while on paid or unpaid leave (as appropriate) during the period. Because restored employees are not entitled to accrue seniority during a period of FMLA leave, pay increases based on performance reviews conducted after 12 months of completed service with the employer may be delayed by the amount of unpaid FMLA leave an employee takes during the 12-month period (in the absence of policies that treat other forms of unpaid leave differently). In contrast, a pay increase based on annual performance reviews geared to an employee's "entry on board" anniversary date without regard to any unpaid leave taken during the period may not be denied or delayed (once the employee returns from FMLA leave) to an employee on FMLA leave on his or her anniversary date. The regulations have been clarified to include some of these principles.

Fourteen commenters (Alabama Power Company (Balch & Bingham); Pathology Medical Laboratories (Riordan & McKinzie); Department of Personnel, City of Dallas; New Hampshire Retirement System; University of California; Hill & Barlow;

Morris R. Friedman; Willcox & Savage; McCready and Keene, Inc; William M. Mercer, Inc; Government Finance Officers Association; National Council on Teacher Retirement; National Restaurant Association; and Virginia Maryland Delaware Association of Electric Cooperatives) expressed various views on, and requested clarification of, provisions included in paragraph (d)(4) of this section that indicated periods of FMLA leave would be treated as "continuous service (i.e., no break in service) for purposes of vesting and eligibility to participate" in pension and other retirement programs. To resolve the confusion created by this provision, several clarifications have been included in the final rule. Under the FMLA, *unpaid* leave does not constitute service credit—except for purposes of "break in service" rules because the taking of FMLA leave cannot " * * * result in the loss of any employment benefit accrued prior to the date on which the leave commenced" (§ 104(a)(2)). Thus, employees will not be deemed to accrue hours of service during periods of *unpaid* FMLA leave (*paid* leave is counted as service credit). Note, in addition, however, that if any FMLA leave is also covered by special maternity and paternity leave plan pension break in service rules under ERISA, the more generous rule would apply. Paragraph (d)(4) of this section is clarified to reflect this position.

Cincinnati Gas & Electric Company and Austin Human Resource Management Association asked that the requirement for an employee to be reinstated to the same or a "geographically proximate" worksite be further defined in paragraph (e)(1) of this section. In response, the rule is clarified to provide that a geographically proximate worksite is one that does not involve a significant increase in commuting time or distance.

Austin Human Resource Management Association also recommended that the rules clarify an employer's obligation to return an employee to an equivalent position following FMLA leave when the employee has medical limitations but is not a qualified individual with a disability under the ADA. An employee's right to restoration under FMLA is dependent upon the employee's ability to perform all of the essential functions of the employee's position. This is now addressed in § 825.214. (See also the discussion in § 825.702.) This commenter also suggested that the final rule expressly state that FMLA does not affect the employer's right to administer a light duty return to work program for employees off work due to injury or

illness. This is an incorrect interpretation of FMLA's leave entitlement provisions and cannot be adopted in the regulations. See the discussion in § 825.702(d)(2). An employer may not require an employee to return to light duty. But the employer is not prohibited from providing a program under which an employee could voluntarily return to duty before he or she is able to perform all the essential functions of the job. In such a case, because an employee cannot waive his or her FMLA rights, the employee's right to be restored to his or her original or an equivalent position would continue until 12 weeks have passed in that 12-month period, including all FMLA leave and the light duty period for which the employee would otherwise have been on leave. See the revisions at §§ 825.220 and 825.702.

College and University Personnel Association commented that § 825.215(d)(2) appeared to prohibit employers from applying "use it or lose it" policies because an employee who takes FMLA leave is entitled to the same benefits upon return from leave as he/she was entitled to at the commencement of the leave, regardless of whether the "use it or lose it" date has passed. The commenter considered this interpretation inconsistent with § 825.216, which suggests an employee has no greater right to benefits than if the employee had been continuously employed during the FMLA leave. The commenter is correct that the FMLA extends no greater right or benefit to eligible employees than they would receive if they worked continuously during the FMLA leave. Consistent with this provision, if an employee would have "lost" the benefit if the employee had been continuously employed instead of taking FMLA leave, the employee is not entitled to "retain" the benefit simply because the employee took FMLA leave, regardless of whether the trigger date for "losing it" occurs during a period the employee is on FMLA leave.

The National Association of Plumbing-Heating-Cooling Contractors commented that for union-affiliated employers under a collective bargaining agreement, an eligible employee who requests FMLA leave will be replaced from the hiring hall. According to the commenter, the employer has no authority to recall a worker back to his or her original position at the end of the leave. As noted in § 825.700 of these regulations and § 402 of the FMLA, the rights established for eligible employees by FMLA may not be diminished by any collective bargaining agreement or any employment benefit program or plan.