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April 16, 1996

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The Honorable Dan Morales  
Attorney General of Texas  
P.O. Box 12548, Capitol Station  
Austin, Texas, 78711-2548

Attn: Opinions Committee

Dear General Morales:

Re: Use of Annual Leave by Employees on Worker's Compensation

Some employees of the Texas Department of Human Services who are receiving worker's compensation request to take annual leave at the same time they are receiving worker's compensation benefits. An employee who takes annual leave would be paid their regular salary for the leave period so that the total payment of worker's compensation benefits and regular salary for that period would exceed one hundred percent of the salary allowed under the classification salary schedule as set out in article IX of the General Appropriations Act, 74th Legislature.

Article IX, Other Employment Policies and Provisions, Sec. 8. 1. of the General Appropriations Act provides that employees are entitled to a vacation each year (generally referred to as annual leave) without a reduction in salary and sets out the schedule of vacation leave that an employee can earn per month.

In the federal FMLA regulations, 29 CFR Part 825, and the General Appropriations Act, Article IX, Other Employment Policies and Provisions, Sec. 8. 14.a. it is clear that an agency can not require an employee on FMLA leave who is receiving worker's compensation benefits to use annual leave while on FMLA leave. In the comments on federal FMLA regulations, 60 Fed. Reg. 2205 (copy enclosed) the Department of Labor stated that an employee who incurs a work related illness or injury elects whether to receive paid leave from the employer or worker's compensation benefits and the employee can not receive both. The Department of Labor cited no authority for this conclusion.

Attorney General Morales

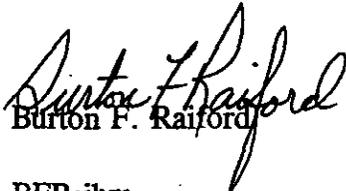
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The Texas Department of Human Services is reviewing its policy on annual leave for employees on worker's compensation. During this review three questions have arisen. Can the department deny the use of annual leave to all employees receiving worker's compensation benefits? Can the department deny the use of annual leave to only employees who are on FMLA leave and receiving worker's compensation benefits? Can the department limit annual leave for all employees receiving worker's compensation benefits to annual leave that will allow the total of annual leave and worker's compensation benefits to total 100% of the employee's salary?

I request an Attorney General's opinion whether any of these practices would violate worker's compensation laws, the appropriations act or any other statutory requirement.

Sincerely,

  
Burton F. Raiford

BFR:jbm

from the Fair Labor Standards Act's (FLSA) requirements for payment of minimum wage and overtime compensation for hours worked over 40 per week (the exemption for "executive, administrative, and professional" employees under FLSA § 13(a)(1)), compliance by an employer with FMLA's requirement to provide unpaid leave shall not affect the exempt status of the employee under the FLSA exemption and its regulations (29 CFR Part 541). Thus, employers can "dock" the pay of otherwise-exempt, salaried employees for FMLA leave taken for partial day absences. If an FLSA-exempt employee needs to work a reduced leave schedule under FMLA, the employer may deduct from the employee's salary partial-day absences for any hours taken as intermittent or reduced schedule FMLA leave within the workweek without causing loss of the employee's exempt status under 29 CFR Part 541. By operation of the statute (FMLA), this exception to the FLSA "salary basis" rule extends only to leave which qualifies as FMLA leave (*i.e.*, FMLA-eligible employees, working for FMLA-covered employers, who take FMLA leave only for reasons which qualify as FMLA leave).

Twenty comments were received on this provision. Many commenters complained that the tension between FMLA's requirement to grant unpaid leave and FLSA's "salary basis" rule prohibiting partial-day deductions from pay for FLSA-exempt employees discourages employers from maintaining more generous family leave policies that were in effect prior to FMLA, or from extending FMLA leave rights to non-covered or non-eligible employees, because of the risk of jeopardizing the exempt status of entire classes of employees. The Personnel Department of Whatcom County, Washington, noted the inequitable result under the rule that causes non-exempt employees to obtain a "better package" under FMLA than exempt employees do. In contrast, the Service Employees International Union stated it would have been inappropriate for DOL to expand FMLA's exception to the FLSA "salary basis" test beyond the use of FMLA-qualified leave. The United Food and Commercial Workers International Union opposed allowing even FMLA-required deductions from an employee's salary without affecting the employee's qualifications for exemption under the FLSA because it permits the employer to reduce an employee's wages for hourly leave without having to grant overtime pay for hours over 40 per week. Van Hoy,

Reutlinger & Taylor recommended that the final rule also address how employers treat salaried but *non-exempt* employees who are paid on the "fluctuating workweek" method for payment of half-time overtime compensation when FMLA leave results in fewer than 40 hours being worked in the workweek.

An employee subject to FLSA's overtime requirements who is paid on a salary basis and whose workhours fluctuate each week may be paid overtime compensation under the "fluctuating workweek" method of payment described in 29 CFR 778.114. Where the employee and employer mutually agree that the salary amount will compensate the employee for all straight-time earnings for whatever hours are worked in the week, whether few or many, payment of extra compensation, in addition to the salary, for all overtime hours worked at one-half the "regular rate" will meet FLSA's overtime compensation requirements. Because the salary covers "straight-time" compensation for however many hours are worked in the workweek, the employee's "regular rate" varies each week (determined by dividing the salary by the number of hours worked each week). Payment for the overtime hours at one-half the rate computed each week, in addition to the salary, results in payment of time-and-one-half the regular rate for all overtime hours worked each week. The "fluctuating workweek" method of payment for overtime hours may not be used unless the salary amount is enough to yield average hourly straight-time earnings in excess of the statutory minimum wage for each hour worked in the weeks when the employee works the greatest number of hours. Typically, it is mutually agreed by the parties under these types of salary arrangements that the salary will be paid as straight-time compensation for however many or few hours are worked, long weeks as well as short weeks, under the circumstances of the employment arrangement as a whole.

Therefore, because payment of the agreed-upon salary is required in each short workweek as a prerequisite for payment of overtime compensation on a "fluctuating workweek" basis, employers may not dock the salary of an employee paid on this basis who takes FMLA leave intermittently or on a reduced leave schedule without abandoning the "fluctuating workweek" overtime formula. An employer may either continue paying such an employee the agreed-upon salary in any week in which any work is performed during the employee's FMLA leave

period, or may choose to convert the employee to an hourly basis of payment, with payment of proper time-and-one-half the hourly rate for any overtime hours worked during the period of the condition for which FMLA leave is needed intermittently or on a reduced leave schedule basis, and later restore the salary basis of payment after the employee's need for intermittent or reduced schedule FMLA leave has concluded. If an employer chooses to follow this exception from the fluctuating workweek method of overtime payment, it must do so uniformly for all employees paid on a fluctuating workweek basis who take FMLA leave intermittently or on a reduced leave schedule, and may not do so for employees taking leave under circumstances not covered by FMLA. The final rule has been clarified to reflect this policy.

While the Department recognizes the view, as some commenters noted, that a tension exists between partial-day docking under the FLSA "salary basis" rule and the intent of FMLA to encourage more generous family and medical leave policies, we are constrained by the literal language of the statutory terms to adhere to the policy set forth in the Interim Final Rule. By operation of FMLA, the statutory exception to the FLSA 541 exemption's "salary basis" rule extends only to leave qualifying as FMLA leave that is taken by FMLA-eligible employees employed by FMLA-covered employers. No further revisions are made in this section.

#### Paid or Unpaid Leave (§ 825.207)

FMLA requires unpaid leave, generally. If an employer provides *paid* leave of fewer than the 12 workweeks required by FMLA, the additional weeks necessary to attain 12 workweeks of leave in the 12-month period may be unpaid. FMLA also provides for substituting appropriate paid leave for the unpaid leave required by the Act. An employee may elect, or an employer may require the employee, to substitute any of the employee's accrued paid vacation leave, personal leave, or family leave if it is: (1) for the birth of a child, and to care for such child; (2) for placement of a child with the employee for adoption or foster care, and to care for such child; or, (3) to care for the employee's spouse, child, or parent, if the spouse, child or parent has a serious health condition. The legislative history explains that "family leave" as used here in FMLA refers to paid leave provided by the employer " \* \* \* covering the particular circumstances for which the employee

is seeking leave under [FMLA for birth or adoption of a child, or for the serious health condition of an immediate family member] \* \* \* (emphasis added). Based on this legislative history, the regulations similarly included a limitation that family leave may only be substituted "under circumstances permitted by the employer's family leave plan" (§ 825.207(b)).

In addition, the employee may elect, or the employer may require the employee, to substitute any of the employee's accrued paid *vacation leave*, *personal leave*, or *medical or sick leave* for FMLA leave taken for the serious health condition of an immediate family member (spouse, child, or parent) or for the employee's own serious health condition that makes the employee unable to work, except that an employer is not required to provide paid *sick leave* or paid *medical leave* "in any situation in which the employer would not normally provide any such paid leave." (FMLA §§ 102(d) (2) (A) & (B).)

These substitution provisions are intended to allow for the specified paid leaves that have accrued but have not yet been taken by an employee to be substituted for the unpaid leave required under FMLA, in order to mitigate the financial impact of wage loss due to family and temporary medical leaves. The substitution provisions assure that an employee is entitled to the benefits of applicable paid leave, plus any remaining leave time made available by FMLA on an unpaid basis.

The State of Oregon's Bureau of Labor and Industries asked for clarification of whether the employee or the employer had the prerogative or control over the decision to substitute paid leave for FMLA leave. Sommer & Barnard suggested additional guidance was needed on employee substitution where the employer does not require it. The California Department of Fair Employment and Housing recommended the rule clearly state that employees have the right to substitute paid vacation during FMLA leave, and suggested further amendments to allow employers to require certification for FMLA leave where an employee desires to use paid vacation leave. The California Teamsters Public Affairs Council opposed permitting an employer to force an employee to use paid vacation or personal leave during FMLA leave absent a specific request from the employee to substitute such paid leave. The Equal Employment

Advisory Council suggested the regulations allow employers to restrict substitution of paid vacation if the employer policy normally restricts

vacations to certain times during the year. Chevron and the American Apparel Manufacturers Association, Inc. stated that paid leave should only be permitted at the employer's option (or discretion). Cincinnati Gas & Electric Company suggested that paid leave should be available for substitution only under the rules of the plan which established the paid time off.

FMLA's substitution language provides that " \* \* \* an eligible employee may elect, or an employer may require the employee, to substitute any of the \* \* \* appropriate paid leave for any part of the 12-week period of FMLA leave. Under these terms, if an employee does not elect to substitute appropriate paid leave when requesting FMLA leave, the employer has the right to require that the employee do so. An employee always has the right to request, in the first instance, that appropriate paid leave be substituted. There are no limitations, however, on the employee's right to elect to substitute accrued paid *vacation* or *personal leave* for qualifying FMLA leave, and the employer may not limit the timing during the year in which paid vacation may be substituted for FMLA-qualifying absences or impose other limitations. If the employee does not initially request substitution of appropriate paid leave, the employer retains the right to require it. An employer may not override an employee's initial election to substitute appropriate paid leave for FMLA leave, nor place any other limitations on its use (e.g., minimum of full days or weeks at a time, etc.). At the same time, in the absence of other limiting factors (such as a State law or an applicable collective bargaining agreement), where an employee does not elect substitution of appropriate paid leave, the employee must nevertheless accept the employer's decision to require it, even where the employee would desire a different result. The regulations have been clarified to address these principles.

The Women's Legal Defense Fund, 9 to 5, National Association of Working Women, AFL-CIO, Food & Allied Service Trades, International Brotherhood of Teamsters, and Service Employees International Union opposed what they perceived as unwarranted regulatory restrictions on the ability to substitute paid "family leave" under FMLA, and recommended deletion of the restrictive language. We have revised the language in § 825.207(b) to track the language of the legislative history, which explains the meaning of "family leave" in this context. The effect of the revision, however, is the

same result as under the terms of the Interim Final Rule.

Sixteen comments raised concerns over the relationship and interaction between FMLA leave and absences caused by on-the-job, workers' compensation injuries, and requested further guidance. The Women Employed Institute and the Women's Legal Defense Fund argued that workers' compensation cannot be substituted as paid leave for FMLA leave, even if such payments are proxies for lost wages. Many employer commenters argued alternatively that employers should not only be allowed to count the workers' compensation absence as FMLA leave, but they should continue to be allowed to exercise their rights under workers' compensation laws to require an employee to return to work at restricted or "light" duty. The Employers Association of Western Massachusetts, Inc. requested clarification of whether insured disability plans and self-insured disability plans are similarly considered a form of "accrued paid leave" under FMLA.

An employee who incurs a work-related illness or injury elects whether to receive paid leave from the employer or worker's compensation benefits. An employee cannot receive both. Therefore, where a work-related illness or injury also causes a "serious health condition that makes the employee unable to perform the functions of the position of such employee" within the meaning of FMLA, and the employee has elected to receive worker's compensation benefits, an employer cannot require the employee to substitute, under FMLA, any paid vacation or other leave during the absence that is covered by payments from the State workers' compensation fund. Similarly, an employee cannot elect to receive both worker's compensation and paid leave benefits. Such an absence can count, however, against an employee's FMLA leave entitlement if it is properly designated at the beginning of the absence as required by these regulations. Neither the statute nor its legislative history suggests that time absent from work for work-related accidents should not run concurrently for purposes of FMLA and the State workers' compensation laws (provided the illness or injury also meets FMLA's definition of "serious health condition"). Indeed, FMLA's legislative history suggests that the Congress contemplated this result—in describing the intended meaning of "serious health condition," the Committee reports refer to "injuries caused by serious accidents on or off the