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U.S. Department of Labor
Employment Standards Administration
Wage and Hour Division
Washington, D.C. 20210

June 15, 1993 **FMLA-1**

Dear ***Name****,

This is in response to your letter to the Department of Labor regarding the Family and Medical Leave Act of 1993 (FMLA).

The FMLA, which becomes effective on August 5, 1993, is intended to provide a structured method for dealing with certain family and medical situations which may require the employee to be absent from work.

The issues contained in your letter regarding the continuation of medical insurance premiums being paid by a contractor is a requirement of the Family and Medical Leave Act. Section 825.209 of the regulations requires an employer to maintain coverage under any group health plan for the duration of such leave and under the conditions coverage would have been provided if the employee had continued in employment continuously for the duration of such leave. If the employer is providing health insurance to discharge the health and welfare benefits requirement of the wage determination, that benefit must continue during the entire period of the unpaid FMLA leave. An employer's obligation to continue medical insurance coverage during a period of FMLA leave would only cease when it becomes known that an employee is not returning to employment, and therefore, would no longer be entitled to leave under this Act.

If the contractor is paying cash in lieu of health and welfare benefits required by the wage determination on the contract, the employer has no obligation to continue cash payments during any period of FMLA leave.

As to whether the contractor can pass along any increased costs on the contract resulting from payments required by FMLA to the contracting agency, this is a matter for negotiation between the contractor and the agency.

We hope that we have been responsive to your inquiry. I am enclosing a copy of our recently published regulations that should address many of the concerns that you may have about the Act.

Sincerely,

J. Dean Speer
Director, Division of Policy & Analysis

Enclosure

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

U.S. Department of Labor
Employment Standards Administration
Wage and Hour Division
Washington, D.C. 20210

August 16, 1993 **FMLA-2**

Dear ***Name****,

This is in response to your letter in which you pose a number of questions regarding the provisions of the Family and Medical Leave Act of 1993 (FMLA) and the implementing regulations at 29 CFR Part 825.

Leave taken for a FMLA required reason (i.e., birth or placement of a child for adoption or foster care, to care for a family member with a serious health condition or for the employee's own serious health condition) may not be counted in any manner under "no fault" attendance policies. See § 825.220(c).

The issue regarding the manner in which paid vacation is accrued is not clear. If the issue is accrual of vacation time (pay) the employee is not entitled to accrue benefits or seniority during periods of unpaid FMLA leave. Consequently, there would be no accrual of vacation pay during a period of unpaid FMLA leave. See §825.215(d)(2).

The Fair Labor Standards Act requires an employer to include nondiscretionary bonuses in the calculation of an employee's regular rate before computing statutory overtime pay due. One method of calculating the overtime pay due as the result of paying a bonus, would be to express the bonus as a percentage of the total earnings of the employee(s) including regular and overtime earnings. Such a calculation would not be contrary to the provisions of the FMLA.

With regard to attendance incentive plans rewarding perfect attendance, an employee may not be disqualified nor may any award be reduced for having taken unpaid FMLA leave. In a case where the bonus is expressed as an amount per hour worked, the employee on unpaid FMLA leave would receive a lesser amount than an employee who had not been on FMLA leave, as the employee on FMLA Leave is not entitled to accrue benefits during FMLA leave. See § 825.220 (c).

Sincerely,

J. DEAN SPEER
Director, Division of Policy and Analysis

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

U.S. Department of Labor
Employment Standards Administration
Wage and Hour Division
Washington, D.C. 20210

September 9, 1993 **FMLA-3**

Dear ***Name****,

Thank you for your letter on behalf of ***Name****. ***Name**** has requested information concerning the Family and Medical Leave Act (FMLA) of 1993. ***Name**** is interested in taking maternity leave and she is concerned about job security. Your inquiry was referred to this office as the Wage and Hour Division of the Department of Labor administers and enforces this law.

The Family and Medical Leave Act entitles eligible employees to take up to 12 weeks of unpaid, job protected leave in any 12 months for specified family and medical reasons. An employee on FMLA leave is entitled to return to the same or an equivalent position with the same pay, benefits, etc., on return from leave.

An equivalent position must involve the same or substantially similar duties and responsibilities, equivalent pay, benefits, and working conditions. Furthermore, an employee is ordinarily entitled to return to the same shift or the same or an equivalent schedule. An employee may request a different shift schedule, or position which better suits the employee's personal needs; however, an employee cannot be required to accept a position against his or her wishes. Additionally, it is unlawful for any employer to interfere with or restrain or deny the exercise of any right provided under the law.

I hope this has been responsive to your concerns. I have enclosed two publications which ***Name**** will find helpful. Also, a local office of the Wage and Hour Division can assist ***Name**** with any additional questions.

Sincerely,

Charles E. Pugh
Assistant Administrator

Enclosures

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

U.S. Department of Labor
Employment Standards Administration
Wage and Hour Division
Washington, D.C. 20210

September 9, 1993 **FMLA-4**

Dear ***Name****,

This is in response to your letter to Secretary Reich concerning the applicability of the Family and Medical Leave Act of 1993 (FMLA) to condominium associations in the State of Hawaii.

You indicate that board members of the condominium associations are unpaid volunteers, and that these boards contract with managing agents to handle the administrative workload of operating the properties. The boards generally handle decisions on hiring, firing, and general employment policies, but the managing agent may be involved in the supervision of the onsite resident manager and other employees.

The term "employer" is defined in the FMLA as any person engaged in commerce or in any industry or activity affecting commerce that employs 50 or more employees during 20 or more calendar workweeks of the current or preceding calendar year. The term includes "any person who acts, directly or indirectly, in the interest of in employer to any of the employees of such an employer."

Under the FMLA, where two or more businesses exercise some control over the work or working conditions of an employee, the businesses may be considered "joint employers" for purposes of complying with the FMLA. Joint employers may be separate and distinct entities with separate owners, managers and facilities. Employees jointly employed by two employers must be counted by both employers in determining employer coverage and employee legibility under FMLA. The factors considered in determining how joint employment relationships are treated under the FMLA are discussed in § 825.106 of the enclosed copy of FMLA's implementing Regulations, 29 CFR Part 825, which became effective on August 5, 1993. Joint employment relationships are not determined by applying any single criterion, but rather the entire relationship is viewed in its totality.

In joint employment relationships under the FMLA, the "primary" employer is responsible to all its employees for giving the notices required by FMLA, providing FMLA leave, maintaining health benefits during leave, and restoring employees to their same or an equivalent position of employment upon the conclusion of leave. A "secondary" employer with a total of 50 or more employees, including all jointly employed employees, must comply with the prohibited acts provisions of the statute, as discussed in § 825.220 of the regulations, which include prohibitions against interfering with an employee's attempt to exercise rights under the Act (including taking FMLA leave), or discharging or discriminating against an employee for opposing a practice that is unlawful under the FMLA.

The factors for distinguishing a "primary" employer from a “secondary" employer in joint employment relationships include which one has the authority and responsibility to hire and fire employees, place them and assign their work, make the payroll, and provide employment benefits. While not entirely clear from the information in your letter, it appears to us that a single managing agent which employs 50 or more employees at various condominium associations during 20 or more calendar workweeks in the current or preceding calendar year would constitute a covered employer" within the meaning of the FMLA, with responsibilities as a "primary" employer as described in § 825.106(e) of the FMLA regulations. To not extend FMLA's protections to employees in such a situation would be contrary to the language of the Act.

We appreciate receiving your views in this matter. A copy of your letter will be included in the official rulemaking record on the interim final FMLA regulations.

Sincerely,

J. Dean Speer
Director, Division of Policy and Analysis

Enclosure

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

U.S. Department of Labor
Employment Standards Administration
Wage and Hour Division
Washington, D.C. 20210

September 27, 1993 **FMLA-5**

Dear ***Name****,

This is in reply to your letter to President Clinton regarding the Family and Medical Leave Act of 1993 (FMLA).

You question whether it would be legal for your employer, ***Name****, to change its medical leave policy before the FMLA became effective on August 5 from one of providing 12 weeks of paid disability leave to one providing 12 weeks of unpaid leave, as FMLA provides. While it is certainly unfortunate, and clearly inconsistent with the spirit of FMLA, that your employer decided to reduce employee benefits before the FMLA became law, there is nothing in FMLA that prevents an employer from amending existing leave and employee benefit programs as your employer has done, provided the resulting policies comply with the FMLA and any other applicable Federal, State or local law. Although the Congress did not intend that the new law discourage employers from adopting or retaining more generous policies, as you point out from your review of section 402 of the FMLA, Congress did not include a "grandfathering" provision to prohibit employers from changing pre existing benefit programs after the FMLA was passed in February but before the law took effect on August 5.

We would note, however, that the new Federal FMLA does not diminish an employer's obligation to comply with any State or local law requiring that employers provide more generous benefits to employees than FMLA requires. If a leave of absence qualifies for FMLA leave and other benefits under State law, the leave period would count simultaneously toward an employee's entitlement under both laws. For example, if State law provides paid benefits for six weeks to employees temporarily disabled due to pregnancy, an employee would be entitled to an additional six weeks of unpaid FMLA leave (or any substituted, accrued paid leave) at the conclusion of the first six weeks.

I hope that this has been responsive to your questions. Enclosed for your information are copies of relevant publications under the FMLA, including a copy of the implementing regulations, 29 CFR Part 825. You may find sections 825.700 and .701 to be particularly informative on the relationship between FMLA and existing employer benefit plans and State laws.

If we may be of further assistance, please do not hesitate to contact us directly, or you may contact the nearest local office of the Wage and Hour Division, listed in most telephone directories under the U.S. Government, Department of Labor, Employment Standards Administration.

Sincerely,

J. Dean Speer
Director, Division of Policy and Analysis

Enclosures

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

U.S. Department of Labor
Employment Standards Administration
Wage and Hour Division
Washington, D.C. 20210

October 1, 1993 **FMLA-6**

Dear ***Name****,

This is in reply to your letter regarding your employee disability benefit plan and compliance with the Family and Medical Leave Act of 1993 (FMLA).

Disability insurance is not part of the health benefits which must be maintained for an "eligible employee" while on FMLA leave. However, as noted in section 825.213(f) of Regulations, 29 CFR Part 825, employers may choose to maintain other employee benefits, such as disability insurance, by continuing to pay premiums during FMLA leave, in order to avoid a lapse in coverage and ensure that the employer can meet its responsibilities under FMLA to provide equivalent benefits upon return of an employee from leave. Under the circumstances set forth in paragraphs (a) through (e) of this section, an employer is entitled to recover any premiums paid on the employee's behalf to maintain such benefits during FMLA leave.

An insurance company is under no legal obligation to modify their policies to comply with FMLA. The employer is legally responsible to maintain health insurance and restore all benefits to employees upon their return from leave.

If you have any further questions, please feel free to contact me at (202) 219-8412.

Sincerely,

J. Dean Speer
Director, Division of Policy and Analysis

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

U.S. Department of Labor
Employment Standards Administration
Wage and Hour Division
Washington, D.C. 20210

October 8, 1993 **FMLA-7**

Dear ***Name****,

Thank you for your letter to Assistant Secretary Geri Palast, Office of Congressional and Intergovernmental Affairs, regarding Your constituent, ***Name**** concerns about the Family and Medical Leave Act of 1993 (FMLA).

Name* wants to know if volunteers are counted as employees when determining entitlement to benefits under FMLA. Only those employee's whose name appears on the employer's payroll will be considered employed each working day of the calendar week, and must be counted for coverage purposes, whether or not any compensation is received for the week. Volunteers do not meet the definition of "employee" and are not to be counted. If the non profit organization where ***Name**** is employed has a total of only 15 employees on the payroll in a 75 mile radius of the worksite, none of the employees would be eligible for FMLA benefits.

We hope that we have been responsive to your constituent's concerns and if we can be of further assistance, let us know.

Sincerely,

Charles E. Pugh
Assistant Administrator

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

U.S. Department of Labor
Employment Standards Administration
Wage and Hour Division
Washington, D.C. 20210

October 15, 1993 **FMLA-8**

Dear ***Name****,

This is in response to your inquiry on the Family and Medical Leave Act of 1993 (FMLA) and temporary help and leasing service companies.

You requested clarification of how the FMLA applies to joint employment relationships. Under the FMLA, where two or more businesses exercise control over the work or working conditions of an employee, the businesses may be considered "joint employers" for purposes of complying with the FMLA. Joint employers may be separate and distinct entities with separate owners, managers and facilities. Employees jointly employed by two employers must be counted by both employers in determining employer coverage and employee eligibility for leave

Section 825.106 of the FMLA Regulations, 29 CFR Part 825 (copy enclosed), discusses the factors to be considered in determining how joint employment relationships are treated under the FMLA. Joint employment relationships are not determined by single criterion, but rather the entire relationship is viewed totality.

In joint employment relationships under the FMLA, the "primary" employer is responsible to all its employees for giving the notices required by FMLA, providing FMLA leave, maintaining health benefits during FMLA leave, and restoring employees to their same or an equivalent position of employment upon the conclusion of FMLA leave. A "secondary" employer with a total of 50 or more employees, including all jointly employed employees, must comply with the prohibited acts provisions of the statute, as discussed in § 825.220 of the FMLA Regulations, which include prohibitions against interfering with an employee's attempt to exercise rights under the Act (including taking FMLA leave), or discharging or discriminating against an employee for opposing a practice that is unlawful under the FMLA. The factors for distinguishing a "primary" employer from a "secondary" employer in joint employment relationships include which one has the authority and responsibility to hire and fire employees, place them and assign their work, make the payroll, and provide employment benefits.

Based on the information in your letter, it appears that if ***Name**** employs 50 or more employees during 20 or more calendar workweeks in the current or preceding calendar year, ***Name**** would be a covered "employer" within the meaning of the FMLA, with the responsibilities of a "primary" employer as described in §825.106(e) of the FMLA regulations. Eligible employees of ***Name**** -- those who have worked for ***Name**** for at least 12 months and for at least 1,250 hours over the previous 12 months, who work at a worksite where at least 50 employees are employed within 75 miles (including jointly employed employees) -- are entitled to take FMLA leave for the reasons stated in the law. Eligible employees are also entitled to have their health benefits maintained by the employer during leave as if they continued to work, and to be restored to their same or an equivalent position of employment at the and of the leave.

A primary employer must meet all of its obligations under the FMLA even when facing a lack of cooperation by a secondary employer. The obligations are statutory. If the position of employment which the employee held when FMLA leave commenced still exists (whether or not a temporary replacement was hired), that same position is the one to which the employee returning on FMLA leave should be restored, or to an equivalent position with equivalent pay, benefits, and other terms and conditions of employment. If an employee is ready to be reinstated after an FMLA leave, the employer cannot require the employee to take additional FMLA leave on an intermittent or reduced leave schedule basis instead of being restored to equivalent employment. Sending the individual on the next available interview similarly would not comply with FMLA, unless the employer can show that the employee would not otherwise have been employed when reinstatement is requested (e.g., that the employee would have been laid off if the employee had continued to work instead of taking FMLA leave). An employer has the burden of proving that an employee would not otherwise have been employed the time the employee returning from FMLA leave seeks reinstatement.

I hope that you find the foregoing information responsive to your inquiry. If we may be of further assistance, please do not hesitate to contact us again.

Sincerely,

J. Dean Speer
Director, Division of Policy and Analysis

Enclosure

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

U.S. Department of Labor
Employment Standards Administration
Wage and Hour Division
Washington, D.C. 20210

October 18, 1993 **FMLA-9**

Dear ***Name****,

This is in response to your inquiry under the Family and Medical Leave Act of 1993 (FMLA) regarding the applicability of the FMLA to employees working in Russia.

The Department of Labor administers the FMLA only with respect to employees employed in the United States, including the District of Columbia and any territory or possession of the United States. Therefore, employees stationed full time overseas in a foreign country on one and two year employment contracts would not be eligible for the benefits of the FMLA while working overseas.

I hope this is responsive to your inquiry. If you have further questions, please do not hesitate to contact us again.

Sincerely,

J. Dean Speer
Director, Division of Policy and Analysis

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

U.S. Department of Labor
Employment Standards Administration
Wage and Hour Division
Washington, D.C. 20210

October 27, 1993 **FMLA-10**

Dear ***Name****,

This is in reply to your letter to the Administrator, Wage and Hour Division, U.S. Department of Labor, asking questions regarding the application of the Family and Medical Leave Act of 1993 (FMLA) and its relationship to the New Jersey family leave law.

One of the three tests for eligibility of an employee to take FMLA leave provided in section 825.110(a) of Regulations, 29 CFR Part 825, is that the employee "is employed at a worksite where 50 or more employees are employed by the employer within 75 miles of that worksite." As provided in section 825.111(a)(2), for employees with no fixed worksite, the "worksite" is the site to which they are assigned as their home base, from which their work is assigned, or to which they report. Under Scenario I in your letter, the sales representatives reports to the employer headquarters in New Jersey where her supervisory management is located, which for FMLA purposes would be her "worksite." If there are 50 or more employees within 75 miles of that worksite, this sales representative is eligible to take FMLA leave.

Under Scenario 2, the sales representatives "worksite" would be the headquarters in New Jersey and he would be eligible to take FMLA if there are 50 or more employees within 75 miles of that worksite.

The sales representative in Scenario 3, would also be eligible to take leave, provided the 50-employee test noted above is met. Whether an employer is a covered employer under State law is not relevant to any determination of coverage under FMLA. As provided in section 825.701(a), nothing in supersedes any provision of State or local law which provides greater family or medical leave rights. The Department of Labor, however, will not enforce State family leave laws, and States may not enforce the FMLA.

The Department did prepare some side-by-side comparisons of FMLA and various State family leave laws to assist the public, with the aid of the State governments. With respect to the New Jersey family leave law, we consulted with the New Jersey Division on Civil Rights and entries describing the State law were made and/or edited with in accordance with information furnished by the State. The Department of Labor does not enforce or interpret the application of State laws.

We have again contacted the New Jersey Division of Civil Rights regarding the two issues you raised. We have been informed that the New Jersey law specifically permits the use of family and medical leave to care for a seriously ill father-in-law or mother-in-law. There is no requirement for a parent-child relationship as described in your letter. Based upon this information, we believe this entry on the side-by-side comparison of the FMLA and New Jersey law is correct. On intermittent leave, we agree with you that the New Jersey and Federal laws contain similar provisions, and our publication will be revised to reflect this comparability.

If you need further clarification of the requirements of the New Jersey law, it is suggested that you contact Linda Wong Peres, Assistant Director of the Policy Bureau, New Jersey Division on Civil Rights, at (609) 984-7091.

Sincerely,

J. Dean Speer
Director, Division of Policy and Analysis

cc: New Jersey Division on Civil Rights

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

U.S. Department of Labor
Employment Standards Administration
Wage and Hour Division
Washington, D.C. 20210

November 2, 1993 **FMLA-11**

Dear ***Name****,

This is in response to your letter in which you expressed concerns regarding certain aspects of the regulations implementing the Family and Medical Leave Act of 1993 (FMLA). You relate your experience regarding an employee who had to take emergency leave. The employee was involved in a number of important projects and was unable to update company management on the status of projects prior to taking leave. You were advised by a Wage and Hour Division official that the employee had no obligation to provide information to you regarding the project while she was on leave.

You also express concern regarding the employer's obligation to maintain group health insurance coverage during a period of FMLA leave and restore the employee to the same or equivalent job and the same level of benefits the employee had when leave began, even though the employee failed to make the co-payments for insurance while on leave. You believe the insurance carrier should have some responsibility in this requirement.

Clearly, it is the intent of Congress in the statute and Secretary of Labor Reich in issuing implementing regulations that the implementation of the FMLA be a cooperative and beneficial exercise for both the employer and the employee. The regulations recognized the need for effective communications between the employee and employer in making arrangements for continuation of work in progress when the need to take FMLA leave became known. The Preamble to the regulations states, "Employees needing family or medical leave, even when not risking the possible loss of their job or health insurance, experience other kinds of stress unrelated to the event occurring in their personal lives. Employers report that many employees fear that leaving their job for some period of time will affect their employer's business, that their work will not get done or be done correctly, or that they will return to an accumulated backlog of work. Employers have found that it is extremely important to involve the employees in planning for how their work will get done during their absence. This effort helps relieve both the employer's and the employee's anxieties in this regard, and fosters cooperation among co-workers who may be called on to help cover the unit's work during the absence."

No attempt was made in the implementing regulations to address every possible fact situation that might arise regarding the taking of leave. The purpose of the regulations was to provide minimal guidelines to both employers and employees regarding the taking of FMLA leave. It was intended that in those situations not specifically addressed by the regulations, the employer and employee cooperatively resolve the issue to their mutual benefit. While the regulations do not specifically permit the employer to contact the employee during FMLA leave to inquire regarding work related matters, there also is no specific prohibition regarding such contact.

In the situation you describe, that the employee needed emergency leave immediately, there certainly was no time to exchange information regarding that employee’s project assignments. It would be entirely appropriate to grant the emergency leave and request the employee to contact the supervisor as soon as convenient to discuss the status or progress of her work while she was taking FMLA leave.

With regard to the maintenance of group health insurance benefits, the statute makes no provision for any regulation regarding the insurance industry. The statute and the regulations make the employer responsible to maintain group health insurance during periods of FMLA leave and the restoration of all benefits when the employee returns from leave. In consideration of an employer's potential dilemma when the employee fails or is unable to make co-payments for premiums during unpaid leave, the regulations provide that the employer may unilaterally decide to pay the premiums for not only group health insurance but also other benefits such as life insurance, disability insurance, etc., thereby avoiding any lapse in coverage.

This provision enables the employer to meet the obligations to restore full benefits upon the employees return to work and avoid any requirements of the insurance carrier that may be imposed in the event coverage is allowed to lapse such as waiting periods, requirements to submit for a physical, or limitations that might be imposed regarding a new preexisting condition of the employee. The regulations further provide that the employer may recover any payments made on behalf of an employee during a period of unpaid leave to cover the employee's share of the premiums. Here again, the regulations do not provide specific guidance regarding the recovery by the employer of the employees share of premiums, but it is intended the employer and employee make arrangements for repayment that do not unduly impact the employee's financial condition such as periodic payroll deductions.

Hopefully this has been responsive to your inquiry. Should you need further assistance please let me know.

Sincerely,

J. DEAN SPEER
Director, Division of Policy and Analysis

cc: FMLA Coordinator Denver RO

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

U.S. Department of Labor
Employment Standards Administration
Wage and Hour Division
Washington, D.C. 20210

This letter is under review in light of issues raised by the U.S. Supreme Court in Ragsdale v. Wolverine World Wide, Inc. and other judicial decisions. It may be superceded by FMLA2002-5-A (http://www.dol.gov/esa/whd/opinion/FMLA/2002_08_06_5A_FMLA.htm).

November 2, 1993 **FMLA-12**

Dear ***Name****,

This is in response to your inquiry regarding the responsibility of an employer to designate and notify an employee that leave taken by the employee is being charged against the employee's entitlement pursuant to the provisions of the Family and Medical Leave Act of 1993 (FMLA).

Regulations 29 CFR Part 825.208 provide that an employer may designate paid leave taken by an employee as FMLA leave as soon as the employer has knowledge that the purpose of the leave is for an FMLA reason. This section further provides that the designation should be made before the leave is taken or before an extension of leave is granted, unless the employer does not have sufficient information as to the reason for the leave until after the leave commences. Under no circumstances may the leave be designated after the leave has been completed.

You provide two examples involving an employee who takes leave for maternity. Both leaves begin before the effective date of the FMLA (August 5, 1993). In the first example, the employer has a paid maternity leave policy and in the second the employee takes sick leave. In the second example the employee requests and receives approval for an extension of sick leave. In both examples you state that all notices required by § 825.301(c) have been given. In both examples, the employer does not designate the leave as FMLA leave until near the date the employee is to return to work. You ask if the employer may retroactively designate the leave as leave.

If the employer has given the notices required by § 825.301(c) as you stated in the examples it would not be necessary to deal with retroactive designation. This section of the FMLA regulations requires the employer to provide specific notifications to the employee which are peculiar to that employee who has given notice of the need to take FMLA leave. One of those notifications is whether the leave is FMLA leave.

Clearly, it is the intent of the regulations that the employee be notified as soon as possible after the employer has decided to designate leave as FMLA leave. This gives the employee needed information to plan how best to manage the family or medical event. In the two examples given, assuming the employer did not comply with the notice requirements of § 825.301, retroactive designation could not be made beyond the date the employer notified the employee of the designation. See §825.208(b) and (c).

Hopefully this has been responsive to your request. If you have further questions please contact J. Dean Speer of my staff at telephone (202) 219-8412.

Sincerely,

MARIA ECHAVESTE
Administrator

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

U.S. Department of Labor
Employment Standards Administration
Wage and Hour Division
Washington, D.C. 20210

November 2, 1993 **FMLA-13**

Dear ***Name****,

This is in response to your inquiry regarding certain provisions of the Family and Medical Leave Act of 1993 (FMLA). It has been the ***Name**** policy to provide an employee the option of retaining full medical coverage during leave or accepting 50% of the cost of in lieu in the form of deferred compensation. You ask if the ***Name**** must continue to offer the deferred compensation during periods of FMLA leave.

The FMLA requires the maintenance of group health insurance coverage by the employer during any period of FMLA leave. Such coverage must be maintained at the same level and in the same manner as existed on the date leave commences. Consequently, the employer may not offer the employee an option that does not provide for maintenance of coverage during any period of leave. Under these circumstances the decision to continue paying deferred compensation to an employee would be at the sole discretion of the employer assuming such payment is not the subject of a collective bargaining agreement.

For your information the publications you requested are enclosed.

Sincerely,

J. DEAN SPEER
Director, Division of Policy and Analysis

Enclosures

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

U.S. Department of Labor
Employment Standards Administration
Wage and Hour Division
Washington, D.C. 20210

November 3, 1993 **FMLA-14**

Dear ***Name****,

During a recent meeting in which the provisions of the Family and Medical Leave Act of 1993 (FMLA) was discussed, a question was posed regarding the obligation of an employer whose employees are covered by a multi-employer benefit plan to maintain group health insurance during a period of unpaid leave. The question arose in the context that the employer had ceased all operations on a particular construction project for the winter and all employees had been laid off. This action takes place during a period when an employee is on unpaid FMLA leave.

The FMLA generally provides that an employer must maintain group health insurance for an employee taking FMLA leave in the same manner and at the same level as was provided on the date leave commences. During the discussions in Congress leading up to the passage of the FMLA, congress specifically addressed the special circumstances relating to employees covered by a multi-employer plan, as reflected in the legislative history.

An employer whose employees are provided benefits through the operation of a multi-employer plan must continue to make contributions during FMLA leave unless the employer demonstrates that the employee would not otherwise have been employed. Coverage by the health plan must continue at the level coverage would have been continued if the employee continued to be employed, unless it is demonstrated that the employee would not otherwise have been employed by the employer or any other member employer of the plan. An employer is otherwise relieved of making contributions to the plan on behalf of an employee taking unpaid FMLA leave if the plan expressly provides for some other method of maintaining coverage for a period of leave required by the FMLA.

In direct response to the question, if the employer whose employees receive benefits pursuant to a multi-employer plan ceases activity and all employees on that job are laid off the employer may discontinue contributions on behalf of an employee taking unpaid FMLA leave if the employer can demonstrate the employee would not have continued to be employed by either the employer or another employer who is a member of the same plan.

Of course, if the employer closes one construction site, lays off all employees, but moves those employees to another site to continue employment, the employer must continue to make contributions on behalf of the employee taking FMLA leave as it is reasonable to assume the employee would have continued employment at the alternate site as well.

Hopefully this has been responsive to the question. If further assistance is needed please contact me at telephone 219-8412.

Sincerely,

J. DEAN SPEER
Director, Division of Policy and Analysis

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

U.S. Department of Labor
Employment Standards Administration
Wage and Hour Division
Washington, D.C. 20210

November 5, 1993 **FMLA-15**

Dear ***Name****,

This is in response to your request for a legal opinion under the Family and Medical Leave Act of 1993 (FMLA) concerning lodgings furnished to resident manager employees who take FMLA leave.

You asked whether an employer (covered by FMLA) has an obligation to continue furnishing lodging to an "eligible employee" who resides on the employer's premises and who is unable to work because of a serious medical condition or some other circumstance which would qualify the employee for FMLA leave. Could the employer require the employee to vacate the premises during the term of the FMLA leave? We would construe an employer's attempt to require an FMLA-eligible employee to vacate the employer-provided lodging during the term of an FMLA leave period as an attempt to interfere with or restrain an employee's attempt to exercise rights under the FMLA to take leave for a qualifying reason under the law. This is a direct violation of § 105 of the Act and § 825.220 of the FMLA Regulations, 29 CFR Part 825.

If you have any further questions, please do not hesitate to contact ***Name**** at (202) 219-8412.

Sincerely,

Maria Echaveste
Administrator

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

U.S. Department of Labor
Employment Standards Administration
Wage and Hour Division
Washington, D.C. 20210

November 15, 1993 **FMLA-16**

Dear ***Name****,

This is in response to your letter expressing concerns regarding provisions of the Family and Medical Leave Act of 1993 (FMLA). You observe the regulations contain no provisions for dealing with employees who fraudulently obtain leave under the FMLA. You suggest the requirement for medical certification is ineffective in addressing employee abuse due to the minimal information required in the certification, particularly with regard to the care of an immediate family member with a serious health condition.

Contrary to your observations, the regulations do provide remedies for employers with regard to employees who fraudulently obtain FMLA leave. In section 825.312(g) the regulations state "An employee who fraudulently obtains FMLA leave from an employer is not protected by FMLA's job restoration or maintenance of health benefits provisions."

The medical certification requirements of the regulations are intended to provide the employer with medical evidence of the existence of a serious health condition for either the employee or an immediate family member. The greatest deterrent to abuse is the fact that the leave is unpaid. Further, if the employer has reason to question the accuracy of the certification from the employee's health care provider, provision is made for a second medical certification from a doctor of the employer's choice, and, if necessary, a third opinion from a doctor who is mutually agreeable to the employer and employee. The fact that the immediate family member is in a foreign country does not prohibit second and third opinions. Not only must the doctor certify that a serious health condition exists, but must provide an estimate of the duration of the serious health condition to insure the employee does not take more leave than necessary.

It is not required that the doctor certify that the employee is the only person that can provide the third party care for an immediate family member; only that third party care is required.

It was anticipated that in many instances, the employee's decision would be a financial one. The choice would be the ability to pay for professional medical care (e.g., a home health nurse) round the clock, or in those instances where there is no requirement to administer medication, the employee must provide the care. If the immediate family member must regularly visit the doctor and is unable to drive an automobile or take public transportation due to their health condition, does the employee hire transportation, or take FMLA leave and provide the transportation themselves. How do we measure the psychological benefit to a child whose mother is able to be present during a stay in the hospital?

Again, with regard to the employee working on another job while on leave, the regulations address this possibility. Section 825.312(h) provides for the employer to apply existing policies with regard to outside or supplemental employment.

It seems most of your concerns have been addressed by the implementing regulations. Hopefully this has been responsive to your inquiry. Should you need further assistance please let me know.

Sincerely,

J. DEAN SPEER
Director, Division of Policy and Analysis

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

U.S. Department of Labor
Employment Standards Administration
Wage and Hour Division
Washington, D.C. 20210

November 15, 1993 **FMLA-17**

Dear ***Name****,

This is in response to your request for an advisory opinion under the Family and Medical Leave Act of 1993 (FMLA) regarding mandatory "modified" or "light duty" job programs for temporarily disabled employees.

You ask if an employer can require a temporarily disabled "eligible employee," who seeks FMLA leave for a serious health condition that makes the employee unable to perform the employee's position, to accept an alternative position (with similar pay and benefits) that has been modified to eliminate the essential functions which the employee cannot perform. If so, you ask if the employer can deny the requested FMLA leave and require the employee's presence at work in the modified job.

The FMLA Regulations, 29 CFR Part 825, at § 825.702(d), provide that if FMLA entitles an employee to leave, an employer may not, in lieu of FMLA leave entitlement, require the employee to take a job with a reasonable accommodation. Thus, an employer could not require an employee to work in a restructured job instead of granting the employee's FMLA leave request in the example you posed in your inquiry.

FMLA does not prohibit an employer from accommodating an employee's request to be restored to a different shift, schedule, or position which better suits the employee's personal needs on return from leave [see § 825.215(e)(4)], but the employee cannot be induced by the employer to accept a different position against the employee's wishes.

As noted in your letter, § 825.204 of the regulations addresses temporary transfers to alternative positions with equivalent pay and benefits for employees who request intermittent leave or leave on a reduced leave schedule for planned medical treatment, including for a period of recovery from a serious health condition.

Sincerely,

Maria Echaveste
Administrator

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

U.S. Department of Labor
Employment Standards Administration
Wage and Hour Division
Washington, D.C. 20210

November 15, 1993 **FMLA-18**

Dear ***Name****,

This is in response to your letter requesting clarification of certain provisions of the Family and Medical Leave Act of 1993 (FMLA). You specifically question the provision in the regulations that requires the employee to work at least 1,250 hours during the 12-month period immediately preceding the date leave commences in order to be eligible for leave. You consider compensable hours (including time spent on some form of paid leave) to be the same as time actually worked.

In developing the FMLA, Congress specifically addressed the issue of the 1,250 hours work time in the legislative history to the statute. The Congress discussed this provision and relied upon the language contained in 29 CFR Part 785 as a basis for making this determination. 29 CFR Part 785 is a publication entitled "Hours Worked" and relates to The Fair Labor Standards Act (FLSA) (copy enclosed). This publication is also referenced in the FMLA regulations. The purpose of the definitions in Part 785 is to enable an employer to determine the number of hours worked by an employee (as opposed to non work time) for which the employer must meet the monetary requirements of FLSA. Part 785 does not include time spent on paid or unpaid leave as hours worked, consequently these hours are not counted in determining the 1,250 hour eligibility test for an employee under FLSA.

Hopefully this has been responsive to your inquiry. Should you need further assistance, please contact ***Name**** of my staff at telephone (202) 219-8412.

Sincerely,

Maria Echaveste
Administrator

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

U.S. Department of Labor
Employment Standards Administration
Wage and Hour Division
Washington, D.C. 20210

December 6, 1993 **FMLA-19**

Dear ***Name****,

This is in response to your inquiry regarding certain provisions of the Family and Medical Leave Act of 1993 (FMLA). ***Name**** plan allows employees who are covered by medical insurance from another source to receive a weekly cash supplement in lieu of insurance. You ask if the company must continue the cash supplement during a period of leave.

Pursuant to the statute and the regulations an employer is required only to maintain a group health insurance benefit during a period of FMLA leave. Consequently, there is no requirement to continue any cash supplement paid in lieu of health insurance.

Hopefully this has been responsive to your inquiry.

Sincerely,

J. DEAN SPEER
Director, Division of Policy and Analysis

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

U.S. Department of Labor
Employment Standards Administration
Wage and Hour Division
Washington, D.C. 20210

December 7, 1993 **FMLA-20**

Dear ***Name****,

This is in response to your inquiry and our telephone conversation regarding certain provisions of the Family and Medical Leave Act of 1993 (FMLA).

Name* currently has an employee on FMLA leave. During the leave the Thanksgiving, Christmas and New Year holidays will occur. The employee is substituting paid sick and vacation leave for the unpaid FMLA leave. It is the ***Name**** policy not to grant holiday pay for any employee who takes a personal leave or educational leave. You ask if the employee is entitled to holiday pay for the three holidays while on FMLA leave.

During our telephone conversation you stated that the personal leave and educational leave you referenced in your letter are forms of unpaid leave. You were not sure what the ***Name**** policy is regarding holiday pay during periods of paid leave such as vacation.

If the employee is entitled to receive holiday pay while on paid leave (e.g., vacation leave) the employee is entitled to holiday pay when the paid leave is being substituted for unpaid FMLA leave. In accordance with the ***Name**** policy, the employee would not be entitled to holiday pay when the employee is taking unpaid FMLA leave. As we discussed, if the employee is entitled to holiday pay while substituting paid leave for unpaid leave, the fact the employee received pay for one or more days in the form of holiday pay would not extend the employee's leave entitlement. For example, if the employee is paid holiday pay for one day, the employee does not then receive 12 weeks and one day of FMLA leave. The entitlement is still 12 weeks.

Hopefully this has been responsive to your inquiry. If I may be of further assistance you may reach me at (202) 219-8412.

Sincerely,

J. DEAN SPEER
Director, Division of Policy and Analysis

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

U.S. Department of Labor
Employment Standards Administration
Wage and Hour Division
Washington, D.C. 20210

December 7, 1993 **FMLA-21**

Dear ***Name****,

This is in response to your letter to Lynn Martin, former Secretary of Labor. I am answering on behalf of the current Secretary of Labor, Robert Reich.

In your letter, you express the view that the Family and Medical Leave Act (FMLA) should cover you or other employees who wish to care for grandparents with serious health conditions as well as others who are not parents, children or spouses but may be dependent on an employee.

Your efforts to assure care for your grandmother and similarly situated persons via FMLA is understood and appreciated. However, the Congress did not provide FMLA coverage for employees caring for persons other than a biological parent or someone who is in loco parentis, in addition to a spouse or child. Accordingly, any change in the law to broaden coverage in the way you suggest would require action by Congress.

Thank you for writing and sharing your views on these matters.

Sincerely,

J. Dean Speer
Director, Division of Policy and Analysis

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

U.S. Department of Labor
Employment Standards Administration
Wage and Hour Division
Washington, D.C. 20210

December 9, 1993 **FMLA-22**

Dear ***Name****,

This is in response to your inquiry regarding certain provisions of the Family and Medical Leave Act of 1993 (FMLA). You inquire regarding the status of ***Name**** as one employer or multiple, individual employers for purposes of coverage by FMLA.

Name* is a holding company consisting of five different divisions, which are decentralized. The five divisions employ 4,500 employees located throughout the United States. The five divisions are: ***Name****, ***Name****, ***Name****, ***Name****, and ***Name****. The only common management is the three top officers of the Company located in ***Name****. ***Name**** owns all divisions and approves all financial goals.

Regulations 29 CFR Part 825.104(c) provides that, "normally the legal entity which employs the employee is the employer under FMLA. Applying this principle, a corporation is a single employer rather than its separate establishments or divisions." Consequently, ***Name**** is a single employer for purposes of coverage based upon the information you provided and the provision of the regulation. An employee would be eligible for FMLA leave if the employee is employed at a worksite which has 50 or more employees at or within 75 miles of the worksite. The 50 employee count would include employees of any of the divisions of ***Name****.

Hopefully this has been responsive to your inquiry. Should you need further assistance please contact ***Name****, a member of my staff at (202) 219-8412.

Sincerely,

Maria Echaveste
Administrator

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

U.S. Department of Labor
Employment Standards Administration
Wage and Hour Division
Washington, D.C. 20210

December 28, 1993 **FMLA-23**

Dear ***Name****,

This is in response to your letter to ***Name**** of my staff regarding the requirement for employers to pay employees' health care premiums under the Family and Medical Leave Act of 1993 (FMLA).

The FMLA and its implementing regulations, 29 CFR Part 825, require that employers maintain an "eligible" employee's coverage under any group health plan during any period of FMLA leave on the same conditions as coverage would have been provided if the employee had worked continuously during the leave. This means that, if an employer normally pays a portion of an employee's group health plan premiums prior to the employee taking FMLA leave, the employer must continue to pay the employer share of the premiums during the FMLA leave at the same rate, i.e., as if the employee continued to work instead of taking the leave. The employer cannot require an employee who takes FMLA leave to pay more for maintaining group health insurance during the FMLA leave than the employee normally pays when working.

Any policy adopted before FMLA became effective by employers that are subject to FMLA which required employees on unpaid leave to pay the entire premium for health insurance in such cases must be revised to comply with this requirement of the FMLA. Section 825.210(c)(4) of the FMLA regulations addresses the employer's right to collect the employee's portion of health plan premiums during a period of FMLA leave, but at the same rate that the employee would normally pay while working as required by the other sections of the regulations.

Sincerely,

J. Dean Speer
Director, Division of Policy and Analysis

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

U.S. Department of Labor
Employment Standards Administration
Wage and Hour Division
Washington, D.C. 20210

January 6, 1994 **FMLA-24**

Dear ***Name****,

This is in reply to your letter of December 14 on behalf of ***Name**** concerning the Family and Medical Leave Act of 1993 (FMLA). Your letter has been referred to the Wage and Hour Division for reply as this office has primary administration and enforcement responsibilities under Title One of FMLA for all private, state and local government employees and some federal employees, including employees of the United States Postal Service.

The FMLA, which became effective for most employees on August 5, 1993, allows up to 12 weeks of unpaid, job-protected leave in a 12-month period—with health insurance coverage maintained during the leave—to eligible employees for specified family and medical reasons. If a collective bargaining agreement (CBA) was in effect on that date, FMLA becomes effective on the expiration date of the CBA or February 5, 1994, whichever is earlier.

Employers are covered under FMLA if they have employed at least 50 employees during 20 or more calendar workweeks in the current or the preceding calendar year. Employees are eligible under FMLA if they have worked for a covered employer for at least 12 months, have worked at least 1,250 hours during the 12 months preceding the start of leave, and are employed at a worksite where the employer employs at least 50 employees within 75 miles.

Unpaid FMLA leave must be granted to an eligible employee for any of the following reasons: (1) for birth of a son or daughter, and to care for the newborn child; (2) for placement with the employee of a son or daughter via adoption or foster care; (3) to care for the employee's spouse, son or daughter, or parent, who has a serious health condition; and (4) for a serious health condition that makes the employee unable to perform his/her job. Pursuant to Regulations 29 CFR 825.220(d), employees cannot, and an employer is prohibited from inducing an employee to, waive their rights under FMLA.

Section 104(a)(2) of the Act stipulates that the taking of FMLA leave will not result in the loss of any employment benefit accrued prior to the date on which the leave began. Section 104(a)(3) lists certain limitations for employees on return to their jobs from FMLA leave and provides that such employees are not entitled to the accrual of any seniority or employment benefits during any period of FMLA leave. Regulations 29 CFR 825.215(d)(2), reiterates this provision by stating that employees may, but are not entitled to, accrue any additional benefits or seniority during unpaid FMLA leave. Benefits accrued at the time leave began (e.g., paid vacation, sick or personal leave to the extent not substituted from FMLA leave) must be available to an employee upon return from leave. If ***Name**** is on unpaid FMLA leave, the employer's position that this employee is not eligible to accumulate sick leave would be consistent with the Act and regulations as long as all employees on an unpaid leave status do not accrue sick pay. If an employee on leave without pay would otherwise be entitled to full benefits, the same benefits would be required to be provided to the employee on unpaid FMLA leave. To do otherwise would be considered a discriminating action by the employer against an employee on FMLA leave, which is prohibited (see Regulations 29 CFR 825.220(c)).

If I may be of further assistance to you, please do not hesitate to contact me.

Sincerely,

Daniel F. Sweeney
Deputy Assistant Administrator

cc: Washington, D.C., Office

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

U.S. Department of Labor
Employment Standards Administration
Wage and Hour Division
Washington, D.C. 20210

January 10, 1994 **FMLA-25**

Dear ***Name****,

This is in response to your inquiry regarding the application of the Family Medical Leave Act of 1993 (FMLA) to long term disability insurance policies.

FMLA provides that "eligible" employees may take up to 12 workweeks of job protected leave in any 12 month period for the birth or placement of a child for adoption or foster care; to care for a child, spouse or parent with a serious health condition; or for the employee's own serious health condition that makes the employee unable to work. To be "eligible" under FMLA, an employee must have worked for the employer for at least 12 months and for at least 1,250 hours in the previous 12 months, and must work at a location where the employer employs at least 50 employees within 75 miles. Employers covered by the law are required to maintain an eligible employee's group health benefits during FMLA leave under the same conditions as coverage would have been provided if the employee had worked continuously during the leave.

In addition, the use of FMLA leave cannot result in an employee losing any employment benefit that accrued before the start of the employee's leave. Accordingly, upon return from FMLA leave, the employee is entitled to be restored to the same employment position which the employee held when the leave commenced, or to an equivalent position with equivalent benefits, pay, and other terms and conditions of employment. "Equivalent benefits" under FMLA means that benefits must be resumed when an employee returns from leave in the same manner and at the same levels as were provided when the leave began, without any requirement that the employee re-qualify for any benefits which the employee enjoyed before the start of the leave (e.g., without any qualifying period, physical examination, exclusion of pre existing conditions, etc.). Thus, in some cases, it may be advantageous for an employer to elect to maintain other benefits in addition to group health benefits, such as life insurance, disability insurance, etc., by paying the employee's share of premiums during periods of FMLA leave to ensure that the employer can meet the statutory responsibility to provide equivalent benefits when the employee returns from leave. The employer is entitled in such cases to recover the premium paid on the employee's behalf to maintain benefits coverage during the FMLA leave period.

You asked how the foregoing provisions would apply to an employee who has satisfied the pre existing conditions limitation period for a particular condition, and is not considered to have a preexisting condition when the employee commences FMLA leave. While on leave, the employee has no disability coverage and suffers from an entirely different condition. Upon return from leave, you question whether a new pre existing conditions limitation period for that particular condition can be imposed.

Under FMLA, an eligible employee must be fully restored upon return from FMLA leave to the same benefits coverage and may not be required to meet any qualifications requirements imposed by the plan to re-qualify for any benefits the employee enjoyed before the FMLA leave began, such as any new pre existing condition waiting period. (See 29 CFR 825.215(d)(1).)

Secondly, you asked how FMLA would address an employee who had only partially satisfied the pre existing conditions limitation period for a particular condition, took leave, then suffered from a separate condition. Could a new pre existing conditions limitation period be imposed for the new condition, or would the employee receive partial credit for both conditions for the amount of time satisfied prior to starting the leave? An employee who has partially satisfied the pre existing conditions limitation period prior to commencing FMLA leave need only satisfy the remainder upon return from leave. A new pre existing conditions limitation period could not be imposed in the example you cited. The employee must receive partial credit toward both conditions for the amount of time satisfied prior to starting the leave.

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, plans may not impose new pre existing conditions limitation periods or "start the limitation period clock ticking again" after each FMLA leave as you suggested in your letter.

Sincerely,

Maria Echaveste
Administrator

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

U.S. Department of Labor
Employment Standards Administration
Wage and Hour Division
Washington, D.C. 20210

January 14, 1994 **FMLA-26**

Dear ***Name****,

This is in reply to a request from ***Name**** for clarification of provisions under the Family and Medical Leave Act of 1993 (FMLA), that allow an employer to recoup group health plan premiums in certain cases from employees who take FMLA leave.

The request for clarification states that a city employee was disabled from a work related injury and began receiving workers compensation benefits for an extended period before FMLA's August 5 effective date. Once those benefits ended, the employee applied for a disability pension. While the disability pension request was pending, the employee requested and was granted FMLA leave that commenced on FMLA's August 5 effective date. Before the 12 week FMLA leave entitlement was exhausted, the City granted the disability pension request, with benefits payable retroactive to May 17, 1993, the day after the workers' compensation benefits expired.

Under City policy, an employee receiving a disability pension does not qualify for a health insurance subsidy until reaching minimum age and length of service criteria, which this particular employee did not meet. The City is not sure if the individual was even eligible for FMLA leave while the disability retirement application was pending. However, inasmuch as FMLA leave was granted, the City believes that it is entitled to recover the health premiums paid for this individual for the FMLA leave period because the subsequent determination to grant pension benefits "preempts" the employee's FMLA leave. The City's view is that the FMLA leave retroactively becomes inoperative on the effective date assigned to the pension benefits, and that a pension and FMLA leave cannot overlap. The employee's union challenges the City's interpretation on the basis that the employee had a serious health condition that precluded return to work when the employee requested, and was granted, FMLA leave, and on the basis that the employee's FMLA leave request was granted by the City while it considered the employee to still be on active status.

Initially, we must point out that if a collective bargaining agreement (CBA) in effect on August 5, 1993, covered this particular employee, FMLA does not take effect with respect to this employee until the date the CBA expires or February 5, 1994, whichever is earlier. (See § 405(b)(2) of the FMLA and § 825.700(c) of the FMLA regulations, 29 CFR Part 825). This statutory delay in FMLA's effective date applies only to employees covered by a CBA that is in effect on August 5, 1993.

If we assume that FMLA's effective date provisions result in FMLA applying to the fact situation described, we would answer your questions in the following manner. An employee is "eligible" for FMLA leave and other benefits if, on the date the employee requests FMLA leave, the employee: (1) works for a covered employer; (2) has worked for the employer for at least 12 months; (3) has worked for the employer for at least 1,250 hours in the previous 12 months; and (4) works at a location where at least 50 employees are employed by the employer within 75 miles. City governments are public agencies and "covered employers" under FMLA regardless of the number of employees employed, and all employees employed by the City government are included when determining if the 50-employees-employed within 75 miles test is met.

The period before FMLA's effective date must be considered when determining if an employee is "eligible." Under § 825.110(c) of the regulations, however, if an employee notifies an employer of the need for FMLA leave before the employee becomes eligible and the employer agrees to the request based on an assumption that the eligibility criteria will be met (or otherwise), the employer may not subsequently challenge the employee's eligibility. Further, under § 825.111(d), once the employer commits to an employee's eligibility after requesting FMLA leave, subsequent changes under the employer coverage or employee eligibility tests will not affect the employee's right to take FMLA leave (e.g., an employer cannot terminate employee leave that has already started if the number of employees employed later drops below 50). As discussed in the accompanying explanation included in the preamble to the Department's FMLA regulations published in the Federal Register on June 4, an employee

requesting FMLA leave needs the opportunity to make plans regarding the leave and both employer and employee benefit from knowing early whether or not an employee is going to be entitled to leave so that each can make appropriate plans. It is in their mutual interest to make this determination when the employee requests leave. (See 58 Fed. Reg. 31798; June 4, 1993). Once decisions are reached in this area, the regulations regard the parties bound by their commitments.

Accordingly, a City employee who is on a leave of absence pending a disability retirement who otherwise meets FMLA's eligibility criteria and who has a serious health condition that makes the employee unable to perform his or her job is eligible for FMLA's leave entitlements, including having their group health benefits maintained under the same terms and conditions as if the employee continued to work for the duration of the protected leave period. If the employee fails to return to work at the end of the employee's FMLA leave entitlement because of the continuation, recurrence, or onset of a serious health condition (or other circumstance beyond the employee's control), the employer cannot recover the premium paid (employer portion) for maintaining the employee's group health coverage during the FMLA leave. A decision subsequent to the granting of an FMLA leave request to grant pension benefits with a retroactive effective date for purposes of receiving pension benefits does not, in our view, "preempt" or extinguish in any way an employee's statutory rights under the FMLA.

I hope that this is responsive to your request. If additional information is required, please do not hesitate to contact me.

Sincerely,

J. DEAN SPEER
Director, Division of Policy and Analysis

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

U.S. Department of Labor
Employment Standards Administration
Wage and Hour Division
Washington, D.C. 20210

January 31, 1994 **FMLA-27**

Dear ***Name****,

This is in response to your inquiry to ***Name**** 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 antidiscrimination laws (such as the ADA), § 401(a) of the FMLA provides that [n]othing 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*." (Emphasis added.) 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.

Sincerely,

J. DEAN SPEER
Director, Division of Policy and Analysis

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

U.S. Department of Labor
Employment Standards Administration
Wage and Hour Division
Washington, D.C. 20210

January 31, 1994 **FMLA-28**

Dear ***Name****,

This is in response to your request for an opinion concerning the status of employees of the office of the Legislative Auditor of the State of Louisiana under the Family and Medical Leave Act of 1993 (FMLA).

Section 101(3) of the FMLA (29 U.S.C. § 2611(3)) defines the term "employee" for FMLA purposes as having the same meaning given that term in section 3(e) of the Fair Labor Standards Act (FLSA) (29 U.S.C. § 203(e)). Section 3(e)(2)(C)(i) and (ii)(V) of the FLSA exclude from the definition of employee" ... any individual employed by a State... who is not subject to the civil service laws of the State... and ... who ... is an employee in the legislative branch or legislative body of that State ... and is not employed by the legislative library of such State ..." The implementing FMLA regulations, 29 CFR Part 825, incorporate these statutory definitions in § 825.800 (see definition of "employee" included therein).

You indicate that the Office of the Legislative Auditor of the State of Louisiana is an agency of the legislative branch of the State, and that its employees are not subject to the civil service regulations of the State. Accordingly, based on FMLA's statutory provisions, employees of the Office of the Legislative Auditor would not be considered eligible "employees" within the meaning of the FMLA and would, therefore, not be subject to the provisions of the FMLA.

Sincerely,

J. DEAN SPEER
Director, Division of Policy and Analysis

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

U.S. Department of Labor
Employment Standards Administration
Wage and Hour Division
Washington, D.C. 20210

February 7, 1994 **FMLA-29**

Dear ***Name****,

We regret the delay in responding to your comments regarding the Family and Medical Leave Act (FMLA) regulations. Your letter was included in our official rulemaking record on the interim final FMLA regulations.

You asked if the intermittent leave provisions of FMLA supersede the Americans with Disabilities Act's (ADA) "essential functions" and "undue hardship" provisions. Initially, we would note that nothing in FMLA modifies or affects any Federal or State law prohibiting discrimination on the basis of disability, including the ADA. See § 825.702 of the FMLA regulations, 29 CFR 825. An employer covered by both statutes (FMLA and ADA) must, therefore, comply with whichever statute provides the greater rights to employees.

In your example, a full-time employee is diagnosed with a kidney disease. All health care providers determine that the employee needs dialysis treatments each Monday and Friday afternoon, which cannot be rescheduled. Attending to the dialysis treatments would make the employee unable to perform an essential job function (e.g., serve as security guard; take a machine reading; etc.), which duties also cannot be rescheduled or reassigned. The employer has no alternative job in which to place this employee that would better accommodate the employee's need for intermittent leave. You suggest that if the employee requests FMLA leave every Monday and Friday afternoon for the dialysis treatments and incurs no other need for FMLA qualifying leave, the employee's right to take job-protected leave under FMLA could last forever because the employee would never use 12 weeks of leave in any 12-month period.

You are correct in your analysis of FMLA's job protections in this case. FMLA entitles eligible employees to take leave because of a "serious health condition," as defined in § 825.114, that makes the employee unable to perform the functions of the employee's job. As discussed in § 825.117, employees who need to take FMLA leave intermittently or on a reduced leave schedule for such purposes must attempt to schedule their leave so as not to disrupt the employer's operations. In addition, an employer may assign an employee to an alternative position with equivalent pay and benefits that better accommodates the employee's need for intermittent leave or leave on a reduced leave schedule. If an employee is temporarily transferred to an alternative position to better accommodate the intermittent leave, the employee cannot be required to take more leave than is medically necessary. The rules for determining the amount of leave used when an employee takes leave intermittently or on a reduced leave schedule are discussed in § 825.205.

If the employee in your example is eligible for leave and cannot reschedule the leave because of medical necessity, and the employer has no alternative position available, the employee is entitled to take job-protected leave on an intermittent basis under FMLA until 12 workweeks of leave have been used in a 12-month period. If the employee never uses as much as 12 workweeks of FMLA leave in a 12-month period, the employee would never exhaust his or her statutory entitlement to take FMLA leave. As discussed in §825.220 of the FMLA regulations, an employer is prohibited from interfering with, restraining, or denying the exercise (or attempts to exercise) any rights provided by FMLA, and from discriminating against employees who use FMLA leave.

We hope that the foregoing information satisfactorily responds to your inquiry. Please note, however, that the FMLA does not diminish any greater family or medical leave rights that apply to employees under the terms of an applicable collective bargaining agreement or employer plan or policy, or applicable State law, nor does FMLA diminish an employer's obligations to comply with applicable Federal or State anti-discrimination laws. The above information is based strictly on our reading of the without regard to the possible applicability of any greater family or medical leave rights or anti-discrimination protections available under other Federal or State laws or employer plans or policies. The FMLA was not intended to discourage employers from adopting policies that provide greater family or medical leave benefits than

those provided by the FMLA. To obtain further information on Federal anti discrimination laws such as the ADA, we would encourage you to contact the nearest office of the U.S. Equal Employment Opportunity Commission.

Sincerely,

J. DEAN SPEER
Director, Division of Policy and Analysis

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

U.S. Department of Labor
Employment Standards Administration
Wage and Hour Division
Washington, D.C. 20210

March 18, 1994 **FMLA-30**

Dear ***Name****,

This is in response to your letter forwarding correspondence from ***Name**** about the application of the Family and Medical Leave Act of 1993 (FMLA) to certain multi-employer Welfare trusts.

The FMLA provides that "eligible" employees may take up to 12 workweeks of job-protected leave in any 12-month period for the birth or placement of a child for adoption or foster care; to care for a child, spouse or parent with a serious health condition; or for the employee's own serious health condition that makes the employee unable to work. To be "eligible" under the FMLA, an employee must have worked for the employer for at least 12 months and for at least 1,250 hours in the previous 12 months, and must work at a location where the employer employs at least 50 employees within 75 miles. Employers covered by this law are required to maintain an eligible employee's group health benefits during FMLA leave under the same conditions as coverage would have been provided if the employee had worked continuously during the leave. Upon return from FMLA leave, the employee is entitled to be restored to the same employment position which the employee held when the leave commenced, or to an equivalent position with equivalent benefits, pay, and other terms and conditions of employment.

To maintain health benefits coverage under multi-employer health plans for employees on FMLA leave, the employer would have to make adequate contributions on behalf of the employee as though the employee had been continuously employed for the duration of FMLA leave. If the multi-employer health plan contains an explicit FMLA provision for maintaining coverage, such as through "pooled contributions" by all employers party to the plan, the employer must make arrangements to ensure that up to 12 weeks of coverage in any 12-month period is maintained for employees on FMLA leave. An employee using FMLA leave cannot be required to use "banked" hours or pay a greater premium than the employee would have been required to pay if the employee had been continuously employed. (See Regulations § 29 CFR 825.211.)

How an employer ensures "adequate contributions" to maintain health benefits coverage on behalf of employees on FMLA leave is not addressed in the regulations. The regulations encourage plans to develop rules which would accommodate this FMLA requirement in the context of the situations in the particular industry. We are not familiar with the guidance referred to in ***Name**** letter that would prohibit the use of established reserves.

If I may be of further assistance to you, please do not hesitate to contact me.

Sincerely,

Daniel F. Sweeney
Deputy Assistant Administrator

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

U.S. Department of Labor
Employment Standards Administration
Wage and Hour Division
Washington, D.C. 20210

March 21, 1994 **FMLA-31**

Dear ***Name****,

This is in response to your letter forwarding correspondence from ***Name**** regarding the Family and Medical Leave Act of 1993 (FMLA). Specifically, ***Name**** is concerned with the Department's position with respect to an employee's entitlement to attendance, safety, or production bonuses upon returning to work after taking leave under the FMLA.

Name* begins her analysis with the question of the definition of employment benefits. Section 101(5) of the FMLA defines employment benefits to include "all benefits provided or made available to employees by an employer, including group life insurance, health insurance, disability insurance, sick leave, annual leave, educational benefits, and pensions..." The Department has found nothing in the legislation or the legislative history to indicate that this definition should be interpreted narrowly or that Congress intended the list in the statute to be exhaustive. Thus, the Department interprets this definition broadly to include all benefits, including attendance, safety, or production bonuses to which the employee would be entitled.

In enacting FMLA, Congress stated in Section 2, that one of the purposes of this law is to entitle employees to take reasonable leave for medical reasons, for the birth or adoption of a child, and for the care of a child, spouse, or parent who has a serious health condition. Section 105 of FMLA and section 825.220 of FMLA Regulations, 29 CFR Part 825, set forth certain protection to employees who exercise their rights under this law. The FMLA prohibits employers from interfering with, restraining, or denying an employee's rights under this law. Further, it is unlawful for any employer to discharge or in any other manner discriminate against any employee for opposing any practice made unlawful by this law. "Interfering with" the exercise of an employee's rights would include refusal to grant FMLA leave, or discouraging an employee from taking FMLA leave. An employer's denial of a bonus to an employee, who otherwise was qualified for the bonus except for taking FMLA leave, would be considered to be a violation of FMLA requirements pursuant to the referenced sections of the statute and regulations.

Bonuses premised on "perfect attendance" or "perfect safety," are rewards not for work or production, but for compliance with rules; i.e., they are the obverse of penalties for infractions of attendance or safety rules. These bonuses can be distinguished from bonuses tied to production, which require some positive effort on the employee's part at the workplace. To deny such bonuses to an employee returning from FMLA leave has the effect of interfering with the exercise of the employee's rights by discouraging the use of FMLA leave (Regulation 29 CFR 825.220(b)), as well as discriminating against such an employee (29 CFR 825.220(c)).

Name* expresses concerns with respect to the requirements of section 825.220(c) which states in part that "employers cannot use the taking of FMLA leave as a negative factor in employment actions, such as promotions or disciplinary actions; nor can FMLA leave be counted under "no fault" attendance policies." The Department does not find any conflict with this provision of the regulations and the position outlined by with respect to equivalent pay and benefits, i.e., sections 825.215(c) and (d). An employee is not automatically entitled to accrue benefits while on FMLA leave, nor can an employer use FMLA leave as a negative factor in employment actions.

To better illustrate how this policy would apply, each of ***Name**** examples are addressed below.

Example 1 - Upon return to work, which for purposes of FMLA would be an employee who returns to work from FMLA leave for at least 30 calendar days (section 825.213(b)), the employee in this example would be entitled to the full amount of the perfect attendance bonus provided that the employee prior to taking unpaid FMLA leave met all of the perfect attendance bonus requirements. (See sections 825.220 (b) and (c).)

Example 2 - The employer cannot disqualify or reduce an award (bonus) for perfect attendance to an employee who has taken unpaid FMLA leave over the 12-month period (see 29 CFR 825.220(b) and (c)).

Example 3 - Employees would not be entitled to production bonuses which require the employee to perform his or her job in the workplace, on the basis that they have been assigned to the department but performed no work during the bonus period. In this instant case, the employee would not be entitled to the monthly production bonuses during the three months on FMLA leave because the employee did not work during this period of time, did not qualify for the production bonus prior to taking FMLA leave, and may, but was not entitled to accrue benefits during the FMLA leave period.

Example 4 - Upon return to work, the employee would be entitled to the entire safety bonus, provided that the employee prior to taking FMLA leave met all of the safety bonus requirements. (See sections 825.220 (b) and (c).)

We trust this information will be helpful and we apologize for any inconvenience caused by our delay in responding. If we may be of further assistance, please do not hesitate to contact me.

Sincerely,

Maria Echaveste
Administrator

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

U.S. Department of Labor
Employment Standards Administration
Wage and Hour Division
Washington, D.C. 20210

March 24, 1994 **FMLA-32**

Dear ***Name****,*

This is in response to your letter about the Family and Medical Leave Act of 1993 (FMLA).

The FMLA provides that "eligible" employees may take up to 12 workweeks of unpaid, job-protected leave in any 12-month period for the birth or placement of a child for adoption or foster care; to care for a child, spouse or parent with a serious health condition; or for the employee's own serious health condition that makes the employee unable to work. To be "eligible" under the FMLA, an employee must have worked for the employer for at least 12 months and for at least 1,250 hours in the previous 12 months, and must work at a location where the employer employs at least 50 employees within 75 miles. Employers covered by this law are required to maintain an eligible employee's group health benefits during FMLA leave under the same conditions as coverage would have been provided if the employee had worked continuously during the leave. Upon return from FMLA leave, the employee is entitled to be restored to the same employment position which the employee held when the leave commenced, or to an equivalent position with equivalent benefits, pay, and other terms and conditions of employment.

Specifically, you have raised four questions concerning provisions under FMLA. Answers to these questions are as follows:

1. Is the current law for maternity leave still two weeks before delivery and six weeks after delivery for a normal delivery? What about for a C-section?

As noted, FMLA leave may be used for the birth of the child and may be taken prior to the birth of the child. Any period before and after the birth of the child where a mother is not able to work for medical reasons may be considered FMLA leave for a serious health condition, despite the fact that the period after birth is also FMLA leave to care for the newborn child. Your questions concerning maternity leave provisions, i.e., that such leave should commence two weeks prior to the delivery and extend for six weeks or longer for a normal delivery or C-section, should be addressed by your employer or by the state if these requirements are mandated by a state law.

2. Does maternity leave count as part of the 12 weeks of unpaid, job protected leave as stated in the Family and Medical Leave Act of 1993?

Paid leave provided under a plan covering temporary disabilities, such as disability leave for the birth of a child, is considered leave for purposes of FMLA and would be counted in the 12 weeks of leave permitted under the Act.

3. What is the total combined leave time (maternity and family leave) I can take in order to be fully protected against job loss?

The Act provides up to 12 workweeks of unpaid, job-protected leave during any 12-month period to eligible employees for certain family and medical reasons, such as the birth and care of the newborn child.

4. How often can I use Family Leave if necessary for the care of the infant? If on a yearly basis, is it based on the calendar year or otherwise?

An eligible employee is entitled to a total of 12 workweeks of FMLA leave during any 12-month period for the birth and care of the newborn child. An employee's entitlement to leave to care for the newborn child, however, expires at the end of the 12-month period beginning on the date of the birth. An employer is permitted to choose any one of the following methods for determining the "12-month period" in which the 12 weeks of leave entitlement occurs:

(1) The calendar year;

(2) Any fixed 12-month "leave year" such as a fiscal year, a year required by State law, or a year starting on an employee's anniversary" date;

(3 The 12-month period measured forward from the date any employee's first FMLA leave begins; or

(4) A "rolling" 12-month period measured backward from the date an employee uses any FMLA leave (except that such measure may not extend back before August 5, 1993, the effect date of FMLA).

You may wish to ask your employer to identify the "12-month period" that has been chosen for employees. For your information, enclosed is the Fact Sheet that summarizes provisions under FMLA.

I trust that you will find the foregoing information responsive to your inquiry. If additional information is required, please feel free to contact our Philadelphia, Pennsylvania district office at the following address and telephone number:

U.S. Department of Labor
Employment Standards Administration
Wage and Hour Division
U.S. Customs House, Room 238
Second and Chestnut Streets
Philadelphia, Pennsylvania 19106
Telephone No. (215) 597-4950

Sincerely,

Daniel F. Sweeney
Deputy Assistant Administrator

Enclosure

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

U.S. Department of Labor
Employment Standards Administration
Wage and Hour Division
Washington, D.C. 20210

March 29, 1994 **FMLA-33**

Dear ***Name****,

This is in response to your letter enclosing correspondence from your constituent, ***Name**** concerning the application of the Family and Medical Leave Act of 1993 (FMLA) to the use of employee earned vacation and sick leave for family and medical leave purposes. ***Name**** and his members feel that the use of earned vacation and sick leave for family and medical leave purposes should be the employee's option rather than a requirement dictated by the company.

The FMLA, which became effective for most employees on August 5, 1993, allows up to 12 weeks of unpaid, job-protected leave in any 12-month period—with health insurance coverage maintained during the leave—to eligible employees for specified family and medical reasons. If a collective bargaining agreement (CBA) was in effect on that date, FMLA became effective on the expiration date of the CBA or on February 5, 1994, whichever came earlier.

Employers are covered under the FMLA if they have employed at least 50 employees during 20 or more calendar workweeks in the current or the preceding calendar year. Employees are eligible under the FMLA if they have worked for a covered employer for at least 12 months, have worked at least 1,250 hours during the 12 months preceding the start of the leave, and are employed at a worksite where the employer employs at least 50 employees within 75 miles. The 12 months that the employee must have worked do not have to be consecutive months.

Unpaid FMLA leave must be granted to an eligible employee for any of the following reasons: (1) for birth of a son or daughter, and to care for the newborn child; (2) for placement with the employee of a son or daughter for adoption or foster care; (3) to care for the employee's spouse, son or daughter, or parent, who has a serious health condition; and (4) for a serious health condition that makes the employee unable to perform his/her job.

Section 102(d)(2) of the Act and section 825.207 of Regulations, 29 CFR Part 825 (copies enclosed) provides that an eligible employee may elect, or an employer may require the employee, to substitute any of the accrued paid vacation leave, personal or family leave, or medical or sick leave for any of the 12-week leave period under certain conditions. Paid vacation leave, personal leave, or family leave may be substituted for all or part of any unpaid leave for the birth and care of the employee's child after birth, or placement for adoption or foster care, or for the care of the seriously ill family member. Paid vacation leave, personal leave, or medical or sick leave may be used and counted as FMLA leave for the employee's own serious health condition. Paid medical or sick leave may be substituted for FMLA leave for the care of a seriously ill family member only to the extent that the employer's leave plan allows paid leave to be used for that purpose. The use of paid family leave as FMLA leave is also limited by the normal use of the employer's plan.

With reference to your constituent's concerns pertaining to paid vacation and sick leave, an employer may require an eligible employee to use all accrued paid vacation or sick leave for the family and medical leave purposes indicated above before making unpaid leave available. However, section 402 of FMLA does not preclude the union's right to collectively bargain greater benefits than those provided under the Act. In this instant case, the subject union could negotiate that substitution of accrued paid leave is an election of the employee only.

I trust that the above information is responsive to your constituent's inquiry. If I can be of further assistance, please do not hesitate to let me know.

Sincerely,

Daniel F. Sweeney
Deputy Assistant Administrator

Enclosures

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

U.S. Department of Labor
Employment Standards Administration
Wage and Hour Division
Washington, D.C. 20210

April 12, 1994 **FMLA-34**

Dear ***Name****,

This is in response to your letter making an inquiry regarding provisions of the Family and Medical Leave Act of 1993 (FMLA). You request guidance regarding the relationship between compensatory time accumulated by a public employee and the taking of FMLA leave.

The 1985 amendments to the Fair Labor Standards Act (FLSA) created an alternative for public employers to pay overtime compensation required by FLSA by providing accrual of compensatory time off in lieu of immediate payment in cash. When overtime hours are worked the public employer is required to credit the employee at the rate of one and one-half hour of compensatory time for each overtime hour worked. This accrued time is then to be used at the discretion of the employee with two exceptions. A public employer may deny a request for the use of compensatory time in situations when to do so would be unduly disruptive to the agency's operations, and when such use is not requested pursuant to the agreement or understanding reached between the employer and the employee or the employee's representative prior to the performance of the work.

The FMLA provides that an employee is entitled to 12 weeks of unpaid leave for certain family or medical reasons. The FMLA further provides for substitution of certain accrued paid leaves for periods of unpaid FMLA leave. Section 102(d)(2) of the statute provides that an employee may elect or an employer may require the substitution of accrued paid leave for periods of unpaid FMLA leave. The types of leave identified in the statute are: paid vacation leave, personal leave, family leave and medical or sick leave. The legislative history makes it clear that the types of accruals that may be substituted for unpaid FMLA leave are types of leave provided by the employer. Compensatory time off accrued in lieu of the payment in cash of FLSA required statutory overtime pay is not a form of accrued personal leave, nor is it identified in FMLA as an accrual that may be substituted for unpaid FMLA leave.

A public employee may elect, subject to employer approval, to use accrued compensatory time off for an absence that would otherwise qualify as a reason for taking FMLA leave. If the employee does so, the employer may not designate the absence as FMLA leave and thereby reduce the employee's FMLA leave entitlement.

Hopefully this has been responsive to your inquiry. If I may be of further assistance please let me know.

Sincerely,

J. Dean Speer
Director, Division of Policy and Analysis

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

U.S. Department of Labor
Employment Standards Administration
Wage and Hour Division
Washington, D.C. 20210

April 19, 1994 **FMLA-35**

Dear ***Name****,

This is in response to your inquiry forwarding correspondence from ***Name****. ***Name**** expresses concern about the Department of Labor's position under the Family and Medical Leave Act (FMLA) as stated in a letter dated November 15, 1993, copy enclosed, that does not allow the employer to require the employee to take a job with a reasonable accommodation in lieu of FMLA leave.

In enacting the law, Congress stated in Section 2, that there is inadequate job security for employees who have serious health conditions that prevent then from working for temporary periods. Congress also stated in Section 2 that it is the purpose of this Act to entitle employees to take reasonable leave for medical reasons. Pursuant to Section 102(a)(1)(D), an eligible employee is entitled to a total of 12 workweeks of unpaid leave during any 12-month period because of a serious health condition that makes the employee unable to perform functions of the employee's position. Section 104(a)(1)(A) and (B) provides that upon return from FMLA leave, employees must be restored to their original or to an equivalent position with equivalent pay, benefits, and terms and conditions of employment. Section 105 prohibits the employer from interfering with or discriminating against an employee who exercises his or her rights under FMLA.

Guidance provided by the Administrator in the opinion letter referenced by ***Name**** is quoted directly from the interim final regulations (copy enclosed) implementing FMLA. The reference may be found at 29 CFR 825.702(d). In the course of developing these regulations, a number of consultations were initiated with other Federal agencies including the Equal Employment Opportunity Commission that took no exception to the language in this section. Public comment on these regulations closed on December 3, 1993. The Department received approximately 900 comments which are presently being analyzed.

In the course of developing the final rule, the Department intends to review each section of the present regulations in light of the public comments and the Department's experience thus far in implementing the statute.

While FMLA's requirements do not permit an employer to require an eligible employee to take a job with a reasonable accommodation instead of taking FMLA leave, other laws such as the Americans With Disabilities (ADA) or state workers' compensation may require employers to offer employees the opportunity to take a restructured job. Under such circumstances, the employer must still afford an employee his or her FMLA rights while at the same time fulfilling the requirements under the respective state or federal law. For example, under a state workers' compensation program, an employer may be required to offer an employee a light duty assignment when the appropriate medical authority has indicated that the person is able to return to work on a limited basis. Such an employee could elect to exercise the remainder of his or her FMLA leave rather than accept the light duty assignment. This does not mean, however, that the employee would be entitled to continue to receive benefits under the workers' compensation program if that program is structured in such a way as to end benefits at the point at which the employee is deemed medically able to accept a light duty assignment and one is offered by the employer. Examples of how FMLA interacts with federal and state anti-discrimination laws, such as the ADA, may be found at Regulations 29 CFR 825.702.

I hope that the above fully addresses the concerns expressed by ***Name****. If we may be of further assistance, please do not hesitate to contact me. We are returning your constituent's letter as you have requested.

Sincerely,

Maria Echaveste
Administrator

Enclosures

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

U.S. Department of Labor
Employment Standards Administration
Wage and Hour Division
Washington, D.C. 20210

May 18, 1994 **FMLA-36**

Dear ***Name****,

This is in response to your letter forwarding correspondence from ***Name**** about the Family and Medical Leave Act of 1993 (FMLA). Your letter has been referred to the Wage and Hour Division for reply as this office has primary administration and enforcement responsibilities under the FMLA for all private, state and local government employees and some federal employees, such as employees of the United States Postal Service and Postal Rate Commission.

The FMLA, which became effective for most employees on August 5, 1993, allows up to 12 workweeks of unpaid, job-protected leave in any 12 months—with group health insurance coverage maintained during the leave—to eligible employees for specified family and medical reasons. If a collective bargaining agreement (CBA) was in effect on that date, the FMLA became effective on the expiration date of the CBA or February 5, 1994, whichever was earlier.

Employers are covered under the FMLA if they have employed at least 50 employees during 20 or more calendar workweeks in the current or the preceding calendar year. Employees are eligible under the FMLA if they have worked for a covered employer for at least 12 months which do not have to be consecutive, have worked at least 1,250 hours during the 12 months preceding the start of leave, and are employed at a worksite where the employer employs at least 50 employees within 75 miles.

Unpaid FMLA leave must be granted to an eligible employee for any of the following reasons: (1) for birth of a son or daughter, and to care for the newborn child; (2) for placement with the employee of a son or daughter by adoption or foster care; (3) to care for the employee's spouse, son or daughter, or parent, who has a serious health condition; and (4) for a serious health condition that makes the employee unable to perform his/her job.

Upon return from FMLA leave, the employee is entitled to be restored to the same position that the employee held when the leave commenced, or to an equivalent position with equivalent pay, benefits, and other terms and conditions of employment.

The FMLA statute (i.e., § 102(d)) and Regulations 29 CFR 825.207 provide that an eligible employee may elect, or an employer may require the employee to substitute any of the accrued paid vacation leave, personal or family leave, or medical or sick leave for any part of the 12 workweeks of unpaid FMLA leave under certain conditions. Paid vacation leave, personal leave, or family leave may be substituted for all or part of any unpaid FMLA leave provided to care for the employee's child after birth, or placement for adoption or foster care, or to care for a seriously ill family member. Paid sick leave or medical leave may be used and counted as FMLA leave for the employee's own serious health condition, and to the extent permitted by the employer's plan to care for the employee's seriously ill family member. Use of paid family leave as FMLA leave is also limited by the normal use of the employer's plan. The FMLA does not supersede any provision of State or local law that provides greater family or medical leave rights than those established under the FMLA so long as the state law has jurisdiction over the employer. In this instant case, the Wisconsin family and medical leave law does not have jurisdiction over the Federal government and its provisions would not be applicable to any Federal employee. Given this fact, the under Title I would have jurisdiction over Federal employees employed by the United States Postal Service. The provisions covering the substitution of accrued paid leave under the FMLA, as previously mentioned, would be applicable to ***Name****.

Under these circumstances, the United States Postal Service would be correct to deny ***Name**** request to substitute accrued paid sick leave for unpaid FMLA leave to care for his newborn child. ***Name**** may substitute accrued paid vacation leave or may take an unpaid FMLA leave of absence to care for his newborn child. A copy of Regulations 29 CFR 825.207 and 701 about the substitution of paid leave and the application of state laws under FMLA is enclosed for information purposes.

If I may be of further assistance, please do not hesitate to contact me.

Sincerely,

Daniel F. Sweeney
Deputy Assistant Administrator

Enclosure

cc: Washington, D.C., office

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

U.S. Department of Labor
Employment Standards Administration
Wage and Hour Division
Washington, D.C. 20210

July 7, 1994 **FMLA-37**

Dear ***Name****,

Thank you for your letter of June 8, 1994, addressed to Secretary Robert B. Reich about the Family and Medical Leave Act of 1993 (FMLA). Your letter has been referred to the Wage and Hour Division for reply as this office has primary administration and enforcement responsibilities under the FMLA for all private, state and local government employees and some federal employees. This letter will also confirm information already provided to you by ***Name**** during a recent telephone conversation.

In your letter, you ask two questions with respect to FMLA regarding an employee who was first employed by a temporary help agency while working on your premises and was subsequently hired by your company as a regular employee and the applicability of State laws with different provisions.

First, you want to know whether the time the employee was employed by the temporary help agency and was working on your premises should be counted towards the tests that determine eligibility, specifically the 1,250 hours worked test and the 12-months of service test. A temporary help agency and the employer are considered joint employers for purposes of determining employer coverage and employee eligibility for purposes of FMLA. (See Regulations, 29 CFR Part 825.106(d).) Consequently, the time that the employee was employed by the temporary help agency would be counted towards the eligibility tests. In the instance cited in your letter, the employee would meet the 12-months of service test on October 4, 1994.

Second, the statute (Section 401(b)) and regulations (825.701) both state that FMLA shall not supersede any provision of any State or local law that provides greater family or medical leave rights. Employees in Tennessee would be entitled to the full 16 weeks of maternity leave provided under State law, provided of course they meet the requirements of that law. During the first 12 weeks of such leave, those employees would also be entitled to the full benefits of FMLA.

If you require further assistance, please do not hesitate to contact us.

Sincerely,

Daniel F. Sweeney
Deputy Assistant Administrator

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

U.S. Department of Labor
Employment Standards Administration
Wage and Hour Division
Washington, D.C. 20210

July 21, 1994 **FMLA-38**

Dear ***Name****,

This is in response to your letter in which you pose questions regarding the relationship between the Family and Medical Leave Act of 1993 (FMLA) and the Federal Employees Compensation Act (FECA). More specifically, you ask what happens when an employee who is receiving FECA benefits and is concurrently on FMLA leave, is advised that he/she is able to return to work in a light duty position and the employee declines. You state that under this circumstance he employee would lose FECA benefits and would be subject to discipline.

We have consulted with the office of Workers Compensation Programs and they advise that you are correct in the statement that if offered employment consistent with the employee's medical limitations, and the employee declines to accept such a job, the employee loses FECA benefits. There is no provision in the FECA regulations that provides for employee discipline in such an instance. We must assume the provision for discipline is contained in the employing agency's policies and procedures.

The employee who is receiving FECA benefits is no different than the employee in the private sector who is receiving state worker's compensation benefits. An employer may offer a "light duty" job to the employee to encourage early return to work, but if FMLA leave is being taken simultaneously, the employee is not required to cease FMLA leave and accept the light duty assignment instead of continuing leave. The result is that the employee who continues on FMLA leave may lose worker's compensation benefits, but may not be subjected to any form of disciplinary action for having exercised his or her statutory rights to continued FMLA leave. In the circumstance you describe, if the U.S. Postal Service attempted to discipline an employee in this circumstance, such action would be a violation of the FMLA.

Hopefully this has been responsive to your inquiry. If I may be of further assistance please let me know.

Sincerely,

J. Dean Speer
Director, Division of Policy and Analysis

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

U.S. Department of Labor
Employment Standards Administration
Wage and Hour Division
Washington, D.C. 20210

July 21, 1994 **FMLA-39**

Dear ***Name****,

This is in response to your inquiry regarding the effective date of the Family and Medical Leave Act of 1993 (FMLA). In designating the effective date, which is generally August 5, 1993 for all employees not subject to the terms of a collective bargaining agreement (CBA), Congress expressly delayed the effective date for employers who had a CBA in effect on August 5, 1993.

The effective date of the FMLA for CBAs subject to the Railway Labor Act is the first date after August 5, 1993 that the contract is reopened for negotiations, or February 5, 1994, whichever occurs first. The fact that the CBA is opened for negotiations, and negotiations for implementation of FMLA is not included, is immaterial; FMLA becomes effective for the employees covered by the CBA on the date negotiations are reopened. Congress delayed the effective date of the FMLA to give employers and union representatives an opportunity to negotiate the implementation of the statute. There is no requirement that such negotiation take place.

Hopefully this has been responsive to your inquiry. If we may be of further assistance please let us know.

Sincerely,

J. Dean Speer
Director, Division of Policy and Analysis

cc: FMLA Coordinator

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

U.S. Department of Labor
Employment Standards Administration
Wage and Hour Division
Washington, D.C. 20210

July 25, 1994 **FMLA-40**

Dear ***Name****,

This is in response to your letter addressed to Ms. Geri D. Palast, Assistant Secretary for Congressional Affairs regarding your concerns about the provisions of the Family and Medical Leave Act of 1993 (FMLA). Your letter has been referred to me for a response.

You express concern that an employee could be called upon to deal with one crisis, e.g., a sick child for several weeks, and then be faced with another medical event, e.g., the birth of a child, and not have adequate leave remaining under FMLA to entirely cover the second event. You express particular concern regarding the exhaustion of leave during a period when worker's compensation is also applicable. You feel this represents a flaw in the FMLA which may or may not have been included by design.

The FMLA provides 12 weeks of unpaid, job-protected leave with maintenance of group health benefits in any 12-month period for four types of medical emergencies. One of these emergencies is for the employee's own serious health condition which may result from an injury on or off the job. Congress clearly intended for the term "serious health condition" to include an injury sustained on the job, i.e., a worker's compensation injury.

While on the one hand it may seem inappropriate for a worker's compensation absence to run concurrently with FMLA leave, in some States the employer is not required to maintain the group health insurance during a worker's compensation absence. In some States, the employer is not required to re-employ the employee after a certain time has elapsed, nor is the employer required to place the employee in the same or equivalent job upon return. So, while in some situations it may seem inappropriate to exhaust FMLA leave during such an absence, in other circumstances it may be to the employee's benefit to be able to utilize such leave (FMLA).

Hopefully this has been responsive to your inquiry. If we may be of further assistance, please let us know.

Sincerely,

J. Dean Speer
Director, Division of Policy and Analysis

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

U.S. Department of Labor
Employment Standards Administration
Wage and Hour Division
Washington, D.C. 20210

August 8, 1994 **FMLA-41**

Dear ***Name****,

This is in response to your request for an opinion addressed to ***Name****, District Director, New Orleans District Office. Your request has been forwarded to me for a response. You ask if "House Officers" of public hospitals are covered by the Family and Medical Leave Act of 1993 (FMLA).

These "House Officers" are medical residents (doctors) who are generally employed under successive one-year contacts for a total of two to six years depending on the discipline involved. You express concern that if a resident is on FMLA leave for six weeks, a serious problem could develop in attempting to return the employee to the same job. The physician would likely be in jeopardy of being hopelessly behind in the program and subject to being dropped from the program. You indicate § 825.216 may be the only possible relief, if the resident is covered.

The question is whether the "House Officers" are employees for purposes of (FMLA). For purposes of FMLA, the definition of an employee or to employ is taken from § 3(g) of the Fair Labor Standards Act. Based on the limited information you have provided, it is our conclusion that these individuals are employees of the hospital. As all public agencies are covered employers for purposes of FMLA (see § 825.104(a)), the only issue would be whether a resident is an eligible employee. If so, the employee is entitled to FMLA leave for any one of the reasons provided in §825.100(a).

Contrary to your assumption, § 825.216 does not provide the hospital any relief in the event the employee takes leave. Under § 825.216, the hospital would have to show that the employee's contract would not have been renewed for some reason other than the taking of FMLA leave. Further, in § 825.215(b) the employee must be given an opportunity to make up any loss in qualifications resulting from the taking of FMLA leave.

Hopefully this has been responsive to your inquiry. If we may be of further assistance please let us know.

Sincerely,

J. Dean Speer
Director, Division of Policy and Analysis

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

U.S. Department of Labor
Employment Standards Administration
Wage and Hour Division
Washington, D.C. 20210

August 23, 1994 **FMLA-42**

Dear ***Name****,

This is in response to your letter requesting guidance under the Family and Medical Leave Act of 1993 (FMLA). Specifically, you request answers to 11 questions about provisions under FMLA. I regret the delay in responding.

1. An employee covered by a collective bargaining agreement (CBA) has requested intermittent FMLA leave. The employer wishes to transfer the employee to a non-contract position to accommodate the FMLA leave. Does the employer have to retain the same level of union benefits during the transfer period?

Yes. Pursuant to Regulations 29 CFR 825.204, the employer must provide equivalent pay and benefits (or hourly rate of pay and benefits for a part time position) to an employee employed in an alternative position as a result of an employee request for intermittent leave or leave on a reduced leave schedule that is foreseeable based on planned medical treatment, including recovery from a serious health condition. The employer may require the employee to transfer temporarily to an available alternative position for which the employee is qualified and which better accommodates recurring periods of leave than does the employee's regular position. Such transfer to an alternative position may require compliance with any applicable CBA, federal law, and state law.

2. A flight attendant requests intermittent FMLA leave - three hours off every Friday for two months to care for her sick mother. Due to the unique working environment of a flight attendant, granting such request means that the flight attendant will not be able to work her flight assignment on Friday for two months. How much leave is charged the employee - three hours that she requested or her entire work period, i.e., ten hours each Friday?

The employee would be charged for three hours of FMLA leave. While only three hours may be charged to FMLA, the remainder of the time may be charged to some other form of paid or unpaid leave. Pursuant to 29 CFR 825.205(a), if an employee takes FMLA leave on an intermittent or reduced leave schedule, only the amount of leave actually taken may be counted towards the 12 weeks of leave to which an employee is entitled. Accordingly, 29 CFR 825.203(d) stipulates that there is no limit on the size of an increment of leave when an employee takes intermittent leave or leave on a reduced schedule. An employer, however, may limit leave increments to the shortest period of time (one hour or less) that the employer's payroll system uses to account for absences or use of leave. The employer may, however, require the employee to transfer to an alternative position as noted above.

3. An employee requests intermittent leave - two hours every day for a month to take care of a sick child. The employee's job is not one that can allow such leave each day. Therefore, in order to accommodate the request the employer wants to transfer the employee to a similar position at another location. The employee refused the transfer. Can the employer grant the employee with one month FMLA as it is unable to otherwise accommodate the employee's requests?

An employee could only refuse a transfer where such transfer would adversely affect the employee. For example, commuting distance, time, and cost would have to be substantially the same for the employee to be required to take the transfer. An example of a transfer that would adversely affect an employee would be the situation where the employee currently uses public transportation to commute to his/her job and such transportation is not available to the worksite the employer seeks to transfer the employee. Thus, we would need to assess the employee's reasons for refusing the transfer as well as the employer's reasons for imposing the transfer. An employee who refuses a transfer that cannot be shown to have an adverse effect would not be protected by provisions.

4. An employee requests a 12-week leave, which the employer grants. During the FMLA leave, the position which the employee held had been eliminated in a corporate restructuring. However, there is an

equivalent position at another location. Can the employer properly transfer the employee to the other location in accordance with the FMLA?

The employer may transfer the employee to the other location. Pursuant to 29 CFR 825.216, an employee has no greater right to reinstatement or to other benefits and conditions of employment than if the employee had been continuously employed during the FMLA leave period.

5. An employee is out on worker's compensation status. Can the employer count this time out as FMLA leave?

Yes, if the employee's absence from work pursuant to a workers' compensation claim for an injury or occupational illness also meets FMLA's definition of a "serious health condition." The period of time out on workers' compensation status may be counted against the 12-week FMLA leave entitlement available to eligible employees provided all other requirements of FMLA are complied with during the period of absence. For example, health benefits must be maintained under the same terms and conditions as if the employee continued to work. (See 29 CFR §825.114 and 825.207.)

6. An employee is granted 12 weeks of unpaid FMLA leave to take care of an adopted child. However, when the employee is scheduled to return to work, he only works for four days and then informs the company that he is quitting and staying home with the child. Can the employer recover, from the employee, the costs of the health care benefits from the period that the employee was out on leave? What is the minimum amount of time that an employee must return to work so as to not be responsible for the cost of health insurance paid for by the employer during the FMLA leave?

Yes, with certain limitations. Pursuant to 825.213, an employer may recover its share of health plan premiums during a period of unpaid FMLA leave from an employee if the employee fails to return to work after the employee's FMLA leave entitlement has been exhausted or expires, unless the reason the employee does not return is due to the continuation, recurrence, or onset of a serious health condition that would entitle the employee to leave under FMLA, or to other circumstances beyond the employee's control. An employee who returns to work for at least 30 calendar days is considered to have "returned" to work for purposes of FMLA and the employee would no longer have any responsibility to reimburse the employer for group health insurance premiums paid while on unpaid FMLA leave.

7. Please explain in detail section 825.202 with respect to how much leave may a husband and wife take, if they are employed by the same employer.

The combined total of workweeks of FMLA leave to which husband and wife employed by the same employer and eligible for FMLA leave are entitled to is limited to 12 workweeks during any 12-month period for the following reasons:

*For the birth and care of the newborn child;
*For placement of a son or daughter for adoption or foster care, or to care for the employee's child after placement; and
*To care for a parent (but not a parent "in-law") with a serious health condition.

The combined 12 workweeks of FMLA leave limitation for married couples for the above mentioned reasons does not apply to leave taken for the following reasons:

*To care for the employee's spouse, son or daughter, who has a serious health condition;
*For serious health condition that makes the employee unable to perform the employee's job.

If FMLA leave was taken for these reasons, each spouse would be entitled to a full 12 workweeks of FMLA leave in any 12 months.

As an example of how this limitation may work, during a 12-month designated period, the married couple took 12 weeks combined (mother took 10 weeks, father took 2 weeks) for the birth and care of the newborn child. The mother/wife would have two workweeks of FMLA leave to care for her own serious health condition or that of her or child or spouse. The father/husband would have remaining 10 weeks of leave to care for his own serious health condition or that of his spouse or child. Since this married couple used 12 workweeks of FMLA leave for the birth and care of the newborn child, no additional FMLA leave may be taken to care for the parent with a serious health condition by either spouse in the remaining 12 months.

8. Airline A's health insurance policy requires employees to contribute 25 percent of the cost of coverage. An employee of Airline A is granted 12 weeks of FMLA leave. However, the employee does not pay his portion of the health care premiums during this period. Can the employer terminate health care coverage for this employee during the leave period?

Yes. While an employer may continue to maintain health benefits, an employer's obligations to maintain health insurance coverage ceases if an employee's premium payment is more than 30 days late. All other obligations of an employer under FMLA would continue, including the obligation to reinstate an employee upon return from leave to their original position or to an equivalent position, with equivalent pay, benefits, terms and conditions of employment. In this regard, the employer may pay and recover from the employee the employee's share of any premium payments missed by the employee for any leave period during which the employer maintains health coverage. (See 29 CFR 825.212.)[1]

9. Can an employer classify a medical leave as FMLA leave at the time an employee takes the medical leave even if the employee does not request that the leave be classified as FMLA leave?

Yes, as long as the employee provides verbal notice sufficient to make the employer aware of the employee's serious health condition that qualifies as FMLA leave, and the anticipated timing and duration of the leave. The employee need not expressly assert the rights under the FMLA or even mention the FMLA, but may only state that leave is needed for one of the permissible reasons for taking FMLA leave. The employer should inquire further of the employee if it is necessary to have more information about whether FMLA leave is being sought by the employee, and obtain the necessary details of the leave to be taken. For medical conditions, the employer may request medical certification to support the need for such leave. (See 29 CFR 825.302). An employee may not refuse to allow the employer to count otherwise qualifying leave as FMLA leave.

10. Airline flight crew members generally have a guaranteed number of hours that they work each month; such guarantees are specified in a CBA. The employee requests and is granted intermittent FMLA leave. Can the FMLA leave hours be deducted from the pay/hour guarantee?

An employer may not discriminate against employees who use FMLA leave. (29 CFR Part 825.220) If all employees who request leave or specify certain periods during which they will be unable to work have such time deducted from their guaranteed hours, the employer could follow an identical policy with respect to employees on FMLA leave.

11. Airline A has a policy that employees do not accrue vacation time, sick leave, or longevity for pay purposes when they are out on FMLA leave. Is Airline A's policy in compliance with the DOL interim final regulations? Is Airline A in compliance if it does not allow longevity to accrue for seniority or promotion purposes during FMLA leave?

An employee may, but is not entitled to, accrue any additional benefits or seniority during unpaid FMLA leave. Benefits accrued at the time leave began, however, must be available to an employee upon return from leave. The employer may be in compliance with the FMLA regulations as long as any employee on a

[1] Provisions applicable to this response were changed in the Final Rule (under section 29 CFR 825.212(a)(1)) published in the Federal Register on January 6, 1995 (60 FR 2180)

leave without pay status, regardless of whether it is FMLA leave or otherwise, does not accrue any additional benefits or seniority. If employees on other types of leave without pay accrue additional benefits or seniority during the unpaid leave status, the same additional benefits and seniority must be provided to the employee on unpaid FMLA leave. (See 29 CFR 825.215(d)(2) and 220(c)).

At this present time, we have not formulated a plan to distribute FMLA opinion letters and policy decisions.

The guidance provided above was based on the limited information provided in your letter and should not be applied to situations with additional or different circumstances.

We appreciate your concerns and interest in FMLA. We regret any inconvenience that our delay in response to your letter may have cause.

Sincerely,

Daniel F. Sweeney
Deputy Assistant Administrator

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

U.S. Department of Labor
Employment Standards Administration
Wage and Hour Division
Washington, D.C. 20210

This letter is under review in light of issues raised by the U.S. Supreme Court in Ragsdale v. Wolverine World Wide, Inc. and other judicial decisions. It may be superceded by FMLA2002-5-A (http://www.dol.gov/esa/whd/opinion/FMLA/2002_08_06_5A_FMLA.htm).

August 24, 1994 **FMLA-43**

Dear ***Name****,

Thank you for your letter of May 23, 1994, addressed to Senator Edward Kennedy, about employment practices by ***Name**** as they relate to the Family and Medical Leave Act of 1993 (FMLA). Your letter has been referred to the Wage and Hour Division of the U.S. Department of Labor for reply as this office has primary administration and enforcement responsibilities under FMLA for all private, state and local government employees, and some Federal employees.

In general, FMLA allows up to 12 weeks of unpaid, job-protected leave in any 12 months—with group health insurance coverage maintained during the leave—to eligible employees for specified family and medical reasons. Unpaid FMLA leave must be granted to an eligible employee for any of the following reasons: (1) for birth and/or care child within one year of birth; (2) for the placement of a child with the employee for adoption or foster care; (3) to care for the employee's spouse, son or daughter, or parent, who has a serious health condition; and (4) for a serious health condition that makes the employee unable to perform his/her job. Upon return from FMLA leave, the employee is entitled to be restored to the employee's original position or to an equivalent position with equivalent pay, benefits, and other employment terms.

Under Regulations (29 CFR 825.114), the term serious health condition is intended to cover conditions or illnesses affecting one's (or the immediate family's) health to the extent that inpatient care is required, or absences are necessary on a recurring basis or for more than a few days for treatment or recovery. This term is not intended to cover short-term conditions for which treatment and recovery are very brief as such conditions would generally be covered by the employer's sick leave policies. Current regulations cover any period of incapacity requiring absence from work, school, or other regular daily activities of more than '"three calendar days" and continuing treatment by (or under the supervision of) a health care provider.

With respect to your first and second concerns about whether an employee on occupational injury leave or maternity leave must be required to apply for FMLA leave, the law does not prohibit the employee's FMLA 12-week leave entitlement from running concurrently with other leaves of absence provided the leaves involve events that qualify under the law, i.e., employee's own serious health condition and the birth of a child respectively. The employer under such circumstances would be required to designate either leave of absence as FMLA qualifying (see 29 CFR 825.208) and to so notify (29 CFR 825.301(c)) the employee that such leave will run concurrently. The employee who is taking a qualifying leave of absence may not waive his or her rights to FMLA leave (29 CFR 825.220(d)).

In response to your third concern, the answer would be yes since it is not the intent of FMLA to discourage an employer from adopting or retaining more generous benefits (29 CFR 825.700(b)). Thus, an employer that provides short-term disability leave that includes partial pay and retention of certain benefits such as group health insurance, should continue to do so, but may also run the unpaid FMLA leave entitlement concurrently with the short-term disability leave of absence. Further, an employer's failure to provide the same level of benefits to an employee on an unpaid FMLA leave of absence as would be provided to an employee who is taking a leave of absence for the same reasons but is not eligible for FMLA leave or who is taking unpaid leave for any reason may be discrimination and may be a violation of Regulations 29 CFR 825.220(c). The FMLA requires employers to provide the same level of benefits to the employee on unpaid FMLA leave that the employer would otherwise provide the employee on another type of unpaid leave or who is taking a leave of absence for a similar reason. For instance, if the employer offers pregnancy disability leave to an employee for the birth of the child then this benefit must also be offered to the employee who is using unpaid FMLA leave for the same reason.

The answer to your fourth concern is no. The FMLA requires the employer to designate a qualifying leave of absence as FMLA leave prior to the employee commencing the leave, if the event is foreseeable and the employer has sufficient information to make the designation. If the event is not foreseeable, then the employer should designate the leave as FMLA leave when sufficient information has been provided by the employee. Any retroactive designation that a leave of absence is qualifying under FMLA must be made while the employee is on leave and before the employee has returned to work. In no event, can the employer designate a leave of absence as FMLA leave once the employee has returned to work.[1] (See 29 CFR 825.208, 303, and 304).

In answer to concern number five, the current Regulations (29 CFR 825.114((a)(2)) cover any period of incapacity requiring absence from work, school, or other regular daily activities of more than "three calendar days" and continuing treatment by (or under the supervision of) a health care provider during this period of time. The employee's own serious health condition requiring a "greater than three day" absence need not be limited to workdays only, but may also include non workdays such as the weekend when the employee is unable to carry out regular daily activities.

The answer to concern number six is yes, in that the employee may request or the employer may require the employee to substitute accrued paid vacation for all or part of the unpaid FMLA leave. (See 825.207)

Your comments under concern number seven are consistent with the provisions of FMLA regarding the amount of leave that a husband and wife can take if employed by the same employer. As you have noted in your letter the combined leave amount for husband and wife is 12 weeks total in any 12-month period for the employee's child after birth, or placement for adoption or foster care, and to care for a parent with a serious health condition. A total of up to 12 weeks of FMLA leave, or the difference remaining from that already taken for the reasons already specified, may be taken by the husband and wife individually for the care of spouse or child who has a serious health condition or for the employee's own serious health condition. For example, if the husband took two weeks and the wife took ten weeks for the birth and care of the newborn child, the husband would still be entitled for the duration of the 12-month period to take up to ten weeks of FMLA leave for his or his wife's or child's serious health condition, while the wife could take only two weeks of FMLA leave for these same reasons. Because the combined 12-week entitlement has already been taken by the married couple for the birth and care of the newborn child, FMLA leave would be exhausted for the birth and care of the newborn child, adoption or foster care placement, or to care for a parent with a serious health condition. (See 825.202)

We hope the above fully responds to the questions you have raised. While we recognize that you may not fully agree with these responses, we would like to point out that Congress, in its statement of findings and purposes, indicated among other things that the purposes of the FMLA were to be accomplished "in a manner that accommodates the legitimate interests of employers."

If I may be of further assistance to you, you may also contact me.

Sincerely,

Daniel F. Sweeney
Deputy Assistant Administrator

cc: Senator Edward M. Kennedy

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

[1] Provisions applicable to this response regarding retroactive designation of FMLA leave after the employee has returned to work were changed in the Final Rule (under section 29 CFR 825.208(e)) published in the Federal Register on January 6, 1995 (60 FR 2180).

U.S. Department of Labor
Employment Standards Administration
Wage and Hour Division
Washington, D.C. 20210

September 13, 1994 **FMLA-44**

Dear ***Name****,

This is in response to your letter requesting a written opinion with respect to the taking of intermittent leave under the Family and Medical Leave Act of 1993 (FMLA). You ask whether a covered employer may encourage an eligible employee to take leave in a block of time rather than intermittently by paying the employee his or her regular wages for such leave.

The difficulty with your proposal is that the difference between the amount of time needed for the intermittent leave and the leave taken in a block cannot be considered FMLA leave. There is nothing to suggest that this time is in any way connected to the employee's need for FMLA leave. Consequently, you could encourage an employee to take leave in a block but you could not count the difference against the employee's 12-week FMLA entitlement.

The FMLA provides for the temporary transfer of an employee needing intermittent leave to an alternative position with equivalent pay and benefits that better accommodates recurring periods of leave. It should also be noted that an employer is required to grant intermittent leave only for those situations involving the serious health condition of the employee or the employee's son, daughter, spouse, or parent.

We have attempted to answer your question directly without considering any other factors that, in a particular situation, would lead to a different conclusion. We will be glad to answer any further question you may have regarding FMLA.

Sincerely,

Daniel F. Sweeney
Deputy Assistant Administrator

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

U.S. Department of Labor
Employment Standards Administration
Wage and Hour Division
Washington, D.C. 20210

October 14, 1994 **FMLA-45**

Dear ***Name****,

This is in reply to your letter of June 3, 1994, about the provisions of the Family and Medical Leave Act of 1993 (FMLA). You specifically request an opinion on how much leave is an eligible employee entitled to under the FMLA for multiple births.

The FMLA, which became effective for most employers on August 5, 1993, allows up to 12 workweeks of unpaid, job-protected leave in any 12-months -- with group health insurance coverage maintained during the leave -- to eligible employees for specified family and medical reasons. If a collective bargaining agreement (CBA) was in effect on that date, FMLA became effective on the expiration date of the CBA or February 5, 1994, whichever was earlier. Employers are covered under the FMLA if they have employed at least 50 employees during 20 or more calendar workweeks in the current or the preceding calendar year. Employees are eligible under the FMLA if they have worked for a covered employer for at least 12 months that need not be consecutive, have worked at least 1,250 hours during the 12 months preceding the start of leave, and are employed at a worksite where the employer employs at least 50 employees within 75 miles.

Unpaid FMLA leave must be granted to an eligible employee for any of the following reasons: (1) for birth of a son or daughter, and to care for the newborn child; (2) for placement with the employee of a son or daughter by adoption or foster care; (3) to care for the employee's spouse, son or daughter, or parent, who has a serious health condition; and (4) for a serious health condition that makes the employee unable to perform his/her job.

Upon return from FMLA leave, the employee is entitled to be restored to the same employment position which the employee held when the leave commenced, or to an equivalent position with equivalent position with equivalent benefits, pay, and other terms and conditions of employment.

In response to your specific question, an eligible employee would be entitled to take up to a total of 12 workweeks of FMLA leave in any 12-month period for the family and medical reasons that qualify for FMLA leave. (See section 102 and 29 USC 2601 of the Act and sections 112 and 200 of Regulations, 29 CFR Part 825.)

Multiple births do not entitle the employee to additional FMLA leave. Employees who have exhausted their 12-weeks of FMLA leave for any one of the four reasons cited previously are not eligible for additional leave in the same 12-month period.

For your information, enclosed is the Compliance Guide to the Family and Medical Leave Act that provides guidance along these lines. If you require further assistance, please do not hesitate to contact me.

Sincerely,

Daniel F. Sweeney
Deputy Assistant Administrator

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

U.S. Department of Labor
Employment Standards Administration
Wage and Hour Division
Washington, D.C. 20210

October 14, 1994 **FMLA-46**

Dear ***Name****,

This is in response to your letter requesting confirmation of guidance given to you orally by representatives of the Wage and Hour Division regarding those hours that would be counted towards meeting the "hours worked" eligibility requirement of the Family and Medical Leave Act of 1993 (FMLA).

Section 101(2)(C) of the FMLA states that, "[f]or purposes of determining whether an employee meets the hours of service requirement specified in subparagraph (A)(ii), the legal standards established under section 7 of the Fair Labor Standards Act of 1938 [FLSA] (29 U.S.C. 297) shall apply." The report of the Senate Committee states, among other things, that the minimum hours of service requirement is meant to be construed broadly, consistent with the legal principles established for determining hours of work under Regulations, 29 CFR Part 785.

Subpart B of Regulations, 29 CFR Part 785 sets out the principles for determining hours worked for purposes of the FLSA. Nothing contained in this subpart can be construed as requiring an employer to count as hours worked those times when the employee has been completely relieved from duty such as when the employee is on paid or unpaid leave. Further, in determining the regular rate for purposes of overtime compensation, section 7(e)(2) of the FLSA specifically excludes "payments made for occasional periods when no work is performed due to vacation, holiday, illness, failure of the employer to provide sufficient work, or other similar cause . . . . ."

With respect to the specific examples cited in your letter, we concur that the following would not be counted as either hours worked for purposes of FLSA or for purposes of meeting the 1,250 hours eligibility test of FMLA:

-paid or unpaid leave
-sick days taken by the employee, even if paid sick leave
-leave of longer duration
-sabbatical leave even if the employee continues to receive some compensation during this period.

Section 101(2) of the FMLA defines an eligible employee as, among other things, one who has been employed for at least 1,250 hours of service with such employer during the previous 12-month period. Section 108 that provides for special rules concerning employees of local educational agencies, provides no special definition of "eligible employee." Thus, all employees must have worked 1,250 in the 12 month period prior to the beginning date of the FMLA leave in order to be eligible for FMLA leave. This would be applicable to school employees who do not work during the summer months. Full-time teachers of an elementary or secondary school system, or institution of higher education, or other educational establishment or institution are deemed to meet the 1,250 test. An employer must be able to clearly demonstrate that such an employee did not work 1,250 hours during the previous 12 months in order to claim that the employee is not "eligible" for FMLA leave. Please keep in mind, however, that if an employee is maintained on the payroll for any part of a week, including periods of paid or unpaid leave during which other benefits or compensation are provided by the employer (e.g., group health plan benefits, workers' compensation benefits, etc.), the week counts as a week of employment for purposes of the 12-month eligibility test.

If the above has not been fully responsive to your inquiry, please let me know.

Sincerely,

Daniel F. Sweeney
Deputy Assistant Administrator

Enclosure

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

U.S. Department of Labor
Employment Standards Administration
Wage and Hour Division
Washington, D.C. 20210

October 17, 1994 **FMLA-47**

Dear ***Name****,

This is in further response to your inquiry regarding the Family and Medical Leave Act of 1993 (FMLA).

You request further guidance regarding an employee who, at the conclusion of leave, is still unable to perform the essential functions of the job which the employee held at the time the leave commenced, but who could perform the duties of an "equivalent" position which is not vacant. You ask if the employee who encumbers the "equivalent" position must be removed in order to make way for the employee who is returning from FMLA leave.

As my earlier response tried to indicate, the answer would be "No" in the situation presented. An employer is not required under the FMLA to create a position that does not exist for an employee who is unable to perform the functions of his or her former position at the end of the FMLA leave. If, at the end of 12 weeks of FMLA leave, an employee is still unable to perform the essential functions of the position which the employee held when the leave commenced, the employee has exhausted his or her job-protected leave entitlement under FMLA and would not be required, under the FMLA, to be restored to employment in a different job. An employer may, however, have additional compliance obligations with respect to this employee under other Federal or State statutes (e.g., the Americans with Disabilities Act). Nothing in FMLA modifies or affects any Federal or State law prohibiting discrimination on the basis of race, religion, color, national origin, sex, age, or disability. See 29 CFR § 825.702.

If further information is required, please let us know.

Sincerely,

J. DEAN SPEER
Director, Division of Policy and Analysis

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

U.S. Department of Labor
Employment Standards Administration
Wage and Hour Division
Washington, D.C. 20210

October 19, 1994 **FMLA-48**

Dear ***Name****,

Thank you for your letter of August 26, 1994, addressed to Secretary Robert Reich, about the Family and Medical Leave Act of 1993 (FMLA). Your letter has been referred to the Wage and Hour Division of the U.S. Department of Labor for reply as this office has primary administration and enforcement responsibilities under FMLA for all private, state and local government employees, and some Federal employees.

You are specifically concerned about § 103(c)(2) of FMLA which contains a statutory prohibition against an employer obtaining a second medical opinion from a health care provider employed on a regular basis by the employer. You request the Department to grant an exception to this statutory prohibition for faculty medical doctors employed by the ***Name****.

First we note that FMLA does not in any way prohibit or affect the practice where University faculty members are the regular physicians of employees of the University. However, the statute grants no authority to the Department of Labor to waive or otherwise modify the statutory provisions of §103(c)(2), and thus we are unable to grant your request to exempt faculty medical doctors of the University ***Name**** from the statutory limitations specified in §103(c)(2) of FMLA. This limitation is intended to protect an employee whose original medical certificate has been challenged by the employer and to ensure an unbiased second medical opinion from the employer designated physician. If the second medical opinion differs from the original medical opinion, the health care provider to furnish the third medical opinion—which will be final and binding on both parties—is not subject to the prohibition against using a health care provider regularly employed by the employer but must be approved jointly by the employee and employer.

We appreciate your concerns about FMLA. If you have any questions or require further assistance, please do not hesitate to contact me.

Sincerely,

Daniel F. Sweeney
Deputy Assistant Administrator

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

This letter is under review in light of issues raised by the U.S. Supreme Court in Ragsdale v. Wolverine World Wide, Inc. and other judicial decisions. It may be superceded by FMLA2002-5-A. (http://www.dol.gov/esa/whd/opinion/FMLA/2002_08_06_5A_FMLA.htm)

October 27, 1994 **FMLA-49**

Dear ***Name****,

Thank you for your letter of August 10, 1994, concerning the Family and Medical Leave Act of 1993 (FMLA). You express two concerns about the provisions of this law: the substitution of paid leave for unpaid FMLA leave; and, whether the employer has the right to designate any leave that is FMLA-qualifying as FMLA leave.

In enacting the law, Congress found inadequate job security for employees who have serious health conditions that prevent them from working for temporary periods of time and a lack of employment policies to accommodate working parents that forces individuals to choose between job security and parenting. Congress stated that the purposes of this law are to balance the demands of the workplace with the needs of families and to entitle employees to take reasonable leave for medical reasons, for the birth or adoption of a child, and for the care of a child, spouse or parent who has a serious health condition. Congress intended that the legitimate interests of the employer must be accommodated in implementing the FMLA.

The FMLA, which became effective for most employees on August 5, 1993, allows up to 12 weeks of unpaid, job-protected leave in any 12-months—with group health insurance coverage maintained during the leave—to eligible employees for specified family and medical reasons. If a collective bargaining agreement (CBA) was in effect on that date, FMLA became effective on the expiration date of the CBA or February 5, 1994, whichever was earlier.

Private-sector employers are covered under FMLA if they have employed at least 50 employees during 20 or more calendar workweeks in the current or the preceding calendar year. All public-sector employers are covered employers regardless of the number of employees employed.

Employees are eligible under FMLA if they have worked for a covered employer for at least 12 months (which need not be consecutive months), have worked at least 1,250 hours during the 12 months preceding the start of leave, and are employed at a worksite where the employer employs at least 50 employees within 75 miles.

Unpaid FMLA leave must be granted to an eligible employee for any of the reasons previously mentioned in paragraph two. Upon return from FMLA leave, the employee is entitled to be restored to the same position that the employee held when the leave commenced, or to an equivalent position with equivalent pay, benefits, and other terms and conditions of employment.

The term serious health condition is intended to cover conditions or illnesses affecting one's (or the immediate family's) health to the extent that inpatient care is required, or absences are necessary on a recurring basis or for more than a few days for treatment or recovery. This term is not intended to cover short term conditions for which treatment and recovery are very brief as such conditions would generally be covered by the employer's sick leave policies. Current regulations define the term serious health condition to include: any period of incapacity or treatment connected with inpatient care in a hospital, hospice or residential medical-care facility; any period of incapacity requiring absence from work, school, or other regular daily activities of more than "three calendar days" that also includes continuing treatment by (or under the supervision of) a health care provider; or continuing treatment by or under the supervision of a health care provider for a chronic or long term health condition that is incurable or so serious that, if not treated, would likely result in a period of incapacity of more than three calendar days, and for prenatal care. Any condition that satisfies any one of these three definitions is a serious health

condition for purposes of the FMLA regardless of how the employer or employee may regard such condition. The FMLA provides that an eligible employee may elect, or an employer may require the employee to substitute any of the accrued paid vacation leave, personal or family leave, or medical or sick leave for any part of the 12-week FMLA leave period under certain conditions. Paid vacation leave, personal leave, or family leave may be substituted for all or part of any unpaid FMLA leave provided to care for the employee's child after birth, or placement for adoption or foster care, or to care for a seriously-ill family member. Paid sick leave or medical leave may be used and counted as FMLA leave for the employee's own serious health condition, and to the extent permitted by the employer's plan to care for the employee's seriously-ill family member. Use of paid family leave as FMLA leave is also limited by the normal use of the employer's plan. If the employer requires paid leave to be substituted for unpaid FMLA leave, the employer must convey this decision to the employee at the time the employee gives notice of the leave or when the employer has determined that the leave qualifies as FMLA leave.

It is the employer's responsibility to designate a leave of absence as FMLA leave, whether paid or unpaid, if the reason for which the employee is taking the leave is qualifying and the employee is eligible. While the employee need not expressly assert his of her rights to leave, the employee or the employee's designated representative must provide sufficient information, i.e., provide a qualifying reason, so that the employer is aware of the employee's entitlement to take the leave of absence under the FMLA. The employer is allowed to make further inquiries to ascertain whether the leave of absence is (or potentially] FMLA qualifying in order to grant the leave of absence to an eligible employee. Without sufficient information, the employer would be under no obligation to approve a leave of absence until the employee provided a qualifying reason. In no event may the employer designate FMLA leave after the leave of absence has ended.

Employees cannot waive their rights under the FMLA by accepting, for example, a trade-off of another benefit offered by the employer for FMLA leave. Likewise, the employer is prohibited from inducing an employee to waive his or her rights under the FMLA. While the employer must grant FMLA leave to an eligible employee who needs a leave of absence for a qualifying reason, the employer may, but is not required to, count the leave used against the 12-week FMLA leave entitlement. Under such circumstances, the employer would be required to provide FMLA's benefits and protection during the leave of absence.

Given the circumstances in your letter, the employer's initial response to allow an employee who wished not to take FMLA leave for a qualifying event to sign a form waiving rights to FMLA leave would be irrelevant. Employees may not waive their FMLA rights. The employer's subsequent response to make FMLA leave mandatory for eligible employees who are taking leave for qualifying events is permissible under the law, but is not required. As previously mentioned, an employer is not precluded under the FMLA from extending greater coverage, e.g., grant the FMLA leave with full protection and benefits without actually counting the leave used against the 12-week entitlement. This response would allow for greater protection and benefits because it would extend the 12-week leave entitlement in the 12-months designated period provided under the FMLA. For example, an employer may permit an employee to use accrued paid sick leave for FMLA qualifying events and, as long as FMLA's job protection and benefits are extended, to bank the 12-week FMLA entitlement leave for later use such as after the employee's sick leave has been exhausted.

We would like to point out that, prior to the FMLA, employees enjoyed no Federal guarantees with respect to absences related to family and medical leave, job restoration, or continued group health care coverage. Employers, for example, would have been able to refuse leave or terminate employees needing to take time off to take care of family and medical situations. The FMLA now guarantees employees at least 12 weeks of job and health care benefits protection in a 12 months period. Employers may voluntarily provide such protection for longer period of time.

For your information, we are enclosing a variety of FMLA publications. If you require additional guidance, you may contact our Wage and Hour District office in New Orleans, Louisiana. The address and telephone number are:

U.S. Department of Labor
Employment Standards Administration
Wage and Hour Division
New Orleans District Office
701 Loyola Avenue, Room 13028
New Orleans, Louisiana 70113
Telephone no. (504) 838-1150

Sincerely,

Daniel F. Sweeney
Deputy Assistant Administrator

Enclosures

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

U.S. Department of Labor
Employment Standards Administration
Wage and Hour Division
Washington, D.C. 20210

November 23, 1994 **FMLA-50**

Dear ***Name****,

Thank you for providing us with a copy of your paper entitled "The Family and Medical Leave Act: A Survey and an Analysis of its Impact and Implications." We appreciate the favorable comments concerning the Department of Labor's efforts in educating the public on the provisions of FMLA.

We wish to bring to your attention a few concerns about the summary of FMLA's major provisions listed in this paper. Comments from your paper are highlighted in bold print.

Covered Employers - "Employers that have fifty or more employees within a seventy-five mile radius" - the seventy-five mile radius goes to employee eligibility rather than the covered employer criteria. You may wish to consider a statement that reads: FMLA applies to private-sector employers that have fifty or more employees for twenty or more calendar weeks in the current or the preceding calendar year. All public-sector employers and employees of public or private elementary or secondary schools are covered regardless of the number of employees employed.

Restoration - "Employee are guaranteed that they will return either to the same job or to a comparable position..." - the operative word is equivalent along the lines of...will return either to the same job or to an equivalent job with equivalent pay, benefits, and other terms and conditions of employment.

Key Employee and Employee Eligibility - provisions outlined in the "Certain employees can be exempted" paragraph needs to be clarified. This is not an exemption.

Key employees are -- salaried employees eligible for FMLA leave -- and among the highest paid l0% of all employees employed by the employer at or within 75 miles of the employee's worksite. Employers must grant FMLA leave to a key employee, but may deny restoration if communicated in writing when FMLA leave is requested and only when it is necessary to prevent "substantial and grievous economic injury" to the employer's operations.

Employee eligibility - FMLA leave must be granted to an eligible employee for any one of the qualifying reasons. An employee is eligible if the employee has worked for a covered employer for at least 12 months (need not be consecutive months); has worked at least 1,250 hours during the 12-month period immediately preceding the commencement of leave; and, is employed at a worksite where at least 50 employees are employed at or within 75 miles.

Medical Certification - "An employer may require a doctor's certification or a second medical opinion to verify a serious illness[.]"...should read...An employer may require a medical certification from a health care provider (as defined under FMLA) for leave due to a serious health condition, and may require a second if the employer has some reason to doubt the accuracy of the first medical certification. If the first and second opinions disagree, the employer may require a third opinion (at the employer's expense) and a fitness for duty report to return to work.

Paid leave substitution - Accrued paid leave can be substituted for all or part of the 12-week FMLA leave entitlement under certain conditions.

We appreciate your interest in FMLA and for making your paper available to the Department.

Sincerely,

Maria Echaveste
Administrator

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

U.S. Department of Labor
Employment Standards Administration
Wage and Hour Division
Washington, D.C. 20210

November 28, 1994 **FMLA-51**

Dear ***Name****,

Thank you for your letter dated May 6, 1994, concerning the Family and Medical Leave Act of 1993 (FMLA). You specifically request an opinion on two issues that involve an employee's entitlement to FMLA leave to care for a child with a serious health condition. The first issue seeks an explanation of how FMLA distinguishes between a child who is under 18 years of age and one who is over 18 years. The second issue seeks a ruling on whether an employee who is a parent may be entitled to FMLA leave to care for a child over 18 years who has given birth or who has a serious health condition related to pregnancy.

Issue No. 1

Pursuant to 29 U.S.C. 2612(a)(1)(C) , a parent who is an eligible employee under FMLA is entitled to take up to 12 workweeks of leave in any 12-month period to care for a son or daughter if that child has a serious health condition. "Son or daughter" is defined under-FMLA, at 29 U.S.C. 2611(12) , to be a child who either is under 18 years of age or is "18 years of age or older and incapable of self-care because of a mental or physical disability." A child 18 years or over, who does not have the limitations described in the statutory definition of "son or daughter," is not among the immediate family members for which an eligible employee may take FMLA leave.

The Senate Report cited on page three of your letter, Senate Report No. 103-3 "Family and Medical Leave Act of 1993, as reported in the Daily Labor Report (BNA on February 8, 1993 at S-34) states that the definition of "son" or "daughter" includes disabled children over 18 years.1 In drawing the line for when a parent may be entitled to FMLA leave to care for a child with a "serious health condition," Congress has determined that there is a "compelling need for parental care" both when a child is under age 18 and when a child is over age 18 and is mentally or physically disabled. Although the Senate Report specifically addresses the situation of a child whose disability existed prior to age 18, the statute by its terms, makes no distinction between children who were mentally or physically disabled prior to age 18 and those who became disabled after age 18.

The interim regulations (29 CFR 825.113(c)), which incorporate the statutory provisions, qualify an eligible employee's entitlement to FMLA leave for a son or daughter older than age 18 to those who are "incapable of self-care because of a mental or physical disability." Subparagraph (c)(1) defines "incapable of self care " as "requiring active assistance or supervision to provide daily self-care in several of the activities of daily living or ADL's." Subparagraph (c)(2) defines "physical or mental disability" by incorporating the regulations issued by the Equal Employment Opportunity Commission (EEOC) under the Americans with Disabilities Act (ADA), 42 U.S.C. 12101 et seq. and codified at 29 CFR Part 1630. The age on which the child became disabled is not a factor for determining an eligible employee's entitlement to FMLA leave under these regulations.

Issue No. 2

For an eligible employee to be entitled to take leave to care for a daughter with a serious health condition, the statute and regulations require that the statutory definition of child be met. As mentioned above, a parent may be entitled to FMLA leave to care for an adult child with a serious health condition if the child has a physical or mental disability within the meaning of the ADA Regulations, 29 CFR Part 1630. A parent is not entitled to FMLA leave to care for a child-over age 18 who is not disabled within the meaning of the ADA regulations, including a daughter over 18 years who has a serious health condition because of pregnancy or is recovering from childbirth. As you have correctly observed, "disability" within the meaning of the ADA does not include pregnancy. We see no "conflict" in this regard between the ADA and FMLA.

I hope that the above fully addresses your concerns. If I may be of further assistance, please do not hesitate to contact me. I apologize for any inconvenience caused by our delay in responding to your request.

Sincerely,

Daniel F. Sweeney
Deputy Assistant Administrator

cc: Equal Employment Opportunity Commission

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

U.S. Department of Labor
Employment Standards Administration
Wage and Hour Division
Washington, D.C. 20210

December 28, 1994 **FMLA-52**

Dear ***Name****,

Thank you for your letter of October 17, 1994, addressed to President Clinton about the Family and Medical Leave Act of 1993 (FMLA). Your letter has been referred to the U.S. Department of Labor's Wage and Hour Division for reply as this office has primary administration and enforcement responsibilities under the FMLA for all private, state and local government employees and some federal employees.

The FMLA, which became effective for most employers on August 5, 1993, allows up to 12 workweeks of unpaid, job-protected leave in any 12-months—with group health insurance coverage maintained during the leave—to eligible employees for specified family and medical reasons. If a collective bargaining agreement (CBA) was in effect on that date, FMLA became effective on the expiration date of the CBA or February 5, 1994, whichever was earlier.

Private-sector employers are covered under if they have employed at least 50 employees during 20 or more calendar workweeks in the current or the preceding calendar year. All public-sector employers are covered employers regardless of the number of employees employed.

Employees are eligible under FMLA if they have worked for a covered employer for at least 12 months (which need not be consecutive months), have worked at least 1,250 hours during the 12 months preceding the start of leave, and are employed at a worksite where the employer employs at least 50 employees within 75 miles.

Unpaid FMLA leave must be granted to an eligible employee for any of the following reasons: (1) for the birth of a son or daughter, and to care for the newborn child; (2) for placement with the employee of a son or daughter for adoption or foster care; (3) to care for the employee's spouse, son or daughter, or parent, who has a serious health condition; and (4) for a serious health condition that makes the employee unable to perform his/her job. Upon return from FMLA leave, the employee is entitled to be restored to the same or equivalent position that the employee held when the leave commenced.

Pursuant to Regulations 29 CFR 825.207, an eligible employee may elect, or an employer may require the employee to substitute accrued paid vacation leave, personal or family leave, or medical or sick leave for any part of the 12-week FMLA leave period under certain conditions. Paid vacation leave and personal leave may be substituted for all or part of any unpaid FMLA leave provided to care for the employee's child after birth, or for placement with the employee of a son or daughter for adoption or foster care, or to care for a seriously ill family member. Paid sick leave or medical leave may be used and counted as leave for the employee's own serious health condition, and to the extent permitted by the employer's plan to care for the employee's seriously-ill family member. Use of paid family leave as FMLA leave is limited by the normal use of the employer's plan. If the employer requires paid leave to be substituted for unpaid FMLA leave, the employer must convey this decision to the employee at the time the employee gives notice of the leave or when the employer has determined that the leave qualifies as FMLA leave. (Reg. 29 CFR 825.301(c))

An employer, however, cannot require the employee to substitute, under FMLA, any paid vacation or other leave during the absence that would otherwise be covered by payments from plans covering temporary disabilities. Whether such temporary disability plans are provided voluntarily through insurance or under a self-insured plan or required to meet state-mandated disability provisions (e.g., pregnancy disability laws) would make no difference. The employer may designate and credit the temporary disability leave of absence against the FMLA 12-week annual entitlement so long as the reason for the leave is qualifying, the employee has been properly notified of the designation prior to the start of leave, and the employee's health care benefits have been maintained during the leave of absence. An employee's receipt of such payments precludes the employee from electing and prohibits the employer from requiring the substitution of any form of accrued paid leave for any part of the absence covered by such payments.

An employer is prohibited from discriminating against an employee who uses FMLA leave (Reg. 29 CFR 825.220(c)). For example, if an eligible employee would have been entitled to paid maternity leave (i.e., pregnancy disability leave) and the employer does not normally require the substitution of paid sick and/or vacation leave, an employer cannot require the substitution of such leave under FMLA.

It is not clear from the limited information contained in your letter whether the employer has discriminated against you, under FMLA, for requiring the substitution of accrued paid vacation and sick leave for a portion of your temporary disability benefits.

If you feel that the employer may have violated FMLA, you may contact the Wage and Hour office closest to your home. The nearest Wage and Hour office is in Atlanta, Georgia, at the following address and telephone number:

U.S. Department of Labor
Employment Standards Administration
Wage and Hour Division
Atlanta, Georgia District Office
1375 Peachtree Street, Room 668
Atlanta, Georgia 30303
Telephone No. (404) 347-4235/4258

For your information, we are enclosing the FMLA fact sheet that summarizes the Act's provisions.

Sincerely,

Daniel F. Sweeney
Deputy Assistant Administrator

Enclosure

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

U.S. Department of Labor
Employment Standards Administration
Wage and Hour Division
Washington, D.C. 20210

December 29, 1994 **FMLA-53**

Dear ***Name****,

Thank you for your letter, addressed to Secretary Robert Reich, about the provisions of the Family and Medical Leave Act of 1993 (FMLA). Your letter has been referred to the Wage and Hour Division of the U.S. Department of Labor for reply as this office has primary administration and enforcement responsibilities under FMA for all private, state and local government employees, and some Federal employees.

The FMLA allows up to 12 workweeks of unpaid, job-protected leave in any 12-months—with group health insurance coverage maintained during the leave—to eligible employees for specified family and medical reasons.

Employers are covered under the FMLA if they have employed at least 50 employees during 20 or more calendar workweeks in the current or the preceding calendar year. Employees are eligible under the FMLA if they have worked for a covered employer for at least 12 months that need not be consecutive, have worked at least 1,250 hours during the 12 months preceding the start of leave, and are employed at a worksite where the employer employs at least 50 employees within 75 miles.

Unpaid FMLA leave must be granted to an eligible employee for any of the following reasons: (1) for birth of a son or daughter, and to care for the newborn child; (2) for placement with the employee of a son or daughter for adoption or foster care; (3) to care for the employee's spouse, son or daughter, or parent, who has a serious health condition; and (4) for a serious health condition that makes the employee unable to perform his/her job.

Upon return from FMLA leave, the employee is entitled to be restored to the same employment position which the employee held when the leave commenced, or to an equivalent position with equivalent benefits, pay, and other terms and conditions of employment.

FMLA leave may be taken "intermittently or on a reduced leave schedule" under certain circumstances. Where leave is taken to care for the newborn child or for placement with the employee of a son or daughter for adoption or foster care, an employee may take leave intermittently or on a reduced leave schedule only if the employer agrees. Where FMLA leave is taken to care for a sick family member or for an employee's own serious health condition, leave may be taken intermittently or on a reduced leave schedule when medically necessary. The employer may require 30 days advance notice when the leave is "foreseeable" and a medical certification from the treating health care provider only when the employee or the employee's family member has a serious health condition.

It would appear from the limited information contained in your letter that the employer need not have approved your requests for leave to care for your newborn child from November 6 through 18 and December 1 through 5. These requests would be considered to be intermittent FMLA leave as they are leaves taken in separate blocks of time following your initial leave of absence due to the birth of the child. This conclusion is based on the information contained in your letter which stated that you returned to work on November 4 and advised your employer on that date that you wished to take two additional leaves as noted above. The employer may have been in violation for requiring medical certification for a leave of absence that appeared not to involve a serious health condition either of your own self or of an immediate family member. The employer could have required 30 days advance notice before approving, if it chose to approve, either intermittent leave request to care for the newborn child.

The information contained in your letter is too limited to determine whether your employer has violated any provisions of FMLA. If you feel that the employer has violated FMLA, you may contact the Wage and Hour area office that handled your previous complaint.

Sincerely,

Daniel F. Sweeney
Deputy Assistant Administrator

cc: Dallas Regional Office

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

U.S. Department of Labor
Employment Standards Administration
Wage and Hour Division
Washington, D.C. 20210

February 22, 1995 **FMLA-54**

Dear ***Name****,

I regret any difficulty that your constituent, ***Name****, may have had in contacting our offices in Sandusky and Columbus and confusion with respect to applicable sections of the Family and Medical Leave Act of 1993 (FMLA).

With respect to ***Name**** specific question, any period of leave will be treated as continued service (i.e., no break in service) for purposes of vesting and eligibility to participate in pension and other retirement plans. If, for example, the plan requires an employee to be working on a specific date in order to be credited with a year of service for vesting or participation purposes, an employee on FMLA leave who subsequently returns to work shall be deemed to have been working on that date. (See 29 CFR 825.215(d)(4)). This provision applies only to questions or vesting or eligibility. An employee may, but is not entitled to, accrue any additional benefits or seniority during unpaid FMLA leave. (See 29 CFR 825.215(d)(2)). Thus, was not necessarily entitled to pension plan credit for the time she was on FMLA leave. There may be other facts not mentioned in her letter, however, that would yield a different answer. For example, was the leave unpaid and what is the employer's policy with respect to employee's on other types of unpaid leave?

I am asking someone from our Chicago Regional office that has administrative authority over the Columbus and Sandusky offices, to review this situation and contact your office directly. If the above does not fully address your concerns or those of your constituent, you may have someone from your office contact me directly.

Sincerely,

Daniel F. Sweeney
Deputy Assistant Administrator

Enclosure

cc: Washington, D.C., Office
Chicago Regional Office

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

U.S. Department of Labor
Employment Standards Administration
Wage and Hour Division
Washington, D.C. 20210

March 10, 1995 **FMLA-55**

Dear ***Name****,

This is in response to your letter forwarding correspondence from ***Name****. ***Name**** expresses concern about the Family and Medical Leave Act of 1993 (FMLA) as it relates to the Americans With Disability Act (ADA) with respect to light duty accommodation and medical certification.

In enacting FMLA, Congress stated in Section 2 that there is inadequate job security for employees who have serious health conditions that prevent them from working for temporary periods. Congress also stated in Section 2 that it is the purpose of this Act to entitle employees to take reasonable leave for medical reasons. Pursuant to Section 102(a)(1)(D), an eligible employee is entitled to a total of 12 workweeks of unpaid leave during any 12-month period because of a serious health condition that makes the employee unable to perform functions of the employee's position. Sections 104(a)(1)(A) and (B) provide that upon return from FMLA leave, employees must be restored to their original or to an equivalent position with equivalent pay, benefits, and terms and conditions of employment. Section 105 prohibits the employer from interfering with or discriminating against an employee who exercises his or her rights under FMLA. The position taken by the Department that prohibits an employer from requiring an employee to accept a "light duty" position in lieu of FMLA leave is the appropriate construction of the statutory language.

Leave provisions of FMLA are wholly distinct from the reasonable accommodation obligations of employers covered under the ADA. While FMLA provides an eligible employee the right to a temporary medical leave of absence for a serious health condition, ADA prohibits employment discrimination against "qualified individuals with disabilities." Reasonable accommodation is a critical component of the ADA's assurance of nondiscrimination and is any change in the work environment or in the way things are usually done, that results in equal employment opportunity for an individual with a disability. An employer under ADA must make a reasonable accommodation to the known physical or mental limitations of a qualified applicant or employee with a disability unless it can show that the accommodation would cause an undue hardship on the operation of its business. In the case of an employee with a serious health condition under FMLA who is also a qualified individual with a disability under ADA, requirements from both laws must be observed and applied in a manner that assures the most beneficial rights and protection. For example, a reasonable accommodation under ADA might be accomplished by providing an individual with a disability with a part-time job which does not ordinarily provide health benefits. Under FMLA, an eligible employee would be permitted to work a reduced leave schedule for up to 12 workweeks of leave in any 12-month period with group health plan benefits maintained during this time. Once the FMLA leave had been exhausted in the 12-month period, the employer would have no further obligations under FMLA and would follow the requirements of ADA and any other applicable law.

Beside the ADA, other laws such as state workers' compensation laws may require employers to offer employees the opportunity to take a restructured or light duty job. Under such circumstances, the employer must still afford an employee his or her FMLA rights while at the same time fulfilling the requirements under the respective state law. For example, under a state workers' compensation program, an employer may be required to offer an employee a light duty assignment when the appropriate medical authority has indicated that the person is able to return to work on a limited basis. Such an employee could elect to exercise the remainder of his or her FMLA leave rather than accept the light duty assignment. This does not mean, however, that the employee would be entitled to continue to receive benefits under the workers' compensation program. If that program is structured in such a way as to end benefits at the point at which the employee is deemed medically able to accept a light duty assignment and one is offered by the employer, but is turned down by the employee, the employer's obligations to provide such benefits may cease.

If an employee on FMLA leave voluntarily accepts a light duty assignment, the final regulations have been amended at 29 CFR 825.220(d) to provide that such an employee retains rights under FMLA to job restoration to the same or an equivalent position held prior to the start of the leave for a cumulative period

of up to 12 workweeks. This "cumulative period" would be measured by the time designated as FMLA leave for the workers' compensation leave of absence and the time employed in a light duty assignment.

The period of time employed in a light duty assignment cannot count, however, against the 12 weeks of FMLA leave. Examples of how FMLA interacts with federal and state anti-discrimination laws, such as the ADA, may be found at Regulations 29 CFR 825.702.

In general, the purpose of the medical certificate is to allow employers to obtain necessary information from a health care provider to verify that an employee in fact has a serious health condition, and the likely periods of absence by the employee. The medical certificate has been revised, copy enclosed, to require certification as to which aspect of the serious health condition definition applies, and to state the medical facts to support the definition. The regulations at 29 CFR 825.306 and the form (WH-380) have also been amended to no longer provide for diagnosis, and make clear, consistent with the ADA and privacy concerns, that all information on the form relates only to the condition for which the employee is taking FMLA leave.

For information, we are enclosing a copy of the final rule which will become effective on April 6, 1995 and a copy of the medical certification, form WH-380, as revised December 1994. I hope that the above fully addresses the concerns expressed by Name*. If we may be of further assistance, please do not hesitate to contact me.

Sincerely,

Daniel F. Sweeney
Deputy Assistant Administrator

Enclosures

cc: Equal Employment Opportunity Commission

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

U.S. Department of Labor
Employment Standards Administration
Wage and Hour Division
Washington, D.C. 20210

March 28, 1995 **FMLA-56**

Dear ***Name****,

This is in response to your letter, transmitted by facsimile to Mr. Richard Brennan of my staff, regarding your client's attendance bonus accrual policy under the Family and Medical Leave Act of 1993 (FMLA).

You state that your client has a policy under which employees accrue a weekly bonus if they work each day in the workweek. Failure to work the entire workweek for any reason causes forfeiture of the bonus entitlement except for employees on vacation or absent due to FMLA-qualifying conditions or events. Employees on vacation or absent for FMLA-qualifying events are entitled to a pro-rata share of the bonus based on the number of days worked. Thus, for example, if an employee missed one day of the week for an FMLA-qualifying condition, the employee would receive the amount of the bonus otherwise accrued for the workweek, i.e., 4/5 of the weekly amount. An employee who misses one day for a reason other than an FMLA-qualifying event or vacation time would not receive any bonus for that week. An employee who works no days in the week (whether due to an FMLA reason or otherwise) accrues none of the bonus, having performed no work during the workweek.

Under FMLA, an employee may, but is not entitled to, accrue additional benefits or seniority during periods of unpaid FMLA leave. Any benefits accrued at the time leave begins must be available to the employee upon return from leave. By the same token, an employer may not discriminate against employees who use FMLA leave. 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. Thus, an employee's entitlement to benefits other than group health benefits during a period of FMLA leave 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). See 29 CFR §§ 825.215(d)(2), 825.220(c), and 825.209(h).

It is our view that your client's policy is consistent with the requirements of FMLA. As your analysis points out, § 104 of FMLA provides:

(1) Eligible employees who take FMLA leave are entitled, upon return from leave, to be restored to equivalent employment benefits (§ 104 (a)(1)(B)) ;

(2) The taking of FMLA leave may not result in the loss of any employment benefit accrued prior to the date FMLA leave commenced (§ 104(a)(2)); and

(3) Nothing in § 104 shall be construed to entitle any restored employee to the accrual of any seniority or employment benefits during periods of FMLA leave (§ 104(a)(3)(A)).

Because FMLA leaves are not disqualifying events under the employer's bonus policy, employees who take FMLA leave do not forfeit bonus amounts accrued prior to the start of their FMLA leave. Employees who take FMLA leave under this bonus policy are entitled to a pro-rata share of a benefit that employees absent for other reasons do not receive (such other absences result in forfeiture of the entitlement, while FMLA absences do not). Thus, because employees on forms of leave other than FMLA or vacation are not otherwise entitled to the bonus, the policy does not unfairly discriminate against employees who use FMLA leave.

I hope that this has been responsive to your request. If further information is required, please do not hesitate to contact this office again.

Sincerely,

J. Dean Speer
Director, Division of Policy and Analysis

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

U.S. Department of Labor
Employment Standards Administration
Wage and Hour Division
Washington, D.C. 20210

April 7, 1995 **FMLA-57**

***This letter has been superseded by FMLA-86, dated December 12, 1996.**

Dear ***Name****,

This is in response to your letter of March 14 forwarding a copy of a letter from your constituent, ***Name**** regarding the Family and Medical Leave Act of 1993 (FMLA). ***Name**** expresses two concerns: that the Department's interpretation of the term serious health condition does not reflect the intent of the Act's authors and is being applied inconsistently; and, that FMLA leave absences may not be counted against an employee for purposes of perfect attendance bonuses or other disciplinary actions. The FMLA defines serious health condition to mean either "inpatient care in a hospital, hospice, or residential medical care facility" or "continuing treatment by a health care provider." Regulations, 29 CFR Part 825, published as a Final Rule on January 6, 1995 and effective April 6, 1995, state that, unless complications arise, the common cold, the flu, ear aches, upset stomach, minor ulcers, headaches other than migraine, routine dental or orthodontia problems, periodontal disease, etc., are examples of conditions that do not meet the definition of a serious health condition and therefore do not qualify for FMLA leave. The fact that an employee is incapacitated for more than three days, has been treated by a health care provider on at least one occasion which has resulted in a regimen of continuing treatment prescribed by the health care provider does not convert minor illnesses such as the common cold into serious health conditions in the ordinary case (absent complications.) See § 825.114(c) of the final FMLA Regulations, 29 CFR Part 825.

With regard to incentive plans rewarding attendance, an employee may not be disqualified solely for having taken bona fide FMLA leave. The statute states that the taking of leave shall not result in the loss of any employment benefit accrued prior to the date the FMLA leave commences. To the extent an employee had perfect attendance before the FMLA leave begins, the employee is entitled to continue eligibility for perfect attendance upon return from leave and may not be disqualified from the bonus because of taking leave. Illnesses that do not meet the definition of a serious health condition do not enjoy FMLA's protection in this regard.

I hope that the above addresses your constituent's concerns and conveys fully the Department's position with respect to these concerns. I would be glad to address any further questions you or your constituent may have.

Sincerely,

Daniel F. Sweeney
Deputy Assistant Administrator

Enclosure

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

U.S. Department of Labor
Employment Standards Administration
Wage and Hour Division
Washington, D.C. 20210

April 28, 1995 **FMLA-58**

Dear ***Name****,

This is in response to your inquiry on the Family and Medical Leave Act (FMLA) regulations.

Your client has asked you for guidance on provisions in sections 825.310(c) and (f) of the FMLA Regulations, 29 CFR Part 825, regarding the circumstances under which an employer may request an employee to furnish a return-to-work medical certification. Paragraph (f) of that section states that an employer may delay job restoration until the employee submits a required fitness-for-duty certification, unless the employer has failed to notify the employee of this requirement in accordance with paragraph (e) of that section (see the enclosed correction document published in the Federal Register on March 30 which, among other revisions, corrected the paragraph citation from (c) to (e) in this section). Paragraph (c) of section 825.310 states that the certification provided by an employee need only be a simple statement that an employee is able to return to work; however, a health care provider employed by the employer may contact the employee's health care provider, with the employee's permission, for purposes of clarification of the employee's fitness to return to work. No additional information may be acquired through this contact, but clarification may be requested of the serious health condition for which the leave was taken. If the employer invokes this provision and directs a health care provider which the employer employs to contact the employee's health care provider, the employer may not delay the employee's return to work while such contact is being made.

When these sections are read in combination, they collectively provide that if an employer has properly advised an employee in advance of the requirement to submit a fitness-for-duty report and the employee requests to be restored without furnishing the requested report, the employer may delay job restoration until the requested report is furnished. If, however, the employee furnishes a fitness-for-duty report (which may be a simple note from his or her doctor) when asking to be restored, and the employer has health care provider which the employer employs contact the employee's health care provider for a clarification, the employer must immediately restore the employee and may not delay restoration while the contact is being made.

FMLA also provides that if the terms of a collective bargaining agreement govern an employee's return to work, those provisions shall be applied as stated in paragraph (b) of that section. As discussed in section 825.700(a) of the regulations, an employer must observe any employment benefit program or plan that provides any greater family or medical leave rights to employees than the rights established by the FMLA, including greater rights provided under the terms of a collective bargaining agreement. However, the rights and benefits established by may not be diminished by any employment benefit program or plan. For example, a collective bargaining agreement which provides for reinstatement to a position that is not equivalent because of seniority (e.g., provides lesser pay) is superseded by FMLA. Nothing in FMLA prevents an employer from amending existing leave and benefit program, provided they comply with FMLA. Thus, if a collective bargaining agreement does not have a return to work certification procedure, the employer may implement such a procedure provided that it complies with FMLA and, provided further, that implementation of the procedure complies with all applicable requirements under Federal and State law (including the National Labor Relations Act).

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

Sincerely,

J. Dean Speer
Director, Division of Policy and Analysis

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

U.S. Department of Labor
Employment Standards Administration
Wage and Hour Division
Washington, D.C. 20210

April 28, 1995 **FMLA-59**

Dear ***Name****,

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 the ***Name****.

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

1. 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.

2. 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.

3. 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."

4. 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.

Sincerely,

Dean Speer
Director, Division of Policy and Analysis

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

U.S. Department of Labor
Employment Standards Administration
Wage and Hour Division
Washington, D.C. 20210

May 2, 1995 **FMLA-60**

Dear ***Name****,

This is in response to your letter forwarding correspondence from ***Name****, concerning the Family and Medical Leave Act of 1993 (FMLA). ***Name**** expresses concern with FMLA's definition of serious health condition, particularly chronic conditions, as summarized in an association bulletin, and its impact on his employer's absence control program. The definition of serious health condition was set forth in FMLA's final regulations, published in the Federal Register on January 6, 1995 and effective on April 6, 1995.

In enacting the law, Congress stated in Section 2, that there is inadequate job security for employees who have serious health conditions that prevent them from working for temporary periods. Congress also stated in Section 2 that it is the purpose of FMLA to entitle employees to take reasonable leave for medical reasons. Pursuant to Sections 101(11)(A) and (B) , a serious health condition is defined as an illness, injury, impairment, or physical or mental condition that involves inpatient care in a hospital, hospice, or residential medical care facility; or continuing treatment by a health care provider.

The legislative history further refines the intent of Congress regarding the meaning of "serious health condition." In this context,".... serious health condition is intended to cover conditions or illnesses that affect an employee's health to the extent that he or she must be absent from work on a recurring basis or for more than a few days for treatment or recovery.(emphasis added) With respect to a child, spouse or parent, the term serious health condition is intended to cover conditions or illnesses that affect the health of the child, spouse or parent such that he or she is similarly unable to participate in school or in his or her regular daily activities."

In developing the regulation's definition of a serious health condition, the Department relied upon the statute and the legislative history. Where inpatient care is not involved, the regulations require the absence from work, or from school or incapacity in performing other daily activities to be greater than three calendar days and to include continuing treatment by (or under the supervision of) a health care provider. Continuing treatment includes (i) two or more visits to a health care provider; (ii) two or more treatments by a health care provider on referral from, or under the direction of, a health care provider; or (iii) a single visit to a health care provider that results in a regimen of continuing treatment under the supervision of the health care provider as for example, a course of medication or therapy to resolve the health condition.

Because the statute (Section 102 (b)) permits intermittent leave or leave on a "reduced leave schedule" in cases of medical necessity, it is also clear that the Act contemplates that employees would be entitled to FMLA leave in some cases because of doctor's visits or therapy due to a condition that need not be incapacitating at that point. The legislative history explains that to receive treatment for early stage cancer I to receive physical therapy after a hospital stay or because of severe arthritis, etc., or for prenatal care are covered by the Act.

The final regulations clarify the interim final regulations' definition of serious health condition for chronic conditions and pregnancy. It is recognized that certain chronic conditions, such as asthma and diabetes, that continue over extended periods of time, often without affecting day-to-day ability to work or perform other activities, may cause episodic periods of incapacity of less than three days. Although persons with such underlying conditions generally visit a health care provider periodically, when subject to a flare-up or other incapacitating episode, the appropriate and effective course of action may be to stay home and to self-treat. The definition has been revised to cover such chronic conditions as serious health conditions under FMLA, even when the individual episodes of incapacity are not of more than three days duration. Neither the interim regulations nor final regulations require a visit to the health care provider for each absence associated with a chronic serious health condition. (See Regulations 29 CFR 825.114)

Name* is correct in stating that FMLA leave may not be the basis of disciplinary action. Pursuant to Section 105 of the statute and Regulations 29 CFR 825.220(c), employers are prohibited from

discriminating against employees who use FMLA leave. Employers cannot use the taking of FMLA leave as a negative factor in employment actions, such as promotions or disciplinary actions; nor can FMLA leave be counted under "no fault" attendance policies.

In passing FMLA, Congress also stated that the purposes of the Act were to be accomplished "in a manner that accommodates the legitimate interests of employers." Employees are required to consult with employers prior to the scheduling of planned medical treatment where intermittent FMLA leave will be used in order to schedule such treatment, if possible, so that it will not unduly disrupt the employer's operations. Employers also may require a medical certification from the employees, or the employee's immediate family member's treating physician, which can provide medical facts about the condition and the duration of treatment and recovery. Moreover, the employer may request certification at some later date if the employer has reason to question the appropriateness of the leave or its duration. If the employer questions the validity of the initial medical certification, the employer may require the employee to obtain a second medical opinion, and possibly a third if necessary, at the employer's expense. Employers also have the right to request recertification in the case of pregnancy, chronic conditions, or permanent/ long-term conditions under the supervision of a health care provider every 30 days or at any reasonable interval based on the circumstances of the case. (See 29 CFR 825.305 -308)

If the employee fails to provide in a timely manner a requested medical certification to substantiate the need for FMLA leave for a serious health condition, the employer may delay FMLA leave until the employee submits the certificate. If the employee is unable to produce the medical certification, the leave is not FMLA leave and the employee is not protected by the Act. (See 29 CFR 825.301(b)(ii) and 312(b) .) While we appreciate ***Name**** concerns, we believe that the regulatory definition of a serious health condition is consistent with the statute and legislative history. We also believe that the regulations provide employers the means to deter employees from improperly using FMLA leave. A copy of the final regulations is enclosed for ***Name**** information.

If I may be of further assistance to you, please do not hesitate to contact me.

Sincerely,

Daniel F. Sweeney
Deputy Assistant Administrator

Enclosure

cc: Washington, D.C., Office

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

U.S. Department of Labor
Employment Standards Administration
Wage and Hour Division
Washington, D.C. 20210

May 12, 1995 **FMLA-61**

Dear ***Name****,

This is in response to your letter requesting an interpretation of the Family and Medical Leave Act of 1993 (FMLA) regarding substitution of an employee's accrued paid leave for unpaid FMLA leave. Specifically, one of your members has been told by his employer that he must substitute vacation leave that he would otherwise not yet be entitled to use for a part of his FMLA leave. Under the employer's vacation leave plan, an employee who has worked 800 hours in the current vacation year earns paid vacation that may not be used until the next vacation year.

Section 102(d)(2) of FMLA (29 U.S.C. 2612(d)(2) provides generally that an employee may elect, or an employer may require the employee, to substitute certain of the accrued paid vacation leave, personal leave, family leave, or sick or medical leave of the employee for the unpaid leave provided under the Act. The legislative history indicates that the purpose of this section was "to provide that specified paid leave which has accrued but has not yet been taken, may be substituted for the unpaid leave under this act in order to mitigate the financial impact of wage loss due to family and temporary medical leaves." (House Report 103-8, Feb. 2, 1993, p. 38) The Department interprets these provisions to mean that the employee has both earned the leave and is able to use that leave during the FMLA leave period. Consequently, in the particular situation that you describe, the employer could not require the employee to substitute leave that is not yet available to the employee to use under the terms of the employer's leave plan.

The foregoing would neither prevent an employer from voluntarily advancing paid leave to an employee nor an employee from voluntarily accepting such leave during an FMLA absence. Section 403 of FMLA (29 U.S.C. 2653) specifically states that "[n]othing in this Act or any amendment made by this Act shall be construed to discourage employers from adopting or retaining leave policies more generous than any policies that comply with the requirements under this Act or any amendment made by this Act."

The above is intended as general guidance only and assumes that no other compliance questions are at issue. Please contact this office directly should the above not fully address your concerns.

Sincerely,

Daniel F. Sweeney
Deputy Assistant Administrator

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

U.S. Department of Labor
Employment Standards Administration
Wage and Hour Division
Washington, D.C. 20210

May 17, 1995 **FMLA-62**

Dear ***Name****,

Thank you for your letter of April 30, 1995, addressed to Secretary Robert Reich, which encloses correspondence from ***Name**** about the Family and Medical Leave Act of 1993 (FMLA). Your letter plus enclosures have been referred to the Wage and Hour Division of the U.S. Department of Labor for reply as this office has primary administration and enforcement responsibility under FMLA for all private, state and local government employees, and some Federal employees.

Name* expresses concern about the general notice requirements under FMLA for covered employers who do not have any eligible employees. Specifically, ***Name**** cites a political subdivision, i.e., public agency, which employs less than 50 employees. Pursuant to Section 101 of FMLA, public agencies are covered employers regardless of the number of employees employed. Also under this section, FMLA excludes from employee eligibility, any employee who is employed at a worksite where less than 50 employees are employed by the employer within 75 miles.

Section 109 of FMLA requires all covered employers to post " ... and keep posted in conspicuous places on the premises of the employer where notices to employees and applicants for employment are customarily posted ..." a notice of the Act's provisions and information concerning procedures for filing complaints of violations. As the preamble to the final rule notes in the information provided by ***Name****, "FMLA imposes a statutory obligation on all covered employers to post the notice to employees informing them of FMLA's provisions, regardless of whether the employer has any 'eligible' employees." This section also notes that there is no authorized exception that relieves covered employers from this notice requirement when they have no eligible employees. Consequently, the Department does not have, given the current language of the statute, the option to waive the posting requirement as suggested by the comments to the final rule and ***Name****.

If I may be of further assistance, please do not hesitate to contact me.

Sincerely,

Daniel F. Sweeney
Deputy Assistant Administrator

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

U.S. Department of Labor
Employment Standards Administration
Wage and Hour Division
Washington, D.C. 20210

June 19, 1995 **FMLA-63**

Dear ***Name****,

This is in response to your letter of May 3, 1995, regarding the Family and Medical Leave Act of 1993 (FMLA) final rule published on January 6, 1995, in the Federal Register. Specifically, you request that certain limitations on treatment that a chiropractor may perform in order to be recognized as a "health care provider" for FMLA purposes be eliminated.

The FMLA entitles eligible employees to take leave for a serious health condition (of either the employee or an immediate family member). "Serious health condition" is defined to include an injury, illness, impairment, or physical or mental condition involving either inpatient care or "continuing treatment by a health care provider." In addition, FMLA's medical certification provisions allow an employer to request that leave for a serious health condition "...be supported by a certification issued by the health care provider..." of the employee or family member. Section 101(6) of the Act defines "health care provider" as a doctor of medicine or osteopathy authorized in the State to practice medicine or surgery (as appropriate) or "any other person determined by the Secretary [of Labor] to be capable of providing health care services."

Based on FMLA's legislative history, it is clear that Congress included the medical certification provisions to enable employers to have a check against employee abuse of the law's leave entitlement. Only health care providers' qualified to provide reliable medical information that supports the existence of serious health conditions (as defined by FMLA) can fulfill that role when employers request medical certifications to support FMLA leave requests.

After reviewing definitions under several programs, including rules of the U.S. Office of Personnel Management and Medicare, the Department of Labor developed FMLA's regulatory definition of "health care provider" by beginning with the definition of "physician" under the Federal Employees' Compensation Act (FECA) (5 U.S.C. 8101(2)). Also included from the FECA definition are podiatrists, dentists, clinical psychologists, optometrists, and chiropractors (limited to treatment consisting of manual manipulation of the spine to correct a subluxation as demonstrated by X-ray to exist) authorized to practice in the State and performing with the scope of their practice as defined under State law. Added to FMLA's definition are nurse practitioners and nurse-midwives (who provide diagnosis and treatment of certain conditions, especially at health maintenance organizations and in rural areas where other health care providers may not be available) performing within the scope of their practice as allowed by State law. The FMLA's definition includes Christian Science Practitioners to reflect the Congressional intent that such practitioners be included as expressed in colloquies on the floors of both the House and Senate, and reflected in the Committee report accompanying Title II of FMLA applicable to Federal civil service employees. Finally, the definition was expanded to include any health care provider that is recognized by the employer or accepted by the group health plan (or equivalent plan) of the employer.

The rulemaking reflects a careful balancing of public comments on the issue. These comments ranged from employer representatives that supported the most narrow definition of "health care providers" over concerns that other persons would not be qualified to provide the reliable medical information contemplated by FMLA's medical certification provisions, to employee advocate groups that supported an expansive definition to include all those who give treatment of any kind.

We appreciate receiving the benefit of your views in this matter. We believe that the above-mentioned refinements in the final rule should take care of those circumstances where the employer or the employer's plan is willing to accept medical services by a chiropractor that go beyond the treatment specified in the definition.

I hope that this letter has been responsive to your needs. If I may be of further assistance, please do not hesitate to contact me.

Sincerely,

Daniel F. Sweeney
Deputy Assistant Administrator

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

U.S. Department of Labor
Employment Standards Administration
Wage and Hour Division
Washington, D.C. 20210

June 21, 1995 **FMLA-64**

Dear ***Name****,

Thank you for your letter of May 5, 1995, addressed to Secretary Reich, forwarding correspondence from about the Family and Medical Leave Act of 1993 (FMLA). Your letter plus enclosures have been referred to the Wage and Hour Division of the U.S. Department of Labor for reply as this office has primary administration and enforcement responsibility under FMLA for all private, state and local government employees, and some Federal employees. ***Name**** expresses concern with the interaction of FMLA's requirements to maintain group health plan coverage during an FMLA leave absence and COBRA with respect to continuation of group health plan coverage once FMLA leave has ended.

In general, FMLA allows up to 12 workweeks of unpaid, job-protected leave in any 12-month period—with group health insurance coverage maintained during the leave—to eligible employees for specified family and medical leave. Upon return to work, the employer is obligated to restore the employee to the employee's same position or to an equivalent position with equivalent pay, benefits and other terms and conditions of employment. Maintenance of health benefits and employment and benefits protection are direct statutory requirements under FMLA at 29 USC 2614.

Under certain circumstances, which are discussed in the revised final rule at section 825.212 of Regulations, 29 CFR Part 825, an employer's obligation to maintain group health benefits may cease under FMLA. Where an employee's premium payment is late, the group health plan coverage may be dropped or canceled only when the employer has provided at least a 15-day written notice to the employee that the payment is late and, unless received, coverage will cease in 15 days. An employer's obligation to maintain group health benefits may also cease if an employee elects to withdraw from coverage during FMLA leave. Such an action would not be prohibited under FMLA as long as the decision was truly voluntary and future reinstatement would not be barred by the terms of the plan or the employer.

When coverage lapses because an employee has not made required premium payments or the employee elects to cancel coverage during the unpaid FMLA leave, upon return to work the employer must restore the employee to coverage and benefits that are equivalent to those the employee would have had if leave had not been taken and the premium payment(s) had not been missed or coverage had not been canceled, including family or dependent coverage. In such cases, an employee may not be required to meet any qualification requirements imposed by the plan, including any new preexisting condition waiting period, to wait for an open season, or to pass a medical examination to obtain reinstatement of coverage.

To ensure that the employer can meet its responsibilities to provide equivalent group health insurance coverage upon the employee's return to work from unpaid FMLA leave, it may be necessary that premiums be paid continuously to avoid a lapse of coverage. If the employer elects to maintain such benefits during the leave, at the conclusion of leave, the employer is entitled to recover the costs incurred for paying the employee's share of any premiums. These recovery provisions under FMLA permit employers to maintain health insurance coverage at no greater costs than what an employer would otherwise pay if an employee was continuously employed during the entire leave period and ensures that the employee will be reinstated to equivalent benefits upon return to work.

While FMLA regulates the maintenance of group health coverage by employers for periods of qualifying FMLA leave, the law does not extend authority to the Department of Labor to require insurance carriers to waive provisions in their existing contracts with employers or to otherwise bear a portion of the burden for maintaining health insurance for employees who take FMLA leave.

To respond to employers' concerns regarding how the requirements under FMLA affect their obligations under COBRA, the Internal Revenue Service published Notice 94-103. This notice, which is enclosed for information, provides guidance on the COBRA continuation coverage requirements of section 4980B of the Internal Revenue Code that may arise once FMLA leave has ended. If ***Name**** wishes further

assistance on COBRA, he may contact Mr. Russ Weinheimer of the Office of the Associate Chief Counsel, Internal Revenue Service Headquarters, U.S. Department of the Treasury, 1111 Constitution Avenue, N.W., Washington, D.C. 20224, telephone (202) 622-4695.

If we can be of further assistance with respect to the provisions of FMLA, please do not hesitate to contact me. We are returning your constituent's correspondence as requested.

Sincerely,

Daniel F. Sweeney
Deputy Assistant Administrator

Enclosures

cc: Mr. Russ Weinheimer

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

U.S. Department of Labor
Employment Standards Administration
Wage and Hour Division
Washington, D.C. 20210

July 13, 1995 **FMLA-65**

Dear ***Name****,

Thank you for your letter of May 18, 1995, addressed to Secretary Reich about the Family and Medical Leave Act of 1993 (FMLA). Your letter has been referred to the Wage and Hour Division for reply as this office has primary administration and enforcement under FMLA for all private, state and local government employees and some federal employees.

In your letter, you ask for an opinion as to how much can be deducted from an employee's wages to repay the employer for paying the employee's portion of the health care premium when the employee returns to work from an FMLA leave if the employee does not agree to the amount proposed by the employer and would prefer a smaller amount. As stated in your letter, we will assume that the employer is covered, the employee is eligible, the reason for taking FMLA leave is one permitted by the Act, and that there are no other compliance questions that might affect our response.

Section 825.210(d) of the FMLA Regulations requires the employer to provide the employee with advance notice of the terms and conditions under which employees may pay their shares of group health benefit plan premiums as a part of the notification requirements of section 825.301(b) and as outlined on optional use form Employer Response to Employee Request for Family or Medical Leave (WH-381).

Consequently, the problem you outline should occur when the leave begins or when the employee gives notice of the need for leave if that occurs earlier. In any event, section 825.210(b) and (c) respectively outline how payments may be made where the leave is paid or unpaid. Where none of the prescribed methods are chosen, the parties may chose any "system voluntarily agreed to between the employer and the employee, which may include prepayment of premiums (e.g., through increased payroll deductions when the need for FMLA leave is foreseeable)." (825.210(c)(5))

The regulations do not contain guidelines with respect to those situations where the employer and employee are unable to resolve differences with respect to the repayment of the employee's share of group health benefit premiums. It is our view that such arrangements should be reasonable and not impose unreasonable hardships or difficulties on either party. For example, the employer should not attempt to recover payments all at once by deducting the entire amount due from the employee's first paycheck. On the other hand, the employee should not attempt to stretch the payments out over an unreasonably long time. The Department would view additional deductions equal to a regular group health plan premium as reasonable.

I hope, this has been responsive to your inquiry. Should you require further assistance, please do not hesitate to contact me.

Sincerely,

Daniel F. Sweeney
Deputy Assistant Administrator

cc: New York Regional Office

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

U.S. Department of Labor
Employment Standards Administration
Wage and Hour Division
Washington, D.C. 20210

July 19, 1995 **FMLA-66**

Dear ***Name****,

This is in response to your request for a review of an issue raised by your constituent, ***Name****. ***Name**** notes an apparently unexplained inconsistency in the final rule (Regulations, 29 CFR Part 825) implementing the Family and Medical Leave Act of 1993 (FMLA).

Name* notes that FMLA assures an employee 12 weeks of unpaid leave for the birth and care of a child but limits married couples who work for the same employer a total of 12 weeks combined for such leave. He also notes that this restriction does not apply to unmarried couples working for the same employer. ***Name**** is concerned that this interpretation provides unmarried parents with significantly better leave benefits than married parents.

The FMLA defines spouse to mean "a husband or wife, as the case may be." Senator Nickles made the following comments regarding this section:

This is the same definition that appears in Title 10 of the United States Code (10 U.S.C. 101).

Under this amendment, an employer would be required to give an eligible female employee unpaid leave to care for her husband and an eligible male employee unpaid leave to care for his wife. No employer would be required to grant an eligible employee unpaid leave to care for an unmarried domestic partner.

This simple definition will spare us a great deal of costly and unnecessary litigation. Without this amendment, the bill would invite lawsuits by workers who unsuccessfully seek leave on the basis of the illness of their unmarried adult companions. (Congressional Record (S 1347), February 4, 1993.)

With respect to spouses employed by the same employer, FMLA states that "[i]n any case in which a husband and wife entitled to leave under subsection (a) are employed by the same employer, the aggregate number of workweeks of leave to which both may be entitled may be limited to 12 workweeks during any 12-month period, if such leave is taken" for the birth and care of a newborn child, for placement with the employee of a child for adoption or foster care, or for the care of a parent with a serious health condition. The Senate Committee Report notes that this "provision is intended to eliminate any employer incentive to refuse to hire married couples." (Senate Report 103-3.)

The final rule reflects the language of these two sections. As the statute is currently written, the Department cannot apply the restriction on spouses who work for the same employer to similarly situated unmarried couples.

I trust that the above fully explains the language of the final rule that concerns your constituent.

Sincerely,

Daniel F. Sweeney
Deputy Assistant Administrator

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

U.S. Department of Labor
Employment Standards Administration
Wage and Hour Division
Washington, D.C. 20210

July 21, 1995 **FMLA-67**

This letter is under review in light of issues raised by the U.S. Supreme Court in Ragsdale v. Wolverine World Wide, Inc. and other judicial decisions. It may be superceded by FMLA2002-5-A. (http://www.dol.gov/esa/whd/opinion/FMLA/2002_08_06_5A_FMLA.htm)

Dear ***Name****,

Thank you for your letters about the Family and Medical Leave Act of 1993 (FMLA). In your November 18, 1994, letter, you specifically request guidance on two issues that involve the counting of FMLA leave and job reinstatement rights. In your January 11, 1995, letter, you request copies of opinion letters issued under FMLA. We regret the delay in our response to your letters.

The FMLA allows up to 12 workweeks of unpaid, job-protected leave in any 12-months-with group health insurance coverage maintained during the leave-to eligible employees for specified family and medical reasons.

Private sector employers are covered under FMLA if they have employed at least 50 employees during 20 or more calendar workweeks in the current or the preceding calendar year. All public-sector employers are covered regardless of the number of employees.

Employees are eligible under FMLA if they have worked for a covered employers for at least 12 months (which need not be consecutive months), have worked at least 1,250 hours during the 12 months preceding the start of leave, and are employed at a worksite where the employer employs at least 50 employees within 75 miles.

Unpaid FMLA leave must be granted to an eligible employee for any of the following reasons: (1) for the birth of a son or daughter, and to care for the newborn child; (2) for placement with the employee of a son or daughter for adoption or foster care, and to care for the newly placed child; (3) to care for the employee's spouse, son or daughter, or parent, who has a serious health condition; and (4) for a serious health condition that makes the employee unable to perform one or more of the essential functions of his/her job.

Upon return from FMLA leave, the employee is entitled to be restored to the same position that the employee held when leave commenced, or to an equivalent position with equivalent pay, benefits, and other terms and conditions of employment.

Sections 101(11)(A) and (B) of FMLA define serious health condition to mean either "inpatient care in a hospital, hospice, or residential medical care facility" or "continuing treatment by a health care provider." Son or daughter is defined under Section 101(12) of FMLA and under Regulations, 29 CFR 825.113(c) to be a child who either is under 18 years of age or is "18 years of age or older and incapable of self-care because of a mental or physical disability." For an eligible employee to be entitled to take FMLA leave to care for a son or daughter with a serious health condition, the statute and regulations require that the statutory definition of "son or daughter" be met. A parent may be entitled to FMLA leave to care for an adult child with a serious health condition if the child is incapable of self-care because of a mental or physical disability within the meaning of the Americans with Disability Act (ADA), at 42 U.S.C. 12101, and regulations promulgated by the Equal Employment Opportunity Commission (EEOC), at 29 CFR 1630. Given the above-mentioned provisions of FMLA, we will assume that the employee in question is eligible and the reason for taking leave is a qualifying event under FMLA.

Issue 1:

Q. Where an employer and employee have agreed that the employee would continue to work out of the office between times spent caring for a seriously ill child, is it proper to include the hours the employee worked when on leave toward the employee's 12 week maximum under the FMLA?

A. No. Only the amount of leave actually taken may be charged as FMLA leave. The amount of time that the employee is "suffered and permitted" to work for the employer, whether requested or not by the employer, must be counted as "hours worked" pursuant to the Fair Labor Standards Act (FLSA) Interpretative Bulletin, section 785.11 of 29 CFR Part 785. This means that the eight hours per day in the hospital and the time at home that the employee was "suffered and permitted to work" for the employer would be considered hours worked under the FLSA (see 29 CFR 785.12 for work performed away from the premises or job site) and this amount of time could not be counted against the employee's 12-week FMLA leave allowance.

Leave taken under FMLA may be taken on an intermittent or on a reduced leave schedule. Because the FMLA leave in question appears to be on a reduced leave schedule, an example of how leave may be counted against the 12-workweek annual allowance may be helpful. Section 825.205(a) of Regulations, 29 CFR Part 825, provides examples of how such leave would be credited against the 12-workweek allowance.

If a full-time employee who normally works eight-hour days switched to a half-time (four hours per day) reduced leave schedule, only ½ week of FMLA leave could be charged each week. In this example, it would take 24 weeks to exhaust the employee's 12-workweek FMLA leave allowance if no other FMLA leave was taken during the 12-month period. In another example, if an employee who normally works five days a week takes off one day a week, the employee would use 1/5 a week of FMLA leave. If the employee in this example used no other FMLA leave during the 12-month period, the employee could be on this schedule for 52-weeks in the designated 12-month period without exhausting his or her 12-workweek allowance.

Issue 2:

Q. Under FMLA, does an employee have the right to return to the same or similar job if the total amount of leave exceeds the 12-week maximum where eight weeks of leave was taken by the employee to care for a seriously ill child, and the additional time is being taken for a stress-related disability caused by the employer's harassment of the employee for taking the initial eight weeks of family leave to care for her sick child?

A. No. The FMLA entitles eligible employees to take FMLA leave of up to 12 workweeks in any 12 month period for qualifying medical reasons, for the birth or adoption of a child, and for the care of a child, spouse, or parent who has a serious health condition. Once the 12-workweek FMLA allowance has been exhausted in the 12-month period, FMLA benefits and protections cease.

Section 105 of FMLA, however, makes it unlawful for any employer to interfere with, restrain, or deny the exercise of any right provided under FMLA, or to discriminate against any employee who uses FMLA leave. Based on this statutory provision, FMLA leave may not be the basis of an employer's disciplinary action. The FMLA Regulations at 29 CFR 825.220(c) provide that employers cannot use the taking of FMLA leave as a negative factor in employment actions; nor can the FMLA leave be counted under any "no fault" attendance policies.

As a special note, Regulations 29 CFR 825.208 provide that an employer may designate the leave of absence of an eligible employee as FMLA leave as soon as the employer has knowledge that the purpose of the leave is for an FMLA reason. This section further provides that the designation should be made before the leave is taken or before an extension of leave is granted, unless the employer does not have sufficient information to determine the reason for the leave until after the leave commences. Under

no circumstances may the employer with sufficient information prior to the start of leave or at some point during the leave designate leave as FMLA leave after the leave has been completed. Accordingly, section 825.301(c) under the interim final rule (or 825.301(b) under the final rule which became effective on April 6, 1995) requires the employer to provide a written notice to the employee that details the employee's obligation while on FMLA leave. This notice must also be given to the employee at the time the employer has sufficient information from the employee to know that the leave is for a FMLA-qualifying reason.

Failure to provide notice to an employee that the leave is designated as FMLA leave would mean that the leave of absence may not be counted against the employee's 12-workweek FMLA leave allowance, but the employee remains subject to the FMLA's protections. See, in particular, section 825.208(c) of 29 CFR Part 825.

Please be advised that the State of California has its own family and medical leave law. The statute at Section 401(b) and Regulations at section 29 CFR 825.701(a) both state that FMLA shall not supersede any provision of any State or local law that provides greater family or medical leave rights. Should you require assistance interpreting California's law you may contact the Fair Employment and Housing Commission. Contacts at the commission that may assist you are Prudence Poppink, Senior Counsel, telephone number at (415) 557-1344 or Earl Sullaway, Deputy Director, telephone number (916) 227-2878.

I hope this letter has provided enough guidance for you to make a determination as to the employee's entitlement to FMLA leave, the amount of FMLA leave the employee may have taken during the period in question, and whether the employer properly designated the leave and gave written notice under the Federal law. If you require further assistance, you may contact me. As you have requested, enclosed are 60 FMLA opinion letters that have been issued through May 2, 1995.

Sincerely,

Daniel F. Sweeney
Deputy Assistant Administrator

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

U.S. Department of Labor
Employment Standards Administration
Wage and Hour Division
Washington, D.C. 20210

July 21, 1995 **FMLA-68**

Dear ***Name****,

This is in response to your letter asking two question regarding the application of the Family and Medical Leave Act of 1993 (FMLA).

The first question is whether an employer can count an absence for sickness or injury as an FMLA absence if the employee does not request that it be counted as such. So long as the employer is a covered employer, the employee is an eligible employee, and the reason for the absence meets one of the conditions described in the definitions of "serious health conditions" under FMLA, the employer may designate (and so advise the employee) and count the absence against the employee's 12-week FMLA entitlement even if the employee has not requested that it be counted as such.

Your second question concerns a negotiated leave of absence policy that was in effect prior to FMLA. Under this policy, employees are not required to use up all of their accrued vacation, sick time, personal time, and any other compensated time before their leave begins. You indicate that, especially in maternity situations, employees may consider this leave preferable to FMLA leave. The FMLA Regulations, 29 CFR Part 825, provide that 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 FMLA. (See Regulations 825.700) There is not enough information in your letter to determine conclusively if the negotiated leave of absence policy provides a greater benefit. If in fact it does, the employer may not cite FMLA as a reason not to adhere to the employer's established policy.

As discussed in Regulations 825.207(h), an employee who complies with an employer's less stringent leave plan requirements may not be denied leave for an FMLA purpose on the grounds that the stricter requirements of FMLA have not been met.

The above answers are based on the limited information provided in your letter and assume that no other compliance issues exist. The application of FMLA in any particular situation will of course be affected by the facts in that situation.

If you have specific questions not addressed by the above, you may contact the office of the Wage and Hour Division responsible for enforcing FMLA in your area located at the U.S. Courthouse and Federal Building, 15 Henry Street, Room 101 K, Binghamton, New York 13901, telephone: (607) 773-2609.

Sincerely,

Daniel F. Sweeney
Deputy Assistant Administrator

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

U.S. Department of Labor
Employment Standards Administration
Wage and Hour Division
Washington, D.C. 20210

July 21, 1995 **FMLA-69**

Dear ***Name****,

This is in response to your letter regarding the application of the provisions of the Family and Medical Leave Act of 1993 (FMLA) 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 in-patient 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.

Sincerely,

Daniel F. Sweeney
Deputy Assistant Administrator

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

U.S. Department of Labor
Employment Standards Administration
Wage and Hour Division
Washington, D.C. 20210

August 23, 1995 **FMLA-70**

Dear ***Name****,

This is in response to your letter regarding the Family and Medical Leave Act of 1993 (FMLA).

You ask, in your letter, how overtime hours are to be counted for purposes of determining whether or not an employee has satisfied the eligibility test of working 1,250 hours in the 12-month period immediately prior to the beginning of the employee's FMLA leave. For purposes of this test, there is no difference between overtime and non-overtime hours worked. No premium is applied to the "hours actually worked" test under FMLA regardless of whether the employee may have received an overtime premium of pay under Federal or State law or the terms of a collective bargaining agreement. Further, only hours actually worked are counted. For example, annual or sick leave, paid or unpaid holidays, or FMLA leave are not counted.

As you have requested, we are enclosing a current copy of the medical certification, Optional Form WH-380. We are also enclosing a copy of the revised employer response to employee request for leave, Optional Form WH-381.

If we may be of further service to you, please do not hesitate to contact us.

Sincerely,

Daniel F. Sweeney
Deputy Assistant Administrator

Enclosures

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

U.S. Department of Labor
Employment Standards Administration
Wage and Hour Division
Washington, D.C. 20210

September 14, 1995 **FMLA-71**

Dear ***Name****,

This is in response to your letter of June 20, 1995, addressed to ***Name**** about the Certification of Health Care Provider under the Family and Medical Leave Act of 1993 (FMLA). You state your concerns that this medical certificate, optional form WH-380, is cumbersome, requests confidential and sensitive information about the patient's health condition, and you will not be compensated for its completion.

In enacting FMLA, Congress found inadequate job security for employees who have serious health conditions that prevent them from working for temporary periods of time and a lack of employment policies to accommodate working parents that forces individuals to choose between job security and parenting. Congress stated that the purposes of FMLA are to balance the demands of the workplace with the needs of families and to entitle employees to take reasonable leave for medical reasons, for the birth or adoption of a child, and for the care of a child, spouse or parent who has a serious health condition. Congress also intended that the legitimate interests of the employer must be accommodated in implementing FMLA.

Section 103 of FMLA provides that the "employer may require that a request for leave" due to a serious health condition "be supported by a certification issued by the health care provider of the eligible employee or of the son, daughter, spouse, or parent of the employee, as appropriate." This provision was designed as a check against employee abuse. The FMLA specifically provides that such certification may include:

(1) the date on which the serious health condition commenced;

(2) the probable duration of the condition;

(3) the appropriate medical facts within the knowledge of the health care provider regarding the condition; and

(4)(A) for purpose of leave [for the care of an immediate family member] a statement that the eligible employee is needed to care for the son, daughter, spouse, or parent and an estimate of the amount of time that such employee is needed to care for the son, daughter, spouse, or parent; and

(4)(B) for purposes of leave [for the employee's own serious health condition] a statement that the employee is unable to perform the functions of the position of the employee.

Under FMLA, the term serious health condition is intended to cover conditions or illnesses affecting one's (or the immediate family member's) health to the extent that inpatient care is required, or absences are necessary on a recurring basis or for more than a few days for treatment or recovery. This term is not intended to cover short-term conditions for which treatment and recovery are very brief as such conditions would generally be covered by the employer's sick leave policies.

The purpose of the medical certificate is to allow employers to obtain information from a health care provider to verify that an employee, or the employee's family member, has a serious health condition, the likely periods of absences, and general information regarding the regimen of treatment (e.g., prescription drugs). The medical certificate has been designed to be consistent with the Americans With Disabilities Act (ADA) and privacy concerns in that all of the information on the form must relate only to the condition for which the employee is taking FMLA leave.

The first two pages of the medical certificate cover the actual certification of the existence of a serious health condition. Pages three and four are really an attachment to the medical certificate and provide a useful guide for defining serious health condition under FMLA. The design of this form was intended to be

helpful to the health care provider in requiring certification as to which aspect of FMLA's serious health condition definition applies and the medical facts to support the definition. It is also noted that only brief statements are required to respond to requested information to complete the certification.

The FMLA does not require health care providers to complete medical certificates. Failure of an employee to provide a medical certification to substantiate the need for FMLA leave for a serious health condition may, however, jeopardize the employee's job and group health insurance coverage as FMLA benefits and protection cannot apply to a leave of absence where the employee is unable to provide the requested certificate.

While we appreciate your concerns in this matter, we have attempted to develop a form that is not overly cumbersome, time consuming, or costly to complete and yet satisfies the requirements of FMLA as well as the needs of employees and employers. How you would obtain compensation for completing this medical certification would, of course, be between you and your customers as this issue was not addressed in FMLA.

For your information, we are enclosing copies of the fact sheet that summarizes FMLA's provisions, the printed version of the medical certificate, and section 825.114 of Regulations, 29 CFR Part 825, which provides a complete discussion of the definition of serious health condition under this law.
If we may of further assistance to you, please do not hesitate to contact me.

Sincerely,

Daniel F. Sweeney
Deputy Assistant Administrator

Enclosures

cc: Senator John Glenn

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

U.S. Department of Labor
Employment Standards Administration
Wage and Hour Division
Washington, D.C. 20210

September 20, 1995 **FMLA-72**

Dear ***Name****,

This is in reply to your letter of April 3, 1995, with which you enclosed a copy of your letter of June 15, 1994, addressed to ***Name****, about the definition of health care providers under the Family and Medical Leave Act of 1993 (FMLA). You express concern that the physician assistant was not among the recognized health care providers included in FMLA's definition.

The FMLA entitles eligible employees to take leave for a serious health condition of either the employee or an immediate family member. "Serious health condition" is defined to include an injury, illness, impairment, or physical or mental condition involving either inpatient care or "continuing treatment by a health care provider." In addition, FMLA's medical certification provisions allow an employer to request that leave for serious health condition "...be supported by a certification issued by the health care provider..." of the employee or family member. Section 101(6) of FMLA defines "health care provider" as a doctor of medicine or osteopathy authorized in the State to practice medicine or surgery (as appropriate) or "any other person determined by the Secretary of Labor to be capable of providing health care services."

An Interim Final Rule, Regulations 29 CFR Part 825, implementing FMLA was published in the Federal Register on June 4, 1993, and became effective on August 5, 1993, the date on which the law became effective for most employees. This rule contained a list of those persons "determined by the Secretary to be capable of providing health care services." As you note in your letter of June 15, 1994, this list did not include physician assistants. The definition of "serious health condition" (29 CFR 825.114), however, specifically recognized that "continuing treatment by a health care provider" under FMLA could include visits to physician assistants for treatment of serious health conditions under the supervision of a health care provider as defined.

The final regulations (29 CFR Part 825.118, published in the Federal Register on January 6, 1995) reflect changes to the definition of health care providers following careful consideration of numerous suggestions from the public. The interim final rule generated many comments, from employers that felt the definition of health care provider should be more limited, and from providers of various health care services who objected to be excluded. Advocacy groups suggested expanding the definition to include any providers of health care services recognized by the employer's health insurance plan, as the U.S. Office of Personnel Management's FMLA regulations provide Federal employees. The final FMLA rule recognizes any health care provider accepted by the employer's group health (or equivalent) plan, and adds clinical social workers to the extent authorized under State law to independently diagnose and treat serious health conditions without supervision. Physician assistants are not specifically included, as they are ordinarily limited to practicing under a doctor's supervision, but any services or treatments they furnish under the supervision of a doctor, and any services recognized by the employer's health plan furnished on referral and under continuing supervision of a health care provider as defined, would qualify as medical treatment for purposes of FMLA.

Accordingly, failure to list physician assistants as health care provider does not preclude such individuals from being health care providers for FMLA leave purposes under certain circumstances. To the extent employers or their group health plans recognize physician assistants for certification of the existence of a serious health condition to substantiate a claim for health care and related services provided, they would be accepted as "health care providers" under FMLA. For example, physician assistants would be considered health care providers under FMLA if an employer's group health plan or program recognized physician assistants as "primary care givers" for dispensing medical treatment and paid claims for such services. Any medical services recognized by an employer's group health plan or equivalent program which are furnished by a physician assistant as a result of a referral while under the continuing supervision of a health care provider would also qualify as medical treatment under FMLA. In addition, FMLA would recognize medical treatment by a physician assistant where an employee receives treatment

by a physician assistant under the supervision of a health care provider without first seeing the health care provider and obtaining a referral.

We appreciate your concerns and interest in FMLA, and trust that this letter has been responsive. We regret any inconvenience that the delay in our response to your letters may have cause.

Sincerely,

Daniel F. Sweeney
Deputy Assistant Administrator

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

U.S. Department of Labor
Employment Standards Administration
Wage and Hour Division
Washington, D.C. 20210

October 26, 1995 **FMLA-73**

Dear ***Name****,

Your letter addressed to ***Name****, has been referred to the Wage and Hour Division of the U.S. Department of Labor to address issues relating specifically to the Family and Medical Leave Act of 1993 (FMLA). The Wage and Hour Division enforces the FMLA for all private, State and local government employees and some Federal employees.

The FMLA entitles eligible employees of covered employers to take up to 12 weeks of unpaid, job-protected leave each year—with continued group health insurance coverage—for specified family and medical reasons.

Private employers are covered under FMLA if they have employed at least 50 employees during 20 or more calendar workweeks in the current or preceding calendar year; all public employers are covered. Employees are eligible under FMLA if they have worked for a covered employer for at least 12 months, have worked at least 1,250 hours during the 12 months preceding the start of leave, and are employed at a worksite where the employer employs at least 50 employees within 75 miles. The 12 months the employee has to have worked do not have to be consecutive.

Unpaid leave must be granted to an eligible employee for any of the following reasons: (1) for the birth of a son or daughter, and to care for the newborn child; (2) for placement with the employee of a son or daughter for adoption or foster care; (3) to care for the employee's spouse, son or daughter, or parent, who has a serious health condition; and (4) for a serious health condition that makes the employee unable to perform his/her job.

The FMLA does not extend to employee absences to provide care to siblings who have a serious health condition. In reviewing your letter, it appears that you were terminated when you took time off to care for your sister. Unfortunately, such situations are not covered by FMLA.

Although I certainly appreciate the recent difficulties you have faced, it does not appear that FMLA applies.

Sincerely,

Daniel F. Sweeney
Deputy Assistant Administrator

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

U.S. Department of Labor
Employment Standards Administration
Wage and Hour Division
Washington, D.C. 20210

October 30, 1995 **FMLA-74**

Dear ***Name****,

Your letter to ***Name**** of the Congressional Liaison Office of the Department of Labor has been referred to the Wage and Hour Division, the agency having primary enforcement responsibility for the Family and Medical Leave Act of 1993 (FMLA) for all private, State and local government employees and some Federal employees. Your constituent, ***Name****, would like to know if she would be able to use more than 12 weeks of FMLA leave in a row for the birth of her child and, if so, would there have to be a medical need for the second 12 weeks.

The FMLA entitles eligible employees of covered employers to take up to 12 weeks of unpaid, job-protected leave each year—with continued group health insurance coverage—for specified family and medical reasons.

Private employers are covered under FMLA if they have employed at least 50 employees during 20 or more calendar workweeks in the current or preceding calendar year; all public employers are covered. Employees are eligible under FMLA if they have worked for a covered employer for at least 12 months, have worked at least 1,250 hours during the 12 months preceding the start of leave, and are employed at a worksite where the employer employs at least 50 employees within 75 miles. The 12 months the employee has to have worked do not have to be consecutive.

Unpaid leave must be granted to an eligible employee for any of the following reasons: (1) for the birth of a son or daughter, and to care for the newborn child; (2) for placement with the employee of a son or daughter for adoption or foster care; (3) to care for the employee's spouse, son or daughter, or parent, who has a serious health condition; and (4) for a serious health condition that makes the employee unable to perform his/her job.

It is up to the employer to choose the applicable 12-month period. The regulations implementing FMLA provide four options: the calendar year; any fixed 12-month period such as a leave or fiscal year; the 12-month period measured forward from the date leave begins; and, a rolling 12-month period measured backward from the day an employee uses FMLA leave. Under the first two methods, and to some extent under the third, an employee could use more than 12 weeks of FMLA leave in a row. These methods are discussed in Regulations, 29 CFR Part 825.200(b), a copy of which is enclosed for your constituent's information.

The FMLA provides that leave for the birth and care or a child or for placement for adoptions or foster care, as opposed to leave due to a child's serious health condition, must be completed within one year of the birth of the child. (Please see Regulations, 29 CFR Part 825.201.) The FMLA does not, however, limit such leave to 12 weeks in those instances where a new 12-month period may begin as, for example, where the employer elects to use the calendar year as the applicable 12-month period. Consequently, could possibly take additional leave to care for the child for reasons unrelated to a serious health condition depending on the 12-month period selected by her employer.

In order to have her questions fully answered, ***Name**** should contact her employer. If she is not satisfied with the response, she may contact the office of the Wage and Hour Division responsible for enforcing FMLA in her area located at the Federal Building, 299 East Broward Boulevard, Room 409, Fort Lauderdale, Florida 33301-1976, telephone: (305) 356-7036.

Sincerely,

Daniel F. Sweeney
Deputy Assistant Administrator

Enclosure
cc: Washington, D.C., Office

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

U.S. Department of Labor
Employment Standards Administration
Wage and Hour Division
Washington, D.C. 20210

October 26, 1995 **FMLA-75**

Dear ***Name****,

This is in further response to your communication regarding correspondence from ***Name**** raises several concerns with the final rule (Regulations, 29 CFR Part 825) implementing the Family and Medical Leave Act of 1993 (FMLA) as it affects employment policies of ***Name****.

In developing FMLA's implementing regulations, the Department of Labor (the Department) considered, among other things, the guiding principles of section 2 of FMLA, stating the findings and purposes of Congress. Congress found inadequate job security for employees who have serious health conditions that prevent them from working for temporary periods of time, and a lack of employment policies to accommodate working parents that forces individuals to choose between job security and parenting. Congress stated that the purposes of FMLA are to balance the demands of the workplace with the needs of families, to promote the stability and economic security of families, to entitle employees to take reasonable leave for medical reasons, for the birth or adoption of a child, and for the care of a child, spouse, or parent who has a serious health condition, and to accomplish these purposes in a manner that accommodates the legitimate interests of employers.

To obtain public input and assist in developing the FMLA regulations, the Department published an initial notice of proposed rulemaking in the Federal Register on March 10, 1993, inviting comments on a variety of questions and issues. A total of 393 comments was received in response to the notice - from employers, trade and professional associations, advocacy organizations, labor unions, State and local governments, law firms and employee benefit firms, academic institutions, financial institutions, medical institutions, governments, Members of Congress, and others.

The Department, after consideration of these comments, issued an interim final rule on June 4, 1993, that went into effect on August 5, 1993, and invited further public comment. More than 900 public comments were received on the interim final rule. In addition, the Department met with a number of groups interested in commenting on the final rule.

After giving careful consideration to the public comments and the legislative history of FMLA, the Department published a final rule in the Federal Register on January 6, 1995. The Department prepared a lengthy preamble to accompany the final rule to be fully responsive to the numerous questions and comments received. We are also committed to entertaining additional comments regarding employers' experiences with the regulations over the course of the year or so following their effective date. Such comments will be reviewed together with the results of the comprehensive study on existing and proposed leave policies being conducted by the Commission on Leave, created under Title III of FMLA to study family and medical leave issues and policies.

Name* raises five broad concerns with the final rule, each of which we would like to address by explaining how the Department arrived at the changes from the interim final rule. A full discussion of all of the significant changes between the interim and final rules is contained in the preamble.

Definition of "Chronic" Serious Health Condition:

There were 88 comments from the public regarding the serious health condition definition, many of which were extremely detailed. The statutory definition is scant and reads:

*** an illness, injury, impairment, or physical or mental condition that involves-

(A) inpatient care in a hospital, hospice, or residential medical care facility; or
(B) continuing treatment by a health care provider.

The legislative history clarified that the term was not intended to cover short-term conditions for which treatment and recovery are very brief, as Congress expected that such conditions would be covered by even the most modest of employer sick leave policies. Many commentators felt that the definition should, among other things, include those conditions that are chronic and therefore cause episodic absences, noting that, although treatment for such conditions may be brief, recovery is not. If chronic conditions such as asthma and migraine headaches were not included as serious health conditions, employees would face adverse actions for associated absences, particularly under company attendance policies that subject employees to disciplinary action after a given number of absences. This issue was addressed by Senator Jeffords, when, in a discussion of intermittent and reduced leave, he stated that "if an employee is afflicted with an unpredictable, episodic illness, like migraines, he is clearly entitled to leave subject to the requirements of the bill." (See the Congressional Record of February 4, 1993) The final rule (825.220(c)) provides, in part, that FMLA leave may not be counted under "no fault" attendance policies.

With respect to medical re-certifications, the statute states that an employer may require subsequent re-certifications only "on a reasonable basis." After a review of the public comments received on this issue, the Department concluded that permitting the employer to routinely request recertification every 30 days is not reasonable in some circumstances. An employer may request recertification for a chronic serious health condition at any time if the circumstances described by the previous certification have changed significantly (e.g., the duration or frequency of absences, the severity of the condition, complications) or the employer receives information that casts doubt upon the employee's stated reason for the absence.

Name* contends that "it is notoriously easy to obtain medical certifications for some of the medical conditions which could be defined as 'chronic' under the regulations" and that this will have an adverse impact on ***Name**** neutral attendance policy. The FMLA and its regulations, in an attempt to prevent employee abuse and address questionable medical certifications, allow for employers to request second medical opinions and, where the second differs from the first, third medical opinions. The employer selects the health care provider for the second opinion, except that the selected health care provider may not be employed by the employer on a regular basis. The health care provider of the third medical opinion (where necessary) is selected jointly by the employer and the employee without restriction. As noted above, reasonable re-certifications may be required if circumstances have changed significantly. Employers must, however, amend attendance policies to exclude absences for bona fide FMLA reasons from adverse employment actions. To do otherwise would be to deny the exercise of an eligible employee's FMLA rights which is prohibited under section 105 of FMLA.

Certification for Paid Leave:

Name* is concerned about coordinating existing employer leave policy requirements and those of FMLA, citing the provision that an employer may not impose the more stringent FMLA requirements where an employee elects to substitute accrued paid leave and the employer has less stringent certification requirements for the use of such paid leave. The anti-discrimination provisions of FMLA prohibit an employer from applying more stringent requirements on employees who take FMLA leave than the requirements imposed on other forms of leave allowed by the employer where employees invoke their rights to substitute their accrued paid leave. He also feels that, as a result of this prohibition, employees will be able to unfairly substitute all of their paid vacation during an FMLA leave period early in the year and be unable to use their paid vacation during the two weeks the plant shuts down in the summer for maintenance, thus qualifying for unemployment during the shut down. We do not believe that either the statute or the regulations requires this result. The statute provides for the substitution of accrued paid leave in certain situations. (See section 102(d)(2)) The legislative history indicates that 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. (House Report 103-8, Feb. 2, 1993, p. 38) The substitution provisions assure that an employee is entitled to the benefits of applicable paid leave provided by an employer, plus any remaining leave time made available by FMLA on an unpaid basis. We interpret these provisions to require that the employee has earned the right to take the

leave under the employer's plan and is therefore entitled to substitute the accrued leave during the FMLA leave period. Consequently, leave that has not yet been earned is not available for substitution by an employee. Also, where an employee may only use leave under the employer's plan during a specified period when the plant is shut down, the employee has not fully vested in the right to substitute that leave for purposes of FMLA.

Light Duty:

Name* also takes issue with the rules governing an employer's offering light duty assignments in situations where the employee has not fully recovered from an injury and is unable to perform all of the essential function of his or her original job. He feels that the final rule will turn unpaid FMLA leave into paid leave under short term disability programs offered by employers and thus encourage employers to limit such policies.

An eligible employee may not be required to accept a light duty position in lieu of remaining on FMLA leave. In such a case, the employee would not be entitled to continue workers' compensation payments if the State workers' compensation program terminated benefits when the employee was deemed medically able to accept such a position. The same rule would apply to a short term disability policy offered by the employer. If the employer's short term disability policy stipulates that payments will cease if the employee is deemed able to accept a light duty assignment, the employee who chooses to remain on FMLA leave would not be entitled to continued payments under the employer's short term disability policy as a result of the FMLA regulations.

Contact with the Employee's Physician:

The interim final rule did not permit any direct contact between an employer and the employee's health care provider. Thus, the only recourse to an employer who questioned the certification was to request a second opinion. Some commentators felt that the restriction worked against the interests of both the employee and employer and left as the only recourse a costly second and possible third opinion in situations where a simple clarification might suffice. A number of commentators expressed concern regarding the privacy of the employee and the ethical considerations of the employee's health care provider furnishing information to a non-medical person. The Division agreed with the need to protect the privacy interests of the employee in allowing any such contact; thus, the rule provides that the contact may be made only with the employee's permission and only by a health care provider.

Notice Requirements:

Name* finally expresses concern regarding the employer's notification requirements and feels that FMLA considerations should not be triggered until the employee states that he or she is requesting FMLA leave. The Division disagrees. We do not believe the legislative history of this law, or other similar laws providing labor standards protections, creates such an expectation. In a recent decision involving this issue, (Manuel v. Westlake Polymers Corp., CA 5, No. 95-30050, 10/3/95), the Court of Appeals of the Fifth Circuit agreed. The court ruled that individuals needing FMLA leave "are workers, not lawyers." The court further cited Senate Report No. 3 at p. 4, reprinted in 1993 U.S.C.C.A.N. 3, 6-7, that stated that the legislative history discloses that FMLA "'is based on the same principle as the child labor laws, the minimum wage, Social Security, the safety and health laws, the pension and welfare benefit laws, and other labor laws that establish minimum standards for employment.' Significantly, none of these other federal labor laws granting benefits to employees requires those employees to refer to the specific statute, much less the specific statutory subsection, in order to avail themselves of its benefits."

In drafting the final rule, the Division attempted to reach a proper balance between the employee rights and protections and the legitimate interests of employers as reflected in FMLA's statement of findings and purpose. In a recently released survey contracted for by the Commission on Leave as a part of its responsibilities under Title III, a majority of FMLA-covered firms reported either "no increase" or a "small increase" in costs due to FMLA. Those reporting either "no increase" or a "small increase" for

administrative costs, continuation of benefits, and hiring/training costs were 89.2%, 93.4%, and 94.8% respectively. Additionally, 85% to 96% of the establishments covered by FMLA reported "no noticeable effect" on their overall business performance. A press release and other material highlighting the surveys findings are enclosed.

I hope that the above information provides some insight into the process of drafting the FMLA final rule and clears up some misunderstandings may have had with respect to certain provisions. Any guidance provided in this letter is based on the information provided by in his letter and could be affected by the specifics of LSI's policies. As Secretary of Labor Reich noted on the second anniversary of FMLA, compliance with the landmark Family and Medical Leave Act remains a simple issue for most firms and few employees are finding difficulty working with their employers to obtain FMLA leave under circumstances that qualify for FMLA's protections.

Thank you for writing. We are returning your constituent's correspondence, as you requested. Should you have any further questions, please do not hesitate to contact Howard B. Ostmann, Office of Enforcement Policy, FMLA Team, at (202) 2l9-84l2.

Sincerely,

Richard M. Brennan

Deputy Director
Office of Enforcement Policy

Enclosures

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

U.S. Department of Labor
Employment Standards Administration
Wage and Hour Division
Washington, D.C. 20210

November 30, 1995 **FMLA-76**

Dear ***Name****,

This is in response to your letter of January 9, 1995, on behalf of your constituent, ***Name****. ***Name**** is concerned with the applicability of the Family and Medical Leave Act (FMLA) to religious institutions as employers. He is also concerned with whether his church's policy regarding maternity/pregnancy leave complies with the FMLA. I regret that the high volume of inquiries received by the Wage and Hour Division and ongoing workloads caused a delay in our response.

The Wage and Hour Division of the U.S. Department of Labor is responsible for the enforcement and administration of the FMLA for all private, state and local government employees and some federal employees. The FMLA entitles eligible employees of covered employers to take up to 12 weeks of unpaid, job-protected leave in any 12 months—with continued group health insurance coverage—for specified family and medical reasons.

Private employers are covered under FMLA if they have employed at least 50 employees during 20 or more calendar workweeks in the current or preceding calendar year; all public agencies are covered regardless of the number of employees employed. Employees are eligible under FMLA if they have worked for a covered employer for at least 12 months, have worked at least 1,250 hours during the 12 months preceding the start of leave, and are employed at a worksite where the employer employs at least 50 employees within 75 miles. The 12 months the employee has to have worked do not have to be consecutive.

Unpaid leave must be granted to an eligible employee for any of the following reasons: (1) for birth of a child, and to care for the newborn child; (2) for placement with the employee of a child for adoption or foster care; (3) to care for the employee's spouse, child, or parent, who has a serious health condition; and (4) for a serious health condition that makes the employee unable to perform his/her job.

Title l, section 101(4)(A) of FMLA defines employer as "any person engaged in commerce or in any industry or activity affecting commerce who employs 50 or more employees for each working day during each of 20 or more calendar workweeks in the current or preceding calendar year...."

There is nothing elsewhere in the legislation or in the legislative history to suggest that Congress intended religious institutions to be excluded from this definition. The FMLA uses the "affecting commerce" test under the Labor Management Relations Act, rather than the narrower standard of the Fair Labor Standards Act. When determining if activities affect "commerce," courts interpret this test very broadly, in effect finding that coverage coincides with the full scope of Congressional power to regulate commerce under the Constitution. Under Title VII of the Civil Rights Act of l964 (Title VII), the U.S. Court of Appeals for the Ninth Circuit stated that it is difficult to imagine any activities, businesses or industries employing l5 or more employees (the Title VII threshold) that do not affect commerce among the States in some degree. Because FMLA has an even higher coverage threshold than Title VII, any employer with 50 or more employees will be deemed to be an employer "... engaged in commerce or in any industry or activity affecting commerce..." within the meaning of FMLA.

Section 825.104(b) of the Regulations provides for a presumption that employers who meet the fifty-employee coverage test "are deemed to be engaged in commerce or in an industry or activity affecting commerce." FMLA coverage of church employees may be found only if the Church meets the fifty-employee coverage test. There may be some cases, however, in which the First Amendment could affect statutory coverage of an otherwise covered religious institution. C.f. Catholic Bishop of Chicago, 440 U.S. 490 (1979) (lay teachers in church-operated schools actively propagating religious faith in the classrooms are exempt from NLRB jurisdiction) and NLRB v. St. Louis Christian Home, 663 F. 2d 60 (8th Cir. 1981) (NLRB jurisdiction extends to church-affiliated child care institution maintaining a commercial relationship with its employees in the same way as a secular child care institution).

Section 825.207 of the Regulations provides that an eligible employee may elect, or an employer may require the employee to substitute any of the accrued paid vacation leave, personal or family leave, or medical or sick leave for any part of the 12-week FMLA leave period under certain conditions. Paid vacation leave, personal leave, or family leave may be substituted for all or part of any unpaid FMLA leave for the birth and care of the employee's child after birth, or placement for adoption or foster care, or for the care of the seriously ill family member. Paid vacation leave, personal leave, or medical or sick leave may be used and counted as FMLA leave for the employee's own serious health condition (pregnancy included). Paid medical or sick leave may be substituted for FMLA leave for the care of a seriously ill family member only to the extent that the employer's leave plan allows paid leave to be used for that purpose. The use of paid family leave as FMLA leave is also limited by the normal use of the employer's plan.

Because of the principles of law involved, whether your constituent's church is covered by the FMLA is a complex question which needs to be analyzed in considerable detail based on the particular facts surrounding all of the church's activities. Unfortunately, there is not enough information included in your correspondence for us to determine whether your constituent's church is covered by the FMLA or whether its maternity/pregnancy leave complies fully with the statute. We, therefore, suggest that, if has additional questions in this regard that cannot be answered based on the foregoing analysis, that he provide additional information concerning the nature of the activity performed by the church as an employer and a more detailed explanation of the leave policy.

Sincerely,

Richard M. Brennan
Deputy Director

Office of Enforcement Policy

cc: Washington, D.C., Office

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

U.S. Department of Labor
Employment Standards Administration
Wage and Hour Division
Washington, D.C. 20210

January 30, 1996 **FMLA-77**

Dear ***Name****,

This is in reply to your letter of June 28, 1995, addressed to ***Name**** regarding the administration of the Family and Medical Leave Act of 1993 (FMLA) by the Department of Labor. I regret that, due to the volume of work associated with administering FMLA, we were not able to respond to your concerns sooner.

You request a clarification of the Department's administration of FMLA with respect to determining whether an employee's illness is a serious health condition for purposes of the Act. You also express a concern that the final rule (Regulations, 29 CFR Part 825) implementing FMLA makes it more difficult for employees to obtain FMLA-protected leave where the employee's absence is due to the employee's illness, particularly for flight attendants.

To obtain public input and assist in developing the FMLA regulations, the Department published an initial notice of proposed rulemaking in the Federal Register on March 10, 1993, inviting comments on a variety of questions and issues. A total of 393 comments was received in response to the notice - from employers, trade and professional associations, advocacy organizations, labor unions, State and local governments, law firms and employee benefit firms, academic institutions, financial institutions, medical institutions, governments, Members of Congress, and others.

The Department, after consideration of these comments, issued an interim final rule on June 4, 1993, that went into effect on August 5, 1993, and invited further public comment. More than 900 public comments were received on the interim final rule. In addition, the Department met with a number of groups interested in commenting on the final rule.

After giving careful consideration to the public comments and the legislative history of FMLA, the Department published a final rule in the Federal Register on January 6, 1995. The Department prepared a lengthy preamble to accompany the final rule to be fully responsive to the numerous questions and comments received.

We are also committed to entertaining additional comments regarding employers' experiences with the regulations over the course of the year or so following their effective date. Such comments will be reviewed together with the results of the comprehensive study on existing and proposed leave policies being conducted by the Commission on Leave, created under Title III of FMLA to study family and medical leave issues and policies.

The term serious health condition is defined in section 101(11) of FMLA as "an illness, injury, impairment, or physical or mental condition that involves-

(A) inpatient care in a hospital, hospice, or residential medical care facility; or
(B) continuing treatment by a health care provider."

Further guidance concerning determining whether an illness is a serious health condition for purposes of FMLA leave is contained in Regulations, 29 CFR Part 825.114. In order for an employee to qualify for FMLA leave, the employee must have a condition that meets the statutory and regulatory definitions.

The FMLA provides further that an employer may require that a request for FMLA leave for a serious health condition be supported by a medical certification and, where the employer has reason to doubt the validity of such a certification, by a second or possibly third opinion from an appropriate health care provider. In the situation you describe in your letter, the flight attendant submitted a completed certification of health care provider form (WH-380) to the employer indicating that the condition in question qualified as a serious health condition for purposes of FMLA. If ***Name**** wished to dispute this certification, it should have sought a second opinion under the terms of the regulations; the certification,

assuming it was properly completed and timely submitted, should not have been rejected unilaterally. The employer may, with the employee's permission, have a health care provider representing the employer contact the employee's health care provider to clarify any information on the form or return the form to the employee if the form is not properly completed.

The definition of a serious health condition is the same for all occupations. There is nothing in the legislative history to indicate that Congress intended the Department to develop separate standards based on an employee's work environment. However, section 102 of FMLA states, in part, that an employee is entitled to FMLA leave "[b]ecause of a serious health condition that makes the employee unable to perform the functions of the position of such employee." Once it has been determined that a serious health condition, as defined in FMLA and the regulations, exists, it must be determined that such a condition prevents the employee from performing any one or more of the essential functions of his or her job. An employee whose illness does not meet the statutory and regulatory definitions of a serious health condition will not be entitled to take FMLA leave even if the employee cannot perform any of the essential functions of his or her job. An employee whose illness does meet such definitions but who may still perform all of the essential functions of the job will also not be entitled to take FMLA leave under the terms of section 102 of the Act.

Our Boston Regional Office has indicated that they have no record of having contacted ***Name**** either regarding his concerns. Many contacts are informal and are not recorded. Further, these types of contacts often do not involve a full discussion of all issues or facts involved. I have asked someone from the Boston Regional Office to contact you directly to fully address your concerns.

Sincerely,

Howard B. Ostmann
Office of Enforcement Policy
Family and Medical Leave Act Team

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

U.S. Department of Labor
Employment Standards Administration
Wage and Hour Division
Washington, D.C. 20210

February 14, 1996 **FMLA-78**

Dear ***Name****,

This is in response to your request for information as to how the Department of Labor will administer subsection 825.110(c) of the regulations implementing the Family and Medical Leave Act of 1993 (FMLA). I apologize that the volume of work associated with administering FMLA has delayed this response. This section states, in pertinent part, that:

For this purpose, full-time teachers ... of an elementary or secondary school system, ...are deemed to meet the 1,250 hour test. An employer must be able to clearly demonstrate that such an employee did not work 1,250 hours during the previous 12 months in order to claim the employee is not "eligible" for FMLA leave.

To be eligible for FMLA leave, an employee must meet three criteria, including that the employee has completed 1,250 hours of service for the employer during the 12-month period preceding the start of the leave. The regulations describe how to determine hours of service for this purpose for employees not subject to the minimum wage and overtime requirements of the Fair Labor Standards Act, and thus for whom no record of hours-worked are required or kept. Full-time FLSA-exempt employees for whom no hours-worked records have been kept and who have worked for the employer for at least 12 months are presumed to have met the 1,250 hours of service requirement for purposes of eligibility for FMLA leave.

An employer must be able to clearly demonstrate that such an employee did not work 1,250 hours during the preceding 12-month period if FMLA leave is to be denied on the basis that the employee is not eligible. For example, in consideration of the time spent at home reviewing homework and tests, full-time teachers in an elementary or secondary school system, or institution of higher education, or other educational establishment or institution are deemed to meet the 1,250 hour test. It should also be noted that an employee would not have to be paid for the time in order for such time to be included as a part of "hours of service."

In your letter, you provide two examples and ask if either employee would be considered eligible for FMLA leave. The first is a teacher employed three hours on each of the 180 days of the school year. The second is a teacher employed 6.5 hours on each of the 180 days of the school year. In both situations, we assume that these are scheduled in-class hours and that the employee does not, during the applicable 12-month period, work for the school in any other capacity.

In the first example, the teacher does not appear to be full-time. We would not, therefore, assume or deem this employee to be eligible. In the second, it appears that this is a full-time position and that the employee would be deemed eligible because of the additional time spent in related activities.

It should be pointed out that the question of employee eligibility in any specific situation will be determined by the information available in each case. Where such information is not available from the employer's records, it may be obtained from other sources including employee interviews. There is no given increment or percentage that will be added to an employee's scheduled hours for purposes of determining eligibility. Only full-time employees will be deemed eligible. Even in these situations, the employer has an opportunity to clearly demonstrate that the employee did not work at least 1,250 hours during the preceding 12-month period and is, therefore, not eligible.

Sincerely,

Howard B. Ostmann
Family and Medical Leave Act Team
Office of Enforcement Policy

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

U.S. Department of Labor
Employment Standards Administration
Wage and Hour Division
Washington, D.C. 20210

February 23, 1996 **FMLA-79**

Dear ***Name****,

This is in further response to your letter requesting an opinion as to whether the Safety Incentive Program rewarding employees for perfect attendance on an individual and team basis complied with the requirements of section 541.118 of Regulations, 29 CFR Part 541. Our initial response was dated January 13, 1994.

While our initial response correctly construed the requirements of 29 CFR Section 541.118, it has come to our attention that it did not address the impact of the Family and Medical Leave Act of 1993 (FMLA) on attendance bonus plans. The FMLA provides that an employee taking leave under the Act shall be restored to the same position of employment held prior to commencing leave or to an equivalent position with equivalent employment benefits, pay, and other terms and conditions of employment. Additionally, FMLA provides that the taking of FMLA leave shall not result in the loss of any employment benefit accrued prior to the date on which the leave commenced. (See Section 104(a)(1) and (2)).

Generally speaking, bonuses for perfect attendance are rewards for compliance with rules or the absence of "occurrences" (i.e., absences) and would be subject to the requirements of Section 104(a)(1) and (2). If an employee was eligible for such a bonus prior to taking FMLA leave, the employee would be eligible for the bonus upon returning to work because the taking of FMLA leave may not be used as a negative factor in employment actions. (See 29 CFR Section 825.220(e)) The employee with an otherwise perfect attendance record may not, as a result of the FMLA leave, be deemed ineligible for the bonus.

On the other hand, FMLA states that nothing in Section 104 shall be construed to entitle any restored employee to the accrual of any seniority or employment benefit during any period of leave or any right, benefit, or position of employment other than any right, benefit, or position to which the employee would have been entitled had the employee not taken the leave. (See Section 104(a)(3) and (4))

Bonuses based on some positive action required by the employee such as production bonuses would be governed by the terms of Section 104(a)(3) and (4). The employee would not be entitled to accrue any additional seniority or other employment benefit during the time spent on FMLA leave. Depending on the terms and conditions governing the production award program, such an employee may be awarded a reduced bonus or be deemed ineligible as a result of having been on FMLA leave and not having had the opportunity to continue to produce during the award period.

It should also be noted that FMLA makes it unlawful for any employer to interfere with the exercise of an employee's rights under the Act or to discharge or in any other manner discriminate against any employee for opposing any practice made unlawful by the Act. An employer's denial of a bonus to an employee, who otherwise would be qualified for the bonus except for taking FMLA leave, would be considered to be a violation of FMLA requirements that prohibit interfering with the exercise of the employee's FMLA rights and those prohibiting discrimination. It would also be considered a violation to grant more favorable considerations to employees on other types of unpaid leave.

I hope that this clarifies our earlier response in connection with attendance bonus plans and requirements under FMLA. Please contact me at (202) 219-8412 if you have any questions regarding the issues addressed in this letter.

Sincerely,

Howard B. Ostmann
Office of Enforcement Policy
Family and Medical Leave Act Team

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

U.S. Department of Labor
Employment Standards Administration
Wage and Hour Division
Washington, D.C. 20210

April 24, 1996 **FMLA-80**

Dear ***Name****,*

This is in response to your request for an opinion with respect to the application of the Family and Medical Leave Act of 1993 (FMLA) and the implementing regulations, 29 CFR Part 825, to probationary teachers who take unpaid leave subject to FMLA. I regret that the volume of work associated with administering FMLA has delayed this response.

Statements made in this letter with regard to the applicable collective bargaining agreement (CBA) or provisions of state law are not meant as interpretations but rather as summaries to frame our response. We will assume that there are no questions with regard to the FMLA issues of employer coverage, employee eligibility, and whether the reason for the leave is covered by FMLA.

Illinois State law provides in part that a "teacher who has been employed in any district as a full-time teacher for a probationary period of 2 consecutive school terms shall enter upon contractual continued service unless given written notice of dismissal stating the specific reason therefore, by certified mail, return receipt requested, by the employing board at least 60 days before the end of such period." The CBA provides that, should a teacher experience a "break in service" during this probationary period before either being recommended for reemployment for the second year or contractual continued service or tenure after the second year, the teacher will return to work the following year as a first year probationary teacher and be required to complete two years of uninterrupted service. A break in service for this purpose would include any period of unpaid leave.

Your specific concern is whether a probationary teacher who takes FMLA-qualifying leave that would otherwise be considered a break in service as defined in the CBA can be returned to work as a first year probationary teacher without violating FMLA's provisions for restoration to an equivalent position with equivalent employment benefits, pay, and other terms and conditions of employment.

After carefully reviewing your questions and comments, it is the position of the Department that a probationary teacher who takes a period of unpaid leave subject to FMLA may not be required, upon returning to work, to begin the probationary period again. To do so would result in an employee losing an earned benefit that accrued prior to when the leave began, contrary to FMLA.

Section 2614(a) of FMLA requires, in part, that an employee who has taken FMLA leave must be returned to either the same position or an equivalent position with equivalent employment, benefits, pay, and other terms and conditions of employment. This section also requires that the taking of FMLA leave shall not result in the loss of any employment benefit accrued prior to the date the leave began. A position as a first-year probationary employee is not equivalent to a position as a second-year probationary employee because additional time must be served before being granted tenure and whatever privileges attend thereto. Prior to beginning leave, the employee had accrued at least one year of service towards the completion of the two-year probationary period. Returning to a position as a first-year probationary employee constitutes the loss of this benefit. With respect to the limitation in this section that the employee is not entitled to accrue seniority during any leave period, our interpretation does not require the accrual of any additional seniority or employment benefit during the period of unpaid leave; it prevents the loss of those benefits already earned.

You also ask about the application of section 2618(e) that provides in part that restorations of eligible employees of local educational agencies or private elementary or secondary schools shall be made on the basis of established school board policies and practices, private school policies and practices, and collective bargaining agreements. Section 825.604 of the regulations points out, in part, that any restoration under such policies or practices "must provide substantially the same protections as provided in the Act for reinstated employees." Section 825.215, the section regarding the restoration of employees generally under FMLA, is specifically referenced. Having to return to a position as a first year probationary employee would be less protection than otherwise provided in FMLA for reinstated employees.

You also ask that if we determine that the use of unpaid leave does not permit the reclassification of the individual as a first year employee can the probationary period be extended for one additional school term. In this particular situation, our answer would be no. It appears that the attaining of contractual continued service is based on an employee's anniversary date, not the accumulation of a certain number of hours or days of work, and the current CBA recognizes certain situations wherein a probationary employee who takes unpaid leave would still attain contractual continued service status after the end of the second year. Were the system based on the completion of a certain number of hours or days worked, however, the employer could delay granting contractual continued service by an amount reflecting the amount of unpaid FMLA leave. This is similar to the interpretation of FMLA the Department takes with respect to production bonuses and pensions as stated in sections 825.215(c)(2) and (d)(4), respectively.

I will be glad to address any further concerns you may have if the above has not been fully responsive.

Sincerely,

Howard B. Ostmann
Office of Enforcement Policy
Family and Medical Leave Act Team

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

U.S. Department of Labor
Employment Standards Administration
Wage and Hour Division
Washington, D.C. 20210

June 18, 1996 **FMLA-81**

Dear ***Name****,

This is in response to your request for information concerning the Department of Labor's position with regard to the question of what leave an employer may require an employee to substitute during leave taken under the Family and Medical Leave Act of 1993 (FMLA). I apologize that the volume of work associated with administering FMLA has delayed this response.

Section 102(d)(2) of FMLA (29 U.S.C. 2612(d)(2)) provides generally that an employee may elect, or an employer may require the employee, to substitute certain of the accrued paid vacation leave, personal leave, family leave, or sick or medical leave of the employee for the unpaid leave provided under the Act.

The legislative history indicates that the purpose of this section was "to provide that specified paid leave which has accrued but has not yet been taken, may be substituted for the unpaid leave under this act in order to mitigate the financial impact of wage loss due to family and temporary medical leaves." (House Report 103-8, Feb. 2, 1993, p. 38) The Department interprets these provisions to mean that the employee has both earned the leave and is able to use that leave during the FMLA leave period.

In your letter, you indicate that, under the terms of the collective bargaining agreement, the employee earns paid vacation during the current year but cannot use the leave until the following year. As noted above, the Department's position with respect to accrued leave for purposes of substitution under FMLA means leave that is both earned and available for use by the employee. In the situation described in your letter, the employee could not elect nor could the employer require the substitution of the paid vacation leave because the leave is not available to the employee until the following year.

The foregoing would neither prevent an employer from voluntarily advancing paid leave to an employee nor an employee from voluntarily accepting such leave during an FMLA absence.

Section 403 of FMLA (29 U.S.C. 2653) specifically states that "[n]othing in this Act or any amendment made by this Act shall be construed to discourage employers from adopting or retaining leave policies more generous than any policies that comply with the requirements under this Act or any amendment made by this Act."

The guidance provided in this letter is intended to address only those circumstances cited in your letter and may not be appropriate where either these circumstances vary or there are additional circumstances present. I hope that this has been responsive to your inquiry.

Sincerely,

Howard B. Ostmann
Office of Enforcement Policy
Family and Medical Leave Act Team

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

U.S. Department of Labor
Employment Standards Administration
Wage and Hour Division
Washington, D.C. 20210

July 31, 1996 **FMLA-82**

Dear ***Name****,

Thank you for your letter of June 21, 1996, forwarding correspondence from ***Name****, who expresses concern with certain employment issues surrounding his wife's use of leave due to a serious health condition under the Family and Medical Leave Act of 1993 (FMLA). Since we do not have the employer's policies for implementing FMLA, we can only address concerns in general terms.

In enacting FMLA, Congress stated that one of the purposes of this law is to entitle employees to take reasonable leave for medical reasons, for the birth or adoption of a child, and for the care of a child, spouse, or parent who has a serious health condition. The FMLA allows up to 12 weeks of unpaid, job-protected leave in any 12 months—with group health insurance coverage maintained during the leave—to eligible employees for the above mentioned family and medical reasons. Upon completion of the leave, the employee must be returned to work to the same or an equivalent position with equivalent pay, benefits and other terms and conditions of employment. Paid leave benefits, which are available for an employee to use, may be substituted at the employee's or employer's option for any portion of the unpaid leave mandated by this law. Employers are required to notify employees in writing of their FMLA rights and obligations while on FMLA leave and to keep track of its usage. It is unlawful for any employer to interfere with or restrain or deny the exercise of any right provided under this act, or to discharge or in any other manner discriminate against an employee for opposing or complaining about any unlawful practice related to this act. A copy of a fact sheet that summarizes FMLA's provisions is enclosed.

Nothing in FMLA (401 of the statute and 825.702 of the regulations) modifies or affects any Federal or State law prohibiting discrimination on the basis of race, religion, color, national origin, sex, age, or disability. For example, where FMLA and the Americans With Disabilities Act (ADA) apply simultaneously, an employer must comply at all times with these laws and in a manner that assures the most generous provisions of both laws would apply. In the case of an employee with a serious health condition under FMLA who is also a qualified individual with a disability under ADA, requirements from both laws must be observed and applied in a manner that assures the most beneficial rights and protection. For instance, a reasonable accommodation under ADA might be accomplished by providing an individual with a disability with a part-time job which does not ordinarily provide health benefits. Under FMLA, an eligible employee would be permitted to work a reduced leave schedule for up to 12 workweeks of leave in any 12-month period with group health plan benefits maintained during the leave. Enclosed is a fact sheet prepared by the Equal Employment Opportunity Commission (EEOC) which administers and enforces the ADA; that provides technical assistance on the interplay between the ADA and FMLA.

The purpose of FMLA is to make temporary leave available to eligible employees of employers within its coverage, and not to limit already existing rights and protection under applicable anti-discrimination statutes (e.g., the ADA). It is not the intent of FMLA to discourage an employer from adopting or retaining more generous employment benefits or leave policies that provide greater family or medical leave rights than those provided under this law. The FMLA does not prevent an employer from amending existing leave and employee benefit programs, provided they comply with the act.

We do not believe that the implementation of FMLA by ***Name**** wife's employer has been detrimental to her employment, particularly with respect to the notification that she is entitled to 12 weeks of job protected leave in a 12-month period under this law. We wish to point out that prior to FMLA, employees enjoyed no Federal guarantees with respect to absences related to family and medical leave, job restoration, or continued group health care coverage. Employers, for example, would have been able to refuse leave or terminate employees needing to take time off to take care of family and medical situations. The FMLA now guarantees employees at least 12 weeks of job and health care benefits protection in a 12-month period.

Any change to extend the leave provisions under FMLA would require an amendment to the statute. Accordingly, President Clinton has recently proposed an expansion to FMLA to cover leaves for school

activities, for routine family medical services, and for older relatives' health needs. The proposal would establish family-friendly leave standards for up to 24 hours of unpaid leave a year. A copy of the press release on the President's "Family-Friendly Workplace Proposal" is enclosed.

We appreciate your concerns and those of ***Name****. If we can be of further assistance, please do not hesitate to contact us.

Sincerely,

Howard B. Ostmann
Office of Enforcement Policy
Family and Medical Leave Act Team

Enclosures

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

U.S. Department of Labor
Employment Standards Administration
Wage and Hour Division
Washington, D.C. 20210

August 7, 1996 **FMLA-83**

Dear ***Name****,

This is in response to your list of questions on the application of the Family and Medical Leave Act of 1993 (FMLA). I have attempted to provide very brief answers to your questions and references to the appropriate sections of Regulations, 29 CFR Part 825 that cover the main topics in these questions. These answers should not be regarded as comprehensive nor should they be regarded as necessarily applicable in any particular situation. Any specific questions you have should be referred to the office of the Wage and Hour Division responsible for administering and enforcing FMLA in your area located in the Austin Laurel Building, Suite 300, 4905 West Laurel Street, Tampa, Florida 33607, telephone: (813) 288-1245.

Who can activate the leave? In all circumstances, it is the employer's responsibility to designate leave, paid or unpaid, as FMLA qualifying, and to give notice of the designation to the employee. An employee may request FMLA leave although it is not necessary for the employee to expressly assert rights under FMLA or even mention the FMLA to meet his or her obligation to provide notice. The employee may not, however, bar the employer from designating any qualifying absence as FMLA leave. (Section 825.208)

Can the request for medical leave be mandated by the employer prior to the use of all compensatory leave? Section 7(o) of the Fair Labor Standards Act permits public employers under prescribed circumstances to substitute compensatory time off accrued at one and one-half hours for each overtime hour worked in lieu of paying cash to an employee. Employees must be permitted to use such time within a "reasonable period" after making a request if such use does not "unduly disrupt" the operations of the agency. The use of such compensatory time is subject to the requirements contained in Regulations, 29 CFR Part 553. A public employer could deny the use of compensatory time if such an employer could show that the time off would "unduly disrupt" operations. The employer cannot, however, deny a request for qualifying FMLA leave. (Sections 825.207(i) and 553.25)

Can the leave time be depleted simultaneously with earned compensatory time? Compensatory time off is not a form of accrued paid leave and may not be counted against the employee's FMLA leave entitlement. (Section 207(i))

When a surgery is planned, and there is no intention of using FMLA leave, is the employee required to sign any documents concerning FMLA leave? As noted in response to your first question, an employee may not bar an employer from designating a FMLA-qualifying absence as FMLA leave. With respect to what types of documentation may be required, please review section 825.302, 825.303, and 825.305.

If an employee wishes to care for a significant partner (unmarried), or a child of that partner, may the employee use the FMLA? The FMLA permits the use of leave only to care for a spouse, parent, son, or daughter. Spouse means a husband or wife as defined under State law and includes a common law marriage in States where it is recognized. Parent means a biological parent or an individual standing in loco parentis. Son or daughter means a biological, adopted, or foster child, a stepchild, a legal ward, or a child of a person standing in loco parentis, who is either under 18, or age 18 or older and "incapable of self-care because of a mental or physical disability." (Regulations 825.113)

If an employee has a complicated pregnancy or other condition, can that employee use the maximum amount of leave allowed by FMLA, followed by the partner using the same amount of time through their employer (same or different employer)? Example:

John and Jane work for the same employer. Jane has a complicated pregnancy and is on bed rest for her maximum leave time. She has the baby and must return to work. The baby is ill and must be cared for by John. Can he take his FMLA leave? Same scenario but different employer: A husband and wife who are eligible for FMLA leave and are employed by the same employer may be limited to a combined total of 12 weeks of leave during any 12-month period if the leave is taken for the birth of the employees' son or

daughter or to care for the child after birth, for placement of a son or daughter with the employees for adoption or foster care, or to care for the child after placement, or to care for an employee's parent with a serious health condition. These limitations do not apply where the reason for the leave is the serious health condition of either the husband or wife or the serious health condition of a child. The limitations also do not apply to employees who are not husband and wife. In your example, we would first determine whether John and Jane were "partners" or husband and wife. If they are husband and wife and John took no FMLA leave to care for Jane during her difficult pregnancy, John could take up to 12 weeks for any FMLA-qualifying reason. Jane's leave was due to her serious health condition and therefore not for one of the reasons for which the leave of a husband and wife working for the same employer may be limited. If Jane and John work for different employers, no restrictions apply. (Regulations 825.202)

What is the maximum amount of leave allowed by FMLA? The FMLA allows for up to 12 workweeks of leave in a 12-month period. (Section 825.200)

Would you recommend that any employee going on compensated sick leave for an extended time fill out a request for FMLA leave "just in case"? I would recommend that the employee review as a minimum, sections 825.208, 825.302, 825.303 and 825.312. An employee who deliberately withholds information may, depending on the circumstances, jeopardize his or her rights under FMLA.

If you have any further questions, please contact the office listed above.

Sincerely,

Howard B. Ostmann
Office of Enforcement Policy
Family and Medical Leave Act Team

Enclosures

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

U.S. Department of Labor
Employment Standards Administration
Wage and Hour Division
Washington, D.C. 20210

October 25, 1996 **FMLA-84**

Dear ***Name****,

This is in response to your letter of August 8, 1996, forwarding correspondence from ***Name**** concerning the Family and Medical Leave Act of 1993 (FMLA) and the response of her employer, the United States Postal Service (USPS), to her request for leave under the Act.

In her letter, ***Name**** states that she was denied FMLA leave to provide foster care for approximately two weeks to a newborn child placed with her by the Vermont Children's Aid Society, Winooski, Vermont. She reports that the Society is licensed and regulated by the State of Vermont to place children in the homes of licensed foster families pending adoption.

Generally, FMLA allows up to 12 workweeks of unpaid, job-protected leave in any 12-month period—with group health insurance coverage maintained during the leave—to eligible employees for specified family and medical leave reasons. Upon return to work, the employer is obligated to restore the employee to the same position or an equivalent position with equivalent pay, benefits and other terms and conditions of employment. To be an FMLA-eligible employee, the employee must have worked for the employer for at least 12 months, for at least 1,250 hours over the 12 months immediately preceding the commencement of leave, and at a worksite where 50 or more employees are employed by the employer within 75 miles of that worksite.

The statute (§102(a)(1)(B)) and implementing regulations (29 FR 825.112(a)(2)) entitle an FMLA-eligible employee to FMLA leave for placement with the employee of a son or daughter "for adoption or foster care." The only statutory or regulatory requirement pertaining to such leave is that it must be concluded within 12 months of the placement. (FMLA §102(a)(2) and 29 CFR 825.112 and 825.201) The regulations also provide that an employee may take FMLA leave not only for the placement of a child for foster care or adoption but also "to care for the newly placed child." (29 CFR 825.200(a)(2))

The implementing regulations (29 CFR 825.112(e)) define "foster care" for purposes of FMLA leave to be "24-hour care for children in substitution for, and away from, their parents or guardian". Such placements involve State action, voluntary or involuntary removal of the child from the parents or guardian, and an agreement between the State and foster family that the foster family will take care of the child.

Neither the statute nor implementing regulations imposes a minimum period of time or permanency in connection with a foster care placement for FMLA leave purposes. So long as the placement is the result of a foster care agreement between the foster parents and the State, leave to care for the newly placed foster child would be considered FMLA leave. This would include placements made by the State through a State-approved agency such as the Vermont Children's Aid Society.

Moreover, the placement with an employee of each child for foster care would be considered a separate FMLA-qualifying event. Subsequent placements would not be subject to the restrictions on intermittent leave for adoption or foster care. (FMLA §102(b) and 29 CFR 825.203(b)) Intermittent FMLA leave is leave taken in separate blocks of time for the same event and is available to care for a newborn or for a newly adopted or placed foster child only with the employer's agreement. By treating each foster care placement as a separate event, the employer does not have the discretion to deny the leave, but would be required to grant FMLA leave to an eligible employee for each placement until such time as the 12 workweek leave entitlement is exhausted in the designated 12-month period. (29 CFR 825.112(a)(2) and 825.203(b))

Employers are permitted to require reasonable documentation from the employee for confirmation of "family relationships." This documentation may take the form of a simple statement from the employee, or a child's birth certificate, a court document, etc. The employer may examine documentation such as a birth certificate or court document, but the employee is entitled to the return of the official document submitted to the employer for this purpose. (29 CFR 825.113(d)) In so far as a foster care placement for

purposes of FMLA leave involves a formal agreement between the State and the foster family, the employer would be permitted to examine, but must return to the employee, the documentation connected with the foster care placement of the child with the family.

An employee may, in addition to leave related to the placement of a son or daughter for adoption or foster care and assuming the employee has not exhausted his or her 12 weeks of FMLA leave, also be entitled to leave to provide care to such a child with a serious health condition. The FMLA defines son or daughter, in part, as "as a biological, adopted, or foster child, a stepchild, a legal ward, or a child of a person standing in loco parentis ...." (FMLA §101.(12)) Leave to provide care to a child with a serious health condition is not subject to the employer's agreement but is subject to the medical certification requirements of FMLA and the implementing regulations.

We have confirmed that adoption and foster care placements by the Vermont Children's Aid Society require action by the State of Vermont before any such placement is finalized. Based on the provisions of FMLA and the facts as they have been presented in this case, we have concluded that ***Name**** leave to care for a newly placed foster child qualifies as FMLA leave. Because the USPS is an FMLA-covered employer, and if ***Name**** is an FMLA-eligible employee, she would be entitled to FMLA leave to care for the newly placed foster child in question for the period of time requested and to receive all of the protections and benefits provided under this law for the duration of the leave. The fact that she may receive some compensation or other consideration for her services is not material.

This response is based on the information that was provided in the letter from your constituent and obtained from the State of Vermont. Any determination in a specific situation will depend on the facts unique to that situation.

Sincerely,

Maria Echaveste
Administrator

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

U.S. Department of Labor
Employment Standards Administration
Wage and Hour Division
Washington, D.C. 20210

November 18, 1996 **FMLA-85**

Dear ***Name****,

This is in response to your letter of May 1, 1996, forwarding correspondence from ***Name****, who expresses concern that the Family and Medical Leave Act of 1993 (FMLA) does not ensure equal leave benefits for all employees upon the arrival of a new child into a family. I apologize for the delay in responding. ***Name**** wishes to obtain paid leave benefits for the adoption of two children as other employees receive for the birth of a child. Specifically, ***Name**** wishes to use her 450 hours of accrued paid sick leave, in lieu of substituting paid vacation leave, for unpaid FMLA leave for the adoption of two children. Although the employer approved the leave of absence and the use of paid vacation leave for unpaid FMLA leave, the employer denied the use of paid sick leave for unpaid FMLA leave as the reason for taking the leave was not covered under the employer's sick leave policy. The employer further advised the employee "...that employees who give birth are deemed as having a short-term disability necessitating paid medical leave" and "...are allowed to use sick leave hours after the birth of a child."

In general, FMLA allows up to 12 workweeks of unpaid, job-protected leave in any 12-month period—with group health insurance coverage maintained during the leave—to eligible employees for specified family and medical leave. Upon return to work, the employer is obligated to restore the employee to the same position or to an equivalent position with equivalent pay, benefits and other terms and conditions of employment.

The statute (§102(d)(2)) and regulations (§29 CFR 825.207) provide that an employee may elect, or an employer may require an employee, to substitute accrued paid vacation leave, personal leave, family leave, or sick/medical leave for any part of the 12 workweeks of unpaid FMLA leave under certain conditions. Paid vacation leave, personal leave or family leave may be substituted for all or part of any unpaid FMLA leave provided to care for the employee's child after birth or placement for adoption or foster care, or to care for a seriously ill family member. Paid sick leave or medical leave may be used and counted as FMLA leave for the employee's own serious health condition, and to the extent permitted by the employer's plan to care for the employee's seriously-ill family member. Use of paid family leave as FMLA leave is also limited by the normal use of the employer's plan.

The FMLA recognizes childbirth and recovery from childbirth as a "serious health condition." The legislative history (Senate Report No. 103-3, January 27, 1993) lists "...ongoing pregnancy, miscarriages, complications or illnesses related to pregnancy, such as severe morning sickness, the need for prenatal care, childbirth and recovery from childbirth" as examples of "serious health conditions" under this Act. The legislative history also cites the legislative history of the Pregnancy Discrimination Act (PDA) which "established that the medical recovery period for a normal childbirth is 4 to 8 weeks, with a longer period where surgery is necessary or other complications develop." Under Title VII of the Civil Rights Act of 1964, as amended by the PDA, an employer should provide the same benefits for women who are pregnant as the employer provides to other employees with short-term disabilities. The PDA is administered and enforced by the Equal Employment Opportunity Commission (EEOC).

An FMLA-eligible employee would, therefore, be entitled to substitute paid sick or medical leave benefits, where such paid benefits have been accrued or earned by the employee and available to use, for unpaid FMLA leave for the employee's own serious health condition due to childbirth. Any FMLA leave taken following the "medical recovery period from childbirth" to care for the newborn child, however, would be treated the same as leave taken to care for the newly-placed adopted child with respect to the types of paid leave (vacation, personal or family) that may be substituted for unpaid FMLA leave.

While ***Name**** is correct in stating that FMLA is a federally mandated Act, the sick leave benefits offered by her employer are not. The FMLA does not require any employer to furnish its employees paid leave benefits; nor does FMLA require an employer to allow the substitution of paid sick or medical leave, where such benefits are furnished to employees, for unpaid FMLA leave "in any situation" where the employer's uniform policy would not normally allow such paid leave. Based on the facts presented in her

letter, it would appear that her employer's decision to deny the substitution of paid sick leave benefits, but to allow instead the substitution of paid vacation leave, for unpaid FMLA leave for the adoption and care of the newly-placed children conforms to the provisions of this statute. Any change to FMLA's "paid leave substitution" rules would require an amendment to the statute.

We appreciate your concerns in this matter. If we may be of further assistance, please do not hesitate to contact us.

Sincerely,

Howard B. Ostmann
Office of Enforcement Policy
Family and Medical Leave Act Team

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

U.S. Department of Labor
Employment Standards Administration
Wage and Hour Division
Washington, D.C. 20210

December 12, 1996 **FMLA-86**

Dear ***Name****,

This is in reference to our letter to you dated April 7, 1995, in connection with an inquiry you received from ***Name****, Human Resources Manager for ***Name****, in which we expressed the view that an employee who has been incapacitated for more than three days and treated at least once by a health care provider, which results in a regimen of continuing treatment prescribed by the health care provider, may not have a qualifying "serious health condition" within the meaning of the Family and Medical Leave Act (FMLA). Upon further review of this issue and of the conclusion expressed in our letter, we have determined that our letter expresses an incorrect view, being inconsistent with the Department's established interpretation of qualifying "serious health conditions" under the FMLA regulations, 29 CFR Section 825.114.

As you know, "eligible employees" (those who have worked at least 12 months for their employer, at least 1,250 hours over the previous 12 months, and who work at a location where the employer employs at least 50 employees within 75 miles) may take qualifying leave under the FMLA for, among other reasons, their own serious health conditions that make them unable to perform the essential functions of their job, or to care for immediate family members (i.e., spouse, child, or parent) with serious health conditions. The FMLA defines serious health condition as an illness, injury, impairment, or physical or mental condition that involves either inpatient care in a hospital, hospice, or residential medical care facility, or continuing treatment by a health care provider.

The FMLA regulations, at section 825.114(a)(2)(i), define "serious health conditions" to include a period of incapacity (i.e., inability to work, attend school or perform other regular daily activities due to the serious health condition, treatment therefore, or recovery there from) of more than three consecutive calendar days, and any subsequent treatment or period of incapacity relating to the same condition, that also involves:

(A) Treatment two or more times by a health care provider, by a nurse or physician's assistant under direct supervision of a health care provider, or by a provider of health care services (e.g., physical therapist) under orders of, or on referral by, a health care provider; or

(B) Treatment by a health care provider on at least one occasion which results in a regimen of continuing treatment under the supervision of the health care provider.

A "regimen of continuing treatment" is defined in section 825.114(b) to include, for example, a course of prescription medication (e.g., an antibiotic) or therapy requiring special equipment to resolve or alleviate the health condition (e.g., oxygen). But the regulations also clarify that the taking of over-the-counter medications such as aspirin, antihistamines, or salves; or bed-rest, drinking fluids, exercise, and other similar activities that can be initiated without a visit to a health care provider, is not, by itself, a regimen of continuing treatment for purposes of FMLA leave.

The FMLA regulations also provide examples, in section 825.114(c), of conditions that **ordinarily**, unless complications arise, would not meet the regulatory definition of a serious health condition and would not, therefore, qualify for FMLA leave: the common cold, the flu, ear aches, upset stomach, minor ulcers, headaches other than migraine, routine dental or orthodontia problems, periodontal disease, etc. Ordinarily, these health conditions would not meet the definition in 825.114(a)(2), as they would not be expected to last for more than three consecutive calendar days and require continuing treatment by a health care provider as defined in the regulations. If, however, any of these conditions met the regulatory criteria for a serious health condition, e.g., an incapacity of more than three consecutive calendar days that also involves qualifying treatment, then the absence would be protected by the FMLA. For example, if an individual with the flu is incapacitated for more than three consecutive calendar days and receives continuing treatment, e.g., a visit to a health care provider followed by a regimen of care such as prescription drugs like antibiotics, the individual has a qualifying "serious health condition" for purposes of FMLA.

Accordingly, our letter to you of April 7, 1995, which stated that conditions meeting the regulatory criteria specified in section 825.114(a)(2)(i) would not "convert minor illnesses * * * into serious health conditions in the ordinary case (absent complications)," is an incorrect construction of the regulations and must, therefore, be withdrawn. Complications, per se, need not be present to qualify as a serious health condition if the regulatory "more than three consecutive calendar days" period of incapacity and "regimen of continuing treatment by a health care provider" tests are otherwise met. The regulations reflect the view that, **ordinarily**, conditions like the common cold and flu (etc.) would not be expected to meet the regulatory tests, not that such conditions could not routinely qualify under FMLA where the tests are, in fact, met in particular cases.

We regret any confusion or misunderstanding our earlier correspondence may have caused. If you have further questions or we may provide additional assistance, please have a member of your staff contact Mr. Howard Ostmann of our FMLA Team, at (202) 219-8412.

Sincerely,

Maria Echaveste
Administrator

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

U.S. Department of Labor
Employment Standards Administration
Wage and Hour Division
Washington, D.C. 20210

December 12, 1996 **FMLA-87**

Dear ***Name****,*

This is in response to two letters from your office asking a number of questions regarding the definition of the term "serious health condition" under the Family and Medical Leave Act of 1993 (FMLA). I regret that, due to the volume of inquiries and other work associated with administering FMLA, we were not able to respond earlier.

Before answering your specific questions, it may be helpful to first examine the pertinent sections of the FMLA and its implementing regulations, 29 CFR Part 825, and explain their underlying rationale. Under FMLA, “eligible employees” may take leave for, among other reasons, their own serious health conditions that make them unable to perform the essential functions of their position, or to care for immediate family members (i.e., spouse, child, or parent) with serious health conditions. Section 101(11) of FMLA defines serious health condition as "an illness, injury, impairment, or physical or mental condition that involves:

(A) inpatient care in a hospital, hospice, or residential medical care facility; or

(B) continuing treatment by a health care provider.”

Under the express statutory language, any absence involving inpatient care qualifies as a serious health condition. A more difficult task, however, has been to define those illnesses that would qualify as serious health conditions because they involved "continuing treatment by a health care provider."

The legislative history states that the meaning of **serious health condition** "is broad and intended to cover various types of physical and mental conditions" and "is intended to cover conditions or illnesses that affect an employee's health to the extent that he or she must be absent from work on a recurring basis or for more than a few days for treatment or recovery." Similar standards apply to a child, spouse, or parent of the employee who is unable to participate in school or in regular daily activities. The legislative history also states that the term "is not intended to cover short-term conditions for which treatment and recovery are very brief" and "minor illnesses which last only a few days and surgical procedures that typically do not involve hospitalization and require only a brief recovery period. Complications arising out of such procedures that develop into ‘serious health conditions’ will be covered by the act. * * *"

In developing the final regulatory definition of “serious health condition” at section 825.114, the Wage and Hour Division carefully reviewed the statute, the legislative history, the public comments received during rulemaking, and its enforcement experience under the interim regulations. As a result of this review, separate definitions were established for: (1) any period of incapacity due to pregnancy and prenatal care (825.114(a)(2)(ii)); (2) a chronic serious health condition (such as asthma, diabetes, etc., section 825.114(a)(2)(iii)); (3) a permanent or long-term condition for which treatment may not be effective (such as Alzheimers, strokes, terminal diseases, etc., section 825.114(a) (2)(iv)); and (4) to receive multiple treatments (including recovery there from) either for restorative surgery after an accident or other injury, or for a condition that would likely result in a period of incapacity of more than three consecutive calendar days in the absence of medical intervention or treatment (such as dialysis, chemotherapy, etc., section 825.114(a)(2)(v)).

In addition, the “three-day incapacity” rule coupled with “continuing treatment” portion of the definition was clarified at section 825.114(a)(2)(i) to mean –

> A period of incapacity (i.e., inability to work, attend school or perform other regular daily activities due to the serious health condition, treatment therefore, or recovery there from) of more than three consecutive calendar days, and any subsequent treatment or period of incapacity relating to the same condition, that also involves:

(A) Treatment two or more times by a health care provider, by a nurse or physician's assistant under direct supervision of a health care provider, or by a provider of health care services (e.g., physical therapist) under orders of, or on referral by, a health care provider; or

(B) Treatment by a health care provider on at least one occasion which results in a regimen of continuing treatment under the supervision of the health care provider.

A "regimen of continuing treatment" is defined in section 825.114(b) to include, for example, a course of prescription medication (e.g., an antibiotic) or therapy requiring special equipment to resolve or alleviate the health condition (e.g., oxygen). But the regulations also clarify that the taking of over-the-counter medications such as aspirin, antihistamines, or salves; or bed-rest, drinking fluids, exercise, and other similar activities that can be initiated without a visit to a health care provider, is not, by itself, a regimen of continuing treatment for purposes of FMLA leave.

The final regulations also provide examples, in section 825.114(c), of conditions that ordinarily, unless complications arise, would not meet the regulatory definition of a serious health condition and would not, therefore, qualify for FMLA leave: the common cold, the flu, ear aches, upset stomach, minor ulcers, headaches other than migraine, routine dental or orthodontia problems, periodontal disease, etc. Ordinarily, these health conditions would not meet the definition in 825.114(a)(2), as they would not be expected to last for more than three consecutive calendar days and require continuing treatment by a health care provider as defined in the regulations. If, however, any of these conditions met the regulatory criteria for a serious health condition, e.g., an incapacity of more than three consecutive calendar days that also involves qualifying treatment, then the absence would be protected by the FMLA. For example, if an individual with the flu is incapacitated for more than three consecutive calendar days and receives continuing treatment, e.g., a visit to a health care provider followed by a regimen of care such as prescription drugs like antibiotics, the individual has a qualifying "serious health condition" for purposes of FMLA.

An employer may, when an employee requests FMLA leave for a serious health condition, request a medical certification by the employee's health care provider to confirm that a serious health condition exists. If the employer has reason to doubt the validity of the certification provided, the employer may require that the employee obtain a second opinion from another health care provider (at the employer's expense). Conflicting opinions are resolved by obtaining a third medical opinion as provided in section 103 of FMLA and sections 825.305 through 825.308 of the regulations.

Turning to your particular questions, we have rephrased and amplified them slightly in the discussion below. These answers should be viewed as general guidance that might not be applicable in a particular situation where other significant factors are present.

Question 1A: People on occasion will go to their doctor if their cold or flu lasts more than three days. The doctor may prescribe an antibiotic (which the patient may or may not fill) in case there is a bacterial infection. The regulations state that, ordinarily, unless complications arise, the common cold and flu are not serious health conditions for purposes of FMLA. Can a cold or the flu ever be a serious health condition for purposes of FMLA?

Answer 1A: Yes, the cold or flu may be a serious health condition for FMLA purposes, if the individual is incapacitated for more than three consecutive calendar days and receives continuing treatment by a health care provider, as defined in the regulations.

Question 1B: What if the employee telephones the doctor but does not actually see the doctor for an examination?

Answer 1B: If an employee who has the flu only telephones the doctor but is not seen or examined by the doctor, those circumstances would not qualify as "treatment" under the regulations. Treatment means an

examination to determine if a serious health condition exists, evaluations of the condition, and actual treatment by the health care provider to resolve or alleviate the condition. A telephone conversation is not an examination. An examination or treatment requires a visit to the health care provider to qualify under FMLA.

Question 1C: What if the doctor only prescribes medication "in case your cold turns into something more serious"? What if the employee does not have the prescription filled or does not follow the doctor's orders?

Answer 1C: A prescription that is given "in case your cold develops into something serious" raises the question of whether the existing condition is a serious health condition for purposes of FMLA. In all likelihood, the employee has not yet suffered the "complications" that would qualify the illness as a serious health condition for FMLA leave purposes. An employee who does not follow the doctor's instructions is probably not under a "regimen of continuing treatment by or under the supervision of the health care provider" within the meaning of the FMLA regulations.

Question 1D: What if the doctor advises the employee to stay at home, drink plenty of fluids, and stay in bed for a few days?

Answer 1D: Staying at home, drinking fluids, and staying in bed are activities which can be initiated without a visit to a health care provider and do not constitute “continuing treatment” under the FMLA regulations. See section 825.114(b).

Question 2A: What if the absence is for strep throat or an ear infection, and the employee goes to the doctor and gets a prescription for an antibiotic, is that a serious health condition?

Answer 2A: The circumstances surrounding each illness must be evaluated to see if it meets one of the regulatory definitions of a serious health condition. If either a strep throat or ear infection results in an incapacity of more than three consecutive calendar days and involves continuing treatment by a health care provider (which can include a course of prescription medication like an antibiotic), the illness would be considered a serious health condition for purposes of FMLA.

Question 2B: Is strep throat without complications a "serious health condition" just because an antibiotic was prescribed?

Answer 2B: If an illness such as strep throat incapacitates someone for a period of more than three consecutive calendar days and involves continuing treatment by a health care provider (including a course of prescription medication like an antibiotic), the condition qualifies as a serious health condition for purposes of FMLA.

Question 3A: What if the employee stays out because her child has bronchitis? She goes to the doctor and medication may or may not be prescribed. Does this meet the criteria for a “serious health condition”?

Answer 3A: Bronchitis may itself be a serious health condition if it meets one of the regulatory definitions. Bronchitis ordinarily may not be a serious health condition because typically it does not involve incapacity of more than three consecutive calendar days and continuing treatment by a health care provider as defined by the regulations. In the case where the doctor does not prescribe any course of medication to resolve or alleviate the health condition, it would not qualify as “a regimen of continuing treatment” within the meaning of the regulations.

Question 3B: If bronchitis may qualify as a serious health condition, does section 825.208(d) of the regulations contradict this when it says "e.g., bronchitis that turns into bronchial pneumonia"?

Answer 3B: No. The complications of an illness that is not itself ordinarily a serious health condition, i.e., does not routinely meet FMLA's definition of a serious health condition, may convert a routine illness into a serious health condition for FMLA leave purposes (e.g., when bronchitis turns into bronchial pneumonia). In such a situation, it may be difficult to determine when the initial illness became a serious health condition for FMLA leave purposes as a result of complications. Any question regarding the onset of a serious health condition may be resolved by obtaining a medical certification from the employee's health care provider and, where there is reason to doubt the validity of the certification provided, a second medical opinion.

Question 4A: Employees occasionally stay home for a week or more with a child who has chicken pox. Assuming there are no complications, is the employee entitled to leave under FMLA?

Answer 4A: Based on the limited information in the situation you describe, there appears to be no continuing treatment by a health care provider that would qualify the absence for FMLA leave.

Question 4B: What if the employee gets chicken pox unrelated to a pregnancy?

Answer 4B: In the absence of additional information, there appears to be no continuing treatment by a health care provider that would qualify the absence for FMLA leave.

Question 4C: What if a doctor advises the employee to stay home for a week?

Answer 4C: The regimen of care described in your question appears to be treatment or activities that can be initiated without a visit to a health care provider. Under those circumstances, without other factors, the situations would not qualify as serious health conditions for FMLA leave purposes.

We are providing the additional information you requested on the FMLA under separate cover. I hope you will find this information responsive to your requests.

Sincerely,

Maria Echaveste
Administrator

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

U.S. Department of Labor
Employment Standards Administration
Wage and Hour Division
Washington, D.C. 20210

December 13, 1996 **FMLA-88**

Dear ***Name****,

This is in response to your letter of October 8, 1996, forwarding correspondence from ***Name****, about the Family and Medical Leave Act of 1993 (FMLA). In her communication, ***Name**** expresses two concerns about how much FMLA leave is available to an employee during a 12-month period and whether the employer can change the 12-month period designated for FMLA leave purposes.

The FMLA entitles eligible employees of covered employers to take up to 12 weeks of unpaid, job-protected leave each year – with continued health insurance coverage maintained during the leave – for specified family and medical leave reasons. Upon return from leave, the employee must be restored to the same position or to an equivalent position with equivalent pay, benefits and other terms and conditions of employment.

Private-sector employers are covered under FMLA if they have employed at least 50 employees during 20 or more calendar workweeks in the current or preceding calendar year. All public-sector employers are covered under FMLA. Employees are eligible under FMLA if they have worked for a covered employer for at least 12 months which need not be consecutive months, have worked at least 1,250 hours during the 12 months preceding the start of leave, and are employed at a worksite where the employer employs at least 50 employees within 75 miles.

Unpaid FMLA leave must be granted to an eligible employee for any of the following reasons: (1) for the birth of a son or daughter, and to care for the newborn child; (2) for placement with the employee of a son or daughter for adoption or foster care, and to care for the newly placed child; (3) to care for the employee's spouse, son or daughter, or parent, who has a serious health condition; and (4) for a serious health condition that makes the employee unable to perform his/her job.

An eligible employee's FMLA leave entitlement is limited to a total of 12 workweeks of leave during any 12-month period for any one, or more, of the specified family and medical reasons previously mentioned. An employer is permitted to choose any one of the following methods for determining the "12-month period" in which the 12 weeks of leave entitlement occurs: (1) the calendar year; (2) any fixed 12-month "leave year," such as a fiscal year, a year required by State law, or a year starting on an employee's "anniversary" date; (3) the 12-month period measured forward from the date an employee's first FMLA leave begins; or (4) a "rolling" 12-month period measured backward from the date an employee uses any FMLA leave. The method selected by the employer must generally be applied consistently and uniformly to all employees. The employer is permitted to change to another method, but is required to provide at least a 60 days notice to all employees. During the 60-day transition period, employees must retain the full benefit of 12 weeks of leave under any one of the methods that would provide the greatest benefit to the employee. Under no circumstances may a new method for determining the 12-month period be implemented in order to avoid the FMLA's leave requirements.

Name* communication indicates that she has taken, or will take, FMLA leave for two separate reasons, i.e., for her own serious health condition due to complications from pregnancy and for the birth and care of the newborn child. Assuming that the employer designated the week of leave taken in July because of pregnancy complications as FMLA leave and she has not taken any other FMLA leave during 1996, ***Name**** would have 11 weeks of FMLA leave remaining if the employer chose as the method for determining the 12-month period either the calendar year or the 12-month period measured forward from the date the employee first took FMLA leave. If the calendar year determines the 12-month period for FMLA leave purposes, as a new calendar year begins an eligible employee would be entitled to 12 weeks of FMLA leave regardless of the amount of FMLA leave taken in the previous calendar year. Taking FMLA leave for more than one reason in the designated 12-month period does not entitle the employee to additional FMLA leave.

We have provided a general response to ***Name**** concerns as her communication contained limited information about her situation and the company's policy. If she feels that her FMLA rights may have been violated or wishes to discuss her situation further, she may contact our district office in Wilkes-Barre, Pennsylvania, at the following address and telephone number: US Department of Labor, Employment Standards Administration, Wage and Hour Division, 3329 Penn Place, 20 North Pennsylvania Avenue, Wilkes-Barre, Pennsylvania 18701, telephone number (717) 826-6316. Enclosed for your constituent's information is the FMLA fact sheet which describes the provisions of this Act.

Sincerely,

Howard B. Ostmann
Office of Enforcement Policy
Family and Medical Leave Act Team

Enclosure

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

U.S. Department of Labor
Employment Standards Administration
Wage and Hour Division
Washington, D.C. 20210

July 3, 1997 **FMLA-89**

Dear ***Name****,

This is in response to your request for guidance under the Family and Medical Leave Act of 1993 (FMLA) as it relates to the Oregon Family Leave Act and the Fair Labor Standards Act (FLSA) exemption for executive, administration and professional employees. I apologize that the volume of work involved with administering the FMLA has delayed this response.

You are correct in your analysis concerning the requirements for payment "on a salary basis" as a prerequisite for the FLSA exemption under the pertinent regulations, 29 CFR 541.118 and 29 CFR 825.206. Under the special statutory exception to the "salary basis" requirements of the FLSA exemption provided by Section 102(c) of the FMLA, only FMLA-eligible employees, who work for FMLA-covered employers, and who take leave for FMLA-qualifying reasons, may have their salaries reduced on a pro-rata basis for the amount of unpaid FMLA leave taken without losing their exempt status under the FLSA. See 29 CFR 825.206(c). Furthermore, if an employer requires an employee to take a full day of leave in circumstances where the employee does not need the full day off to attend to the situation requiring FMLA leave, the employer would be violating both the FLSA regulations at 29 CFR 541.118(a)(1) (deductions from salary not permitted for absences occasioned by the employer), and the FMLA regulations at 29 CFR 825.203(d) (employee may not be required to take more FMLA leave than necessary to address the circumstance that precipitated the need for the leave (except under special rules for local educational agencies)).

I hope that the above response fully explains the Department's position and the rationale behind that position. We would be glad to address any further concerns or questions you might have.

Sincerely,

Michael Ginley
Director
Office of Enforcement Policy

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

U.S. Department of Labor
Employment Standards Administration
Wage and Hour Division
Washington, D.C. 20210

This letter is under review in light of issues raised by the U.S. Supreme Court in Ragsdale v. Wolverine World Wide, Inc. and other judicial decisions. It may be superceded by FMLA2002-5-A. (http://www.dol.gov/esa/whd/opinion/FMLA/2002_08_06_5A_FMLA.htm)

July 3, 1997 **FMLA-90**

Dear ***Name****,

This is in response to your request for written guidance from the Wage and Hour Division of the U.S. Department of Labor with regard to the application of the Family and Medical Leave Act of 1993 (FMLA) in your situation. In order to provide a concise response to your request, we will only address the situation you have outlined in your letter. We will assume that your employer is covered, you are an eligible employee, the reason you have requested leave is one specified in FMLA, and that both you and your employer have met those responsibilities not discussed in this response, but otherwise imposed by FMLA and the implementing regulations, 29 CFR Part 825.

According to your letter, you have requested FMLA leave to provide care for your wife and have given your employer a medical certification from your wife's health care provider stating in part that your wife's condition will, over the course of the next year, require that you provide care on an intermittent basis. The nature of your wife's illness is such that it is not possible to predict when or for how long it will be necessary to provide appropriate care. Your employer "provisionally" approved your request for leave indicating that a final determination will be made when you take leave. Your employer has also indicated that leave will not be approved in advance unless you can provide specific dates. Should your employer decide not to approve any specific absence, you would be subject to discipline under your employer's attendance policy.

The FMLA provides, in part, that an employee is entitled to leave for up to 12 weeks in any 12 months period to care for a spouse, son, daughter, or parent who has a serious health condition. The Act provides that leave may be taken all at once, or may be taken "intermittently or on a reduced leave schedule" when medically necessary. If FMLA leave is taken intermittently for planned medical treatment that is foreseeable, the employee must make a reasonable effort to schedule intermittent leave for such treatments so as not to unduly disrupt the employer's operations, contingent upon approval of the health care provider. When need for leave is not foreseeable, an employee is required to notify the employer "as soon as practicable" which ordinarily means at least verbal notice to the employer within one or two business days of when the need for leave becomes known to the employee. (See §§ 29 CFR 825.302 and .303.)

Once the employer has acquired knowledge that the leave is being taken for an FMLA-qualifying reason, the employer must promptly (within one or two business days absent extenuating circumstances) notify the employee that the leave is designated and counted as FMLA leave, and inform an employee of his/her rights and responsibilities under FMLA, including giving specific written notice on what is required of the employee and what might happen if the employee fails to meet these responsibilities. An employer, for instance, may require that a request for FMLA leave due to a serious health condition be supported by a certificate issued by the individual's health care provider and may require (at its own expense) a second and third opinion, if the employer has reason to doubt the validity of the original certification. Pending resolution of the employee's right to FMLA leave through the certification process, the employee is "provisionally" entitled to the benefits and protection of the Act. This provisional entitlement to FMLA leave is only applicable where the employer has elected to seek a second or third opinion and that opinion is not yet available. An employer also has the right to request subsequent medical recertifications on a reasonable basis. (See §§ 29 CFR 825.208, .301, .307 and .308.)

The FMLA lists those items of information that may be included in the medical certification. Included in this list is "the probable duration of the condition", "an estimate" of the time needed to care for a family member, and for intermittent leave or leave or a reduced leave schedule, "the expected duration" and schedule of such leave, and must indicate that the medical need for leave can be "best accommodated"

through an intermittent or reduced leave schedule. (Emphasis added.) (See §§ 29 CFR 825.117 and .306.)

The FMLA, which recognizes that not all absences caused by certain serious health conditions will be predictable, does not provide any language to suggest or require an employee or health care provider to submit an exact schedule of leave when submitting the medical certification. Nor does FMLA permit an employer to withhold approval of a request for FMLA leave if an exact schedule of leave is not submitted. An employer who withholds approval of FMLA leave and who disciplines an employee under the company's attendance control policy for any "unscheduled" leave taken to care for a family member who has a serious health condition (for FMLA leave purposes) may be considered in violation under this law. (See §§ 29 CFR 825.114, .220, .306, and .312.)

The FMLA prohibits interference with an employee's rights under the Act. If an employee makes a bona fide request for FMLA, the employer must respond in the appropriate manner as outlined above. An employer that does not make a timely designation and is unable to cite extenuating circumstances cannot deny the leave or deny the benefits and protection of FMLA. In such circumstances, the employee is subject to the full protections of FMLA but the employer may not count any of the leave against the employee's 12-week entitlement. (See §§ 29 CFR 825.208 and .220.)

If this information has not full addressed your concerns, please contact the nearest office of the Wage and Hour Division, which is located at 26 Federal Plaza, Room 3838, New York, New York 10278, telephone number (212) 264-8185.

Sincerely,

Michael Ginley
Director
Office of Enforcement Policy

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

U.S. Department of Labor
Employment Standards Administration
Wage and Hour Division
Washington, D.C. 20210

December 9, 1997 **FMLA-91**

Dear ***Name****,*

This is in response to your request for guidance under the Family and Medical Leave Act of 1993 (FMLA) as it relates to the Oregon Family Leave Act and the Fair Labor Standards Act (FLSA) exemption for executive, administration and professional employees. I apologize that the volume of work involved with administering the FMLA has delayed this response.

We regret the delay in our response to your letter of May 17, 1996, regarding the Family and Medical Leave Act of 1993 (FMLA). You specifically request an opinion as to the interaction of FMLA with employer benefit programs or plans that provide more generous leave benefits than those provided under this law.

In enacting FMLA (29 U.S.C. 2601 et seq.), Congress stated that one of the purposes of this law is to entitle employees to take reasonable leave for medical reasons, for the birth or adoption of a child, and for the care of a child, spouse, or parent who has a serious health condition. The FMLA allows up to 12 weeks of job-protected leave in any 12 months – with group health insurance coverage maintained during the leave – to eligible employees for the above mentioned family and medical reasons. Upon completion of the leave, the employee must be returned to work to the same or an equivalent position with equivalent pay, benefits and other terms and conditions of employment. It is unlawful for any employer to interfere with or restrain or deny the exercise of any right provided under this Act, or to discharge or in any other manner discriminate against an employee for opposing or complaining about any unlawful practice related to this law.

Section 402 of FMLA, 29 U.S.C. 2652, and the regulations at § 29 CFR 825.700 describe the interaction between FMLA and employer plans and provide that nothing in FMLA diminishes an employer's obligation under a collective bargaining agreement (CBA) or employment benefit program or plan to provide greater family or medical leave rights to employees than the rights established under FMLA, nor may the rights established under FMLA be diminished by any such CBA or plan.

In your letter, you give an example of a more generous employment leave plan that provides job protected leave of 12 weeks plus one week for every full year of service as the maximum leave of absence, except maternity. Normally, employees will be terminated from their jobs, if they do not return to work within the prescribed period of their leave of absence as based upon the above formula. You pose three questions with respect to the interaction between FMLA and the employer's more generous leave policy:

First Question: Can an employer, who grants more than twelve weeks of leave for reasons including, but not limited to, FMLA qualifying reasons, run the twelve weeks of FMLA leave concurrently with the leave of absence?

Leave granted under circumstances that qualify as FMLA leave can be counted against the 12-week entitlement so long as the employee is FMLA-eligible and is notified in writing that the leave is designated as FMLA leave. (See § 29 CFR 825.208.) Employers are permitted to designate paid leave as FMLA leave and offset the maximum entitlements under the employer's more generous policies to the extent that the leave qualifies as FMLA leave. (See §§ 29 CFR 825.700 and 825.207.) Leave granted for reasons not covered by FMLA, however, cannot be counted against FMLA's 12-week entitlement.

Second Question: Can an employer terminate the employment of an employee who has worked less than a year and does not return to work after 12 weeks of leave?

To be eligible for FMLA leave, an employee must meet three tests, i.e., must work for an employer for at least 12 months, which need not be consecutive months, and work at least 1,250 hours over the 12 months preceding the taking of FMLA leave, and work at a worksite where the employer employs 50 or

more employees within 75 miles. (See § 29 CFR 825.110.) If the employee had less than one year of service with the employer at the time the leave in question commenced, the employee would not have been eligible for FMLA leave nor entitled to its protection and benefits. During this period of non-eligibility, any employment actions taken by the employer in granting leave, maintaining health care benefits and providing job protection would have been determined by the employer's plan rather than the provisions of FMLA. Any leave taken before the employee meets all of the FMLA employee eligibility tests cannot be counted against the employee's FMLA 12-week leave entitlement. If FMLA-qualifying leave continues after the employee becomes FMLA-eligible, only that portion of leave taken after the employee becomes FMLA-eligible may be counted against the employee's 12-week leave entitlement, and only so long as the employer has designated in writing the leave as FMLA leave.

Third Question: Can an employer terminate the employment of a two-year employee if the employee does not return after fourteen weeks of leave?

The FMLA requires covered employers to provide eligible employees with up to 12 workweeks of leave in a 12-month period for any one or more of the specified family or medical reasons. If the employee is unable to or does not return to work at the end of 12 weeks of FMLA leave (provided the employer designated the leave as FMLA leave and so notified the employee in writing), all entitlements and rights under FMLA cease at that time. The employee is no longer entitled to any further job restoration rights under FMLA and may be terminated.

An employer, however, must observe any employment benefit program or plan or CBA that provides greater family or medical leave rights to employees than the rights established by the FMLA. (See § 29 CFR 825.700.) Thus, an employer under your example would have an obligation under its own "leave of absence" policies to extend leave benefits, health care benefits, and job protection for up to 14 weeks, but not beyond 14 weeks. You also should be aware that the discrimination prohibition in FMLA (Section 105) would prevent an employer from terminating such employees who have used FMLA leave and do not return after 14 weeks if the employer does not treat similarly situated employees who have not used FMLA leave (for example, employees on leave to care for an ill grandparent or parent-in-law) the same.

The above information should be viewed as general guidance based upon the limited information contained in your letter. If we may be of further assistance to you, please do not hesitate to contact me.

Sincerely,

Michelle M. Bechtoldt
Office of Enforcement Policy
Family and Medical Leave Act Team

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

U.S. Department of Labor
Employment Standards Administration
Wage and Hour Division
Washington, D.C. 20210

December 12, 1997 **FMLA-92**

Dear ***Name****,*

Thank you for your letters concerning the Family and Medical Leave Act of 1993 (FMLA). I apologize that, because of the volume of work associated with administering FMLA, we were not able to respond sooner to your request.

Your questions relate to employee absences pursuant to a public or private temporary disability plan or workers' compensation laws. You have asked whether such temporary disability leave or workers' compensation absences are paid leave within the meaning of the FMLA; whether the employer or employee may substitute paid vacation, personal, or medical or sick leave for such leave; whether the employer may recover both health and non-health premiums it has paid during such an absence; and whether employees accrue seniority and other benefits during such an absence.

As explained in the preamble to the regulations, leave under a temporary disability plan, whether public or private, or under a workers' compensation law is not a form of "accrued paid leave" within the meaning of the FMLA (see 60 Fed.Reg. 2180, 2205-06 (1995), preamble to 29 CFR 825.207). Nor is such leave under a temporary disability plan or workers' compensation law "unpaid" leave within the meaning of the FMLA (see 29 CFR 825.207(d)(1) and (2)). Therefore, where a work-related illness or injury constitutes a serious health condition which triggers application of the FMLA, and the employee has elected to receive payments from a private disability plan or from a state workers' compensation plan, the employer cannot require the employee to substitute, under section 102(d), any paid vacation, personal, or medical or sick leave, for any part of the absence that is covered by the payments under the temporary disability plan or under a workers' compensation plan. Similarly, an employee is precluded from relying upon FMLA's substitution provision to insist upon receiving both temporary disability or workers' compensation and accrued paid leave benefits during such an absence. In accordance with the regulations, however, the employer may, at the beginning of the absence, designate the temporary disability leave or workers' compensation absence as FMLA leave and count the period of the absence under both the temporary disability plan or workers' compensation plan and FMLA (see 29 CFR 825.207(d)(1) and (2); 29 CFR 825.208; 60 Fed.Reg. at 2205-2206).

With respect to the employer's right to recover its share of insurance premiums paid during the absence if the employee fails to return, the statute only authorizes the recovery of the employer's share of insurance premiums that are paid to maintain coverage for the employee under a group health plan (as defined in 29 CFR 825.800) during any period of unpaid leave (see 29 USC 2614(c)). Since leave taken pursuant to a temporary disability plan or workers' compensation plan is not unpaid leave within the meaning of the Act, the statutory provision for recovery of health insurance premiums does not apply (see 29 CFR 825.213(d)). Also, neither the statute nor the regulations provide for the employer's recovery of any non-health benefit premiums paid during a FMLA-designated temporary disability leave or workers' compensation absence, as opposed to during unpaid leave (see 29 CFR 825.213(b)).

Finally, if the employer designates the absence due to a temporary disability or workers' compensation as FMLA leave, then the employee is entitled to all employment benefits accrued prior to the date on which the leave commenced. The FMLA does not entitle the employee to the accrual of any seniority or employment benefits during any period of FMLA leave, nor to any right, benefit or position of employment other than that to which he or she would have been entitled had the employee not taken the leave (see 29 USC 2614; 29 CFR 825.215(d)(2) and (4)). Thus, an employee on FMLA leave does not accrue seniority or employment benefits during the absence by operation of the FMLA. Nevertheless, in addition to the group health benefits guaranteed under section 104(c) of the FMLA, an employee on FMLA leave—whether paid or unpaid—may be entitled to additional benefits while absent, depending on the employers established policy for providing such benefits when employees are absent on other forms of leave (see 29 CFR 825.209(h) and 825.220(c)).

I trust this letter has responded to your concerns. If I may be of further assistance, please do not hesitate to contact me.

Sincerely,

Michelle M. Bechtoldt
Office of Enforcement Policy
Family and Medical Leave Act Team

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

U.S. Department of Labor
Employment Standards Administration
Wage and Hour Division
Washington, D.C. 20210

February 6, 1998 **FMLA-93**

Dear ***Name****,

Thank you for your letter concerning the Family and Medical Leave Act of 1993 (FMLA). I apologize that, because of the volume of work associated with administering FMLA, we were not able to respond sooner to your request.

You request reconsideration of a written response from our ***Name**** District Office concerning the granting of paid administrative leave for physical fitness activities when an employee is on intermittent FMLA leave on a reduced workweek schedule, i.e., every Monday to care for a relative. (We assume that the relative in this case is either a spouse, parent, son or daughter, which are the family members covered by FMLA.) Enclosed with your letter is Policy Issuance No. 29, which provides that the immediate supervisor "shall consider the needs of the Department's business, including the assignments and responsibilities of the employee" in approving an employee's request for such administrative leave. The administrative leave is limited to three one-half hour periods per week for an employee to participate in structured physical fitness activity during the lunch hour. Approval can be granted in situations where the request can be "reasonably accommodated." Use of such leave may be suspended if there is "abuse or if it is in the best interests of the Department." Because of the discretionary nature of this leave, you argue that the leave is not a "benefit" for FMLA leave purposes.

Section 101(5) of the FMLA defines employment benefits to include "all benefits provided or made available to employees by an employer, including group life insurance, health insurance, disability insurance, sick leave, annual leave, educational benefits, and pensions…" The Department of Labor has found nothing in the legislation or the legislative history to indicate that this definition should be interpreted narrowly or that Congress intended the list in the statute to be exhaustive. Thus, the Department interprets this definition broadly to include all benefits provided or made available to employees, including discretionary benefits such as paid administrative leave for physical fitness activity.

Section 105 of FMLA and section 825.220 of the Regulations, 29 CFR Part 825, set forth certain protection to employees who exercise their rights to take FMLA leave. The FMLA prohibits employers from interfering with, restraining, or denying an employee's rights under this law. Further, it is unlawful for any employer to discharge or in any other manner discriminate against any employee for opposing any unlawful practice under this law. Moreover, employers may not use the taking of FMLA leave as a negative factor in any employment action or decision.

"Interfering with" the exercise of an employee's rights would include refusal to grant FMLA, or discouraging an employee from taking FMLA leave. The FMLA, however, does not entitle any employee to any right, benefit, or position of employment other than any right, benefit, or position of employment to which the employee would have been entitled if the employee had not taken FMLA leave. Thus, the Act's anti-discrimination provisions prohibit an employer from requiring more of an employee who took FMLA leave than the employer would require of employees who take other forms of paid or unpaid leave. The decision to approve or deny paid administrative leave for physical fitness activity in this case must take into consideration what the employer would normally do in similar leave situations that involve non-FMLA leave, in addition to the other factors that are used to determine whether such leave would be granted. Simply denying an employee the use of administrative leave for physical fitness activity during the lunch hour because the employee is taking intermittent FMLA leave is discriminatory on its face.

We don't see anything in your description of the facts about why the employee was not allowed to use administrative leave for physical fitness but for the taking of FMLA leave. If the assessment of these facts is correct, we would view the denial of physical fitness leave in this case to be a violation of FMLA's anti-discrimination clause (Sections 105 of the Act and 29 CFR 825.220 of the Regulations) on the basis that the employer cannot treat employees who use FMLA leave in a manner that discriminates against them for taking FMLA leave.

I trust this letter clarifies our earlier response on this matter. If you require further assistance, please do not hesitate to contact the ***Name**** District Office or me.

Sincerely,

Michelle M. Bechtoldt
Office of Enforcement Policy
Family and Medical Leave Act Team

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

U.S. Department of Labor
Employment Standards Administration
Wage and Hour Division
Washington, D.C. 20210

February 27, 1998 **FMLA-94**

This is in response to your letter to the U.S. Department of Labor (the Department) on behalf of ***Name*.*** ***Name**** is concerned that her employer, ***Name****, may have violated provisions of the Family and Medical Leave Act of 1993 (FMLA) by denying her time off to attend Care Conferences related to her mother's health condition.

The FMLA entitles eligible employees of covered employers to take up to 12 weeks of unpaid, job-protected leave each year -- with continued group health insurance coverage during the leave -- for specified family and medical reasons.

Private employers are covered under FMLA if they have employed at least 50 employees during 20 or more calendar workweeks in the current or preceding calendar year; all public employers are covered. Employees are eligible under FMLA if they have worked for a covered employer for at least 12 months, have worked at least 1,250 hours during the 12 months immediately preceding the start of leave, and are employed at a worksite where the employer employs at least 50 employees at the site or within 75 miles of the site. The 12 months the employee has to have worked do not have to be consecutive.

Unpaid leave must be granted to an eligible employee for any of the following reasons: (1) for the birth of a son or daughter, and/or to care for the newborn child within one year of birth; (2) for placement with the employee of a son or daughter for adoption or foster care, and/or to care for the newly placed child within one year of placement; (3) to care for the employee's spouse, son or daughter, or parent, who has a serious health condition; and, (4) for a serious health condition that makes the employee unable to perform his/her job.

An employer may require that an employee's FMLA leave be supported by a certification issued by a health care provider. The Department has developed an optional form (Form WH-380) for use in obtaining medical certification. Form WH-380, or another form containing the same basic information, may be used by the employer; however, no additional information may be required. An employer may generally request subsequent re-certifications no more often than 30 days and only in connection with an absence by the employee. The FMLA Regulations, 29 CFR 825, provide guidelines for employer clarification of medical certifications and also for obtaining second and third medical opinions.

With regard to whether or not attending a Care Conference such as the one described by ***Name**** would be covered by FMLA as a part of providing care for her mother, it is our position that such an event would be covered. The legislative history clearly reflects the intent of the Congress that providing physical and psychological care and comfort to family members with serious health conditions would be a legitimate use of FMLA leave. A Care Conference, during which the individual's health care providers (nurses, dieticians, physical therapists, activity directors, doctors, etc.) discuss the individual's condition, immediate needs, incidents, and general well being, etc., is clearly essential to the employee's ability to provide appropriate physical or psychological care.

While we regret the delay in our response to ***Name**** inquiry, if she still has concerns about this matter she may contact the nearest office of the Wage and Hour Division for further assistance. This office is located at the ***Name****, telephone number **********.

Sincerely,

Michelle M. Bechtoldt
Office of Enforcement Policy
Family and Medical Leave Act Team

Enclosure

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

U.S. Department of Labor
Employment Standards Administration
Wage and Hour Division
Washington, D.C. 20210

June 3, 1998 **FMLA-95**

Dear ***Name****,

Your request for an interpretation of the application of the Family and Medical Leave Act of 1993 (FMLA) has been referred to this office for a response. In your particular situation, the Office of the Sheriff employs eight technical support telecommunication technicians who perform a variety of tasks. One of these technicians is currently on FMLA leave. This particular technician has also received "extensive specialized training and certification in audio/video enhancement for evidence analysis and testimony as an expert witness. No other Telecommunication Technician in the unit has received comparable training nor is qualified to perform these specialized functions." You also state that, during the technician's FMLA leave, "the unit has experienced not only a backlog for video analysis, but also an increased demand for these services internally and from other law enforcement entities."

You pose five specific questions with regard to your obligations to provide FMLA leave and the employee's right to be restored to the same or an equivalent position.

Question 1: Under what circumstances may an employer assert a 'compelling business interest' in determining work redistribution or position restructuring involving employees on FMLA leave?

Answer 1. The FMLA does not provide for an exception to its requirement to restore an employee to the same or an equivalent position due to 'compelling business interests.' An employer may redistribute the employee's work, restructure positions, or take other actions during the employee's absences on FMLA leave, as required for the continued operation of the business. Regardless of the action taken, the employer is required to restore the employee taking FMLA to the same or an equivalent position as noted in Regulations, 29 CFR Part 825.214 and 825.216.

Question 2: Although language in FMLA narrowly limits restoration exemptions to 'highly compensated employees', does FMLA allow an expansion of those limits to circumstances where reinstatement of the employee on leave to the employee's original or equivalent would result in 'undue hardship' to the employer?

Answer 2. The FMLA does not provide for any expansion of the exemption applicable to 'certain highly compensated employees' for any reason.

Question 3: Given the facts stated, management is faced with an increased workload with only one employee certified to perform the tasks required. In this particular situation, would the reorganization of tasks among the telecommunications technicians, without altering compensation or benefits of the employee on FMLA leave, constitute a failure to return the employee to the same or equivalent position?

Answer 3. Regulations, 29 CFR Part 825.216(a), state in part that an "employee has no greater right to reinstatement or to other benefits and conditions of employment than if the employee had been continuously employed during the FMLA leave period." If the reorganization was solely the result of an increased workload and would have occurred had the employee continued to work, the employer would not necessarily be required to restore the employee to the same or an equivalent position. If, however, the reorganization was due solely to the reallocation of the employee's work while the employee was on leave, the employee would be entitled to be restored to the same or an equivalent position. Only those terms and conditions of employment that would be considered de minimis or intangible, immeasurable aspects of the job would not be considered in determining whether the employer had complied with the FMLA requirements. (Regulations, 29 CFR 825.215(f)) Not having access to a company vehicle and diminished opportunities for overtime would not seem to be de minimis, intangible, immeasurable aspects of the job.

Question 4: The FMLA speaks clearly with regard to its prohibition against employer decisions that diminish an employee's employment status. Given the proposed management action, the task redistribution would not diminish the employee's status but rather enhance the employee's opportunity to assume greater responsibilities and authority. Would an enhanced position stay a noncompliance issue?

Answer 4. Upon returning to work an employer may offer an employee a position that differs from the position that the employee had prior to starting FMLA leave. The employer may not, however, induce the employee to accept a different position against the employee's wishes. (Regulations, 29 CFR Part 825.215(e)(4))

Question 5: If a 'compelling business interest' is successfully asserted, does the FMLA scrutiny continue by evaluating the impact of that decision?

Answer 5. There is no 'compelling business interest' exception under FMLA. As provided for under FMLA and the regulations, a covered employer must grant FMLA leave, continue group health coverage, and provide restoration to an eligible employee for those reasons cited in the statute. Under certain circumstances, an employer may deny restoration to "certain highly compensated employees." (Regulations, 29 CFR 825.216(c) and 825.217)

I hope the above has fully addressed your concerns. I regret the lengthy delay in responding to your request.

Sincerely,

Michelle M. Bechtoldt
Office of Enforcement Policy
Family and Medical Leave Act Team

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

U.S. Department of Labor
Employment Standards Administration
Wage and Hour Division
Washington, D.C. 20210

June 4, 1998 **FMLA-96**

Dear ***Name****,

Your inquiry regarding the application of the Family and Medical Leave Act of 1993 (FMLA), originally submitted to our ***Name**** District Office, was referred to this office for a response. Specifically, you ask if the term "legal ward", as used in FMLA, would include your parents-in-law for whom the courts have appointed you co-guardian and co-conservator. For the purpose of addressing your question, we will assume no other issues or provisions of FMLA are disputed and there is no need to summarize the Act's provisions.

The FMLA provides that, in part, an eligible employee of a covered employer may take FMLA leave "to care for the spouse, or a son, daughter, or parent, of the employee, if such spouse, son, daughter, or parent has a serious health condition." (Section 102(a)(1)(C)) The FMLA, in section 101(12), defines "son or daughter" as "a biological, adopted, or foster child, a stepchild, a legal ward, or a child of a person standing in loco parentis, who is -

(A) under 18 years of age; or
(B) 18 years of age or older and incapable of self-care because of a mental or physical disability.

In addressing your question, we looked first at the placement of the term "legal ward" within FMLA. This term is included in the FMLA definition of "**son or daughter**" (section 101(12)) rather than in section 102(a)(1)(C) that lists situations in which an employee is entitled to FMLA leave. This leads us to conclude that the legislation considers the term legal ward only in the context of determining those individuals who, for purposes of FMLA, would be considered a son or daughter. In other words, an employee may qualify for FMLA leave to provide care for a legal ward so long as the relationship between the employee and the legal ward is similar in nature to that of parent to child. Our conclusion may have been different had FMLA's leave entitlements in section 102(a)(1)(C) included leave to care for a legal ward.

Next, we reviewed the legislative history of these sections of FMLA to determine if the legislative history is consistent with our conclusion. The sections of the Senate (SR 103-3) and House Reports (HR 103-8) discussing the term "son or daughter" both state in part that the definitions "reflect the reality that many children in the United States today do not live in traditional 'nuclear' families with their biological father and mother" and that "those who find themselves in need of workplace accommodation of their child care responsibilities are not the biological parent of the children they care for, but their adoptive, step, or foster parents, their guardians, or sometimes simply their grandparents or other relatives or adults." Finally, the reports state that the definitional language is intended to "be construed broadly . . . to ensure that an employee who actually has day-to-day responsibility for caring for a child is entitled to leave even if the employee does not have a biological or legal relationship to that child."

With regard to sons or daughters older than 18, the reports recognize "that in special circumstances, where a child has a mental or physical disability, **a child's need for parental care may not end when he or she reaches 18 years of age**. In such circumstances, **parents may continue** to have an active role in caring for the son or daughter. **An adult son or daughter** who has a serious health condition and who is incapable of self-care because of a mental or physical disability presents the same compelling **need for parental care** as the child less than 18 years of age with a serious health condition." (Emphasis added.)

The language in the reports supports the conclusion that an employee is entitled to FMLA leave to care for a legal ward only to the extent that the employee has a relationship with the ward that is similar to that of a parent to a child. If, for example, a child becomes the legal ward of his or her aunt, uncle, or parents' best friends because of the death of his or her biological parents, we believe that such legal wards fall within FMLA's definition of son or daughter. We do not believe, however, that the definition of "son or daughter" can be interpreted to encompass relatives such as parents-in-law.

That your wife has been named co-guardian and co-conservator for her parents does not impact on her entitlement to take leave to care for her parents.

Although you have not specifically raised the question, we would also like to point out that the term "parent", as used in section 102(a)(1)(C) is limited to the employee's biological parent or an individual who stood in loco parentis to the employee. The term does not extend to a parent-in-law. Moreover, this entitlement is expressly limited to " . . . care for the . . . parent, **of the employee**, if such . . . parent has a serious health condition." Thus, each eligible spouse may take qualifying FMLA leave to care for his or her own biological (or in loco parentis) parent who has a serious health condition, but the leave entitlement cannot be extended to parents-in-law.

While we appreciate that our conclusion means that you are not entitled to FMLA leave to care for your parents-in-law who have become your legal wards, we believe that a careful review of FMLA and the legislative history supports no other result. If you have any further questions, please contact our District Office located at ***Name****, telephone **********.

Sincerely,

Michelle M. Bechtoldt
Office of Enforcement Policy
Family and Medical Leave Act Team

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

U.S. Department of Labor
Employment Standards Administration
Wage and Hour Division
Washington, D.C. 20210

July 10, 1998 **FMLA-97**

Dear ***Name****,

Thank you for your letter concerning the Family and Medical Leave Act of 1993 (FMLA). I apologize that, because of the volume of work associated with administering FMLA, we were not able to respond sooner to your request.

Thank you for your letter of December 19, 1997, concerning the interplay between the leave requirements of the Family and Medical Leave Act of 1993 (FMLA) and the job accommodation obligations of the Americans with Disabilities Act (ADA). I apologize that, because of the volume of work associated with administering the FMLA, we were not able to respond sooner to your concerns.

In enacting the FMLA, Congress stated in Section 2 that there is inadequate job security for employees who have serious health conditions that prevent them from working for temporary periods. Congress also stated in Section 2 that it is the purposes of this Act to entitle employees to take reasonable leave for medical reasons. Pursuant to Section 102(a)(1)(D), an eligible employee is entitled to a total of 12 workweeks of unpaid leave during any 12-month period because of a serious health condition that make the employee unable to perform functions of the employee's position. Section 102(b)(1) provides that leave may also be taken intermittently, or on a reduced leave schedule, by the employee when medically necessary. Sections 104(a)(1)(A) and (B) provide that, upon return from FMLA leave, employees must be restored to their original or to an equivalent position with equivalent pay, benefits, and terms and conditions of employment. Section 105 prohibits employers from interfering with or discriminating against employees who exercise their rights under this law.

Leave provisions of FMLA are wholly distinct from the reasonable accommodation obligations of employers covered under the ADA. While FMLA provides an eligible employee the right to a temporary medical leave of absence for a serious health condition, ADA prohibits employment discrimination against "qualified individuals with disabilities." Reasonable accommodation is a critical component of the ADA's assurance of nondiscrimination and is any change in the work environment, or in the way things are usually done, that results in equal employment opportunity for an individual with a disability. An employer under ADA must make a reasonable accommodation to the known physical or mental limitations of a qualified applicant or employee with a disability unless it can show that the accommodation would cause an undue hardship on the operation of its business.

In the case of an employee with a serious health condition under FMLA who is also a qualified individual with a disability under ADA, requirements from both laws must be observed and applied in a manner that assures the most beneficial rights and protection. For example, a reasonable accommodation under ADA might be accomplished by providing an individual with a disability with a part time job which does not ordinarily provide health benefits. Under FMLA, an eligible employee would be permitted to work a reduced leave schedule for up to 12 workweeks of leave in any 12 month period with group health plan benefits maintained during this time. If the employee is unable to or does not return to work at the end of 12 weeks of FMLA leave (provided the employer designated the leave as FMLA leave and so notified the employee in writing), all entitlements and rights under FMLA cease at that time. The employee is no longer entitled to any further job restoration rights under FMLA and may be terminated. An employer must observe any employment benefit program or plan or CBA or State or local law that provides greater family or medical leave rights to employees than the rights established by the FMLA, and any Federal or State law that prohibits employment discrimination. (See Title IV of the Act.)

Based on the facts contained in your letter, it appears that the employee in question is eligible to take FMLA leave on a reduced leave schedule due to a serious health condition caused by a serious on-the-job injury. The fact that the condition is permanent and the employee will more than likely not be able to return to full employment in the near future would not diminish the employee's entitlement to FMLA leave, assuming the employee has met all of the employee eligibility tests under the Act. (This appears obvious since the employer agreed to approve FMLA leave for the employee in question, and you state that the

employee worked 1,250 hours in the previous year.) Once the employee has exhausted the 12 workweeks of FMLA leave in the designated 12-month period, the employee would no longer have job restoration rights under the Act. Thus, if the employee in question is unable to resume full-time employment at the conclusion of the 12 workweeks of FMLA leave in the 12-month period, the employer would no longer be obligated to continue to provide job-protected FMLA leave beyond the 12 weeks. Nor at the conclusion of 12 weeks of job-protected leave in the 12-month period would the employer be in violation of the FMLA by notifying the employee in question that his/her job restoration rights to his/her original or equivalent full-time position has ceased, and subsequently offer to place the employee in a part-time position as, for instance, an accommodation under the ADA.

If the employer has made a permanent or long-term change in the employee's schedule, as in the case of the employee in question who may not be able to return to full-time employment following the completion of 12-weeks of FMLA leave in the 12- month period and is subsequently offered part-time employment as an accommodation under the ADA, the hours worked under the new schedule would be used to calculate the amount of leave available for the employee to use (intermittently or on a reduced leave schedule). For example, if the employee's new workweek schedule is 24 hours and the employee needs eight hours of FMLA leave per week for medical necessity, the employee's eight hours of leave would constitute one-third of a week of FMLA leave for each week the employee works the reduced leave schedule.

With respect to your concerns about the substitution of accrued paid leave for unpaid leave provisions under FMLA, employees may elect or employers may require employees, to substitute accrued paid leave for all or any portion of the unpaid FMLA leave taken for a qualifying reason. Your concerns about an employee receiving indefinitely "full-time pay for part-time work" by substituting accrued paid leave for unpaid FMLA leave taken intermittently or on a reduced leave schedule, are a reflection of the employer's generous paid leave benefits, as FMLA by its terms provides unpaid leave. An employee who never exhausts his/her 12 weeks of FMLA leave in a 12 months period (e.g., takes medical leave one day in a five-day workweek), and who has accumulated a substantial balance of accrued paid leave that may be substituted for unpaid FMLA leave, may receive "full-time pay for part-time work" indefinitely until the employee no longer needs to take FMLA leave or no longer has any accrued paid leave to substitute for unpaid FMLA leave.

For your information, enclosed is a fact sheet that provides technical assistance on some common issues involving ADA and FMLA. This fact sheet was prepared by the Equal Employment Opportunity Commission (EEOC), which administers the ADA.

I hope that our reply is responsive to your needs. If you require further assistance on this matter, please do not hesitate to contact us.

Sincerely,

Michelle M. Bechtoldt
Office of Enforcement Policy
Family and Medical Leave Act Team

Enclosure

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

U.S. Department of Labor
Employment Standards Administration
Wage and Hour Division
Washington, D.C. 20210

November 18, 1998 **FMLA-98**

Dear ***Name****,

Thank you for your inquiry of October 28, 1998, forwarding correspondence from Name* about the Family and Medical Leave Act of 1993 (FMLA).

The Wage and Hour Division of the U.S. Department of Labor administers and enforces FMLA for all private, State and local government employees and some Federal employees. The FMLA entitles eligible employees of covered employers to take up to 12 weeks of unpaid, job-protected leave each year—with continued group health insurance coverage during the leave—for specified family and medical reasons.

Private employers are covered under FMLA if they have employed at least 50 employees during 20 or more calendar workweeks in the current or preceding calendar year; all public employers are covered. Employees are eligible under FMLA if they have worked for a covered employer for at least 12 months, have worked at least 1,250 hours during the 12 months immediately preceding the start of leave, and are employed at a worksite where the employer employs at least 50 employees at the site or within 75 miles of the site. The 12 months the employee has to have worked do not have to be consecutive.

Unpaid leave must be granted to an eligible employee for any of the following reasons: (1) for the birth of a son or daughter, and/or to care for the newborn child within one year of birth; (2) for placement with the employee of a son or daughter for adoption or foster care, and/or to care for the newly placed child within one year of placement; (3) to care for the employee's spouse, son or daughter, or parent, who has a serious health condition; and, (4) for a serious health condition that makes the employee unable to perform his/her job. For ***Name**** information, we are enclosing the Compliance Guide that provides a full explanation of FMLA's benefits and protections.

Under the FMLA (29 U.S.C. 2611(13)), the term "spouse" is defined as a husband or wife, which the regulations (29 CFR 825.113(a)) clarified to mean a husband or wife as defined or recognized under State law for purposes of marriage in the State where the employee resides, including common law marriage in States where it is recognized. The legislative history confirms that this definition was adapted to ensure that employers were not required to grant FMLA leave to an employee to care for an unmarried domestic partner. (See Congressional Record, S 1347, February 4, 1993) Moreover, the subsequently enacted Defense of Marriage Act of 1996 (DOMA) (Public Law 104-199) establishes a Federal definition of "marriage" as only a legal union between **one man and one woman** as husband and wife, and a "spouse" as only a person of the **opposite sex** who is a husband or wife. Because FMLA is a Federal law, it is our interpretation that only the Federal definition of marriage and spouse as established under DOMA may be recognized for FMLA leave purposes.

Title IV of the FMLA contains certain provisions as they relate to other laws and employment benefits. Section 401 of the Act provides that nothing in the FMLA supersedes any provision of any State or local law that provides greater family or medical leave rights than the rights under the FMLA, nor modifies or affects any Federal or State law prohibiting discrimination on the basis of race, religion, color, national origin, sex, age or disability. Section 402 of the Act provides that nothing in the FMLA diminishes an employer's obligation under a collective bargaining agreement (CBA) or employment benefit program or plan to provide greater family or medical leave rights to employees than the rights established under FMLA, nor may the rights established under FMLA be diminished by any such CBA or plan. These provisions of the FMLA have been highlighted, as they are the only alternatives that may provide some relief to ***Name****. While the FMLA would not cover absences for the serious health condition of a "domestic partner," ***Name**** employer or possibly a State or local law may provide some benefits for job-protected leave along the lines that she needs.

We appreciate the concerns raised by your constituent, and regret that we are unable to provide greater assistance. If we may be of further assistance to you, please do not hesitate to contact us.

Sincerely,

Michelle M. Bechtoldt
Office of Enforcement Policy
Family and Medical Leave Act Team

Enclosure

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

U.S. Department of Labor
Employment Standards Administration
Wage and Hour Division
Washington, D.C. 20210

January 12, 1999 **FMLA-99**

Dear ***Name****,

Thank you for your letter of December 10, 1998, seeking guidance on the Family and Medical Leave Act as it would relate to siblings who work for the same employer.

In enacting FMLA (29 U.S.C. 2601 et seq.), the Congress stated that one of the purposes of this law is to entitle employees to take reasonable leave for medical reasons, for the birth or adoption of a child, and for the care of a child, spouse, or parent who has a serious health condition. The FMLA allows up to 12 weeks of job-protected leave in any 12 months – with group health insurance coverage maintained during the leave – to eligible employees for the above mentioned family and medical reasons. Upon completion of the leave, the employee must be returned to work to the same or an equivalent position with equivalent pay, benefits and other terms and conditions of employment. It is unlawful for any employer to interfere with or restrain or deny the exercise of any right provided under this Act, or to discharge or in any other manner discriminate against an employee for opposing or complaining about any unlawful practice related to this law.

Section 29 USC 2612(f) specifically limits the total aggregate number of workweeks of leave to which an "eligible" husband and wife are both entitled to if they work for the same employer. This "spousal limitation" provides that a combined total of 12 workweeks of FMLA leave may be taken between the two for the birth or adoption or foster care placement of a child or to care for a sick parent. The "spousal limitation" does not apply to husbands and their wives, however, if the reason for leave is for a serious health condition of the employee or the employee's spouse or child. According to the legislative history of the Act, the limitation on leave taken by spouses who work for the same employer is intended to eliminate any employer incentive to refuse to hire married couples.

As you have correctly noted in your letter, the FMLA does not have any provisions for limiting the amount of leave siblings working for the same employer may use to care for a seriously ill parent. Thus, in the example cited in your letter, you would not be permitted under the Act to limit the amount of FMLA leave the two sisters may use to care for their seriously ill mother.

To amend the Act to include provisions to limit the amount of FMLA leave that siblings may take to care for a seriously ill parent would require action by Congress. The Department of Labor is not authorized to make such changes to this law.

We appreciate your interest in the FMLA and for sharing your concerns with us. I hope that this letter fully responds to your concerns.

Sincerely,

Michelle M. Bechtoldt
Office of Enforcement Policy
Family and Medical Leave Act Team

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

U.S. Department of Labor
Employment Standards Administration
Wage and Hour Division
Washington, D.C. 20210

January 12, 1999 **FMLA-100**

Dear ***Name****,*

Thank you for your letter of August 17, 1998, seeking information on the Family and Medical Leave Act as it would relate to no fault attendance policies.

In enacting FMLA (29 U.S.C. 2601 et seq.), the Congress stated that one of the purposes of this law is to entitle employees to take reasonable leave for medical reasons, for the birth or adoption of a child, and for the care of a child, spouse, or parent who has a serious health condition. The FMLA allows up to 12 weeks of job-protected leave in any 12 months – with group health insurance coverage maintained during the leave – to eligible employees for the above mentioned family and medical reasons. Upon completion of the leave, the employee must be returned to work to the same or an equivalent position with equivalent pay, benefits and other terms and conditions of employment.

In your letter, you state that your employer has a no fault attendance policy whereby an employee's employment may be terminated for exceeding seven attendance points within 180 days. This policy, however, allows a point to drop off if an employee goes 90 days without a recordable incident, or points to drop off after 180 days if the employee does not go to the next step during that time period. You cite an employee who was terminated for reaching seven points in a 180 day period even though six weeks of that time were designated as FMLA leave. You asked whether the employer treated the FMLA leave as a negative factor by not crediting the leave towards the 90-day time period for purposes of removing points.

The FMLA (§ 105) and Regulations (§ 825.220) set forth certain protection to employees who exercise their rights to take FMLA leave. The FMLA prohibits employers from interfering with, restraining, or denying an employee's rights under this law. Further, it is unlawful for any employer to discharge or in any other manner discriminate against any employee for opposing any unlawful practice under this law. Employers may not use the taking of FMLA leave as a negative factor in any employment action or decision, such as promotions or disciplinary actions; nor can FMLA leave be counted under "no fault" attendance policies. Section 402 of FMLA, 29 U.S.C. 2652, and the Regulations at § 29 CFR 825.700 describe the interaction between FMLA and employer plans and provide that nothing in FMLA diminishes an employer's obligation under a collective bargaining agreement (CBA) or employment benefit program or plan to provide greater family or medical leave rights to employees than the rights established under FMLA, nor may the rights established under FMLA be diminished by any such CBA or plan.

While the statute (§ 102(a)(2)) provides that the taking of FMLA leave shall not result in the loss of any employment benefit accrued prior to the date the FMLA leave commenced, the Act does not provide for the accrual of benefits or seniority during an unpaid leave of absence. Moreover, the Act does not provide an employee greater rights to reinstatement or to other benefits and conditions of employment than if the employee had been continuously working during the FMLA leave period.

Based on the limited information contained in your letter, we cannot determine if the employer has discriminated against the employee in question. The following examples, however, should provide sufficient guidance for you and the employee in question to determine if an FMLA violation may have occurred. In the first example, if the employee was on unpaid FMLA leave and the employer's policy does not permit the accrual of benefits or seniority during any unpaid leave, upon return to work the employer would only be obligated to restore the employee to the same or an equivalent position to what the employee had prior to the start of leave. If the employee had 45 days without a recordable incident at the time the unpaid FMLA leave commenced, the employer would be obligated to restore the employee to this number of days credited without an incident. The employer could 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. In the second example, if the FMLA leave was covered by paid leave (or unpaid leave) that provides for the accrual of benefits and seniority, then the FMLA leave could be credited towards the time free of a recordable incident.

The above information should be viewed as general guidance. If, after reading this letter, you believe that the employer may have violated the employee's rights under the FMLA, the employee, or you with the employee's permission, may file a complaint with the nearest Wage and Hour District Office at ***Name****, telephone number **********.

Sincerely,

Michelle M. Bechtoldt
Office of Enforcement Policy
Family and Medical Leave Act Team

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

U.S. Department of Labor
Employment Standards Administration
Wage and Hour Division
Washington, D.C. 20210

January 15, 1999 **FMLA-101**

Dear ***Name****,*

This is in response to your letter of September 16, 1996, concerning the Family and Medical Leave Act of 1993 (FMLA) and attendance control policies as they relate to employee notification. I apologize that, because of the volume of work associated with administering FMLA, we were not able to respond sooner to your request.

In enacting FMLA, Congress stated that one of the purposes of this law is to entitle employees to take reasonable leave for medical reasons, for the birth or adoption of a child, and for the care of a child, spouse, or parent who has a serious health condition. The FMLA allows up to 12 weeks of job-protected leave in any 12 months -- with group health insurance coverage maintained during the leave – to eligible employees for the above mentioned family and medical reasons. It is unlawful for any employer to interfere with or restrain or deny the exercise of any right provided under this Act, or to discharge or in any other manner discriminate against an employee for opposing or complaining about any unlawful practice related to this law.

In your letter, you ask to what extent an employer may enforce its attendance policy reporting requirements against employees, who are eligible for intermittent FMLA leave. The company is proposing to modify its attendance control policy by assessing points against an employee who fails to report within one hour after the start of the employee's shift that the employee is taking FMLA intermittent leave, unless the employee is unable to report the absence due to circumstances beyond the employee's control. You indicate that the company has had problems with employees eligible for intermittent FMLA leave who miss work without reporting the absence in accordance with the attendance policy's one hour notification rule. You further state that the company's attendance control policies for reporting leave would operate independently from FMLA's notification requirements and would not be used to grant or deny FMLA leave, but would negate the application of § 825.302(d) of the FMLA Regulations, 29 CFR Part 825, to these attendance policies.

Section 102(e) of the statute sets out obligations of the employee to provide notice to the employer of the need to take leave in both foreseeable, and unforeseeable circumstances. Employees must give 30 days advance notice to employers of the need to take unpaid FMLA leave when it is foreseeable for the birth or placement of a child for adoption or foster care, or for planned medical treatment. When it is not practicable under the circumstances to provide such advance notice, e.g., premature birth, such notice must be given "as soon as practicable," ordinarily within one or two business days of when the employee learns of the need for the leave. Whether leave is taken all at once or intermittently, the employee is only required to give notice one time, but must advise as soon as practicable if dates of scheduled leave change, or are extended, or were initially unknown. Verbal notice sufficient to inform the employer that the employee will need FMLA leave satisfies the FMLA notice requirement. (§§ 825.302 and 825.303)

An employer may require an employee to comply with the employer's usual and customary notice and procedural requirements for requesting leave that qualifies as FMLA leave. For instance, an employer may require an advance written notice specifying the reason(s) for leave, start of leave and the anticipated duration of leave. Written advance notice pursuant to the employer's internal rules and procedures may not be required when FMLA leave is needed for a medical emergency of either the employee or the employee's immediate family member. An employee's failure to follow such internal employer notification procedures will not permit an employer to disallow or delay an employee taking FMLA leave if the employee gives timely verbal or other notice. (§ 825.302(d))

We do not agree with your interpretation that the provisions of § 825.302(d) would not apply with respect to the company's attendance policy. This section of the regulations governs notification procedures under FMLA and is contingent upon an employee providing timely notice pursuant to FMLA's requirements, i.e., within two business days of learning of the need for leave. The company's attendance policy imposes more stringent notification requirements than those of FMLA and assigns points to an employee who fails

to provide such "timely" notice of the need for FMLA intermittent leave. Clearly, this policy is contrary to FMLA's notification procedures which provide that an employer may not impose stricter notification requirements than those required under the Act (§ 825.302(g)) and that FMLA leave cannot be denied or delayed if the employee provides timely notice (under FMLA), but did not follow the company's internal procedures for requesting leave.

Moreover, as previously mentioned in this letter, an employer is prohibited under the Act (§ 105) and Regulations (§ 825.220) from interfering with, restraining, or denying the exercise of (or attempts to exercise) any rights provided by the Act. "Interfering with" the exercise of an employee's rights would include, for example, not only refusing to authorize FMLA leave, but discouraging an employee from using such leave (§ 825.220(a)). We would construe an employer's attendance control policies that require more stringent notification requirements than those already established in the FMLA regulations and which would assign points to FMLA leave takers who failed to follow the company's more stringent notice policies to be an attempt to interfere with or to discourage an employee's attempt to exercise rights under the FMLA to take leave for a qualifying reason. We would view these policies to be in direct violation of the Act and regulations.

The employer, however, could impose a penalty, i.e., assign points under its customary attendance control policy, in a situation where the employee was in the position of providing advance notice, absent extenuating circumstances, of the need for FMLA leave and failed to provide the notice in accordance with FMLA's requirements and the company's notification policy, if less stringent than FMLA's. Under this circumstance, the provisions of § 825.302(d) would not apply because of the employee's failure to provide timely notice based upon FMLA's requirements (§§ 825.302(a) and (b)).

For example, an employee receives notice on Monday that his/her therapy session for a seriously injured back, which normally is scheduled for Fridays, must be rescheduled for Thursday. If the employee failed to provide the employer notice of this scheduling change by close of business Wednesday (as would be required under FMLA's two-day notification rule), the employer could take an adverse action against the employee for failure to provide timely notice under the company's attendance control policy. In another example, an employee receives notice after work on Wednesday that the therapy session has been rescheduled for Thursday morning instead of Friday, to start at 7:00AM, an hour before start of work at 8:00AM, and will last until 4:00PM. The health care provider advises the employee that he/she must attend the session. The employee, who lives alone and is unable to contact anyone from work about this scheduling change, attends the therapy session as recommended by the health care provider and notifies the employer on Friday morning that FMLA leave was taken on Thursday. Under FMLA's two-day rule, the employee would be deemed to have provided a timely notice, and the employer, notwithstanding the company's notification requirements under its attendance control policy, could not take adverse action against the employee.

With regard to your concerns about managing the intermittent leave provision under FMLA, we wish to point out that an employee is entitled to intermittent leave or leave on a reduced leave schedule only in cases of medical necessity (as distinguished from voluntary treatments and procedures). It must be demonstrated that the regimen of medical treatment needed can best be accommodated through an intermittent or reduced leave schedule. The employee needing intermittent FMLA leave or leave on a reduced leave schedule for planned medical treatment must attempt to work out a schedule with the employer, and, based on input from the health care provider, that meets the employee's needs without unduly disrupting the employer's operations. An additional option for managing intermittent leave allows an employer to assign an employee to an alternative position with equivalent pay and benefits that better accommodates the employee's intermittent or reduced leave schedule for planned medical treatment, including during a period of recovery from a serious health condition. (§§ 825.117, 825.203, 825.204, and 825.302(e))

If we may of further assistance, please do not hesitate to contact us.

Sincerely,

Michelle M. Bechtoldt
Office of Enforcement Policy
Family and Medical Leave Act Team

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

U.S. Department of Labor
Employment Standards Administration
Wage and Hour Division
Washington, D.C. 20210

March 26, 1999 **FMLA-102**

Dear ***Name****,

Thank you for your letter of March 9, 1999, concerning a class action complaint under the Family and Medical Leave Act of 1993 (FMLA) filed by the union against ***Name****. In your letter you state that ***Name**** is discriminating against FMLA leave takers with respect to the accrual of paid vacation benefits for the taking of FMLA leave. You cite the company's policy under the collective bargaining agreement (CBA) that "…requires that each employee work 156 days in a calendar year in order to qualify for vacation time the following calendar year." You indicate that employees on FMLA leave are denied vacation the following year if they do not work the necessary 156 workdays. You questioned whether the employer is discriminating against FMLA leave takers by counting FMLA leave in determining an employee's entitlement to vacation benefits and provide examples of employees who were denied vacation benefits in part due to their taking FMLA leave.

In enacting FMLA, the Congress stated that one of the purposes of this law is to entitle employees to take reasonable leave for medical reasons, for the birth or adoption of a child, and for the care of a child, spouse, or parent who has a serious health condition. The FMLA allows up to 12 weeks of job-protected leave in any 12 months—with group health insurance coverage maintained during the leave—to eligible employees for the above mentioned family and medical reasons. Upon completion of leave, an eligible employee must be returned to work to the same or an equivalent position with equivalent pay, benefits and other terms and conditions of employment.

The FMLA (section 105) and the Regulations (section 29 CFR 825.220) set forth certain protections to employees who exercise their rights to take FMLA leave. The FMLA prohibits employers from interfering with, restraining, or denying an employee's rights

under the law. Further, it is unlawful for any employer to discharge or in any other manner discriminate against any employee for opposing any unlawful practice under the law. Employers may not use the taking of FMLA leave as a negative factor in any employment action or decision, such as promotions or disciplinary actions; nor can FMLA leave be counted under "no fault" attendance policies. The FMLA (section 402) and Regulations (section 29 CFR 825.700) describe the interaction between FMLA and employer plans and provide that nothing in the FMLA diminishes an employer's obligation under the CBA or employment benefit program or plan to provide greater family or medical leave rights to employees than the rights established under the FMLA, nor may the rights established under the FMLA be diminished by any such CBA or plan.

The FMLA (section 104(a)(2)) stipulates that the taking of FMLA leave will not result in the loss of any employment benefit accrued prior to the date on which the leave began. Certain limitations for employees on return to their jobs from FMLA leave are also listed in the FMLA (section 104(a)(3)). These limitations provide that such employees are not entitled to the accrual of any seniority or employment benefits during any period of unpaid FMLA leave, or to any right, benefit, or position of employment other than any right, benefit, or position to which the employee would have been entitled had the employee not taken leave. The Regulations (sections 29 CFR 825.215(d)(2) and (5)) reiterate these provisions by stating that employees may, but are not entitled to, accrue any additional benefits or seniority during unpaid FMLA leave. Benefits accrued at the time leave began (e.g., paid vacation to the extent not substituted for unpaid FMLA leave) must be available to an employee upon return from leave. If paid leave benefits are predicated on a pre-established number of hours worked each year and the employee does not have sufficient hours as a result of taking unpaid FMLA leave, the benefit is lost.

The above should be viewed as general guidance as your letter does not provide sufficient information for this office to determine conclusively whether the employer has violated the FMLA. It appears, however, that the provisions of the CBA with respect to the accrual of vacation benefits do not diminish FMLA's benefits and protection; nor does it appear that the employer has violated the FMLA by implementing these CBA provisions.

For your information, we are enclosing the Statute and Regulations. If you should require further assistance, please do not hesitate to contact me at telephone number **********.

Sincerely

Michelle M. Bechtoldt
Office of Enforcement Policy
Family and Medical Leave Act Team

Enclosures

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

U.S. Department of Labor
Employment Standards Administration
Wage and Hour Division
Washington, D.C. 20210

This letter is under review in light of issues raised by the U.S. Supreme Court in Ragsdale v. Wolverine World Wide, Inc. and other judicial decisions. It may be superceded by FMLA2002-5-A. (http://www.dol.gov/esa/whd/opinion/FMLA/2002_08_06_5A_FMLA.htm)

March 26, 1999 **FMLA-103**

Dear ***Name****,

Thank you for your letter of March 3, 1999, seeking information on the Family and Medical Leave Act of 1993 (FMLA) as it would relate to an employer's more generous medical leave of absence policies regarding length of leave and job restoration.

In enacting FMLA (29 U.S.C. 2601 et seq.), the Congress stated that one of the purposes of this law is to entitle employees to take reasonable leave for medical reasons, for the birth or adoption of a child, and for the care of a child, spouse, or parent who has a serious health condition. The FMLA allows up to 12 weeks of job-protected leave in any 12 months—with group health insurance coverage maintained during the leave—to eligible employees for the above mentioned family and medical reasons. Upon completion of the leave, the employee must be returned to work to the same or an equivalent position with equivalent pay, benefits and other terms and conditions of employment. It is unlawful for any employer to interfere with or restrain or deny the exercise of any right provided under this Act, or to discharge or in any other manner discriminate against an employee for opposing or complaining about any unlawful practice related to this law.

The FMLA (§ 29 U.S.C. 2652) and the Regulations (§ 29 CFR 825.700) describe the interaction between FMLA and employer plans and provide that nothing in FMLA diminishes an employer's obligation under a collective bargaining agreement (CBA) or employment benefit program or plan to provide greater family or medical leave rights to employees than the rights established under FMLA, nor may the rights established under FMLA be diminished by any such CBA or plan.

In your letter, you give an example of a more generous employment leave plan that permits an employee to take up to 52 weeks of medical leave and to return to work. If the employee fails to return to work within the 52 weeks of medical leave, the employer may terminate the employee's employment. You asked whether the employer can lawfully terminate an employee's employment if an employee has been on a medical leave of absence for 52 weeks with12 of those weeks also designated as FMLA leave, or whether the employee, after 52 weeks of a medical leave of absence, would be entitled at that point to an additional 12 weeks of FMLA leave.

In response to your question, we wish to note that the FMLA requires covered employers to provide eligible employees with up to 12 workweeks of leave in a 12-month period for any one or more of the specified family or medical reasons. By its terms, FMLA requires unpaid leave, but also provides for the use of appropriate paid leave for any portion of the unpaid leave required by the Act. (See § 29 U.S.C. 2612(d) and § 29 CFR 825.207.) If the employee is unable to or does not return to work at the end of 12 weeks of FMLA leave (provided the employer designated the leave as FMLA leave and so notified the employee in writing), all entitlements and rights under FMLA cease at that time. The employee is no longer entitled to any further job restoration rights under the FMLA. (See § 29 U.S.C. 2612(a) and §§ 29 CFR 825.200 and .214.)

An employer, however, must observe any employment benefit program or plan or CBA that provides greater family or medical leave rights to employees than the rights established by the FMLA. (See § 29 CFR 825.700.) Thus, the employer in your example may have an obligation under its own "medical leave of absence" policies to extend leave benefits for up to 52 weeks, but not beyond 52 weeks. If the medical leave of absence also qualifies as a serious health condition for FMLA purposes, the employer may designate 12 weeks of that absence as FMLA leave so long as the employee is eligible. While the discrimination prohibition in FMLA (§ 29 U.S.C. 2615 and § 29 CFR 825.220) would prevent an employer from treating FMLA leave takers differently than it would treat similarly situated employees who were not

eligible for FMLA leave, the FMLA would not require, nor prohibit, an employer to extend leave benefits beyond the 52 weeks.

The above information should be viewed as general guidance based upon the limited information contained in your letter. If we may be of further assistance to you, please do not hesitate to contact me.

Sincerely,

Michelle M. Bechtoldt
Office of Enforcement Policy
Family and Medical Leave Act Team

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

U.S. Department of Labor
Employment Standards Administration
Wage and Hour Division
Washington, D.C. 20210

May 21, 1999 **FMLA-104**

Dear ***Name****,

Thank you for your letter concerning the Family and Medical Leave Act of 1993 (FMLA). I apologize that, because of the volume of work associated with administering FMLA, we were not able to respond sooner to your request.

Thank you for your letter of September 17, 1998, addressed to John R. Fraser, Acting Administrator of the Wage and Hour Division, concerning the Family and Medical Leave Act of 1993 (FMLA). The FMLA entitles eligible employees of covered employers to take up to 12 weeks of unpaid, job-protected leave each year – with continued group health insurance coverage maintained during the leave – for specified family and medical reasons.

In your letter, you specifically request an opinion as to whether the ***Name**** is subject to the provisions of the FMLA. You provide information indicating that the Board is an independent occupational licensing board, which operates under the Nursing Practice Act ***Name**** as enacted by the General Assembly ***Name****. The ***Name**** Act provides under section ***Name**** that the Board will consist of 15 members, of whom the Governor will appoint two members and commission all Board members upon their election or appointment. You also indicate that the Board employs 36 employees who are not subject to the State ***Name**** Personnel or Retirement Acts.

The provisions of FMLA apply to all public agencies at the State and local government level, including local education agencies (schools). A public agency as an "employer" under FMLA includes any "public agency," as defined in section 3(x) of the Fair Labor Standards Act (FLSA), 29 U.S.C. 203(x). The FLSA's definition of "public agency" includes the government of a State or political subdivision of a State; or an agency of a State, or a political subdivision of a State, or any interstate governmental agency. In applying the term "political subdivision" in the past, the Department of Labor has followed Supreme Court case law that considers whether an entity was either 1) created directly by the State or 2) administered by individuals who are responsible to public officials or the general electorate. The Board was created by the State and is, therefore, a public agency.

With regard to the term "employee," the FMLA's definition of "employee" (see section 29 CFR 825.800) is the same as that term is defined under section 3(e) of the FLSA, 29 U.S.C. 203(e). In the case of an individual employed by a public agency, the term employee means any individual employed by a State, political subdivision of a State, or an interstate governmental agency. Excluded are individuals who are not subject to the civil service laws of the State, political subdivision, or agency which employs them, and who (1) hold a public elective office of that State, subdivision or agency; (2) are selected by the holder of such an office to be a member of his personal staff; (3) are appointed by such an office holder to serve on a policymaking level; (4) are immediate advisors to such an office holder with respect to the constitutional or legal powers of the officeholder; or (5) are employees of the legislative branch or legislative body of that State, political subdivision, or agency.

Your letter implies that employees of the Board are not subject to the State's civil service laws. If this is correct, then any one of the five additional criteria mentioned above would remove any individual worker from the definition of the term "employee" for purposes of the FMLA and FLSA. The ***Name**** Act ***Name**** states that the Board, which employs all staff, is not comprised of elected public officials; nor does the Board serve as personal staff or advisor to an elected official. In a recent telephone conversation between yourself and Name* of my staff, you advised that the Board is not part of the legislative branch or legislative body of the State. Based on the information provided, it appears that none of the five exclusionary criteria as listed above are applicable to the employees of the Board. Although the employees of the Board are not subject to the State's civil service laws, this condition alone is not a sufficient basis to exclude the Board's employees from coverage under the FMLA (or for that matter the FLSA).

As the Board is a covered employer, and its workers are employees, the FMLA would apply to the Board's eligible employees. All public agencies are covered by the FMLA regardless of the number of employees; they are not subject to the coverage threshold of 50 employees carried on the payroll each day for 20 or more weeks in a year. Employees of public agencies must meet all of the requirements of eligibility, i.e., at least 12 months of service with the employer, and have worked 1,250 hours during the 12 months immediately preceding the start of leave, and are employed at a worksite where the employer employs at least 50 or more employees at the site or with 75 miles of the site.

A State is considered a single employer for purposes of FMLA, which means that State agencies constitute the same public agency for determining employee eligibility. This provision is particularly relevant as it relates to "50 employees within 75 miles" employee eligibility test as all state employees within a 75 mile area must be counted to determine if there are 50 or more (State) employees within 75 miles of the Board's worksite location.

This opinion is based exclusively on the facts and circumstances provide in your submission, information provided by the Bureau of Census, and telephone conversations with yourself and the State ***Name**** Attorney General's Office. If you require further assistance on any provision of this letter, please do not hesitate to contact me.

For your information, we are enclosing several FMLA documents that may assist you in implementing the FMLA for your employees. If you require further assistance in implementing the FMLA, you may contact the Wage and Hour District Office located at ***Name****. The office's telephone number is **********.

I trust that this reply is responsive to your inquiry.

Sincerely,

Michelle M. Bechtoldt
Office of Enforcement Policy
Family and Medical Leave Act Team

Enclosures

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

U.S. Department of Labor
Employment Standards Administration
Wage and Hour Division
Washington, D.C. 20210

June 16, 1999 **FMLA-105**

Dear ***Name****,

Thank you for your letter of March 15, 1999, in which you are seeking guidance on the Family and Medical Leave Act of 1993 (FMLA) in determining an employee's entitlement to leave in a 12-month period. I regret that the volume of work associated with administering the FMLA did not allow for an earlier reply to your letter.

The FMLA permits an employer to choose one of the four methods for determining the "12-month period" in which the 12 weeks of leave entitlement may be taken. These methods are the calendar year, any fixed 12-month "leave year," the 12-month period measured forward from the date any employee's first FMLA leave begins, or a "rolling" 12-month period measured backward from the date an employee uses any FMLA leave. Once an employer has made a selection, the employer must ensure that it is applied consistently and, in most cases, uniformly to all employees. An employer is also permitted to change to another alternative method so long as a 60-day notice is given to all employees, and the full benefit of 12 weeks of FMLA leave under whichever alternative method yields the greatest benefit during the 60-day transition period is retained by all employees. At the conclusion of the 60-day transition period, the employer may implement the new alternative method selected. (Regulations 29 CFR §825.200)

In your letter, you describe a situation where an employer has decided to change its method for determining the 12-month FMLA leave period from a "calendar year" to the "rolling" twelve month period measured backward from the date that an employee uses any FMLA leave. During the employer's "60-day" transition period, an employee requests FMLA leave which is granted. At the conclusion of the transition period, however, the employer denies FMLA leave as the employee has already exhausted more than 12 weeks of FMLA leave (excluding the 60-day transition period) in the preceding 12-month period. You ask whether the employer has acted appropriately in denying the employee's request for FMLA leave.

Based on the limited facts presented in your letter, it would appear that the employer would have been permitted at the conclusion of the 60-day transition period to deny further use of FMLA leave as, you have alleged, the employee has exhausted over 12 weeks of FMLA leave in the preceding 12-month period. As already noted in this letter, during the 60-day transition period, the employee is entitled to choose whichever method is most beneficial in terms of taking FMLA leave during this period. Once the 60-day transition period has ended, the employer is free to implement the new method, in this case the "rolling" 12-month period measured backward, in order to determine the employee's FMLA leave entitlement.

You may view this letter as providing guidance based upon the limited information contained in your letter regarding the factual circumstances surrounding the employer's actions and the employee's rights to FMLA leave. If we may be of further assistance, please do not hesitate to contact us.

Sincerely,

Michelle M. Bechtoldt
Office of Enforcement Policy
Family and Medical Leave Act Team

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

U.S. Department of Labor
Employment Standards Administration
Wage and Hour Division
Washington, D.C. 20210

July 1, 1999 **FMLA-106**

Dear ***Name****,

Thank you for your letter of April 29, 1999, concerning the Family and Medical Leave Act of 1993 (FMLA). I apologize that, because of the volume of work associated with administering the FMLA, I was not able to respond sooner to your concerns.

In enacting FMLA (29 USC 2601 et seq.), the Congress stated that one of the purposes of this law is to entitle employees to take reasonable leave for medical reasons, for the birth or adoption of a child, and for the care of a child, spouse, or parent who has a serious health condition. The FMLA allows up to 12 weeks of job-protected leave in any 12months—with group health insurance coverage maintained during the leave—to eligible employees for the above mentioned family and medical reasons. Upon completion of the leave, the employee must be returned to work to the same or an equivalent position with equivalent pay, benefits and other terms and conditions of employment. It is unlawful for any employer to interfere with or restrain or deny the exercise of any right provided under this Act, or to discharge or in any other manner discriminate against an employee for opposing or complaining about any unlawful practice related to this law.

In your letter, you ask whether an employee, who is eligible for FMLA leave for a qualifying reason, is entitled to the leave even though during the leave the employee intends to continue to work at his second job. The answer to your question will be determined by whether the employer has a uniformly-applied policy governing outside or supplemental employment. For example, the employer may have an established policy that prohibits outside employment while an employee is on a paid or unpaid leave of absence where benefits may be maintained. If so, the employee on FMLA leave would be subject to that policy as it is our position that an employee on FMLA leave continues to have an employment relationship with the employer. Consequently, the employer's employment policies continue to apply to an employee on FMLA leave in the same manner as they would apply to an employee who continues to work, or is absent while on some other form of leave. (See 29 USC §2614(a)(3)(B) of the Act and 29 CFR §§825.216 and 825.312(h) of the Regulations.)

As a special note, we wish to point out that neither the statute nor regulations prohibit outside employment by an employee on FMLA leave except as a result of the employer's established policies. In the absence of such a policy, the employee may do as he/she chooses while on FMLA leave.

Sincerely,

Michelle M. Bechtoldt
Office of Enforcement Policy
Family and Medical Leave Act Team

Enclosure

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

U.S. Department of Labor
Employment Standards Administration
Wage and Hour Division
Washington, D.C. 20210

July 19, 1999 **FMLA-107**

Dear ***Name****,

Thank you for your letter of July 7, 1999, forwarding correspondence from ***Name**** concerning the Family and Medical Leave Act of 1993 (FMLA). Your letter has been referred to the Wage and Hour Division of the U.S. Department of Labor for reply as the Division administers and enforces FMLA for all private, State and local government employees, and some Federal employees. The FMLA entitles eligible employees of covered employers to take up to 12 workweeks of unpaid, job-protected leave each year—with continued group health insurance coverage during the leave—for specified family and medical reasons.

Private employers are covered under FMLA if they have employed at least 50 employees during 20 or more calendar workweeks in the current or preceding calendar year; all public employers are covered. Employees are eligible under FMLA if they have worked for a covered employer for at least 12 months, have worked at least 1,250 hours during the 12 months immediately preceding the start of leave, and are employed at a worksite where the employer employs at least 50 employees at the site or within 75 miles of the site. The 12 months the employee has to have worked do not have to be consecutive.

Unpaid leave must be granted to an eligible employee for any of the following reasons: (1) for the birth of a son or daughter, and/or to care for the newborn child within one year of birth; (2) for placement with the employee of a son or daughter for adoption or foster care, and/or to care for the newly placed child within one year of placement; (3) to care for the employee's spouse, son or daughter, or parent, who has a serious health condition; and, (4) for a serious health condition that makes the employee unable to perform his/her job. For your constituent's information, we are enclosing the Compliance Guide that provides a full explanation of FMLA's benefits and protection.

Under the FMLA, the term "workweek" is the employee's usual or normal schedule (hours/days per week) prior to the start of FMLA leave, and is the controlling factor for determining how much leave an employee is entitled to use when taking FMLA leave intermittently or on a reduced workweek schedule for a serious health condition. If overtime hours are on an "as needed basis" and are not part of the employee's usual or normal workweek, or is voluntary, such hours would neither be counted to calculate the amount of the employee's FMLA leave entitlement nor charged to the employee's FMLA leave entitlement. Where overtime hours are not part of the employee's usual or normal workweek, disciplinary action may not be taken against an employee for being unable to work overtime as a result of limitations contained in a medical certification obtained for FMLA purposes. If the normal workweek is greater than 40 hours, hours worked above 40 hours must be included in determining the maximum amount of leave available to the employee under the FMLA. For example, if an employee normally works overtime in three of every four weeks, then such overtime hours are part of the usual and normal workweek schedule of the employee and would be included in calculating the amount of FMLA leave available to the employee. This would be the case even where the employer may not know in advance of the workweek when overtime will be scheduled or how much overtime will be worked that week as overtime hours may be based upon business demand that varies from week to week.

In calculating the amount of FMLA leave available to an employee whose schedule varies from week to week, a weekly average of the hours worked over the 12 weeks prior to the beginning of the leave period would be used. In her letter, the constituent indicates that ten to twenty hours of overtime hours not worked due to an FMLA-qualifying reason are now being charged against the employee's FMLA 12-week leave entitlement. Let's assume that an employee's schedule over the 12 weeks before starting FMLA leave shows five weeks at 50 hours, four weeks at 60 hours, and three weeks at 40 hours for a total of 610 hours. Under the FMLA, only the amount of leave actually taken may be counted towards the 12-week entitlement of FMLA leave. If overtime hours are part of an "eligible" employee's usual and normal workweek and the employee is unable to work overtime hours because of an FMLA qualifying reason, then any overtime hours not worked may be counted against the employee's FMLA leave entitlement so long as the employer designates the absence as FMLA leave. Using the above mentioned example, if the

employee was not able to work overtime hours over the 12-week period due to an FMLA-qualifying reason (e.g., serious health condition), then 130 hours (610 – 480 [40 hours x 12]) may be charged to the employee's FMLA leave entitlement. Thus, any pro-rata reduction in total leave entitlement during intermittent FMLA leave or reduced leave schedules should be based on the employee's normal workweek – even if it exceeds 40 hours. Similarly, the amount of FMLA leave available to the employee must be based upon the number of hours worked in the normal workweek – even if it exceeds 40 hours.

Responsibility for investigating allegations of violations of FMLA has been delegated to the various district offices of the Wage and Hour Division. If your constituent feels that her employer may have violated the FMLA, she may contact the nearest district office of the Wage and Hour Division located at the ***Name****, telephone number **********.

Sincerely,

Michelle M. Bechtoldt
Office of Enforcement Policy
Family and Medical Leave Act Team

Enclosure

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

U.S. Department of Labor
Employment Standards Administration
Wage and Hour Division
Washington, D.C. 20210

April 13, 2000 **FMLA-108**

Dear ***Name****,

This is in response to your March 21, 2000 letter requesting an opinion concerning application of sections 825.207(h), 825.305(e), and 825.306(c) of the Department of Labor's Family and Medical Leave Act ("FMLA") regulations (29 C.F.R. Part 825) to your client, ***Name****. These regulations (the "less stringent standard" regulations), provide that when an employee substitutes paid leave under the employer's sick leave plan for the unpaid leave generally provided under the FMLA, and the employer's leave plan imposes less stringent medical certification requirements than those allowed under the FMLA, the employer must apply those less stringent standards, rather than those otherwise authorized by the FMLA and its certification regulations.

I have reviewed the information contained in Exhibit C, and Attachment 1 ("Ex. C1"), submitted with ***Name**** July 21, 1999 response to the Department's motion to dismiss for lack of subject matter jurisdiction in ***Name****. Based upon this review, I have determined, and it is the position of the Department, that the medical certification procedures under ***Name**** sick leave policy are not less stringent than the medical certification requirements imposed by the FMLA, within the meaning of the regulations at issue. ***Name**** sick or medical leave plan, examined as a whole, authorizes more information to be furnished in medical certifications of employee health conditions than the certification requirements of the statute and the FMLA regulations. See 29 C.F.R. 825.306(c). Furthermore, overall, ***Name**** certification procedures are less favorable to employees than those under the FMLA. Consequently, the "less stringent standard" regulations do not apply to ***Name****.

Name* policy provides that when its Labor Relations Manager "has reasonable cause to question the basis of an employee's claim for sick leave benefits," he or she may require the employee to release to the Chief Company Doctor all "medical information relating to and necessary to process that employee's claims[.]" ***Name**** Ex. C1, Sick Leave Policy, 10.

Accordingly, ***Name**** Medical Release Form authorizes release of "copies of [the employee's] medical records or a summary report noting the day or days that [the employee] was seen by [the doctor], the disabling factors, treatment and the diagnosis." ***Name**** Ex. C1, Ex. 3, Medical Release Form.

By contrast, the FMLA does not provide the employer the discretion to require such a broad release of medical information from the employee's health care provider. The statute and the regulations strictly limit the information an employer may obtain from the health care provider. See 29 U.S.C. 2613(b); 29 C.F.R. 825.306(b) In fact, under the FMLA, the employer cannot acquire the employee's medical records or a summary medical report containing any information not set forth on the Department's certification form (i.e., Optional Form Wage-Hour 380 at 29 C.F.R. Part 825, Appendix B), or in the regulations at 29 C.F.R. 825.306(b). See 29 C.F.R. 825.307(a) Nor does a FMLA certification require the disclosure of the dates on which the employee was seen by the health care provider, or the nature of treatment provided (in most circumstances), or allow the disclosure of the diagnosis. See 29 C.F.R. 825.306(b)(3); 60 Fed.Reg. 2180, 2222 (1995)(preamble to the final FMLA regulations). Under the FMLA certification requirements, the company's only recourse where it has reason to doubt the validity of the initial certification is to obtain a second opinion at its own expense. See 29 U.S.C. 2613(c)(1).[1]

Name* policy authorizes the Chief Company Doctor to order a second examination, but, unlike the FMLA, only after the receipt of the employee's medical records or a summary report. ***Name**** Ex. C1, Sick Leave Policy, 10. Moreover, under ***Name**** procedures, the employee must use a "company doctor." Id.

[1] Under the FMLA, before seeking a second opinion, a health care provider representing the employer, with the employee's permission, may contact the employee's health care provider for purposes of clarification and authentication of the initial medical certification, but may not request additional information. See 29 C.F.R. 825.307(a).

Under the FMLA, the employer cannot require a second opinion from a doctor employed by, or otherwise regularly utilized by, the company. 29 U.S.C. 2613(c)(2); 29 C.F.R. 825.307(b).[2] Here, it is evident that the Chief Company Doctor, as well as the other "company doctors," are regularly utilized by ***Name****.

Also, the FMLA limits the second opinion to the information certified in the initial certification. 29 U.S.C. 2613(c)(1). By its terms, ***Name**** policy contains no such limitation on the extent of the second medical examination and opinion.

Additionally, in the event that there is a conflict between the second opinion of the company doctor and the opinion of the employee's doctor, ***Name**** procedures require a third examination by a doctor chosen by "the local medical society," whose report will be final. ***Name**** Ex. C1, Sick Leave Policy, 10. The FMLA requires that the employee and employer agree on the doctor to be used. 29 U.S.C. 2613(d). Furthermore, unlike ***Name**** policy, the third opinion is limited to the information originally certified. Id.

Also, ***Name**** recertification provision is more stringent than the FMLA recertification provisions. ***Name**** provision does not impose any restriction on when and how often the company may obtain a recertification from the employee. Rather, the provision authorizes ***Name**** to seek recertification "from time to time during periods of prolonged illness." ***Name**** Ex. C1, Sick Leave Policy, 10. On the other hand, the FMLA regulations are more favorable to the employees because they establish numerous limitations on the employer's authority to request re-certifications. See 29 C.F.R. 825.308.

Finally, ***Name**** certification procedure is less favorable to employees with regard to how quickly an employee must submit the certification. Under ***Name**** policy, the initial certification form must be submitted "at the earliest possible date following the occurrence of the disability." ***Name**** Ex. C1, Sick Leave Policy, 10. By contrast, the FMLA regulations provide that when the need for leave is foreseeable, the employee must supply a requested certification before the leave begins and if this is not possible (including circumstances where leave is not foreseeable), the employer must provide the employee at least 15 days after the request in which to furnish the certification. See 29 C.F.R. 825.305(b).

Based upon these factors, ***Name**** certification procedure is not "less stringent" than the procedure provided by the FMLA and the pertinent regulations. Therefore, the "less stringent standard" regulations do not apply to ***Name****.

This opinion is based exclusively on the facts and circumstances you provided to the court in ***Name****, and is given on the basis of your representations, explicit or implied, that you have provided a full and fair description of all the facts and circumstances which would be pertinent to our consideration of the question presented.

Sincerely,

Michael Ginley
Director, Office of Enforcement Policy
Wage and Hour Division

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

[2] In the very limited circumstances of employers that are located in areas where access to health care is extremely limited (e.g., a rural area where no more than one or two doctors practice in the relevant specialty), the regulations allow the use of a health care provider commonly used by the employer. See 29 C.F.R. 825.307(b). Under the FMLA, the employer does have the right to designate or approve the health care provider. See 29 U.S.C. 2613(c)(1).

U.S. Department of Labor
Employment Standards Administration
Wage and Hour Division
Washington, D.C. 20210

September 8, 2000 **FMLA-109**

Dear ***Name****,

Thank you for your letter requesting guidance on the accrual of seniority during paid and unpaid leave under the Family and Medical Leave Act (FMLA). Please accept my apologies for not responding sooner to your request.

As you have correctly noted in your letter, the FMLA does not entitle an employee to the accrual of any seniority (or employment benefits) during any period of FMLA leave; nor to any right, benefit or position of employment, other than that to which the employee would have been entitled, had the employee not taken the leave. By operation of the FMLA, an employee on covered leave does not accrue seniority (or employment benefits) during the absence. An employee's entitlement to the accrual of seniority (or employment benefits) during FMLA leave, whether paid or unpaid, will be strictly based upon the employer's established policies for accruing seniority (or employment benefits) during any absence where paid or unpaid leave applies. (See 29 USC § 2614(3) and 29 CFR §§ 825.215(d)(2) and (5).)

The following examples will illustrate this position:

Example One: If the employer's established leave policies do not permit the accrual of seniority during an unpaid leave of absence, this same policy would apply to unpaid leave covered by the FMLA leave. The employer in this example would be in compliance so long as the returning employee is restored to the same level of seniority that the employee accrued prior to the commencement of FMLA leave.

Example Two: If the employer's established leave policies provide for the accrual of seniority during an absence where paid leave benefits have been applied, then the employer must permit, consistent with its policies, the accrual of seniority during the portion of FMLA leave where paid leave benefits (i.e., vacation, personal, sick/medical leave, or family) are substituted for unpaid FMLA leave.

Example Three: If the employer's established policies do not permit the accrual of seniority during an absence covered by a State workers' compensation plan, nothing in the FMLA will require the employer to modify its policies to permit the accrual of seniority during the workers' compensation absence that also qualifies for and is designated as FMLA leave. This position would also apply where an employee on FMLA leave receives concurrently paid disability leave benefits and the accrual of seniority under the employer's established policies is not permitted.

Section 29 CFR 825.209(h) pertains to an employee's entitlement to benefits, other than group health insurance benefits, while using FMLA leave, and provides that such benefits will be determined by the employer's established policies when an employee is on other forms of paid or unpaid leave. Thus, an employer may not treat employees who take FMLA leave in a manner that discriminates against them. For example, if employees on other forms of paid or unpaid leave are entitled to have coverage maintained for other, non-health plan benefits (such as life insurance), then employers are required to follow its established policies for maintaining those "other" benefits for employees on paid or unpaid FMLA leave. (See also 29 CFR § 825.220(c).)

I trust this letter has responded to your concerns. If we may be of further assistance, please do not hesitate to contact us.

Sincerely,

Michelle M. Bechtoldt
Office of Enforcement Policy
Family and Medical Leave Act Team

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

U.S. Department of Labor
Employment Standards Administration
Wage and Hour Division
Washington, D.C. 20210

September 11, 2000 **FMLA-110**

Dear ***Name****,*

This is in response to your letter seeking clarification of the Family and Medical Leave Act of 1993 (FMLA) as applied to a company bonus incentive program.

You described a company bonus incentive program that is offered to all production employees in a particular department on a monthly basis. Employees are eligible for the bonus if they work at least 80 percent of the time the shift is scheduled to work during the month. Paid time off for witness and jury duty, bereavement leave, military leave of absence, weather days declared by the company, vacation days, and holidays not scheduled as work days by the company are counted as regular work days and credited towards meeting the 80 percent work hours test for bonus eligibility. Leave without pay for any reason is not counted towards meeting the 80 percent work hours test. In addition, while paid leave (whether or not substituted for unpaid FMLA leave) is counted towards meeting the 80 percent work test for bonus eligibility, it is not included in computing the amount of the bonus. Only the gross pay for time actually worked is used in calculating the bonus. Although you do not mention whether this incentive program is a non-discretionary bonus where employees know in advance of how they would qualify, we are assuming that employees are aware of this bonus and that they would automatically receive the bonus if they qualify.

Under the FMLA, while an employee is not automatically entitled to accrue additional seniority or benefits during unpaid FMLA leave, an employer cannot use unpaid FMLA leave as a negative factor in employment actions. For example, in the case of a monthly "perfect" attendance bonus that tracks absences rather than performance, an employee who had not missed any time before taking unpaid FMLA leave would continue to be eligible for the bonus upon returning from FMLA leave. Where the amount of the bonus is calculated from hours worked, the FMLA leave taker would naturally receive a lesser amount than an employee who had not been on leave.

The incentive program you have described appears to determine qualifications for and the amount of a bonus based upon compensated hours, i.e., "an employee must work or be on paid leave for at least 80 percent of the time." Thus, an employee who takes unpaid FMLA leave for greater than 20 percent of the rating period who was eligible for the bonus prior to starting the leave would no longer be eligible for the bonus. To disqualify an employee who takes unpaid FMLA leave for greater than 20 percent of the rating period (or whose unpaid FMLA leave in conjunction with other unpaid absences exceed 20 percent) would not be in compliance with FMLA's employment and benefits protections. These protections guarantee that an employee must be restored to the same or to an equivalent job with equivalent pay, benefits and other terms and conditions of employment. For the incentive program to be in compliance with the FMLA, it would have to allow an employee, who met all the requirements for the bonus prior to the start of the leave, to continue to accrue entitlement to the bonus upon returning from FMLA leave. In other words, the taking of unpaid FMLA leave cannot be the basis, in whole or in part, for disqualifying an employee's entitlement to the bonus. For example, an employee during a rating period that consists of 20 eight-hour workdays for a total of 160 hours takes unpaid FMLA leave for five consecutive workdays (40 hours) midway through rating period. Prior to the start of FMLA leave, the employee had perfect attendance. Upon return from FMLA leave, the employee would continue to be eligible for the bonus. At the conclusion of the rating period, if the employee did not take any other leave, the employee would be entitled to a bonus calculated on the actual hours worked (which, of course, would not include the 40 hours of unpaid FMLA leave). (See sections 825.215 (c)(2) and (d)(2), and section 825.220(c) of the Regulations and Preamble, 29 CFR Part 825.)

In response to your question about whether the reference to production bonuses in the regulations (section 825.215(c) and the Preamble to section 825.220) pertains to the performance of one employee or to a group of employees, this reference, including the reference to "perfect attendance" and "safety" bonuses, pertains to an individual employee. With respect to your question about whether the employer must count time off on unpaid FMLA leave as days worked in determining bonus eligibility, the answer is

provided above. The FMLA does not entitle an employee to the accrual of seniority or benefits during unpaid leave, but does require any benefit accrued prior to the start of FMLA leave to be available to the employee upon return from leave. In response to your question for determining the amount of the bonus, since bonuses may be pro-rated based upon hours worked, it would not be a violation under FMLA to determine the bonus percentage based only upon the actual hours of work during the monthly rating period. The employer should treat FMLA leave taken intermittently or on a reduced leave schedule no differently than FMLA leave taken in a continuous block of time.

Notwithstanding your reference to "production incentives" in your letter, the information you provided for the incentive program in question describes only attendance qualifications, as opposed to performance qualifications, that production employees must meet in order to receive a bonus. Our response is based solely upon the information contained in your letter. If any other factual or historical background exists that was not included with your request, a different conclusion might be required than the one we have expressed above.

I trust that our reply is helpful, and apologize for any inconvenience caused by our delay in not being able to respond sooner to your letter. Should you require further assistance, please do not hesitate to contact me.

Sincerely,

Michelle M. Bechtoldt
Office of Enforcement Policy
Family and Medical Leave Act Team

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

U.S. Department of Labor
Employment Standards Administration
Wage and Hour Division
Washington, D.C. 20210

September 11, 2000 **FMLA-111**

Dear ***Name****,*

Thank you for your letter of May 27, 2000, addressed to Secretary of Labor Alexis M. Herman about the Family and Medical Leave Act of 1993 (FMLA). Your letter has been referred to the Wage and Hour Division of the U.S. Department of Labor for reply as this office administers and enforces the FMLA for all private, State and local government employees, and some Federal employees. The FMLA entitles eligible employees of covered employers to take up to 12 weeks of unpaid, job-protected leave each year—with continued group health insurance coverage during the leave—for specified family and medical reasons.

The referenced letter seeks guidance on whether a "Professional Employer Organization" (PEO) would be a covered employer under the FMLA based upon either the "integrated employer" test or the joint employment criteria as delineated in the Regulations at sections 29 CFR 825.104 and 825.106. As described in the letter, the PEO establishes a contractual relationship with clients by establishing and maintaining an employer relationship with the workers assigned to its client (leases worksite employees via a written contract with the client) and assumes substantial employer rights, responsibilities and risks. The PEO assumes responsibility for personnel management, health benefits, workers' compensation claims, payroll, payroll tax compliance, and unemployment insurance claims. In addition, the PEO has the right to hire, fire, assign, and direct and control the employees.

Under the FMLA, any employer in the private sector that is engaged in commerce or in an industry or activity affecting commerce is covered if 50 or more employees are employed in at least 20 or more calendar workweeks in the current or preceding calendar year. If the test of an integrated employer is met, all entities in question will be considered one employer, for purposes of counting employees as well as other purposes. If two entities are found to be joint employers, each would be responsible for its obligations under FMLA, provided it had the requisite number of employees.

The "integrated employer" test is not a new concept created solely for purposes of the FMLA. It is based upon established case law arising under Title VII of the Civil Rights Act of 1964 and the Labor Management Relations Act (LMRA). As FMLA's legislative history states, the definition of "employer" parallels Title VII language defining a covered employer and is intended to receive the same interpretation. Under Title VII and other employment-related legislation, including the LMRA, when determining whether to treat separate entities as a single employer, individual determinations are highly fact-specific and are based on the following factors:

1. interrelation of operations, i.e., common offices, common record keeping, shared bank accounts and equipment;
2. common management, common directors and boards;
3. centralized control of labor relations and personnel, i.e., hire and fire employees; and,
4. common ownership and financial control.

A determination of whether or not separate entities are an integrated employer is not determined by the application of any single criterion, but rather the entire relationship is to be reviewed in its totality. All four criteria need not be present in all cases, but the Equal Employment Opportunity Commission, which administers the Civil Rights Act, considers the first three criteria to be the most important, with centralized control of labor relations to be most critical of these three. Although the standards are somewhat different, it is our opinion that an employer who meets the "enterprise" test under the Fair Labor Standards Act (FLSA) will ordinarily meet the integrated employer test. For purposes of FLSA, the "enterprise" consists of the related activities performed (either through unified operations or common control) by any person or persons for a common business purpose. Thus, separate entities may be so integrated that they are considered to be one employer, whether commonly owned or not.

Under joint employment, separately owned and operated companies may each exercise sufficient control over the employee that they are considered joint employers. The standards established under the Fair

Labor Standards Act (FLSA) are used to determine joint employment under the FMLA. A joint employment relationship will be considered to exist in situations such as:

1. Where there is an arrangement between employers to share an employee's services or to interchange employees;
2. Where one employer acts directly or indirectly in the interest of the other employer in relation to the employee; or
3. Where the employers are not completely disassociated with respect to the employee's employment and may be deemed to share control of the employee, directly or indirectly, because one employer controls, is controlled by, or is under common control with the other employer.

Similar to the determination process for integrated employers, the determination of whether a joint employment relationship exists is also not determined by the application of any single criterion; rather the entire relationship is to be viewed in its totality. For example, joint employment will ordinarily be found to exist when a temporary or leasing agency supplies employees to a second employer.

Based on the information presented in the letter, it appears that the PEO is in a joint employment relationship with its client for these reasons:

1. The PEO is a separately owned and a distinct entity from the client as it is under contract with the client to lease employees for the purpose of handling "critical human resource responsibilities and employer risks for the client."
2. The PEO is acting directly in the interest of the client in assuming human resource responsibilities.
3. The PEO appears to also share control of the "leased" employee consistent with the client's responsibility for its product or service.

In joint employment relationships, the factors for determining the "primary" employer are authority/responsibility to hire and fire, assign/place the employee, make payroll, and provide employment benefits. Based on the description of the PEO's responsibilities, it would appear that the PEO is the "primary" employer for those employees "leased" under contract with the client. As the "primary" employer, the PEO is responsible for giving required notices to its employees, providing FMLA leave, maintaining group health insurance benefits during the leave, and restoring the employee to the same or equivalent job upon return from leave. The "secondary employer" (i.e., the client) is responsible for accepting the employee returning from FMLA leave in place of a replacement employee if the PEO chooses to place the employee with the client. In addition, the client as the "secondary" employer, whether a covered employer or not under the FMLA, is prohibited from interfering with a "leased" employee's attempt to exercise rights under the Act, or discharging or discriminating against an employee for opposing a practice that is unlawful under the Act.

Both employers must count employees who are jointly employed, whether or not maintained on the other employer's payroll, in determining employer coverage and employee eligibility. For example, if the client employer has 40 "leased" employees that are jointly employed with the PEO and, in addition, employs 15 "permanent" employees at the worksite, then the client is an FMLA-covered employer as it employs more than 50 employees. The client employer would only be responsible for granting FMLA leave to its 15 "permanent" employees, but not for the jointly employed "leased" employees as that responsibility belongs to the PEO as the "primary" employer. If the total number of employees, both jointly employed and "permanent," is less than 50 and the client employer does not have any other worksites, the client employer would not be a covered employer and would not have to grant FMLA leave to its "permanent" employees. Eligibility for the 40 "leased" employees would be determined by counting all of the "leased" employees assigned from or working at the PEO's site of employment (most likely the "placement" or "corporate" office). Excluded from this count would be any "permanent" employee of any client employer.

I hope this letter fully addresses your concerns. If you require further assistance, please do not hesitate to contact me.

Sincerely,

Michelle M. Bechtoldt
Office of Enforcement Policy
Family and Medical Leave Act Team

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

U.S. Department of Labor
Employment Standards Administration
Wage and Hour Division
Washington, D.C. 20210

September 11, 2000 **FMLA-112**

Dear ***Name****,

Thank you for your letter seeking an opinion on how the 1,250 hours of service test applies under the Family and Medical Leave Act of 1993 (FMLA) in determining an employee's eligibility for leave taken intermittently or on a reduced leave schedule due to a qualifying serious health condition.

You specifically inquired about determining the eligibility of a part-time employee who used intermittent FMLA leave on a number of occasions due to a chronic serious health condition (multiple sclerosis or MS). Later in the same year, the employee took six weeks of FMLA leave for another serious health condition (a hysterectomy). Although she had worked 1,356.75 hours in 12 months preceding the commencement of this leave, by the conclusion of the leave, she had dropped below 1,250 hours of service in the preceding year (1,195.25). After her return to work, she again needed leave for her MS. Because she only worked a part-time schedule, she had worked fewer than the required 1,250 hours in the 12 months preceding this latest leave. You cited the decision in Barron v. Runyon, 11 F. Supp. 2d 676 (E.D. Va. 1998), and asked how this court decision would apply in determining this employee's eligibility for FMLA leave for her MS.

The statute defines an eligible employee in Section 101(2)(A)(i) and (ii) as one who has "been employed . . . for at least 12 months by the employer with respect to whom leave is requested and for at least 1,250 hours of service with such employer during the previous 12-month period." The FMLA Regulations, at 29 CFR § 825.110 (a)(2), provide that the employee must have performed "at least 1,250 hours of service during the 12-month period ***immediately preceding the commencement of leave***." This regulation is consistent with both the Senate and House Committee Reports, which state that "the employee must . . . have worked for the employer for at least 1,250 hours of service during the 12 months period ***immediately preceding the commencement of the leave***." In addition, § 825.110(d) expressly states that determinations of whether an employee has worked for the employer for at least 12 months and for 1,250 hours in the past 12 months must be made "***as of the date leave commences***." The issue, then, is what the term "leave" means—whether it encompasses all leave for the same serious health condition, or whether ***each*** intermittent leave absence for the same condition is considered separate leave under the Act and regulations.

The FMLA regulations define intermittent leave as "leave taken in **separate blocks** of time due to a single qualifying reason" (§§ 825.203 and 825.800; emphasis added). This definition is based upon the statutory provisions and the legislative history pertaining to intermittent leave. The FMLA authorizes employees to take intermittent leave or leave on a reduced schedule "when medically necessary." Section 102(b)(1).

The Congressional Committee Reports recognize that some serious health conditions require that an employee be "absent from work on a recurring basis" rather than for a single block of time, and that "continuing treatment or supervision may sometimes take the form of intermittent visits to the doctor." Intermittent leave may be medically necessary for planned and/or unanticipated medical treatment, or for recovery from a serious health condition. Intermittent leave may be taken for an employee's own or a family member's serious health condition. Congress confirmed that, when an employee uses intermittent leave, only the amount of time actually used may be counted against the 12 weeks of leave to which an employee is entitled. Section 102(b)(1).

The intermittent leave concept assumes alternating periods of absence from and presence at work for the same FMLA-qualifying reason. If each such absence were treated as a separate period of FMLA leave, requiring an employee to reestablish eligibility with each absence, there would have been no need for Congress to codify the concept of intermittent leave. Thus, it is our position that the 1,250-hour eligibility test is applied only once, on the commencement of a series of intermittent absences, if all involve the same FMLA-qualifying serious health condition during the same 12-month FMLA leave year. The employee in such a case remains entitled to FMLA leave for that FMLA reason throughout that 12-month

period, even if the 1,250-hour calculation is not met at some later point in the 12-month period during the series of related intermittent absences.

Once an employee is determined to be eligible for FMLA leave, whether the leave is taken continuously or intermittently, the statute (§ 102(a)) provides for "a total of 12 workweeks of leave during any 12-month period for one or more" qualifying reasons. The regulations (29 CFR §§ 825.200(b) through (e)) permit an employer to choose from four different methods for determining the 12-month period that will be used to calculate an employee's FMLA leave entitlement. The four methods are the calendar year, any fixed 12-month "leave year," a 12-month period measured forward from the date any employee's first FMLA leave begins, and a "rolling" 12-month period measured backward from the date an employee uses any FMLA leave. Where an employer has selected either the calendar year, fixed year, or the 12-month period measured forward, it is our position that an employee's eligibility, once satisfied, for intermittent FMLA leave for a particular condition would last through the entire current 12-month period as designated by the employer for FMLA leave purposes. If an employer uses the rolling backward method, an employee's eligibility for absence due to a particular condition would continue for 12 months from the date of the first FMLA absence for the condition. Under all of these methods, eligibility could be re-calculated at the time of the first absence for the condition after the conclusion of the 12-month period. Furthermore, it is important to realize that this analysis is separate and distinct from determining whether an eligible employee's leave entitlement has been exhausted.

In Barron v. Runyon, the court considered these questions under the FMLA and rendered a decision consistent with our analysis set forth above. In Barron, the court held that an employee need only establish eligibility once at the beginning of the intermittent leave, and "an employee who requests several distinct periods of absence for 'a single qualifying reason' is seeking only one period of intermittent leave." 11 F. Supp. 2d at 682. The court observed that the rule for determining employee eligibility based on whether 50 employees are employed within 75 miles (29 CFR § 825.110(f)) is determined when the employee gives notice of the need for leave and, once eligible, the employee's eligibility is not affected by any subsequent changes in the number of employees employed at or within 75 miles of the employee's worksite, for that specific notice of the need for leave. An employer, for instance, could not terminate FMLA leave after it has commenced if the employee-count drops below 50. The court found this regulation "directly analogous to the situation [that] once an employee is determined eligible based on the number of hours he has worked in the twelve months preceding the first date of the leave, 'the employee's eligibility is not affected by any subsequent change in the number' of hours he worked in the twelve months prior to any subsequent date on which he takes an absence pursuant to his intermittent leave for the same medical condition." Id. The court also concluded that FMLA leave "cannot be taken 'forever' on the basis of one leave request. Instead, the statute grants an employee twelve weeks of leave per twelve-month period, not indefinitely." 11 F. Supp. 2d at 683. See also Butler v. Owens-Brockway Plastic Products, Inc, 5WH Cases 2d 1281 (6th Circuit 1999), in which the court held that the 1,250 hours of service must be computed from the date of commencement of leave rather than the date of the adverse action that violated the Act.

The following three examples will help to illustrate how an employee's eligibility is determined by FMLA's 1,250-hour test:

1. Assume an employee is diagnosed with an FMLA-qualifying chronic condition, such as MS as in your example, which results in an employee needing intermittent leave due to the episodic nature of the condition. For example, if an employee with MS who was eligible to take intermittent FMLA leave in April and May needed leave again when the episodes of incapacity recurred in July and again in October, the employee would be entitled to FMLA leave without having to re-qualify under the 1,250-hour eligibility test so long as the absences occurred within the same 12-month period and the employee had not exhausted the 12-week leave entitlement for this or any other FMLA-qualifying reason. If the employee needed leave for MS again in a new 12-month period, the employee would have to re-qualify under the 1,250-hour eligibility test to be entitled to take FMLA leave for the same chronic condition in the new 12-month period.

2. Assume the same facts as in the first example and, in addition, assume that the employee requests FMLA leave for up to six weeks for another serious health condition that requires major surgery and a subsequent period of recovery (e.g., a hysterectomy). If, at the time of this second and different FMLA-qualifying circumstance, the employee met the 1,250-hour eligibility test, the employee would be entitled to FMLA leave for ***that*** (i.e., second) reason. In addition, the employee would also continue to be eligible for intermittent FMLA leave for the chronic serious health condition (i.e., MS) for the remainder of the current 12-month period or until the 12-week leave entitlement has been exhausted.

3. Assume the same facts as in the second example, except at the time of the second and different FMLA-qualifying circumstance the employee does not meet the 1,250-hour eligibility test. In this situation, the employee would not be entitled to FMLA leave for *that* (i.e., second) reason. Thus, it is possible that an employee could remain eligible for leave for one FMLA-qualifying reason for which prior notice had been given when the employee met the 1,250-hour test (i.e., MS), but not be eligible for FMLA leave for a different FMLA-qualifying reason (i.e., surgery and recovery), due to the 1,250-hour test being re-calculated at the ***commencement*** of the subsequent and separate need for leave.

Our response is based solely upon the information contained in your letter and addresses only the application of the 1,250-hour eligibility test in the context of intermittent leave. We have assumed that all other FMLA requirements are satisfied, or are otherwise not an issue.

I trust that our reply is responsive to your request, and apologize for any inconvenience caused by our delay in not being able to respond sooner to your letter. Please contact this office if you have any questions or require further assistance.

Sincerely,

T. Michael Kerr
Administrator

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

U.S. Department of Labor
Employment Standards Administration
Wage and Hour Division
Washington, D.C. 20210

September 11, 2000 **FMLA-113**

Dear ***Name****,

Thank you for your letters seeking an opinion under the Family and Medical Leave Act of 1993 (FMLA) regarding return-to-work procedures required by the ***Name**** for employees who are returning to work following FMLA leave due to their own "serious health condition."

In the first letter, you specifically ask whether the FMLA would permit the ***Name**** to require an employee to submit to a "fitness-for-duty examination" before returning to work from FMLA leave where the employee's health care provider has certified the employee to be "fit to return to duty without restriction." You also asked that we assume for purposes of answering your inquiry that the handbook and manual provisions relied on by the ***Name**** are part of a collective bargaining agreement (CBA) under the FMLA regulations. In the second letter, you ask whether the ***Name****, in those instances where it failed to provide notice of any requirements for a medical certification as a condition of reinstatement, can delay an FMLA leave taker's return to work until such certification has been received.

As a condition of restoration, the FMLA permits an employer that has a uniformly- applied policy or practice to require all employees, or only certain employees, who take leave for their own serious health condition to provide a return-to-work certification from their health care provider. The certification need only be a simple statement of an employee's ability to work and must relate only to the particular health condition that caused the employee's need for FMLA leave. Under this provision, an employer may not impose additional requirements. These fitness-for-duty certification provisions, however, do not **supersede** any valid State or local law or CBA that governs return to work for such employees. (See 29 U.S.C. §2614(a)(4) and 29 C.F.R. §825.310.) How FMLA's certification provisions interact with the terms of a CBA that govern an employee's reinstatement is specifically discussed in §825.310(b) of the regulations. If the terms of the CBA, for instance, require a fitness-for-duty examination in addition to a return-to-work certification, then those terms apply with certain conditions. The FMLA, which has adopted the guidelines of the Americans with Disabilities Act (ADA), requires that any fitness-for-duty examination as a condition of returning to work must be job-related and consistent with business necessity.

As you have noted in your letter, a part of the CBA includes, by reference, the handbook and manual provisions regarding "return-to-work medical certifications," which are detailed medical reports, and "fitness-for-duty examinations." If the above-referenced return-to-work medical certification and fitness-for-duty examination provisions in the handbook and manual are a part of the CBA as you have asked that we assume, then these provisions would apply instead of FMLA's return-to-work certification requirements. If these provisions are not part of the CBA, then FMLA's return-to-work certification requirements would apply. This conclusion is consistent with the district court case referenced in your letter, i.e., Albert v. Runyon, where the court determined that the terms for a United States Postal Service District Manager returning to work were neither governed by a CBA, nor State or local law. In that case, the court determined that the FMLA would only require as a condition of restoration that the employee submit to the employer a certification obtained from the employee's health care provider that consisted of a simple statement of the employee's ability to return to work.

With respect to your letter on the effect of ***Name**** failure to give timely notice for return-to-work certifications, the regulations, at §825.310(e), discuss FMLA's notification procedures as they relate to medical certification requirements as a condition for reinstatement to the same or an equivalent position. This regulation tracks closely the general notification (§825.301(a)) and employee specific notification (§825.301(b)) requirements as they would relate to an employer's obligation to communicate its restoration policies to employees who are returning to work following FMLA leave due to their own serious health condition. Employers must notify employees in writing of their obligations and what happens if they fail to meet these obligations within a reasonable period of time, generally one or two business days, if feasible, following the employee's request for leave that is FMLA-qualifying. It should be noted that these notification requirements would permit the employer to modify the notice applicable to the return-to-work certification if the employee's medical condition should change during the course of the

leave and affect the certification requirements. In this situation, the employer's modified notice to the employee should come shortly after receipt of information from the employee that the medical condition has changed (i.e., within two business days absent extenuating circumstances).

The FMLA notification procedures establish the minimum notice due even when a CBA establishes the return-to-work certification requirements. If an employee's reinstatement is delayed as a result of the employer's failure to provide timely notice under the FMLA, the lack of notice would result in interference with and violation of the employee's statutory right to reinstatement. In such a situation, the employer can neither count the additional time against the employee's FMLA leave entitlement, nor penalize the employee for being absent. On the other hand, if the employer has provided a timely notice as specified in the FMLA regulations, that clearly identifies what the CBA requires the employee to submit, the employer may delay restoration until the employee submits the required certification. (See §§825.310(f), 825.311(c), and 825.312(c).)

I hope that this letter has fully responded to your concerns. If you require further assistance, please do not hesitate to contact me.

Sincerely,

Michelle M. Bechtoldt
Office of Enforcement Policy
Family and Medical Leave Act Team

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

U.S. Department of Labor
Employment Standards Administration
Wage and Hour Division
Washington, D.C. 20210

May 9, 2002 **FMLA2002-1**

Dear ***Name****

Thank you for your letter addressed to Joe Kennedy, then Acting Assistant Secretary of the Employment Standards Administration, concerning how leave entitlement under the Family and Medical Leave Act of 1993 (FMLA) is determined for employees who normally work part-time or variable hours. Your letter has been referred to the Wage and Hour Division of the Employment Standards Administration for reply as the Division administers and enforces FMLA for all private, State and local government employees, and some Federal employees. The FMLA entitles eligible employees of covered employers to take up to 12 workweeks of unpaid, job-protected leave each year -- with continued group health insurance coverage during the leave -- for specified family and medical reasons.

Under the FMLA, the workweek is the basis for an employee's leave entitlement (See FMLA, Section 102(a)(1).) The entitlement is not phrased in terms of a particular number of days or hours of leave, but rather as 12 workweeks of leave. Thus if there is a holiday in a week when an employee is on leave for the full week, the employee is still charged with a week of leave. (See Section 825.200(f) of Regulations, 29 CFR Part 825.) Similarly, if an employee normally works a 50-hour workweek, the employee's statutory entitlement is not capped at 480 hours. (See 60 Fed. Reg. 2180 (Jan. 6, 1995) (preamble to 825.205.) Thus, the focus is always on the workweek, and the employee's "normal" workweek (hours/days per week) prior to the start of FMLA leave is the controlling factor for determining how much leave an employee is entitled to use. Only the amount of leave actually taken may be counted against the employee's 12-week entitlement of FMLA leave. (See section 825.205 of Regulations, 29 CFR Part 825.)

Whether FMLA leave is taken for qualifying family reasons or medical reasons, or taken continuously or intermittently, the rules for calculating the amount of leave available to the employee and to be used during the leave period are exactly the same. For example, an employee, who works 40 hours per week (five (5) days, eight (8) hours each day), needs one (1) day a week of intermittent FMLA leave for six (6) months to undergo treatment for a serious health condition. The employer calculates the employee's leave entitlement based on the employee's full-time schedule and determines that the employee will take one-fifth (1/5), or 20 percent, of a workweek of FMLA leave each week during the leave period. Assuming the employee had 12 workweeks of FMLA leave at the commencement of leave and took no additional FMLA leave during the leave period, at the conclusion of the leave period, the employee took five and one-fifth (5-1/5) workweeks, or 26 workdays, of FMLA leave with a remaining balance of six and four-fifths (6-4/5) workweeks, or 34 workdays. While the computations work out the same whether you use a fraction of the workweek or individual hours, as you will see when reviewing your first example, it is much easier to compute using the fraction of the workweek method when an employee is on leave for consecutive full days, and is not using leave on an intermittent or reduced schedule basis for a few hours at a time.

Prior to determining the amount of FMLA leave an employee is entitled to take, and the amount of FMLA leave an employer may count against that entitlement, the employee's established 7-day workweek and the 12-month leave period selected by the employer in which the 12 weeks of leave entitlement occurs must be known. Since this information was not provided in your request, for the purposes of this response, we will assume that the employee's workweek in all examples is Sunday through Saturday. We will also assume that the employer has selected the calendar year as the 12-month leave period. (See section 825.200 of Regulations, 29 CFR Part 825.)

You present an example of an employee who had a normal workweek schedule of 34 hours, Monday through Friday, prior to taking FMLA leave due to a serious health condition from February 8 through March 7. During this leave period, the employee used a total of four and one/fifth (4-1/5) workweeks (i.e., 21 workdays) of FMLA leave.

A break-out of the amount of leave taken during the leave period is the following: four/fifths (4/5) of a workweek from February 8 through 11 (Tuesday through Friday); three (3) full workweeks from February 14 (Monday) through March 3 (Friday), and; two-fifths (2/5) of a workweek from March 6 (Monday) through March 7 (Tuesday). The error in your computation was that you determined the number of hours of leave available for this period based upon the average 30-hour workweek that the employee worked later in the year, and your formula includes weekends rather than looking at the fraction of the Monday through Friday workweek the employee missed.

Three months later (June 8), this same employee needed FMLA leave to care for an immediate family member who was seriously ill. The employee's normal workweek schedule prior to the start of the second leave period had changed to 30 hours a week, Monday through Friday. In this situation, the new workweek schedule would be used for calculating the amount of FMLA leave available to the employee if the employer made a permanent or long-term change in the employee's workweek schedule for non-FMLA reasons prior to the employee's request for FMLA leave. (See section 825.205(c) of Regulations 29 CFR Part 825.) The amount of leave available to the employee for the second FMLA leave period would be seven and four/fifths (7-4/5) workweeks. The employee could remain on FMLA leave continuously from June 8 through August 1, or 39 workdays. Because this employee did not use intermittent or reduced schedule leave, there is no need to compute the leave available or the leave used in hours.

In calculating the amount of FMLA leave available to an employee whose schedule varies from week to week, a weekly average of the hours worked over the 12 weeks prior to the beginning of the leave period should be used. (See section 825.205(d) of Regulations 29 CFR Part 825.) In your second example, an employee works an alternating workweek schedule of three days (Monday through Wednesday), 12 hours per day, or 36 hours one week, and four days (Monday through Thursday), 12 hours per day, or 48 hours the following week. The employee requested and was granted FMLA leave for his serious health condition on April 7 (Friday) and returned to work on May 1 (Monday). Since April 7 fell on a Friday, the employee could not be charged with FMLA leave on that day as the employee had already worked his scheduled hours for that week. The employee's start of FMLA leave in this example should be April 10 (Monday). The amount of FMLA leave used by the employee is exactly three (3) workweeks of FMLA leave. Four months later when the employee needed FMLA leave for the same condition, the employee would have nine (9) workweeks of FMLA leave remaining to use. Again, because the employee used full workweeks of leave, there is no need in this case to compute the leave in hours.

You also present a third example, whereby the employee works an alternating workweek schedule similar to the second example except the employee works ten-hour days instead of 12-hour days. Despite the change in hours, if the leave circumstances were exactly the same as those described in the second example, the employee would have used three (3) workweeks of FMLA leave for the first absence and would have nine (9) workweeks of leave available to use for the second leave period.

We trust that this letter is responsive to your concerns. If you should require further information, please do not hesitate to contact us.

Sincerely,

Rosemary E. Sumner
Office of Enforcement Policy
Family and Medical Leave Act Team

*Note: * Name(s) withheld to preserve privacy, in accordance with 5 U.S.C. 552(b)(7).*

U.S. Department of Labor
Employment Standards Administration
Wage and Hour Division
Washington, D.C. 20210

July 19, 2002 **FMLA2002-2**

Dear ***Name****

This is in response to your letters of April 1, 2002, and May 22, 2002, regarding the Family and Medical Leave Act of 1993 (FMLA). You write in reference to the actions of a specific employee (whom you call Officer John Doe) who failed to report for duty on scheduled shifts. Upon his return to duty, Officer Doe gave the Scheduling Unit a note requesting that the previous day's absence be changed on his records to a "family leave day." You are concerned that Officer Doe did not request leave in advance, and that he offered no further explanation of his absence. You state you have approved the taking of FMLA leave on an intermittent basis for Officer Doe. No information concerning the serious health condition for which the leave has been approved was submitted in your inquiry.

As you know, the FMLA entitles eligible employees of covered employers to take up to 12 weeks of unpaid, job-protected leave each year – with continued group health insurance coverage – for specified family and medical reasons. FMLA leave may be taken all at once or may be taken intermittently or on a reduced leave schedule when medically necessary for the employee's own serious health condition, or when the employee is needed to care for a spouse, child, or parent with a serious health condition.

The FMLA at § 102(e) and its implementing regulations at 29 CFR Part 825.302 and § 825.303 set out the obligations of the employee to provide notice to the employer of the need for leave. Where the need for leave is unforeseeable, including unforeseen intermittent leave, an employee is required to provide notice "as soon as practicable" given the particular facts and circumstances. It is expected that this notice shall be given within one or two working days of learning of the need for leave, except in extraordinary circumstances where it is not feasible. Additionally, § 825.208 requires that an employee must give enough information when requesting leave for the employer to determine that the leave qualifies under the Act.

An employer may require an employee to comply with the employer's usual and customary notice and procedural requirements for requesting leave that qualifies as FMLA leave. For instance, an employer may require an advance written notice specifying the reason(s) for the leave, when the leave will start, and the anticipated duration of the leave (except an employee cannot be required to provide advance written notice when FMLA leave is needed for a medical emergency.) If the employee fails to follow such internal employer notification procedures, the employer may not disallow or delay the taking of FMLA leave if the employee gives timely verbal or other notice. An employer can, however, impose a penalty in a situation where the employee was in a position of providing advance notice of the need for FMLA leave and failed to provide the notice in accordance with FMLA's requirements and the company's notification policy, if less stringent than FMLA's. Opinion letter FMLA-101, that provides some additional examples of how this principle is applied, is enclosed for your information.

Determinations of compliance, eligibility and other issues under the FMLA are fact-specific. Unfortunately, from the information provided, we are unable to determine the application of the FMLA to the particular situation discussed in your letter. If, after reading the enclosed opinion letter you have additional questions, you may contact the Wage and Hour District Office nearest you at 200 Sheffield Street, Suite 102, Mountainside, New Jersey, 07092, telephone (973) 645-2279.

Sincerely,

Rosemary E. Sumner
Office of Enforcement Policy
Family and Medical Leave Act Team

Enclosure

Note: * Name(s) withheld to preserve privacy, in accordance with 5 U.S.C. 552(b)(7).

U.S. Department of Labor
Employment Standards Administration
Wage and Hour Division
Washington, D.C. 20210

July 19, 2002 **FMLA2002-3**

Dear ***Name****

Thank you for your letter concerning employees of the ***Name**** located in ***Name**** and the Family and Medical Leave Act of 1993 (FMLA). The Wage and Hour Division of the U.S. Department of Labor administers the FMLA for all private, state, and local government employees, and some federal employees.

The FMLA entitles eligible employees of covered employers to take up to 12 weeks of unpaid, job-protected leave each year – with continued group health insurance coverage – for specified family and medical reasons. All public agencies are covered employers under FMLA regardless of the number of employees. They are not required to meet the 50-employee threshold test for private employers. "Public agency" means the Government of the United States; the government of a State or political subdivision thereof; any agency of the United States (including the United States Postal Service and the Postal Rate Commission), a State, or a political subdivision of a State or any interstate governmental agency. Employees are eligible under FMLA if they work for a covered employer, and: (1) have worked for their employer for at least 12 months; (2) have worked at least 1,250 hours during the 12 months immediately preceding the start of leave; and, (3) work at a worksite where the employer employs at least 50 employees at the site or within 75 miles of the site.

Unpaid leave must be granted to an eligible employee for any of the following reasons: (1) for the birth of a son or daughter, and to care for the newborn child; (2) for placement with the employee of a son or daughter for adoption or foster care, and to care for the newly placed child; (3) to care for the employee's spouse, son or daughter, or parent, who has a serious health condition, and (4) for a serious health condition that makes the employee unable to perform his/her job.

As union steward, you are concerned that the facility requires that FMLA leave run concurrently with worker's compensation leave. Worker's compensation leave may, in fact, run concurrently with unpaid FMLA leave and may count toward an employee's FMLA leave entitlement, provided the reason for the absence is due to a qualifying "serious health condition" as defined in the FMLA and the implementing Regulation 29 CFR 825.114 (copy enclosed). However, an employee's receipt of workers' compensation payments precludes the employee from electing, and prohibits the employer from requiring, substitution of any form of accrued paid leave for any part of the absence covered by such payments.

You also express concern that the facility has failed to post a notice of the provisions of the FMLA, has failed to provide general and specific notice of the entitlements of FMLA, and that several employees have been terminated in violation of FMLA.

Generally, the FMLA and §825.300 of the Regulations require employers to post on their premises a notice explaining the Act's provisions and providing information concerning the procedures for filing complaints of violations of the Act with the Wage and Hour Division. An FMLA poster (form WH-1420) may be obtained from the Department's web site (http://www.dol.gov/osbp/sbrefa/poster/main.htm) or from the local Wage and Hour Division office. Additionally, pursuant to § 825.301 of the Regulations, employers should provide employees who take FMLA-qualifying leave with both general and specific notification detailing the FMLA entitlements and specific expectations and obligations of employees taking leave, as well as explaining the consequences of failing to meet these obligations.

You should be aware, however, that the U.S. Supreme Court recently invalidated the FMLA Regulations at §825.700(a), which provides categorical sanctions against employers who fail to designate FMLA-qualifying leave as FMLA leave (Ragsdale v. Wolverine Worldwide, Inc.) This section of the regulations states that employers who fail to designate paid or unpaid FMLA-qualifying leave as FMLA leave can not count the leave toward the employee's FMLA entitlement, and the employee is still entitled to all of FMLA's protections during that leave.

In light of the U.S. Supreme Court's decision, the Department believes it is inappropriate, in most cases, to pursue compliance actions in instances where the employee has clearly taken FMLA leave and the employer has failed to designate the leave as such. The Supreme Court's decision in Ragsdale may leave open the possibility that cases may be pursued, based on the principle of equitable estoppel, where the failure to designate the leave as FMLA-qualifying interfered with the employee's exercise of FMLA rights (per §825.220), and the employee could have taken other action had he/she known that the leave would count against his/her FMLA entitlement.

Responsibility for enforcing allegations of violations of FMLA has been delegated to the various district offices of the Wage and Hour Division. If you, or the employees you represent at ***Name**** , need further clarification regarding your rights under the FMLA, you may contact the Wage and Hour District Office nearest you at Leo W. O'Brien Federal Building, Room 822, Albany, New York 12207, telephone (518) 431-4278.

Sincerely,

Rosemary E. Sumner
Office of Enforcement Policy
Family and Medical Leave Act Team

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

U.S. Department of Labor
Employment Standards Administration
Wage and Hour Division
Washington, D.C. 20210

July 23, 2002 **FMLA2002-4**

Dear ***Name****

This is in response to your letter requesting guidance concerning leave taken on an intermittent basis after birth or placement of a child for adoption under the Family and Medical Leave Act of 1993 (FMLA). We regret that due to the large volume of correspondence handled by this office, our response to your request has been delayed. Specifically, you ask that, given the employer's right not to allow intermittent leaves following birth or adoption unless it agrees otherwise, may the employer require that such leaves be taken in minimum increments of not less than one full workday?

We agree with your conclusion that because an agreement between the employee and employer is required for the use of FMLA-qualifying intermittent or reduced schedule leave for the birth or placement of a child, the agreement may also govern the size of an increment of leave taken by the employee despite the language of Section 825.203(d) of the FMLA Regulations.

Section 102(b)(1) of the FMLA provides that qualifying leave may be taken "intermittently or on a reduced leave schedule" under certain circumstances. Intermittent leave is not available for the birth and care of a newborn child or for the placement with the employee of a son or daughter for adoption or foster care unless the employee and employer agree otherwise. The Act, however, does entitle eligible employees to take FMLA-qualifying leave on an intermittent or reduced schedule when medically necessary for their own or a family member's serious health condition. Neither the Act nor the FMLA Regulations, 29 CFR Part 825, limit the size of an increment of leave. However, §825.302(d) stipulates that an employer may limit leave increments to the shortest period of time that the employer's payroll system uses to account for absences of leave, provided it is one hour or less. An employee may not be required to take more FMLA leave than necessary to address the circumstance that precipitated the need for the leave, except as provided in §§825.601 and 825.602 that discuss a partial exception to this rule for employees of schools.

Section 825.203(b) of the FMLA Regulations addresses the distinction provided in the statute for intermittent and reduced schedule leaves taken for the different reasons authorized by the FMLA. It states that when leave is taken after the birth or placement of a child for adoption or foster care, an employee may take leave intermittently or on a reduced leave schedule only if the employer agrees. The employer's agreement is not required, however, for leave during which the mother has a serious health condition in connection with the birth of her child or if the newborn or newly placed child has a serious health condition.

Therefore, after birth or placement of a child, an eligible employee is entitled to take a block of 12 weeks of FMLA leave to care for and bond with the child. Since the employee is not entitled by the statute to take this type of FMLA leave on an intermittent or reduced schedule basis without an agreement with the employer, we believe that the employee's use of intermittent leave or leave on a reduced schedule after birth or the placement of a child will be governed by the terms of the agreement entered into by the employee and the employer. Accordingly, we believe that the employee and employer agreement may include restrictions on the minimum size of the increment of intermittent or reduced schedule leave taken for such purposes.

This answer is based solely on the information presented in your letter. If you have further questions or additional information is required, please do not hesitate to contact us again.

Sincerely,

Rosemary E. Sumner
Office of Enforcement Policy
Family and Medical Leave Act Team

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

U.S. Department of Labor
Employment Standards Administration
Wage and Hour Division
Washington, D.C. 20210

August 6, 2002 **FMLA2002-5-A**

Dear ***Name****,*

Thank you for your letter of January 31, 2002 addressed to Kristine Iverson, the Assistant Secretary of Labor for Congressional and intergovernmental Affairs, on behalf of your constituent, ***Name****.* Your letter has been forwarded to this office for a response.

Name* is concerned that her former employer may have violated her rights under the Family and Medical Leave Act of 1993 (FMLA) by failing to notify her of her eligibility status in a timely manner and subsequently terminating her employment while she was on leave for the birth of her child. ***Name**** states she had not worked 1,250 hours for her employer in the 12 months prior to her leave.

As you know, the FMLA entitles eligible employees of covered employers to take up to 12 weeks of unpaid, job-protected leave each year with continued group health insurance coverage - for specified family and medical reasons. Employees are eligible for these FMLA protections only if they work for a covered employer, and: (1) have worked for their employer for at least 12 month, (2) have worked at least 1,250 hours during the 12 months immediately preceding the start of leave, and (3) work at a worksite where the employer employs at least 50 employees at the site or within 75 miles of the site.

Generally, where employees provide their employers with sufficient notice of the need for leave which may be protected, the FMLA Regulations at 29 CFR §825.110(d) provide that the determination of whether employees have met the eligibility tests as described above must be made as of the date leave commences. This section of the regulations sometimes referred to as the “deeming provisions,'' provides that an otherwise ineligible employee whose employer fails to advise him/her of eligibility status prior to the commencement of leave will be "deemed" eligible and the employer may not then deny the leave. However, several Circuit Courts of Appeals have issued decisions that construe the deeming provisions to be invalid and contrary to congressional intent. Further, the U.S. Supreme Court (in Ragsdale vs. Wolverine World Wide. Inc.) recently invalidated another section of the FMLA regulations which, although unrelated to the deeming provisions, similarly requires employers to notify employees and then imposes a set of consequences if the employers fail to do so. The Court concluded this section of the regulations (29 CFR §825.700(a)) improperly provided that if the employer fails to designate leave as FMLA leave, then the leave is not counted toward an employee's FMLA 12-week entitlement.

Based on the information provided, ***Name**** was not notified by her employer of her eligibility status until after her leave had commenced. ***Name**** asserts that she should have been "deemed" eligible because her employer failed to advise her of her eligibility status prior to the commencement of her leave. The department believes it is inappropriate, in most cases, to pursue compliance actions in instances where the employee is clearly ineligible and relies solely upon the "deeming" provisions as articulated in § 825.110(d) to assert the protections of the FMLA. The Supreme Court's decision in *Ragsdale* may leave open the possibility that cases may be pursued, based on the principle of equitable estoppel, where the employer's failure to properly advise the employee of FMLA eligibility/ineligibility is determined to have interfered with the employee's rights (per § 825.220), and the employee could have taken other action had he/she been properly notified.

From the information presented by your constituent it would appear inappropriate for the Department to pursue the complaint. If you have any additional questions, please do not hesitate to contact me.

Sincerely,

Tammy D. McCutchen
Administrator

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

U.S. Department of Labor
Employment Standards Administration
Wage and Hour Division
Washington, D.C. 20210

December 4, 2002 **FMLA2002-6**

Dear ***Name****

This is in response to your letter of ***Name****, requesting written guidance from the Wage and Hour Division of the U.S. Department of Labor with regard to the application of the 1,250-hour eligibility test and intermittent leave under the Family and Medical Leave Act of 1993 (FMLA).

The scenario you describe in your letter, and in a conversation with a member of my staff, involves several employees who submitted FMLA documentation to their employer and were subsequently approved for intermittent leave for a twelve-month period. On the medical certification form, the employees' physician specified how often they would be expected to be absent from work on a monthly basis. However, when employees miss more workdays on a monthly basis than those specified on the medical certification, the employer requires them to submit another FMLA request form and to update the information on their medical certification form to reflect the need for additional time off monthly. Once the medical certification is resubmitted for the same serious health condition, the employer applies the 1,250-hour eligibility test for the second time in the same twelve-month period. As a result, some employees are denied additional FMLA leave pursuant to the original approved FMLA leave request, as well as the new request, because they fail to meet the 1,250-hour requirement.

The FMLA provides that an employee is entitled to leave for up to 12 weeks in any 12-month period for the employee's own serious health condition, or to care for a spouse, son, daughter, or parent who has a serious health condition. Pursuant to Section 102(b)(1) of the Act, leave may be taken all at once, or may be taken "intermittently or on a reduced leave schedule" when medically necessary. The FMLA's implementing regulations at 29 CFR Part 825.203 and 825.800, copy enclosed, define intermittent leave as "leave taken in separate blocks of time due to a single qualifying reason." This definition is based upon the statutory provisions and legislative history pertaining to intermittent leave.

An employer may require that a request for FMLA leave due to a serious health condition be supported by a certification completed by the individual's health care provider. However, not all absences caused by certain serious health conditions will be predictable, and the FMLA does not require a health care provider to submit an exact schedule of leave when submitting the medical certification. Health care providers are only expected to provide their best, informed medical judgment. The FMLA does not permit an employer to withhold approval of a request for FMLA leave if an exact schedule of leave is not submitted. For pregnancy, chronic, and long-term serious health conditions, an employer may require this medical certification every 30 days in connection with an absence by the employee. However, where the circumstances described by a previous medical certification have changed significantly (including significant changes in the duration and/or frequency of absences), an employer may request recertification in less than the 30-day minimum interval, but also only in connection with an absence. (See Section 825.308)

The intermittent leave concept assumes alternating periods of absence from and presence at work for the same FMLA-qualifying condition. Thus, as we have previously explained (see opinion letter FMLA-112 enclosed), an employer may not require an employee to reestablish eligibility with each absence. The 1,250-hour eligibility test may be applied only once during the same 12-month FMLA leave year, on the commencement of a series of intermittent absences, if all involve the same FMLA-qualifying serious health condition. The employee would remain entitled to FMLA leave for that medical reason throughout the 12-month period, even if the 1,250-hour calculation is not met at some later point in the 12-month period when another related instance of intermittent leave occurs.

Responsibility for investigating allegations of violations of the FMLA has been delegated to the various district offices of the Wage and Hour Division. If, after reading this letter, you need further clarification regarding the application of the FMLA to your situation, you may contact the nearest office of the Wage and Hour Division, which is located at 230 South Dearborn Street, Room 412, Chicago, Illinois 60604, telephone (312) 353-8145.

Sincerely,

Rosemary E. Sumner
Office of Enforcement Policy
Family and Medical Leave Act Team

Enclosure

*Note: * Name(s) withheld to preserve privacy, in accordance with 5 U.S.C. 552(b)(7).*

U.S. Department of Labor
Employment Standards Administration
Wage and Hour Division
Washington, D.C. 20210

March 5, 2003 **FMLA2003-1-A**

Dear ***Name****,

Thank you for your letter to Secretary Chao expressing your membership's concerns regarding the complaint intake process of the Southeast Region of the Wage and Hour Division (Division) of the U. S. Department of Labor under the Family and Medical Leave Act of 1993 (FMLA). She asked me to respond to your letter. The Division administers the FMLA for all private, state and local government employees, and some federal employees, including employees of the USPS. In addition to enforcing other standards, such as federal minimum wage, overtime, and child labor laws, the Division has processed over 25,000 FMLA complaints since the law was enacted.

Responsibility for investigations of complaints has been delegated to the various district offices of the Division, and these offices must exercise discretion regarding the scheduling of investigations. The number of complaints received by the Division varies by region and by district office. Each office has an obligation during the complaint intake process to explain thoroughly the Division's enforcement authority, the investigative process, and available resources so that employees may make informed decisions regarding the best avenue for pursuing their complaints. Therefore, a district office has discretion to defer pursuing a complaint where the complainant has also filed a grievance subject to binding arbitration.

In August 2002, the Solicitor of the Department of Labor issued a memorandum outlining principles to consider in determining whether the Department and the Division should defer to arbitration agreements. Putting these principles into action allows us to maximize the enforcement impact of our limited resources while recognizing what the Supreme Court has characterized as our "liberal federal policy favoring arbitration agreements." Some of the factors we consider in deciding whether to defer to arbitration include: whether the arbitration agreement covers the same statutory claims; whether the complaint involves an individual claim for relief; and, whether a complaint can be efficiently and expeditiously arbitrated. I have attached a copy of the Solicitor's memorandum, which is also available on the Department's web site at www.dol.gov/sol.

As you well know, collective bargaining agreements often offer greater benefits to employees than the basic protections provided by labor laws, such as the FMLA. Binding arbitration featured in collective bargaining agreements often can resolve employment problems more quickly and informally than investigating and litigating a FMLA complaint. If arbitration fails to resolve sufficiently a valid FMLA complaint, then the Division may accept the complaint for investigation. However, in name situation, it appears from the information submitted to our Miami District Office that he was not protected by FMLA.

Our policy does not institute a per se rule against Department enforcement actions where an arbitral process is available. The factors identified in the attached memorandum are to be applied on a case-by-case basis and necessarily require the exercise of the Department's enforcement discretion. It is intended to expedite an employee's access to justice without compromising their procedural protections. Lastly, the Department and Division can act upon a FMLA complaint when the facts and equities of a particular case demand our intervention in order to achieve the broadest possible compliance with the law.

Should you have further questions or comments concerning enforcement strategies of the Division, please feel free to contact me at (202) 693-0051.

Sincerely,

Tammy D. McCutchen
Administrator

Enclosure

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

U.S. Department of Labor
Employment Standards Administration
Wage and Hour Division
Washington, D.C. 20210

June 30, 2003 **FMLA2003-2**

Dear ***Name****

Your inquiry regarding the application of the Family and Medical Leave Act of 1993 (FMLA) was referred to this office for a response. Specifically, you asked if an employee, ***Name**** who is the legal guardian to her adult disabled sister, is entitled to FMLA for purposes of caring for this sister. You have indicated that based on your reading of DOL Opinion Letter-96 (June 4, 1998), you do not believe that the leave falls under the FMLA protections. However, you are seeking clarification from the Department on this matter. Based on the facts you have provided, we have concluded that ***Name**** situation is clearly distinguishable from that described in Opinion Letter 96, in which the parent-in-law for which the employee became the co-guardian did not become disabled until well past the age of 18 and no parent-child relationship ever existed between the employee and the legal ward.

The FMLA provides that, in part, an eligible employee of a covered employer may take FMLA leave "to care for the spouse, or a son, daughter, or parent, of the employee, if such spouse son, daughter, or parent has a serious health condition." (Section 102(a)(1)(C)). The FMLA, in section 101(12), defines "son or daughter" as "biological, adopted, or foster child, a stepchild, a legal ward, or a child of a person standing in loco parentis who is (A) under 18 years of age; or (B) 18 years of age or older and incapable of self-care because of a mental or physical disability."

Opinion Letter-96 cites the legislative history of this section of the FMLA. The legislative history recognizes "that in special circumstances, where a child has a mental or physical disability, ***a child's need for parental care may not end when he or she reaches 18 years of age***. In such circumstances, parents may continue to have an active role in caring for the son or daughter. An adult son or daughter who has a serious health condition and who is incapable of self-care because of a mental or physical disability presents the same compelling need for parental care as the child under 18 years of age with a serious health condition." (emphasis added). Thus, the legislative history makes clear that where a child under the age of 18 has a mental or physical disability that continues into adulthood, the ***need*** for parental care ***continues*** to exist and the individual remains a "child" for purposes of FMLA coverage.

In the case of ***Name****, her sister had a mental or physical disability from birth that continued into adulthood, thus continuing the need for parental care and maintaining her status as a "daughter" for purposes of FMLA coverage. As ***Name**** serves as her sister's parent in her capacity as legal guardian since both of their biological parents are deceased, she is entitled to the protections of the FMLA for purposes of caring for this sister.

We believe a careful review of the FMLA, the legislative history, and DOL Opinion Letter 96 support no other result. If you have any further questions, please do not hesitate to contact our District Office located at 135 High Street, Room 210, Hartford, Connecticut 06103-1111 telephone, (860) 240-4160.

Sincerely,

Rosemary Sumner
Office of Enforcement Policy
Family Medical Leave Act Team Leader

*Note: * Name(s) withheld to preserve privacy, in accordance with 5 U.S.C. 552(b)(7).*

U.S. Department of Labor
Employment Standards Administration
Wage and Hour Division
Washington, D.C. 20210

July 24, 2003 **FMLA2003-3-A**

Dear ***Name****,

This is in response to your letter dated June 4, 2003, addressed to the Secretary of Labor Elaine L. Chao and Tammy D. McCutchen, Administrator of the Wage and Hour Division, regarding the handling of your complaint under the Family and Medical Leave Act of 1993 (FMLA) against ***Name**** by the Wage and Hour Division District Office (DO) in Kansas City, Kansas. A member of my staff has spoken with you on several occasions regarding your concerns.

The Kansas City DO conducted an investigation of your complaint beginning in June 2002, and could not substantiate that you where terminated in violation of the FMLA. The outcome of that investigation was reviewed by the Midwest Regional Office (RO) in Chicago, Illinois, which has authority to review the enforcement actions of the Kansas City DO. The Midwest RO concluded that the DO acted in accordance with established policies and procedures. Subsequently, you contacted a member of the FMLA Team in Washington, D.C., office of the Wage and Hour Division (the Division) to discuss your concerns.

You enclosed additional documents with your June 4th letter which you contend support that you were terminated from your employment in violation of the FMLA. You also contend that the U. S. Department of Labor is not subject to the automatic stay provisions of the Bankruptcy Code (11 U.S.C. 362(a)) and, therefore, is able to recover money you believe is due to you from ***Name**** since your termination on May 30, 2002. You advised us that ***Name**** filed for Chapter 11 bankruptcy protection on May 31, 2002.

In our view, the police and regulatory power exception to the automatic stay provision of the bankruptcy code would allow the Department of Labor to bring an action under the FMLA in district court while an employer is in bankruptcy. 11 U.S.C. 362(b)(4). Injunctive relief could be obtained in such an action, which in the proper circumstances may allow reinstatement to a complainant's prior position. However, the Department cannot collect back wages or other monetary relief from an employer in bankruptcy as a result of that action. A proof of claim would have to be filed in bankruptcy court in order to obtain monetary relief. That claim would be subject to the priorities and rules of the bankruptcy court.

We are forwarding your letter with its enclosures to our Midwest RO. The Midwest RO will review the additional documentation you provided and determine if this new information is sufficient to support directing the Kansas City DO to complete additional fact-finding in your case. Someone from the RO will contact you directly to advise you of the outcome of their review, and to discuss the bankruptcy as it relates to your case. You may contact the RO directly at (312) 596-7204. In addition, you may independently file a proof of claim with the bankruptcy court.

Sincerely,

Tammy D. McCutchen
Administrator

cc: Midwest Regional Office

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

U.S. Department of Labor
Employment Standards Administration
Wage and Hour Division
Washington, D.C. 20210

July 29, 2003 **FMLA2003-4**

Dear ***Name****

Thank you for your letter addressed to President George W. Bush seeking his assistance concerning the Family and Medical Leave Act of 1993 (FMLA). Your letter has been forwarded to the Wage and Hour Division of the U.S. Department of Labor for response as this office administers the FMLA for all private, state and local government employees, some federal employees, and employees of local education agencies that are covered under special provisions. Specifically, you are concerned about an attendance "point system" that your employer implemented in January of 2003. Under this system, an employee receives one point for each absence and the employee is subject to termination after accumulating seven points.

The FMLA entitles eligible employees of covered employers to take up to 12 weeks of unpaid, job-protected leave each year – with continued group health insurance coverage – for specified family and medical reasons. Eligible employees are entitled to unpaid FMLA leave for any of the following reasons: (1) the birth of a son or daughter, and to care for the newborn child within one year of birth; (2) the placement with the employee of a son or daughter for adoption or foster care, and to care for the newly placed child within one year of placement; (3) to care for the employee's spouse, son or daughter, or parent who has a serious health condition; and (4) for a serious health condition that makes the employee unable to perform his/her job.

Point systems, sometimes, referred to as "no 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. Employers are prohibited from counting FMLA-qualifying absences against employees under a "no fault" attendance policy.

Determinations of compliance, eligibility and other issues under the FMLA are fact-specific. Based on the limited information provided in your letter, we are unable to determine the application of the FMLA to your daughter's circumstances. For your information, we are enclosing the *Compliance Guide to the Family and Medical Leave Act* which provides an explanation of the FMLA's benefits. Page 13 discusses "no fault" attendance policies.

Responsibility for investigating allegations of violations of the FMLA has been delegated to the district offices of the Wage and Hour Division. If, after reading the enclosed pamphlet you believe that your employer may have violated your daughter's rights under the FMLA, you may contact the nearest Wage and Hour District Office located at TCBY Building, Suite 725, 425 West Capitol Avenue, Little Rock, Arkansas 72201, telephone (501) 324-5292.

Sincerely,

Rosemary E. Sumner
Office of Enforcement Policy
Family and Medical Leave Act Team

Enclosure

cc: The White House

*Note: * Name(s) withheld to preserve privacy, in accordance with 5 U.S.C. 552(b)(7).*

U.S. Department of Labor
Employment Standards Administration
Wage and Hour Division
Washington, D.C. 20210

December 17, 2003 **FMLA2003-5**

Dear ***Name****

Thank you for your letter of November 17, 2003, addressed to Kristine Iverson, Assistant Secretary for Congressional and Intergovernmental Affairs, on behalf of ***Name**** regarding the Family and Medical Leave Act of 1993 (FMLA). ***Name**** asks several questions concerning compliance issues with the FMLA.

The FMLA entitles eligible employees of covered employers to take up to 12 weeks of unpaid, job-protected leave each year – with continuation of group health insurance coverage under the same conditions as prior to leave – for specified family and medical reasons. Eligible employees are entitled to unpaid FMLA leave for any of the following reasons: (1) the birth of a son or daughter, and to care for the newborn child within one year of birth, (2) the placement with the employee of a son or daughter for adoption or foster care, and to care for the newly placed child within one year of placement, (3) to care for the employee's spouse, son or daughter, or parent who has a serious health condition, and (4) for a serious health condition that makes the employee unable to perform the essential functions of his/her job.

Name* asks a number of general questions concerning the application of the FMLA. As determinations of coverage, employee eligibility and other compliance issues under the FMLA are fact-dependent, we will provide general guidance in answer to each of the questions.

1. Can an employer require an employee to exhaust accrued sick and vacation time while on paid leave?

Generally, pursuant to Regulations 29 CFR 825.207, an employer may require the employee to substitute accrued paid leave for unpaid FMLA-qualifying leave. However, an employer cannot require an employee to substitute, under FMLA, any paid vacation or other leave during the absence that would otherwise be covered by payment from plans covering temporary disabilities. Because the leave pursuant to a temporary disability benefit plan is not unpaid leave, the provision for substitution of paid leave is inapplicable. An employee's receipt of such payment precludes the employee from electing and prohibits the employer from requiring the substitution of any form of accrued paid leave for any part of the absence covered by such payments. However, the employer may designate the paid leave under a temporary disability plan as FMLA leave and count the leave as running concurrently for purposes of both the benefit plan and the FMLA leave entitlement. See 29 CFR 25.207(d).

2. Can something like a broken leg be designated as FMLA leave?

This depends on whether this condition meets the definition of a "serious health condition" as defined in the FMLA's implementing regulations at 29 CFR 825.114 (copy enclosed).

3. Are there repercussions for an employer who violates the FMLA but does not terminate the employee? (For example, the employer fails to notify the employee in the appropriate time, requires the employee to return to light duty, and contacts the employee's doctor.)

Potential remedies available to employees under the FMLA include reinstatement or promotion, lost wages and other compensation, employment benefits, or actual monetary loss sustained as a direct result of the violation, and (where leave is denied) requiring an employer to allow FMLA leave for an eligible employee for a qualifying reason. Employees may file complaints under the FMLA with their local Wage and Hour Division district office. Complaints are reviewed by the district offices and appropriate enforcement actions are taken to administratively resolve these complaints. The FMLA also provides that employees or the Department of Labor may file suit against an employer to enforce the provision of the Act.

You also ask about the designation of leave as FMLA leave. According to 29 CFR 825.208(a), in all circumstances, it is the employer's responsibility to designate leave, paid or unpaid, as FMLA-qualifying, and to give notice of the designation to the employee. Employers are prohibited under the FMLA from

interfering with, restraining, or denying the exercise of (or attempts to exercise) any rights provided by the Act. Failure to designate a portion of FMLA-qualifying leave as FMLA would not preempt an eligible employee's entitlement to FMLA protections for a period of leave that otherwise qualifies as FMLA leave.

As stated previously, determinations of compliance, eligibility and other issues of compliance under the FMLA are fact-specific. Based on the limited information provided in ***Name**** inquiry, we are unable to determine the application of the FMLA to his particular circumstances. For his information, we are enclosing the FMLA's implementing regulations and the *Compliance Guide to the Family and Medical Leave Act*. If, after reading this letter and the enclosed publications, ***Name**** has additional questions, he may contact the nearest Wage and Hour District Office located at 211 W. Fort Street, Room 1317, Detroit, Michigan 48226-32317; telephone, (313) 226-7447.

Sincerely,

Rosemary E. Sumner
Office of Enforcement Policy
Family and Medical Leave Act Team

Enclosure

cc: Washington, D.C., Office

*Note: * Name(s) withheld to preserve privacy, in accordance with 5 U.S.C. 552(b)(7).*

U.S. Department of Labor
Employment Standards Administration
Wage and Hour Division
Washington, D.C. 20210

April 5, 2004 **FMLA2004-1-A**

Dear ***Name****,*

This is in response to your letter requesting an interpretation under the Family and Medical Leave Act of 1993 (FMLA) regarding counting employees from temporary agencies (and, specifically, regarding the counting of "day laborers" from the temporary agency) toward the 50-employee threshold test for coverage when the client employer otherwise employs fewer than 50 permanent full-time and part-time employees. You also ask if the owner of the company should be counted as one of the 50 employees for FMLA coverage.

There was a delay in responding to your initial request and you have advised us that the particular client for whom you had originally requested this interpretation no longer employs day laborers. However, you state that, since the situation described in your letter is not uncommon in your area, you still wish to receive a response. You also have advised us that you may use the guidance for publication of an article in a newsletter. Determinations of compliance, eligibility and other issues under the FMLA are fact-specific. Since the particular situation for which you originally requested guidance no longer exists, and no additional facts regarding that situation can be obtained, the following is provided as general guidance regarding the issue raised. Existence of any other factual or historical background not contained in your request might require a different conclusion than the one expressed herein.

The FMLA at § 101(4)(A)(i) and its implementing regulations at 29 CFR Part 825.104(a) define an "employer" as "any person engaged in commerce or in any industry or activity affecting commerce who employs 50 or more employees for each working day during each of 20 or more calendar workweeks in the current or preceding calendar year." Several concepts that are critical in determining who is counted toward the FMLA's "50 or more employees" coverage test are discussed below.

First, it is necessary to determine if an employment relationship exists as distinguished from a contractual one. The FMLA at § 101(3) defines the terms "employ" and "employee" as having the same meaning given such terms in the Fair Labor Standards Act of 1938, as amended (FLSA). Under the FLSA an employee, as distinguished from a person who is engaged in a business of his or her own, is one who, as a matter of economic reality, follows the usual path of an employee and is dependent upon the business which he or she serves.[1] You have not disputed that the client firm's temporary help employees and occasional day laborers are, in fact, employees.

Second, it is necessary to determine if employees (as opposed to contractors) of an employer have a continuing employment relationship with the employer. The FMLA's legislative history states that the language "employs 50 or more employees for each working day during each of 20 or more calendar workweeks in the current or preceding calendar year" parallels language used in Title VII of the Civil Rights Act of 1964 (Title VII), and is intended to receive the same interpretation. [See *Report from the Committee on Labor and Human Resources (S. 5),* Report 103-3, January 27, 1993, p. 22, and *Report from the Committee on Education and Labor* (H.R. 1), *Report 103-8*, Part 1, February 2, 1993, p. 33.] The Supreme Court has interpreted this language under Title VII as meaning "employ" in the sense of maintain on the payroll. See Walters v. Metropolitan Educational Enterprises, 519 U.S. 202 (1997).

As you correctly note in your letter, employees on paid and unpaid leaves of absence are counted as long as there is a reasonable expectation that the employee will return to active employment. However, where there is no continuing employment relationship (e.g., when an employee is temporarily or indefinitely laid off), or where the employment relationship does not continue for each working day of the workweek (e.g., when an employee begins or ends employment with an employer midweek), the employee is not counted for FMLA coverage and eligibility purposes.[2] See § 825.105(c) and (d).

Finally, pursuant to § 825.106 of the FMLA regulations, a temporary help agency and an employer who hires employees from the agency may be considered joint employers for purposes of determining employer coverage and employee eligibility. The FMLA implementing regulations utilize standards

established under the FLSA to determine whether the employment of the same employee by two employers is to be considered joint employment or separate and distinct employment. See § 825.106(a). The determination depends upon all the facts in the particular case. Generally, a joint employment relationship will be considered to exist where:

1. there is an arrangement between employers to share an employee's services or to interchange employees;
2. one employer acts, directly or indirectly, in the interest of the other employer in relation to the employee; or,
3. the employers are not completely disassociated with respect to the employee's employment and may be deemed to share control of the employee, directly or indirectly, because one employer controls, is controlled by, or is under common control with the other employer.

Using these principles, the Department believes that a joint employment relationship ordinarily exists, for purposes of the FMLA, where a temporary agency supplies employees to a client employer. Employees who are jointly employed by two employers must be counted by both employers, whether or not maintained on only one of the employer's payroll in a record-keeping sense, in determining employer coverage and employee eligibility under the FMLA. See § 825.106(b) and (d).

Your letter describes a situation in which a client employer has 42 full and part time employees on the payroll, routinely employs five or six employees who are provided by a temporary agency (routine temps), and from time to time uses day laborers who are also provided by a temporary agency. You ask several questions regarding if and how these employees should be counted for purposes for employer coverage. It is our position that the "routine temp" as well as the day laborers, as described in you letter, are jointly employed by the temporary help firm and your client firm. However, whether there is a continuing employment relationship for the purposes of FMLA coverage would depend upon all the circumstances in the individual case.

Based on the principles stated above, the following general examples are provided. In each example we assume, based on the limited information provided, that the routine temps work each day of the week for the client employer:

Example One: The temporary service agency provides the client firm with five day laborers in addition to the five or six routine temps. The same five day laborers work for the client company all week. In this example, the client firm would count the 42 full and part time regular employees, the five or six routine temps, and the five day laborers, as the day laborers are jointly employed by the client employer each working day of the week and there remains a continuing employment relationship with the client employer for the week.

Total employees for the week: 52 or 53. This week would be counted toward the 20 workweek threshold.

Example Two: In addition to the client firm's regular employees and the five or six routine temps, the temporary service provides three day laborers each day, but not the same three workers.

Your client would count the firm's regular employees and the five or six routine temps as in Example One above. The day laborers in this example need not be counted as no day laborer worked for the client employer each day of the week or appeared to have a continuing employment relationship with the client employer.

Total employees for the week: 47 or 48. This week would not be counted toward the 20 workweek threshold for the client employer.

Example Three: The client firm needs six day laborers one day and three each of the following three days, in addition to the 42 regular employees and five or six routine temps. In this case, the client firm would count its 42 regular employees and five or six routine temps. The day laborers need not be counted as no day laborer worked for the client employer each working day of the week or appeared to have a continuing employment relationship with the client employer.

Total employees for the week: 47 or 48. As in Example Two, this week would not be counted toward the 20 workweek threshold for the client employer.

Finally, you question whether the owner of the client company would be counted for the 50-employee threshold test for the FMLA coverage. The answer to this question is fact specific and dependent upon whether an employment relationship existed between the business entity and the "owner." See Clackamas Gastroenterology Assoc. P.C. v. Wells, 123 S. Ct. 1673 (2003). Unfortunately, there was not enough information in your inquiry for us to make such a determination. However, in general, whether an individual is a true owner or partner as opposed to an employee depends on whether he or she acts independently and participates in management or instead is subject to the control of the organization. Clackamas, 123 S. Ct. at 1680.

This opinion is based exclusively on the facts and circumstances described in your request and is given on the basis of your representation, explicit or implied, that you have provided a full and fair description of all the facts and circumstances which would be pertinent to our consideration of the question presented. Existence of any other factual or historical background not contained in your request might require a different conclusion than the one expressed herein. You have represented that this opinion is not sought by a party to pending private litigation concerning the issue addressed herein. You have also represented that this opinion is not sought in connection with an investigation or litigation between a client or firm and the Wage and Hour Division or the Department of Labor.

We trust that we have been responsive to your inquiry.

Sincerely,

Tammy D. McCutchen
Administrator

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

[1] See Rutherford Food Corp. V. McComb, 331 U.S. 722 (1947); Goldberg v. Whitaker House Cooperatives, Inc., 336 U.S. 28 (1961): Walling v. Portland Terminal Co., 330 U.S. 148 (1947); and Walling v. American Needlecrafts, Inc., 139 F. 2d 60, (6th Cir. 1943).

[2] Part-time employees, like full-time employees, are considered to be employed each working day of the calendar week, as long as they are maintained on the payroll.

U.S. Department of Labor
Employment Standards Administration
Wage and Hour Division
Washington, D.C. 20210

May 25, 2004 **FMLA2004-2-A**

Dear ***Name****,*

Thank you for your letters dated July 7, 1998, addressed to Ms. Michelle Bechtoldt, formerly of the Office of Enforcement Policy, Family and Medical Leave Act Team, in regard to medical recertification issues under the Family and Medical Leave Act of 1993 (FMLA). You have requested clarification of Regulations 29 Part 825 in regard to recertification issues

You agreed in a telephone conversation on February 27, 2004, that it would be appropriate to combine our response to your inquiries in one letter. We apologize for the long delay in providing this response.

The Wage and Hour Division of the U.S. Department of Labor administers the FMLA for all private, state and local government employees, and some federal employees. Although determinations of coverage, eligibility and other issues of compliance under the FMLA are fact intensive, we trust that the following information will provide the clarification you requested.

1. Minimum recertification period when no minimum duration of capacity is specified in the medical certification.

You understand that the FMLA allows an employer to request recertification every 30 days for pregnancy, chronic or permanent/long term conditions, citing four scenarios involving such conditions, none of which have a minimum duration of incapacity specified in the medical certification.[1] You request that we confirm this understanding or explain our basis for disagreement.

We agree with your understanding, provided the recertification is requested in connection with an absence. Section 103(e) of the FMLA states the employer may require subsequent recertifications "on a reasonable basis." The FMLA regulations at §825.308(a) limit recertification for pregnancy, chronic, or permanent/long-term serious health conditions, when no minimum duration of incapacity is specified on the medical certification (as discussed in §825.308(b)), to no more often than every 30 days, provided the recertification is done only in connection with an absence. If circumstances have changed significantly, or the employer receives information which casts doubt upon the continuing validity of the certification, recertification may be requested more frequently than every 30 days.

2. Minimum recertification period with Friday/Monday absence pattern.

You understand that a pattern of Friday/Monday absences can constitute "information that casts doubt upon the employee's stated reason for the absence" (§825.308(a)(2)), thus allowing an employer to request recertification more frequently than every 30 days.

We agree with your understanding, provided there is no evidence that provides a medical reason for the timing of such absences and the request for recertification is made in conjunction with an absence. A recertification under these circumstances could thus be justified, for example, if a medical certification indicated the need for intermittent leave for two or three days a month due to migraine headaches, and the employee took such leave every Monday or Friday (the first and last days of the employee's work week).

3. Informing medical provider of pattern of Monday/Friday or apparent excessive absences, and asking for clarification.

You understand that an employer, when requesting medical certification or recertification, may inform the health care provider that the employee has a pattern of Friday/Monday or apparent excessive absences. You add that you understand that an employer who has observed such a pattern of potential abuse may ask the health care provider, as part of the certification (and subsequent recertification) process, if this pattern of absence is consistent with the employee's serious health condition. You recognize that an

employer's direct contact with the employee's health care provider is prohibited, but you understand that this question could be added to the medical certification form given to the employee for completion by the health care provider.[2]

The FMLA does not prohibit an employer from including a record of an employee's absences along with the medical certification form for the health care provider's consideration in determining the employee's likely period of future absences. Nor does the FMLA prohibit an employer from asking, as part of the recertification process, whether the likely duration and frequency of the employee's incapacity due to the chronic condition is limited to Mondays and Fridays.

Further, please be aware that Regulation §825.307(a) permits a health care provider representing the employer to contact the employee's health care provider for purposes of clarifying the information in the medical certification. Such contact may only be made with the employee's permission.

This opinion is based exclusively on the facts and circumstances described in your request and is given on the basis of your representation, explicit or implied, that you have provided a full and fair description of all the facts and circumstances which would be pertinent to our consideration of the question presented. Existence of any other factual or historical background not contained in your request might require a different conclusion than the one expressed herein. You have represented that this opinion is not sought by a party to pending private litigation concerning the issue addressed herein. You have also represented that this opinion is not sought in connection with an investigation or litigation between a client or firm and the Wage and Hour Division or the Department of Labor.

We hope that this has been responsive to the questions you have raised. If I can be of further assistance, please do not hesitate to contact me.

Sincerely,

Tammy D. McCutchen
Administrator

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

[1] Scenario One: An employee's Health Care Provider (HCP) certifies her migraine headaches will last indefinitely. Scenario Two: An employee's HCP certifies a chronic serious health condition (diabetes) and provides no time frame for the duration of the condition. Scenario Three: The employee's chronic serious health condition (asthma) is certified to last for an indefinite period, with possible episodes of incapacity (coinciding with pollen season) over a three month period. Scenario Four: The certification again specifies an indefinite period, but indicates a need for breathing tests and treatments to be conducted over the next three months.

[2] Under the Health Insurance Portability and Accountability Act (HIPAA), 104 P.L. 191, 42 USC §1320d, covered entities (such as HCPs) are subject to certain standards regarding the use and disclosure of an individual's protected health information. (See 45 CFR Parts 160 and 164, administered by the U.S. Department of Health and Human Services, Office for Civil Rights.) In general, the HIPAA does not prohibit covered entities from releasing an individual's protected health information to that individual. An employee's failure to provide information an employer is entitled to under the FMLA could jeopardize the employee's FMLA leave entitlement.

U.S. Department of Labor
Employment Standards Administration
Wage and Hour Division
Washington, D.C. 20210

October 4, 2004 **FMLA2004-3-A**

Dear ***Name****,

Thank you for your letter regarding the substitution of paid leave for absences covered under the Family and Medical Leave Act of 1993 (FMLA). Specifically, you ask whether ***Name **** may offer enhanced sick leave benefits to employees beyond what the FMLA mandates, contingent upon the following: (1) ***Name **** receives additional information from the employee verifying the basis for the requested leave beyond that required under the FMLA, and (2) ***Name **** does not discriminate against individuals taking FMLA-qualified leaves versus other types of leaves in requesting such information.

Name * sick leave policy, ***Name ****, allows supervisors to require that employees who are absent because of illness provide "proof of illness" (by way of a doctor's note or otherwise) in order to receive paid sick leave. Proof of illness may be required from all employees under the plan, including those whose absences are covered under Section 102(a)(1)(D) of the FMLA and who have previously submitted medical certifications. You advise that the ***Name **** was in effect prior to the FMLA enactment and that similar ***Name **** exist for employees covered by collective bargaining agreements and for employees who are not covered under ***Name **** (including managers). You request an opinion from our office on whether ***Name **** complies with the FMLA.

The ***Name **** defines an "incidental absence" as the first seven consecutive calendar days or less that an employee is absent from work due to personal illness. As you have described the ***Name ****, proof of illness is not normally requested for the majority of employees subject to the plan. However, it is within the supervisor's right to request proof of illness from any employee if the supervisor has reason to believe that the employee may not be too sick to work or if the employee has a certain pattern or trend of absence which casts doubt upon the legitimacy of his/her claim to be too sick to work, such as a Monday/Friday absence pattern.

You advise that the ***Name **** are administered separately from FMLA leave policies and that it is possible for an absence to be paid under the ***Name **** and not approved as FMLA qualifying, and vice versa. You state that employees who take FMLA-qualifying leave for their own serious health conditions but fail to provide the proof of illness when requested receive unpaid, FMLA-protected leave but are not eligible for paid sick leave. Employees may substitute accrued personal or vacation leave for FMLA-qualifying absences without being required to provide proof of illness. You state that the ***Name **** specifically provides that "the fact that an employee has numerous FMLA-approved absences is not a reason to require proof of illness in order for the employee to receive paid sick leave for an incidental absence, without additional facts such as a Monday-Friday absence pattern, absence which coincides with a holiday, absence which coincides with overtime assignments, etc."

The FMLA entitles eligible employees of covered employers to take up to 12 weeks of unpaid, job protected leave each year – with the maintenance of any group health insurance coverage – for specified family and medical reasons. Section 102(d) permits the substitution of certain paid leaves for the unpaid FMLA leave. Section 102(d)(2) provides that an employee may elect, or an employer may require, the employee to substitute certain accrued paid vacation leave, personal leave, family leave, or sick or medical leave for the unpaid leave provided under the Act. FMLA's legislative history indicates that the purpose of Section 102(d)(2) was "to provide that specified paid leave which has accrued but has not yet been taken, may be substituted for the unpaid leave under this act in order to mitigate the financial impact of wage loss due to family and temporary medical leaves." (House Report 103-8, Feb. 2, 1993, p. 38.)

While the employer may not limit the substitution of accrued paid vacation or personal leave (see 29 C.F.R. 825.207(e)), the employer may limit the substitution of paid sick or medical leave to circumstances which meet the employer's usual requirements for the use of such paid leave (see Section 102(d)(2)(B) and 29 C.F.R. 825.207(c)). The regulations state that "an employer is not required to allow substitution of paid sick or medical leave for unpaid FMLA leave 'in any situation' where the employer's uniform policy would not normally allow such paid leave." 29 C.F.R. 825.207(c).

If, as you represent, ***Name ** paid sick leave program is uniformly applied to absences caused by illness regardless of whether the absences are FMLA-qualifying, and if employees may take unpaid FMLA leave or substitute accrued vacation or personal leave should they choose not to provide the additional proof of illness required to receive paid sick leave, then the ***Name ** would comply with the FMLA.

Please note that in responding to your inquiry, we have assumed that all FMLA absences at issue are for FMLA-qualifying reasons. In your letter you raise the issue of seeking additional documentation pursuant to the ***Name ** for an employee you believed was potentially not "too sick to work" (the standard in your plan) but on FMLA-covered leave. We note that if an employer receives information that casts doubt upon the validity of the employee's stated reason for the FMLA-covered absence, the employer may request recertification. See 29 C.F.R. § 825.308; see also DOL Opinion Letter dated May 25, 2004 (finding that a pattern of Friday/Monday absences can constitute "information that casts doubt upon the employee's stated reason for the absence," and clarifying that employers can inform the health care provider of such an absence pattern as part of the recertification process.) Moreover, we note that FMLA protections do not apply where an employee fraudulently obtains FMLA leave. See 29 C.F.R. § 825.312(g).

This opinion is based exclusively on the facts and circumstances described in your request and is given on the basis of your representation, explicit or implied, that you have provided a full and fair description of all the facts and circumstances which would be pertinent to our consideration of the question presented. Existence of any other factual or historical background not contained in your request might require a different conclusion than the one expressed herein. You have represented that this opinion is not sought by a party to pending private litigation concerning the issue addressed herein. You have also represented that this opinion is not sought in connection with litigation between a client or firm and the Wage and Hour Division or the Department of Labor.

Sincerely,

Alfred B. Robinson, Jr.
Acting Administrator

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

U.S. Department of Labor
Employment Standards Administration
Wage and Hour Division
Washington, D.C. 20210

October 25, 2004 **FMLA2004-4**

Dear ***Name****

This is in response to your letter of January 9, 2004, regarding an employee's rights under the Family and Medical Leave Act of 1993 (FMLA) and employer required drug testing. You ask if an employer may require an employee returning from FMLA qualifying leave to undergo drug testing within three days of the employee's return to work. You state that employees who refuse to submit to the drug testing are treated as insubordinate.

The FMLA entitles eligible employees of covered employers to take up to 12 weeks of unpaid, job-protected leave each year – with continuation of group health insurance coverage under the same conditions as prior to leave – for specified family and medical reasons. However, to be eligible for these FMLA protections, employees must work for a covered employer, have worked for their employer for at least 12 months, have worked at least 1,250 hours during the 12 months preceding the start of leave, and work at a site where the employer employs at least 50 employees at the site or within 75 miles of the site. The 12 months the employee has to have worked do not have to be consecutive.

Eligible employees are entitled to unpaid FMLA leave for any of the following reasons: (1) the birth of a son or daughter, and to care for the newborn child within one year of birth, (2) the placement with the employee of a son or daughter for adoption or foster care, and to care for the newly placed child within one year of placement, (3) to care for the employee's spouse, son or daughter, or parent who has a serious health condition, and (4) for a serious health condition that makes the employee unable to perform the essential functions of his/her job.

When an employee is returning to work after FMLA leave, section 104(a)(4) of the FMLA permits an employer to require a "fitness for duty" test if the employer has a uniformly-applied policy or practice that requires all similarly situated employees who take leave for their own serious health conditions to obtain and present certification from their health care providers that they are able to resume work. An employer may seek fitness-for-duty certification only with regard to the particular health condition that caused the employee's need for FMLA leave. 29 C.F.R. 825.310(c). However, if State or local law or the terms of a collective bargaining agreement govern an employee's return to work, those provisions shall be applied. Nothing in the FMLA prohibits an employer from requiring an employee to submit to drug testing once the employee has returned to work. Therefore, the employer's actions do not violate the FMLA.

Responsibility for investigating allegations of violations of the FMLA has been delegated to the district offices of the Wage and Hour Division. If you have additional questions, you may contact the nearest Wage and Hour District Office located at 211 W. Fort Street, Room 1317, Detroit, Michigan, 48226, telephone (313) 226-7447.

This opinion is based exclusively on the facts and circumstances described in your request and is given on the basis of your representation, explicit or implied, that you have provided a full and fair description of all the facts and circumstances which would be pertinent to our consideration of the question presented. Existence of any other factual or historical background not contained in your request might require a different conclusion than the one expressed herein. You have represented that this opinion is not sought by a party to pending private litigation concerning the issue addressed herein. You have also represented that this opinion is not sought in connection with an investigation or litigation between a client or firm and the Wage and Hour Division or the Department of Labor.

Sincerely,

Rosemary E. Sumner
Office of Enforcement Policy
Family and Medical Leave Act Team

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

U.S. Department of Labor
Employment Standards Administration
Wage and Hour Division
Washington, D.C. 20210

August 26, 2005 **FMLA2005-1-A**

Dear ***Name****,

This is in response to your letter requesting an opinion to clarify issues surrounding the application of the Family and Medical Leave Act of 1993 (FMLA), 29 U.S.C. 2601 et seq., to an absence for the placement of a child for adoption or foster care. You specifically inquire about an employee who has a child placed in the home for foster care and then, after a period of one or more years, decides to adopt that same child. You cite the FMLA regulations at 29 CFR 825.201 that state, in part, "entitlement to leave for a birth or placement for adoption or foster care expires at the end of the 12-month period beginning on the date of the birth or placement…," and ask which placement date (for foster care or for adoption) qualifies the employee for leave entitlement or if both placement dates qualify for FMLA leave as separate events. You also inquire as to whether or not taking an adopted child on a vacation to introduce him/her to extended family can be a qualifying event under the FMLA.

The FMLA entitles eligible employees of covered employers to take up to 12 weeks of unpaid, job-protected leave each year – with continuation of group health insurance coverage under the same conditions as prior to leave and reinstatement to the same or equivalent position – for specified family and medical reasons. In answering your inquiry, we assume you refer to a covered employer, an eligible employee and that all other applicable criteria for FMLA leave have been met.

As you are aware, FMLA section 102(a)(1)(B) and the regulations at 29 CFR 825.112(a)(2) allow an eligible employee to take leave for the placement of a son or daughter with the employee for adoption or foster care. In addition, section 102(a)(2) of the Act provides that "[t]he entitlement to leave…for a birth or placement of a son or daughter shall expire at the end of the 12-month period beginning on the date of such birth or placement."

The regulations also discuss the timing of when an employee may use FMLA leave for purposes of adoption or foster care placements. Regulation 825.200(a) provides that an eligible employee's FMLA leave entitlement is limited to a total of 12 workweeks of leave during any 12-month period for, among other purposes, the "placement with the employee of a son or daughter for adoption or foster care, and to care for the newly placed child" (emphasis added). The regulation is based on the Act's legislative history, which similarly emphasizes that the leave is available to care for a "child newly placed with the employee for adoption or foster care." Senate Report No. 103-3, p.24. The statutory focus on the date of placement and the legislative history indicate that only the initial date of placement with a family triggers the right to leave.

In the scenario you provide, the child would be "newly placed" at the time of the foster care placement rather than when the subsequent adoption occurs. Therefore, only the placement for foster care would be a FMLA qualifying event.

You also ask whether taking an adopted child on vacation to meet extended family members constitutes a FMLA qualifying event. The FMLA does not require an employer to grant FMLA leave for the purpose of taking an adopted child on vacation to meet extended family. FMLA section 102(b) provides that leave taken for the placement of a son or daughter with the employee for adoption or foster care "shall not be taken by an employee intermittently or on a reduced leave schedule unless the employee and the employer of the employee agree otherwise." Intermittent leave is leave taken in separate blocks of time for the same FMLA-qualifying reason. In other words, FMLA leave for the placement of a child for foster care or adoption needs to be taken in one block of time, unless the employer and employee agree that the leave can be taken intermittently.

Nothing in the FMLA, however, prohibits the employee from introducing his or her newly placed son or daughter to extended family members while taking leave for the placement of the child. The initial

placement of the child for adoption or foster care would be the qualifying event. While on leave for the placement, as a part of integrating the child into your employee's family, he or she could introduce the child to the extended family.

This opinion is based exclusively on the facts and circumstances described in your request and is given on the basis of your representation, express or implied, that you have provided a full and fair description of all the facts and circumstances that would be pertinent to our consideration of the questions presented. Existence of any other factual or historical background not contained in your request might require a different conclusion than the one expressed herein. You have represented that this opinion is not sought by a party to a pending private litigation concerning the issue addressed herein. You have also represented that this opinion is not sought in connection with an investigation or litigation between a client or firm and the Wage and Hour Division or the Department of Labor.

Sincerely,

Alfred B. Robinson, Jr.
Deputy Administrator

Enclosures: Family and Medical Leave Act of 1993, sections 102(a)(1)(B), 102(a)(2) and 102(b)(1)
29 CFR 825.112(a)(2) and 825.201

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

U.S. Department of Labor
Employment Standards Administration
Wage and Hour Division
Washington, D.C. 20210

September 14, 2005 **FMLA2005-2-A**

Dear ***Name****,

This is in response to your request for clarification regarding the application of the medical certification provisions of the Family and Medical Leave Act of 1993 (FMLA), 29 U.S.C. § 2601 *et seq*. You state you understand that an employee who qualifies for FMLA leave for his or her own serious health condition may be asked to provide a new medical certification, not just a recertification, for his or her first FMLA-absence in a new leave year. You request confirmation that a second and third opinion can be sought on this new certification, even though the employee's serious health condition was previously certified, and FMLA leave approved, in previous years. We are aware that your employer is covered under Title I of the FMLA, and we assume for the purposes of this letter that your inquiry relates to eligible employees who have requested and taken leave in more than one FMLA 12-month leave year for the same qualifying serious health condition.

Background

The FMLA entitles eligible employees of covered employers to take up to 12 weeks of unpaid, job-protected leave in a designated 12-month leave period – with continuation of group health insurance coverage under the same conditions as prior to leave – for specified family and medical reasons. 29 C.F.R. § 825.200(c) permits four methods for determining the 12-month leave period: (1) a calendar year; (2) any fixed 12-month leave year; (3) a 12-month period measured forward from the date any employee's first FMLA leave begins; or, (4) a "rolling" 12-month period measured backward from the date an employee uses any FMLA leave. Once the employer chooses the 12-month leave period, it must be applied consistently and uniformly to all employees, with certain limited exceptions.

Medical certification issued by a health care provider may be requested for FMLA leave for a serious health condition of the employee or the employee's spouse, child, or parent. *See* 29 U.S.C. § 2613 and 29 C.F.R. § 825.305. The purpose of the medical certification is to allow employers to obtain information from a health care provider to verify that an employee, or the employee's ill family member, has a serious health condition, the likely periods of absences, and general information regarding the regimen of treatment. When requested, medical certification is a basic qualification for FMLA-qualifying leave for a serious health condition, and the employee is responsible for providing such certification to his or her employer. If an employee fails to submit a requested certification, the leave is not FMLA-protected leave. See 29 C.F.R. § 825.312(b).

Where the employer has reason to doubt the validity of the medical certification, the employer, at its own expense, may require the employee to obtain a second opinion and, if the employee's health care provider's certification and the second opinion certification conflict, a third opinion certification. *See* 29 C.F.R. § 825.307.

Subsequent recertification of the same serious health condition may be requested on a reasonable basis. *See* 29 U.S.C. § 2613(e). The regulations define the parameters under which recertification may be requested. *See* 29 C.F.R. § 825.308. Recertification is at the employee's expense unless the employer provides otherwise and second and third opinions may not be required on recertifications (§ 825.308(e)).

Medical Certification in a New 12-Month Leave Period

29 U.S.C. § 2612(a)(1)(C) and (D) of the FMLA entitle an eligible employee to 12 workweeks of leave for a serious health condition during the 12-month period selected by the employer [29 C.F.R. 825.200(b)] – subject to the medical certification requirements in 29 U.S.C. § 2613 of the Act. Medical certification in the new 12-month leave year is similar to the issue of retesting of the 1,250 hours-of-service employee eligibility criterion addressed in the FMLA-112 opinion letter dated September 11, 2000, copy enclosed. In that letter, we opined that an employee's eligibility, once satisfied for intermittent leave for a particular condition, would last through the entire current 12-month period FMLA leave year designated by the

employer for FMLA purposes. However, if the employee used leave in a new FMLA leave year, the employer could reassess the employee's eligibility for FMLA leave at that time. Our analysis was consistent with *Barron v. Runyon*, 11 F. Supp. 2d 676 (E.D. Va. 1998), where the court concluded that FMLA leave "cannot be taken 'forever' on the basis of one leave request. Instead the statute grants an employee twelve weeks of leave per twelve-month period, not indefinitely." 11 F. Supp. 2d at 683.

Given the statutory focus on the leave year, our interpretation regarding new medical certifications is consistent with our interpretation on retesting the 1,250 hours-of-service employee eligibility criterion for the first absence in a new 12-month leave year for employees taking intermittent leave for the same serious health condition. It is our opinion that an employer may reinitiate the medical certification process with the first absence in a new 12-month leave year. A second and third medical opinion, as appropriate, could then be requested in any case in which the employer has reason to doubt the validity of the new medical certification. This is the case despite the fact that the employer had requested recertification in the previous 12-month leave year. Such a conclusion is also consistent with FMLA's purpose of balancing the interests of employees who need leave with the interests of employers in the operation of their businesses. *See* 29 U.S.C. § 2601(b).

This opinion is based exclusively on the facts and circumstances described in your request and is given on the basis of your representation, express or implied, that you have provided a full and fair description of all the facts and circumstances that would be pertinent to our consideration of the question presented. Existence of any other factual or historical background not contained in your request might require a different conclusion than the one expressed herein. You have represented that this opinion is not sought by a party to pending private litigation concerning the issue addressed herein. You have also represented that this opinion is not sought in connection with an investigation or litigation between a client or firm and the Wage and Hour Division or the Department of Labor.

Sincerely,

Alfred B. Robinson, Jr.
Deputy Administrator

Enclosure: FMLA-112

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

U.S. Department of Labor
Employment Standards Administration
Wage and Hour Division
Washington, D.C. 20210

November 17, 2005 **FMLA2005-3-A**

Dear ***Name****

This is in response to your request for clarification of a Family and Medical Leave Act (FMLA) opinion letter (FMLA-112, enclosed). Specifically, you wish to confirm that your method of tracking an employee's leave balance when taking intermittent FMLA leave during the "rolling" 12-month leave period complies with the Family and Medical Leave Act of 1993, 29 U.S.C. § 2601 *et seq*. Secondly, you ask whether employees may be disciplined under your attendance policy for absences that occur after they have exhausted their 12-week FMLA entitlement in the 12-month period. Finally, you question whether FMLA-112 allows the employee to have eligibility "renewed" and a "full new bank of annual FMLA hours" reissued every year. For the purposes of this letter, we assume that your company uses the "rolling" 12-month period to determine employee eligibility and track the amount of FMLA leave available for employee use.

The FMLA entitles eligible employees of covered employers to take up to 12 weeks of unpaid, job-protected leave each year – with continuation of group health insurance coverage under the same conditions as prior to leave and reinstatement to the same or equivalent position – for specified family and medical reasons. In answering your inquiry, we assume you refer to a covered employer, an eligible employee and that all other applicable criteria for FMLA leave have been met. *See* 29 U.S.C. §§ 2611; 2612(a); 29 C.F.R. §§ 825.104-.112, 825.114.

The leave entitlement requirements of the Act are found at 29 U.S.C.
§ 2612(a)(1) and state that eligible employees are entitled to 12 workweeks of leave in any 12-month period for specified qualifying medical conditions. "Any 12-month period" is defined in the regulations at 29 C.F.R. § 825.200(b), and allows an employer to elect:

- a calendar year,
- a fixed 12-month "leave year,"
- a 12-month period rolled forward from the date any employee's first FMLA leave begins, or
- a "rolling" 12-month period measured backward from the date an employee uses any FMLA leave.

Your questions pertain to the last option – the "rolling" 12-month period. Under the rolling 12-month period, "each time an employee takes FMLA leave the remaining leave entitlement would be any balance of the 12 weeks which has not been used during the immediately preceding 12 months." *See* 29 C.F.R. § 825.200(c).

Question #1: You state that an employee's leave was approved and first used on April 3 through May 12, a period of 6 weeks. The same employee then applied and was approved for intermittent leave for the same qualifying health condition for absences on July 17, August 8 and 9, November 14, and January 12, bringing the total leave used to 7 weeks (280 hours). On April 3 of the next year, the company began adding back FMLA hours used the previous year, with the balance updated daily. If no additional FMLA leave is used by May 12, the employee would have a leave balance of 11 weeks (440 hours), with an additional 8 hours added back on July 17, 16 hours added back for August 8 and 9, and so on. You ask whether this method is correct for tracking the usage and remaining FMLA leave entitlement under the "rolling" 12-month period.

Answer #1: Yes. The company is properly applying the rolling 12-month period for purposes of calculating the appropriate FMLA leave balances for this employee. Each time the employee takes FMLA leave, the remaining leave entitlement is the balance of the 12 weeks that has not been used during the immediately preceding 12 months.

Question #2: During the initial 12-month leave period, an employee used all but 16 hours of FMLA leave. This initial rolling 12-month period ends, and the employee is recertified for the same condition. In

time, a total of 24 hours is added to the employee's leave balance of 16 hours, giving the employee 40 hours of available FMLA leave. The next pay period the employee is absent a total of 56 hours, 2 days of which are unscheduled, and after the total available FMLA hours were exhausted. You ask whether the employee's absence on the two unprotected days can be subject to discipline under the employer's attendance policy if that policy normally issues occurrences for unscheduled absences.

Answer #2: Yes. As stated above, under the FMLA, an eligible employee is entitled to a *total* of 12 weeks of job-protected leave. Once those 12 weeks are exhausted, the employee is no longer eligible for the protections afforded by the Act.

Your summary paragraph indicates some potential confusion concerning the difference between the application of the rolling 12-month period used for entitlement purposes and the 1,250 hours of work in the preceding 12 months test used for eligibility purposes. As outlined in Opinion Letter FMLA-112, the rolling 12-month period applied to determining whether an eligible employee's leave entitlement has been exhausted is separate and distinct from testing an employee's **eligibility** for FMLA leave under the 1,250 hours of service test. The statute at 29 U.S.C. § 2611 and regulations at 29 C.F.R. § 825.110 require that eligibility for FMLA leave must be tested immediately preceding the commencement of leave for each qualifying condition. In other words, the employee maintains eligibility for 12 months **forward** from the point that it is established. In contrast, entitlement under the rolling 12-month period is measured **backward** from the date an employee uses any FMLA leave. The fact that an employee may be eligible for and takes leave for more than one FMLA-qualifying condition does not change the fact that an employee is entitled to a **total** of 12 weeks of FMLA leave within the rolling 12-month period. Thus, as you correctly noted, the number of available hours remaining in the employee's 12-week leave entitlement can change daily by adding back 12 months later any hours used on that particular date in the prior year.

This opinion is based exclusively on the facts and circumstances described in your request and is given based on your representation, express or implied, that you have provided a full and fair description of all the facts and circumstances that would be pertinent to our consideration of the question presented. Existence of any other factual or historical background not contained in your letter might require a conclusion different from the one expressed herein. You have represented that this opinion is not sought by a party to pending private litigation concerning the issue addressed herein. You have also represented that this opinion is not sought in connection with an investigation or litigation between a client or firm and the Wage and Hour Division or the Department of Labor.

Sincerely,

Alfred B. Robinson, Jr.
Deputy Administrator

Enclosure: Opinion Letter FMLA-112

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

U.S. Department of Labor
Employment Standards Administration
Wage and Hour Division
Washington, D.C. 20210

January 17, 2006 **FMLA2006-1-A**

Dear ***Name****:

This is in response to your letter asking whether, under certain circumstances, your client may require an employee to vacate employer-provided lodging while the employee is on leave pursuant to the Family and Medical Leave Act of 1993 (FMLA), 29 U.S.C. § 2601 *et seq*. We apologize for the delay in responding.

Your letter provides the basis for the following assumptions that we have used in answering this inquiry. Your client is the owner and operator of a self-storage business that provides on-site lodging for managers of the storage facilities. Your client provides managers with an on-site apartment for the convenience of the employer and without charge to the employee. Although a resident manager is not required to be on call when not on duty, the manager is expected to respond to customer service issues or emergency situations if the manager is there. The presence of a live-in manager is a "critical part of the operation" of your client's business, because it (1) deters crime, (2) is a "selling point" with prospective tenants, and (3) is much more efficient than paging an off-site manager who would have to drive to the facility. Your client will ask a manager on leave for a non-FMLA reason to move out of the apartment when the business begins to suffer because there is no resident manager. The timing of this temporary move depends on "a variety of factors including the age of the property, the mix of customers, the occupancy rate, the competition in the market, the availability of another employee, etc."

Your letter states that you consider the provision of lodging also to be a benefit to the employee-managers, and that your client proposes to treat managers on FMLA and non-FMLA leave in the same way. That is, the client would ask a resident manager who is on FMLA leave to vacate the employer-provided housing when the business requires that a manager in a non-leave status be on the premises. You further state that the employee on FMLA leave who has vacated the premises pursuant to such policy will have restoration rights, including the right to return to the employer-provided residence, at the end of the FMLA leave.

The FMLA entitles eligible employees of covered employers to take up to 12 weeks of unpaid, job-protected leave each year – with continuation of group health insurance coverage under the same conditions as prior to leave – for specified family and medical reasons. We assume your inquiry refers to a covered employer and an eligible employee.

The FMLA, at 29 U.S.C. § 2614(a), sets forth an employee's rights to restoration. Section 2614(a)(2) provides that the taking of FMLA leave may not result in the loss of any employment benefit accrued prior to the date of that leave. The regulations at 29 C.F.R. § 825.209 address whether an employee is entitled to benefits while using FMLA leave. Although the regulatory provisions primarily describe an employer's obligation under 29 U.S.C. § 2614(c) to maintain an employee's coverage under a group health plan, 29 C.F.R. § 825.209(h) states that an employee's entitlement to benefits other than the maintenance of group health coverage during a period of FMLA leave "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)." In the situation you describe, the employee's right to continued lodging would be determined by established employer policy. Because the employer would restore the employee to the apartment at the end of the FMLA leave, the employee would not be denied upon restoration any employment benefits accrued prior to the date of the FMLA-protected leave. *See* 29 U.S.C. § 2614(a); 29 C.F.R. § 825.215.

We agree with your conclusion that the situation you describe is different from the one in our opinion letter of November 5, 1993 (FMLA-15), in which the Wage and Hour Administrator stated that "[w]e would construe an employer's attempt to require an FMLA-eligible employee to vacate the employer-provided lodging during the term of an FMLA leave period as an attempt to interfere with or restrain an employee's attempt to exercise rights under the FMLA" in violation of the Act at 29 U.S.C. § 2615 and the regulations at 29 C.F.R. § 825.220. The letter prompting that opinion did not state that the employer had an

established policy (or intended to establish one) covering all employees with respect to FMLA and non-FMLA leave.

We believe requiring an employee to vacate the premises during a FMLA leave would not violate the Act under the circumstances you describe, which include your client adopting and applying a policy that provides similar treatment to employees on leave for both FMLA and non-FMLA reasons and restoration of the employer-provided lodging upon return from FMLA leave. It should be emphasized, however, that such a policy must be established and uniformly applied to non-FMLA absences in order to be available for FMLA absences. The FMLA at 29 U.S.C. § 2615(a) and the FMLA regulations at 29 C.F.R. § 825.220(c) prohibit discrimination against an employee for taking FMLA leave. We believe that requiring an employee who has taken FMLA leave to vacate employer-provided housing, when such action is not required of a similarly situated employee on non-FMLA leave, would constitute such impermissible discrimination.

This opinion is based exclusively on the facts and circumstances described in your request and is given based on your representation, express or implied, that you have provided a full and fair description of all the facts and circumstances that would be pertinent to our consideration of the question presented. Existence of any other factual or historical background not contained in your letter might require a conclusion different from the one expressed herein. You have represented that this opinion is not sought by a party to pending private litigation concerning the issue addressed herein. You have also represented that this opinion is not sought in connection with an investigation or litigation between a client or firm and the Wage and Hour Division or the Department of Labor.

Sincerely,

Alfred B. Robinson, Jr.
Deputy Administrator

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

U.S. Department of Labor
Employment Standards Administration
Wage and Hour Division
Washington, D.C. 20210

January 20, 2006 **FMLA2006-2**

Dear ***Name****:

This responds to your request for an advisory opinion under the Family and Medical Leave Act of 1993 (FMLA), 29 U.S.C. § 2601 et seq., with regard to the requirement for employer contributions to a multi-employer health plan.

You represent a multi-employer health plan that provides a "Disability Extension of Coverage" to participants whose "disability prevents [them] from engaging in any occupation or employment for remuneration or profit." Benefits for disabled participants are funded entirely from the plan's general reserves rather than from employer contributions during the period of disability. You state that the benefits provided by the health plan to disabled participants meet the requirements of 29 C.F.R. § 825.211(c), (d), and (e), relating to the continuation of employees' group health coverage while on FMLA leave, because coverage and benefits are maintained at the same level "for a period greater than the duration of any FMLA leave." However, the plan contains no provisions that explicitly address the FMLA or participants who are on FMLA leave. You inquire whether current employer contributions are required for a plan participant on FMLA leave due to the employee's own serious health condition who is provided with health benefits under the plan's "Disability Extension of Coverage" provision.

The FMLA regulations require an employer to continue contributing to a multi-employer health plan on behalf of an employee on FMLA leave, "unless the plan contains an explicit FMLA provision for maintaining coverage such as through pooled contributions by all employers party to the plan." See 29 C.F.R. § 825.211(b). The FMLA legislative history – on which the Department of Labor relied in drafting 29 C.F.R. § 825.211(b) – indicates that Congress expected employers to continue contributing to multi-employer health plans for the duration of an employee's FMLA leave, "unless the plan expressly provides for some other method of maintaining coverage . . . notwithstanding any terms of any collective bargaining or other agreement to the contrary." See H.R. Rep. No. 103-8, Pt. 1, at 44-45 (1993).

Your question assumes: (1) that the multi-employer health plan you describe continues to provide group health insurance coverage for all employees who take FMLA-covered leave for their own serious health conditions, as if they had been continuously employed during the FMLA leave period; and (2) the health plan provides benefits through its Disability Extension of Coverage rules, which require no current employer contributions. In this particular situation, if these rules do apply to all employees taking FMLA-covered leave for any condition that meets FMLA's definition of a serious health condition, 29 C.F.R. § 825.211(b) would not require the employer to make contributions on behalf of the employee using FMLA leave. This is because the multi-employer plan expressly provides a method of maintaining health insurance coverage during the FMLA leave through payments from the plan's reserves.

However, the FMLA would require that continued employer contributions be made to the multi-employer plan for employees with a qualifying FMLA serious health condition who would not meet the plan's Disability Extension of Coverage rules' definition of "disability" and would fall outside the plan's method for continuation of group health benefits. Additionally, employers would be required to make contributions to the plan for employees who take FMLA-qualifying leave for the birth and care of a newborn; for adoption or for placement of a son or daughter in foster care; and in order to care for a spouse, son or daughter, or parent with a serious health condition. This is because the plan would have no method for expressly maintaining group health insurance coverage for employees during their FMLA leave for these qualifying reasons. See 29 U.S.C. § 2612(a)(1); 29 C.F.R. §§ 825.112, -.114.

You also inquire whether an employer's failure to designate leave as FMLA leave under 29 C.F.R. § 825.700(a) affects the employer's duty to contribute to the plan during the leave. Although we do not believe it relevant to the answer of this specific question, you should be aware the U.S. Supreme Court invalidated the FMLA regulations at § 825.700(a), which provides categorical sanctions against employers who fail to designate FMLA-qualifying leave as FMLA leave. *See Ragsdale v. Wolverine Worldwide, Inc., 535 U.S. 81 (2002).*

An employee who is entitled to FMLA leave also is entitled to have his or her group health benefits continue in effect, whether the employer has properly designated the leave or not. See 29 U.S.C. § 2614(c)(1) ("[d]uring any period that an eligible employee takes leave under [the FMLA], the employer shall maintain coverage under any 'group health plan'… for the duration of such leave at the level and under the conditions coverage would have been provided if the employee had continued in employment continuously for the duration of such leave"). Therefore, the employer's failure to designate leave as FMLA leave would not affect the employer's obligation under the FMLA to make contributions to the multi-employer plan for employees taking FMLA-qualifying leave.

This opinion is based exclusively on the facts and circumstances described in your request and is given based on your representation, express or implied, that you have provided a full and fair description of all the facts and circumstances that would be pertinent to our consideration of the question presented. Existence of any other factual or historical background not contained in your letter might require a conclusion different from the one expressed herein. You have represented that this opinion is not sought by a party to pending private litigation concerning the issue addressed herein. You have also represented that this opinion is not sought in connection with an investigation or litigation between a client or firm and the Wage and Hour Division or the Department of Labor.

Sincerely,

Rosemary E. Sumner
Office of Enforcement Policy
Family and Medical Leave Act Team

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

U.S. Department of Labor
Employment Standards Administration
Wage and Hour Division
Washington, D.C. 20210

January 31, 2006 **FMLA2006-3-A**

Dear ***Name****:

Both the City and the Union have requested an interpretation regarding the application of the Family and Medical Leave Act of 1993 (FMLA), 29 U.S.C. § 2601 *et seq*., to a "cafeteria plan" under which the City allocates all or a portion of an employee's benefit plan allotment to pay for group health insurance. Based on the information you have provided, the Department's opinion is that those employees taking unpaid FMLA leave must have that portion of their cafeteria plan allotment allocated to group health insurance (including dental) premiums paid by the City in the same amount as paid prior to the start of FMLA leave.

You represent that the City allocates to each employee $452.08 per month under the cafeteria plan. From this sum, each employee must pay the premium for one of the City's group health plans with the balance of the allotment to be used, at the employee's option, to provide dental/disability/life insurance or compensation. You ask whether the FMLA requires the City to continue cafeteria plan health payments for an employee on unpaid FMLA leave if City policy requires all employees on unpaid leave of any kind to make their own group health coverage payments. City policy precludes accrual of additional benefits during unpaid leave. Although the City pays the group health insurance premium during a period of unpaid leave, it requires employees to repay the City for the premium payments upon the employee's return to work. City policy also requires that employees exhaust all accrued paid leave before taking unpaid FMLA leave. When FMLA leave is unpaid leave, no cafeteria plan allotment is provided during the leave. The City believes that it complies with the FMLA and thinks that if it paid the cafeteria plan allotment for an employee on unpaid FMLA leave, it would be discriminating against employees on other types of unpaid leave whose cafeteria plan allotments are not paid.

The Union disagrees with the City and believes that the portion of the allotment paying for an employee's group health insurance must be maintained during unpaid FMLA-qualifying leave. In practice, according to a telephone conversation a member of my staff had with the Union's representative, the City has agreed to pay this portion of the allotment until this office issues an opinion letter.

The FMLA provides that "during any period that an eligible employee takes leave under section 102, the employer shall maintain coverage under any 'group health plan' (as defined in section 5000(b)(1) of the Internal Revenue Code of 1986) for the duration of such leave at the level and under the conditions coverage would have been provided if the employee had continued in employment continuously for the duration of such leave." 29 U.S.C. § 2614(c)(1). The FMLA regulations state that the "benefit coverage during FMLA leave for medical care, surgical care, hospital care, dental care, eye care, mental health counseling, substance abuse treatment, etc., must be maintained during leave if provided in an employer's group health plan, including a supplement to a group health plan, whether or not provided through a flexible spending account or other component of a cafeteria plan." 29 C.F.R. § 825.209(b).

Consequently, as the FMLA and its regulations require maintenance on the same conditions of any group health plan coverage (whether or not provided through a flexible spending account or other component of a cafeteria plan), the Department takes the position that employees taking unpaid FMLA leave must have that portion of their cafeteria plan allotment allocated to group health insurance (including dental) premiums paid by the City in the same amount as paid prior to the start of FMLA leave. *See* 29 U.S.C. § 2614(c)(1); 29 C.F.R. § 825.209(a). Moreover, because the City provides the money for the group health insurance coverage when employees are working, it may not recover such payments for periods of FMLA leave. *See* 29 U.S.C. § 2614(c)(1).

An employee's entitlement to benefits other than group health insurance 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). Although the FMLA does not require the maintenance of benefits other than group health insurance during the period of the leave, at the end of an employee's FMLA leave "benefits must be resumed in the same manner and at the same levels as provided when the leave began, and subject to any changes in benefit levels that may have taken place during the period of FMLA leave." 29 C.F.R. § 825.215(d)(1). For example, if an employee

was covered by a life/disability insurance policy before taking leave but is not covered or coverage lapses during the period of unpaid FMLA leave, the employee cannot be required to meet any qualifications, such as taking a physical examination, in order to requalify for life/disability insurance upon return from leave. Accordingly, some employers may find it necessary to arrange for continued payment of costs to maintain such benefits or to pay the costs of these benefits during the period of FMLA leave in order to restore employees to equivalent benefits upon return from FMLA leave. However, the employer may recover the employee's share of those payments when the employee returns from leave. *See* 29 C.F.R. §§ 825.213(b), -.215(d)(1).

This opinion is based exclusively on the facts and circumstances described in your request and is given based on your representation, express or implied, that you have provided a full and fair description of all the facts and circumstances that would be pertinent to our consideration of the question presented. Existence of any other factual or historical background not contained in your letter might require a conclusion different from the one expressed herein. You have represented that this opinion is not sought by a party to pending private litigation concerning the issue addressed herein. You have also represented that this opinion is not sought in connection with an investigation or litigation between a client or firm and the Wage and Hour Division or the Department of Labor.

Sincerely,

Alfred B. Robinson, Jr.
Deputy Administrator

Enclosures:

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

U.S. Department of Labor
Employment Standards Administration
Wage and Hour Division
Washington, D.C. 20210

February 13, 2006 **FMLA2006-4-A**

Dear ***Name****:

This is in response to your letter requesting an advisory opinion under the Family and Medical Leave Act of 1993 (FMLA), 29 U.S.C. § 2601 *et seq*. Your letter concerns a client company that is subject to collective bargaining agreements (CBAs), many of which stipulate that in order for an employee to maintain group health insurance benefits for the following calendar year, the employee must work a specified number of hours in the preceding calendar year. You inquire whether FMLA leave taken during the year must be credited towards qualification for the following year's group health insurance benefits for employees subject to these agreements, or whether the employer can lawfully deny these employees' group health insurance benefits if the required hours are not worked because of FMLA leave. You do not specify whether the CBAs treat other types of paid or unpaid leave as hours worked.

In the scenario you describe, employees of your client are subject to CBAs that require at least 1500 hours of work in a calendar year in order to maintain group health insurance benefits for the following year. You ask us to assume that these employees currently have group health insurance benefits and that those benefits have been maintained for employees taking FMLA-qualifying leave in the current calendar year. Because of the FMLA leave taken, however, these employees will not work the 1500 hours required under the CBAs to qualify for the following year's benefits.

The FMLA entitles eligible employees of covered employers to take up to 12 weeks of unpaid, job-protected leave each year – with continuation of group health insurance coverage under the same conditions as prior to leave – for specified family and medical reasons. We assume your inquiry relates to a company that is covered by the Act and to eligible employees taking FMLA leave for a qualifying reason under the Act. *See* 29 U.S.C. §§ 2611-2612(a); 29 C.F.R. §§ 825.104-.112, 825.114.

The FMLA requires an employer to maintain coverage under any group health plan (as defined in 26 U.S.C. § 5000(b)(1)) for the duration of the eligible employee's FMLA leave at the level and under the conditions coverage would have been provided if the employee had been employed continuously for the duration of such leave. *See* 29 U.S.C. § 2614(c). The legislative history further explains that "[n]othing in [2614(c)] requires an employer to provide health benefits if it does not do so at the time the employee commences leave. [Section 2614(c)] is strictly a maintenance of benefits provision."
S. Rep. 103-3 at 31 (1993).

Pursuant to 29 U.S.C. § 2614(a)(2), "[t]he taking of leave under section [2612] shall not result in the loss of any employment benefit accrued **prior** to the date on which the leave commenced." (Emphasis added.) The FMLA goes on to clarify that a restored employee is not entitled to "the **accrual** of any seniority or employment benefits during any period of leave." *Id.* § 2614(a)(3)(A) (emphasis added). The regulations provide that "if the benefit plan is predicated on a pre-established number of hours worked each year and the employee does not have sufficient hours as a result of taking unpaid FMLA leave, the benefit is lost." 29 C.F.R. § 825.215(d)(5).

Where an employee is covered by a group health insurance plan at the time FMLA leave commences, the employer "shall maintain coverage … for the duration of such leave." 29 U.S.C. § 2614(c)(1). However, the FMLA does not require an employer to provide health insurance coverage if such coverage is not provided to the employee when the leave commences. As such, if the eligible employee is not entitled to group health insurance coverage prior to the start of FMLA-qualifying leave because he or she has not worked 1500 hours in the previous calendar year as required by the CBA, the employer is not required to provide health insurance coverage during the FMLA leave. Nor is the employer required to provide insurance coverage to an employee who does not meet the 1500 hours requirement due to FMLA leave the employee took in the prior year.

Moreover, the FMLA and its regulations prohibit employers from interfering with, restraining, or denying an employee's rights under this law. *See* 29 U.S.C. § 2615; 29 C.F.R. § 825.220. Specifically, 29 U.S.C.

§ 2652 and 29 C.F.R. § 825.700 describe the interaction between the FMLA and employer plans and provide that nothing in the FMLA diminishes an employer's obligation under a CBA to provide greater family or medical leave rights to employees than the rights established under the FMLA, nor may the rights established under the FMLA be diminished by a CBA. Therefore, if the contract provides that other types of leave, paid or unpaid, count as hours worked for purposes of determining eligibility for health insurance in the following year, the FMLA leave of an equivalent type would need to be treated in the same manner.

This opinion is based exclusively on the facts and circumstances described in your request and is given based on your representation, express or implied, that you have provided a full and fair description of all the facts and circumstances that would be pertinent to our consideration of the question presented. Existence of any other factual or historical background not contained in your letter might require a conclusion different from the one expressed herein. You have represented that this opinion is not sought by a party to pending private litigation concerning the issue addressed herein. You have also represented that this opinion is not sought in connection with an investigation or litigation between a client or firm and the Wage and Hour Division or the Department of Labor.

Sincerely,

Alfred B. Robinson, Jr.
Acting Administrator

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