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).*