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).*