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).*