**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).*