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).*