U.S. Department of Labor
Employment Standards Administration
Wage and Hour Division
Washington, D.C. 20210

December 17, 2003 **FMLA2003-5**

Dear ***Name****

Thank you for your letter of November 17, 2003, addressed to Kristine Iverson, Assistant Secretary for Congressional and Intergovernmental Affairs, on behalf of ***Name**** regarding the Family and Medical Leave Act of 1993 (FMLA). ***Name**** asks several questions concerning compliance issues with the FMLA.

The FMLA entitles eligible employees of covered employers to take up to 12 weeks of unpaid, job-protected leave each year – with continuation of group health insurance coverage under the same conditions as prior to leave – for specified family and medical reasons. Eligible employees are entitled to unpaid FMLA leave for any of the following reasons: (1) the birth of a son or daughter, and to care for the newborn child within one year of birth, (2) the placement with the employee of a son or daughter for adoption or foster care, and to care for the newly placed child within one year of placement, (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 the essential functions of his/her job.

Name* asks a number of general questions concerning the application of the FMLA. As determinations of coverage, employee eligibility and other compliance issues under the FMLA are fact-dependent, we will provide general guidance in answer to each of the questions.

1. Can an employer require an employee to exhaust accrued sick and vacation time while on paid leave?

Generally, pursuant to Regulations 29 CFR 825.207, an employer may require the employee to substitute accrued paid leave for unpaid FMLA-qualifying leave. However, an employer cannot require an employee to substitute, under FMLA, any paid vacation or other leave during the absence that would otherwise be covered by payment from plans covering temporary disabilities. Because the leave pursuant to a temporary disability benefit plan is not unpaid leave, the provision for substitution of paid leave is inapplicable. An employee's receipt of such payment precludes the employee from electing and prohibits the employer from requiring the substitution of any form of accrued paid leave for any part of the absence covered by such payments. However, the employer may designate the paid leave under a temporary disability plan as FMLA leave and count the leave as running concurrently for purposes of both the benefit plan and the FMLA leave entitlement. See 29 CFR 25.207(d).

2. Can something like a broken leg be designated as FMLA leave?

This depends on whether this condition meets the definition of a "serious health condition" as defined in the FMLA's implementing regulations at 29 CFR 825.114 (copy enclosed).

3. Are there repercussions for an employer who violates the FMLA but does not terminate the employee? (For example, the employer fails to notify the employee in the appropriate time, requires the employee to return to light duty, and contacts the employee's doctor.)

Potential remedies available to employees under the FMLA include reinstatement or promotion, lost wages and other compensation, employment benefits, or actual monetary loss sustained as a direct result of the violation, and (where leave is denied) requiring an employer to allow FMLA leave for an eligible employee for a qualifying reason. Employees may file complaints under the FMLA with their local Wage and Hour Division district office. Complaints are reviewed by the district offices and appropriate enforcement actions are taken to administratively resolve these complaints. The FMLA also provides that employees or the Department of Labor may file suit against an employer to enforce the provision of the Act.

You also ask about the designation of leave as FMLA leave. According to 29 CFR 825.208(a), in all circumstances, it is the employer's responsibility to designate leave, paid or unpaid, as FMLA-qualifying, and to give notice of the designation to the employee. Employers are prohibited under the FMLA from

interfering with, restraining, or denying the exercise of (or attempts to exercise) any rights provided by the Act. Failure to designate a portion of FMLA-qualifying leave as FMLA would not preempt an eligible employee's entitlement to FMLA protections for a period of leave that otherwise qualifies as FMLA leave.

As stated previously, determinations of compliance, eligibility and other issues of compliance under the FMLA are fact-specific. Based on the limited information provided in ***Name**** inquiry, we are unable to determine the application of the FMLA to his particular circumstances. For his information, we are enclosing the FMLA's implementing regulations and the *Compliance Guide to the Family and Medical Leave Act*. If, after reading this letter and the enclosed publications, ***Name**** has additional questions, he may contact the nearest Wage and Hour District Office located at 211 W. Fort Street, Room 1317, Detroit, Michigan 48226-32317; telephone, (313) 226-7447.

Sincerely,

Rosemary E. Sumner
Office of Enforcement Policy
Family and Medical Leave Act Team

Enclosure

cc: Washington, D.C., Office

*Note: * Name(s) withheld to preserve privacy, in accordance with 5 U.S.C. 552(b)(7).*