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

January 17, 2006 **FMLA2006-1-A**

Dear ***Name****:

This is in response to your letter asking whether, under certain circumstances, your client may require an employee to vacate employer-provided lodging while the employee is on leave pursuant to the Family and Medical Leave Act of 1993 (FMLA), 29 U.S.C. § 2601 *et seq*. We apologize for the delay in responding.

Your letter provides the basis for the following assumptions that we have used in answering this inquiry. Your client is the owner and operator of a self-storage business that provides on-site lodging for managers of the storage facilities. Your client provides managers with an on-site apartment for the convenience of the employer and without charge to the employee. Although a resident manager is not required to be on call when not on duty, the manager is expected to respond to customer service issues or emergency situations if the manager is there. The presence of a live-in manager is a "critical part of the operation" of your client's business, because it (1) deters crime, (2) is a "selling point" with prospective tenants, and (3) is much more efficient than paging an off-site manager who would have to drive to the facility. Your client will ask a manager on leave for a non-FMLA reason to move out of the apartment when the business begins to suffer because there is no resident manager. The timing of this temporary move depends on "a variety of factors including the age of the property, the mix of customers, the occupancy rate, the competition in the market, the availability of another employee, etc."

Your letter states that you consider the provision of lodging also to be a benefit to the employee-managers, and that your client proposes to treat managers on FMLA and non-FMLA leave in the same way. That is, the client would ask a resident manager who is on FMLA leave to vacate the employer-provided housing when the business requires that a manager in a non-leave status be on the premises. You further state that the employee on FMLA leave who has vacated the premises pursuant to such policy will have restoration rights, including the right to return to the employer-provided residence, at the end of the FMLA leave.

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. We assume your inquiry refers to a covered employer and an eligible employee.

The FMLA, at 29 U.S.C. § 2614(a), sets forth an employee's rights to restoration. Section 2614(a)(2) provides that the taking of FMLA leave may not result in the loss of any employment benefit accrued prior to the date of that leave. The regulations at 29 C.F.R. § 825.209 address whether an employee is entitled to benefits while using FMLA leave. Although the regulatory provisions primarily describe an employer's obligation under 29 U.S.C. § 2614(c) to maintain an employee's coverage under a group health plan, 29 C.F.R. § 825.209(h) states that an employee's entitlement to benefits other than the maintenance of group health coverage during a period of FMLA leave "is to be determined by the employer's established policy for providing such benefits when the employee is on other forms of leave (paid or unpaid, as appropriate)." In the situation you describe, the employee's right to continued lodging would be determined by established employer policy. Because the employer would restore the employee to the apartment at the end of the FMLA leave, the employee would not be denied upon restoration any employment benefits accrued prior to the date of the FMLA-protected leave. *See* 29 U.S.C. § 2614(a); 29 C.F.R. § 825.215.

We agree with your conclusion that the situation you describe is different from the one in our opinion letter of November 5, 1993 (FMLA-15), in which the Wage and Hour Administrator stated that "[w]e would construe an employer's attempt to require an FMLA-eligible employee to vacate the employer-provided lodging during the term of an FMLA leave period as an attempt to interfere with or restrain an employee's attempt to exercise rights under the FMLA" in violation of the Act at 29 U.S.C. § 2615 and the regulations at 29 C.F.R. § 825.220. The letter prompting that opinion did not state that the employer had an

established policy (or intended to establish one) covering all employees with respect to FMLA and non-FMLA leave.

We believe requiring an employee to vacate the premises during a FMLA leave would not violate the Act under the circumstances you describe, which include your client adopting and applying a policy that provides similar treatment to employees on leave for both FMLA and non-FMLA reasons and restoration of the employer-provided lodging upon return from FMLA leave. It should be emphasized, however, that such a policy must be established and uniformly applied to non-FMLA absences in order to be available for FMLA absences. The FMLA at 29 U.S.C. § 2615(a) and the FMLA regulations at 29 C.F.R. § 825.220(c) prohibit discrimination against an employee for taking FMLA leave. We believe that requiring an employee who has taken FMLA leave to vacate employer-provided housing, when such action is not required of a similarly situated employee on non-FMLA leave, would constitute such impermissible discrimination.

This opinion is based exclusively on the facts and circumstances described in your request and is given based on your representation, express or implied, that you have provided a full and fair description of all the facts and circumstances that would be pertinent to our consideration of the question presented. Existence of any other factual or historical background not contained in your letter might require a conclusion different from the one expressed herein. You have represented that this opinion is not sought by a party to pending private litigation concerning the issue addressed herein. You have also represented that this opinion is not sought in connection with an investigation or litigation between a client or firm and the Wage and Hour Division or the Department of Labor.

Sincerely,

Alfred B. Robinson, Jr.
Deputy Administrator

***** *Note: The actual name(s) was removed to preserve privacy in accordance with 5 U.S.C. 552 (b)(7).*