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

December 12, 1996 **FMLA-86**

Dear ***Name****,

This is in reference to our letter to you dated April 7, 1995, in connection with an inquiry you received from ***Name****, Human Resources Manager for ***Name****, in which we expressed the view that an employee who has been incapacitated for more than three days and treated at least once by a health care provider, which results in a regimen of continuing treatment prescribed by the health care provider, may not have a qualifying "serious health condition" within the meaning of the Family and Medical Leave Act (FMLA). Upon further review of this issue and of the conclusion expressed in our letter, we have determined that our letter expresses an incorrect view, being inconsistent with the Department's established interpretation of qualifying "serious health conditions" under the FMLA regulations, 29 CFR Section 825.114.

As you know, "eligible employees" (those who have worked at least 12 months for their employer, at least 1,250 hours over the previous 12 months, and who work at a location where the employer employs at least 50 employees within 75 miles) may take qualifying leave under the FMLA for, among other reasons, their own serious health conditions that make them unable to perform the essential functions of their job, or to care for immediate family members (i.e., spouse, child, or parent) with serious health conditions. The FMLA defines serious health condition as an illness, injury, impairment, or physical or mental condition that involves either inpatient care in a hospital, hospice, or residential medical care facility, or continuing treatment by a health care provider.

The FMLA regulations, at section 825.114(a)(2)(i), define "serious health conditions" to include a period of incapacity (i.e., inability to work, attend school or perform other regular daily activities due to the serious health condition, treatment therefore, or recovery there from) of more than three consecutive calendar days, and any subsequent treatment or period of incapacity relating to the same condition, that also involves:

(A) Treatment two or more times by a health care provider, by a nurse or physician's assistant under direct supervision of a health care provider, or by a provider of health care services (e.g., physical therapist) under orders of, or on referral by, a health care provider; or

(B) Treatment by a health care provider on at least one occasion which results in a regimen of continuing treatment under the supervision of the health care provider.

A "regimen of continuing treatment" is defined in section 825.114(b) to include, for example, a course of prescription medication (e.g., an antibiotic) or therapy requiring special equipment to resolve or alleviate the health condition (e.g., oxygen). But the regulations also clarify that the taking of over-the-counter medications such as aspirin, antihistamines, or salves; or bed-rest, drinking fluids, exercise, and other similar activities that can be initiated without a visit to a health care provider, is not, by itself, a regimen of continuing treatment for purposes of FMLA leave.

The FMLA regulations also provide examples, in section 825.114(c), of conditions that **ordinarily**, unless complications arise, would not meet the regulatory definition of a serious health condition and would not, therefore, qualify for FMLA leave: the common cold, the flu, ear aches, upset stomach, minor ulcers, headaches other than migraine, routine dental or orthodontia problems, periodontal disease, etc. Ordinarily, these health conditions would not meet the definition in 825.114(a)(2), as they would not be expected to last for more than three consecutive calendar days and require continuing treatment by a health care provider as defined in the regulations. If, however, any of these conditions met the regulatory criteria for a serious health condition, e.g., an incapacity of more than three consecutive calendar days that also involves qualifying treatment, then the absence would be protected by the FMLA. For example, if an individual with the flu is incapacitated for more than three consecutive calendar days and receives continuing treatment, e.g., a visit to a health care provider followed by a regimen of care such as prescription drugs like antibiotics, the individual has a qualifying "serious health condition" for purposes of FMLA.

Accordingly, our letter to you of April 7, 1995, which stated that conditions meeting the regulatory criteria specified in section 825.114(a)(2)(i) would not "convert minor illnesses * * * into serious health conditions in the ordinary case (absent complications)," is an incorrect construction of the regulations and must, therefore, be withdrawn. Complications, per se, need not be present to qualify as a serious health condition if the regulatory "more than three consecutive calendar days" period of incapacity and "regimen of continuing treatment by a health care provider" tests are otherwise met. The regulations reflect the view that, **ordinarily**, conditions like the common cold and flu (etc.) would not be expected to meet the regulatory tests, not that such conditions could not routinely qualify under FMLA where the tests are, in fact, met in particular cases.

We regret any confusion or misunderstanding our earlier correspondence may have caused. If you have further questions or we may provide additional assistance, please have a member of your staff contact Mr. Howard Ostmann of our FMLA Team, at (202) 219-8412.

Sincerely,

Maria Echaveste
Administrator

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