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

March 26, 1999 **FMLA-102**

Dear ***Name****,

Thank you for your letter of March 9, 1999, concerning a class action complaint under the Family and Medical Leave Act of 1993 (FMLA) filed by the union against ***Name****. In your letter you state that ***Name**** is discriminating against FMLA leave takers with respect to the accrual of paid vacation benefits for the taking of FMLA leave. You cite the company's policy under the collective bargaining agreement (CBA) that "…requires that each employee work 156 days in a calendar year in order to qualify for vacation time the following calendar year." You indicate that employees on FMLA leave are denied vacation the following year if they do not work the necessary 156 workdays. You questioned whether the employer is discriminating against FMLA leave takers by counting FMLA leave in determining an employee's entitlement to vacation benefits and provide examples of employees who were denied vacation benefits in part due to their taking FMLA leave.

In enacting FMLA, the Congress stated that one of the purposes of this law is to entitle employees to take reasonable leave for medical reasons, for the birth or adoption of a child, and for the care of a child, spouse, or parent who has a serious health condition. The FMLA allows up to 12 weeks of job-protected leave in any 12 months—with group health insurance coverage maintained during the leave—to eligible employees for the above mentioned family and medical reasons. Upon completion of leave, an eligible employee must be returned to work to the same or an equivalent position with equivalent pay, benefits and other terms and conditions of employment.

The FMLA (section 105) and the Regulations (section 29 CFR 825.220) set forth certain protections to employees who exercise their rights to take FMLA leave. The FMLA prohibits employers from interfering with, restraining, or denying an employee's rights

under the law. Further, it is unlawful for any employer to discharge or in any other manner discriminate against any employee for opposing any unlawful practice under the law. Employers may not use the taking of FMLA leave as a negative factor in any employment action or decision, such as promotions or disciplinary actions; nor can FMLA leave be counted under "no fault" attendance policies. The FMLA (section 402) and Regulations (section 29 CFR 825.700) describe the interaction between FMLA and employer plans and provide that nothing in the FMLA diminishes an employer's obligation under the CBA or employment benefit program or plan to provide greater family or medical leave rights to employees than the rights established under the FMLA, nor may the rights established under the FMLA be diminished by any such CBA or plan.

The FMLA (section 104(a)(2)) stipulates that the taking of FMLA leave will not result in the loss of any employment benefit accrued prior to the date on which the leave began. Certain limitations for employees on return to their jobs from FMLA leave are also listed in the FMLA (section 104(a)(3)). These limitations provide that such employees are not entitled to the accrual of any seniority or employment benefits during any period of unpaid FMLA leave, or to any right, benefit, or position of employment other than any right, benefit, or position to which the employee would have been entitled had the employee not taken leave. The Regulations (sections 29 CFR 825.215(d)(2) and (5)) reiterate these provisions by stating that employees may, but are not entitled to, accrue any additional benefits or seniority during unpaid FMLA leave. Benefits accrued at the time leave began (e.g., paid vacation to the extent not substituted for unpaid FMLA leave) must be available to an employee upon return from leave. If paid leave benefits are predicated on a pre-established number of hours worked each year and the employee does not have sufficient hours as a result of taking unpaid FMLA leave, the benefit is lost.

The above should be viewed as general guidance as your letter does not provide sufficient information for this office to determine conclusively whether the employer has violated the FMLA. It appears, however, that the provisions of the CBA with respect to the accrual of vacation benefits do not diminish FMLA's benefits and protection; nor does it appear that the employer has violated the FMLA by implementing these CBA provisions.

For your information, we are enclosing the Statute and Regulations. If you should require further assistance, please do not hesitate to contact me at telephone number **********.

Sincerely

Michelle M. Bechtoldt
Office of Enforcement Policy
Family and Medical Leave Act Team

Enclosures

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