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

May 21, 1999 **FMLA-104**

Dear ***Name****,

Thank you for your letter concerning the Family and Medical Leave Act of 1993 (FMLA). I apologize that, because of the volume of work associated with administering FMLA, we were not able to respond sooner to your request.

Thank you for your letter of September 17, 1998, addressed to John R. Fraser, Acting Administrator of the Wage and Hour Division, concerning the Family and Medical Leave Act of 1993 (FMLA). 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 maintained during the leave – for specified family and medical reasons.

In your letter, you specifically request an opinion as to whether the ***Name**** is subject to the provisions of the FMLA. You provide information indicating that the Board is an independent occupational licensing board, which operates under the Nursing Practice Act ***Name**** as enacted by the General Assembly ***Name****. The ***Name**** Act provides under section ***Name**** that the Board will consist of 15 members, of whom the Governor will appoint two members and commission all Board members upon their election or appointment. You also indicate that the Board employs 36 employees who are not subject to the State ***Name**** Personnel or Retirement Acts.

The provisions of FMLA apply to all public agencies at the State and local government level, including local education agencies (schools). A public agency as an "employer" under FMLA includes any "public agency," as defined in section 3(x) of the Fair Labor Standards Act (FLSA), 29 U.S.C. 203(x). The FLSA's definition of "public agency" includes the government of a State or political subdivision of a State; or an agency of a State, or a political subdivision of a State, or any interstate governmental agency. In applying the term "political subdivision" in the past, the Department of Labor has followed Supreme Court case law that considers whether an entity was either 1) created directly by the State or 2) administered by individuals who are responsible to public officials or the general electorate. The Board was created by the State and is, therefore, a public agency.

With regard to the term "employee," the FMLA's definition of "employee" (see section 29 CFR 825.800) is the same as that term is defined under section 3(e) of the FLSA, 29 U.S.C. 203(e). In the case of an individual employed by a public agency, the term employee means any individual employed by a State, political subdivision of a State, or an interstate governmental agency. Excluded are individuals who are not subject to the civil service laws of the State, political subdivision, or agency which employs them, and who (1) hold a public elective office of that State, subdivision or agency; (2) are selected by the holder of such an office to be a member of his personal staff; (3) are appointed by such an office holder to serve on a policymaking level; (4) are immediate advisors to such an office holder with respect to the constitutional or legal powers of the officeholder; or (5) are employees of the legislative branch or legislative body of that State, political subdivision, or agency.

Your letter implies that employees of the Board are not subject to the State's civil service laws. If this is correct, then any one of the five additional criteria mentioned above would remove any individual worker from the definition of the term "employee" for purposes of the FMLA and FLSA. The ***Name**** Act ***Name**** states that the Board, which employs all staff, is not comprised of elected public officials; nor does the Board serve as personal staff or advisor to an elected official. In a recent telephone conversation between yourself and Name* of my staff, you advised that the Board is not part of the legislative branch or legislative body of the State. Based on the information provided, it appears that none of the five exclusionary criteria as listed above are applicable to the employees of the Board. Although the employees of the Board are not subject to the State's civil service laws, this condition alone is not a sufficient basis to exclude the Board's employees from coverage under the FMLA (or for that matter the FLSA).

As the Board is a covered employer, and its workers are employees, the FMLA would apply to the Board's eligible employees. All public agencies are covered by the FMLA regardless of the number of employees; they are not subject to the coverage threshold of 50 employees carried on the payroll each day for 20 or more weeks in a year. Employees of public agencies must meet all of the requirements of eligibility, i.e., at least 12 months of service with the employer, and have worked 1,250 hours during the 12 months immediately preceding the start of leave, and are employed at a worksite where the employer employs at least 50 or more employees at the site or with 75 miles of the site.

A State is considered a single employer for purposes of FMLA, which means that State agencies constitute the same public agency for determining employee eligibility. This provision is particularly relevant as it relates to "50 employees within 75 miles" employee eligibility test as all state employees within a 75 mile area must be counted to determine if there are 50 or more (State) employees within 75 miles of the Board's worksite location.

This opinion is based exclusively on the facts and circumstances provide in your submission, information provided by the Bureau of Census, and telephone conversations with yourself and the State ***Name**** Attorney General's Office. If you require further assistance on any provision of this letter, please do not hesitate to contact me.

For your information, we are enclosing several FMLA documents that may assist you in implementing the FMLA for your employees. If you require further assistance in implementing the FMLA, you may contact the Wage and Hour District Office located at ***Name****. The office's telephone number is **********.

I trust that this reply is responsive to your inquiry.

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).*