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

July 19, 1999 **FMLA-107**

Dear ***Name****,

Thank you for your letter of July 7, 1999, forwarding correspondence from ***Name**** concerning the Family and Medical Leave Act of 1993 (FMLA). Your letter has been referred to the Wage and Hour Division of the U.S. Department of Labor for reply as the Division administers and enforces FMLA for all private, State and local government employees, and some Federal employees. The FMLA entitles eligible employees of covered employers to take up to 12 workweeks of unpaid, job-protected leave each year—with continued group health insurance coverage during the leave—for specified family and medical reasons.

Private employers are covered under FMLA if they have employed at least 50 employees during 20 or more calendar workweeks in the current or preceding calendar year; all public employers are covered. Employees are eligible under FMLA if they have worked for a covered employer for at least 12 months, have worked at least 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 employees at the site or within 75 miles of the site. The 12 months the employee has to have worked do not have to be consecutive.

Unpaid leave must be granted to an eligible employee for any of the following reasons: (1) for the birth of a son or daughter, and/or to care for the newborn child within one year of birth; (2) for placement with the employee of a son or daughter for adoption or foster care, and/or 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 his/her job. For your constituent's information, we are enclosing the Compliance Guide that provides a full explanation of FMLA's benefits and protection.

Under the FMLA, the term "workweek" is the employee's usual or normal schedule (hours/days per week) prior to the start of FMLA leave, and is the controlling factor for determining how much leave an employee is entitled to use when taking FMLA leave intermittently or on a reduced workweek schedule for a serious health condition. If overtime hours are on an "as needed basis" and are not part of the employee's usual or normal workweek, or is voluntary, such hours would neither be counted to calculate the amount of the employee's FMLA leave entitlement nor charged to the employee's FMLA leave entitlement. Where overtime hours are not part of the employee's usual or normal workweek, disciplinary action may not be taken against an employee for being unable to work overtime as a result of limitations contained in a medical certification obtained for FMLA purposes. If the normal workweek is greater than 40 hours, hours worked above 40 hours must be included in determining the maximum amount of leave available to the employee under the FMLA. For example, if an employee normally works overtime in three of every four weeks, then such overtime hours are part of the usual and normal workweek schedule of the employee and would be included in calculating the amount of FMLA leave available to the employee. This would be the case even where the employer may not know in advance of the workweek when overtime will be scheduled or how much overtime will be worked that week as overtime hours may be based upon business demand that varies from week to week.

In calculating the amount of FMLA leave available to an employee whose schedule varies from week to week, a weekly average of the hours worked over the 12 weeks prior to the beginning of the leave period would be used. In her letter, the constituent indicates that ten to twenty hours of overtime hours not worked due to an FMLA-qualifying reason are now being charged against the employee's FMLA 12-week leave entitlement. Let's assume that an employee's schedule over the 12 weeks before starting FMLA leave shows five weeks at 50 hours, four weeks at 60 hours, and three weeks at 40 hours for a total of 610 hours. Under the FMLA, only the amount of leave actually taken may be counted towards the 12-week entitlement of FMLA leave. If overtime hours are part of an "eligible" employee's usual and normal workweek and the employee is unable to work overtime hours because of an FMLA qualifying reason, then any overtime hours not worked may be counted against the employee's FMLA leave entitlement so long as the employer designates the absence as FMLA leave. Using the above mentioned example, if the

employee was not able to work overtime hours over the 12-week period due to an FMLA-qualifying reason (e.g., serious health condition), then 130 hours (610 – 480 [40 hours x 12]) may be charged to the employee's FMLA leave entitlement. Thus, any pro-rata reduction in total leave entitlement during intermittent FMLA leave or reduced leave schedules should be based on the employee's normal workweek – even if it exceeds 40 hours. Similarly, the amount of FMLA leave available to the employee must be based upon the number of hours worked in the normal workweek – even if it exceeds 40 hours.

Responsibility for investigating allegations of violations of FMLA has been delegated to the various district offices of the Wage and Hour Division. If your constituent feels that her employer may have violated the FMLA, she may contact the nearest district office of the Wage and Hour Division located at the ***Name****, telephone number **********.

Sincerely,

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

Enclosure

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