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

July 21, 1995 **FMLA-67**

This letter is under review in light of issues raised by the U.S. Supreme Court in Ragsdale v. Wolverine World Wide, Inc. and other judicial decisions. It may be superceded by FMLA2002-5-A.
(http://www.dol.gov/esa/whd/opinion/FMLA/2002_08_06_5A_FMLA.htm)

Dear ***Name****,

Thank you for your letters about the Family and Medical Leave Act of 1993 (FMLA). In your November 18, 1994, letter, you specifically request guidance on two issues that involve the counting of FMLA leave and job reinstatement rights. In your January 11, 1995, letter, you request copies of opinion letters issued under FMLA. We regret the delay in our response to your letters.

The FMLA allows up to 12 workweeks of unpaid, job-protected leave in any 12-months-with group health insurance coverage maintained during the leave-to eligible employees for specified family and medical reasons.

Private sector employers are covered under FMLA if they have employed at least 50 employees during 20 or more calendar workweeks in the current or the preceding calendar year. All public-sector employers are covered regardless of the number of employees.

Employees are eligible under FMLA if they have worked for a covered employers for at least 12 months (which need not be consecutive months), have worked at least 1,250 hours during the 12 months preceding the start of leave, and are employed at a worksite where the employer employs at least 50 employees within 75 miles.

Unpaid FMLA leave must be granted to an eligible employee for any of the following reasons: (1) for the birth of a son or daughter, and to care for the newborn child; (2) for placement with the employee of a son or daughter for adoption or foster care, and to care for the newly placed child; (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 one or more of the essential functions of his/her job.

Upon return from FMLA leave, the employee is entitled to be restored to the same position that the employee held when leave commenced, or to an equivalent position with equivalent pay, benefits, and other terms and conditions of employment.

Sections 101(11)(A) and (B) of FMLA define serious health condition to mean either "inpatient care in a hospital, hospice, or residential medical care facility" or "continuing treatment by a health care provider." Son or daughter is defined under Section 101(12) of FMLA and under Regulations, 29 CFR 825.113(c) to be a child who either is under 18 years of age or is "18 years of age or older and incapable of self-care because of a mental or physical disability." For an eligible employee to be entitled to take FMLA leave to care for a son or daughter with a serious health condition, the statute and regulations require that the statutory definition of "son or daughter" be met. A parent may be entitled to FMLA leave to care for an adult child with a serious health condition if the child is incapable of self-care because of a mental or physical disability within the meaning of the Americans with Disability Act (ADA), at 42 U.S.C. 12101, and regulations promulgated by the Equal Employment Opportunity Commission (EEOC), at 29 CFR 1630. Given the above-mentioned provisions of FMLA, we will assume that the employee in question is eligible and the reason for taking leave is a qualifying event under FMLA.

Issue 1:

Q. Where an employer and employee have agreed that the employee would continue to work out of the office between times spent caring for a seriously ill child, is it proper to include the hours the employee worked when on leave toward the employee's 12 week maximum under the FMLA?

A. No. Only the amount of leave actually taken may be charged as FMLA leave. The amount of time that the employee is "suffered and permitted" to work for the employer, whether requested or not by the employer, must be counted as "hours worked" pursuant to the Fair Labor Standards Act (FLSA) Interpretative Bulletin, section 785.11 of 29 CFR Part 785. This means that the eight hours per day in the hospital and the time at home that the employee was "suffered and permitted to work" for the employer would be considered hours worked under the FLSA (see 29 CFR 785.12 for work performed away from the premises or job site) and this amount of time could not be counted against the employee's 12-week FMLA leave allowance.

Leave taken under FMLA may be taken on an intermittent or on a reduced leave schedule. Because the FMLA leave in question appears to be on a reduced leave schedule, an example of how leave may be counted against the 12-workweek annual allowance may be helpful. Section 825.205(a) of Regulations, 29 CFR Part 825, provides examples of how such leave would be credited against the 12-workweek allowance.

If a full-time employee who normally works eight-hour days switched to a half-time (four hours per day) reduced leave schedule, only ½ week of FMLA leave could be charged each week. In this example, it would take 24 weeks to exhaust the employee's 12-workweek FMLA leave allowance if no other FMLA leave was taken during the 12-month period. In another example, if an employee who normally works five days a week takes off one day a week, the employee would use 1/5 a week of FMLA leave. If the employee in this example used no other FMLA leave during the 12-month period, the employee could be on this schedule for 52-weeks in the designated 12-month period without exhausting his or her 12-workweek allowance.

Issue 2:

Q. Under FMLA, does an employee have the right to return to the same or similar job if the total amount of leave exceeds the 12-week maximum where eight weeks of leave was taken by the employee to care for a seriously ill child, and the additional time is being taken for a stress-related disability caused by the employer's harassment of the employee for taking the initial eight weeks of family leave to care for her sick child?

A. No. The FMLA entitles eligible employees to take FMLA leave of up to 12 workweeks in any 12 month period for qualifying 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. Once the 12-workweek FMLA allowance has been exhausted in the 12-month period, FMLA benefits and protections cease.

Section 105 of FMLA, however, makes it unlawful for any employer to interfere with, restrain, or deny the exercise of any right provided under FMLA, or to discriminate against any employee who uses FMLA leave. Based on this statutory provision, FMLA leave may not be the basis of an employer's disciplinary action. The FMLA Regulations at 29 CFR 825.220(c) provide that employers cannot use the taking of FMLA leave as a negative factor in employment actions; nor can the FMLA leave be counted under any "no fault" attendance policies.

As a special note, Regulations 29 CFR 825.208 provide that an employer may designate the leave of absence of an eligible employee as FMLA leave as soon as the employer has knowledge that the purpose of the leave is for an FMLA reason. This section further provides that the designation should be made before the leave is taken or before an extension of leave is granted, unless the employer does not have sufficient information to determine the reason for the leave until after the leave commences. Under

no circumstances may the employer with sufficient information prior to the start of leave or at some point during the leave designate leave as FMLA leave after the leave has been completed. Accordingly, section 825.301(c) under the interim final rule (or 825.301(b) under the final rule which became effective on April 6, 1995) requires the employer to provide a written notice to the employee that details the employee's obligation while on FMLA leave. This notice must also be given to the employee at the time the employer has sufficient information from the employee to know that the leave is for a FMLA-qualifying reason.

Failure to provide notice to an employee that the leave is designated as FMLA leave would mean that the leave of absence may not be counted against the employee's 12-workweek FMLA leave allowance, but the employee remains subject to the FMLA's protections. See, in particular, section 825.208(c) of 29 CFR Part 825.

Please be advised that the State of California has its own family and medical leave law. The statute at Section 401(b) and Regulations at section 29 CFR 825.701(a) both state that FMLA shall not supersede any provision of any State or local law that provides greater family or medical leave rights. Should you require assistance interpreting California's law you may contact the Fair Employment and Housing Commission. Contacts at the commission that may assist you are Prudence Poppink, Senior Counsel, telephone number at (415) 557-1344 or Earl Sullaway, Deputy Director, telephone number (916) 227-2878.

I hope this letter has provided enough guidance for you to make a determination as to the employee's entitlement to FMLA leave, the amount of FMLA leave the employee may have taken during the period in question, and whether the employer properly designated the leave and gave written notice under the Federal law. If you require further assistance, you may contact me. As you have requested, enclosed are 60 FMLA opinion letters that have been issued through May 2, 1995.

Sincerely,

Daniel F. Sweeney
Deputy Assistant Administrator

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