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

November 14, 1995 **FMLA-75**

Dear ***Name****,

This is in further response to your communication regarding correspondence from ***Name**** raises several concerns with the final rule (Regulations, 29 CFR Part 825) implementing the Family and Medical Leave Act of 1993 (FMLA) as it affects employment policies of ***Name****.

In developing FMLA's implementing regulations, the Department of Labor (the Department) considered, among other things, the guiding principles of section 2 of FMLA, stating the findings and purposes of Congress. Congress found inadequate job security for employees who have serious health conditions that prevent them from working for temporary periods of time, and a lack of employment policies to accommodate working parents that forces individuals to choose between job security and parenting. Congress stated that the purposes of FMLA are to balance the demands of the workplace with the needs of families, to promote the stability and economic security of families, 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, and to accomplish these purposes in a manner that accommodates the legitimate interests of employers.

To obtain public input and assist in developing the FMLA regulations, the Department published an initial notice of proposed rulemaking in the Federal Register on March 10, 1993, inviting comments on a variety of questions and issues. A total of 393 comments was received in response to the notice - from employers, trade and professional associations, advocacy organizations, labor unions, State and local governments, law firms and employee benefit firms, academic institutions, financial institutions, medical institutions, governments, Members of Congress, and others.

The Department, after consideration of these comments, issued an interim final rule on June 4, 1993, that went into effect on August 5, 1993, and invited further public comment. More than 900 public comments were received on the interim final rule. In addition, the Department met with a number of groups interested in commenting on the final rule.

After giving careful consideration to the public comments and the legislative history of FMLA, the Department published a final rule in the Federal Register on January 6, 1995. The Department prepared a lengthy preamble to accompany the final rule to be fully responsive to the numerous questions and comments received. We are also committed to entertaining additional comments regarding employers' experiences with the regulations over the course of the year or so following their effective date. Such comments will be reviewed together with the results of the comprehensive study on existing and proposed leave policies being conducted by the Commission on Leave, created under Title III of FMLA to study family and medical leave issues and policies.

Name* raises five broad concerns with the final rule, each of which we would like to address by explaining how the Department arrived at the changes from the interim final rule. A full discussion of all of the significant changes between the interim and final rules is contained in the preamble.

Definition of "Chronic" Serious Health Condition:

There were 88 comments from the public regarding the serious health condition definition, many of which were extremely detailed. The statutory definition is scant and reads:

*** an illness, injury, impairment, or physical or mental condition that involves-

(A) inpatient care in a hospital, hospice, or residential medical care facility; or
(B) continuing treatment by a health care provider.

The legislative history clarified that the term was not intended to cover short-term conditions for which treatment and recovery are very brief, as Congress expected that such conditions would be covered by even the most modest of employer sick leave policies. Many commentators felt that the definition should, among other things, include those conditions that are chronic and therefore cause episodic absences, noting that, although treatment for such conditions may be brief, recovery is not. If chronic conditions such as asthma and migraine headaches were not included as serious health conditions, employees would face adverse actions for associated absences, particularly under company attendance policies that subject employees to disciplinary action after a given number of absences. This issue was addressed by Senator Jeffords, when, in a discussion of intermittent and reduced leave, he stated that "if an employee is afflicted with an unpredictable, episodic illness, like migraines, he is clearly entitled to leave subject to the requirements of the bill." (See the Congressional Record of February 4, 1993) The final rule (825.220(c)) provides, in part, that FMLA leave may not be counted under "no fault" attendance policies.

With respect to medical re-certifications, the statute states that an employer may require subsequent re-certifications only "on a reasonable basis." After a review of the public comments received on this issue, the Department concluded that permitting the employer to routinely request recertification every 30 days is not reasonable in some circumstances. An employer may request recertification for a chronic serious health condition at any time if the circumstances described by the previous certification have changed significantly (e.g., the duration or frequency of absences, the severity of the condition, complications) or the employer receives information that casts doubt upon the employee's stated reason for the absence.

Name* contends that "it is notoriously easy to obtain medical certifications for some of the medical conditions which could be defined as 'chronic' under the regulations" and that this will have an adverse impact on ***Name**** neutral attendance policy. The FMLA and its regulations, in an attempt to prevent employee abuse and address questionable medical certifications, allow for employers to request second medical opinions and, where the second differs from the first, third medical opinions. The employer selects the health care provider for the second opinion, except that the selected health care provider may not be employed by the employer on a regular basis. The health care provider of the third medical opinion (where necessary) is selected jointly by the employer and the employee without restriction. As noted above, reasonable re-certifications may be required if circumstances have changed significantly. Employers must, however, amend attendance policies to exclude absences for bona fide FMLA reasons from adverse employment actions. To do otherwise would be to deny the exercise of an eligible employee's FMLA rights which is prohibited under section 105 of FMLA.

Certification for Paid Leave:

Name* is concerned about coordinating existing employer leave policy requirements and those of FMLA, citing the provision that an employer may not impose the more stringent FMLA requirements where an employee elects to substitute accrued paid leave and the employer has less stringent certification requirements for the use of such paid leave. The anti-discrimination provisions of FMLA prohibit an employer from applying more stringent requirements on employees who take FMLA leave than the requirements imposed on other forms of leave allowed by the employer where employees invoke their rights to substitute their accrued paid leave. He also feels that, as a result of this prohibition, employees will be able to unfairly substitute all of their paid vacation during an FMLA leave period early in the year and be unable to use their paid vacation during the two weeks the plant shuts down in the summer for maintenance, thus qualifying for unemployment during the shut down. We do not believe that either the statute or the regulations requires this result. The statute provides for the substitution of accrued paid leave in certain situations. (See section 102(d)(2)) The legislative history indicates that these substitution provisions are intended to allow for the specified paid leaves that have accrued but have not yet been taken by an employee to be substituted for the unpaid leave required under FMLA in order to mitigate the financial impact of wage loss due to family and temporary medical leaves. (House Report 103-8, Feb. 2, 1993, p. 38) The substitution provisions assure that an employee is entitled to the benefits of applicable paid leave provided by an employer, plus any remaining leave time made available by FMLA on an unpaid basis. We interpret these provisions to require that the employee has earned the right to take the leave under the employer's plan and is therefore entitled to substitute the accrued leave during the FMLA leave period. Consequently, leave that has not yet been earned is not available for substitution by an

employee. Also, where an employee may only use leave under the employer's plan during a specified period when the plant is shut down, the employee has not fully vested in the right to substitute that leave for purposes of FMLA.

Light Duty:

Name* also takes issue with the rules governing an employer's offering light duty assignments in situations where the employee has not fully recovered from an injury and is unable to perform all of the essential function of his or her original job. He feels that the final rule will turn unpaid FMLA leave into paid leave under short term disability programs offered by employers and thus encourage employers to limit such policies.

An eligible employee may not be required to accept a light duty position in lieu of remaining on FMLA leave. In such a case, the employee would not be entitled to continue workers' compensation payments if the State workers' compensation program terminated benefits when the employee was deemed medically able to accept such a position. The same rule would apply to a short term disability policy offered by the employer. If the employer's short term disability policy stipulates that payments will cease if the employee is deemed able to accept a light duty assignment, the employee who chooses to remain on FMLA leave would not be entitled to continued payments under the employer's short term disability policy as a result of the FMLA regulations.

Contact with the Employee's Physician:

The interim final rule did not permit any direct contact between an employer and the employee's health care provider. Thus, the only recourse to an employer who questioned the certification was to request a second opinion. Some commentators felt that the restriction worked against the interests of both the employee and employer and left as the only recourse a costly second and possible third opinion in situations where a simple clarification might suffice. A number of commentators expressed concern regarding the privacy of the employee and the ethical considerations of the employee's health care provider furnishing information to a non-medical person. The Division agreed with the need to protect the privacy interests of the employee in allowing any such contact; thus, the rule provides that the contact may be made only with the employee's permission and only by a health care provider.

Notice Requirements:

Name* finally expresses concern regarding the employer's notification requirements and feels that FMLA considerations should not be triggered until the employee states that he or she is requesting FMLA leave. The Division disagrees. We do not believe the legislative history of this law, or other similar laws providing labor standards protections, creates such an expectation. In a recent decision involving this issue, (Manuel v. Westlake Polymers Corp., CA 5, No. 95-30050, 10/3/95), the Court of Appeals of the Fifth Circuit agreed. The court ruled that individuals needing FMLA leave "are workers, not lawyers." The court further cited Senate Report No. 3 at p. 4, reprinted in 1993 U.S.C.C.A.N. 3, 6-7, that stated that the legislative history discloses that FMLA "'is based on the same principle as the child labor laws, the minimum wage, Social Security, the safety and health laws, the pension and welfare benefit laws, and other labor laws that establish minimum standards for employment.' Significantly, none of these other federal labor laws granting benefits to employees requires those employees to refer to the specific statute, much less the specific statutory subsection, in order to avail themselves of its benefits."

In drafting the final rule, the Division attempted to reach a proper balance between the employee rights and protections and the legitimate interests of employers as reflected in FMLA's statement of findings and purpose. In a recently released survey contracted for by the Commission on Leave as a part of its responsibilities under Title III, a majority of FMLA-covered firms reported either "no increase" or a "small increase" in costs due to FMLA. Those reporting either "no increase" or a "small increase" for administrative costs, continuation of benefits, and hiring/training costs were 89.2%, 93.4%, and 94.8% respectively. Additionally, 85% to 96% of the establishments covered by FMLA reported "no noticeable

effect" on their overall business performance. A press release and other material highlighting the surveys findings are enclosed.

I hope that the above information provides some insight into the process of drafting the FMLA final rule and clears up some misunderstandings may have had with respect to certain provisions. Any guidance provided in this letter is based on the information provided by in his letter and could be affected by the specifics of LSI's policies. As Secretary of Labor Reich noted on the second anniversary of FMLA, compliance with the landmark Family and Medical Leave Act remains a simple issue for most firms and few employees are finding difficulty working with their employers to obtain FMLA leave under circumstances that qualify for FMLA's protections.

Thank you for writing. We are returning your constituent's correspondence, as you requested. Should you have any further questions, please do not hesitate to contact Howard B. Ostmann, Office of Enforcement Policy, FMLA Team, at (202) 2l9-84l2.

Sincerely,

Richard M. Brennan

Deputy Director
Office of Enforcement Policy

Enclosures

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