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

January 30, 1996 **FMLA-77**

Dear ***Name****,

This is in reply to your letter of June 28, 1995, addressed to ***Name**** regarding the administration of the Family and Medical Leave Act of 1993 (FMLA) by the Department of Labor. I regret that, due to the volume of work associated with administering FMLA, we were not able to respond to your concerns sooner.

You request a clarification of the Department's administration of FMLA with respect to determining whether an employee's illness is a serious health condition for purposes of the Act. You also express a concern that the final rule (Regulations, 29 CFR Part 825) implementing FMLA makes it more difficult for employees to obtain FMLA-protected leave where the employee's absence is due to the employee's illness, particularly for flight attendants.

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.

The term serious health condition is defined in section 101(11) of FMLA as "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."

Further guidance concerning determining whether an illness is a serious health condition for purposes of FMLA leave is contained in Regulations, 29 CFR Part 825.114. In order for an employee to qualify for FMLA leave, the employee must have a condition that meets the statutory and regulatory definitions.

The FMLA provides further that an employer may require that a request for FMLA leave for a serious health condition be supported by a medical certification and, where the employer has reason to doubt the validity of such a certification, by a second or possibly third opinion from an appropriate health care provider. In the situation you describe in your letter, the flight attendant submitted a completed certification of health care provider form (WH-380) to the employer indicating that the condition in question qualified as a serious health condition for purposes of FMLA. If ***Name**** wished to dispute this certification, it should have sought a second opinion under the terms of the regulations; the certification,

assuming it was properly completed and timely submitted, should not have been rejected unilaterally. The employer may, with the employee's permission, have a health care provider representing the employer contact the employee's health care provider to clarify any information on the form or return the form to the employee if the form is not properly completed.

The definition of a serious health condition is the same for all occupations. There is nothing in the legislative history to indicate that Congress intended the Department to develop separate standards based on an employee's work environment. However, section 102 of FMLA states, in part, that an employee is entitled to FMLA leave "[b]ecause of a serious health condition that makes the employee unable to perform the functions of the position of such employee." Once it has been determined that a serious health condition, as defined in FMLA and the regulations, exists, it must be determined that such a condition prevents the employee from performing any one or more of the essential functions of his or her job. An employee whose illness does not meet the statutory and regulatory definitions of a serious health condition will not be entitled to take FMLA leave even if the employee cannot perform any of the essential functions of his or her job. An employee whose illness does meet such definitions but who may still perform all of the essential functions of the job will also not be entitled to take FMLA leave under the terms of section 102 of the Act.

Our Boston Regional Office has indicated that they have no record of having contacted ***Name**** either regarding his concerns. Many contacts are informal and are not recorded. Further, these types of contacts often do not involve a full discussion of all issues or facts involved. I have asked someone from the Boston Regional Office to contact you directly to fully address your concerns.

Sincerely,

Howard B. Ostmann
Office of Enforcement Policy
Family and Medical Leave Act Team

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