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

June 18, 1996 **FMLA-81**

Dear ***Name****,

This is in response to your request for information concerning the Department of Labor's position with regard to the question of what leave an employer may require an employee to substitute during leave taken under the Family and Medical Leave Act of 1993 (FMLA). I apologize that the volume of work associated with administering FMLA has delayed this response.

Section 102(d)(2) of FMLA (29 U.S.C. 2612(d)(2)) provides generally that an employee may elect, or an employer may require the employee, to substitute certain of the accrued paid vacation leave, personal leave, family leave, or sick or medical leave of the employee for the unpaid leave provided under the Act.

The legislative history indicates that the purpose of this section was "to provide that specified paid leave which has accrued but has not yet been taken, may be substituted for the unpaid leave under this act 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 Department interprets these provisions to mean that the employee has both earned the leave and is able to use that leave during the FMLA leave period.

In your letter, you indicate that, under the terms of the collective bargaining agreement, the employee earns paid vacation during the current year but cannot use the leave until the following year. As noted above, the Department's position with respect to accrued leave for purposes of substitution under FMLA means leave that is both earned and available for use by the employee. In the situation described in your letter, the employee could not elect nor could the employer require the substitution of the paid vacation leave because the leave is not available to the employee until the following year.

The foregoing would neither prevent an employer from voluntarily advancing paid leave to an employee nor an employee from voluntarily accepting such leave during an FMLA absence.

Section 403 of FMLA (29 U.S.C. 2653) specifically states that "[n]othing in this Act or any amendment made by this Act shall be construed to discourage employers from adopting or retaining leave policies more generous than any policies that comply with the requirements under this Act or any amendment made by this Act."

The guidance provided in this letter is intended to address only those circumstances cited in your letter and may not be appropriate where either these circumstances vary or there are additional circumstances present. I hope that this has been responsive to your inquiry.

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).*