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

August 7, 1996 **FMLA-83**

Dear ***Name****,

This is in response to your list of questions on the application of the Family and Medical Leave Act of 1993 (FMLA). I have attempted to provide very brief answers to your questions and references to the appropriate sections of Regulations, 29 CFR Part 825 that cover the main topics in these questions. These answers should not be regarded as comprehensive nor should they be regarded as necessarily applicable in any particular situation. Any specific questions you have should be referred to the office of the Wage and Hour Division responsible for administering and enforcing FMLA in your area located in the Austin Laurel Building, Suite 300, 4905 West Laurel Street, Tampa, Florida 33607, telephone: (813) 288-1245.

Who can activate the leave? In all circumstances, it is the employer's responsibility to designate leave, paid or unpaid, as FMLA qualifying, and to give notice of the designation to the employee. An employee may request FMLA leave although it is not necessary for the employee to expressly assert rights under FMLA or even mention the FMLA to meet his or her obligation to provide notice. The employee may not, however, bar the employer from designating any qualifying absence as FMLA leave. (Section 825.208)

Can the request for medical leave be mandated by the employer prior to the use of all compensatory leave? Section 7(o) of the Fair Labor Standards Act permits public employers under prescribed circumstances to substitute compensatory time off accrued at one and one-half hours for each overtime hour worked in lieu of paying cash to an employee. Employees must be permitted to use such time within a "reasonable period" after making a request if such use does not "unduly disrupt" the operations of the agency. The use of such compensatory time is subject to the requirements contained in Regulations, 29 CFR Part 553. A public employer could deny the use of compensatory time if such an employer could show that the time off would "unduly disrupt" operations. The employer cannot, however, deny a request for qualifying FMLA leave. (Sections 825.207(i) and 553.25)

Can the leave time be depleted simultaneously with earned compensatory time? Compensatory time off is not a form of accrued paid leave and may not be counted against the employee's FMLA leave entitlement. (Section 207(i))

When a surgery is planned, and there is no intention of using FMLA leave, is the employee required to sign any documents concerning FMLA leave? As noted in response to your first question, an employee may not bar an employer from designating a FMLA-qualifying absence as FMLA leave. With respect to what types of documentation may be required, please review section 825.302, 825.303, and 825.305.

If an employee wishes to care for a significant partner (unmarried), or a child of that partner, may the employee use the FMLA? The FMLA permits the use of leave only to care for a spouse, parent, son, or daughter. Spouse means a husband or wife as defined under State law and includes a common law marriage in States where it is recognized. Parent means a biological parent or an individual standing in loco parentis. Son or daughter means a biological, adopted, or foster child, a stepchild, a legal ward, or a child of a person standing in loco parentis, who is either under 18, or age 18 or older and "incapable of self-care because of a mental or physical disability." (Regulations 825.113)

If an employee has a complicated pregnancy or other condition, can that employee use the maximum amount of leave allowed by FMLA, followed by the partner using the same amount of time through their employer (same or different employer)? Example:

John and Jane work for the same employer. Jane has a complicated pregnancy and is on bed rest for her maximum leave time. She has the baby and must return to work. The baby is ill and must be cared for by John. Can he take his FMLA leave? Same scenario but different employer: A husband and wife who are eligible for FMLA leave and are employed by the same employer may be limited to a combined total of 12 weeks of leave during any 12-month period if the leave is taken for the birth of the employees' son or

daughter or to care for the child after birth, for placement of a son or daughter with the employees for adoption or foster care, or to care for the child after placement, or to care for an employee's parent with a serious health condition. These limitations do not apply where the reason for the leave is the serious health condition of either the husband or wife or the serious health condition of a child. The limitations also do not apply to employees who are not husband and wife. In your example, we would first determine whether John and Jane were "partners" or husband and wife. If they are husband and wife and John took no FMLA leave to care for Jane during her difficult pregnancy, John could take up to 12 weeks for any FMLA-qualifying reason. Jane's leave was due to her serious health condition and therefore not for one of the reasons for which the leave of a husband and wife working for the same employer may be limited. If Jane and John work for different employers, no restrictions apply. (Regulations 825.202)

What is the maximum amount of leave allowed by FMLA? The FMLA allows for up to 12 workweeks of leave in a 12-month period. (Section 825.200)

Would you recommend that any employee going on compensated sick leave for an extended time fill out a request for FMLA leave "just in case"? I would recommend that the employee review as a minimum, sections 825.208, 825.302, 825.303 and 825.312. An employee who deliberately withholds information may, depending on the circumstances, jeopardize his or her rights under FMLA.

If you have any further questions, please contact the office listed above.

Sincerely,

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

Enclosures

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