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

January 6, 1994 **FMLA-24**

Dear ***Name****,

This is in reply to your letter of December 14 on behalf of ***Name**** concerning the Family and Medical Leave Act of 1993 (FMLA). Your letter has been referred to the Wage and Hour Division for reply as this office has primary administration and enforcement responsibilities under Title One of FMLA for all private, state and local government employees and some federal employees, including employees of the United States Postal Service.

The FMLA, which became effective for most employees on August 5, 1993, allows up to 12 weeks of unpaid, job-protected leave in a 12-month period—with health insurance coverage maintained during the leave—to eligible employees for specified family and medical reasons. If a collective bargaining agreement (CBA) was in effect on that date, FMLA becomes effective on the expiration date of the CBA or February 5, 1994, whichever is earlier.

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. Employees are eligible under FMLA if they have worked for a covered employer for at least 12 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 birth of a son or daughter, and to care for the newborn child; (2) for placement with the employee of a son or daughter via adoption or foster care; (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 his/her job. Pursuant to Regulations 29 CFR 825.220(d), employees cannot, and an employer is prohibited from inducing an employee to, waive their rights under FMLA.

Section 104(a)(2) of the Act stipulates that the taking of FMLA leave will not result in the loss of any employment benefit accrued prior to the date on which the leave began. Section 104(a)(3) lists certain limitations for employees on return to their jobs from FMLA leave and provides that such employees are not entitled to the accrual of any seniority or employment benefits during any period of FMLA leave. Regulations 29 CFR 825.215(d)(2), reiterates this provision by stating that employees may, but are not entitled to, accrue any additional benefits or seniority during unpaid FMLA leave. Benefits accrued at the time leave began (e.g., paid vacation, sick or personal leave to the extent not substituted from FMLA leave) must be available to an employee upon return from leave. If ***Name**** is on unpaid FMLA leave, the employer's position that this employee is not eligible to accumulate sick leave would be consistent with the Act and regulations as long as all employees on an unpaid leave status do not accrue sick pay. If an employee on leave without pay would otherwise be entitled to full benefits, the same benefits would be required to be provided to the employee on unpaid FMLA leave. To do otherwise would be considered a discriminating action by the employer against an employee on FMLA leave, which is prohibited (see Regulations 29 CFR 825.220(c)).

If I may be of further assistance to you, please do not hesitate to contact me.

Sincerely,

Daniel F. Sweeney
Deputy Assistant Administrator

cc: Washington, D.C., Office

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