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

March 29, 1994 **FMLA-33**

Dear ***Name****,

This is in response to your letter enclosing correspondence from your constituent, ***Name**** concerning the application of the Family and Medical Leave Act of 1993 (FMLA) to the use of employee earned vacation and sick leave for family and medical leave purposes. ***Name**** and his members feel that the use of earned vacation and sick leave for family and medical leave purposes should be the employee's option rather than a requirement dictated by the company.

The FMLA, which became effective for most employees on August 5, 1993, allows up to 12 weeks of unpaid, job-protected leave in any 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 became effective on the expiration date of the CBA or on February 5, 1994, whichever came earlier.

Employers are covered under the 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 the 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 the leave, and are employed at a worksite where the employer employs at least 50 employees within 75 miles. The 12 months that the employee must have worked do not have to be consecutive months.

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 for 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.

Section 102(d)(2) of the Act and section 825.207 of Regulations, 29 CFR Part 825 (copies enclosed) provides that an eligible employee may elect, or an employer may require the employee, to substitute any of the accrued paid vacation leave, personal or family leave, or medical or sick leave for any of the 12-week leave period under certain conditions. Paid vacation leave, personal leave, or family leave may be substituted for all or part of any unpaid leave for the birth and care of the employee's child after birth, or placement for adoption or foster care, or for the care of the seriously ill family member. Paid vacation leave, personal leave, or medical or sick leave may be used and counted as FMLA leave for the employee's own serious health condition. Paid medical or sick leave may be substituted for FMLA leave for the care of a seriously ill family member only to the extent that the employer's leave plan allows paid leave to be used for that purpose. The use of paid family leave as FMLA leave is also limited by the normal use of the employer's plan.

With reference to your constituent's concerns pertaining to paid vacation and sick leave, an employer may require an eligible employee to use all accrued paid vacation or sick leave for the family and medical leave purposes indicated above before making unpaid leave available. However, section 402 of FMLA does not preclude the union's right to collectively bargain greater benefits than those provided under the Act. In this instant case, the subject union could negotiate that substitution of accrued paid leave is an election of the employee only.

I trust that the above information is responsive to your constituent's inquiry. If I can be of further assistance, please do not hesitate to let me know.

Sincerely,

Daniel F. Sweeney
Deputy Assistant Administrator

Enclosures

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