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

**September 9, 1993** **FMLA-4**

Dear ***Name****,

This is in response to your letter to Secretary Reich concerning the applicability of the Family and Medical Leave Act of 1993 (FMLA) to condominium associations in the State of Hawaii.

You indicate that board members of the condominium associations are unpaid volunteers, and that these boards contract with managing agents to handle the administrative workload of operating the properties. The boards generally handle decisions on hiring, firing, and general employment policies, but the managing agent may be involved in the supervision of the onsite resident manager and other employees.

The term "employer" is defined in the FMLA as any person engaged in commerce or in any industry or activity affecting commerce that employs 50 or more employees during 20 or more calendar workweeks of the current or preceding calendar year. The term includes "any person who acts, directly or indirectly, in the interest of in employer to any of the employees of such an employer."

Under the FMLA, where two or more businesses exercise some control over the work or working conditions of an employee, the businesses may be considered "joint employers" for purposes of complying with the FMLA. Joint employers may be separate and distinct entities with separate owners, managers and facilities. Employees jointly employed by two employers must be counted by both employers in determining employer coverage and employee legibility under FMLA. The factors considered in determining how joint employment relationships are treated under the FMLA are discussed in § 825.106 of the enclosed copy of FMLA's implementing Regulations, 29 CFR Part 825, which became effective on August 5, 1993. Joint employment relationships are not determined by applying any single criterion, but rather the entire relationship is viewed in its totality.

In joint employment relationships under the FMLA, the "primary" employer is responsible to all its employees for giving the notices required by FMLA, providing FMLA leave, maintaining health benefits during leave, and restoring employees to their same or an equivalent position of employment upon the conclusion of leave. A "secondary" employer with a total of 50 or more employees, including all jointly employed employees, must comply with the prohibited acts provisions of the statute, as discussed in § 825.220 of the regulations, which include prohibitions against interfering with an employee's attempt to exercise rights under the Act (including taking FMLA leave), or discharging or discriminating against an employee for opposing a practice that is unlawful under the FMLA.

The factors for distinguishing a "primary" employer from a “secondary" employer in joint employment relationships include which one has the authority and responsibility to hire and fire employees, place them and assign their work, make the payroll, and provide employment benefits. While not entirely clear from the information in your letter, it appears to us that a single managing agent which employs 50 or more employees at various condominium associations during 20 or more calendar workweeks in the current or preceding calendar year would constitute a covered employer" within the meaning of the FMLA, with responsibilities as a "primary" employer as described in § 825.106(e) of the FMLA regulations. To not extend FMLA's protections to employees in such a situation would be contrary to the language of the Act.

We appreciate receiving your views in this matter. A copy of your letter will be included in the official rulemaking record on the interim final FMLA regulations.

Sincerely,

J. Dean Speer
Director, Division of Policy and Analysis

Enclosure

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