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

August 23, 1994 **FMLA-42**

Dear ***Name****,

This is in response to your letter requesting guidance under the Family and Medical Leave Act of 1993 (FMLA). Specifically, you request answers to 11 questions about provisions under FMLA. I regret the delay in responding.

1. An employee covered by a collective bargaining agreement (CBA) has requested intermittent FMLA leave. The employer wishes to transfer the employee to a non-contract position to accommodate the FMLA leave. Does the employer have to retain the same level of union benefits during the transfer period?

Yes. Pursuant to Regulations 29 CFR 825.204, the employer must provide equivalent pay and benefits (or hourly rate of pay and benefits for a part time position) to an employee employed in an alternative position as a result of an employee request for intermittent leave or leave on a reduced leave schedule that is foreseeable based on planned medical treatment, including recovery from a serious health condition. The employer may require the employee to transfer temporarily to an available alternative position for which the employee is qualified and which better accommodates recurring periods of leave than does the employee's regular position. Such transfer to an alternative position may require compliance with any applicable CBA, federal law, and state law.

2. A flight attendant requests intermittent FMLA leave - three hours off every Friday for two months to care for her sick mother. Due to the unique working environment of a flight attendant, granting such request means that the flight attendant will not be able to work her flight assignment on Friday for two months. How much leave is charged the employee - three hours that she requested or her entire work period, i.e., ten hours each Friday?

The employee would be charged for three hours of FMLA leave. While only three hours may be charged to FMLA, the remainder of the time may be charged to some other form of paid or unpaid leave. Pursuant to 29 CFR 825.205(a), if an employee takes FMLA leave on an intermittent or reduced leave schedule, only the amount of leave actually taken may be counted towards the 12 weeks of leave to which an employee is entitled. Accordingly, 29 CFR 825.203(d) stipulates that there is no limit on the size of an increment of leave when an employee takes intermittent leave or leave on a reduced schedule. An employer, however, may limit leave increments to the shortest period of time (one hour or less) that the employer's payroll system uses to account for absences or use of leave. The employer may, however, require the employee to transfer to an alternative position as noted above.

3. An employee requests intermittent leave - two hours every day for a month to take care of a sick child. The employee's job is not one that can allow such leave each day. Therefore, in order to accommodate the request the employer wants to transfer the employee to a similar position at another location. The employee refused the transfer. Can the employer grant the employee with one month FMLA as it is unable to otherwise accommodate the employee's requests?

An employee could only refuse a transfer where such transfer would adversely affect the employee. For example, commuting distance, time, and cost would have to be substantially the same for the employee to be required to take the transfer. An example of a transfer that would adversely affect an employee would be the situation where the employee currently uses public transportation to commute to his/her job and such transportation is not available to the worksite the employer seeks to transfer the employee. Thus, we would need to assess the employee's reasons for refusing the transfer as well as the employer's reasons for imposing the transfer. An employee who refuses a transfer that cannot be shown to have an adverse effect would not be protected by provisions.

4. An employee requests a 12-week leave, which the employer grants. During the FMLA leave, the position which the employee held had been eliminated in a corporate restructuring. However, there is an

equivalent position at another location. Can the employer properly transfer the employee to the other location in accordance with the FMLA?

The employer may transfer the employee to the other location. Pursuant to 29 CFR 825.216, an employee has no greater right to reinstatement or to other benefits and conditions of employment than if the employee had been continuously employed during the FMLA leave period.

5. An employee is out on worker's compensation status. Can the employer count this time out as FMLA leave?

Yes, if the employee's absence from work pursuant to a workers' compensation claim for an injury or occupational illness also meets FMLA's definition of a "serious health condition." The period of time out on workers' compensation status may be counted against the 12-week FMLA leave entitlement available to eligible employees provided all other requirements of FMLA are complied with during the period of absence. For example, health benefits must be maintained under the same terms and conditions as if the employee continued to work. (See 29 CFR §825.114 and 825.207.)

6. An employee is granted 12 weeks of unpaid FMLA leave to take care of an adopted child. However, when the employee is scheduled to return to work, he only works for four days and then informs the company that he is quitting and staying home with the child. Can the employer recover, from the employee, the costs of the health care benefits from the period that the employee was out on leave? What is the minimum amount of time that an employee must return to work so as to not be responsible for the cost of health insurance paid for by the employer during the FMLA leave?

Yes, with certain limitations. Pursuant to 825.213, an employer may recover its share of health plan premiums during a period of unpaid FMLA leave from an employee if the employee fails to return to work after the employee's FMLA leave entitlement has been exhausted or expires, unless the reason the employee does not return is due to the continuation, recurrence, or onset of a serious health condition that would entitle the employee to leave under FMLA, or to other circumstances beyond the employee's control. An employee who returns to work for at least 30 calendar days is considered to have "returned" to work for purposes of FMLA and the employee would no longer have any responsibility to reimburse the employer for group health insurance premiums paid while on unpaid FMLA leave.

7. Please explain in detail section 825.202 with respect to how much leave may a husband and wife take, if they are employed by the same employer.

The combined total of workweeks of FMLA leave to which husband and wife employed by the same employer and eligible for FMLA leave are entitled to is limited to 12 workweeks during any 12-month period for the following reasons:

*For the birth and care of the newborn child;
*For placement of a son or daughter for adoption or foster care, or to care for the employee's child after placement; and
*To care for a parent (but not a parent "in-law") with a serious health condition.

The combined 12 workweeks of FMLA leave limitation for married couples for the above mentioned reasons does not apply to leave taken for the following reasons:

*To care for the employee's spouse, son or daughter, who has a serious health condition;
*For serious health condition that makes the employee unable to perform the employee's job.

If FMLA leave was taken for these reasons, each spouse would be entitled to a full 12 workweeks of FMLA leave in any 12 months.

As an example of how this limitation may work, during a 12-month designated period, the married couple took 12 weeks combined (mother took 10 weeks, father took 2 weeks) for the birth and care of the newborn child. The mother/wife would have two workweeks of FMLA leave to care for her own serious health condition or that of her or child or spouse. The father/husband would have remaining 10 weeks of leave to care for his own serious health condition or that of his spouse or child. Since this married couple used 12 workweeks of FMLA leave for the birth and care of the newborn child, no additional FMLA leave may be taken to care for the parent with a serious health condition by either spouse in the remaining 12 months.

8. Airline A's health insurance policy requires employees to contribute 25 percent of the cost of coverage. An employee of Airline A is granted 12 weeks of FMLA leave. However, the employee does not pay his portion of the health care premiums during this period. Can the employer terminate health care coverage for this employee during the leave period?

Yes. While an employer may continue to maintain health benefits, an employer's obligations to maintain health insurance coverage ceases if an employee's premium payment is more than 30 days late. All other obligations of an employer under FMLA would continue, including the obligation to reinstate an employee upon return from leave to their original position or to an equivalent position, with equivalent pay, benefits, terms and conditions of employment. In this regard, the employer may pay and recover from the employee the employee's share of any premium payments missed by the employee for any leave period during which the employer maintains health coverage. (See 29 CFR 825.212.)[1]

9. Can an employer classify a medical leave as FMLA leave at the time an employee takes the medical leave even if the employee does not request that the leave be classified as FMLA leave?

Yes, as long as the employee provides verbal notice sufficient to make the employer aware of the employee's serious health condition that qualifies as FMLA leave, and the anticipated timing and duration of the leave. The employee need not expressly assert the rights under the FMLA or even mention the FMLA, but may only state that leave is needed for one of the permissible reasons for taking FMLA leave. The employer should inquire further of the employee if it is necessary to have more information about whether FMLA leave is being sought by the employee, and obtain the necessary details of the leave to be taken. For medical conditions, the employer may request medical certification to support the need for such leave. (See 29 CFR 825.302). An employee may not refuse to allow the employer to count otherwise qualifying leave as FMLA leave.

10. Airline flight crew members generally have a guaranteed number of hours that they work each month; such guarantees are specified in a CBA. The employee requests and is granted intermittent FMLA leave. Can the FMLA leave hours be deducted from the pay/hour guarantee?

An employer may not discriminate against employees who use FMLA leave. (29 CFR Part 825.220) If all employees who request leave or specify certain periods during which they will be unable to work have such time deducted from their guaranteed hours, the employer could follow an identical policy with respect to employees on FMLA leave.

11. Airline A has a policy that employees do not accrue vacation time, sick leave, or longevity for pay purposes when they are out on FMLA leave. Is Airline A's policy in compliance with the DOL interim final regulations? Is Airline A in compliance if it does not allow longevity to accrue for seniority or promotion purposes during FMLA leave?

An employee may, but is not entitled to, accrue any additional benefits or seniority during unpaid FMLA leave. Benefits accrued at the time leave began, however, must be available to an employee upon return from leave. The employer may be in compliance with the FMLA regulations as long as any employee on a

[1] Provisions applicable to this response were changed in the Final Rule (under section 29 CFR 825.212(a)(1)) published in the Federal Register on January 6, 1995 (60 FR 2180)

leave without pay status, regardless of whether it is FMLA leave or otherwise, does not accrue any additional benefits or seniority. If employees on other types of leave without pay accrue additional benefits or seniority during the unpaid leave status, the same additional benefits and seniority must be provided to the employee on unpaid FMLA leave. (See 29 CFR 825.215(d)(2) and 220(c)).

At this present time, we have not formulated a plan to distribute FMLA opinion letters and policy decisions.

The guidance provided above was based on the limited information provided in your letter and should not be applied to situations with additional or different circumstances.

We appreciate your concerns and interest in FMLA. We regret any inconvenience that our delay in response to your letter may have cause.

Sincerely,

Daniel F. Sweeney
Deputy Assistant Administrator

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