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

This letter is under review in light of issues raised by the U.S. Supreme Court in Ragsdale v. Wolverine World Wide, Inc. and other judicial decisions. It may be superceded by FMLA2002-5-A (http://www.dol.gov/esa/whd/opinion/FMLA/2002_08_06_5A_FMLA.htm).

August 24, 1994 **FMLA-43**

Dear ***Name****,

Thank you for your letter of May 23, 1994, addressed to Senator Edward Kennedy, about employment practices by ***Name**** as they relate to the Family and Medical Leave Act of 1993 (FMLA). Your letter has been referred to the Wage and Hour Division of the U.S. Department of Labor for reply as this office has primary administration and enforcement responsibilities under FMLA for all private, state and local government employees, and some Federal employees.

In general, FMLA allows up to 12 weeks of unpaid, job-protected leave in any 12 months—with group health insurance coverage maintained during the leave—to eligible employees for specified family and medical reasons. Unpaid FMLA leave must be granted to an eligible employee for any of the following reasons: (1) for birth and/or care child within one year of birth; (2) for the placement of a child with the employee 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. Upon return from FMLA leave, the employee is entitled to be restored to the employee's original position or to an equivalent position with equivalent pay, benefits, and other employment terms.

Under Regulations (29 CFR 825.114), the term serious health condition is intended to cover conditions or illnesses affecting one's (or the immediate family's) health to the extent that inpatient care is required, or absences are necessary on a recurring basis or for more than a few days for treatment or recovery. This term is not intended to cover short-term conditions for which treatment and recovery are very brief as such conditions would generally be covered by the employer's sick leave policies. Current regulations cover any period of incapacity requiring absence from work, school, or other regular daily activities of more than '"three calendar days" and continuing treatment by (or under the supervision of) a health care provider.

With respect to your first and second concerns about whether an employee on occupational injury leave or maternity leave must be required to apply for FMLA leave, the law does not prohibit the employee's FMLA 12-week leave entitlement from running concurrently with other leaves of absence provided the leaves involve events that qualify under the law, i.e., employee's own serious health condition and the birth of a child respectively. The employer under such circumstances would be required to designate either leave of absence as FMLA qualifying (see 29 CFR 825.208) and to so notify (29 CFR 825.301(c)) the employee that such leave will run concurrently. The employee who is taking a qualifying leave of absence may not waive his or her rights to FMLA leave (29 CFR 825.220(d)).

In response to your third concern, the answer would be yes since it is not the intent of FMLA to discourage an employer from adopting or retaining more generous benefits (29 CFR 825.700(b)). Thus, an employer that provides short-term disability leave that includes partial pay and retention of certain benefits such as group health insurance, should continue to do so, but may also run the unpaid FMLA leave entitlement concurrently with the short-term disability leave of absence. Further, an employer's failure to provide the same level of benefits to an employee on an unpaid FMLA leave of absence as would be provided to an employee who is taking a leave of absence for the same reasons but is not eligible for FMLA leave or who is taking unpaid leave for any reason may be discrimination and may be a violation of Regulations 29 CFR 825.220(c). The FMLA requires employers to provide the same level of benefits to the employee on unpaid FMLA leave that the employer would otherwise provide the employee on another type of unpaid leave or who is taking a leave of absence for a similar reason. For instance, if the employer offers pregnancy disability leave to an employee for the birth of the child then this benefit must also be offered to the employee who is using unpaid FMLA leave for the same reason.

The answer to your fourth concern is no. The FMLA requires the employer to designate a qualifying leave of absence as FMLA leave prior to the employee commencing the leave, if the event is foreseeable and the employer has sufficient information to make the designation. If the event is not foreseeable, then the employer should designate the leave as FMLA leave when sufficient information has been provided by the employee. Any retroactive designation that a leave of absence is qualifying under FMLA must be made while the employee is on leave and before the employee has returned to work. In no event, can the employer designate a leave of absence as FMLA leave once the employee has returned to work.[1] (See 29 CFR 825.208, 303, and 304).

In answer to concern number five, the current Regulations (29 CFR 825.114((a)(2)) cover any period of incapacity requiring absence from work, school, or other regular daily activities of more than "three calendar days" and continuing treatment by (or under the supervision of) a health care provider during this period of time. The employee's own serious health condition requiring a "greater than three day" absence need not be limited to workdays only, but may also include non workdays such as the weekend when the employee is unable to carry out regular daily activities.

The answer to concern number six is yes, in that the employee may request or the employer may require the employee to substitute accrued paid vacation for all or part of the unpaid FMLA leave. (See 825.207)

Your comments under concern number seven are consistent with the provisions of FMLA regarding the amount of leave that a husband and wife can take if employed by the same employer. As you have noted in your letter the combined leave amount for husband and wife is 12 weeks total in any 12-month period for the employee's child after birth, or placement for adoption or foster care, and to care for a parent with a serious health condition. A total of up to 12 weeks of FMLA leave, or the difference remaining from that already taken for the reasons already specified, may be taken by the husband and wife individually for the care of spouse or child who has a serious health condition or for the employee's own serious health condition. For example, if the husband took two weeks and the wife took ten weeks for the birth and care of the newborn child, the husband would still be entitled for the duration of the 12-month period to take up to ten weeks of FMLA leave for his or his wife's or child's serious health condition, while the wife could take only two weeks of FMLA leave for these same reasons. Because the combined 12-week entitlement has already been taken by the married couple for the birth and care of the newborn child, FMLA leave would be exhausted for the birth and care of the newborn child, adoption or foster care placement, or to care for a parent with a serious health condition. (See 825.202)

We hope the above fully responds to the questions you have raised. While we recognize that you may not fully agree with these responses, we would like to point out that Congress, in its statement of findings and purposes, indicated among other things that the purposes of the FMLA were to be accomplished "in a manner that accommodates the legitimate interests of employers."

If I may be of further assistance to you, you may also contact me.

Sincerely,

Daniel F. Sweeney
Deputy Assistant Administrator

cc: Senator Edward M. Kennedy

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

[1] Provisions applicable to this response regarding retroactive designation of FMLA leave after the employee has returned to work were changed in the Final Rule (under section 29 CFR 825.208(e)) published in the Federal Register on January 6, 1995 (60 FR 2180).