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

October 14, 1994 **FMLA-46**

Dear ***Name****,

This is in response to your letter requesting confirmation of guidance given to you orally by representatives of the Wage and Hour Division regarding those hours that would be counted towards meeting the "hours worked" eligibility requirement of the Family and Medical Leave Act of 1993 (FMLA).

Section 101(2)(C) of the FMLA states that, "[f]or purposes of determining whether an employee meets the hours of service requirement specified in subparagraph (A)(ii), the legal standards established under section 7 of the Fair Labor Standards Act of 1938 [FLSA] (29 U.S.C. 297) shall apply." The report of the Senate Committee states, among other things, that the minimum hours of service requirement is meant to be construed broadly, consistent with the legal principles established for determining hours of work under Regulations, 29 CFR Part 785.

Subpart B of Regulations, 29 CFR Part 785 sets out the principles for determining hours worked for purposes of the FLSA. Nothing contained in this subpart can be construed as requiring an employer to count as hours worked those times when the employee has been completely relieved from duty such as when the employee is on paid or unpaid leave. Further, in determining the regular rate for purposes of overtime compensation, section 7(e)(2) of the FLSA specifically excludes "payments made for occasional periods when no work is performed due to vacation, holiday, illness, failure of the employer to provide sufficient work, or other similar cause . . . . ."

With respect to the specific examples cited in your letter, we concur that the following would not be counted as either hours worked for purposes of FLSA or for purposes of meeting the 1,250 hours eligibility test of FMLA:

-paid or unpaid leave
-sick days taken by the employee, even if paid sick leave
-leave of longer duration
-sabbatical leave even if the employee continues to receive some compensation during this period.

Section 101(2) of the FMLA defines an eligible employee as, among other things, one who has been employed for at least 1,250 hours of service with such employer during the previous 12-month period. Section 108 that provides for special rules concerning employees of local educational agencies, provides no special definition of "eligible employee." Thus, all employees must have worked 1,250 in the 12 month period prior to the beginning date of the FMLA leave in order to be eligible for FMLA leave. This would be applicable to school employees who do not work during the summer months. Full-time teachers of an elementary or secondary school system, or institution of higher education, or other educational establishment or institution are deemed to meet the 1,250 test. An employer must be able to clearly demonstrate that such an employee did not work 1,250 hours during the previous 12 months in order to claim that the employee is not "eligible" for FMLA leave. Please keep in mind, however, that if an employee is maintained on the payroll for any part of a week, including periods of paid or unpaid leave during which other benefits or compensation are provided by the employer (e.g., group health plan benefits, workers' compensation benefits, etc.), the week counts as a week of employment for purposes of the 12-month eligibility test.

If the above has not been fully responsive to your inquiry, please let me know.

Sincerely,

Daniel F. Sweeney
Deputy Assistant Administrator

Enclosure

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