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

December 28, 1994 **FMLA-52**

Dear ***Name****,

Thank you for your letter of October 17, 1994, addressed to President Clinton about the Family and Medical Leave Act of 1993 (FMLA). Your letter has been referred to the U.S. Department of Labor's Wage and Hour Division for reply as this office has primary administration and enforcement responsibilities under the FMLA for all private, state and local government employees and some federal employees.

The FMLA, which became effective for most employers on August 5, 1993, allows up to 12 workweeks 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. If a collective bargaining agreement (CBA) was in effect on that date, FMLA became effective on the expiration date of the CBA or February 5, 1994, whichever was earlier.

Private-sector employers are covered under if they have employed at least 50 employees during 20 or more calendar workweeks in the current or the preceding calendar year. All public-sector employers are covered employers regardless of the number of employees employed.

Employees are eligible under FMLA if they have worked for a covered employer for at least 12 months (which need not be consecutive months), have worked at least 1,250 hours during the 12 months preceding the start of leave, and are employed at a worksite where the employer employs at least 50 employees within 75 miles.

Unpaid FMLA leave must be granted to an eligible employee for any of the following reasons: (1) for the 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. Upon return from FMLA leave, the employee is entitled to be restored to the same or equivalent position that the employee held when the leave commenced.

Pursuant to Regulations 29 CFR 825.207, an eligible employee may elect, or an employer may require the employee to substitute accrued paid vacation leave, personal or family leave, or medical or sick leave for any part of the 12-week FMLA leave period under certain conditions. Paid vacation leave and personal leave may be substituted for all or part of any unpaid FMLA leave provided to care for the employee's child after birth, or for placement with the employee of a son or daughter for adoption or foster care, or to care for a seriously ill family member. Paid sick leave or medical leave may be used and counted as leave for the employee's own serious health condition, and to the extent permitted by the employer's plan to care for the employee's seriously-ill family member. Use of paid family leave as FMLA leave is limited by the normal use of the employer's plan. If the employer requires paid leave to be substituted for unpaid FMLA leave, the employer must convey this decision to the employee at the time the employee gives notice of the leave or when the employer has determined that the leave qualifies as FMLA leave. (Reg. 29 CFR 825.301(c))

An employer, however, cannot require the employee to substitute, under FMLA, any paid vacation or other leave during the absence that would otherwise be covered by payments from plans covering temporary disabilities. Whether such temporary disability plans are provided voluntarily through insurance or under a self-insured plan or required to meet state-mandated disability provisions (e.g., pregnancy disability laws) would make no difference. The employer may designate and credit the temporary disability leave of absence against the FMLA 12-week annual entitlement so long as the reason for the leave is qualifying, the employee has been properly notified of the designation prior to the start of leave, and the employee's health care benefits have been maintained during the leave of absence. An employee's receipt of such payments precludes the employee from electing and prohibits the employer from requiring the substitution of any form of accrued paid leave for any part of the absence covered by such payments.

An employer is prohibited from discriminating against an employee who uses FMLA leave (Reg. 29 CFR 825.220(c)). For example, if an eligible employee would have been entitled to paid maternity leave (i.e., pregnancy disability leave) and the employer does not normally require the substitution of paid sick and/or vacation leave, an employer cannot require the substitution of such leave under FMLA.

It is not clear from the limited information contained in your letter whether the employer has discriminated against you, under FMLA, for requiring the substitution of accrued paid vacation and sick leave for a portion of your temporary disability benefits.

If you feel that the employer may have violated FMLA, you may contact the Wage and Hour office closest to your home. The nearest Wage and Hour office is in Atlanta, Georgia, at the following address and telephone number:

U.S. Department of Labor
Employment Standards Administration
Wage and Hour Division
Atlanta, Georgia District Office
1375 Peachtree Street, Room 668
Atlanta, Georgia 30303
Telephone No. (404) 347-4235/4258

For your information, we are enclosing the FMLA fact sheet that summarizes the Act's provisions.

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).*