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

October 15, 1993 **FMLA-8**

Dear ***Name****,

This is in response to your inquiry on the Family and Medical Leave Act of 1993 (FMLA) and temporary help and leasing service companies.

You requested clarification of how the FMLA applies to joint employment relationships. Under the FMLA, where two or more businesses exercise 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 eligibility for leave

Section 825.106 of the FMLA Regulations, 29 CFR Part 825 (copy enclosed), discusses the factors to be considered in determining how joint employment relationships are treated under the FMLA. Joint employment relationships are not determined by single criterion, but rather the entire relationship is viewed 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 FMLA leave, and restoring employees to their same or an equivalent position of employment upon the conclusion of FMLA 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 FMLA 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.

Based on the information in your letter, it appears that if ***Name**** employs 50 or more employees during 20 or more calendar workweeks in the current or preceding calendar year, ***Name**** would be a covered "employer" within the meaning of the FMLA, with the responsibilities of a "primary" employer as described in §825.106(e) of the FMLA regulations. Eligible employees of ***Name**** -- those who have worked for ***Name**** for at least 12 months and for at least 1,250 hours over the previous 12 months, who work at a worksite where at least 50 employees are employed within 75 miles (including jointly employed employees) -- are entitled to take FMLA leave for the reasons stated in the law. Eligible employees are also entitled to have their health benefits maintained by the employer during leave as if they continued to work, and to be restored to their same or an equivalent position of employment at the and of the leave.

A primary employer must meet all of its obligations under the FMLA even when facing a lack of cooperation by a secondary employer. The obligations are statutory. If the position of employment which the employee held when FMLA leave commenced still exists (whether or not a temporary replacement was hired), that same position is the one to which the employee returning on FMLA leave should be restored, or to an equivalent position with equivalent pay, benefits, and other terms and conditions of employment. If an employee is ready to be reinstated after an FMLA leave, the employer cannot require the employee to take additional FMLA leave on an intermittent or reduced leave schedule basis instead of being restored to equivalent employment. Sending the individual on the next available interview similarly would not comply with FMLA, unless the employer can show that the employee would not otherwise have been employed when reinstatement is requested (e.g., that the employee would have been laid off if the employee had continued to work instead of taking FMLA leave). An employer has the burden of proving that an employee would not otherwise have been employed the time the employee returning from FMLA leave seeks reinstatement.

I hope that you find the foregoing information responsive to your inquiry. If we may be of further assistance, please do not hesitate to contact us again.

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).*