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

**April 5, 2004** **FMLA2004-1-A**

Dear ***Name****,*

This is in response to your letter requesting an interpretation under the Family and Medical Leave Act of 1993 (FMLA) regarding counting employees from temporary agencies (and, specifically, regarding the counting of "day laborers" from the temporary agency) toward the 50-employee threshold test for coverage when the client employer otherwise employs fewer than 50 permanent full-time and part-time employees. You also ask if the owner of the company should be counted as one of the 50 employees for FMLA coverage.

There was a delay in responding to your initial request and you have advised us that the particular client for whom you had originally requested this interpretation no longer employs day laborers. However, you state that, since the situation described in your letter is not uncommon in your area, you still wish to receive a response. You also have advised us that you may use the guidance for publication of an article in a newsletter. Determinations of compliance, eligibility and other issues under the FMLA are fact-specific. Since the particular situation for which you originally requested guidance no longer exists, and no additional facts regarding that situation can be obtained, the following is provided as general guidance regarding the issue raised. Existence of any other factual or historical background not contained in your request might require a different conclusion than the one expressed herein.

The FMLA at § 101(4)(A)(i) and its implementing regulations at 29 CFR Part 825.104(a) define an "employer" as "any person engaged in commerce or in any industry or activity affecting commerce who employs 50 or more employees for each working day during each of 20 or more calendar workweeks in the current or preceding calendar year." Several concepts that are critical in determining who is counted toward the FMLA's "50 or more employees" coverage test are discussed below.

First, it is necessary to determine if an employment relationship exists as distinguished from a contractual one. The FMLA at § 101(3) defines the terms "employ" and "employee" as having the same meaning given such terms in the Fair Labor Standards Act of 1938, as amended (FLSA). Under the FLSA an employee, as distinguished from a person who is engaged in a business of his or her own, is one who, as a matter of economic reality, follows the usual path of an employee and is dependent upon the business which he or she serves.[1] You have not disputed that the client firm's temporary help employees and occasional day laborers are, in fact, employees.

Second, it is necessary to determine if employees (as opposed to contractors) of an employer have a continuing employment relationship with the employer. The FMLA's legislative history states that the language "employs 50 or more employees for each working day during each of 20 or more calendar workweeks in the current or preceding calendar year" parallels language used in Title VII of the Civil Rights Act of 1964 (Title VII), and is intended to receive the same interpretation. [See *Report from the Committee on Labor and Human Resources (S. 5),* Report 103-3, January 27, 1993, p. 22, and *Report from the Committee on Education and Labor* (H.R. 1), *Report 103-8*, Part 1, February 2, 1993, p. 33.] The Supreme Court has interpreted this language under Title VII as meaning "employ" in the sense of maintain on the payroll. See Walters v. Metropolitan Educational Enterprises, 519 U.S. 202 (1997).

As you correctly note in your letter, employees on paid and unpaid leaves of absence are counted as long as there is a reasonable expectation that the employee will return to active employment. However, where there is no continuing employment relationship (e.g., when an employee is temporarily or indefinitely laid off), or where the employment relationship does not continue for each working day of the workweek (e.g., when an employee begins or ends employment with an employer midweek), the employee is not counted for FMLA coverage and eligibility purposes.[2] See § 825.105(c) and (d).

Finally, pursuant to § 825.106 of the FMLA regulations, a temporary help agency and an employer who hires employees from the agency may be considered joint employers for purposes of determining employer coverage and employee eligibility. The FMLA implementing regulations utilize standards

established under the FLSA to determine whether the employment of the same employee by two employers is to be considered joint employment or separate and distinct employment. See § 825.106(a). The determination depends upon all the facts in the particular case. Generally, a joint employment relationship will be considered to exist where:

1. there is an arrangement between employers to share an employee's services or to interchange employees;
2. one employer acts, directly or indirectly, in the interest of the other employer in relation to the employee; or,
3. the employers are not completely disassociated with respect to the employee's employment and may be deemed to share control of the employee, directly or indirectly, because one employer controls, is controlled by, or is under common control with the other employer.

Using these principles, the Department believes that a joint employment relationship ordinarily exists, for purposes of the FMLA, where a temporary agency supplies employees to a client employer. Employees who are jointly employed by two employers must be counted by both employers, whether or not maintained on only one of the employer's payroll in a record-keeping sense, in determining employer coverage and employee eligibility under the FMLA. See § 825.106(b) and (d).

Your letter describes a situation in which a client employer has 42 full and part time employees on the payroll, routinely employs five or six employees who are provided by a temporary agency (routine temps), and from time to time uses day laborers who are also provided by a temporary agency. You ask several questions regarding if and how these employees should be counted for purposes for employer coverage. It is our position that the "routine temp" as well as the day laborers, as described in you letter, are jointly employed by the temporary help firm and your client firm. However, whether there is a continuing employment relationship for the purposes of FMLA coverage would depend upon all the circumstances in the individual case.

Based on the principles stated above, the following general examples are provided. In each example we assume, based on the limited information provided, that the routine temps work each day of the week for the client employer:

Example One: The temporary service agency provides the client firm with five day laborers in addition to the five or six routine temps. The same five day laborers work for the client company all week. In this example, the client firm would count the 42 full and part time regular employees, the five or six routine temps, and the five day laborers, as the day laborers are jointly employed by the client employer each working day of the week and there remains a continuing employment relationship with the client employer for the week.

Total employees for the week: 52 or 53. This week would be counted toward the 20 workweek threshold.

Example Two: In addition to the client firm's regular employees and the five or six routine temps, the temporary service provides three day laborers each day, but not the same three workers.

Your client would count the firm's regular employees and the five or six routine temps as in Example One above. The day laborers in this example need not be counted as no day laborer worked for the client employer each day of the week or appeared to have a continuing employment relationship with the client employer.

Total employees for the week: 47 or 48. This week would not be counted toward the 20 workweek threshold for the client employer.

Example Three: The client firm needs six day laborers one day and three each of the following three days, in addition to the 42 regular employees and five or six routine temps. In this case, the client firm would count its 42 regular employees and five or six routine temps. The day laborers need not be counted as no day laborer worked for the client employer each working day of the week or appeared to have a continuing employment relationship with the client employer.

Total employees for the week: 47 or 48. As in Example Two, this week would not be counted toward the 20 workweek threshold for the client employer.

Finally, you question whether the owner of the client company would be counted for the 50-employee threshold test for the FMLA coverage. The answer to this question is fact specific and dependent upon whether an employment relationship existed between the business entity and the "owner." See Clackamas Gastroenterology Assoc. P.C. v. Wells, 123 S. Ct. 1673 (2003). Unfortunately, there was not enough information in your inquiry for us to make such a determination. However, in general, whether an individual is a true owner or partner as opposed to an employee depends on whether he or she acts independently and participates in management or instead is subject to the control of the organization. Clackamas, 123 S. Ct. at 1680.

This opinion is based exclusively on the facts and circumstances described in your request and is given on the basis of your representation, explicit or implied, that you have provided a full and fair description of all the facts and circumstances which would be pertinent to our consideration of the question presented. Existence of any other factual or historical background not contained in your request might require a different conclusion than the one expressed herein. You have represented that this opinion is not sought by a party to pending private litigation concerning the issue addressed herein. You have also represented that this opinion is not sought in connection with an investigation or litigation between a client or firm and the Wage and Hour Division or the Department of Labor.

We trust that we have been responsive to your inquiry.

Sincerely,

Tammy D. McCutchen
Administrator

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

[1] See Rutherford Food Corp. V. McComb, 331 U.S. 722 (1947); Goldberg v. Whitaker House Cooperatives, Inc., 336 U.S. 28 (1961): Walling v. Portland Terminal Co., 330 U.S. 148 (1947); and Walling v. American Needlecrafts, Inc., 139 F. 2d 60, (6th Cir. 1943).

[2] Part-time employees, like full-time employees, are considered to be employed each working day of the calendar week, as long as they are maintained on the payroll.