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

**October 25, 2004** **FMLA2004-4**

Dear ***Name****

This is in response to your letter of January 9, 2004, regarding an employee's rights under the Family and Medical Leave Act of 1993 (FMLA) and employer required drug testing. You ask if an employer may require an employee returning from FMLA qualifying leave to undergo drug testing within three days of the employee's return to work. You state that employees who refuse to submit to the drug testing are treated as insubordinate.

The FMLA entitles eligible employees of covered employers to take up to 12 weeks of unpaid, job-protected leave each year – with continuation of group health insurance coverage under the same conditions as prior to leave – for specified family and medical reasons. However, to be eligible for these FMLA protections, employees must work for a covered employer, have worked for their employer for at least 12 months, have worked at least 1,250 hours during the 12 months preceding the start of leave, and work at a site where the employer employs at least 50 employees at the site or within 75 miles of the site. The 12 months the employee has to have worked do not have to be consecutive.

Eligible employees are entitled to unpaid FMLA leave for any of the following reasons: (1) the birth of a son or daughter, and to care for the newborn child within one year of birth, (2) the placement with the employee of a son or daughter for adoption or foster care, and to care for the newly placed child within one year of placement, (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 the essential functions of his/her job.

When an employee is returning to work after FMLA leave, section 104(a)(4) of the FMLA permits an employer to require a "fitness for duty" test if the employer has a uniformly-applied policy or practice that requires all similarly situated employees who take leave for their own serious health conditions to obtain and present certification from their health care providers that they are able to resume work. An employer may seek fitness-for-duty certification only with regard to the particular health condition that caused the employee's need for FMLA leave. 29 C.F.R. 825.310(c). However, if State or local law or the terms of a collective bargaining agreement govern an employee's return to work, those provisions shall be applied. Nothing in the FMLA prohibits an employer from requiring an employee to submit to drug testing once the employee has returned to work. Therefore, the employer's actions do not violate the FMLA.

Responsibility for investigating allegations of violations of the FMLA has been delegated to the district offices of the Wage and Hour Division. If you have additional questions, you may contact the nearest Wage and Hour District Office located at 211 W. Fort Street, Room 1317, Detroit, Michigan, 48226, telephone (313) 226-7447.

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.

Sincerely,

Rosemary E. Sumner
Office of Enforcement Policy
Family and Medical Leave Act Team

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