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

This letter is under review in light of issues raised by the U.S. Supreme Court in Ragsdale v. Wolverine World Wide, Inc. and other judicial decisions. It may be superceded by FMLA2002-5-A.

October 27, 1994 **FMLA-49**

Dear ***Name****,

Thank you for your letter of August 10, 1994, concerning the Family and Medical Leave Act of 1993 (FMLA). You express two concerns about the provisions of this law: the substitution of paid leave for unpaid FMLA leave; and, whether the employer has the right to designate any leave that is FMLA-qualifying as FMLA leave.

In enacting the law, Congress found inadequate job security for employees who have serious health conditions that prevent them from working for temporary periods of time and a lack of employment policies to accommodate working parents that forces individuals to choose between job security and parenting. Congress stated that the purposes of this law are to balance the demands of the workplace with the needs of families and to entitle employees to take reasonable leave for medical reasons, for the birth or adoption of a child, and for the care of a child, spouse or parent who has a serious health condition. Congress intended that the legitimate interests of the employer must be accommodated in implementing the FMLA.

The FMLA, which became effective for most employees on August 5, 1993, allows up to 12 weeks 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 FMLA 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 reasons previously mentioned in paragraph two. Upon return from FMLA leave, the employee is entitled to be restored to the same position that the employee held when the leave commenced, or to an equivalent position with equivalent pay, benefits, and other terms and conditions of employment.

The term serious health condition is intended to cover conditions or illnesses affecting one's (or the immediate family's) health to the extent that inpatient care is required, or absences are necessary on a recurring basis or for more than a few days for treatment or recovery. This term is not intended to cover short term conditions for which treatment and recovery are very brief as such conditions would generally be covered by the employer's sick leave policies. Current regulations define the term serious health condition to include: any period of incapacity or treatment connected with inpatient care in a hospital, hospice or residential medical-care facility; any period of incapacity requiring absence from work, school, or other regular daily activities of more than "three calendar days" that also includes continuing treatment by (or under the supervision of) a health care provider; or continuing treatment by or under the supervision of a health care provider for a chronic or long term health condition that is incurable or so serious that, if not treated, would likely result in a period of incapacity of more than three calendar days, and for prenatal care. Any condition that satisfies any one of these three definitions is a serious health

condition for purposes of the FMLA regardless of how the employer or employee may regard such condition. The FMLA provides that an eligible employee may elect, or an employer may require the employee to substitute any of the 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, personal leave, or family leave may be substituted for all or part of any unpaid FMLA leave provided to care for the employee's child after birth, or placement 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 FMLA 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 also 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.

It is the employer's responsibility to designate a leave of absence as FMLA leave, whether paid or unpaid, if the reason for which the employee is taking the leave is qualifying and the employee is eligible. While the employee need not expressly assert his of her rights to leave, the employee or the employee's designated representative must provide sufficient information, i.e., provide a qualifying reason, so that the employer is aware of the employee's entitlement to take the leave of absence under the FMLA. The employer is allowed to make further inquiries to ascertain whether the leave of absence is (or potentially] FMLA qualifying in order to grant the leave of absence to an eligible employee. Without sufficient information, the employer would be under no obligation to approve a leave of absence until the employee provided a qualifying reason. In no event may the employer designate FMLA leave after the leave of absence has ended.

Employees cannot waive their rights under the FMLA by accepting, for example, a trade-off of another benefit offered by the employer for FMLA leave. Likewise, the employer is prohibited from inducing an employee to waive his or her rights under the FMLA. While the employer must grant FMLA leave to an eligible employee who needs a leave of absence for a qualifying reason, the employer may, but is not required to, count the leave used against the 12-week FMLA leave entitlement. Under such circumstances, the employer would be required to provide FMLA's benefits and protection during the leave of absence.

Given the circumstances in your letter, the employer's initial response to allow an employee who wished not to take FMLA leave for a qualifying event to sign a form waiving rights to FMLA leave would be irrelevant. Employees may not waive their FMLA rights. The employer's subsequent response to make FMLA leave mandatory for eligible employees who are taking leave for qualifying events is permissible under the law, but is not required. As previously mentioned, an employer is not precluded under the FMLA from extending greater coverage, e.g., grant the FMLA leave with full protection and benefits without actually counting the leave used against the 12-week entitlement. This response would allow for greater protection and benefits because it would extend the 12-week leave entitlement in the 12-months designated period provided under the FMLA. For example, an employer may permit an employee to use accrued paid sick leave for FMLA qualifying events and, as long as FMLA's job protection and benefits are extended, to bank the 12-week FMLA entitlement leave for later use such as after the employee's sick leave has been exhausted.

We would like to point out that, prior to the FMLA, employees enjoyed no Federal guarantees with respect to absences related to family and medical leave, job restoration, or continued group health care coverage. Employers, for example, would have been able to refuse leave or terminate employees needing to take time off to take care of family and medical situations. The FMLA now guarantees employees at least 12 weeks of job and health care benefits protection in a 12 months period. Employers may voluntarily provide such protection for longer period of time.

For your information, we are enclosing a variety of FMLA publications. If you require additional guidance, you may contact our Wage and Hour District office in New Orleans, Louisiana. The address and telephone number are:

U.S. Department of Labor
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Sincerely,

Daniel F. Sweeney
Deputy Assistant Administrator

Enclosures

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