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 It may be superceded by FMLA2002-5-A.

November 2, 1993 **FMLA-12**

Dear ***Name****,

This is in response to your inquiry regarding the responsibility of an employer to designate and notify an employee that leave taken by the employee is being charged against the employee's entitlement pursuant to the provisions of the Family and Medical Leave Act of 1993 (FMLA).

Regulations 29 CFR Part 825.208 provide that an employer may designate paid leave taken by an employee as FMLA leave as soon as the employer has knowledge that the purpose of the leave is for an FMLA reason. This section further provides that the designation should be made before the leave is taken or before an extension of leave is granted, unless the employer does not have sufficient information as to the reason for the leave until after the leave commences. Under no circumstances may the leave be designated after the leave has been completed.

You provide two examples involving an employee who takes leave for maternity. Both leaves begin before the effective date of the FMLA (August 5, 1993). In the first example, the employer has a paid maternity leave policy and in the second the employee takes sick leave. In the second example the employee requests and receives approval for an extension of sick leave. In both examples you state that all notices required by § 825.301(c) have been given. In both examples, the employer does not designate the leave as FMLA leave until near the date the employee is to return to work. You ask if the employer may retroactively designate the leave as leave.

If the employer has given the notices required by § 825.301(c) as you stated in the examples it would not be necessary to deal with retroactive designation. This section of the FMLA regulations requires the employer to provide specific notifications to the employee which are peculiar to that employee who has given notice of the need to take FMLA leave. One of those notifications is whether the leave is FMLA leave.

Clearly, it is the intent of the regulations that the employee be notified as soon as possible after the employer has decided to designate leave as FMLA leave. This gives the employee needed information to plan how best to manage the family or medical event. In the two examples given, assuming the employer did not comply with the notice requirements of § 825.301, retroactive designation could not be made beyond the date the employer notified the employee of the designation. See §825.208(b) and (c).

Hopefully this has been responsive to your request. If you have further questions please contact J. Dean Speer of my staff at telephone (202) 219-8412.

Sincerely,

MARIA ECHAVESTE
Administrator

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