

PERSONNEL SERVICES BULLETINS (PSBs)

440-8R

Subject: Guidelines on the Family and Medical Leave Act of 1993

Supersedes: Personnel Services Bulletin No. 440-8

Date: April 17, 2000

PURPOSE

To amend the procedure which coordinates the granting of leave under the Family and Medical Leave Act of 1993 ("FMLA") with leave provisions contained in the Citywide Agreement between the City of New York and District Council 37, the "Leave Regulations for Employees Who Are Under the Career and Salary Plan," and the "Leave Regulations for Management Employees." Personnel Policy and Procedure Bulletin No. 600-94 established interim guidelines on the FMLA based on the U. S. Department of Labor's Interim Final Rule. This Personnel Services Bulletin establishes guidelines based on the federal agency's Final Rule.

BACKGROUND

The federal Family and Medical Leave Act of 1993 entitles eligible City employees to 12 weeks of leave in a 12-month period for child care and for the serious health condition of the employee or covered family members. The FMLA became effective on August 5, 1993 for managers and employees in original jurisdiction positions; on February 5, 1994, it became effective for employees covered under collective bargaining agreements with the City of New York. (See Memorandum to Agency Heads dated August 23, 1993.)

GENERAL PROVISIONS

The following FMLA provisions are integrated with existing time and leave benefits contained in the Citywide Agreement, the "Leave Regulations for Employees Who Are Under the Career and Salary Plan," and the "Leave Regulations for Management Employees." FMLA provisions apply to eligible full-time and part-time employees in all jurisdictional classifications (competitive, non-competitive, labor, and exempt) and include provisional, temporary, and seasonal employees. Each agency must designate an FMLA Coordinator to assist in effectuating these provisions.

1. Certain individuals are excluded from the definition of "employee" under the FMLA. A person who:
 - a. is not subject to the civil service laws of the political subdivision which employs the employee, **and**
 - b. holds a public elective office; or
 - c. is selected by the holder of such public elective office to be a member of his/her personal staff; or
 - d. is appointed by such public elective officeholder to serve on a policymaking level; or
 - e. is an immediate adviser to such public elective officeholder with respect to the constitutional or legal powers of the office of such officeholder; or
 - f. is an employee in the legislative branch or legislative body of... [the] political subdivision

is not eligible for FMLA leaves.

2. An eligible employee is one who has worked for the employer for a total of at least 12 months preceding the start of the leave. The 12 months need not be consecutive. If an employee is maintained on the payroll for any part of a week, the week counts as a week of employment. To be eligible, the employee must also have actually worked 1,250 hours over the 12-month period immediately preceding the start of the leave.

3. An eligible employee is entitled to a total of 12 weeks of leave in a 12-month period. Leave may be taken upon the birth of a child to the employee, to care for such child; or upon the placement of a child with the employee for adoption or foster care, to care for such child ("FMLA child care leave"). Leave may also be taken to care for a child of the employee when the child has a serious health condition, as defined herein; to care for the employee's parent or spouse when such person has a serious health condition; and for the employee's own serious health condition.

"Child" means a biological, adopted or foster child of the employee; a legal ward or stepchild of the employee; or a child for whom the employee stands in loco parentis. A child must either be under the age of 18 or incapable of self-care because of mental or physical disability. "Spouse" means a husband or wife as defined or recognized under state law for purposes of marriage in the state where the employee resides. "Parent" means the biological parent of the employee, or a person who stands or stood in loco parentis for the employee when the employee was a child, as defined herein; it does not include "in-laws."

4. In addition, an eligible employee with a domestic partner may take up to 12 weeks of leave to care for the employee's domestic partner if such person has a serious health condition. Any FMLA leave already taken during the previous 12 months, pursuant to Section 3 above, will be subtracted from the 12 weeks allowed for this purpose. Leave taken for this purpose does not diminish the employee's entitlement to the 12 weeks of FMLA leave permitted pursuant to Section 3 above. "Domestic Partner" means domestic partner as defined in Section 1-112 (121) of the Administrative Code of the City of New York.

5. The 12-month period in which the 12 weeks of leave entitlement occurs is a "rolling" 12-month period measured backward from the date any FMLA leave is to be used. Under this method of leave calculation, each time an employee is to take FMLA leave, the leave entitlement would be the balance of the 12 weeks which had not been used during the immediately preceding 12 months.

6. Serious health condition, as further explained below, means an illness, injury, impairment, or physical or mental condition that involves inpatient care or continuing treatment by a health care provider.

A serious health condition which involves inpatient care (i.e., overnight stay) in a hospital, hospice, or residential medical facility also includes any period of incapacity, and any subsequent treatment, related to such inpatient care.

Incapacity means inability to work, attend school, or perform other regular daily activities due to the serious health condition, or consequent treatment, or recovery from the serious health condition. When leave is taken for the employee's own serious health condition, incapacity means the inability to work at all or to perform any one of the essential functions of the employee's position within the meaning of the Americans with Disabilities Act of 1990 and its implementing regulations.

A serious health condition which involves continuing treatment by a health care provider includes one or more of the following:

a. A period of incapacity of more than three consecutive calendar days, and any subsequent treatment or period of incapacity relating to the same condition, that also involves treatment two or more times by a health care provider, a nurse or physician's assistant under the direct supervision of a health care provider, or by a provider of health care services (e.g., physical therapist) under orders of, or on referral by, a health care provider; or

b. A period of incapacity of more than three consecutive calendar days, and any subsequent treatment or period of incapacity relating to the same condition, that also involves treatment by a health care provider on at least one occasion which results in a regimen of continuing treatment under the supervision of the health care provider; or

c. Any period of incapacity due to pregnancy or for prenatal care; or

d. Any period of incapacity due to a chronic serious health condition which requires periodic visits for treatment, continues over an extended period of time, and may cause episodic rather than a continuing period of incapacity (e.g., asthma, diabetes, epilepsy, etc.); or

e. A period of incapacity which is long term or a permanent incapacity due to a condition for which treatment may not be effective (e.g., Alzheimer's Disease, stroke, etc.). Active treatment by a health care provider may not be necessary but continuing supervision by a health care provider is required; or

f. Any period of absence to receive multiple treatments (including any period of recovery resulting from treatment) by a health care provider or by a provider of health care services under orders of, or on referral by, a health care provider, for restorative surgery after an injury, or for a condition that would likely result in a period of incapacity of more than three consecutive calendar days in the absence of medical treatment, such as cancer (chemotherapy, radiation, etc.), kidney disease (dialysis), etc.

7. Health care providers include doctors of medicine or osteopathy authorized to practice medicine or surgery; podiatrists, dentists, clinical psychologists, optometrists, chiropractors in certain instances, nurse practitioners, nurse-midwives, and clinical social workers, authorized to practice in the state; and Christian Science practitioners listed with the First Church of Christ Scientist in Boston, Massachusetts; or any other health care provider determined by the U.S. Department of Labor to be capable of providing health care services.

8. Leave taken for the employee's own serious health condition or to care for a covered relative's serious health condition may be taken on an intermittent or reduced leave schedule in cases of medical necessity. Certification from a health care provider stating the medical necessity for leave on an intermittent or reduced leave basis and the duration and schedule of the leave satisfies the medical necessity requirement. However, the employee must attempt to schedule leave so as not to disrupt the agency's operations. If an employee requests intermittent leave or leave on a reduced leave schedule that is foreseeable based on planned medical treatment, including a period of recovery from a serious health condition, the employer may require the employee to transfer temporarily to an available alternative position for which the employee is qualified and which has equivalent pay and benefits, which better accommodates recurring periods of leave than does the employee's regular position. Transfer to an alternative position shall require compliance with any applicable collective bargaining agreement, federal law (such as the Americans with Disabilities Act), and State law.

9. Entitlement to FMLA child care leave expires 12 months after the birth or placement of the child with the adoptive or foster parent. Child care leave may not be taken on an intermittent or reduced leave schedule. Paid annual leave and non-FLSA compensatory time must be used concurrently with FMLA child care leave, but if FMLA leave is to be extended by City provided child care leave (for birth or adoption), only that portion of the FMLA leave which is not coincident with paid leave is to be counted against the City child care leave entitlement. If an employee commences child care leave and has no annual leave or compensatory time, FMLA child care leave is to be counted in its entirety against the City child care leave entitlement. If FMLA child care leave has not been taken and the 12-month eligibility period has elapsed, City child care leave may be taken at any time until the child's fourth birthday.

10. When the need for FMLA leave is foreseeable, an employee must give the agency FMLA Coordinator at least 30 calendar days advance notice before the leave begins. If the employee does not, the employer can delay the start of the FMLA leave. If leave is to be delayed by the agency because of the employee's failure to comply with the 30-day requirement, it must be clear that the employee had notice of this requirement. It is therefore imperative that the notice entitled "Your Rights under the Family and Medical Leave Act of 1993" be posted conspicuously at the worksite and, where appropriate, included in the agency's employee handbook. If the employee's foreseeable leave is to be delayed because there was no reasonable cause for the untimely notification, an administrative review must be conducted by designated agency personnel. If the need for leave is unforeseeable, the employee is ordinarily required to give notice within one or two business days of when the need for leave becomes known to the employee.

In those cases where paid leave is used concurrently with FMLA leave, if the City's notice requirements are less stringent than the notice requirements of the FMLA, only the less stringent requirements may be imposed.

11. When an employee requests leave for an FMLA qualifying purpose but does not request to use FMLA leave, it is the agency's responsibility to designate such leave as FMLA leave. Such designation may be made before or after the leave commences, as long as it is made within two business days, absent extenuating circumstances, of the agency acquiring knowledge that the leave is for an FMLA qualifying purpose. If the agency learns, subsequent to the commencement of leave, that the leave or some portion thereof, is or was for an FMLA qualifying purpose, the agency must designate such leave as FMLA leave retroactively to, and/or prospectively from, the FMLA qualifying event.

The agency may designate leave as FMLA leave after the employee returns to work only if the agency was not aware of the reason for the leave prior to such time or the agency preliminarily designated leave as FMLA leave while awaiting medical certification. In the former instance, leave must be designated as FMLA leave within two business days of the employee's return to work, with appropriate notice to the employee. In the latter case, the preliminary designation of FMLA leave becomes final upon receipt of medical certification confirming the leave was for an FMLA qualifying purpose. If the employee requests leave to be counted as FMLA leave after returning to work, the employee must notify the agency of the FMLA qualifying purpose of the leave within two business days of returning to work.

If the agency's initial notice to the employee designating FMLA leave is oral, the agency must confirm the designation in writing, in any format, no later than the following payday or, if there is less than one week between the oral notice and the next payday, written notice must be no later than the subsequent payday.

12. When an employee requests leave for an FMLA qualifying purpose, the attached Form DP-2494, "Request for Leave under the Family and Medical Leave Act," and a copy of the notice entitled "Your Rights under the Family and Medical Leave Act of 1993" must be immediately provided to the employee. The employee must, in turn, submit the completed form as soon as practicable. Please note that the agency may not deny or delay the leave because the employee has not submitted written notice as long as the employee has provided timely oral notice of the need to take leave for an FMLA qualifying reason. The agency FMLA Coordinator or designee must sign the request form indicating the disposition and return it to the employee within 5 working days of receipt. The approved request form may be used as written confirmation of an FMLA designated leave, as required in Section 11, if it is returned to the employee within the time constraints stated in Section 11.

Please note that the request form contains notice to the employee of specific obligations of the employee and the consequences of the failure to meet these obligations, as well as certain obligations of the employer. Among the items discussed are the requirements for documents to support the leave and the return to work, the employee's status as a "key" employee, the right to be restored to the same or equivalent position, and the requirement to substitute paid leave.

13. Appropriate paid leave balances (including managers' vested or sub-managerial leave balances as applicable) must be used concurrently with FMLA leave. For instance, all paid sick leave must be used and counted against the 12-week FMLA leave entitlement if absence is due to the employee's own serious health condition. If all sick leave balances have been exhausted and annual leave is used due to the employee's own serious health condition, the annual leave used shall be counted against the FMLA entitlement. Compensatory time balances, except for compensatory time subject to the Fair Labor Standards Act, must also be used and counted against the FMLA entitlement. Similarly, all paid annual leave and non-FLSA compensatory time must be used and counted as FMLA leave if absence is for any other FMLA qualifying purpose. After all leave balances have been exhausted, any leave that is advanced or granted for either the employee's own serious health condition or other FMLA qualifying reasons will be counted against the employee's FMLA entitlement. If an employee chooses to use FLSA compensatory time for an FMLA qualifying purpose, such time used may not be counted against the employee's FMLA leave entitlement.

14. An employee will be required to present medical documentation to support a request for FMLA leave when a serious health condition is involved. For the employee's own serious health condition, such documentation should include the date the serious health condition commenced, the probable duration of the condition, the diagnosis, the regimen of treatment prescribed, a statement that the employee is unable to perform all or any one of the essential functions of the employee's position, or in the case of leave to care for a covered relative's serious health condition, a statement that the relative requires assistance for basic medical needs, hygiene, nutritional needs, safety, transportation, or psychological comfort. Documentation should be requested at the time the employee requests leave or in the case of unforeseen leave, soon after the leave commences. Documentation must be provided within 15 calendar days from the agency's request where practicable. (Use attached Form DP-

2496, "Certification of Physician or Health Care Provider" or if not practicable, provide appropriate documentation in another form.)

15. An employee will be required to present documentation to support a request for FMLA leave to care for a newborn child or a child who has been adopted or received into foster care. Documentation should be requested at the time the employee requests leave, or in the case of unforeseen leave, soon after the leave commences. Documentation must be provided within 15 calendar days from the agency's request where practicable. (See attached Form DP-2495, "Child Care Leave Certification under the Family and Medical Leave Act.")

16. An employee on FMLA leave for his/her own serious health condition may be required to provide medical documentation certifying fitness to return to work before restoration.

17. An employee who returns from FMLA leave must be restored to his or her previous position or to an equivalent position. An equivalent position is a position in the same civil service title which has the same pay, benefits, and working conditions (including the same worksite or a geographically proximate worksite). A geographically proximate worksite is one that does not involve a significant increase in commuting distance or time. If the employee is denied restoration or other benefits, the agency must be able to show that the employee would not have continued to be employed, or to have received the benefits, if the employee had been continuously employed during the leave period.

18. FMLA leave is not considered a break in service for the purpose of pay and benefits; however, the time spent on unpaid leave is not counted as service in determining benefits, including pensions.

19. Where the restoration of a "key" employee would cause substantial and grievous economic injury to its operations, an employer may refuse to restore such employee provided certain procedures have been followed. A "key" employee is a salaried employee who is among the highest paid ten percent of salaried and unsalaried City employees. A "key" employee must be advised in writing of his/her status as such, and the implications of such status, at the time leave is requested. If it is determined, while the employee is on leave, that restoration will cause grievous economic injury, the agency must notify the employee by certified mail that it intends to deny restoration on completion of leave and must state the basis for its determination. The "key" employee must be given a reasonable time in which to return to work. If he/she does not return to work at that time, the "key" employee may still request restoration at the end of the leave period. If the agency's determination remains the same, the employee must be notified by certified mail that restoration is denied. Please note that "key" employees who are also permanent employees covered under Civil Service Law, Section 75, must be restored to their positions unless the appropriate procedures required by Civil Service Law have been followed. In addition, "key" employees who are on City provided child care leave concurrent with FMLA child care leave are to be restored to their positions pursuant to the City's leave provisions.

20. Group health insurance must be maintained for an employee on FMLA leave on the same terms as if the employee had continued to work. However, the employer may recover its share of health plan premiums for the period of time the employee was on unpaid leave if the employee does not return to work after the FMLA leave has expired, unless there is a continuation or onset of a serious health condition or another circumstance occurs which is beyond the employee's ability to control. The NYC Office of Labor Relations has issued additional information on health insurance and welfare funds under separate cover.

21. FMLA leave records must be maintained by the agency as described in Section 825.500 of the regulations issued by the U.S. Department of Labor, which is attached.

22. Employees who exercise their rights under the FMLA are protected as described in Section 825.220 of the regulations issued by the U.S. Department of Labor, which is attached.

23. The Office of Payroll Administration has issued instructions under separate cover with regard to the Payroll Management System and FMLA leave.

William J. Diamond
Commissioner

Attached Forms:

[Request for Leave Under the Family Medical Leave Act](#) (in pdf format)

[Child Care Leave Certification under the Family and Medical Leave Act](#) (in pdf format)

[Certification of Physician or Other Health Care Provider](#) (in pdf format)

[Sections of Federal Law Your Rights Under the Family and Medical Leave Act of 1993](#) (in pdf format)

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