

*Circulate
Dunsem
Deuchs*

RECEIVED

APR 13 AM 10:50 No.

Issue No.
1

THE CITY OF NEW YORK
DEPARTMENT OF PERSONNEL

600-94

PERSONNEL POLICY AND PROCEDURE

DATE: March 15, 1994

SUBJECT: Interim Guidelines on the Family and Medical Leave Act of 1993

PURPOSE:

To establish an interim procedure which coordinates the granting of leave under the Family and Medical Leave Act of 1993 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."

BACKGROUND:

The federal Family and Medical Leave Act of 1993 ("FMLA") entitles eligible City employees to 12 weeks of leave in a 12-month period for child care and for the serious illness of the employee or covered family members. 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 Career and Salary Plan leave regulations, and the Managerial leave regulations. 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 is:
 - not subject to the civil service laws of the political subdivision which employs the employee, and
 - holds a public elective office; or
 - is selected by the holder of such public elective office to be a member of his/her personal staff; or

INQUIRIES: Citywide Personnel Policies and Standards Division (212) 487-6158

- is appointed by such public elective officeholder to serve on a policymaking level; or
- is an immediate adviser to such public elective officeholder with respect to the constitutional or legal powers of the office of such officeholder; or
- 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, which 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 to care for a newborn child or a child who has been adopted or received into foster care; to care for the employee's seriously ill spouse, child who is either under age 18 or who is age 18 or older and incapable of self-care because of a mental or physical disability, or parent; and to receive medical care for the employee's own serious health condition. Leave taken for the serious health condition of a spouse, child or parent also covers a common law spouse, adopted or foster child, legal ward, stepchild, child for whom the employee stands in loco parentis, or person who stood in loco parentis for the employee.
4. 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 has not been used during the immediately preceding 12 months.
5. Serious health condition means an illness, injury, impairment, or physical or mental condition that involves: any period of incapacity or treatment in connection with or consequent to inpatient care (i.e., an overnight stay) 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 3 calendar days, that also involves 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 3 calendar days; and for prenatal care.

6. Continuing treatment by a health care provider means one or more of the following:
 - The employee or family member in question is treated 2 or more times for the injury or illness by a health care provider. Normally this would require visits to the health care provider or to a nurse or physician's assistant under direct supervision of the health care provider.
 - The employee or family member is treated for the injury or illness 2 or more times by a provider of health care services (e.g., physical therapist) under orders of, or on referral by, a health care provider, or is treated for the injury or illness 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 - for example, a course of medication or therapy - to resolve the health condition.
 - The employee or family member is under the continuing supervision of, but not necessarily being actively treated by, a health care provider due to a serious long-term or chronic condition or disability which cannot be cured.

7. A health care provider includes 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 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. 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 must also be used and counted against the FMLA entitlement. Similarly, all paid annual leave and 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 reasons will be counted against the employee's FMLA entitlement.

9. 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 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.

10. 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 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.

11. 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.

12. When an employee requests FMLA leave, 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 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. 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 things 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. 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 any 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.)

14. An employee will be required to present documentation to support a request for FMLA leave to care for a newborn child or a child which 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.")
15. An employee on FMLA leave for his/her serious health condition may be required to provide medical documentation certifying fitness to return to work before restoration.
16. 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). 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.

17. 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.

18. Where the restoration of a "key" employee would cause 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. (The NYC Office of Management and Budget will provide information shortly on the identification of key employees.) A "key" employee must be advised 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.

19. 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 will issue further information under separate cover on health insurance.

20. 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.
21. 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.
22. The Office of Payroll Administration will issue instructions under separate cover with regard to the payroll management system and FMLA leave. In the interim, all FMLA leave transactions are to be performed manually.



Lilliam Barrios-Paoli
City Personnel Director/Commissioner