

October 2006

Legal Q&A

By Evelyn W. Njuguna

TML Legal Counsel

Q: What is the Family and Medical Leave Act (FMLA)?

A: The FMLA is a federal law that went into effect on August 5, 1993. 29 U.S.C. §201 *et seq.* Under the FMLA, eligible employees are entitled to 12 weeks of unpaid leave for certain qualifying events.

Q: Is my city covered by the FMLA?

A: All public agencies, including cities, are covered entities, regardless of their size. 29 CFR §825.104.

Q: Which employees are eligible for leave under the FMLA?

A: Not all city employees are eligible for FMLA leave. To be eligible for leave, an employee must: (1) have been employed by the city for at least 12 months, which do not have to be consecutive; (2) have worked for at least 1,250 hours in the 12-month period immediately preceding the date the FMLA leave begins; and (3) be employed by a city that has at least 50 employees at the site where the employee works or within 75 miles of that work site. 29 CFR §825.110.

Q: What types of events qualify for leave under the FMLA?

A: Not all medical and family situations qualify for FMLA leave. An employee can take FMLA leave for the following reasons: (1) to care for a newborn child; (2) to have a child placed with the employee for adoption or foster care; (3) to care for the employee's spouse, child, or parent with a serious health condition; and (4) for a serious health condition that prevents the employee from performing the job. 29 CFR §825.112.

A parent does not have to be a biological or legal parent. An eligible employee may take leave to care for an individual who stood *in loco parentis* (in the place of a parent) to an employee when the employee was a child. 29 CFR §825.113. A "child" under the FMLA is defined as a son or daughter who is either under the age of 18 or is over the age of 18 and incapable of self-care because of a mental or physical disability. *Id.*

Q: What benefits do eligible employees enjoy under the FMLA?

A: An eligible employee is entitled to a total of 12 workweeks of leave during any 12-month period for a qualifying event. 29 CFR §825.100. Eligible employees do not have to take the entire 12 workweeks at once. An employee may take leave under the FMLA intermittently or on a reduced leave schedule. 29 CFR §825.203.

Intermittent leave is FMLA leave taken in separate blocks of time due to a single qualifying reason. A reduced leave schedule is a schedule that reduces an employee's usual number of working hours per workweek, or hours per workday. *Id.* Intermittent leave for the birth of a child or placement of a child for adoption or foster care is subject to approval by the employer. *Id.* However, an employee with a pregnancy-related illness may take leave intermittently for a serious health condition. *Id.*

Generally, a city is required to restore an eligible employee to the same position the employee held when the employee began FMLA leave, or to an equivalent position with equivalent benefits and pay. 29 CFR §825.207. If the city determines that restoration of a key employee would cause substantial and grievous economic injury to the city, the city may notify the key employee that he will not be restored at the end of the leave. 29 CFR §825.217-219. A "key employee" is any exempt employee who is among the highest paid ten percent of all employees within 75 miles of the employee's worksite. *Id.*

A city is also required to maintain the employee's health benefits as if the employee were continuously employed during the leave period. 29 CFR §825.209.

Q: Am I required to pay an employee who is on leave under the FMLA?

A: Generally, leave under the FMLA is unpaid. However, a city may require an employee to substitute accrued paid leave (vacation or sick leave) for FMLA leave. 29 CFR §825.207.

A city that has adopted a compensatory time-off policy under Section 7(o) of the Fair Labor Standards Act (FLSA) may not require a non-exempt employee to substitute compensatory time for unpaid FMLA leave. If the city allows the employee to use compensatory time, the absences may not be counted against the employee's FMLA leave entitlement. 29 CFR § 825.207(i).

Q: What notice requirements must a city provide to employees under the FMLA?

A: A city is required to post a notice that explains the provisions of the FMLA and provides information concerning the procedures for filing complaints of violation of the FMLA. 29 CFR § 825.300. The notice must be posted in a conspicuous place where it can be readily seen by employees and applicants for employment. When a city's workforce is comprised of a significant portion of employees who are not literate in English, the city must provide the notice in a language in which the employees are literate. *Id.*

If a city has eligible employees, information concerning FMLA entitlements and employee obligations under the FMLA must be included in the city's employee handbook or personnel policies. If the city has neither, the city must provide the employee with written guidance on employees' rights and obligations under the FMLA each time an employee requests to use leave under the FMLA. 29 CFR §825.301.