

Legal Q&A

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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. § 2601-2654. Under the FMLA, eligible employees are entitled to 12 weeks or 26 weeks of unpaid leave for certain qualifying events. On January 16, 2009, new FMLA regulations went into effect that clarify leave provisions and add new leave options for military personnel and their families.

Q: Is my city covered by the FMLA?

A: All cities as public entities are covered by the FMLA, regardless of the city's size. 29 C.F.R. § 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 C.F.R. § 825.110.

Q: What is a city required to do if it is covered by FMLA but does not have any employees who are eligible for FMLA leave?

A: All cities are covered by FMLA, but many do not have a sufficient number of employees to be required to comply with FMLA leave requirements. A city in that position must post FMLA posters, but may decide for itself what kind of leave options to offer to its employees. These and other employment posters are available in a document titled "Employment Law Posters" on the legal page of the Texas Municipal League Web site.

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 his job. Under the 2009 rules, two new events will qualify for leave under the FMLA, including: (1) any "qualifying exigency" arising out of the fact that the employee's spouse, son, daughter, or parent is a covered military member on active duty; and (2) caring for a covered servicemember

with a serious injury or illness if the employee is the spouse, son, daughter, parent, or next of kin of the servicemember. 29 C.F.R. § 825.112.

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

A: An eligible employee is entitled to a total of 12 workweeks of leave during any 12-month period for: (1) the birth and care of a newborn child; (2) the placement of a child with the employee for adoption or foster care; (3) care of a family member with a serious health condition; (4) the employee's own serious health condition that makes the employee unable to perform the functions of his or her job; or (5) any qualifying exigency arising out of the fact that the employee's spouse, son, daughter, or parent is a covered military member on active duty (or has been notified of an impending call or order to active duty). 29 C.F.R. § 825.100. An eligible employee is entitled to a total of 26 workweeks of leave during any single 12-month period to care for a covered servicemember with a serious injury or illness. *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 C.F.R. § 825.209.

Eligible employees do not have to take the entire leave at once. An employee may take leave under the FMLA intermittently or on a reduced leave schedule for a serious health condition of the employee or the employee's family member, or for a qualifying exigency. 29 C.F.R. § 825.203.

Q: What intermittent leave benefits does an employee receive under the FMLA?

A: 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 is only required to be given by an employer if: (1) medically necessary due to the serious health condition of a covered family member or the employee; (2) medically necessary due to the serious injury or illness of a covered servicemember; or (3) necessary because of a qualifying exigency. While an employee generally must receive permission from the employer to take intermittent leave for the birth of a child, an employee with a pregnancy-related illness may take leave intermittently for a serious health condition. *Id.*

Q: What happens when an employee returns from FMLA leave?

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 C.F.R. § 825.214. 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 C.F.R. §§ 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.*

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 C.F.R. §825.207. If an employee requests and is permitted to use accrued compensatory time to receive pay for time taken off for an FMLA reason, or if the employer requires such use pursuant to the Fair Labor Standards Act, the time taken may be counted against the employee's FMLA leave entitlement. 29 CFR § 825.207(f). A city should have a written policy regarding how such leave and use of compensatory time off will be treated.

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

A: Every 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, regardless of whether it has any eligible employees or not. 29 C.F.R. § 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. *Id.* If the city has neither, the city must provide the employee with written guidance on employees' rights and obligations under the FMLA when the employee is hired.