

Administration of The Family and Medical Leave Act of 1993

INTRODUCTION

The Family and Medical Leave Act of 1993 (FMLA) **requires** certain employers to allow eligible employees to take up to 12 weeks of unpaid, job-protected leave for certain family and medical events. The law is intended to assist employees in reaching a balance between family and work responsibilities, with as little conflict as possible. This is a law that not only allows the leave, but also contains provisions for maintenance of benefits during the leave, job restoration after the leave, and protection for the employees who request or take FMLA leave. It is a federal law that was passed by Congress 2/93, signed by President Clinton 2/93, and final Department of Labor Regulations was issued 1/95.

This law contains specific posting and notification requirements. Recently we provided each department with an updated FMLA notification form that must be displayed in a conspicuous place where all employees can view the information.

Today we are providing you with the City's FMLA policy booklet and signature page to be distributed to all employees. Please have each employee sign for the booklet and return all signature pages upon completion of distribution to Susan Williams in Human Resources.

WHICH CITY EMPLOYEES ARE ELIGIBLE FOR FMLA LEAVE

Employees of the City Of Port St. Lucie that have **been employed at least 12 months** prior to the commencement of the leave, and they must have **worked at least 1,250 hours** during the 12-month period immediately preceding the commencement of leave. It is most important that you accurately determine an employee's eligibility for FMLA entitlement.

REASONS FOR QUALIFIED FMLA LEAVE

There are two types of leave under FMLA as follows:

1. **Family Leave** – can be taken for the birth or for placement of a child for adoption or for foster care. (Use of intermittent or reduced schedule leave can be taken only with the approval of the employer.)
2. **Medical Leave** – can be taken to care for the employee's spouse, child or parent with a serious health condition, or for the employee's own serious health condition. (Use of intermittent or reduced schedule leave can be taken when medically necessary as provided for on the medical certification form. The employee must make a reasonable effort to schedule leave so as not to unduly disrupt the employer's operations.)

WHAT CONSTITUTES A SERIOUS HEALTH CONDITION

A “serious health condition” is defined as an illness, injury, impairment, or condition that involves any one of the following:

1. Any inpatient care
2. A period of incapacity requiring the absence of the employee from work for more than three consecutive calendar days, that also involves either treatment two or more times by a health care provider, or treatment on at least one occasion by the health care provider that resulted in a regimen of continuing treatment under the supervision of a health care provider.
3. Pregnancy or prenatal care. A visit to the health care provider is not necessary for each absence.
4. A chronic serious health condition that continues over an extended period of time, requires periodic visits to a health care provider, and may involve occasional episodes of incapacity (e.g., asthma, diabetes). A visit to the health care provider is not necessary for each absence.
5. A permanent or long-term condition for which treatment may not be effective (e.g., Alzheimer’s, a severe stroke, terminal cancer). Only supervision by a health care provider is required, rather than active treatment.
6. Any absences to receive multiple treatments for restorative surgery or for a condition that would likely result in a period of incapacity of more than three consecutive calendar days if not treated (e.g., chemotherapy or radiation treatments for cancer).

IMPORTANT FACTS TO KNOW

1. “**Employer**” includes “any person who acts, directly or indirectly, in the interest of an employer to any of the employees of such employer.” This includes but is not limited to crew leaders, supervisors, office personnel, and department heads, as well as any HR personnel administering FMLA.
2. The employee need only give **verbal notice** to make an “employer” aware that leave is needed. The employee must explain the reasons for the needed leave.
3. It is the **Employer’s responsibility** to ascertain whether the employee’s absence is potentially FMLA-qualifying, and if so, to designate leave as FMLA qualifying, and to give notice of the designation to the employee **within two business days** of the notice by the employee or the commencement of leave. (Preliminary Designation form can be used to accomplish this)
4. Designation must be based upon information received from the **employee** or the **employee’s spokesperson**.
5. Employee’s can take FMLA **leave intermittently or on a reduced schedule** in certain instances. Deduct only the actual number of hours used under FMLA for each absence.

6. If the “employer” “has the requisite knowledge” to determine that a leave is FMLA-qualifying but fails to designate at the time of the request or leave commencement, the **leave cannot be retroactively designated** but the employee is subject to the full protection of the act without any of the preceding time being counted against the FMLA entitlement.

PROCEDURES TO BE FOLLOWED BY EACH DEPARTMENT

1. Any “**employer representative**” (e.g., crew leader, supervisor) that learns of an employee’s need to be absent or actual absence, should **immediately** notify the “**appropriate individual**” (e.g., timekeeper, office manager) in each department that handles employee absences. **(Make certain that all employer representatives within your department are clear on who to contact and when.)**
2. That “**appropriate individual**” (e.g., timekeeper, office manager) needs to **immediately** determine if the employee’s absence has or will exceed three consecutive business days, and if there is a possibility that the cause of the absence would be considered an FMLA qualifying event. **(Use the “Checklist” form)**
3. If it is **immediately known** that the absence will/does qualify as an FMLA qualifying event, the FMLA “**Memorandum**” and “**Medical Certification**” form must be sent or given to the employee by the department **within two business days** of the notice by the employee of his/her need for leave or the actual absence. Also, the “**Employer Response To Employee’s Request For Family and Medical Leave**” must be mailed or given to the employee as soon as possible. If the absence **does not** qualify as FMLA leave, you must still notify the employee of that fact, in writing, within the two business days. **Immediately contact Susan Williams in HR at 871-5207 to notify of FMLA leave & discuss leave with her. (Use notification “Memorandum” form & “Employer Response” form)**
4. If the FMLA designation **cannot be immediately determined**, contact **Susan Williams** in Human Resources at **871-5207 immediately**. She will review the information, and if necessary, she will issue a “Preliminary Designation Notice” to the employee **within the two-business day time period**, along with a “Medical Certification” form to determine if there is an FMLA qualifying event.
5. Once the determination is made, Susan will contact the department. The department must then **immediately** notify the employee as to whether or not his/her leave qualifies and will be counted against his/her FMLA leave entitlement. A “**Memorandum**” stating the determination, can be mailed or given to the employee, along with the “**Employer Response**” form. **(Use notification “Memorandum” form & “Employer Response” form)**
6. Don’t forget to immediately notify Human Resources of any employee that is a possible FMLA candidate.

MEDICAL CERTIFICATION FORMS (Official DOL form)

The City will generally require by written notice that employees, at the employee's expense, provide written certification from a health care provider to support a requested FMLA leave for a seriously ill spouse, child, or parent, or the serious illness of the employee. No additional information, other than what is on the Medical Certification form may be required of the employee. Employees that will receive temporary disability benefits or workers' compensation benefits will generally not be required to provide this additional medical certification.

FMLA law states that under **no circumstances** may a representative of the City contact the employee's health care provider. Only an official medical representative of the City may contact the employee's provider, and then only for specific information.

The FMLA law requires that this medical information be obtained and maintained under **strict confidentiality**. **All Medical Certification Forms are to be sent directly to Susan Williams in HR from the health care provider. All medical forms are to be maintained solely under the Administrative Services Department. (FMLA & ADA Requirement)**

ADDITIONAL MEDICAL INFORMATION

The City will require "periodic status reports" from the employee during the leave. (status & intent to return to work). Also, the employee will be required to provide a Fitness-for-Duty certificate from the health care provider stating that the employee is able to resume work. Recertification of the Medical Certification Form is allowed under certain restrictions.

LIGHT DUTY

An employee on FMLA leave may not be **required** to accept a light duty assignment. If the employee chooses to return to work under a light duty assignment, the time under light duty work will continue to be deducted from the employee's "restoration rights" remaining on his/her 12-week FMLA entitlement. Conversely, if the employee is under FMLA leave and Workers' Compensation leave concurrently, refusal by the employee to accept a light duty position offered by the employer will generally end the workers' compensation benefits.

BENEFITS CONTINUATION PROTECTION

Under the FMLA entitlement, upon the employee's return to work from an FMLA leave, the employer must reinstate all benefits the employee participated in prior to the leave. Therefore, if an employee on leave does not have sufficient sick and vacation leave accruals to continue the employee contribution throughout the leave, arrangements must be made with the employee to compensate the City for the uncovered contributions during the leave. **Please contact Claudia McCaskill at 344-4081 immediately if this situation is determined.**

RESTORATION TO DUTY

Upon return from FMLA leave, an employee must be restored to the employee's original job, or to an equivalent job with equivalent pay, benefits and other terms and conditions of employment. (Virtually identical position and duties)

The employee cannot be disqualified for perfect attendance because of FMLA leave time.

The City will deny restoration if the employee fails to provide the required fitness-for-duty certification.

TRACKING USE OF FMLA - LEAVE CALENDAR

The Family and Medical Leave Act requires employers to accurately track the use of FMLA and to choose which method of recording FMLA leave they wish to use. The City has established that the first day of commencement of the leave, going forward, will determine the 12-month entitlement period for each employee.

Because in some cases FMLA leave will actually be recorded in small increments such as 15 minutes, 3 hours, etc., the use of hours has been chosen over the use of days.

Therefore, the calendar we are providing to you today indicates the maximum FMLA time available to employees in a 12-month period. (12 weeks X 40 Hr. Week = 480 Hrs.)

For part-time employees or others who **work less than a 40 hr. week**, their leave allotment is determined on a pro-rata basis, e.g. 12 weeks X 32 Hr. Week = 384 Hrs.) For variable schedules, determine the "normal" workweek by averaging the hours worked in the prior 12 weeks, and multiplying that average by 12. Deduct only the normal number of hours the employee would work per day or week for FMLA use.

Upon return of the employee from his/her FMLA leave, make certain that the employee's leave calendar is an accurate reflection of the actual time used toward their leave. It is a direct violation of the law to charge time against the employee's leave calendar inappropriately.

Attach a copy of the timesheets reflecting the FMLA absences to the leave calendar. Keep this calendar in an appropriate place for your use should the employee require leave again within the 12-month entitlement period. It will be up to each department representative to determine if the employee has remaining FMLA entitlement, and if so, how much.

MAINTENANCE OF FMLA RECORDS

FMLA law requires and therefore it is the responsibility of **each department** to maintain all records associated with each employee's use of FMLA leave. These records must be maintained a minimum of **three years** from the time of the employee's request for FMLA leave. In the event of any audit or legal action, these records would be summoned, and must be made available. The DOL is currently conducting audits to determine if employer's policies, practices and record keeping meet FMLA regulations. Remember that all medical records are to be maintained solely by the Administrative Services Department.

UNLAWFUL ACTS

It is unlawful for any employer to interfere with, restrain, or deny the exercise of any right provided by FMLA. It is also unlawful for an employer to discharge or discriminate against any individual for opposing any practice, or because of involvement in any proceeding, related to FMLA.

ENFORCEMENT

FMLA complaints are filed with the US Department of Labor. A private lawsuit may be filed against the employer. Violations of FMLA rules may result in personal liability for individuals meeting the statutory and regulatory definition of "employer" (e.g., supervisors, managers, etc.) Indemnification by the City may be withheld to any employee who fails to adhere to the City's policies and procedures regarding the administration of FMLA entitlement.

COORDINATION OF OTHER FEDERAL & STATE LAWS

It is important to know that other federal and state laws, such as ADA and Workers' Compensation, do impact and coordinate with the FMLA law. Many times, an employee who is on an FMLA protected leave will also qualify under ADA protections and/or Workers' Compensation benefits.

Pages 7, 8 and 9 briefly explain how the ADA and Workers' Compensation laws require different considerations involving the employee's absence, medical condition, and return to work accommodations. Because of the various laws and their potential impact regarding an employee who is seriously ill or injured, the Administrative Services Department must always be made aware of employee accidents, serious illnesses, and absences to monitor for the possible involvement of these other laws.

**COORDINATION OF:
ADA, FMLA AND WORKER'S COMP.**

ISSUES BEFORE 12 WEEKS OF FMLA ALLOTMENT IS EXHAUSTED

ADA AND FMLA:

Under ADA, the employer can only require medical information that is job related and consistent with business necessity (narrow in scope).

FMLA LEAVE VS. REASONABLE ACCOMMODATION:

An employee that is entitled to ADA protection and cannot perform one or more essential functions of his job because of a serious health condition, would still be eligible for FMLA leave, but employer should offer return to work with a reasonable accommodation.

ALTERNATIVE POSITION VS. REASONABLE ACCOMMODATION:

When an employee is entitled to intermittent FMLA and ADA protections, the employer, in an attempt to return the employee to work, can offer a reasonable accommodation in the employee's job that will allow the employee to return. If however, there is no reasonable accommodation possible or the employee refuses it in favor of the intermittent FMLA, the employer can require the employee to take an alternate position during intermittent leave, maintaining regular pay while in the alternate position until FMLA protections are exhausted.

REQUEST FOR LEAVE FOR DISABLING CONDITION:

If an employee requests time off for a reason related or possibly related to a disability, the employer should consider this a request for ADA reasonable accommodation and FMLA leave. Medical certification may be required and disability related inquiries may be made to determine if employee is entitled to ADA protections. The employee, however, could state that they only want to invoke rights under FMLA, and the employer should refrain from making ADA inquiries.

MEDICAL CERTIFICATION:

Under ADA, the employer can only require medical information that is job-related and consistent with business necessity. (narrow in scope)

The Department of Labor's model FMLA medical certification form will not violate ADA by asking for the medical information allowed under FMLA.

RESTORATION AND REASONABLE ACCOMMODATION:

If you have an employee returning from FMLA leave who is ADA protected, and could be returned under FMLA to a different shift, schedule or position that better suits the employee's needs, employer should first attempt to provide reasonable accommodation to allow employee to return to his original position. ADA allows job restructuring and/or a modified work schedule as reasonable accommodations.

It is recommended that if employer does change the position under the acceptance of the employee, that the employer has the **employee agree in writing to the change**.

ADA protected employees returning from FMLA leave must be returned to their original position, rather than equivalent positions as allowed under FMLA **unless** the employer can show this would cause undue hardship or that the employee no longer qualifies for their original position, with or without reasonable accommodation.

ISSUES AFTER FMLA LEAVE IS EXHAUSTED

ADA AND FMLA EXTENDING LEAVE:

Extending unpaid leave beyond 12 weeks required by FMLA, may be a reasonable accommodation under ADA. While FMLA protections technically do not apply to extended time, ADA does stipulate that the employee's job is kept open and the employee is reinstated to the original position upon return.

UNABLE TO RETURN AFTER FMLA:

If FMLA is exhausted and employee cannot perform the essential functions of his position, the employer should attempt the following:

1. Attempt to provide reasonable accommodation.
2. Consider extension of leave (Our 180-day policy).
3. If no reasonable accommodation possible to return employee to original position, employee must be assigned to a vacant equivalent position for which he is qualified and for which reassignment will not cause undue hardship to employer. The disabled person is entitled to the vacant position even if their not the best qualified, can't be made to compete for the position, must be offered reassignment even if not normally allowed, and can not be restricted to own office, branch, department, facility, etc.
4. If there is no vacant equivalent position, the employer must offer reassignment to a vacant position at a lower level.
5. Employer need not create a position.

WORKER'S COMPENSATION AND FMLA:

FMLA and Light-Duty – If a light-duty assignment is available for an employee on Worker's Compensation and FMLA concurrently, the employer may offer the light-duty assignment but **cannot** require the employee take it.

Consequences of Employee's Choice – It needs to be made clear to the employee that taking FMLA over a light-duty position may cause the employee to lose Worker's Compensation benefits, and the employer can now require concurrency of other paid benefits (use of sick and vacation leave benefits). Also, should the employee voluntarily accept the light-duty assignment, FMLA leave will stop, however, light-duty counts against the restoration benefit, allowing the employee's right to job restoration under FMLA to possibly expire even though the employee still has FMLA leave time allotted.

It should be noted, however, that if an employee is still unable to resume normal duties after 12 weeks of FMLA and light-duty combined, it is quite likely that ADA protects them.

WORKER'S COMPENSATION AND OTHER PAID BENEFITS:

When FMLA and Worker's Compensation run concurrently, employers cannot require the use of paid leave benefits.

CONTACT WITH PHYSICIANS:

If state Worker's Compensation rules allow direct contact with the employee's physician, the employer can contact the physician directly even under concurrent FMLA leave. FMLA certification form not required as Worker's Compensation medical information usually more than FMLA allows anyway.

FMLA, ADA AND WORKER'S COMPENSATION:

When an employee has a Worker's Compensation illness or injury and qualifies under ADA, and is eligible for FMLA, **do not** require the ADA protected employee to take a job with a reasonable accommodation in lieu of FMLA.

Addendum To The City's Family and Medical Leave Act (FMLA) Policy

1. National Defense Authorization Act (H.R. 4986), Section 585

On January 28, 2008, President Bush signed the 2008 National Defense Authorization Act that significantly expanded the Family Medical Leave Act (FMLA) for families of military service members. The Department of Labor (DOL) will publish the implementing final regulations for these provisions in the near future and an updated Addendum to the FMLA policy will be released at that time. These new laws are the first major revision to the FMLA since its enactment in 1993, and include the following:

Family Leave Due to a Call to Active Duty –

An eligible employee may now take up to 12 weeks of unpaid FMLA leave for any “qualifying exigency” (to be defined by regulation) related to a spouse, son, daughter or parent’s active duty or notification of an impending call or order to active duty in the Armed Forces in support of a “contingency operation” (generally a war or similar combat operation). The leave may commence as soon as he or she is notified of an impending call or order. The City will voluntarily extend this leave to qualifying employees, pending the finalization of the regulations by the DOL.

Caregiver Leave for An Injured Service Member –

An eligible employee who is the spouse, son, daughter, parent, or next of kin of a covered service member may now take up to 26 weeks of FMLA leave in a single 12-month period, to care for the service member with an injury or illness incurred in the line of active duty that rendered the member unable to perform the duties of the member’s office, grade, rank or rating. This provision of the law is effective as of January 28, 2008.

Most of the provisions of the FMLA remain unchanged and will apply to these new types of FMLA leave, including employer coverage, employee eligibility requirements, health insurance continuation, and reinstatement rights. Employees can utilize the leave on an incremental basis or in quarter hours as tracked by the City’s payroll system.

2. Florida’s New Domestic Violence Leave Law

As of July 1, 2007, Florida employers must provide eligible employees with up to three (3) days of leave in a 12-month period if the employee, a family member, or a household member is a victim of domestic violence. The employee must have worked for the City for a minimum of 3 months. Employees may either use their accrued leave benefits or take the leave as unpaid.

Types of Activities Covered by the Law:

- Seeking an injunction for protection against domestic violence or repeat violence, dating violence, or sexual violence.
- Obtaining medical care or mental health counseling or both for the employee or a family or household member to address injuries resulting from domestic violence.
- Obtaining services from victim services organizations such as domestic violence shelters or rape crisis centers.
- Making the employee’s home secure from the perpetrator of domestic violence or finding a new home to escape the perpetrator.
- Seeking legal assistance to address issues arising from domestic violence or attending or preparing for court-related proceedings arising from the act of domestic violence.