



U.S. DEPARTMENT OF JUSTICE
FEDERAL BUREAU OF INVESTIGATION

IDENTIFICATION DIVISION

00



145 6-
145999

AMERICAN

December 1993
Volume 62
Number 12

United States
Department of Justice
Federal Bureau of
Investigation
Washington, DC 20535

Louis J. Freeh,
Director

Contributors' opinions and statements should not be considered as an endorsement for any policy, program, or service by the FBI.

The Attorney General has determined that the publication of this periodical is necessary in the transaction of the public business required by law. Use of funds for printing this periodical has been approved by the Director of the Office of Management and Budget.

The *FBI Law Enforcement Bulletin* (ISSN-0014-5688) is published monthly by the Federal Bureau of Investigation, 10th and Pennsylvania Avenue, N.W., Washington, D.C. 20535. Second-Class postage paid at Washington, D.C., and additional mailing offices. Postmaster: Send address changes to *FBI Law Enforcement Bulletin*, Federal Bureau of Investigation, Washington, D.C. 20535.

Editor

Dr. Stephen D. Gladis
Managing Editor

Kathryn E. Sulewski
Art Director

John E. Ott

Associate Editors

Andrew DiRosa

Karen F. McCarron

Kimberly J. Waggoner

Assistant Art Director

Amelia J. Brooks

Production Manager

T.L. Wilson

Staff Assistant

Darlene J. Butler

Cover photo
© The Thin Blue Line

FBI Law Enforcement

B ♦ U ♦ L ♦ L ♦ E ♦ T ♦ I ♦ N



Features

Focus on Leadership

Leadership in the Nineties

By Ronnie Garner

145996

1

Providing employees with a clear organizational vision forms a framework to support management decisions.

Employee Empowerment

By Shelja Berglund

145997

5

The Lakewood, Colorado, Police Department discovers that putting employees first does not mean putting customers last.

Developing a Positive Organizational Culture

By Randall Aragon

145998

10

Leaders who involve employees in all facets of department operations produce positive results.

The Family Leave and Medical Act of 1993

By Jeffrey Higginbotham

145999

15

Police department leave policies must comply with the Family and Medical Leave Act of 1993.

Departments

8 Police Practices

Citizen Advisory
Committees

13 Unusual Weapon

Buckle Knife

14 Book Review

Mental Disorder

22 Bulletin Reports

Police Body Armor
Spanish Reference Manual

23 1993 Subject Index

27 1993 Author Index

**U.S. Department of Justice
National Institute of Justice**

145996-
145999

This document has been reproduced exactly as received from the person or organization originating it. Points of view or opinions stated in this document are those of the authors and do not necessarily represent the official position or policies of the National Institute of Justice.

Permission to reproduce this ~~copyrighted~~ material has been granted by

FBI Law Enforcement Bulletin

to the National Criminal Justice Reference Service (NCJRS).

Further reproduction outside of the NCJRS system requires permission of the ~~copyright~~ owner.

The Family and Medical Leave Act of 1993

By
JEFFREY HIGGINBOTHAM, J.D.

Recently, Congress enacted and the President signed a new Federal statute—the Family and Medical Leave Act of 1993 (FMLA). The act may require law enforcement administrators to modify certain departmental leave practices.

This article provides an overview of the FMLA, followed by a more thorough analysis of its requirements and the potential impact on law enforcement agencies. It also sets forth a sample policy to guide agencies in light of the FMLA.¹

Overview

The FMLA became effective on August 5, 1993,² and applies to all public employers, regardless of the size of the agency.³ Under the FMLA, persons who have worked for their employer a total of 12 months and at least 1,250 hours during the year preceding the start of any qualifying leave are entitled to take up to 12 weeks' leave in a 12-month period⁴ for:

- 1) Care of a newborn child
- 2) Adoption of a child or placement of a child in the employee's foster care
- 3) Care of a son, daughter, spouse, or parent who has a serious health condition, or
- 4) A serious health condition that makes the employee



unable to perform the functions of the job.⁵

While the employee is on leave, the employer is obligated to "maintain coverage under any 'group health plan'...for the duration of such leave at the level and under the conditions coverage would have been provided..." if the employee had not gone on leave.⁶ On return to work from FMLA leave, the employee is to be restored to the position held when the leave began or to an "equivalent position with equivalent employment benefits, pay, and other terms and conditions of employment."⁷ Employers who violate the FMLA are liable in damages for any wages, salary, employment benefits, or other compensation denied or lost, or for any actual monetary loss sustained by the employee where leave was denied, up to an amount equal to 12 weeks of the employee's salary or wages.⁸

IMPACT ON LAW ENFORCEMENT AGENCIES

Childbirth, Adoption, Foster-Care Issues

Eligible employees are entitled to take leave upon the birth of a child, the adoption of a child, or the placement of a child with the employee for foster care. Any such leave must be taken within the first 12 months⁹ and can be taken intermittently only if the employer permits.¹⁰ If both husband and wife work for the same employer, they are entitled to take a combined 12 weeks of leave for the birth, adoption, or foster-care placement of a child.¹¹

Care for Family Members

Under the FMLA, an employee is entitled to take up to 12 weeks of leave to provide care for a spouse, son, daughter, or parent¹² who has a serious health condition. Child care

leave is available to care for a child with a serious health condition who is under the age of 18 or, if older, is "incapable of self care because of physical or mental disability."¹³

The law does not require leave be made available to care for family members with routine illnesses or short-term ailments that would normally be covered by the employer's sick leave or personal leave policies. Family care leave under the FMLA is available only for serious health conditions involving (a) "inpatient care in a hospital, hospice or residential medical care facility,"¹⁴ or (b) continuing treatment by a health care provider.¹⁵

Where inpatient treatment is not required, the family member must have been absent from work, school, or normal activities for more than 3 days and have received treatment from or under the direction or supervision of a health care provider or practitioner on two or more occasions.¹⁶ Medical treatment received on a voluntary basis or for cosmetic purposes that are not medically necessary is excluded from the coverage, unless inpatient care is required.¹⁷ Thus, orthodontic care, treatment for acne, outpatient cosmetic surgery, or minor illness not involving medical treatment are not covered. Examples of conditions for which family leave would be available include heart attacks, strokes, pneumonia, severe arthritis, prenatal care, stress, and substance abuse treatment.¹⁸

An employer who receives an employee's request for leave to care for a family member may require the employee to provide



Special Agent Higginbotham is a legal instructor at the FBI Academy.

“
Police administrators...should carefully review departmental leave policies to ensure they comply with the four primary requirements of the FMLA.
”

certification from a health care provider that the employee is needed to provide care, physical assistance, or psychological support. To be eligible for family care leave, the assistance to the family member must be provided by the employee, not by a nurse, nursing home, or personal aide.¹⁹

An employee who is needed to care for a family member with a serious health condition and who provides the requested medical certification may take the leave on an intermittent or reduced work schedule basis when medically necessary.²⁰ That is, the employee may need FMLA leave for only a few days or hours in a given workweek or can work part-time.

Where intermittent leave for planned medical treatment is needed, the employee must attempt to schedule it so as not to disrupt the employer's operations.²¹ Where the employee holds a position that does not accommodate a reduced work schedule or irregular attendance, the employer may require the employee to transfer to an alternative position, with equal pay and benefits, that better accommodates the recurring leave.²²

Leave for Self-Care

The FMLA also permits a covered employee to take leave to provide self-care, when the employee is unable to perform the functions of the job. Like the rules regarding family care leave, the employee must suffer a serious health condition that requires inpatient treatment or absence of work for more than 3 days and treatment by or under the supervision or direction of a health

care provider or practitioner on two or more occasions.

An employee taking leave for self-care, who has a medical need for intermittent leave, must also try to schedule it to reduce disruption to the employer's operations and may be reassigned to an equivalently paid position that better accommodates the need for recurring leave. The employee may also be required to provide a health care provider's

“

The FMLA also permits a covered employee to take leave to provide self-care, when the employee is unable to perform the functions of the job.

”

certification of the need for the self-care leave, including a statement that based on a review of the employee's essential functions, the employee is unable to perform the job.²³ An employee who has taken leave for a serious health condition may also be required, as a condition of returning to work, to provide a medical fitness-for-duty report.²⁴

Paid or Unpaid Leave Issues

The 12 weeks of leave provided under the FMLA need *not* be paid leave. Where an employer provides less than 12 weeks of paid leave per year, the leave beyond the period of paid leave may be required to be taken without pay.²⁵ However,

absent an employer's policy concerning use of paid leave, an employee may take unpaid leave or use available paid leave, or any combination of paid and unpaid leave. On the other hand, an employer may require the employee to exhaust available paid leave before resorting to unpaid FMLA leave.

If the leave is necessary to care for a newborn, adopted, or foster-care child, or because of the serious health condition of a family member, an employee may elect, or an employer may require the employee, to substitute any accrued paid vacation, personal, or family leave before unpaid leave is taken under the FMLA.²⁶ If the leave is occasioned by the serious health condition of a family member or the employee's own illness or condition, the employee may elect, or the employer may require, substitution of accrued paid vacation, personal, family, or sick leave before unpaid leave is taken.²⁷

Law enforcement administrators should carefully consider their prerogatives under this section of the FMLA. Unless the employer decides as a matter of policy that accrued paid leave must be used before unpaid FMLA leave, an employee would be entitled to take available accrued paid leave, *in addition* to the 12 weeks' leave available under the FMLA.²⁸

If an agency decides that it is the better practice to substitute accrued paid leave for unpaid FMLA leave, it must determine that the reason leave is requested qualifies under the FMLA and notify the employee of the substitution requirement at the time the employee requests

leave.²⁹ To ensure this practice functions smoothly, departments could require employees to indicate the general reason for leave whenever it is requested.³⁰

Job and Benefit Protections

The FMLA provides two major job and benefit protections. First, an employee who returns from FMLA leave is entitled to be restored to the position held at the time of the leave or to an equivalent position with equivalent employment benefits, pay, and other terms and conditions of employment.³¹

Job restoration rights do not guarantee that the employee will return to the old position, although normally that should occur if the position remains available and the employee continues to meet the job qualifications.³² If the position is no longer available, the employee is to be placed in a position with the same pay, benefits, and working conditions. If the employee held a position for which pay premiums were earned (e.g., shift differential pay) or that regularly entailed overtime work and pay, the employee is entitled to a like position upon return to work.³³

The position must also "involve the same or substantially similar duties and responsibilities, which must entail substantially equivalent skill, effort, responsibility, and authority."³⁴ In addition, the employee is entitled to receive any unconditional pay raises, such as cost of living adjustments, that occurred during the period of leave.

Second, unless waived by the employee, the employer is obligated to maintain the employee's insurance coverage under any "group

health plan" during the period of leave at the same level of coverage and under the same conditions that existed prior to the leave.³⁵ An employee on unpaid FMLA leave may be required to pay the employee's share of the health insurance premiums, including any increase or decrease in the premiums that occurs during the period of leave.³⁶

**“
The FMLA...applies
to all public
employers,
regardless of the
size of the agency.
”**

Agencies that require employee contributions for health insurance coverage must devise a system for ensuring the employee's share of the premium is paid and must provide the employee with advance written notice of the terms and conditions under which the payments must be made. Only health coverage is required to be maintained; life insurance and other benefits need not be continued, although upon return to duty, the employee is entitled to resume receipt of those additional benefits without having to wait for "open season" enrollment periods.³⁷

An employee who was on unpaid FMLA leave and who does not return to work for at least 30 days at the expiration of that leave is liable for the employer's share of health insurance premiums and any part of the employee's share that was paid

by the employer.³⁸ However, an employee who does not return to work because of the "continuation, recurrence, or onset of a serious health condition which would entitle the employee to leave under FMLA" or for circumstances beyond the employee's control, cannot be held liable for the insurance premiums.³⁹ Where recovery of premiums is permitted, the employer is entitled to set off the amount against any final pay or monetary benefit to which the employee would otherwise be entitled.

CONCLUSION

Law enforcement administrators must remain alert to changes in the law that affect the personnel practices of their agencies. Police administrators with responsibility for personnel management should carefully review departmental leave policies to ensure they comply with the four primary requirements of the FMLA.

First, leave policies must permit leave to care for a child upon birth, adoption, or placement in foster care; to care for a son, daughter, spouse, or parent with a serious health condition; and to provide self-care when the employee is not able to perform the essential functions of the job. Second, leave policies should specify whether the employee will be permitted or required to substitute accrued paid leave available under existing leave policies for unpaid leave under the FMLA. Third, policies must be implemented to ensure that employees returning to duty are restored to their old or an equivalent position. Fourth, health insurance coverage should be examined to ensure

mechanisms exist to continue coverage at the same levels and under the same conditions as if the employee were not on leave. Administrators should conduct this review of their leave practices now so as to be prepared when employees request the leave to which they are entitled under the FMLA. ♦

Endnotes

¹ Similar legislation already exists in several States and is not preempted unless the State law conflicts with the Federal law. State laws that grant employees greater rights or protections must be followed.

² P.L. 103-3, Section 405. For agencies operating under a collective bargaining agreement on that date, the effective date is delayed until expiration of the agreement or February 5, 1994, whichever is earlier.

³ P.L. 103-3(4)(A)(iii); 29 C.F.R. §815.108. There must, however, be at least 50 employees of the employing municipality working within a 75-mile radius before an employee is eligible for FMLA leave. *Id.* Title I of the FMLA applies to State and local governments. Title II contains similar provisions, which apply to the Federal Government.

⁴ P.L. 103-3, Section 101(2). An employer is permitted to designate the 12-month period in which the leave may be taken. An employer may elect the regular calendar year, a fiscal year, a leave year, any fixed 12-month period, a rolling 12-month period forward from the date leave is first used, or a rolling 12-month period measured backward from the date leave was last used. 29 C.F.R. §825.200. Choosing one of the first four options permits the employee to "stack" leave by taking 12 weeks at the end of the year and an additional 12 weeks at the beginning of the next 12-month period.

⁵ P.L. 103-3, Section 102(a).

⁶ P.L. 103-3, Section 104(c).

⁷ P.L. 103-3, Section 104(a).

⁸ P.L. 103-3, Section 107(1)(A). In addition, if the employer acted in bad faith and caused the loss of wages or salary, the FMLA contains a liquidated damages provision that doubles the amount otherwise payable. P.L. 103-3, Section 107(a)(1)(A)(iii).

⁹ 29 C.F.R. §825.201. Leave related to pregnancy or prenatal care is included but is generally taken under the self-care provisions of the FMLA. *See*, 29 C.F.R. §825.114.

¹⁰ 29 C.F.R. §825.203.

¹¹ P.L. 103-3, Section 102(f); 29 C.F.R. §825.202. Where combined leave is taken, the employee is entitled to take the remainder of the 12 weeks for other FMLA purposes. For example, if a husband and wife working for the same employer both took 6 weeks of leave to care for a newborn child, each would be eligible to take 6 weeks' additional leave to care for other family members or for self-care. *Id.*

¹² The parent-child relationship may be biological, by reason of adoption or foster care, guardianship, or because of "day-to-day responsibilities to care for and financially support a child." 29 C.F.R. §825.113. More distantly related persons and parents-in-law are not covered. *Id.* Common-law marriages, if recognized under State law, are sufficient to establish a spousal relationship; however, unmarried domestic partners do not qualify for leave to care for their partner. *Id.*

¹³ P.L. 103-3, Section 101(12).

¹⁴ P.L. 103-3, Section 101(11)(A); 29 C.F.R. §825.114.

¹⁵ P.L. 103-3, Section 101(11)(B).

¹⁶ 29 C.F.R. §815.114. The regulations also include conditions that, if left untreated, would result in the absence from normal activities for more than 3 days.

¹⁷ *Id.*

¹⁸ 29 C.F.R. §825.114.

¹⁹ 29 C.F.R. §825.116.

²⁰ P.L. 103-3, Section 102(b).

²¹ 29 C.F.R. §825.118. The FMLA also imposes a duty on employees intending to use FMLA leave to provide the employer with at least 30 days' notice, or such notice as practicable, when the use of the leave is foreseeable. P.L. 103-3, Section 102(e).

²² P.L. 103-3, Section 102(b)(2).

²³ 29 C.F.R. §825.306. Where the employer questions the adequacy of the medical certification, it may require the employee to be examined by an independent health care provider, at the employer's expense. If the two medical opinions conflict, an examination by a third health care provider, mutually agreed upon by the employer and employee, may be required. The expense of the third examination is to be borne by the employer and the opinion shall be binding. 29 C.F.R. §825.307.

²⁴ P.L. 103-3, Section 104(a)(4); 29 C.F.R. §825.310. Such a requirement must be pursuant to a uniform policy, and the employee must have been put on notice that the employer would require the fitness-for-duty certification. The act imposes other notification requirements on the employer, including a requirement that a

description of rights and obligations under the FMLA be included in any written leave and benefit materials normally provided employees or provided in writing at the time the employee requests or gives notice of the need for FMLA leave.

²⁵ P.L. 103-3, Section 102(c).

²⁶ P.L. 103-3, Section 101(d)(2)(A).

²⁷ P.L. 103-3, Section 101(d)(2)(B).

However, the FMLA does not require an employer to provide paid sick leave when it would not otherwise be available. If paid sick leave cannot be used to care for other persons' illnesses under existing employment practices, the FMLA does not require a change to that practice. 29 C.F.R. §825.207.

²⁸ The accrued paid leave must be used in accordance with the employer's policy governing its use. *See*, note 27, *supra*. If the accrued paid leave is taken for purposes other than child, family, or self-care, the employee is entitled to up to 12 weeks' additional leave for those purposes under the FMLA. 29 C.F.R. §825.207.

²⁹ 29 C.F.R. §825.208.

³⁰ 29 C.F.R. §825.208 provides that "...[a]n employee requesting unpaid FMLA leave must explain the reasons for the needed leave so as to allow the employer to determine that the leave qualifies under the Act...In any circumstance where the employer does not have sufficient information about the reason for an employee's use of paid leave, the employer should inquire further to ascertain whether the paid leave is potentially FMLA-qualifying."

³¹ P.L. 103-3, Section 104(a).

³² 29 C.F.R. §825.214. If the employee's job qualifications, e.g., a licensing requirement, lapse during the period of leave, the employee must be "given a reasonable opportunity to fulfill those conditions upon return to work." 29 C.F.R. §825.215.

³³ 29 C.F.R. §825.215.

³⁴ 29 C.F.R. §825.215(a).

³⁵ P.L. 103-3, Section 104(c).

³⁶ 29 C.F.R. §825.209.

³⁷ *Id.*

³⁸ 29 C.F.R. §§825.213 and 825.212(b).

³⁹ P.L. 103-3, Section 104(c)(2); 29 C.F.R. §825.213.

Law enforcement officers of other than Federal jurisdiction who are interested in this article should consult their legal advisor. Some police procedures ruled permissible under Federal constitutional law are of questionable legality under State law or are not permitted at all.
