



## IACP NATIONAL LAW ENFORCEMENT POLICY CENTER

# Family and Medical Leave

### Concepts and Issues Paper

August 1996

## I. INTRODUCTION

### A. Purpose of Document

This document was designed to accompany the *Model Policy on Family and Medical Leave* developed by the IACP National Law Enforcement Policy Center. This paper provides essential background material and supporting documentation to provide greater understanding of the developmental philosophy and implementation requirements for the model policy. This material will be of value to law enforcement executives in their efforts to tailor the model to the requirements and circumstances of their community and their law enforcement agency.

### B. Background

The IACP *Model Policy on Family and Medical Leave* states that "it is the policy of this agency to provide employees with leave for serious health and certain family matters as required by federal law." This paper is prepared in conjunction with that model policy.<sup>1</sup> Both this paper and the model policy are designed to assist law enforcement agencies in understanding and complying with the federal Family and Medical Leave Act (FMLA) of 1993. FMLA is a very complicated piece of legislation, with many requirements, conditions, and exceptions. The following discussion reviews the content of the model policy and explores the aspects of the Family and Medical Leave Act that are the basis of the model policy's provisions.<sup>2</sup>

FMLA<sup>3</sup> is designed to assist workers who have family responsibilities or personal health problems. It provides for up to 12 weeks of annual leave for such workers in addition to the leave normally provided by their employers, in order that these family and personal problems may be properly addressed by the employee concerned.

The FMLA applies to private and public employers—including cities and counties and agencies thereof—that have 50 or more total employees.<sup>4</sup> Since most cities and counties now employ at least 50 persons, this legislation affects local police departments in all but the smallest U.S. jurisdictions. Therefore, police executives must be aware of the act and avoid departmental leave policies and decisions that conflict with its provisions.

In order to understand the requirements of both the model policy and FMLA, the following definitions should be noted:

**Departments subject to FMLA.** FMLA applies to any private or public employer that has had 50 or more eligible employees working within 75 miles of one another in the current or preceding calendar year. This includes both full-time and part-time employees. Whether the employer is within the coverage of the act is determined at the time that the employee requests leave. Once it is determined that the employer is covered and the employee is eligible for leave, a subsequent reduction in the number of employees below the 50-employee cutoff does not affect that employee's

<sup>1</sup> This paper conforms in most instances to the order of the sections and subsections of the FMLA model policy.

<sup>2</sup> Because of the complexity of the legislation, police executives will need to seek guidance from their local legal advisors to assure conformance with all of the FMLA's requirements in a particular case.

<sup>3</sup> 29 U.S.C. §2600 et seq. However, other federal, state and local laws may have an impact on a department's leave policies as well.

<sup>4</sup> The act purports to apply to public employers of any size, but a subsequent provision excludes from coverage employers with fewer than 50 employees.

eligibility for FMLA leave.<sup>5</sup>

**Eligible employees.** The test of FMLA coverage is not just the number of employees, but the number of “eligible” employees. An “eligible” employee is one who has been with the employer for at least 12 months (not necessarily consecutive) and who has worked at least 1,250 hours during the 12-month period immediately preceding the start of the leave mandated by FMLA. An employee who worked fewer than 1,250 hours during the period would not be counted as part of the required 50, nor would such an employee be eligible for FMLA leave.

**Key employees.** A “key employee” is one who is among the highest-paid 10 percent of the employer’s employees. Key employees are subject to special rules, particularly those relating to reinstatement following the leave. Special provisions applicable to key employees are discussed later in this document.

**Spouse.** For purposes of FMLA, “spouse” is defined as “a husband or wife as defined or recognized under state law for purposes of marriage, including common-law marriages in states where common-law marriages are recognized under the law of that jurisdiction.”<sup>6</sup>

**Child.** “Child” includes adopted children, foster children, stepchildren, legal wards, and anyone for whom the employee stands or has stood in loco parentis—i.e., anyone for whom the employee has acted in a capacity equivalent to that of a parent. The coverage includes children over the age of 18, if they are incapable of caring for themselves.

**Parent.** “Parent” includes not only biological parents, but also an individual who stands or stood in loco parentis to an employee when the employee was a child—for example, an adoptive parent, foster parent, stepparent, etc.

**Serious health condition.** A “serious health condition” includes any illness, injury, impairment, or other physical or mental condition that involves any of the following: (1) any period of incapacity or treatment in connection with or consequent to inpatient care in a hospital, hospice, or residential medical care facility; (2) any period of incapacity requiring absence from work, school, or other regular daily activities lasting more than three calendar days and that requires continuing treatment by a health-care provider; (3) continuing treatment by 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 three calendar days, and (4) pre-natal care.

<sup>5</sup> Once found to be covered, the employer must thereafter employ fewer than 50 employees for two consecutive years to avoid further FMLA liability.

<sup>6</sup> Local “partnering” laws that give homosexual couples the same employment benefits as heterosexual couples apparently do not qualify the partner as a “spouse” under the FMLA.

As these very broad definitions indicate, FMLA and the resultant departmental policy must necessarily provide for leave in a wide variety of situations, including virtually any medical, physical, or mental problem. The leave policy must include, for example, treatment for such ongoing conditions as allergies, stress, or substance abuse. The availability of leave for stress-induced conditions is of particular concern to law enforcement employers, because of the opportunities that it provides to police personnel for claiming leave under FMLA.<sup>7</sup>

## II. PROCEDURES

### A. General Provisions

**Other leave provided for by any local, state, or federal law.** If state or local law provides for family leave, this may be taken in addition to FMLA leave, depending upon the circumstances and the wording of the state or local law. For example, if the state or local law provides for leave for a purpose not stated in the FMLA, the employee may be able to take both the leave mandated by the state or local law and, if an FMLA-approved situation also arose during that period, the leave mandated by the FMLA.

Departments should also be aware that the provisions of FMLA are, in effect, cumulative to the provisions of the Fair Labor Standards Act (FLSA) and the Americans with Disabilities Act (ADA). Thus, employers must consider the provisions of all of these federal laws in dealing with employees. For example, a condition that would not be considered a “serious health condition” under the FMLA might nevertheless be considered a “disability” under the ADA—and vice versa.

**Male and female employees eligible.** The legislative history of the FMLA indicates that this legislation was motivated largely by congressional concern over issues related to the increase in the number of women in the work force and the increase in the number of single-parent homes.<sup>8</sup> Further, it seems to have been assumed that the majority of the employees who apply for FMLA leave will be women.<sup>9</sup> However, it must be emphasized that the FMLA by its terms applies equally to both men and women, and no gender-based distinction may be made by employers in applying the act’s provisions.

<sup>7</sup> There is considerable uncertainty as to what conditions will in fact justify leave under the FMLA. It is probable that this issue will be explored in the courts over the next several years.

<sup>8</sup> See Senate Report No. 3, 103rd Congress, 1st Session 5 (1993). The Report noted that “divorce, separation, and out-of-wedlock births have left millions of women to struggle as single heads of households to support themselves and their children.” Senate Report No. 3, 103rd Congress, 1st Session 5 (1993) at page 6.

<sup>9</sup> See 29 U.S.C. §§ 2601(a)(5).

**Unpaid Leave.** Leave taken under the FMLA is normally unpaid leave. (However, under certain circumstances, employees seeking FMLA leave may be required first to exhaust available paid leave. (See item 7.)

**Leave availability.** The leave prescribed by the act is available to employees in any one or more of four instances: birth of a child of the employee; placement with the employee of a child for adoption or foster care; serious health condition of an employee's spouse, parent, or child; or serious health condition of the employee.

**Amount of leave.** Eligible employees may take up to 12 weeks of leave under this policy during any 12-month period.<sup>10</sup> Husbands and wives employed by the same jurisdiction may take a combined total of 12 weeks per year to care for a newborn or newly placed child. The combined total of 12 weeks in a 12-month period also applies to the birth, adoption, or foster care placement of a couple's child even if the couple is not married. The couple may also take up to 12 weeks each to care for a sick child or for each other.

**Exhausting accrued paid leave.** As noted above, FMLA leave is, in general, unpaid leave. However, under certain circumstances, paid leave provided under the employer's own leave policies may be taken instead of or in addition to FMLA leave. Under FMLA, an employer may require the employee to substitute accrued vacation time or personal leave for any purpose set forth in the act. The employee may also elect to do this. The act specifically provides that "accrued paid family leave may be substituted for birth or adoption, or to care for a seriously ill immediate family member; and accrued paid medical or sick leave may be substituted to care for a seriously ill immediate family member or for the employee's own serious health condition."<sup>11</sup>

Accordingly, the IACP model policy provides that, before taking unpaid leave under FMLA, employees may elect, and the agency reserves the right to require, that the employees first exhaust all accrued paid leave, including compensatory time, sick or medical leave, vacation time, or similar accrued paid time off. The model policy further provides that, except when the leave is for the birth, adoption, or foster care of a child, the agency may not

require the exhaustion of sick or medical leave, but the employee and the agency may agree to such a procedure.

**Off-duty employment.** The department's policy regarding outside employment will continue to apply to the employee while the employee is on leave. The employee may engage in outside employment while on FMLA leave as long as the department's outside employment policy does not otherwise prohibit such employment.

**Restriction to jurisdiction during leave.** The IACP model policy states that during the FMLA leave period, the employee shall not leave the county of his or her residence without the prior approval of the unit commander and the chief of police, except for medical treatment purposes.

## **B. Notice of Need for Leave**

**Advance notice required.** An employee must provide 30 days' advance notice if the need for leave is foreseeable. The projected birth of a child is an example of a foreseeable need. If the need for leave was not foreseeable, notice must be provided as soon as practicable after the need arises. If an employee fails without excuse to give the required notice, the employer may deny the taking of FMLA leave until at least 30 days after the date of the notice.<sup>12</sup>

**Proof of need for leave; scheduling of leave.** Under the FMLA, employers may require that employees present medical certification as to the need for leave. The model policy requires that the employee must provide a medical certificate to support a request for leave for a serious health condition of the employee or a member of the employee's family. (As to the form and content of such certificates, see below.)

Where it is medically feasible to do so, the employee is required to make a reasonable effort to schedule treatment to avoid disruption to the employer's operations; however, this requirement is subject to the approval of the health-care provider.

**Form and content of certificate of need for leave.** The medical certificate referred to in the preceding subsection must include a statement as to (a) the treatment prescribed by the health-care provider and (b) whether in-patient hospitalization is required.

If the leave is requested for the employee's own serious health condition, the employee must provide a medical certification that states that the employee's health condition renders the employee unable to perform the "essential functions" of the employee's job.<sup>13</sup>

The department may require the employee to obtain a medical certification from a second health-care provider at the department's expense. If the second health-care

<sup>10</sup> This 12-month period may be calculated in four different ways: (1) A calendar year; (2) any 12-month "leave year," e.g., a fiscal year; (3) a 12-month period measured from the time that an employee's first FMLA leave begins; or (4) a 12-month period measured backward from the date an employee uses any FMLA leave. Employers may select the method of calculation to be used for their employees, provided that the method selected is applied uniformly to all employees. Employers may change the method upon 60 days' notice to all employees, provided, however, that the change does not curtail leave currently available to employees under the originally used method.

<sup>11</sup> The Family and Medical Leave Act of 1993, 58 Fed. Reg. 31,794 & 31,802 (1993).

<sup>12</sup> This is so only if the need for leave was clearly foreseeable and the employee had actual notice of the FMLA requirements.

<sup>13</sup> See IACP Model Policy §IV(B)3.



provider's opinion differs from that of the first provider, the department may require a third medical opinion at the department's expense. If a third opinion is to be sought, the model policy provides that the employee and representatives of the department "shall cooperate and act in good faith in selecting any third health-care provider." Both the employee and the department are bound by the medical decision of the third health-care provider.

### C. Pay and Benefits

**Health Insurance.** While the employee is on FMLA leave, the employer must maintain the employee's group health insurance, under the same conditions as those applicable to such benefits while the employee was actively employed. If the employer's group health plan required the employee to pay all or part of the premiums, the employee must continue to make the premium payments during the period of FMLA leave. However, if the employee was not required to pay any such premiums while on duty, no such payment will be required while the employee is on FMLA leave. If the employee fails to return after the leave, the employer may recover from the employee any premiums paid by the employer for the employee's health insurance coverage during the leave, unless the employee who fails to return suffers a continuation, recurrence, or onset of a serious medical condition that would entitle the employee to leave under the FMLA, or other circumstances exist that are beyond the employee's control.

**Life insurance and disability insurance.** Normally the employer is not required to maintain an employee's life insurance or disability insurance coverage during FMLA leave. However, the Department of Labor has warned that life or disability policies that require a waiting period upon reinstatement may cause problems for employers who discontinue such policies during the employee's leave, since the employer is obligated to reinstate the employee with full benefits upon the completion of the leave. Where such waiting periods are in effect, the employer may have to maintain the employee's life and disability coverage during the leave to avoid violating FMLA upon reinstatement. To prevent the department from being caught in such a situation, the IACP model policy simply provides that "Life insurance and disability insurance paid by this agency will continue in force during an employee's leave."

**Reinstatement and Replacement.** When the employee returns from leave, the employee must be reinstated to his or her original position or to an equivalent position—that is, one that has the same rank, pay, benefits, and

working conditions.<sup>14</sup> Since it is rare that two different positions are completely equal in these respects, employers may anticipate a protest from any employee who is not reinstated in the very same position that he or she occupied before leave started.

Under both FMLA and the model policy, reinstatement is conditional upon proof, through medical certification, that the employee is physically and mentally fit to return to work. However, the employee should be notified in advance that such certification will be required. This condition should be clearly stated in any employee handbook, policy, or other written notice to employees regarding FMLA leave. In addition, it is highly desirable that the employee be personally notified of this provision before FMLA leave starts. If the employer has adequately notified the employee of the necessity of presenting medical certification for reinstatement, the employer may refuse to reinstate the employee until the certification is presented.

An employee may be permitted to return to work in a light-duty status in accordance with the provisions of the department's light-duty policy.

**Reinstatement of "key employees."** Under the FMLA, an exception to the reinstatement requirement may occur in the case of a "key employee." As noted earlier, a "key employee" is one who is among the highest-paid 10 percent of the employer's employees. The employer may not deny a key employee FMLA leave, but the employer is not obligated to reinstate the key employee following the leave if to do so would cause "substantial and grievous economic injury" to the employer. However, the alleged economic injury to the employer must be shown by the employer to be due to the reinstatement, not to the absence itself.

The employee must be notified by the employer prior to taking leave that the employee is considered a "key employee." The employer must further notify the key employee that if he or she takes, or remains on, FMLA leave, such injury will be the result, and that if the employee takes FMLA leave, the employee will not be reinstated. This notification must be given before leave starts, or as soon thereafter as the employer determines that the employee is a key employee and that economic injury to the employer would result from reinstatement. The model policy requires that key employees "who will not or who may not be reinstated shall be notified in writing prior to taking the leave." In addition to being in writing, this notification should be delivered to the employee either in

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<sup>14</sup> If the employer can show that, even if the employee had not been on leave, the employee would not still have been employed at the time of the requested reinstatement, then the employer is not obligated to reinstate the employee. However, the burden of proof is upon the employer to prove that this is the case.

person or by certified mail.

## **D. Other Matters Not Specifically Addressed in the Model Policy**

**No break in service.** Except as otherwise noted, for purposes of employee benefits the employer must treat an employee returning from FMLA leave as if there had been no break in the employee's service. This means, among other things, that the employee may not be penalized in matters of pay, promotion, assignment, etc., because of the leave.

**Replacement of employees on FMLA leave.** An employee on FMLA leave may be replaced, either temporarily or permanently. Many private- and public-sector employers can manage with temporary employees during a period of FMLA leave, but temporary replacement, especially of sworn personnel, may not be feasible for a law enforcement agency. Permanent replacement, although permitted where necessary, carries a considerable potential disadvantage to the employer, for if a permanent replacement is necessary, the employer will be required to find the employee who took FMLA leave an equivalent position at the time of the leave-taking employee's return. If no such position is available when the leave-taking employee returns from leave, litigation against the employer is almost inevitable, either by the employee who took the leave or the new employee who must be "bumped" to make room for the employee returning from leave.

**Notice to employees of FMLA leave policies.** As the provisions of the model policy clearly reflect, FMLA places considerable emphasis on notice to employees regarding its provisions. In addition, the department's policies must ensure that the required notice is given. To this end, as indicated above, notice regarding FMLA entitlements must be included in any employee handbook, policy manual, and the like, that provides written guidance to employees regarding their rights and benefits. Employers must also post a notice in the workplace informing employees of their FMLA rights. In addition, any employee proposing to take FMLA leave should be notified personally and in writing of the terms and provisions under which the leave is to be taken, the obligations of the employee under the terms and provisions, and the consequences of the employee's failure to meet these obligations.

The Family and Medical Leave Act of 1993 is a complex piece of legislation that poses many problems for law enforcement executives. The IACP model policy attempts to cover the major requirements of this legislation, insofar as those can be determined at this time. Unfortunately, many of the provisions of the law are so ambiguous, or are so insufficiently detailed, that it is difficult to provide firm guidance. Disputes have already

arisen over the meaning of some of the act's provisions, which means that further legislative or judicial clarification is almost inevitable. Police executives should monitor legal developments in this area of the law on a continuing basis to ensure that their leave policies satisfy the present and future requirements of the act. When confronted with a personnel situation that appears to involve the act's provisions, and when the requirements of the law are unclear, police managers should immediately consult their city or county attorneys or other legal advisors for additional guidance.

Every effort has been made by the IACP National Law Enforcement Policy Center staff and advisory board to ensure that this document incorporates the most current information and contemporary professional judgment on this issue. However, law enforcement administrators should be cautioned that no "model" policy can meet all the needs of any given law enforcement agency. Each law enforcement agency operates in a unique environment of federal court rulings, state laws, local ordinances, regulations, judicial and administrative decisions and collective bargaining agreements that must be considered. In addition, the formulation of specific agency policies must take into account local political and community perspectives and customs, prerogatives and demands; often divergent law enforcement strategies and philosophies; and the impact of varied agency resource capabilities among other factors.

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