

The City University of New York

Office of the General Counsel and Vice Chancellor for Legal Affairs

*Robert E. Diaz
General Counsel*

*Roy P. Moskowitz
Deputy General Counsel*

535 East 80 Street, New York, N.Y. 10021

Phone: (212) 794-5382

Fax: (212) 794-5426

*Daphna H. Mitchell •
Linda Myles
Lisa Okubo
Nicholas R. Santangelo
Michael D. Solomon •
Jane Severn
Eduard Tuller
• Associate General Counsel*

July 27, 1993

Memorandum

To: College Presidents

From: Robert E. Diaz

Re: Family and Medical Leave Act of 1993
Personnel Advisory Memorandum

The attached personnel advisory memorandum was distributed several weeks ago. At that time an attachment to the memorandum, a notice entitled "Your Rights under the Family and Medical Leave Act of 1993", was inadvertently omitted.

Please replace Personnel Advisory Memorandum #5, dated July 8, 1993 with the enclosed updated memorandum.

H:MEMO#5.BOB/je

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Daphna H. Mitchell •
Linda Myles
Lisa Olusbo
Nicholas R. Santangelo
Michael D. Solomon •
Jane Sovern
Esdras Tulier
• Associate General Counsel

PERSONNEL ADVISORY
MEMORANDUM #5

July 27, 1993

To: College Presidents
From: Vice Chancellor Robert E. Diaz
Re: Family and Medical Leave Act of 1993

The Family and Medical Leave Act of 1993 ("FMLA" or "Act") was signed into law on February 5, 1993. CUNY falls within the Act's definition of "employer" and must comply with the requirements of the new law.

The FMLA mandates that eligible employees¹ be provided with unpaid leave of up to 12 weeks in any 12-month period for any of the following reasons:

- the birth or adoption of a child, or the placement of a child with the employee for foster care;
- to care for a child, parent or spouse with a serious health condition;²

¹ To be eligible, an employee must have been employed by the employer for at least 12 months prior to commencement of the leave and must have worked at least 1250 hours during the 12-month period. Sect. 101 (2)(a).

² According to section 101 of the Act:
- "son or daughter" means a biological, adopted, step-or foster child, legal ward, or a child of a person standing in loco parentis who is under 18 years of age or incapable of self-care because of a mental or physical disability;

- "parent" includes both a biological parent or someone who stood in loco parentis to the employee when he was a child;

- a "serious health condition" is one that involves

- the employee's own serious health condition makes him unable to perform his job.

Upon return from leave, the employee must be reinstated to his position or its equivalent (in pay, benefits and other terms and conditions), unless the employee is among the highest-paid 10% of the employer's workforce. Such "highly compensated employees" may be denied restoration of position and benefits if such denial is necessary to prevent a "substantial and grievous economic injury" to the employer, and provided certain procedural steps are followed.

The employee must give at least 30 days' notice when the need for leave is foreseeable; otherwise he must give as much notice as is practicable. If the leave is for planned medical treatment, the employee must make reasonable efforts to schedule the leave so as not to disrupt the employer's operations. If medically necessary, leave due to a serious health condition may be taken on an intermittent or reduced work schedule basis, although the employee may then be required to transfer temporarily to another position with the same pay and benefits. Leave for birth, adoption or foster care cannot be taken intermittently or by way of reduced work schedule, unless by agreement, and must be taken within one year of the event.

If both spouses have the same employer and the leave arises either from birth, adoption, foster care or the need to care for a parent, the couple is entitled to a total of 12 weeks of leave, to be apportioned between them. The 12 weeks are not so aggregated in the case of medical leave for oneself or to care for a spouse or child.

An employee is not entitled to compensation for leave under the FMLA. However, pre-existing health benefits must be maintained during the leave. If employee contributions are required, the employee must provide notice as to how and when payments are to be made. An employee who refuses to contribute must have benefits reinstated after the leave without having to qualify as a new beneficiary. Accrual of seniority or other employment benefits during the leave period is not required.

The employer may recover health care premiums it paid during the leave if the employee fails to return to work, unless the failure is due to continuance or recurrence of the cause of the medical leave, or to other circumstances beyond the employee's control. Where paid leave, including vacation, is available, it may be substituted for any part of the FMLA leave (and the

either inpatient care in a hospital, hospice or residential medical care facility or continuing treatment by a health care provider.

employer may so require), except that paid sick leave may be substituted only for leave that is taken under the Act's serious health condition provision.

Medical certification may be required to support leave for a serious health condition. Certification is sufficient if it contains:

- the date the condition began and its probable duration;
- appropriate medical facts within the knowledge of the health care provider; and
- a statement that the employee is unable to perform his job functions or is needed to care for a spouse, child, or parent, with an estimate of the time needed for care; and
- in the case of intermittent leave for planned medical treatment, the dates on which such treatment is expected to be given and the duration of such treatment.

When there is reason to doubt the validity of a certification, an employer may, at its own expense, require other medical opinions to verify the need for leave.³

An employer may uniformly require each employee to provide certification from a health care provider when that employee is able to resume work, provided that such a policy does not supersede state or local law or a collective bargaining agreement.

The Act prohibits interference with or discrimination against employees exercising rights under it and requires posting of a notice prepared or approved by the Secretary of Labor. Civil and administrative actions are permitted for violations of the Act.⁴

³ The employer may designate the second health care provider, who may not be someone regularly in its employ. If the two opinions differ, the employer may, at its own expense, require a third opinion, by a jointly designated provider, which is final and binding. Sect. 103 (c) and (d).

⁴ Damages in civil actions include back pay or actual monetary losses sustained by the employee due to the violation (including the cost of providing care, up to the sum of 12 weeks of the employee's wage or salary), interest, liquidated damages and attorneys' fees.

"Interim final" implementing regulations were issued by the Labor Department on June 3. The FMLA itself will become effective on August 5, 1993, or, where a collective bargaining agreement is in effect on that date, upon termination of the agreement or by February 5, 1994, whichever is earlier.

Employers covered by the FMLA must post a notice prepared by the Secretary of Labor, which summarizes the provision of the act. A copy of the notice is attached. Original copies may be obtained from the local Wage Hour Division Office of the U.S. Department of Labor. Employers must also provide additional notice through employee handbooks or through written information when employees request leave.

This memorandum has summarized various requirements of the Act. It does not address how our existing collective bargaining agreements and the Civil Service Law may modify our compliance obligation.

c: Vice Presidents for Administration
Labor Designees
Legal Affairs Designees
Personnel Directors

Appendix C to Part 825—Notice to Employees of Rights Under FMLA

YOUR RIGHTS under the FAMILY AND MEDICAL LEAVE ACT OF 1993

FMLA requires covered employers to provide up to 12 weeks of unpaid, job-protected leave to "eligible" employees for certain family and medical reasons. Employees are eligible if they have worked for a covered employer for at least one year, and for 1,250 hours over the previous 12 months, and if there are at least 50 employees within 75 miles.

REASONS FOR TAKING LEAVE: Unpaid leave must be granted for any of the following reasons:

- ▶ to care for the employee's child after birth, or placement for adoption or foster care;
- ▶ to care for the employee's spouse, son or daughter, or parent, who has a serious health condition; or
- ▶ for a serious health condition that makes the employee unable to perform the employee's job.

At the employee's or employer's option, certain kinds of paid leave may be substituted for unpaid leave.

ADVANCE NOTICE AND MEDICAL CERTIFICATION: The employee may be required to provide advance leave notice and medical certification. Taking of leave may be denied if requirements are not met.

- ▶ The employee ordinarily must provide 30 days advance notice when the leave is "foreseeable."
- ▶ An employer may require medical certification to support a request for leave because of a serious health condition, and may require second or third opinions (at the employer's expense) and a fitness for duty report to return to work.

JOB BENEFITS AND PROTECTION:

- ▶ For the duration of FMLA leave, the employer must maintain the employee's health coverage under any "group health plan."
- ▶ Upon return from FMLA leave, most employees must be restored to their original or equivalent positions with equivalent pay, benefits, and other employment terms.
- ▶ The use of FMLA leave cannot result in the loss of any employment benefit that accrued prior to the start of an employee's leave.

UNLAWFUL ACTS BY EMPLOYERS: FMLA makes it unlawful for any employer to:

- ▶ interfere with, restrain, or deny the exercise of any right provided under FMLA;
- ▶ discharge or discriminate against any person for opposing any practice made unlawful by FMLA or for involvement in any proceeding under or relating to FMLA.

ENFORCEMENT:

- ▶ The U.S. Department of Labor is authorized to investigate and resolve complaints of violations.
- ▶ An eligible employee may bring a civil action against an employer for violations.

FMLA does not affect any Federal or State law prohibiting discrimination, or supersede any State or local law or collective bargaining agreement which provides greater family or medical leave rights.

FOR ADDITIONAL INFORMATION: Contact the nearest office of the Wage and Hour Division, listed in most telephone directories under U.S. Government, Department of Labor.