July 16, 2014
Medical Leave Training
Questions from HR Professionals Meeting

CCSF Only Medical Leaves

1. Does the employer (City), have the right to investigate an employees' use of sick leave?

Yes. The City has a right to inquire about the use of sick leave. Any reasonable suspicion concerning whether an employee used sick leave appropriately is grounds for an investigation. Here are two examples: (1) a disgruntled employee calls in sick, but on the same day comes to work to get his/her paycheck or is seen in the parking lot talking to coworkers; and (2) an employee requests vacation which is denied and the employee subsequently calls in sick. Both scenarios cast doubt on the employee's claimed illness and would support an investigation.

2. Is the denial of Paid Sick Leave (SLP) appealable to the Civil Service Commission?

No. Employees may grieve denial of sick leave, or employees may appeal the denial in writing to the Human Resources Director, whose decision is final. *See* CSC Rule 120.42.1 and 120.42.2

3. When would granting additional leave following FMLA/CFRA or PDL be an undue hardship?

There are several factors to consider when deciding whether an employee's request for additional leave would pose an undue hardship. As with all reasonable accommodation requests, it is critical to identify how the requested leave actually impacts services and operations. Factors that may support a decision that additional leave is an undue hardship include:

- Significant losses in productivity because work is completed by less effective, temporary workers, or employees working overtime who may be overburdened, slower or more susceptible to error and fatigue
- Lower quality of work and less accountability for quality due to insufficient staffing or lack of leadership caused by a supervisory employee's absence
- Less responsive public service and increased public dissatisfaction
- Deferred or delayed projects
- Increased burden on management staff required to find replacement workers, or readjust work flow or readjust priorities to accommodate the absent employee
- Increased stress on overburdened co-workers

Undue hardship is never an excuse for denying FMLA, CFRA or PDL leaves, however, once these entitlements are exhausted employers may consider the impact of leave.

4. Can you clarify whether the extension of leave for up to one year occurs after FMLA or CFRA expires, or does it run concurrently?

Employees may request up to one year of leave, which may run concurrently with FMLA, CFRA and Family Care Leave. In addition, requests for sick leave without pay exceeding one year must be reviewed by the Human Resources Director pursuant to Civil Service Rule 120.21.1.

5. Does the City have an affirmative duty to tell employees about Family Care Leave (as the employer does with giving notice of FMLA and CFRA rights)?

No. The City does not have an affirmative duty to inform employees about Family Care Leave or other employee leave provisions unique to the City's Employee Handbook. Handbook p.32.

6. Does the six months of continuous service under the Paid Parental Leave (PPL) statute include periods of leave?

No. Leaves of absence are not counted toward the six months of continuous service under the PPL. San Francisco Charter § A8.365-2 An employee must be physically present and working for six months, and regularly work at least 20 hours a week, in order to meet eligibility requirements under pattern one of the PPL statute (*see*, A8.365-2).

7. If a person who received PPL benefits does not return to City employment, can the benefits they owe the City be deducted from the employee's final paycheck?

Please consult with the Controller's Payroll Division as this is outside the scope of managing leaves.

8. Is there a requirement that in order to keep the PPL benefits paid while out on a qualifying leave the employee has to return to work and stay at least six months?

Yes. By agreement, an employee must continue in City employment for at least six months following a leave during which the employee received PPL wage supplement benefits, or the benefits shall be treated as a loan.

9. Does PPL apply to foster care and adoption?

Yes. PPL provides up to twelve weeks of supplemental wage compensation in any twelve month period for employees who take leave pursuant to the Family and Medical Leave Act (FMLA) or the California Family Rights Act (CFRA) for the:

1) Birth of a child to the employee, the employee's spouse, or the employee's domestic partner; or

2) Placement of a child with the employee's family for adoption or foster care.

To be eligible for leave for bonding with a newborn, adopted child or child placed for foster care under FMLA and CFRA, an employee must take leave within 12 months of the birth or placement. These provisions also apply to PPL benefits.

10. Does eligibility for PPL commence with the birth of a child?

No. PPL provides compensation to supplement State Disability Insurance payments, paid sick leave, vacation, compensatory time and other forms of paid leave to ensure that an employee will receive the equivalent of the employee's salary for up to sixteen weeks while on approved pregnancy disability leave. Pregnancy-related disability may occur before or after the birth of a child. Consequently, eligibility for PPL begins when an employee meets the employment term and time requirements as defined in the PPL statute; has exhausted all accrued paid leave; and has a valid certificate of pregnancy disability signed by a health care provider, or after the birth or placement of a child for adoption or foster care. See, SF Charter § A8.365-2

11. Does PPL apply to paternity leave?

Yes. Non-birth parents can receive up to 12 weeks of PPL supplemental pay while on qualifying FMLA or CFRA leave for child birth and bonding or foster and adoption placement.

12. If an employee calls and wants to know more about the Catastrophic Illness Program (CIP), do we refer them to DHR or DPH?

Refer the employee to the DHR website. Employees can find general information and the application for CIP on DHR's website at http://www.sfdhr.org/ under the Employee Leaves Tab. For more information about CIP benefits for the employee's own catastrophic illness, or to care for a family member with a catastrophic illness, employees should contact the number on the CIP application form.

13. Must an employee first apply for short-term disability benefits before he/she is eligible for CIP?

Yes, if the employee participates in a short-term disability program paid for by the city. This excludes benefit programs such as SDI, which are paid for by the employee through payroll tax deductions. This requirement has been in place since 2002. *See,* SF Admin. Code Section 16.9-29A(d)(4).

> (d) **Eligibility of Employees to Participate in CIP.** Any employee of the City and County of San Francisco may participate in the CIP if the employee meets all of the following conditions:
> (1) The employee is eligible to accumulate and use sick leave and vacation credits;
> (2) The employee is catastrophically ill;
> (3) The employee has exhausted all of his/her available paid leave; and

> (4) The employee does not participate in a short or long-term disability program for which the City pays in whole, directly or indirectly, or ***if the employee participates in such a program, the employee agrees to, and does, apply for disability benefits immediately upon becoming eligible for such benefits***. (Emphasis added.)

14. Are the 70 hours/year of accrued sick leave under the Sick Leave Ordinance (SLO) an addition to the 104 hours of sick leave City employees accrue annually?

No. Sick leave accrued under the SLO is included in the 104 hours of sick leave full-time employees accrue each year. *See*, SF Admin Code Chapter 12 W.3(d):

> (d) If an employer has a paid leave policy, such as a paid time off policy, that makes available to employees an amount of paid leave that may be used for the same purposes as paid sick leave under this Chapter and that is sufficient to meet the requirements for accrued paid sick leave as stated in subsections (a)-(c), the employer is not required to provide additional paid sick leave.

15. Is there an updated list of City employee unions that are <u>not</u> covered under the SLO?

While most city employee unions have waived protections and benefits under the SLO, as of July 1, 2014, the following City employees are covered by the SLO:

> SEIU, Local 1021, Miscellaneous
> International Federation of Professional and Technical Engineers (IFPTE), Local 21
> Laborers International Union, Local 261 (Temporary Exempt/As Needed Employees Only)
> Union of American Physicians & Dentists (UAPD) Units 17 and 18

Employees in these unions may access their accrued sick leave with pay after 90 days of continuous employment.

16. Can you call or fax an employee's doctor in order to authenticate a doctor's note?

Yes, but <u>only</u> if you have a signed medical release from the employee.

<u>State and Federal Leaves</u>

17. If an employee takes leave under FMLA that runs concurrently with CFRA, is the employer obligated to inform the employee that the leaves run concurrently?

Yes. The leave should be designated as FMLA and CFRA, and the employee should receive notice of the leave designation.

18. Can a registered domestic partner take CFRA leave to care for a partner with a pregnancy-related disability?

Yes. A registered domestic partner *may* take leave under CFRA to care for a partner with a pregnancy-related disability, if the disability also meets the definition of a serious health condition. However, the partner with the pregnancy-related disability is not entitled to leave under CFRA, as the employee's own pregnancy-related disability is excluded as a serious health condition under CFRA.

19. Should CFRA and FMLA run concurrently for registered domestic partners caring for a partner disabled by pregnancy?

No. FMLA does not include registered domestic partners as a qualifying relationship; it only covers a parent, spouse or child. In contrast, CFRA includes registered domestic partners as a qualifying relationship. An employee using CFRA to care for the serious health condition of a registered domestic partner may still be entitled to 12 weeks of additional leave for an FMLA qualifying reason. In the case of an employee caring for a registered domestic partner's pregnancy-related serious health condition, the employee may be eligible for up to 12 weeks of protected leave under CFRA and an additional 12 weeks of bonding leave under FMLA.

20. Since the Department of Veterans Affairs seems to take years to adjudicate service connected disability claims, how does an employer determine whether the servicemember's injury or illness is service connected for purposes of approving Military Caregiver Leave?

The law does not require an employer to make a legal determination regarding whether an injury/illness is "service connected." Instead, a health care provider may certify that a servicemember's condition meets the FMLA definition of a serious illness or injury incurred or aggravated by his/her military service. Guidelines for health care providers certifying eligibility for FMLA Military Caregiver Leave are included in 29 CFR 825.310. These guidelines are summarized on DOL Form WH-385-V:

> For purposes of FMLA Military Caregiver Leave, a serious injury or illness means an injury or illness incurred by the servicemember in the line of duty on active duty in the Armed Forces (or that existed before the beginning of the servicemember's active duty and was aggravated by service in the line of duty on active duty in the Armed Forces) and manifested itself before or after the servicemember became a veteran, and is:
> (i) a continuation of a serious injury or illness that was incurred or aggravated when the covered veteran was a member of the Armed Forces and rendered the servicemember unable to perform the duties of the servicemember's office, grade, rank, or rating; or
> (ii) a physical or mental condition for which the covered veteran has received a U.S. Department of Veterans Affairs Service Related Disability Rating (VASRD) of 50 percent or greater, and such VASRD rating is based, in whole or in part, on the condition precipitating the need for military caregiver leave; or

(iii) a physical or mental condition that substantially impairs the covered veteran's ability to secure or follow a substantially gainful occupation by reason of a disability or disabilities related to military service, or would do so absent treatment; or
(iv) an injury, including a psychological injury, on the basis of which the covered veteran has been enrolled in the Department of Veterans' Affairs Program of Comprehensive Assistance for Family Caregivers.

Note: A servicemember's serious illness or injury is not the same as a serious health condition, but the qualifying condition **could** meet both definitions.

21. If an employee takes Military Caregiver Leave, but also requests leave under FMLA or CFRA for another qualifying purpose, can the employee decide how to allocate the leave (i.e., 14 weeks to FMLA Military Caregiver Leave and 12 weeks to FMLA/CFRA)?

Yes.

22. Is it correct that CFRA excludes Military Exigency Leave, but covers Military Caregiver Leave?

CFRA does not include protections for leave related to a qualifying military exigency, however, CFRA may cover some leaves that qualify for protections under FMLA Military Caregiver Leave regulations. CFRA applies only to those leaves where the servicemember is also in a qualifying relationship with the employee requesting the leave, i.e. spouse, child or parent, AND the servicemember's qualifying illness or injury also meets the definition of a serious health condition. If these conditions are met, CFRA would run concurrently with FMLA Military Caregiver Leave for 12 weeks out of the total 26 weeks.

23. What does the employer do when an employee's doctor determines that the employee will be disabled by her pregnancy for a period of time in excess of the 16 weeks covered by Pregnancy Disability Leave (PDL)?

If an employee requires more than 16 weeks of PDL as a result of a pregnancy-related disability, the employer should engage the employee and consider extending her leave as a reasonable accommodation. See 29 CFR 825.120(a)(2), 29 CFR 825.121(a)(2) and C.C.R § 11051(b).

24. What if an employee decides not to take baby bonding leave immediately after the baby is born?

That's fine; however, baby bonding leave under FMLA and CFRA must be completed within 12 months of the date of birth.

25. If an employee takes 20 weeks of leave due to pregnancy-related disability, and then requests bonding leave a month after her return to work, is she eligible for additional leave?

Maybe. If she meets the length of service (12 months) and hours worked (1,250 hours) requirements under CFRA, then she will qualify for up to 12 weeks of bonding leave. But the 12 weeks of leave must be completed within 12 months of the date of birth.

26. If an employee requests a year-long medical leave, and provides supporting medical certification, is it appropriate to approve the employee's leave in three month intervals?

Absolutely. Granting leave in three month intervals is recommended in order to maintain regular contact with the employee and his/her healthcare provider. Periodic updates on the employee's medical condition may enable the employer to explore options for early return to work or determine whether additional leave is likely to enable the employee to return to work.

27. What if an employee refuses to return to work after a reasonable accommodation has been offered?

In a situation where the medical restrictions on file demonstrate that the employee is able to return to work, and the City has offered to provide an accommodation or modified work consistent with the employee's restrictions, the employer may follow normal AWOL procedures. The AWOL notice should include: (1) the accommodation offered, (2) the employee's medical restrictions, and (3) the employee's refusal or failure to return to work.

28. Are there limitations or restrictions on communicating with an employee on leave when that employee has a pending lawsuit or Workers' Compensation claim?

No. There are no restrictions on sending emails or letters in order to engage employees in the reasonable accommodation process or to inquire about their ability to return to work. If an employee has a representative or attorney, the representative or attorney may assist in communicating with the employee. If an employee designates his/her representative or attorney as the person authorized to receive work-related communications, then the employer should communicate with the employee through the representative or attorney to the extent such communications are practical.

29. What does the employer do when a letter regarding leave sent Certified Mail is returned as a result of the employee's unwillingness to accept the letter? Would sending the employee an email be an acceptable alternative?

Always keep returned correspondences regarding leaves in the employee's medical file. Sending an email would definitely be acceptable, especially if email has been a successful form of communication in the past. Employers should send any correspondence regarding long-term leaves via regular mail, certified mail, and email to ensure that the employee receives the document.

Employees are responsible for providing a current mailing address to the employer, and the employer is not responsible for correspondence not received due to outdated contact/mailing information.

30. With regard to Kin Care Leave, is an employee entitled to use half of their total accrued sick leave to care for sick "kin," or only half of their annual accrued sick leave?

California Labor Code Section 233 allows employees to use half of their *annual* accrued sick leave, to care for a qualifying family member. This means that full time City employees who earn 13 paid sick days per year are entitled to use 6.5 paid sick days annually for Kin Care Leave.

31. Can employees use Kin Care Leave to take healthy qualifying "kin" for routine annual check-ups?

Yes. The Kin Care Leave law allows employees to use sick leave for a qualifying relative's pregnancy or physical examinations.

32. Is there a self-service drop-down on eMerge to designate Kin Care Leave?

Not yet.

33. How can employers know what kind of leave to designate with all the recent changes in leave laws?

You should examine the facts supporting each request for leave, including medical certification and qualifying relationships in light of the various laws that may apply. When in doubt, City HR professionals can consult resources available through the Leave Management Program.

34. What type of leave does an employee take to care for an in-law?

Employees can take sick leave, or sick leave without pay to care for a parent in-law. Employees may also qualify for state Paid Family Leave benefits to care for a parent in-law.

35. If an employee is out on paid sick leave for more than seven days, does the City have an obligation to place the employee on State Disability Insurance (SDI)?

No. The City cannot apply for SDI on behalf of an employee. The employee must complete and submit a Claim for Disability Insurance Benefits form. Employees can apply online through the State's Employment Development Department website at *http://edd.ca.gov/Disability/.*

36. Is the City required to automatically designate leave as FMLA/CFRA if the employee has been out sick for more than 5 days?

Yes. FMLA/CFRA regulations and City policy allow automatic designation of leaves qualifying under the statues. This is so because it is the employer's responsibility to designate leave as FMLA/CFRA when the employer has enough information to determine that the leave is being taken for a qualifying reason. Calling in sick for five days is sufficient notice to tentatively designate the leave as qualifying and then request certification from the employee, or his or her

spokesperson (for example, a spouse, adult family member or other responsible party), to determine whether the leave is in fact FMLA/CFRA-qualifying. The City's practice of designating sick leaves of five days or more as FMLA/CFRA is consistent with the regulations and protects employee rights.

37. What happens if an employee does not respond to the request for medical certification after the leave has been automatically designated as FMLA/CFRA qualifying?

If the leave has been tentatively designated as FMLA/CFRA and the employer requests certification, then the employee must provide the requested certification within 15 calendar days, unless it is not practicable under the particular circumstances to do so despite the employee's diligent good faith efforts. The failure to provide certification could result in withdrawal of the tentative FMLA/CFRA designation.

But, if the leave has been tentatively designated as FMLA/CFRA and the employer subsequently acquires sufficient knowledge from the employee or the employee's spokesperson that the leave is being taken for a qualifying reason, then the tentative FMLA/CFRA designation stands.

38. Is an employer allowed to discipline an employee for misuse of sick leave? The Sick Leave Ordinance says that an employer may not do so.

Yes. Misuse of sick leave is grounds for discipline, up to and including termination. If abuse of sick leave is suspected, the employer should initiate an investigation.

Under the Sick Leave Ordinance an employer may take reasonable measures to verify or document that an employee's use of paid sick leave is lawful. Any unlawful use of sick leave is not protected under the ordinance and can be grounds for discipline. (*See,* SF Admin Code § 12W.4(d).)

39. What can a department do if an employee is using more than the 13 paid sick days granted annually and management thinks the sick leave use is excessive?

If the leave is not protected under FMLA/CFRA or some other statute, the department may give the employee notice that his/her sick leave use is excessive and advise the employee that his/her leave use is being monitored. The department may also require certification for any period of sick leave use, provided that the employee has received written notice that certification for absences of less than five working days will be required. (*See*, Civil Service Rule 120.4.1.) Some departments call these actions "Sick Leave Restriction." The notices and restrictions should convey that inability to maintain regular and reliable attendance may lead to discipline, up to and including termination.

If the employee indicates his/her absences are related to a disability, then the department should attempt to engage the employee in the reasonable accommodation process. The employee, the department Reasonable Accommodation Coordinator and the employee's health care provider can discuss whether an accommodation will assist the employee with maintaining regular and

reliable attendance, which is an essential function of every City job. Of course, the department should not contact the employee's health care provider without first obtaining a signed release.

40. Can the employer request an updated certificate of disability if a doctor certifies that an employee will require 16 weeks of Pregnancy Disability Leave, but the employee gives birth before the 16-week period ends?

No. The birth of a child does not automatically end the period of pregnancy-related disability. The health care provider's certification regarding the period of pregnancy-related disability may include pre-birth incapacity and post-partum incapacity or recovery. The employer should accept the doctor's certification and approve the leave accordingly. If the doctor certification is open-ended and does not include a return date, then the employer is allowed to inquire further about the length of leave required before approving the leave.

41. Is the City working on an automated program to manage medical leaves?

Yes. We have been meeting with software vendors, communicating with other jurisdictions and talking to the eMerge team to evaluate options.

42. Are all employees eligible for SDI?

No. Not all classifications pay into SDI. Those that do not pay into SDI are not eligible to apply for this benefit. CITE?