



Office of the City Auditor
Compliance with the Family and Medical Leave Act

Report Date: November 30, 2012



Office of the City Auditor

"Promoting Accountability and Integrity in City Operations"

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Office of the City Auditor Compliance with the Family and Medical Leave Act



Date: November 30, 2012
To: James K. Spore, City Manager
Subject: Compliance with the Family and Medical Leave Act

I am pleased to present the report of our review of the City's Compliance with the Family and Medical Leave Act (FMLA). Our review focused on the City's overall compliance with the FMLA, the City's administration of the benefits available under the Act and its use of recommended (best) practices to ensure compliance and curb abuse.

Overall, the revisions to the City's Family and Medical Leave Policy and Procedure proposed by Human Resources meet the requirements of the federal legislation. Through our research, we identified recommended practices for reducing the risk of FMLA abuse and strengthening the City's ability to prevent and/or detect misuse. The City has already incorporated many of these recommended practices, but can enhance its efforts to prevent misuse by implementing and ensuring consistent application of the remaining recommended practices. Additionally, internal controls and procedures related to the administration of family medical leave can be strengthened to facilitate the City's ability to ensure compliance and monitor employee use of family medical leave. Findings considered to be of insignificant risk have been discussed with management. We completed our fieldwork on October 12, 2012. The results of this review will be provided to City Council through the City's Audit Committee.

The Office of the City Auditor reports to City Council through the City's Audit Committee and is organizationally independent of all other City Departments. This report is intended solely for the information and use of the Audit Committee, City Council, City Manager, and appropriate management. It is not intended to be and should not be used by anyone other than these specified parties. However, this report is a matter of public record and its distribution is not limited.

We would like to thank the staff of Human Resources, the City Attorney's Office, Payroll and various other City departments for their courtesy and assistance provided during our review.

If you have any questions about this report, or any audit-related issue, I can be reached at 385.5872 or via email at lremias@vbgov.com.

Respectfully submitted,

Lyndon S. Remias, CPA, CIA
City Auditor

c: City Council Members
Audit Committee Members
Cindy Curtis, Deputy City Manager
Regina Hilliard, Director, Human Resources



EXECUTIVE SUMMARY

Introduction

As part of our annual audit plan, we reviewed the City's compliance with the Family Medical Leave Act and the associated requirements. The Family and Medical Leave Act (FMLA) is a federally mandated program which allows eligible employees to take up to 12 weeks of leave from work for certain medical and family situations. The FMLA protects the employment status and benefits of most¹ eligible employees for the duration of FMLA leave taken. Leave may be paid or unpaid and taken concurrently or intermittently. Our review focused on the City's overall compliance with the FMLA, the City's administration of the benefits available under the Act and its use of recommended (best) practices to ensure compliance and curb abuse.

Purpose and Scope

The purpose of our review was to assess the City's compliance with the Family Medical Leave Act and to ensure adequate policies and procedures are in place to reduce the risk of misuse and/or abuse. Our audit did not look at the merits of individual cases of FMLA leave or investigate possible misuse and/or abuse of family medical leave, but instead evaluated family medical leave usage overall. The review covered family medical leave utilized during the period of July 1, 2011 through June 30, 2012.

Summary of Findings and Recommendations

The revisions to the City's Family and Medical Leave Policy and Procedure (HR Policy 3.03A)² proposed by Human Resources meet the requirements of the federal legislation. Internal controls and procedures related to the administration of family medical leave can be strengthened to facilitate the City's ability to ensure compliance and monitor employee use of family medical leave.

Through our research, we identified recommended practices for reducing the risk of FMLA abuse and strengthening the City's ability to prevent and/or detect misuse. The City has already incorporated many of these recommended practices, but can enhance its efforts to prevent misuse by implementing and ensuring consistent application of the remaining recommended practices.

The City currently has a decentralized approach to overall administration of the program and monitoring of compliance and family medical leave utilization with the departments responsible for determining eligibility, communications with the employee and monitoring utilization. Human Resources/Occupational Safety and Health is responsible for medical certification, recertification and medical record keeping. Departments are responsible for certification of non-medical entitlements under the Act. Human Resources/Employee Relations is responsible for assisting employees and departments with interpreting the City's policy. This approach puts the onus on individual departments to ensure the City's compliance with the Act and reduces the chance that the benefits afforded under the FMLA will be applied in a fair and consistent manner throughout the City.

¹ Some highly compensated employees may be denied the restoration of their position in certain situations.

² The City's Family and Medical Leave Policy and Procedure was under revision at the time of our review.



Office of the City Auditor Compliance with the Family and Medical Leave Act

Conclusion

Overall, the revisions to the City's Family and Medical Leave Policy and Procedure proposed by Human Resources meet the requirements of the federal legislation. Through our research, we identified recommended practices for reducing the risk of FMLA abuse and strengthening the City's ability to prevent and/or detect misuse. The City has already incorporated many of these recommended practices, but can enhance its efforts to prevent misuse by implementing and ensuring consistent application of the remaining recommended practices.

Additionally, internal controls and procedures related to the administration of family medical leave can be strengthened to facilitate the City's ability to ensure compliance and monitor employee use of family medical leave.



TABLE OF CONTENTS

Transmittal Letter	i
Executive Summary	ii
Purpose	1
Scope and Objectives.....	1
Methodology	1
Standards	2
Background	3
Findings and Recommendations	5
Conclusion	10
Acknowledgements	10
Management’s Response	Attachment A



Purpose

The purpose of our review was to assess the City's compliance with the Family and Medical Leave Act (FMLA) and to ensure adequate policies and procedures are in place to reduce the risk of misuse and/or abuse.

Scope and Objectives

The objectives of our review were:

- To determine whether the City's FMLA Policy, procedures and related controls comply with the requirements of the FMLA.
- To ensure the related procedures and controls are effectively designed to reduce the risk of noncompliance and reduce the risk of misuse and/or abuse.

We did not look at the merits of individual cases of FMLA leave or investigate possible misuse and/or abuse of family medical leave, but evaluated family medical leave usage overall.

The review covered family medical leave utilized during the period of July 1, 2011 through June 30, 2012.

Methodology

To accomplish our objectives, we performed the following procedures:

- Obtained and reviewed pertinent laws, regulations, policies and procedures regarding the Family and Medical Leave Act and use of associated family medical leave (FML).
- Reviewed the City's policies and process(es) related to Family Medical Leave through inquiry and examination of documents and data.
- Met with appropriate staff to discuss current policies, processes and leave usage.
- Assessed whether the design of the City's FML policies and process(es) were adequate to ensure compliance and reduce the risk of noncompliance to an acceptable level.
- Identified key indicators of noncompliance and misuse of FML.
- Obtained a listing of employees using FML and an extract of FML for the period under review.
- Performed analysis and tests of data designed to identify usage trends and employees meeting our high risk criteria.
- Selected a sample of employees for review based on the results of our analysis.
- Traced our sample employees to documentation supporting compliance. Investigated anomalies/irregularities.
- Made recommendations, as appropriate to ensure compliance, improve processes, increase efficiency and reduce the risk to the City of noncompliance and/or misuse of FML.



Standards

We conducted this performance audit in accordance with generally accepted government auditing standards. Those standards require we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objectives. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions.

Our audit work was limited to the areas specified in the Objectives, Scope and Methodology section of this report.

The Office of the City Auditor reports to City Council through the Audit Committee and is organizationally independent of all City Departments. This report will be distributed to the City's Audit Committee, City Council, City Manager, and appropriate management within the City of Virginia Beach. This report will also be made available to the public.



Background

The Family and Medical Leave Act (FMLA) is a federally mandated program that was signed into law on February 5, 1993 and amended by the National Defense Authorization Act on January 28, 2008. The FMLA allows eligible employees to take up to 12 weeks of unpaid leave from work for certain medical and family situations. The FMLA protects the employment status and benefits of most³ eligible employees for the duration of leave taken in accordance with the Act. Enforcement actions under FMLA can be brought by either the United States Department of Labor or individual employees.

FMLA entitles eligible employees of covered employers⁴ to take unpaid, job-protected leave for specified family and medical reasons with continuation of group health insurance coverage under the same terms and conditions as if the employee had not taken leave. Eligible employees are entitled to:

Twelve workweeks of leave in a 12-month period for:

- the birth of a child and to care for the newborn child within one year of birth;
- the placement with the employee of a child for adoption or foster care and to care for the newly placed child within one year of placement;
- to care for the employee's spouse, child, or parent who has a serious health condition;
- a serious health condition that makes the employee unable to perform the essential functions of his or her job;
- any qualifying exigency arising out of the fact that the employee's spouse, son, daughter, or parent is a covered military member on "covered active duty;" **or**

Twenty-six (26) workweeks of leave during a single 12-month period to care for a covered service member with a serious injury or illness if the eligible employee is the service member's spouse, son, daughter, parent, or next of kin (military caregiver leave).

Under the FMLA, an eligible employee is one who has worked for the employer for at least twelve months; and has worked for at least 1,250 hours during the last 12-month period. The hours worked exclude any paid time off. Employees can take FMLA leave continuously, intermittently, or on a reduced leave schedule. Employers can require employees to use any accrued paid leave for any part of the 12 workweeks of FMLA leave.

FMLA requires eligible employees to be restored to either the same or equivalent position or job classification when they return from FMLA leave. Employees taking FMLA leave cannot lose their employment benefits because of the leave. The employer is required to maintain the employee's group health insurance coverage under the same conditions as prior to the leave. Once the 12 weeks (26 weeks for care of a military service member) are exhausted, the employee is no longer eligible for the protections afforded by the Act.

³ Some highly compensated employees may be denied the restoration of their position in certain situations.

⁴ FMLA applies to all public agencies, all public and private elementary schools, and companies with 50 or more employees



Office of the City Auditor Compliance with the Family and Medical Leave Act

It is the policy of the City to fully comply with the FMLA and provide eligible employees up to 12 weeks of unpaid family and medical leave per leave year because of their own serious health condition, the serious health condition of an eligible family member, birth or adoption of a child, military family leave or up to 26 weeks of unpaid leave to care for a covered service member with a serious injury or illness if the employee is the spouse, son, daughter, parent or next of kin of the service member. Employees may use their accrued leave during this time.

In FY12, there were at least 425 City employees that took leave under the FMLA. Leave taken ranged from 0.5 hours to 744 hours per employee. The average time taken was 140 hours, or approximately three and one-half weeks.

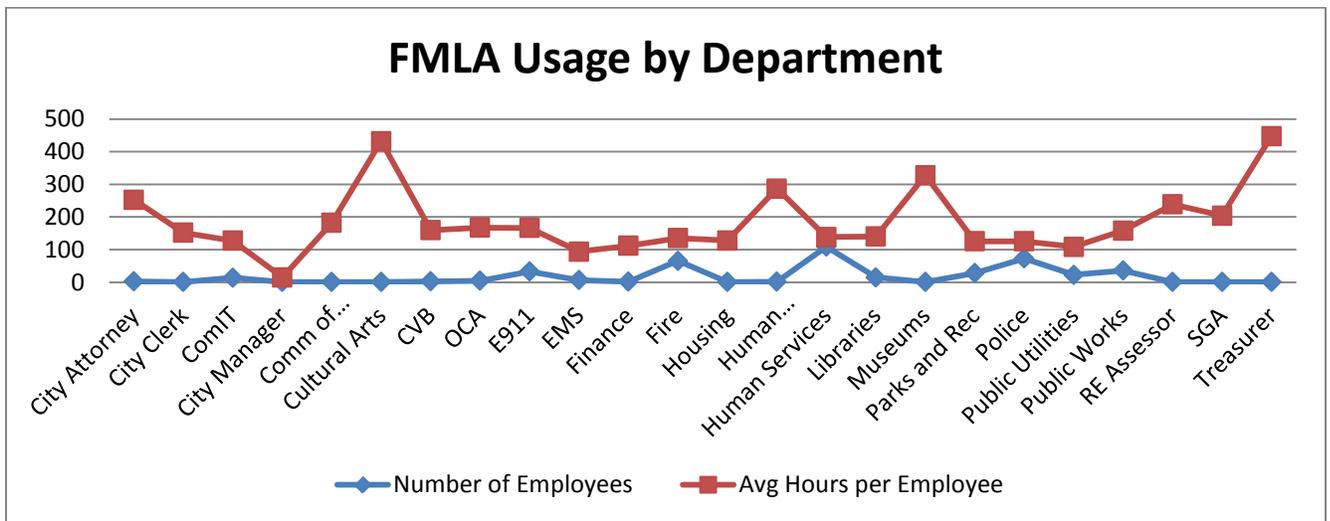
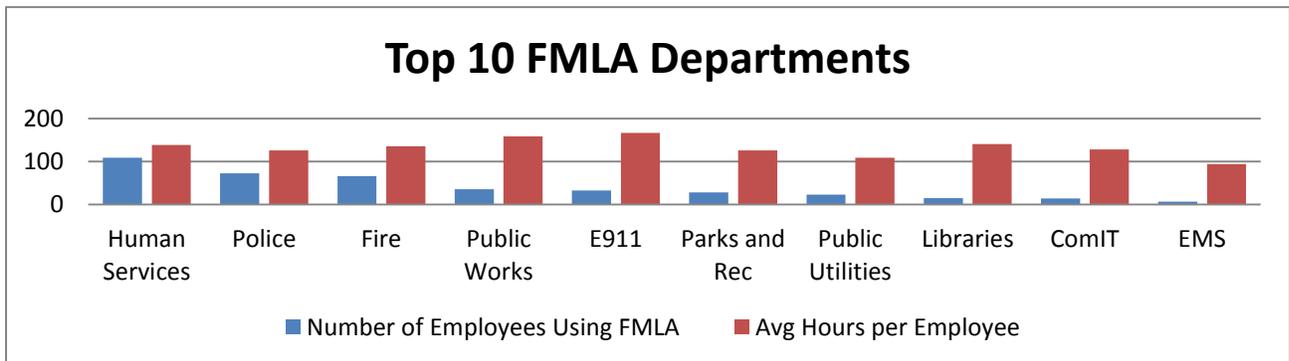


Exhibit 1, above, provides a pictorial view of FMLA usage by department. The Top 10 FMLA Departments are shown in Exhibit 2 below.





Findings and Recommendations

Finding 1: City's FMLA Policy Complies with Federal Requirements

Overall, Human Resources' proposed revisions⁵ to the City's Family and Medical Leave Policy and Procedure (HR Policy 3.03A) meet the requirements of the Family and Medical Leave Act and corresponding regulations.

The City's policy regarding Family and Medical Leave is intended to provide guidance to departments to ensure the City's compliance with FMLA. Training on the Act's requirements, processing procedures and guidelines are provided to those responsible for administering and processing FMLA requests through the City's supervisory training and the HR/PALS meetings. Supplementary information and guidance is available on Beachnet.

The City's has a decentralized approach to the overall administration of the FMLA program and monitoring of compliance and family medical leave utilization with the departments responsible for determining eligibility, communication with the employee and monitoring utilization. Human Resources/Occupational Safety and Health is responsible for medical certification, recertification and medical record keeping. Departments are responsible for certification of non-medical entitlements under the Act. Human Resources/Employee Relations is responsible for assisting employees and departments with interpreting the City's policy.

This approach puts the onus on individual departments to ensure the City's compliance with the Act and reduces the chance that the benefits afforded under the FMLA will be applied in a fair and consistent manner throughout the City.

Recommendations

To enhance the City's management of family medical leave, we recommend the City:

- 1.1 Consider centralizing the overall administration of the program and monitoring of compliance and family medical leave utilization within Human Resources to ensure that the City is in compliance with the Act and that eligibility is determined in a fair and consistent manner throughout the City. If sufficient resources are not available, additional resources should be sought to ensure the City complies with the FMLA.
- 1.2 Consider incorporating the recommendations in this report into the proposed revisions, or developing additional guidelines for monitoring and controlling FML utilization.

⁵ The City's Family and Medical Leave Policy and Procedure was under revision at the time of our review.



Finding 2: The City Could Do More to Ensure Compliance and Manage the Risk of Abuse

We researched recommended (best) practices regarding the administration and monitoring compliance with the FMLA as well as preventing and/or detecting its abuse. Table 1 depicts the City’s use of the recommended practices.

Recommended Practice	Required by City Policy	Not Required
Calculate FMLA entitlement period using a “rolling” 12-month period.		X
Require employees to use accrued paid leave prior to taking unpaid leave (LWOP).		X
Require medical certifications be returned within 15 days. Obtain clarifications if necessary.	X	
Routinely verify information about the medical provider when assessing the soundness of certifications.	X ⁶	
Require employees to provide 30-days notice for foreseeable FMLA leave.	X	
Encourage employees to schedule intermittent leave associated with medical appointments and treatments around your operations schedule.	X	
Establish and enforce reasonable attendance and call-in rules for all leave.	X	
Assign employees taking intermittent leave to alternative positions that cause less disruption, if possible.	X	
Monitor employee’s use of FMLA leave for suspicious patterns of unscheduled absence or red flags (i.e., Monday/Friday absences; consistently using the maximum amount of accumulated leave; episodes occurring around the holidays, etc).	X	
Train supervisors and timekeepers so they feel confident about the FMLA rules and can recognize red flags.	X	
Require “fitness for duty” or “return to work” certifications for employees returning to work.	X	
Require employees to submit a recertification every 30 days.	X	
Require second and third medical opinions.	X	
Have a policy prohibiting employees from working second jobs while on leave.		X
Investigate suspected abuse.	X	

As shown above, the City follows most of the recommended practices designed to ensure compliance and curb the risk of FMLA abuse. The recommended practices the City has not adopted are described below.

⁶ Currently, Human Resources/Occupational Safety and Health verifies information about the service provider only when warranted. The recommended practice is to routinely verify information about the service provider for every certification.



Calculate FMLA leave using a “rolling” 12-month period. The recommended practice is to use the “rolling” year method to define the 12-month period within which an employee’s FMLA entitlement occurs. Measuring FML using this method which entails looking back one year and determining how much FML an employee has already used avoids the potential abuse of employees “doubling” FML, which can happen if FML is measured using other methods.

The City does not use the “rolling” 12 month period. It uses the “12-month period rolled forward” in which the 12-month period of FML designation is measured forward from the first day an employee takes FML leave. After completion of the 12 months from the first day FML leave is taken, the next 12-month period begins the next time FML leave is used. The City chose this option because it is easier to manage; thereby, reducing the likelihood of noncompliance and liability.

Require employees to use all accrued leave prior to taking unpaid FML. City employees are not required to use paid time off for FML. However, an employee may choose to use paid time off (e.g. annual leave, sick leave, and compensatory time) in lieu of leave without pay for FML. All paid or unpaid leave designated and used by an employee for FML purposes is counted toward the permissible twelve (12) or twenty-six (26) workweeks provided under the FMLA. Experts believe that employees are less likely to abuse FML if they have to use their annual leave to do so.

Have a policy prohibiting employees from working second jobs while on leave. Without a uniform policy against holding a second job while on any type of leave (other than vacation), an employee on FMLA can be protected from disciplinary action for working a second job while on FMLA leave.

Through our research, we identified recommended practices for reducing the risk of FMLA abuse and strengthening the City’s ability to prevent and/or detect misuse. The City has already incorporated many of these recommended practices, but can enhance its efforts to prevent misuse by implementing and ensuring consistent application of the remaining recommended practices.

Recommendations

To further curb the risk of family medical leave abuse, we recommend the City:

- 2.1 Consider using the “rolling” year to define the 12-month entitlement period.
- 2.2 Require use of all accrued leave prior to using leave without pay.
- 2.3 Prohibit employees from working second jobs while on family medical leave.
- 2.4 Verify information about the service provider for all medical certifications.



Finding 3: Improved Monitoring Can Reduce the Opportunities for Abuse

Actively monitoring program operations is one characteristic of an effective control environment. Program monitoring should be performed continually and ingrained into the program's operations. Monitoring FMLA use may deter employees from misuse if they know management will actively seek out and investigate cases of potential abuse.

According to the City's Family and Medical Leave Policy and Procedure, City departments, not Human Resources, are responsible for determining eligibility, ensuring compliance with communication requirements and monitoring FMLA leave. Occupational Health is responsible for reviewing medical information and certifying medical necessity.

The City as a whole relies on InSITE (HR, OTL, Payroll and General Ledger) to record and process hours worked, leave and pay. Individual departments may or may not have automated time and attendance management systems. At the time of our review, there was only one report available related to FMLA leave utilization. There are only two status designations related to FMLA (with pay and without pay). There is no overall date tracking capability for meeting the communication deadlines, or automated means of monitoring that required communications have been sent and/or received. Nor is there any way to quickly determine an employee's FMLA application status.

Departments are not currently provided sufficient information to adequately monitor FML by employee, budget unit and/or department. Monitoring of individual FML usage is necessary to ensure compliance. Without the proper tools necessary to monitor employees' FMLA use, such as training and reporting systems, the city cannot detect and deter the misuse of FMLA leave.

InSITE does not identify or alert supervisors and/or timekeepers if they are entering FMLA leave hours for employees who may not be approved for FMLA leave, or that an employee has reached or exceeded the number of hours of FMLA leave allowed. Our review of HR/Payroll data revealed discrepancies such as employees using more than 480 hours of FMLA leave in a year; employees with absences coded as FMLA leave without an active FML status designation in InSITE and employees with an active FML status designation and no identified FMLA leave. These discrepancies could be a result of inaccurate data entry or intentional miscoding of leave by employees.

We compared the documentation contained in a sample of FMLA files with data in the InSITE system and found discrepancies between the dates of certification, type of absence (concurrent or intermittent) and the leave duration. We found approvals in the files that were not indicated by a FMLA status designation in HR/Payroll InSITE, and FML status designations in InSITE that did not have corresponding documentation in the supporting records.



Recommendations

We offer the following recommendations to improve the City's management of FMLA and facilitate the enforcement of FMLA requirements, Human Resources should:

- 3.1 Explore possible FMLA management capabilities available within the InSITE HR/Payroll modules.
- 3.2 Consider adding status codes to identify the type (concurrent or intermittent) of FMLA leave and controls to prohibit timekeepers from entering FMLA leave for employees who may not be approved for FMLA leave, or that an employee has reached or exceeded the number of hours allowed.
- 3.3 Develop exception-based reports to assist departments in adequately monitoring FMLA utilization, such as:
 - Employees with FMLA leave posted that do not have a designated FMLA status and vice versa.
 - Employees approaching and/or exceeding the maximum hours allowable.
- 3.4 Develop procedures for regularly reviewing FMLA data in HR/Payroll for discrepancies and follow up with departments when discrepancies are identified so they can be resolved.
- 3.5 Modify the certification letter provided by Occupational Health to include easy-to-understand information related to an employee's expected use of family medical leave. The certification letter should also include a statement regarding what to do if actual leave usage varies from the estimated amount.
- 3.6 Provide refresher training for supervisors and timekeepers related to FMLA to ensure that the City is correctly and effectively monitoring employees' FMLA use.



Conclusion

Overall, the proposed revisions to the City's Family and Medical Leave Policy and Procedure proposed by Human Resources meet the requirements of the federal legislation. Through our research, we identified recommended practices for reducing the risk of FMLA abuse and strengthening the City's ability to prevent and/or detect misuse. The City has already incorporated many of these recommended practices, but can enhance its efforts to prevent misuse by implementing and ensuring consistent application of the remaining recommended practices.

Additionally, internal controls and procedures related to the administration of family medical leave can be strengthened to facilitate the City's ability to ensure compliance and monitor employee use of family medical leave.

Acknowledgements

We would like to thank the staff of Human Resources, the City Attorney's Office, Payroll and various other departments for their cooperation and responsiveness to our requests during our review and their receptiveness to questions, recommendations and suggestions.



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INTER-OFFICE MEMORANDUM

DATE: November 15, 2012

TO: Lyndon Remias, City Auditor
 Gretchen Hudome, Auditor

FROM: Regina S. Hilliard, Director of Human Resources

SUBJECT: FML Compliance Report

Thank you for the opportunity to review the report on compliance with the Family and Medical Leave Act. I am pleased that you found we meet the requirements of this legislation. As with any process, there is always room for improvement, and I appreciate the time you devoted to finding and outlining suggestions to strengthen the City's FML practices.

Our response to the recommendations identified is noted below.

Audit Recommendation	Response
Centralized Administration	The current allotment of staff will not allow Human Resources to centralize responsibilities for FML. However, we could support centralized administration if we were provided additional staff. We will include this in our budget submission for FY2014.
Require use of accrued leave prior to using LWOP	The City cannot put a more stringent requirement on leave usage for FML than it does for other purposes. Please note the use of LWOP is already included in the overall review of leave being conducted by Human Resources and using LWOP as a leave of last resort has been discussed

	with Department Directors as a probable modification to current leave practices.
Calculate FML entitlement using a rolling 12 month	According to the Society for Human Resource Management (SHRM), the rolling "look back" method is considered the most common, but also the most confusing. Nevertheless, it definitely has advantages. Unfortunately, given the decentralized current process, using this more confusing method has a potential to result in gaps. If FML administration is centralized, suggest that the rolling method could then be introduced.
Verify medical provider information	According to DOL FML regulations, an employer may only seek authentication and/or clarification when the certification is incomplete or insufficient and only after giving the employee an opportunity to rectify the deficiency. If the certification appears complete and sufficient and has a signature from the stated health care provider, then the City cannot request any authentication or clarification. If the certification is not complete, or there is a need for clarification, HR/Occupational Health is already ensuring follow up.
Establish policy prohibiting employees from working second jobs while on Family Medical leave.	As noted above, the City cannot put a more stringent requirement on employees who are on FML than those using leave under other City policies. Therefore, this would require a policy decision to modify other existing policies. Restrictions have been previously discussed related to sick leave, but have not been implemented due to other complexities. For example, an employee's injury could prevent them from being able to perform their City job, but not have an impact on the second job due to different work requirements involved. We are also concerned with the Fair Labor Standards Act: if the City is too restrictive regarding the activities that can be performed while an employee is on leave, we could impact whether that time is compensable. Currently, the City treats sick leave as hours worked, but that is a policy decision that could change if desired by the City Manager.

<p>Suggestions related to InSITE to improve the City's management of FMLA requirements</p>	<p>Meetings have taken place with ComIT representatives and Oracle consultants on the suggestions outlined in the compliance report. Among the results:</p> <ul style="list-style-type: none"> - Additional status codes can be added to identify the type of FMLA and qualifying events (events are date tracked in InSITE) - Validation rules can be set up in OTL to prohibit employees from exceeding number of hours allowed. - Alerts and additional reports can be created to help PALS monitor FML usage. <p>We will work with ComIT toward implementing appropriate changes.</p>
<p>Modify certification letter</p>	<p>We will review the certification letter for modifications. However, the current forms are based on the DOL model notifications and certification forms.</p>
<p>Refresher training</p>	<p>After modifications have been made in InSITE, training will be provided for PALS and timekeepers, which is a typical process when changes occur. Additionally, FML training is available to supervisors in the Policy and Procedure Training for Supervisors class.</p>

The HR proposed changes to the FML policy were considered in your review. We will be proceeding with the implementation of those changes. If further modifications to the FML process are implemented that require modification of policy, the policy will be again changed at that time.

Again, thank you for the review of the FML process. Members of the Human Resources department, in conjunction with the City Attorney's Office and various departments across the organization, work diligently to ensure compliance. We are pleased that your review confirmed our efforts in that regard.