CITY OF OAKLAND
ADMINISTRATIVE INSTRUCTION

SUBJECT:	Family Care and Medical Leave, Pregnancy Disability Leave, and Paid Family Leave	**NUMBER:**	567
REFERENCE:		**EFFECTIVE DATE:**	August 3, 2004

SUPERSEDES: AI 567 dated February 5, 1994

I. POLICY

Employees may take unpaid family care and medical leave as prescribed in the federal Family and Medical Leave Act of 1993 ("FMLA") and the California Family Rights Act of 1991, as amended ("CFRA"). Implementation of this Article is governed by the FMLA and the federal regulations adopted at 29 C.F.R. Part 825 and by the CFRA and the state regulations adopted at California Code of Regulations, Title 2, division 4, sections 7297.0-7297.11.

II. PURPOSE

The purpose of this Administrative Instruction is to establish City of Oakland policy, procedures and responsibilities regarding Family Care and Medical Leave, Pregnancy Disability Leave and Paid Family Leave.

III. DEFINITIONS

A. Eligibility

To be eligible for family care and medical leave, on the date on which leave is to begin, an employee must have been employed by the City for at least 12 months, and have been employed for at least 1,250 hours of service during the 12-month period immediately preceding the commencement of the leave. (29 C.F.R §825.110, Government Code §12945.2[a])

1. For the purposes of meeting the 1,250 hours of service eligibility test of this Article, the determining factor is the number of hours an employee has worked for the City within the meaning of the Fair Labor Standards Act of 1938 [FLSA] (29 U.S.C. 297), (29 C.F.R. §825.110[c]; [see 29 C.F.R. §785 for FLSA])

B. Family Care and Medical Leave Entitlement

Subject to the provisions of these administrative regulations and state and federal law, an eligible employee is entitled to a total of 12 workweeks of leave during any 12-month period for any one, or more, of the following reasons:

1. The birth of a child and to care for the newborn child;

2. The placement with the employee of a child for adoption or foster care by the employee. (29 C.F.R. §825.200[a], §825.112[a]; Government Code §12945.2[c][3]);

3. To care for the employee's child, parent, or spouse who has a serious health condition; (See 29 C.F.R. §825.113 and 2 C.C.R. §7297.0 for definitions; Government Code §12945.2[c][1]);

4. To care for the employee's domestic partner who has a serious health condition and the employee has filed a Declaration of Domestic Partnership in accordance with established City policy;

5. Because of an employee's own serious health condition that makes the employee unable to perform the functions of the employee's position, except for disability on account of pregnancy, childbirth, or related medical conditions, which are covered by pregnancy disability leave. (Government Code §12945.2[c][3][c]; see 29 C.F.R. §825.114-115 for definitions of "serious health condition" and "unable to perform the functions of the employee's position" and Government Code §12945.2[c][8])

    a. For family care and medical leave purposes, the "12-month period" in which the 12 weeks of leave entitlement occurs shall be defined as a "rolling" 12-month period measured backward from the date the employee uses any family care and medical leave.

    b. "Twelve workweeks" means the equivalent of 12 of the employee's normally scheduled workweeks. For eligible employees who work more or less than five days a week, or who work on alternative work schedules, the number of working days that constitutes "12 workweeks" is calculated on a pro rata or proportional basis.

    c. "Serious health condition" means an illness, injury (including on-the-job injuries), impairment, or physical or mental condition of the employee or a child, parent, spouse, or domestic partner of the employee, which involves either:

i. inpatient care (i.e. an overnight stay) in a hospital, hospice, or residential health care facility; or

ii. continuing treatment or continuing supervision by a health care provider, as described in detail in the FMLA and its implementing regulations.

C. Minimum Duration of Leave

1. Intermittent leave is leave taken in separate blocks of time due to a single qualifying reason, rather than for one continuous period of time. (29 C.F.R. §825.203[a])

2. Reduced leave schedule is a leave schedule that reduces an employee's usual number of working hours per workweek, or hours per workday. (29 C.F.R. §825.203[a])

3. Minimum Duration of Leave Taken for Serious Health Condition of a Parent, Child, Spouse, or Domestic Partner or for the Serious Health Condition of the Employee

Subject to the provisions of this Article, an employee may take family care and medical leave intermittently or on a reduced leave schedule to care for a sick spouse, parent, child, or domestic partner when medically necessary or for the employee's own serious health condition when medically necessary. (2 C.C.R. §7297.3[d], [e])

a. The following conditions must be met for an employee to take family care and medical leave on an intermittent or a reduced leave schedule under this section:

i. there must be a medical need for leave (as distinguished from voluntary treatments and procedures);

ii. the medical need can be best accommodated through an intermittent or reduced leave schedule; and

iii. the employee must provide certification of the medical necessity of intermittent leave or leave on a reduced schedule. The certification of a serious health condition required below meets this requirement. (29 C.F.R. §825.117)

4. Minimum Duration for Leave Taken for the Birth, Adoption, or Foster Care Placement of a Child

Family care and medical leave taken because of the birth, adoption, or foster care placement of a child of the employee does not have to be taken in one continuous period of time. Any leave(s) taken shall be concluded within one year of the birth or adoption or foster care placement of the child with the employee. The

basic minimum duration of the leave shall be two weeks. However, the City shall grant a request for a leave of less than two weeks duration on any two occasions. (2 C.C.R. §7297.3[d])

5. Leaves shall be taken in increments of at least one hour. Only the amount of leave actually taken will be counted toward the 12 weeks of leave to which an employee is entitled. (29 C.F.R. §825.203[d], 29 C.F.R. §825.205, see also 2 C.C.R. §7297.3[c][2] and [e])

6. Employees needing intermittent leave or leave on a reduced leave schedule must attempt to schedule their leave so as not to disrupt the City's operations. (29 C.F.R. §825.117)

7. The City may, at its discretion, assign an employee to an alternative position with equivalent pay and benefits that better accommodates the employee's intermittent or reduced leave schedule, as determined by the City. (29 C.F.R. §825.117, 29 C.F.R. §825.204)

IV. PAY STATUS AND BENEFITS

A. Except as provided in this section, the family care and medical leave will be unpaid. The City will continue to provide and pay for group health benefits during the period of leave on the same basis as coverage would have been provided had the employee been continuously employed during the entire leave period. (29 C.F.R. §825.207, 29 C.F.R. §825.209; Government Code §12945.2[d], [e], [f]; 2 C.C.R. §7297.5[c])

1. The employee will be required to continue to pay the employee's share of premium payments, if any. An employee's premium payment for the entire period of the unpaid leave is due before the leave begins. (29 C.F.R. §825.210, 29 C.F.R. §825.210[a] and [e])

2. The City's obligation to maintain health insurance coverage ceases if an employee's premium payment is more than 30 days late. (29 C.F.R. §825.212[a] and [c]; Government Code §12935[a], 12945.2), 2 C.C.R. §7297.5[f])

3. As permitted by law, the City will recover from an employee its share of health plan premiums during a period of unpaid family care and medical leave if the employee fails to return to work after the employee's family care and medical leave entitlement has expired, if the employee's failure to return to work is not due to the employee's own serious health condition or to circumstances beyond the employee's control. (Government Code §12945.2[f], 2 C.C.R. §7297.5; §825.212 and 29 C.F.R. §825.213)

B. Other Benefits

While on unpaid family care and medical leave, an employee will not accrue seniority, sick leave, vacation leave, or retirement credit. (2 C.C.R. §7297.5[d]; Government Code §12945.2[f][2])

C. Relationship of Unpaid Family Care and Medical Leave to Other Leaves

1. Use of Paid Leave

When an employee takes family care and medical leave because of the employee's own serious health condition, he/she shall be required to use all but 10 days of his/her accrued sick leave.

An employee may choose to use any accrued sick leave, vacation or other accrued paid personal time off that the employee is otherwise eligible to use during the otherwise unpaid family care and medical leave.

2. Concurrent Use of Leave

Any leave of absence that qualifies as family care and medical leave, and is designated by the City as family care and medical leave, will be counted as running concurrently with any other paid or unpaid leave to which the employee may be entitled or required to use for the same qualifying reason under a memorandum of understanding, City policy, or state law. (Government Code §12945.2[e]; 29 C.F.R. §825.207, §825.208; 29 C.C.R. §7297.5)

3. Workers' Compensation Leave

The City may count any time off for an employee's on-the-job injury against the employee's family care and medical leave entitlement when the employee's injury meets the criteria for a serious health condition; however, an employee's accrued paid leave may not be substituted for any part of an FMLA leave that is also a workers' compensation leave. (29 C.F.R. §825.207[d][2], also, §825.210[f], §825.216[d], §825.2209[d], §825.307[a][1])

4. Relationship to Pregnancy Disability Leave

The family care and medical leave provided under this section is in addition to any leave taken on account of pregnancy, childbirth, or related medical conditions for which an employee may be qualified under state law and described in City policy or relevant memorandum of understanding. (Government Code §12945.2, §12935[a]; 2 C.C.R. §7297.6)

5. California Paid Family Leave ("PFL")

Beginning on July 1, 2004, employees on FML in order to care for a family member or bond with a child, and who are eligible for State Disability Insurance (SDI), may apply for Paid Family Leave benefits (six weeks of partial wage replacement) through the Family Temporary Disability Insurance program, which is administered by the State Disability Insurance program.

a. PFL must be taken concurrently with Family Medical Leave. PFL does not entitle employees to job protection, beyond that provided under FML.

b. Employees must be off work for seven calendar days and use two weeks of vacation leave, if it has been accrued, before PFL benefits begin. (Employees need not have worked any minimum amount of time to qualify for PFL.)

c. PFL does not give an employee any additional rights under CFRA or FMLA. Employees whose employment is governed by a collective bargaining agreement that addresses Family Medical Leave may have additional entitlements and rights pursuant to that Agreement.

V. NOTICES TO CITY

A. An employee should request a family care and medical leave by submitting a completed Family Care and Medical Leave application and a Health Care Provider Certification form to the employee's department personnel representative.

1. The employee must provide written notice to the City as far in advance of the leave as possible and as soon as the employee reasonably knows of the need for the leave. If the need for the leave is foreseeable based on an expected birth, placement for adoption or foster care, or planned medical treatment, the notice must be provided at least 30 calendar days in advance of the leave. If 30 days notice is not practicable, such as because of a lack of knowledge of approximately when leave will be required to begin, a change in circumstances, or a medical emergency, notice must be given as soon as practicable.

2. The written notice must inform the City of the reasons for the leave, the anticipated duration of the leave, and the anticipated start of the leave. The employee should use the City's Family Care and Medical Leave application whenever possible. (29 C.F.R. §825.302; 2 C.C.R.§7297.4)

3. If an employee fails to give 30 calendar days notice for foreseeable leave with no reasonable excuse for the delay, the City may deny the family care and medical leave request until at least 30 calendar days after the date the employee provides notice to the City of the need for family care and medical leave. (29 C.F.R. §825.304[b])

4. The employee shall consult with the City and make a reasonable effort to schedule any planned medical treatment or supervision so as to minimize disruption to the City's operations. Scheduling, however, shall be subject to the approval of the health care provider of the employee or the employee's child, parent, spouse, or domestic partner. (2 C.C.R. §7297.4 [a][2])

B. Medical Certification

1. An employee's request for family care and medical leave to care for a child, a spouse, a domestic partner, or a parent who has a serious health condition shall be supported by a certification issued by the health care provider of the individual requiring care. If additional leave is required after the expiration of the time originally estimated by the health care provider, the employee shall provide the City with recertification by the health care provider. (Government Code §12945.2[j]; 29 C.F.R. §825.305-306; 2 C.C.R. §7297.11, §7297.0[a])

2. An employee's request for family care and medical leave because of the employee's own serious health condition shall be supported by a certification issued by the employee's health care provider. (Government Code §12945.2[k])

3. As a condition of an employee's return from leave taken because of the employee's own serious health condition, the employee is required to obtain certification from his/her health care provider that the employee is able to resume work. (29 C.F.R. §825.310)

4. Employees are required to use the "Certification of Health Care Provider or Practitioner" form available from the City to meet the certification and recertification requirements of this policy. In addition, for the "fitness for duty" certification required under Article V B-3 above, the City may provide the health care provider with the City's customary "fitness for duty" forms, which may include a job position description and a list of the job position's essential functions.

5. If the City has reason to doubt the validity of the certification provided by an employee for the employee's own serious health condition, at the City's discretion and expense the City may require that the employee obtain the opinion of a second health care provider designated or approved by the City in accordance with the appropriate statutory provisions. At the City's discretion and expense, the City may also require the opinion of a third health care provider, in accordance with the appropriate statutory provisions, in the event that the second opinion differs from the opinion in the original certification. At the employee's request, the City shall provide the employee with copies of any second and third medical opinions. (Government Code §12945.2[k]; 29 C.F.R. §825.307-308; 2 C.C.R. §7297.4[b][2])

6. Under this Article, "health care provider" means a health care provider as defined in federal and state regulations implementing the FMLA and the CFRA. (29 C.F.R. §825.11; 2 C.C.R. §7297.[j])

7. In cases of adoption or foster care placement, the employee must provide written verification, such as an adoptive home study, an adoption placement agreement, or a juvenile court order.

8. An employee shall provide any health care certification or recertification or adoption/foster care verification required by the City under this AI within 15 calendar days of the City's request, unless it is not practicable for the employee to do so despite the employee's good faith efforts. An employee's failure to submit a required certification, recertification, or verification can result in a denial or delay of leave approval.

VI. CITY RESPONSE TO LEAVE REQUEST

It is the City's responsibility to designate leave, paid or unpaid, as family and medical leave-qualifying and to notify the employee of the designation. The City shall respond to the leave request as soon as practicable and no later than 10 calendar days after receiving the request. (2 C.C.R. §7297.4[a][6])

A. Parents' Dual Employment

Where both parents are entitled to family care and medical leave and both are City employees, allowable leave for the birth, adoption, or foster care placement of their child is limited to a total of 12 workweeks in a 12-month period between the two employees. Their family care and medical leave entitlement is not limited or combined for any other qualifying purpose. (2 C.C.R. §7297.1[c])

B. Employee's Status on Returning from Leave

Except as provided by law, on a timely return from family care and medical leave an employee is entitled to be returned to the same position the employee held when leave commenced, or to an equivalent position with equivalent benefits, pay, and other terms and conditions of employment. An employee has no right to return to the same position. An employee has no greater right to reinstatement than if the employee had been continuously employed during the leave period. The leave shall not constitute a break in service for purposes of longevity or seniority under any memorandum of understanding, City policy, or any employee benefit plan. (Government Code §12945.2[g]; 29 C.F.R. §825.214-219; 2 C.C.R. §7297.5[f])

VII. PREGNANCY DISABILITY LEAVE AND BONDING LEAVE

A. Pregnancy disability means that, in the opinion of her health care provider, an employee is unable because of pregnancy to work at all or is unable to perform any one or more of the essential functions of her job or to perform those functions without undue risk to herself, the successful completion of her pregnancy, or to other persons. Pregnancy disability also includes severe "morning sickness" and time off needed for prenatal care.

1. Duration of Leave

   a. An employee is entitled to up to four months of leave for the period(s) of time the employee is actually disabled by pregnancy, childbirth, or related medical conditions.

   b. Pregnancy disability leave may be taken as needed intermittently or on a reduced work schedule when medically advisable, as determined by the employee's health care provider. Only the amount of leave actually taken may be counted toward the four months of leave to which the employee is entitled.

2. Eligibility for Leave

   There is no length-of-service requirement before an employee disabled by pregnancy is entitled to a pregnancy disability leave.

B. Transfer

The City will grant the transfer request of an employee affected by pregnancy to a less strenuous or hazardous position or to less strenuous or hazardous duties if both of the following conditions are met:

1. The employee's request is based on her health care provider's certification that a transfer is medically advisable; and

2. The City can reasonably accommodate a transfer. Any duty assignments resulting from an approved transfer request under this section will be determined by the City Manager or the City Manager's designee.

C. Eligibility for Transfer

There is no length of service requirement before an employee affected by pregnancy is eligible for a transfer under this section.

1. Transfer to Accommodate Intermittent Leave or a Reduced Work Schedule

   If it is medically advisable for an employee to take intermittent leave or leave on a reduced work schedule and it is foreseeable based on planned medical treatment because of pregnancy, the City may require the employee to transfer temporarily to an available alternative position. This alternative position must have the equivalent rate of pay and benefits, the employee must be qualified for the position, and it must better accommodate recurring periods of leave than the employee's regular assignment. The temporary assignment does not have to have equivalent duties. Transfer to an alternative position may include altering an existing job to accommodate better the employee's need for intermittent leave or reduced work schedule.

2. Right to Reinstatement After Transfer

When the employee's health care provider certifies that there is no further medical need for the transfer, intermittent leave, or leave on a reduced work schedule, the employee must be reinstated to her same or comparable position in accordance with Article VII F.

3. Requesting Leave or Transfer

a. An employee shall provide at least verbal notice sufficient to inform the City of the employee's need for pregnancy disability leave or transfer, and the leave's/transfer's anticipated timing and duration.

b. An employee must provide at least 30 days advance notice before the leave/transfer is needed if the need for the leave or transfer is foreseeable. If 30 days advance notice is not practicable, for example because the employee does not know approximately when the leave/transfer will be required to begin, a change in circumstances, or a medical emergency, notice must be given as soon as practicable.

c. The employee shall consult with the City and make a reasonable effort to schedule any planned medical treatment or supervision so as to minimize disruptions to the City's operations. Scheduling, however, shall be subject to the employee's health care provider's approval.

d. The City shall respond to the request as soon as practicable and in any event no later than 10 calendar days after receiving the request. The City will try to respond to the leave request before the date the leave is due to begin. Once given, approval shall be deemed retroactive to the date of the first day of the leave.

D. Medical Certification

1. A request for a pregnancy disability leave or transfer must be supported by medical certification.

2. A medical certification for a pregnancy disability leave is sufficient if it contains:

a. The date the employee became disabled due to pregnancy;

b. The probable duration of the period(s) of disability; and

c. An explanatory statement that, due to the disability, the employee is unable to work at all or is unable to perform any one or more of the essential functions of her position without undue risk to herself, the successful completion of her pregnancy, or to other persons.

3. A medical certification indicating that it is medically advisable for the employee to be transferred to a less strenuous or hazardous position or to less strenuous or hazardous duties is sufficient if it contains:

    a. The date the need to transfer became medically advisable;

    b. The probable duration of the period(s) of the need for the transfer; and

    c. An explanatory statement that, due to the employee's pregnancy, the transfer is medically advisable.

E. Terms of Pregnancy Disability Leave

1. A pregnancy disability leave is unpaid except that an employee shall be required to use all but 10 days of her accrued and accumulated sick leave during the otherwise unpaid pregnancy disability leave. An employee may choose to use any accrued sick leave, vacation, or other accrued paid personal time off that the employee is otherwise eligible to use during the otherwise unpaid pregnancy disability leave.

2. During unpaid pregnancy disability leave, the employee is entitled to accrue seniority and to participate in all employee benefit plans to the same extent and under the same conditions as would apply to any other unpaid disability leave under established City policy or memorandum of understanding.

3. During any portion of a pregnancy disability leave that an employee is using other accrued paid leave, the employee is entitled to accrue seniority and to participate in all employee benefit plans to the same extent and under the same conditions as apply to any paid sick leave, vacation, or other paid time off under established City policy or memorandum of understanding.

4. During any portion of a pregnancy disability leave that is also an FMLA leave, the City will continue to provide and pay for group health benefits on the same basis as coverage would have been provided had the employee been in paid status. When the employee has exhausted any FMLA portion of the leave and the employee continues on unpaid pregnancy disability leave only, the employee's entitlement to continued heath benefit coverage will be the same as any other employee on an unpaid disability leave of absence.

5. An employee returning from pregnancy disability leave shall return with no less seniority than the employee had when the leave began for purposes of layoff, recall, promotion, job assignment, and seniority-related benefits.

6. The employee shall retain employee status while on pregnancy disability leave. The leave shall not constitute a break in service for purposes of longevity and/or seniority under any memorandum of understanding or under any employee benefit plan. Benefits must be resumed upon the employee's reinstatement in the same manner and at the same levels as provided when the leave began, without any new qualifying conditions.

7. As a condition of the employee's return to work from pregnancy disability leave or transfer, the employee must obtain a release to return to work from her health care provider stating that she is able to resume her original job duties.

F. Right to Reinstatement from Pregnancy Disability Leave/Transfer

1. Subject to state law and regulations, an employee returning from a pregnancy disability leave or transfer is usually entitled to reinstatement to the same position. If the City is excused by law from reinstating her to the same position, the employee is usually entitled to reinstatement to a comparable position.

2. Reinstatement to the Same Position

An employee has no greater right to reinstatement to the same position or to other benefits and conditions of employment than if the employee had been continuously employed in her position during the leave or transfer period. The City may refuse to reinstate the employee to her same position or duties for either of the following reasons:

a. At the time she requests reinstatement, the employee would not otherwise have been employed in her same position for legitimate business reasons unrelated to the employee's pregnancy disability leave or transfer, such as a layoff.

b. Each means of preserving the job or duties for the employee, such as leaving it unfilled or filling it with a temporary employee, would substantially undermine the City's ability to operate safely and efficiently.

3. Reinstatement to a Comparable Position

An employee has no greater right to reinstatement to a comparable position or to other benefits and conditions of employment than an employee who has been continuously employed in another position that is being eliminated. If the City is excused from reinstating an employee to her same position, or to the same duties, under Article VII F-2 then the City will reinstate the employee to a comparable position unless either of the following occurs:

a. No comparable position is available; or

b. If the employee is returning from a pregnancy disability leave that does not qualify as an FMLA leave, a comparable position is available, but filling the available position with the returning employee would substantially undermine the City's ability to operate safely and efficiently.

4. If an employee exhausts all available leaves and is still disabled by pregnancy and unable to return to work, the employee's reinstatement rights are the same as the reinstatement rights of any other similarly situated employee.

G. Relationship of Pregnancy Disability Leave to FMLA, CFRA, and Other Leaves

1. Any period of incapacity or treatment due to pregnancy, including prenatal care, is a "serious health condition" under the FMLA. An employee's unpaid pregnancy disability leave will run concurrently with unpaid FMLA leave, up to a maximum of 12 workweeks, and will also run concurrently with any accrued paid leave the employee is required to use or elects to use under Article VII E above.

2. Bonding/CFRA Leave

a. An employee's own disability due to pregnancy, childbirth, or related medical conditions is not included as a "serious health condition" under the CFRA. At the end of the employee's period(s) of pregnancy disability, or at the end of four months pregnancy disability leave, whichever occurs first, a CFRA-eligible employee may request to take unpaid CFRA leave of up to 12 workweeks for reason of the birth of her child, if the child has been born by this date.

b. CFRA leave for bonding with the child does not require that either the employee or the child have a serious health condition. There is also no requirement that the employee no longer be disabled by her pregnancy before taking CFRA leave for reason of the birth of her child.

c. The City may, but is not required to, grant unpaid CFRA leave if an employee continues to be disabled after exhaustion of pregnancy disability leave and prior to the birth of her child.

3. Maximum Entitlement

The maximum possible entitlement for qualified and eligible employees for both pregnancy disability leave under FMLA, state law, and this AI and CFRA leave for the reason of the birth of the child is four months and 12 workweeks.

VIII. INTEGRATION OF DISABILITY INSURANCE COVERAGE AND PAID LEAVES

An employee may supplement any disability insurance benefits paid under a City provided plan or SDI with accumulated sick leave and vacation to the extent necessary to make up the difference between the amount of insurance benefits paid and the normal weekly base pay for each week of disability.

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