Arkansas Municipal League

The Civilpedia Handbook

A Guide to Municipal Government in Arkansas

Section 3

Municipal Human Resources and Personnel

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Introduction

Welcome to the first edition of the *Arkansas Municipal Civilpedia: A Guide to Municipal Government in Arkansas*. The primary purpose of the *Civilpedia* is to provide a practical guide to assist elected officials, newly elected and incumbent alike, in learning everything you need to know about your municipal government. While the *Civilpedia* will not replace the need to consult an attorney every now and then, it will provide you with the fundamental information you need regarding your statutory duties and responsibilities, how to pass ordinances and resolutions, municipal boards and commissions, revenue sources for municipalities, human resource issues, and much more. Further, it includes checklists, charts and timelines to provide practical guidance for municipal officials. The *Civilpedia* provides real-world examples and cites Arkansas statutes and case law, and it is designed to be updated on a regular basis as the Arkansas Code is amended and to reflect any changes in case law.

Before diving in, it is important to note that Arkansas statutes are laws passed by the Arkansas General Assembly and are codified into the Arkansas Code Annotated of 1987 as amended. The *Civilpedia* cites many statutes in the Arkansas Code and throughout it you will see Arkansas Code Annotated (abbreviated as A.C.A.) followed by pairs of numbers. When you see, for example, A.C.A. § 14-42-102, it means that the statute can be found in Title 14 – Chapter 42 – Subchapter 1. In this example, Title 14 references "Local Government," Chapter 42 references "Government of Municipalities Generally" and Subchapter 1 references "General Provisions." The *Civilpedia* will help you become familiar with the layout of the code, and you'll learn to recognize that when you see something like A.C.A. § 14-43-104, you know that Chapter 43 pertains predominantly to cities of the first class.[1]

Disclaimer

The information contained within this handbook is not intended as legal advice for any specific issue that may arise. The *Civilpedia* is meant to be used as a resource to learn more about municipal government in Arkansas. As you know, or will soon find out, many of the issues and challenges municipal governments face on a day-to-day basis are very fact specific. Elected officials are responsible for consulting with legal counsel when questions arise concerning the application of the law to a particular set of facts. This handbook is intended solely for educational and informational purposes.

1 There will also be times you read citations with the word "et seq." after them, such as A.C.A. § 14-44-101 et seq. "Et seq." is an abbreviated form of a range of Latin words that simply means "to follow." So, if you see A.C.A. § 14-44-101 et seq., it will reference not only A.C.A. § 14-44-101, but every other statute in subchapter one, which in this case would be A.C.A. § 14-44-101 through A.C.A. § 14-44-117 (which is the last statute in this particular subchapter).

Section III. Municipal Human Resources and Personnel

Chapter 1. Introduction

The most important resources any organization has are the people working for it. This is as true for municipalities as it is for Fortune 500 companies. As we will discuss throughout this chapter, municipalities are simultaneously government and employer, and with that intersection comes unique challenges and requirements. However, with a little attentiveness and patience, our cities and towns can thrive while balancing the needs of the employer and the rights of the employee, creating a safe workplace, and ensuring high quality public services for the citizens.

Chapter 2. Employment Law

A. "At-Will" Employment

When discussing human resources, it makes sense to start at the very beginning—the hiring process and the description of the type of employment being offered. There are essentially two types of employment: at-will or contract employment. In Arkansas, the default type of employment is at-will employment, unless the employment is for a fixed term or unless the city or town's employee handbook stipulates that the employee may only be terminated for cause.[2] Therefore, in the majority of circumstances, both the employer and the employee may end the employment relationship at any time, for any reason that is not unlawful.[3]

Importantly, the courts have noted at least four exceptions to the at-will standard, holding that employers violate the law when they take adverse action against an employee for refusing to violate a criminal law, for exercising a statutory right, for complying with a statutory duty, or where the termination would violate a general public policy of the state.[4] Municipalities are encouraged to ensure that their employee handbooks contain a provision expressing that all employment with the municipality is at-will. If the municipality's personnel manual or handbook contains a "for cause" provision, the employee can rely on that document and may have a legal cause of action if the employment is terminated arbitrarily. Clearly establishing at-will employment will ensure that all parties are on notice of their individual legal standing and rights regarding the employment status.

B. Personnel Files

Every employee should have a personnel file. The Society for Human Resources Management (SHRM)[5] recommends that all documents related to the employee's job be kept in this file. For example, a personnel file should contain all hiring documents, any performance reviews that have been conducted, documentation of any disciplinary actions (including verbal warnings), the employee's job description, and copies of the employee handbook that have been acknowledged and signed by the employee. Equally as important is what documents should not be included. The Americans with Disabilities Act (ADA) is clear that employers are prohibited from including any medical information in an employee's personnel file. HR officers and managers will want to create a separate file for medical documentation and records. Additionally, all federal I-9 forms should be kept separate from personnel files.

It is recommended that municipalities adopt a policy in writing regarding the supervision of and access to personnel files. By having a written policy in place, we are able to see who exactly is in charge of personnel files and who may have access to them. This also helps ensure continuity as new elected officials take office.

As will be discussed in the Freedom of Information Act (FOIA) portion of this publication, all public records shall be open to inspection and copying by the public.[6] In Arkansas, the definition of "public records" is broad and includes all documents in all mediums that are required to be kept by law and "which constitute a record of the performance or lack of performance of official functions."[7] Personnel files are not automatically exempt, and

2 Eddings v. City of Hot Springs, Ark., 323 F.3d 596 (2003)
3 Unlawful reasons for termination can include violations of the Civil Rights Act, the Americans with Disabilities Act, the Fair Medical Leave Act, the Fair Labor Standards Act, and other state and federal laws. These will be further discussed later in this publication.
4 Sterling Drug, Inc. v. Oxford, 294 Ark. 239, 743 S.W.2d 380, 381 (1988)
5 www.shrm.org/resourcesandtools/tools-and-samples/hr-qa/pages/includedinpersonnelfile.aspx
6 A.C.A § 25-19-105(a)(1)(A)
7 A.C.A § 25-19-103(1)

therefore they fit under this umbrella, as the law provides that "all records maintained in public offices or by public employees within the scope of their employment shall be presumed to be public records."[8]

However, the law provides exceptions that municipal officials and employees must be made aware of to ensure the constitutional privacy rights of employees are upheld. Courts have held that the constitutional right to privacy can supersede the disclosure requirements of the FOIA.[9] To that end, the Arkansas FOIA exempts "personnel records to the extent that disclosure would constitute a clearly unwarranted invasion of personal privacy.[10] As a general rule, the following information is exempt and should be redacted if an employee's personnel file is requested for inspection or copying:[11]

- Dates of birth
- Social Security numbers
- Personal banking information
- Marital status/dependent information
- Net pay/payroll deductions
- Medical information
- Personal contact information
- Home/cell phone numbers
- Personal email addresses
- Home addresses of non-elected employees
- Leave information[12]

Additionally, public employers must be mindful that requests for employee evaluation or job performance records are held to a different standard than personnel records. If a particular record is created by or at the behest of the employer for purposes of investigating allegations of employee misconduct, the records are not automatically disclosable.[13] Employee evaluation records or job performance records are only disclosable if the record or evaluation in question has led to the employee's suspension or termination, there has been a final administrative resolution of the matter, and if the public has a compelling interest in the disclosure of the record or evaluation.[14] In terms of best practices, it may be best to keep job performance records and employee evaluations separately labeled in the personnel file.

Since certain redactions are required, the municipality should invest in redaction tools or software if it has not already. The mere fact that a public document may contain information that is exempt from the FOIA does not make the entirety of the document exempt, and public employers are still required to provide the non-exempt portions of public records for inspection and copying.[15] Employers will have to redact exempt information and personal private information prior to turning the records over.

As to the question of how long personnel files should be kept, there is a plethora of law spread throughout state and federal statutes and regulations about this topic. These laws and regulations dictate different record retention requirements based on different facts for employees. Records for an employee who is paid through federal grant funding must be retained longer than records for an employee who is paid solely from the city's general fund. As a rule, public employers should establish a policy wherein all employee records are kept for a minimum of eight years. This will ensure compliance with the vast majority of state and federal retention requirements. That said, if an individual retires from employment with the city, all retirement documents are required to be kept permanently under Arkansas law, so plan accordingly and ensure that these documents are removed from personnel files prior to the files' disposal, in accordance with local policy.[16]

8 Id.
9 McCambridge v. City of Little Rock, 298 Ark. 219, 766 S.W.2d 909 (1989)
10 A.C.A § 25-19-105(b)(12)
11 See Young v. Rice, 308 Ark. 593, 826 S.W.2d 252 (1992), holding that the court will weigh the public interest in the requested records against the affected individuals' privacy interest in withholding them.
12 Ark. Op. Atty. Gen. No. 2006-225
13 Ark. Op. Atty. Gen. No. 98-122
14 Id.
15 A.C.A § 25-19-105(f)
16 A.C.A § 14-59-114(a)(3)(A)

C. The Family and Medical Leave Act (FMLA)

The famed American comedian and actor George Burns once said, "Happiness is having a large, loving, caring, close-knit family in another city." Families can have a profound impact on the lives of employees and employers, both in and outside of the workplace. While Burns' witticism may have merit beyond comedic value, employees are often called to those other cities to care for family members in some capacity or another. Illnesses and injuries happen, and rarely do they come with advanced warning giving employees and employers time to prepare. While advancements in remote work capabilities have given some workers the option to carry their job duties with them, it is not an option for every worker. In short, some workers will necessarily miss work to care for themselves or their families. Enter the Family and Medical Leave Act (FMLA)[17].

The FMLA is a federal law mandating that certain employers offer certain employees 12 weeks of unpaid leave during a 12-month period for certain specified reasons. This section will discuss which employers are subject to the FMLA, which employees are eligible for FMLA coverage, what conditions qualify for FMLA leave, and how long an employee may be absent under FMLA leave. Additionally, the FMLA only mandates unpaid leave, but many employers allow staff to take paid leave concurrently with FMLA leave if the employee is entitled to paid leave. Employers will need to know what employees are entitled to paid sick leave by law or by agreement.

Covered Employers

The starting point for any FMLA analysis is to determine if an employer is subject to the FMLA at all. Simply put, not every entity with employees is subject to the FMLA's regulations. For example, private sector employers are only subject to FMLA if the business has 50 or more employees on staff for 20 or more weeks in either the current or preceding year.[18] Municipalities, however, are not private sector employers. Federal, state and local governments are colloquially known as public sector employers. Cities and towns are public agencies, and the FMLA is applicable to all public agencies, no matter how many individuals are employed by the city or town. If you are reading this, you are likely an official or employee of a city or town and the FMLA applies to your entity.

Eligible Employees

Now that we've established that all public employers are subject to the FMLA, the second step in the analysis is to determine if an employee qualifies for coverage. To do that, employers must know how the law defines the term "employee." On the surface, the law's definition is straightforward: "any individual employed by an employer."[19] This is a very broad definition, and if it seems familiar, it is the same definition used by the Fair Labor Standards Act. Please note that volunteers, contract labor, and elected or appointed public officers do not qualify as employees.[20]

Now that a working definition of employee has been established, employers can determine if an employee is eligible for leave under FMLA. Again, definitions offer guidance. The Act defines an eligible employee as an individual who has been employed by a covered entity for a minimum of 12 months, who has worked a minimum of 1,250 hours during the previous 12-month period and who has requested FMLA leave. The 12 months that the employee is required to have worked does not have to be consecutive. As a general matter, employers do not have to look back more than seven years to determine if the employee has worked a total of 12 months.[21] However, the employee must have worked at least 1,250 hours during the 12 months preceding the first day that the employee takes leave. But what if an employee was on paid or unpaid leave during that period? Does that count? It absolutely does. If an employee was on the payroll at the time the leave was taken, employers must count the time towards the determination of eligibility.

There is a second factor in determining if an employee is eligible for FMLA coverage. The law specifically excludes employees who work for an employer with less than 50 employees in a 75-mile radius.[22] This may seem confusing because the law has established that all public employers are subject to the FMLA regardless of how many individuals they employ. Both are true. Although all public agencies are subject to the FMLA regardless of

17 29 U.S.C. §§ 2601-2654
18 29 U.S.C. § 2611(4)(A)(i). See also 29 C.F.R. § 825.104.
19 29 U.S.C. § 2611(3). See also 29 U.S.C. § 203.
20 29 U.S.C. § 203
21 You may have to look back more than seven years if the employee was out on covered military leave or if there is a written agreement between the city and the employee such as a collective bargaining agreement.
22 29 U.S.C. § 2611(2)(B)(ii)

the number of employees, a public employee will only be eligible for FMLA if the employee works for an agency with 50 or more employees in a 75-mile radius. All public employers are covered, however, not all public employees are. If your city or town employs fewer than 50 employees, the employees likely do not qualify for FMLA leave. This nuance is tricky but important, which makes diligence paramount.

Qualifying Conditions

Having covered which employers and employees are subject to and eligible for FMLA, the next step is to determine if the requested leave is for an authorized reason. The FMLA authorizes leave for:[23]

- Pregnancy, birth, adoption and foster care.
- Personal or family member care related to serious health conditions.
- Qualifying military related leave.

It is a straightforward list, but there are a number of terms in that list that must be defined to get a full picture of conditions that are FMLA eligible. Again, employees are only eligible for 12 weeks of FMLA leave during a 12-month period. During a calendar year, FMLA may be taken at different times for different reasons, but this time is factored together. For example, if an employee takes eight weeks off work to care for a newborn child and later develops a serious health condition, they would only be entitled to four weeks of FMLA leave during the 12-month window.

Pregnancy, Birth, Adoption and Foster Care

FMLA leave may be taken prior to the birth of the child. Pregnant employees are allowed to utilize FMLA leave for prenatal care or if complications from the pregnancy render the employee unable to work.[24] The spouse of a pregnant individual may also utilize FMLA leave to provide care for an expectant spouse who is incapacitated during the pregnancy. However, to be considered a spouse, the individuals must be legally married or have moved from a state which recognizes common law marriages and have met the criteria of common law marriage. Fiancés, boyfriends and/or biological parents with no spousal relationship are not eligible for FMLA leave to care for a pregnant individual.[25] Similarly, an eligible employee may take FMLA leave for the birth of a child. The 12-month window in which FMLA leave is authorized for the birth of a child is limited to exactly 12 months from the day the child is born. Additionally, employers should be aware of the Pregnant Workers Fairness Act (PWFA) and what steps municipal employers must take to comply with that law.[26]

Since Arkansas does not have a general prohibition against nepotism, a municipality may find itself facing circumstances where two employees are married to one another and having a child together. When spouses who are employed by the same employer are both eligible for FMLA leave, the spouses are not entitled to 12 individual weeks of FMLA leave each. Instead, the employer combines the hours for each, and the total allowed childbirth leave for both spouses together is 12 weeks.[27] If the newborn develops a serious medical condition, each spouse may take up to the full FMLA leave of 12 weeks to care for the child.[28] In a similar vein to the PWFA, municipal governments need to be aware of the Providing Urgent Maternal Protection for Nursing Mothers (PUMP) Act to ensure the rights of new mothers are protected when they return from FMLA leave.[29]

The FMLA also contemplates and provides leave for employees who adopt children or host foster children. Eligible employees are entitled to FMLA leave when a child is placed with the employee for adoption or fostering.[30] The employee is able to take the leave either immediately before the child enters the home or after the placement. Employees who adopt or foster are given a window that expires 12 months from the date the child is placed in the custody of the parent to request and take authorized FMLA leave.[31] FMLA leave for this purpose is no longer available after the child has been with the adoptive or fostering employee more than one year. Spouses who work

23 29 U.S.C. § 2612(a)(1)9A) to (F)
24 29 C.F.R. § 825.120
25 Id.
26 42 U.S.C. §§ 2000gg-2000gg-6
27 29 C.F.R. § 825.120(a)(3)
28 29 C.F.R. § 825.120(a)(6)
29 29 U.S.C. § 218
30 29 C.F.R. § 825.121(a)(1)
31 29 C.F.R. § 825.121(a)(2)

for the same employer that adopt or foster a child are entitled to a combined total of 12 weeks of leave for adoption or fostering.[32]

Although there are noted similarities between birth and adoption or fostering, there are also a few nuances unique to adoption and fostering as well. For example, the FMLA defines what constitutes adoption and fostering. The law defines adoption as being the legal and permanent assumption of the responsibility of raising a child as one's own, while fostering is the state sanctioned 24-hour care of children by individuals other than a parent or guardian.[33] In both cases, the government and the employee will have engaged in a legal process. The employee cannot, for example, unilaterally move a child into their home and call it adoption or fostering.

Serious Health Condition of an Employee or Employee's Family

The second category of approved FMLA leave is for a serious health condition. This raises certain questions: What is a serious medical condition? Who does the law consider to be family members? Can an employee take 12 weeks of FMLA leave to care for their third cousin who has a common cold? There are three portions of this authorized category of leave that must be defined for employers.

First, employers need to have a solid understanding of what conditions are considered serious health conditions. This intricate element is the main source of confusion and contention in human resources departments. A serious health condition is an illness, injury, impairment or any physical or mental condition that involves overnight hospital care, inpatient treatment, treatment in connection with inpatient care, hospice, or admittance in a residential medical facility.[34] If FMLA leave is requested for a chronic medical condition, authorization can only be given if the condition requires no less than two annual visits to a health care provider[35] for treatment, the condition continues over an extended period, and the condition causes episodic incapacity.[36] Keep in mind that the first of the two or more health care visits must occur within seven days of the original first day of incapacity to qualify as an authorized cause.[37]

Permanent incapacity may also qualify if the incapacity is a result of a condition that medical professionals have not developed effective treatment for, such as Alzheimer's disease.[38] Consider also conditions requiring ongoing treatments that will cause sporadic absences, otherwise known as intermittent leave.

There has been a plethora of litigation stemming from efforts to define a serious health condition. Both the legislative history of the FMLA and subsequent case law include the following under this definition: heart attack and conditions requiring heart surgery; most cancers; spine and lumbar conditions that require therapy or surgery; strokes; severe respiratory conditions; appendicitis; pneumonia; emphysema; severe arthritis; severe nervous disorders; injuries that are the result of serious accidents (whether they occur on or off the job); pregnancy and pregnancy related complications including miscarriages, prenatal care and childbirth; major restorative dental procedures; cosmetic surgery after a disfiguring incident or the removal of a cancerous growth; issues stemming from mental illnesses; and severe and chronic allergies.[39] Lastly, an employee who is struggling with substance abuse issues may qualify to take authorized leave if the condition meets the treatment thresholds discussed above. However, FMLA leave related to substance abuse can only be taken for treatment by a health care provider or to receive treatment services based on a referral from a health care provider.[40] The employee is not entitled to leave merely because the employee's substance abuse issues result in absenteeism unrelated to treatment.[41]

It may also be helpful to know some common illnesses that, although intrusive and unpleasant, are not generally considered to be serious health conditions. Conditions such as the common cold, the flu, ear and toothaches, indigestion and upset stomachs, minor ulcers, headaches other than migraines, and routine dental issues do not qualify for leave under FMLA.[42]

32 29 C.F.R. § 825.121(a)(3)
33 29 C.F.R. § 825.121(g)-(f)
34 29 U.S.C. § 2611(11) and 29 C.F.R. §§ 825.113-115
35 A health care provider is defined as either a medical doctor or a doctor of alternative medicine, licensed by the state to practice medicine, or any other person determined by the Secretary of Labor to be capable of providing health care services. See 29 C.F.R. §825.125.
36 29 U.S.C. § 2611(11) and 29 C.F.R. §§ 825.113-115
37 Id.
38 Id.
39 29 C.F.R. § 825.113(d)
40 29 C.F.R. § 825.119
41 Id.
42 29 C.F.R. § 825.113(d)

When an employee suffering from a condition involving an illness, injury, impairment, or if another physical or mental condition renders the employee unable to perform the essential functions of the job, they are likely entitled to FMLA leave.[43] This is not to say that the law requires an employee to literally be, in that moment, rendered either mentally or physically incapacitated that they could not possibly do any work. The law is written and interpreted so that it applies to circumstances that require an employee to be physically absent from the workplace to be treated or evaluated for an actual or potential serious health condition.[44]

The more difficult task is to determine whether an employee is authorized to take leave to care for a family member suffering from a serious health condition. This authorization hangs upon the definition of "family member." The law defines family members as spouses, children, parents or children for whom an employee stands *in loco parentis*—meaning that the employee is in the position of a parent by assuming and discharging parental obligations.[45] On a related note, employers should know that "to care for" means that the employee is allowed leave to provide for both the basic physical and psychological needs of the family member, including but not limited to the medical, hygienic, nutritional, safety and medical transportation needs.[46]

Military Related Leave

Finally, the FMLA contemplates that individuals may simultaneously be enlisted military personnel or have close relatives who are serving in the military. Leave may be authorized when an employee's spouse, son or daughter, or parent who is a member of the armed forces or reserves is called for active duty or is given notice of an impending call to active duty.[47] Further, if a parent of an active duty service member is incapable of self-care, the FMLA provides for an employee to take leave to care for the incapacitated parent.[48] From a public policy standpoint, employment should not interfere with the combat readiness of soldiers, which includes care of military families.

In all the cases and circumstances that have been discussed so far, the maximum FMLA leave an employee is entitled to is 12 weeks. However, The FMLA provides an exception for extended leave in situations where a member of the military requires care in conjunction with a serious injury or illness stemming from their military service. In certain situations, eligible employees of covered employers are authorized to take up to 26 weeks of leave.

Understanding the 12-Month Leave Period

As discussed above, FMLA mandates covered employers to all eligible employees to take 12 of unpaid leave (or 26 weeks to care for an injured military family member) during a 12-month period. How are employers to know when the 12-month period begins? Does it follow the calendar year? Is it the fiscal year?[49] Does it start from the employee's date of hire? These are all good questions, and at least as far as the FMLA is concerned, the answer to all of them is "yes." Simply put, employers are allowed to designate the parameters of the 12-month window as a matter of local policy. For municipal employers, this means that the city council or board of directors should set your policy or delegate the authority to do so to the mayor or the mayor's representative.

As a practical matter, a single method should be selected and applied to all departments to ensure uniformity. Many municipalities have opted for a "rolling" 12-month period. This minimizes the amount of leave that an employee takes in totality and protects the employer from a circumstance where an employee could "stack" leave. Stacking leave is a situation where the employee takes 12 weeks of leave at the end of a calendar year and 12 more weeks at the beginning of the next calendar year. Employees are hired because they are needed to perform important functions, and most cities and towns cannot afford for an employee to take six months off work.[50] If your municipality has not established and designated the 12-month period for FMLA leave, and an employee sues the

43 29 U.S.C. § 2612(a)(1)(D)
44 29 C.F.R. § 825.123(a); Prenatal care is also covered. See 29 C.F.R. § 825.120(a)(4).
45 29 U.S.C. § 2612(a)(1)(C)
46 29 C.F.R. § 825.124(a)
47 29 U.S.C. § 2612(a)(1)(E)
48 29 C.F.R. § 825.126(b)(8).
49 Almost all cities and towns in Arkansas have a fiscal year that overlaps with the calendar year because the law requires municipal budgets to be passed by the governing body of the municipality by February 1 for the year. See A.C.A § 14-58-201.
50 Reminder: An employee might be able to take 26 weeks off to care for an injured military family member.

city for denying leave, it is likely that the court will choose a window of leave for the city. In other words, you may lose that lawsuit, so ensure that you have a policy regarding the FMLA leave.

Another issue that commonly arises from FMLA leave is whether the employee is required to take a full day of leave or whether FMLA leave can be taken in partial days. This is otherwise known as intermittent or reduced-schedule leave. Leave does not have to be taken in full-day increments, although it certainly can be, and full-day increments are likely the most common. However, employees can take intermittent leave—they may take FMLA leave in "blocks" of time that are less than one day. Also, an employee may work on a reduced-leave schedule that allows them to work fewer hours per day or per week. In order to take intermittent leave or work a reduced schedule for FMLA purposes, the employee must be eligible for leave and the leave must be for a qualifying reason as discussed above.[51]

For an employee to be entitled to intermittent or reduced-schedule leave, the employee must be able to perform the essential functions of the job during the time that they are working, and they must make a "reasonable effort" to schedule the leave so as to not disrupt the employer's business operations.[52] When an employee wishes to take intermittent or reduced-schedule leave, the employer is prohibited from forcing the employee to take more leave than is necessary, and the employer is mandated to account for FMLA leave in the increments that are no greater than one hour.[53] Because the law allows for a total of 12 weeks of FMLA leave, employers will need to know what schedule the employee's work day is predicated on. For example, if an employee's workday is eight hours, and the employee takes three hours of leave for treatment of a serious medical condition, the employer cannot mandate the employer take a full eight hours or even a half day totaling four hours if it is not necessary. The employer would log that the individual took three hours for FMLA leave and still retains five hours FMLA leave available to constitute a full day of leave.

Notice Requirements

Every covered employer is required to provide notice to employees of the FMLA's rights and obligations. There are three types of notice required by law:

1. The Notice Poster

Every municipality is a covered employer, so every municipality is required to have a notice poster. It must be legible, using large text to ensure that employees can read it easily, and it must be posted in a prominent location in the workplace. Most cities and towns have employees in several different locations. Each location is required to have a notice poster. It is not sufficient to only have one poster placed in city hall. For employers that have employees working remotely, an electronic notice poster will suffice. The city is also required to provide general notice by including notice in an employee handbook or by giving the employee notice on the date of hire.[54] Employers will also want to consider that notice must be given in the language in which employees are literate, which may be a language other than English.[55]

2. Notice of Eligibility, Rights and Responsibilities

Employers have five business days in which to provide an employee who has requested FMLA leave with a notice of eligibility, rights and responsibilities.[56] Occasionally, an employer may learn of an employee's need to take FMLA leave through some channel other than the employee. This five-day window applies to those circumstances as well. For example, if an employer learns that an employee has been in a car wreck and is in a coma, the employer is obligated to provide the employee and the employee's family with notice even if the employee has not informed the employer.

If an employer determines that an employee is ineligible to take FMLA leave, the employer is required to provide, at minimum, one reason why. This can legally be done verbally, but employers are advised to put everything in writing and keep the record in the employee's file. If the employee requests subsequent FMLA leave and

51 29 C.F.R. § 825.202
52 29 C.F.R. § 825.203
53 29 C.F.R. § 825.205
54 29 C.F.R. § 825.300
55 Id.
56 29 C.F.R. § 825.300(c)(1)-(6)

the employee's eligibility has not changed, then the employer need not provide a new eligibility notice. However, if the employee has since qualified for FMLA eligibility, the employer must provide notice of eligibility, rights and responsibilities within five days. The rights and responsibilities must include any requirement for the employee to provide medical certification, any requirement that the employee substitute paid leave, and the maintaining of benefits.[57]

3. Designation Notice

Once an employer has determined whether the employee's requested leave is qualified under the FMLA, the employer must provide a designation notice to the employee within five days. Practically, most employers provide the designation notice along with the eligibility, rights and responsibilities notice. This notice will state whether the leave has or has not been granted as FMLA-qualifying, and whether more information is needed. If more information is required to make a determination, a written explanation is required and should sufficiently explain what is needed from the employee. If the municipality has a policy requiring the employee to substitute paid leave during FMLA leave, the designation notice must state as such, as well as advise the employee of the amount of leave that will count against the employee's FMLA leave. If the amount of leave that will be taken is undeterminable, the employer is required to inform the employee of the right to request the amount of FMLA leave to be counted against FMLA entitled leave at least once in a 30-day period if leave was taken in that 30-day window. If the employer requires a fitness-for-duty exam prior to returning to work, that requirement must also be noted in the designation notice.[58] Such notice must have the essential functions of the job listed so that the medical personnel performing the fitness-for-duty examination will know what to test for.[59]

Employee Notice Requirement

Employees also bear responsibility to notify an employer of certain things when the employee is going to take, or is currently taking, FMLA leave. If the leave is foreseeable, such as childbirth or a scheduled medical procedure, the employee is required to notify the employer at least 30 days prior.[60] The notice can be written or verbal, but again, it is much easier to document such notice if it is written. When these foreseeable events occur, the employee is only required to give this notice a single time, but they must advise the employer of any changes in regard to the scheduled leave, any necessary prolongations of the leave, or any new dates for intermittent leave. If the qualifying reason is foreseeable and the employee did not give the employer the required notice, the employer may deny the leave until at least 30 days have passed.[61] However, FMLA leave cannot always be scheduled in time to provide 30 days' notice. Accidents and emergencies happen. Employers should establish a policy requiring employees to provide notice as soon as it is practicable to do so.[62] The law allows employers to designate FMLA leave as qualifying prospectively and retroactively.[63] Some employees may not wish to have leave designated as FMLA leave for a variety of reasons. However, unless the employee can show actual harm or injury from an employer's early or late FMLA designation, the employer is within their rights to do so. A simple conversation between human resources managers and employees can avoid many future problems on both accounts.

Certification and Recertification

Employers may require the employee taking the leave to provide a doctor's note describing the need for the leave. The FMLA allows employers to implement a policy that requires the worker taking leave to provide a certification from a licensed medical professional within 15 days or when reasonably possible that qualifies the leave.[64] That said, unless circumstances change, a single doctor's note should be sufficient to cover the entirety of the leave, including multiple absences due to intermittent leave. Employers should not ask for a doctor's note every time the employee is absent due to the leave. Some courts have held employers liable for violating the FMLA when they have done so. However, there are circumstances that will necessitate recertification, discussed in more detail below.

57 Id.
58 If the employee handbook requires a fitness for duty certification, this notice isn't required in the designation notice, but it's best to cover all bases.
59 29 C.F.R. § 825.300(d)(1)-(6).
60 29 C.F.R. § 825.302(a)
61 29 C.F.R. § 825.304
62 29 C.F.R. § 825.302(a)
63 29 C.F.R. § 825.301(d)
64 29 C.F.R. § 825.305(b)

If the medical certificate that the employee provides is vague, ambiguous or non-responsive, the employer is required to inform the employee via written notice that the doctor's certification is incomplete or insufficient.[65] The employee then has seven days to bring a corrected certification back to the employer. If the employer has questions regarding the certification, an authorized representative such as an HR official or manager may contact the healthcare provider to discuss the form. However, the employee's direct supervisor is expressly prohibited from contacting the employee's health care provider.[66]

If the employer, after the employer has contacted the health care provider to discuss the certification, still believes that the certification is lacking or invalid, the employer may—at the employer's expense—send the employee to get a second opinion from a health care provider that the employer designates. If the first and second opinion are conflicting, then the employer may—again, at the employer's expense—seek a third opinion, but the employer will be bound by the third opinion. If the municipality does choose to seek a second or third opinion, the employer is required to obtain authorization from the employee to release relevant medical information to the subsequent health care providers. If the employee will not authorize the medical records release, the municipality may deny FMLA leave.[67]

Remember, an employer should avoid requesting a certification every time the employee is absent. That would be an overburdensome process and potentially violate the FMLA. However, circumstances do occur when recertification is necessary to ensure that the FMLA process is being property utilized. The baseline rule is that the employer should not request a certification more than once in a 30-day period.[68] For that matter, there is no practical reason to request recertification for any reason other than further absenteeism that the employee claims is a further extension of the qualifying reason that prompted the original FMLA leave in the first place. That said, if an employee's condition is likely to cause an absence that lasts longer than 30 days, the law generally allows employers to request a recertification one time in a six-month period.[69] So again, the focus should not be on each occurrence of an absence, but the overall umbrella of absences that stem from a qualifying reason in a limited window of time.

FMLA Leave: Paid or Unpaid

Generally, this will be a matter of local policy. For certain uniformed employees, such as police officers and firefighters, the law has certain paid leave requirements that will be discussed below. For other non-uniformed employees, there are very few state level entitlements to paid sick leave. However, many municipalities do offer paid sick leave to employees—it's a great tool to improve morale, it helps ensure employees are able to focus on their health and well-being, and paid leave serves as a great recruiting tool. If the employee is entitled to any paid leave—including vacation, personal or sick leave—the employer may require that an employee use this leave concurrently with qualifying FMLA leave, including for intermittent leave.[70]

D. The Americans with Disabilities Act (ADA)

Many Americans live with physical or mental impairments that substantially limit their ability to engage in major life activities. These impairments, otherwise called "disabilities," might affect the way an employee completes a task or the tools the employee will need access to, but the employee is still capable of doing the essential functions of the job. These individuals are no less in need of employment than those who do not have disabilities. Historically, the laws have not provided for or entitled disabled Americans to workplace provisions or protections. This is no longer the case.

The Americans with Disabilities Act (ADA) is a federal law that provides workplace protections for most citizens living with disabilities by creating certain rights that covered employers are required to respect and protect.[71] As employers, local governments must understand the requirements of the ADA, must be able to identify what situations necessitate accommodation, and must know how to engage in the interactive process with employees to

65 29 C.F.R. § 825.305(c)
66 29 C.F.R. § 825.307(a)
67 29 C.F.R. § 825.307(b)-(c)
68 29 C.F.R. § 825.308(a)
69 29 C.F.R. § 825.308(b)
70 29 C.F.R. § 825.207(a)
71 42 U.S.C. §§ 12101-12213

ensure that needs of all parties are met. Disabled citizens must earn a living. Employers must ensure that necessary work is being performed. Both can be accomplished when savvy employers understand that one of the most important roles of human resources is ensuring ADA compliance by clearly identifying the essential functions of each and every position by performing a full analysis of the positions. A detailed job description allows employers to understand and communicate the physical and mental attributes that each job position requires. In turn, this empowers the employer's ability to engage in exploratory conversations with disabled employees to find reasonable, workable and functional accommodations.

Covered Employers

The ADA prohibits both private and municipal employers with 15 or more employees from discriminating against qualified individuals simply because they are disabled.[72] An employee is a "qualified individual" if they can "perform the essential functions" of a job that they are applying for or that they currently hold with or without a reasonable accommodation.[73] Remember, the employer initially determines what functions are essential and, where employers have provided a written job description as part of an employee handbook or used in advertisements for the position, a court reviewing a legal challenge under the ADA will give consideration to this description.

Covered Employees

The ADA provides protections for municipal employees and applicants for municipal jobs if the municipality employs at least 15 employees for 20 or more calendar work weeks in either the current or preceding calendar year.[74] The 20-week qualifier is collective; it does not have to be consecutive. A one-week lapse where a city only has 19 employees does not restart the clock. Importantly, the ADA does not apply to independent contractors or individuals who volunteer their time for the city.

To qualify for ADA protections, a disabled employee must have the skills, experience, education or other requirements needed to perform all essential functions of a given job, with or without an accommodation.[75] Again, responsible employers will have identified the skills, experience, education and other requirements that are legitimately related to the competent and safe performance of a job position. An essential function is defined as one that is a "fundamental job duty of the employment position the individual with a disability holds or desires."[76] As you can see, the employer has quite a bit of discretion in determining what job functions are essential.

Lastly, and this may seem intuitive, the employee must be disabled in some manner. A disability is defined under the law as any physical or mental impairment that substantially limits one or more major life activity, and the employee must show a history (even if brief) to show that they are regarded as having such an impairment.[77] The limitation must be substantial but doesn't have to completely prevent or restrict the employee from performing the major life activities. To determine how substantial a limitation is, step back and compare the limitation to the average person in the general population and make assessments of the impairment on a one-on-one, case-by-case basis, avoiding generalizations. It's also important to note that the courts have prohibited employers from factoring in "corrective measures" that help an employee overcome a disability.[78] So, avoid the tendency to consider if an employee or applicant is on medication, or whether a piece of medical equipment assists the employee when doing such an evaluation. While an exhaustive list of major life activities would require its own encyclopedic volume, employers should consider the performance of manual tasks, vision, hearing, walking, standing, lifting, reading, working and other activities.[79]

Accommodations

When a covered entity employs or has an applicant who informs the employer of a disability, the employer is required to provide a reasonable accommodation, unless doing so would cause the employer an undue hardship. It

72 42 U.S.C. § 12111(5)
73 42 U.S.C. § 12111(8)
74 42 U.S.C. § 12111(5) and 29 C.F.R. § 1630.2(e)
75 29 C.F.R. § 1630.2(m)
76 29 C.F.R. § 1630.(2)(n)(1)
77 42 U.S.C. 12102(1); 29 C.F.R. § 1630.2(g)(1)
78 See Sutton v. United Airlines, Inc., 527 U.S. 471, 488 (1999).
79 42 U.S.C. § 12101(2)(a)

is the employee's responsibility to let the employer know that an accommodation is required, unless the employer knows or should know that the employee has a disability that is creating problems in the workplace, or that would prevent the employee from asking for an accommodation.[80]

This gives rise to a broader set of questions:

- How do we know what accommodation is needed?
- Do we have to grant a request for every accommodation an employee wants?
- How do we start the implementation process?

To answer these and other questions, the ADA instructs employers to engage in an "interactive process" when the employer realizes that a disability exists and the employee requires an accommodation.[81] The interactive process is an informal, good-faith conversation between the employer and the employee. It does not have to be overly complicated. The employee must give the employer enough information about the disability so that the employer can provide a reasonable accommodation. The employer should keep detailed documentation for the personnel file, ask about the details of the disability to understand the scope, request notes or contact information from medical providers, and—most importantly—discuss potential accommodations with the employee. Not every request for a specific accommodation has to be accepted, as some might present an undue hardship on the employer or interrupt the work environment for other workers. All that is required under the law is that the employer provide a reasonable accommodation, and therefore the employer must engage in the interactive process.

A reasonable accommodation is one that enables a qualified applicant to be considered for a job or allows a change to the work environment that enables an employee to perform a job and enjoy all the benefits and privileges that employment provides to similarly situated employees without a disability.[82] This could require adaptations to existing work spaces, job restructuring, modifications to work schedules, additional training, the presence of ADA-certified assistance animals in the workplace, new technology, or the provision of accessible equipment. A reasonable accommodation may not be readily apparent, and the HR professionals may have to flex their creative muscles, but that is what the interactive process is designed for. Thanks to advancements in technology, employers can now consider remote work as a reasonable accommodation as well.

Not every accommodation is a reasonable one, however. Employers are not required to eliminate or redefine the essential function of a job or lower productivity and quality standards. Also, an accommodation that would impose an undue hardship is not reasonable. Employers must consider the nature and cost of an accommodation, whether the accommodation is feasible considering the financial resources available, the size of the employing entity and how many facilities are available, and the type of work the entity does.[83] Of course, there is no clear and definitive line in the sand, at least as far as the law is concerned. Courts view whether an accommodation creates an undue hardship on a case-by-case basis. Cities with large populations have different resources, abilities, infrastructure, financial capacities and worker pools than municipalities with small populations. All of these factors must be considered when determining the reasonableness of an accommodation.

Lastly, the law prohibits covered employers from taking retaliatory action against any employee for requesting an accommodation or for reporting a violation of the law, even if the accommodation was not for the reporting party themselves. When a city or town violates the law, they can be sued and may be liable for compensatory and punitive damages, attorney fees, back pay and more. Retaliation is considered a second violation, which will double or triple the municipality's liability. On this note, municipal employers should know that where an employee cannot perform the essential functions of a job, they are under no obligation to employ the individual. When issues arise, contact the city attorney immediately.

80 See Brady v. Wal-Mart Stores, Inc., 531 F.3d 127 (2nd Cir. 2008).
81 29 C.F.R. 21 1630.2(o)(3)
82 29 C.F.R. § 1630.2(o)(1)
83 42 U.S.C. § 12111(10)(b)

E. The Fair Labor Standards Act (FLSA)

Introduction

The Fair Labor Standards Act (FLSA) is a comprehensive federal law that establishes minimum wage, overtime pay eligibility, recordkeeping, and child labor standards affecting full-time and part-time workers in the private sector and in federal, state and local governments. It is a dense and complicated set of laws that can be difficult to navigate. To assist municipalities with compliance, here are 21 things you should know about the FLSA. If issues arise based on the points below, please consult with your city attorney before taking any action.

21 Things You Should Know

All Employees

1. Effective January 1, 2021, the minimum wage in Arkansas rose to eleven dollars ($11.00) per hour except as otherwise provided in this subchapter." (A.C.A. § 11-4-210(a)(2)).

Note: The federal minimum wage for covered, non-exempt employees is $7.25 per hour. However, states are entitled to set a higher minimum wage. Accordingly, the higher Arkansas wage rates are applicable.

2. Overtime or compensatory time must be paid at time and one-half of the employee's regular hourly rate (29 U.S.C. § 207(a)(1)). Even if the employee receives a salary, overtime or compensatory time must be granted unless the employee is exempt as explained below.

Employers cannot avoid paying overtime or compensatory time by averaging hours over several workweeks. The FLSA requires that each workweek stand alone (29 C.F.R. § 778.104). (See chart below for information on uniformed employee shifts).

3. If an employee volunteers to substitute shifts with another employee after first obtaining the employer's approval and works more than the maximum hours for a given work period because of the switch, the employer is not responsible for paying the additional overtime (29 C.F.R. § 533.31(a)).

The regulations state that this may occur "only if employees' decisions to substitute for one another are made freely and without coercion, direct or implied. An employer may suggest that an employee substitute or 'trade time' with another employee working in the same capacity during regularly scheduled hours, but each employee must be free to refuse to perform such work without sanction and without being required to explain or justify the decision." (29 C.F.R. § 533.31(b)).

Employers are not required to maintain a record of time traded and there is no specific period of time in which the shift must be paid back (29 C.F.R. § 533.31). Therefore, the employee's paycheck for that period would not reflect the switch in additional hours or overtime pay (29 C.F.R. § 553.31).

4. Employees do not have to be paid for "on-call" time unless their activities are overly restricted (29 C.F.R. § 785.17). On-call time should not be counted as compensable unless the employee is required to remain at or near the employer's premises or otherwise cannot use their time freely (29 C.F.R. § 785.17). Providing electronic pagers or cell phones to employees can solve many on-call time problems.

Exempt Employees

5. Elected municipal officials, their personal staffs, persons appointed by elected officials to serve on a policymaking level, and legal advisors are considered exempt employees and are excluded from coverage under the FLSA (29 C.F.R. § 553.11).

Trainees and students are not employees within the meaning of the FLSA if they meet all six criteria below:

(1) The training, even though it includes actual operation of the facilities of the federal activity, is similar to that given in a vocational school or other institution of learning;

(2) The training is for the benefit of the individual;

(3) The trainee does not displace regular employees, but is supervised by them;

(4) The federal activity which provides the training derives no immediate advantage from the activities of the trainee—on occasion its operations may actually be impeded;

(5) The trainee is not necessarily entitled to a job with the federal activity at the completion of the training period; and

(6) The agency and the trainee understand that the trainee is not entitled to the payment of wages from the agency for the time spent in training (5 C.F.R. § 551.104).

6. Volunteers are not employees, and a public agency employee cannot volunteer to do the same work for which they are being paid by the same public agency (29 C.F.R. §§ 553.100, 553.102).

7. Prisoners are generally not treated as employees under FLSA (U.S. Department of Labor Field Operations Handbook 10b27, www.dol.gov/whd/FOH/FOH_ch10.pdf).

8. Executive, administrative and professional "white-collar" employees are exempt from both minimum wage and overtime provisions if they meet all the requirements specified for their job category. These are not the only exemptions, but are the most typical in Arkansas cities and towns.

Executive Employees

(A) The employee must be compensated on a salary basis at a rate not less than $684 per week;

(B) The employee's primary duty must be managing the enterprise in which the employee is employed or managing a customarily recognized department or subdivision of the enterprise;

(C) The employee must customarily and regularly direct the work of two or more other full-time employees or their equivalent; and

(D) The employee must have the authority to hire or fire other employees, or the employee's suggestions and recommendations as to the hiring, firing, advancement, promotion or any other change of status of other employees are given particular weight (29 C.F.R. § 541.100).

Administrative Employee

(A) Compensated on a salary or fee basis at a rate of not less than $684 per week exclusive of board, lodging or other facilities;

(B) Whose primary duty is the performance of office or non-manual work directly related to the management or general business operations of the employer or the employer's customers; and

(C) Whose primary duty includes the exercise of discretion and independent judgment with respect to matters of significance (29 C.F.R. § 541.200).

Professional Employee

(A) The term "employee employed in a bona fide professional capacity" in section 13(a)(1) of the Act shall mean any employee:

(B) Compensated on a salary or fee basis at a rate of not less than $684 per week exclusive of board, lodging, or other facilities; and

(C) Whose primary duty is the performance of work:

(i) Requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction; or

(ii) Requiring invention, imagination, originality or talent in a recognized field of artistic or creative endeavor (29 C.F.R. § 541.300).

Computer Employee Exemption

(A) Computer systems analysts, computer programmers, software engineers or other similarly skilled workers in the computer field are eligible for exemption as professionals under section 13(a)(1) of the Act and under

section 13(a)(17) of the Act. Because job titles vary widely and change quickly in the computer industry, job titles are not determinative of the applicability of this exemption.

(B) The (a)(1) exemption applies to any computer employee compensated on a salary or fee basis at a rate of not less than $684 per week exclusive of board, lodging or other facilities, and the (a)(17) exemption applies to any computer employee compensated on an hourly basis at a rate not less than $27.63 an hour. In addition, under either section 13(a)(1) or section 13(a)(17) of the Act, the exemptions apply only to computer employees whose primary duty consists of:

(i) The application of systems analysis techniques and procedures, including consulting with users, to determine hardware, software or system functional specifications;

(ii) The design, development, documentation, analysis, creation, testing or modification of computer systems or programs, including prototypes, based on and related to user or system design specifications;

(iii) The design, documentation, testing, creation or modification of computer programs related to machine operating systems; or

(iv) A combination of the aforementioned duties, the performance of which requires the same level of skills (29 C.F.R. § 541.400).

9. Employees of amusement or recreational establishments are exempt from minimum wage and overtime if one of the following requirements is satisfied:

(A) The establishment must not operate for more than seven months in any calendar year.

(B) During the preceding calendar year, the establishment's average receipts for any six months of that year must have been equal to or less than one-third of its average receipts for the other six months of that year (29 C.F.R. § 779.385).

Uniformed Employees: Police and Fire

10. Law enforcement officers in cities and towns with fewer than five law enforcement officers, including the chief or marshal, are exempt from the overtime provisions (29 U.S.C. § 213(b)(20); 29 C.F.R. §§ 553.200, 553.211). To count as a law enforcement officer, the officer must be someone: (1) who is a uniformed or plain-clothed member of a body of officers and subordinates who are legally authorized to enforce laws designed to maintain public peace and order and to protect both life and property from accidental or willful injury, and to prevent and detect crimes; (2) who has the power to arrest; and (3) who is presently undergoing or has undergone or will undergo on-the-job training and/or a course of instruction and study which typically includes physical training, self-defense, firearm proficiency, criminal and civil law principles, investigative and law enforcement techniques, community relations, medical aid and ethics (29 C.F.R. § 553.211).

Volunteers are not considered "employees" for this purpose however. No distinction is made between part-time and full-time employees. This means that if you have four or fewer than four law enforcement officers (not including radio operators), the city does not have to pay overtime. You must be sure your officers receive minimum wage for all hours worked in a work period.

11. Cities and towns with fewer than five paid firefighters, including the chief (if paid), are exempt from paying overtime to those employees who meet the following definition. "Employee in fire protection activities" means an employee, including a firefighter, paramedic, emergency medical technician, rescue worker, ambulance personnel, or hazardous materials worker, who is:

(A) trained in fire suppression, has the legal authority and responsibility to engage in fire suppression, and is employed by a fire department of a municipality, county, fire district, or state; and

(B) is engaged in the prevention, control, and extinguishment of fires or response to emergency situations where life, property, or the environment is at risk (29 U.S.C. § 203(y); see also 29 C.F.R. § 553.210(a)).

You must be sure your paid firefighters (four or fewer) receive minimum wage for all hours on duty during the work period (see 29 U.S.C. § 213(b)(20) and A.C.A. § 11-4-210(a)(2)).

12. Volunteer firefighters and auxiliary police officers are "volunteers" and are not treated as employees under the 1985 amendments to the FLSA (29 C.F.R. § 553.104(b)).

13. The FLSA provides a partial overtime exemption for law enforcement officers and firefighters who work a "work period" established by the city of no fewer than seven days and no more than 28 days. The city can establish separate work periods for the police department and the fire department. If the city fails to establish a work period, 207(k) does not apply and a fire or police employee working over 40 hours will accrue overtime compensation (29 C.F.R. § 553.230).

The Secretary of Labor has set maximum hour standards based on a 28-day work period for both fire department and law enforcement personnel, determining that law enforcement employees who work over 171 hours within a 28-day work period must be compensated for those hours in excess of 171 and that fire department employees working in excess of 212 hours within a 28-day period must also be compensated (29 C.F.R. § 553.230). These 28-day standards can be used as ratios to determine maximum hours for other approved work periods. See the following chart.

Maximum Hour Standards for work periods of 7 to 28 days – section 7(k). 29 C.F.R. § 552.230.		
Work period (days)	Maximum hours standards	
	Fire protection	Law enforcement
28	212	171
27	204	165
26	197	159
25	189	153
24	182	147
23	174	141
22	167	134
21	159	128
20	151	122
19	144	116
18	136	110
17	129	104
16	121	98
15	114	92
14	106	86
13	98	79
12	91	73
11	83	67
10	76	61
9	68	55
8	61	49
7	53	43

When determining compensatory time for either law enforcement personnel or firefighters who miss a shift due to illness, vacation, personal leave or any other reason, hours missed will not count as hours worked and are not compensable for overtime purposes (29 C.F.R. §§ 553.201, 553.230).

14. Civilian radio operators, clerks, secretaries and janitors of police and fire departments are on a 40-hour workweek with time and one-half for all hours over 40 hours per week. They do not qualify for the law enforcement officers or firefighters' "work period" hours exemption (see 29 C.F.R. §§ 553.210(b), 553.211(e)).

15. The city as employer has the option of paying overtime or of giving comp time off. The employee must understand that the city has a policy of compensatory time off. Compensatory time is accrued at one and one-half hours for each hour worked. Public safety employees—police and fire—and emergency response employees can accrue a maximum of 480 hours of comp time or 320 hours worked. After an employee has accrued maximum compensatory time, the employee must be paid in cash for overtime worked.

An employee shall be permitted to use accrued comp time within a reasonable period after requesting it if to do so would not disrupt the operations of the employer. Payment of accrued comp time upon termination of employment shall be calculated at the average regular rate of pay for the final three years of employment or the final regular rate received by the employee, whichever is higher (29 C.F.R. § 553.21(o)(3)(B)).

If the employer pays cash wages for overtime hours rather than in compensatory time, the wages must be paid at one and one-half times the employee's regular rate of pay (29 C.F.R. § 553.232).

The U.S. Supreme Court has held that a public employer may require its employees to use their accumulated compensatory time (*Christensen v. Harris County*, 529 U.S. 576, 120 S.Ct. 1655 (2000)). If employees do not use accumulated compensatory time, the employer must pay cash compensation in some circumstances. In order to avoid paying for accrued compensatory time, Harris County, Texas, enacted a policy requiring its employees to schedule time off in order to reduce the amount of accrued compensatory time. The Court described Harris County's policy as follows: "The employees' supervisor sets a maximum number of compensatory hours that may be accumulated. When an employee's stock of hours approaches that maximum, the employee is advised of the maximum and is asked to take steps to reduce accumulated compensatory time. If the employee does not do so voluntarily, a supervisor may order the employee to use their compensatory time at specified times." The Court held that, although 29 U.S.C. § 207(o)(5) limits an employer's ability to prohibit the use of compensatory time when requested, that does not restrict the employer's ability to require employees to use compensatory time.

Non-Uniformed Employees

16. All non-uniformed employees are entitled to overtime or compensatory time off after 40 hours per week worked unless they are otherwise exempt (see, for example the categories discussed in No. 8 above) (29 C.F.R. § 778.101).

17. There is no FLSA limit on the number of hours per day worked (other than child labor) (29 C.F.R. § 778.102).

18. A work week under the FLSA is defined as seven consecutive 24-hour periods (although this may be altered for police and firefighters as discussed above). Note that this may not be the same as the city's "pay period." The city can determine the day and the time of day that the work week begins. Once the beginning time of an employee's workweek is established, it remains fixed regardless of the schedule of hours worked by them. The beginning of the workweek may be changed if the change is intended to be permanent and is not designed to evade the overtime requirements of the Act (29 C.F.R. § 778.105). We recommend that the city workweek for water, sewer, street, sanitation, etc., employees begin at 5 p.m. on Fridays.

The city can schedule the hours worked within the workweek to limit or prevent overtime. If an emergency occurs over the weekend and some employees must work 16 hours Saturday and 16 hours Sunday, then the city can (if their services are not absolutely needed) tell those employees to take off the rest of the week after working one eight-hour shift each. This way each employee is limited to 40 hours per week for the week beginning 5 p.m. on Friday.

19. Only hours worked count in calculating overtime. Pay for holidays, vacations, sick time, jury duty, etc., do not count as hours worked (see 29 C.F.R. § 778.102).

20. If an employee works more than 40 hours per week, the city could give them compensatory time off at the rate of one and one-half hours for each hour worked over 40 hours per week. The compensatory time belongs to the employee and can accrue to a maximum of 240 hours (160 hours actual work).

Employees must be allowed to use their comp time when they desire unless it would unduly disrupt the city's operations to do so at that particular time. For a discussion of requiring the employee to take accumulated compensatory time, see No. 16 above.

In the event of termination of employment, an employee shall be paid for all accrued comp time at their then salary or the average rate of pay for the final three years of employment, whichever is greater (29 C.F.R. §§ 553.21, 553.25).

Chapter 3. Personnel Handbook

An employee handbook provides guidance and information on an organization's mission, vision, values, policies and procedures, and workplace code of conduct. The Arkansas Municipal League offers a *Sample Personnel Handbook* to help your city establish guidelines concerning various personnel issues. However, employment law is heavily regulated and rapidly changing, and it is a sample only. The League strongly encourages you to continually monitor and update your city's personnel handbook to ensure that it continues to meet the needs of your city from both legal and employee relations standpoints. While it may seem burdensome, a personnel handbook should be reviewed annually by city officials and city attorney(s). This task could result in substantial monetary savings if it prevents just one lawsuit or administrative complaint filed against the city.

If you adopt a personnel handbook, failing to follow and consistently enforce its guidelines may result in legal liability. The League suggests that the handbook adopted by your city be as simple and concise as possible. You are strongly encouraged to develop a handbook that is practical and useful for your city. If you can define a policy or guideline, you can enforce it. Before adopting a final version of any handbook, you should ask your city attorney to review it to ensure that it complies with federal, state and local laws.

Finally, policies are of no value if city employees, supervisors, department heads and officials are not advised of them. For that reason, each employee should be provided with a copy of the handbook and be required to execute an acknowledgement of receipt and understanding.

Content

The content of your city's personnel handbook will be based on the size and complexity of your city. The League's *Sample Personnel Handbook* is extremely comprehensive and not all content will be appropriate for your city. Carefully review the sample and select the content that is right for your organization.

A personnel handbook should contain only general information and guidelines. It is not intended to be comprehensive or to address every specific application of, or exceptions to, the general policies and procedures contained within the document.

When writing your personnel handbook, it is appropriate to use gender-neutral pronouns such as they/them/theirs. Your handbook is a first step toward respecting people's gender identity and creating a welcoming space for people of all genders.

Basically, personnel handbooks should include the following:

Overview and General Information. An employee handbook should set a positive tone and identify information about your city such as its mission, vision and values. It should also contain a disclaimer that makes it clear that the handbook is to be used as a guide and is not intended to create an employment contract.

Non-Discrimination and Anti-Harassment. An employee handbook should outline your city's policies ensuring equal treatment of all employees (Equal Employment Opportunity statement) and, if you have more than 15 employees, an Americans with Disabilities Act (ADA) policy. It should also contain your city's policy regarding unlawful discrimination and harassment, bullying and if applicable, your city's civility policy.

Complaint reporting and investigation procedures should be outlined so that employees understand their rights and responsibilities in this regard. The steps should be well-defined. Retaliation and false accusations should also be addressed.

Compensation and Matters Affecting Employment Status. Employees need guidance on work hours and attendance, compensation and payroll procedures, overtime and compensatory time, vacancies and promotions, performance evaluations, resignation, termination, etc. This section should be used to provide this information.

Benefits. The benefits section of an employee handbook should contain vacation policies for both uniformed and non-uniformed employees, holidays, holiday pay for uniformed employees, sick leave for both uniformed and non-uniformed employees, funeral or bereavement leave (if applicable), military leave, family medical leave, maternity leave (if applicable), and leave for jury duty.

It should contain general information on employee health benefits, life coverage and supplemental coverages offered if applicable. You may consider making this section a statement of coverage provided without specifically referring to a provider since that is subject to change.

It is important to note that the Affordable Care Act governs the timing of when benefits (if offered) must become effective. It is important to stay abreast of other legal guidelines as well. For example, A.C.A. § 14-52-114 became effective August 1, 2023, and increased the amount of annual paid leave time a member of the armed forces shall be granted to 168 hours per calendar year plus necessary travel time for annual training requirements and other duties performed in an official duty status.

Code of Conduct. Policies and guidelines regarding employees' code of conduct should be included in a city's employee handbook to ensure a safe and productive work environment. This section should include ethical standards, uniforms and personal appearance, and acceptable behavior toward staff members, city officials and the public.

This section is the place for your drug-free workplace policy, use of narcotics, alcohol and tobacco policy, outside employment guidelines, and information on the use of city assets and resources including city vehicles.

Miscellaneous Information. Use this section to include a policy statement, conflicts statement, severability language, information about how and when policies can be changed and other legal statements. Sample verbiage can be found in the League's *Sample Personnel Handbook*.

Employee Acknowledgement. All employees should be provided with a copy of the personnel handbook. At the time it is distributed, the employee should be given the opportunity to review the contents, ask questions for clarification if requested, and then be required to execute an acknowledgement of receipt and agreement to comply with the policies and procedures contained within the handbook. A sample employee acknowledgement is provided in the League's *Sample Personnel Handbook*. The acknowledgement should be maintained in the employee's personnel file. Each time the handbook is updated, a new copy of the handbook should be provided to each employee and a new acknowledgement executed and placed in the employee's personnel file.

Chapter 4. Equal Employment Opportunity Commission

The U.S. Equal Employment Opportunity Commission (EEOC) is responsible for enforcing federal laws that make it illegal to discriminate against a job applicant or employee because of the person's race, color, religion, national origin, sex (including pregnancy and related conditions, gender identity and sexual orientation), age (40 and older), disability, genetic information (including employer requests for, or purchase, use or disclosure of genetic tests, genetic services or family medical history), retaliation for filing a charge, reasonably opposing discrimination, or participating in a discrimination lawsuit, investigation, or proceeding, Interference, coercion, or threats related to exercising rights regarding disability discrimination or pregnancy accommodation.

Most employers, including cities and towns, with at least 15 employees are covered by EEOC laws. The laws apply to all types of work situations, including but not limited to hiring, firing, layoffs, transfers, promotions, harassment, training, wages, failure to provide reasonable accommodations for a disability, job training, benefits and more.

An employer's responsibilities under EEOC laws are:

- To provide equal pay to male and female employees who perform the same work unless an employer can justify a pay difference under the law.
- To prohibit discrimination against or harassment of applicants, employees or former employees because of race, color, religion, sex, national origin, age, disability or genetic information.
- An employer must not use employment policies or practices that have a negative effect on applicants or employees of a particular race, color, religion, sex, or national origin, or applicants or employees with disabilities unless the policies or practices are related to the job and are necessary for the operation of your city.
- An employer must not use employment policies or practices that have a negative effect on applicants or employees who are 40 or older unless the policies or practices are based on a reasonable factor other than age.
- An employer must provide reasonable accommodations for an applicant's or employee's religious beliefs, disability, pregnancy, childbirth or related medical condition.
- An employer cannot request medical or genetic information from applicants. However, an employer may request medical or genetic information from employees in very limited circumstances, but if legally obtained it must be kept in a confidential, separate medical file.
- An employer cannot retaliate against an applicant, employee or former employee for reporting discrimination, participating in a discrimination investigation or lawsuit, or for opposing discrimination.
- An employer is required to display a poster that describes the federal employment discrimination laws. A copy of the poster can be obtained at www.eeoc.gov/poster.

An employer must retain employment records, such as applications, personnel and payroll records as required by law.

Cities and towns may also be required to provide an informational report to the government. The State and Local Government Information Report (EEO-4) is a mandatory biennial data collection that requires all state and local governments with 100 or more employees to submit demographic workforce data, including data by race/ethnicity, sex, job category and salary band. They are filed in odd years, the most recent being 2023. The filing by eligible state and local governments is required under section 709(c) of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000e-8(c), 29 CFR 1602.30 and .32-.37.

Cities and towns with more than 50 employees and whose U.S. federal grant awards such as certain U.S. Department of Justice (DOJ) grants are over $25,000 may be required to submit an Equal Employment Opportunity Plan (EEOP). An EEOP is a comprehensive document that analyzes a grant recipient's relevant labor market data, as well as the recipient's employment practices. It is used to identify possible barriers to the participation of women and minorities in all levels of a recipient's workforce. The report should include a plan to address the barriers. Its purpose is to ensure the opportunity for full and equal participation of men and women in the workplace, regardless of race, color or national origin.

Cities and towns can work with their human resources department to prepare the plan. It should be reviewed and approved by the mayor before submitting the plan to the granting agency. Since the plan covers the entire city workforce, only one EEOP is required and may be turned in for any grant for which it is required. For more information and online template, see the DOJ website at www.ojp.gov/program/civil-rights-office/equal-employment-opportunity-plans.

For more information regarding the EEOC, visit www.eeoc.gov.

Chapter 5. Municipal Drug Testing

A. Introduction

As employers, Arkansas municipalities need to have a legally sound, written drug and alcohol testing policy that outlines expectations and responsibilities for both the employee and the employers. Once again, cities and towns are not simply employers—you are also the government. Because of that fact, there are constitutional implications that must be considered to ensure that the citizens' constitutional rights are safeguarded while also ensuring that the workplace is safe, functional and drug-free.

When a city or town is enforcing a drug testing policy, the baseline consideration is the Fourth Amendment of the U.S. Constitution. The Fourth Amendment protects the "right of the people to be secure in their persons, houses, papers, and effects" by prohibiting unreasonable searches and seizures by the government.[84] A search within the meaning of the Fourth Amendment is considered unreasonable when the search violates a citizen's reasonable expectation of privacy.[85] As a general rule, the governmental entity must get a warrant prior to conducting a search. However, when it comes to drug testing—especially urine tests—exceptions to the warrant requirement come into play.[86] The U.S. Supreme Court has long recognized that "government offices could not function if every employment decision became a constitutional matter."[87] So, as municipal employers, it is important to understand that drug testing falls within the protective parameters of the Fourth Amendment, but a warrant is not normally necessary. Even though a warrant may not be necessary, municipalities are not free to drug test without limitations. The law provides for two different categories of drug testing: (1) drug testing conducted when the employer has individualized, reasonable suspicion that the employee is using controlled substances unlawfully, or (2) suspicionless drug testing of certain qualified employees, including conditional post-offer, pre-employment drug tests.

B. Testing Pursuant to Reasonable Suspicion

The vast majority of municipal employees will fall into this category, from our receptionists to our street crews to the maintenance workers. As will be discussed further below, employees who are not considered to be in safety or security sensitive positions cannot be drug tested unless the employer has individualized, reasonable suspicion that the worker is abusing drugs or alcohol. This means that the city must be able to articulate objective facts that would lead a reasonable person to believe that drug-related activities have taken place and the employee who will be tested is involved in that drug-related activity.[88] This essentially means that random drug testing of these employees is strictly prohibited. Firsthand knowledge that drug-related activity has occurred is sufficient.[89] For example, if the employer walks in on an employee snorting a powdery substance off of the restroom counter, a reasonable person would have suspicion to believe that the individual is doing drugs. However, information that is provided by reliable third parties can also give rise to reasonable suspicion when supported by the third party's history of reliability, the specificity of the information being provided to the employer, the existence of corroborating information, and when other facts are presented that support the employer's suspicion.[90] Documentation will be key if an employee challenges the city's reasonable suspicion to require a drug test.

Suspicionless Drug Testing

While random drug testing is prohibited for most municipal workers, certain types of employees can be randomly drug tested without the need for the city or town to articulate facts giving rise to reasonable suspicion. Where an employee's job is considered to be a safety or security sensitive position, random drug tests are allowed. The Arkansas Constitution defines a "safety sensitive position" as one that qualifies for drug/alcohol testing under the Department of Transportation's regulations or "any position designated in writing by an employer as a safety sensitive position in which a person performing the position while under the influence of [drugs or alcohol] may constitute a threat to health or safety."[91] This includes but is not limited to an employee who carries a firearm,

84 U.S.C.A. amend. IV
85 See National Treasury Employees Union v. Von Raab, 489 U.S. 656 (1989).
86 Green v. City of N. Little Rock, 388 S.W.3d 85, 90 (Ark. App. 2012)
87 Connick v. Myers, 461 U.S. 138, 143 (1983)
88 Dimeo v. Griffin, 721 F. Supp. 958, 973 (N.D.Ill. 1989); and see Green at 388 S.W.3d 85.
89 Kittle-Aikeley v. Strong, 844 F.3d 727 (Eighth Cir. 2016)
90 George v. Dept of Fire, 637 So.2d 1097, 1101 (La.App. 1994)
91 Ark. Const. Amend. 98, § 2(25)

performs life-threatening procedures, works with confidential information or documents pertaining to criminal investigations, or who works with or around hazardous or flammable materials, controlled substances, food or medicine.[92] The definition also applies to workers who operate, repair, maintain or monitor heavy equipment, machinery, aircraft, motorized watercraft or motor vehicles.[93]

The key aspect of defining a safety sensitive position is determining that a momentary "lapse of attention could result in injury, illness, or death."[94] If the employment position fits into this category and the municipality has designated it as a safety sensitive position, then random drug testing may be allowed, and the Fourth Amendment is satisfied. Random testing should be conducted in adherence with federal regulations.[95] Treat all safety and security sensitive employees equally and fairly. The League highly recommends creating a list of all employees on the payroll who meet these criteria and generate the tests at random with the assistance of the agency performing the tests.

Post-Offer, Pre-Employment Drug Testing

The two categories of testing discussed above pertain to individuals who are already employed by the municipality. Cities also have tools they can rely on to avoid hiring someone who may have substance abuse issues. Can the city test potential employees? Does a city have to articulate probable cause to drug test prior to employment? The short answer is no. Local governments are allowed to require job applicants to submit to drug testing as part of a pre-employment physical examination after a conditional job offer.[96] This can also apply to pre-employment fitness-for-duty examinations. The government still has to establish "special needs" beyond simply normal law enforcement or crime detection to do so, and simply wishing to have a drug-free workplace is not enough justification by itself.[97] However, where an employee volunteers to take the test and signs a release, such a program is allowed.

Chapter 6: Mental Health in the Workplace

Employee mental health and well-being is an important component of an employee's overall wellness. Overall wellness is based on both physical and mental health, and the COVID-19 pandemic has underscored the importance of providing comprehensive support to our employees. When a municipality helps an employee address mental health, overall employee engagement and experience improve.

Mental health is the emotional, psychological and social well-being of an individual. The Municipal Health Benefit Program (MHBP) provides coverage for mental health conditions just as the program provides coverage for physical health conditions. Some additional benefits a municipality may choose to offer to assist municipal employees include an employee assistance program, a mental health first aid program, management training around mental health issues, workshops or seminars on stress management, mental health days, and support for work/life balance.

The MHBP provides an employee assistance program option. Mental health first aid is a program that provides a professional on staff or on call for employee mental health concerns. The League offers stress management and mental resilience training that is available to members.

Mental health assistance for employees increases employee engagement and productivity, lowers absenteeism and resignation, and has a positive impact on the bottom line of the municipality.

92 Id.
93 Id.
94 Id.
95 See 49 U.S.C. § 31306.
96 Chandler v. Miller, 520 U.S. 305 (1997)
97 Id.

The Civilpedia Handbook
Section III. Municipal Human Resources and Personnel

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