July 14, 2011

MEMORANDUM NO: 059-11HR

TO: Agency Administrators

FROM: Bobbie Chappell, Director of Human Resources

VIA: Rip Colvin, Executive Director

RE: **Policy Clarification 2011-#003: Administering FMLA for Employees with Prior Service at a State Entity Outside of the State Personnel System (SPS)**

The Workforce Development and Benefits Team within the Department of Management Services (DMS), Division of Human Resource Management has issued Policy Clarification: 2011-#003, Administering FMLA for Employees with Prior Service at a State Entity Outside of the State Personnel System (SPS).

The question was asked, is prior service at a state entity outside of the State Personnel System (SPS) included as part of the cumulative services and hours worked calculations used for determining FMLA eligibility? The short answer is, no. Attached you will find the Policy Clarification that goes into detail about the issue, policy, background and applicable statutes/rule citation.

According to Rule 60L-29.002, F.A.C., Definitions - (5) "State Personnel System" means the employment system comprised of positions within the Career Service, selected Exempt Service, or Senior Management Service and within all agencies except those in the State University System, the Florida Lottery, the Legislature, ***the Justice Administration System,*** or the State Court System.

Please contact Andy Snuggs at SnuggsA@justiceadmin.org if you have any questions.

Thank you.

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Department of Management Services
Division of Human Resource Management

POLICY CLARIFICATION

STATUTORY/RULE REFERENCE NUMBER:	TRACKING NUMBER:
29 CFR Part 825, *The Family and Medical Leave Act of 1993* *Rule 60L-29.002, Florida Administrative Code (F.A.C.), Definitions*	*2011-#003*
SUBJECT: *Administering FMLA for Employees with Prior Service at a State Entity Outside of the State Personnel System (SPS)*	
APPROVAL SIGNATURE: Sharon D. Larson, Director	**EFFECTIVE DATE:** *June 30, 2011*

***Issue*:**

The federal Family and Medical Leave Act (FMLA) provides job protected leave to employees who meet certain eligibility criteria when the reason for leave is covered by the law. The FMLA requires that, in order to be eligible for FMLA leave, an employee must have 12 months of cumulative service (excluding any service time which may have occurred prior to a break in service of more than seven years) and that the employee have worked a total of 1,250 hours (not including any types of paid leave) with the employer in the 12 months immediately preceding the start of the requested leave.

Is prior service at a state entity outside of the State Personnel System (SPS) included as part of the cumulative service and hours worked calculations used for determining FMLA eligibility?

Policy:

No. Only prior service in a Career Service (CS, Pay Plan 01), Selected Exempt Service (SES, Pay Plan 08) or Senior Management Service (SMS, Pay Plan 09) position at a SPS agency or prior service in Other Personal Services (OPS) employment at an agency within the SPS should be included in the calculation of cumulative months of service and hours worked for purposes of determining FMLA eligibility. Likewise, only FMLA leave used during prior service in CS, SES, SMS or OPS positions at SPS agencies shall be considered in administering the provisions of the FMLA. This policy is notwithstanding any paid leave transfer policies used by the SPS as a recruitment tool to allow for transfer of paid leave credits among these entities.

In determining the eligibility of an employee for FMLA leave, agency personnel offices should first refer to the "agency hire date" on the "key service dates" screen of the People First system to determine if the employee has at least 12 months of service with the agency (agencies should not use the "creditable service" field to determine the months of service since this number may include employment outside of the SPS and service which may have occurred prior to a break in service of more than seven years). If the employee has at least 12 months of service, the agency should then determine if the employee has worked at least 1,250 hours in the 12 months immediately preceding the start of the requested leave by calculating the employee's hours of "Regular Work" (Code 1000).

In cases where an employee's "agency hire date" in the People First system is less than 12 months

prior to the start of the requested leave, agencies must then look to the employee's "state hire date" and the "action history" screen in the People First system to determine if any prior service was in a CS, SES, SMS position or OPS employment with a SPS agency which should be included in the calculation of total months of service or hours worked for purposes of FMLA leave eligibility. If an employee does not meet the 1,250 hours of work requirement with the current agency, but has 12 continuous months of service that includes service with other SPS agencies, the employee's current agency should contact the employee's former employing agencies to determine if the employee meets this requirement based on work hours at the other agencies to determine if the employee has worked 1,250 hours in the 12 months immediately preceding the start of leave.

Background:

The federal FMLA requires that employers must consider the months of cumulative service (excluding any service time which may have occurred prior to a break in service of more than seven years) and the hours worked in the 12 months immediately preceding the start of the requested leave when determining an employee's eligibility for FMLA leave.

While the regulations state that, "A state or political subdivision constitutes a single public agency and, therefore, a single employer for determining employee eligibility," the regulations provide public entities flexibility in determining whether agencies of a state or political subdivision constitute separate employers as it goes on to read, "Whether two agencies of the same state constitute the same public agency can only be determined on a case-by-case basis." (29 C.F.R. §825.108(c)(1)) The regulations further state that, "one factor that would support a conclusion that two agencies are separate agencies is whether they are treated separately for statistical purposes in the Census of Governments issued by the Bureau of Census, U.S. Department of Commerce." This language (which amended the original FMLA regulations of 1995 that stated the Census was the ONLY factor used in determining whether public agencies were separate employers) mirrors the language used to define the term "employer" in the regulations governing the Fair Labor Standards Act (FLSA) and, as noted in §825.108(a), C.F.R., "an employer under the FMLA includes any "public agency" as defined in section 3(x) of the Fair Labor Standards Act, 29 U.S.C 203(x)".

While the Census of Governments does not list State of Florida entities as separate agencies, as the regulations state and explain further in the preamble of the regulations (See 73 Fed. Reg. 222, 67939 (November 17, 2008), this is only one factor that is considered in determining whether two public agencies are separate employers for purposes of administering FMLA. Previous opinion letters from U.S. Department of Labor – Wage and Hour Division offer guidance on the determination of whether two public agencies are considered separate employers for the administration of FLSA which, by virtue of the analogous standard now used for FMLA, offer guidance for determining whether two public agencies are considered separate employers in the administration of FMLA. In Opinion Letter FLSA2007-12, for example, the Department of Labor states that other factors relevant to the determination of whether two agencies are separate employers include: (1) whether the employers have separate payroll/personnel systems; (2) whether the employers have separate retirement systems; (3) whether the employers have separate budgets and funding authorities; (4) whether the employers are separate legal entities with the power to sue and be sued; (5) whether the employers deal with each other at arm's length concerning the employment of the individuals in question; (6) how they are treated under state law; and (7) whether one employer controls the appointment of the officers of the other entity.

When applying this Wage and Hour standard to determine whether two public agencies are separate employers, it can be determined that the SPS satisfies the preponderance of the factors, including, but not limited to, the fact that it is subject to different personnel rules and statutes than the entities outside the SPS. By virtue of these factors and the fact that state entities outside of the SPS derive their statutory authority for developing and administering their own independent personnel programs and pay plans from statutory provisions separate from those which govern the SPS, only service time and hours worked in a CS, SES, SMS position or during OPS employment with a SPS agency should be used in determining the eligibility of an employee to use FMLA leave. This is consistent with the SPS policy that only hours worked in positions within SPS agencies should be used to determine overtime eligibility in cases of dual employment.

Applicable Statute/Rule Citation:

Rule 60L-29.002, F.A.C., Definitions

(5) "State Personnel System" means the employment system comprised of positions within the career service, selected exempt service, or senior management service and within all agencies except those in the State University System, the Florida Lottery, the Legislature, the Justice Administration System, or the State Courts System.

29 C.F.R. § 825.108, Public agency coverage.

(a) An "employer" under FMLA includes any "public agency," as defined in section 3(x) of the Fair Labor Standards Act, 29 U.S.C. 203(x). Section 3(x) of the FLSA defines "public agency" as the government of the United States; the government of a State or political subdivision of a State; or an agency of the United States, a State, or a political subdivision of a State, or any interstate governmental agency. "State" is further defined in Section 3(c) of the FLSA to include any State of the United States, the District of Columbia, or any Territory or possession of the United States.

(b) The determination of whether an entity is a "public" agency, as distinguished from a private employer, is determined by whether the agency has taxing authority, or whether the chief administrative officer or board, *etc.,* is elected by the voters-at-large or their appointment is subject to approval by an elected official.

(c)(1) A State or a political subdivision of a State constitutes a single public agency and, therefore, a single employer for purposes of determining employee eligibility. For example, a State is a single employer; a county is a single employer; a city or town is a single employer. Whether two agencies of the same State or local government constitute the same public agency can only be determined on a case-by-case basis. One factor that would support a conclusion that two agencies are separate is whether they are treated separately for statistical purposes in the Census of Governments issued by the Bureau of the Census, U.S. Department of Commerce.

(2) The Census Bureau takes a census of governments at 5-year intervals. Volume I, Government Organization, contains the official counts of the number of State and local governments. It includes tabulations of governments by State, type of government, size, and county location. Also produced is a universe list of governmental units, classified according to type of government. Copies of

Volume I, Government Organization, and subsequent volumes are available from the Superintendent of Documents, U.S. Government Printing Office, Washington, DC 20402, U.S. Department of Commerce District Offices, or can be found in Regional and selective depository libraries, or online at *http://www.census.gov/govs/www/index.html* . For a list of all depository libraries, write to the Government Printing Office, 710 N. Capitol St., NW., Washington, DC 20402.

(d) All public agencies are covered by the FMLA regardless of the number of employees; they are not subject to the coverage threshold of 50 employees carried on the payroll each day for 20 or more weeks in a year. However, employees of public agencies must meet all of the requirements of eligibility, including the requirement that the employer (*e.g.* , State) employ 50 employees at the worksite or within 75 miles.

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