HELP NEWS

The Monthly Newsletter of Helping Employees Learn Prosperity (HELP)

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Welcome!

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Helping Employees Learn Prosperity (HELP) is an IRC 501 (c)(4) charitable non-profit, tax-exempt, non-partisan, independent employee affiliation.

HELP is a Registered Employee Organization with the County of Los Angeles and has a County assigned payroll deduction code.

HELP's status with the City of Los Angeles is a Qualified Employee Organization.

Outside Employment

Public employees, to make ends meet, sometimes consider "moonlighting" – working a second job or running a side business in addition to their public service work. This practice is generally lawful. However, for public employees, the public employer has the right to know about the outside employment and, in some cases, to tell the employee to choose between their public agency job and the outside work. In other words, while employees may generally choose who to work for, public employers can require that it not interfere with their public employment.

Labor Code §96(k), enacted in 2000, says the California Labor Commissioner can pursue individual "claims for loss of wages as the result of demotion, suspension, or discharge from employment for lawful conduct occurring during nonworking hours away from the employer's premises." Generally, this means the public employer cannot discipline or take adverse action against employees for engaging in outside employment.

However, Gov't Code §1126, enacted in 1971, specifically prohibits local government employees from engaging "in any employment, activity, or enterprise for compensation which is inconsistent, incompatible, in conflict with, or inimical to" their public duties. The statute authorizes public employers to

determine which outside activities are prohibited. The law also specifically requires public employers to adopt rules to prevent public employees from using their government position for private gain. The public employer's rules must include notice to employees of the prohibited activities, of the potential for disciplinary action for engaging in prohibited activities, and the process for appealing a determination or application of the rules.

In accordance with Gov't Code §1126, most local governments have since adopted outside employment policies. These policies are negotiable subjects of bargaining. A typical policy requires public employees to disclose any outside work to management first, to determine if the outside work is incompatible with their public duties. For the most part, the public employer is concerned with a potential conflict of interest (i.e. working for a contractor that bids for public contracts, when your role for the public employer is to manage or approve those contracts). The public employer can also prohibit employees from using government resources (e.g., vehicles, equipment, uniforms, insignia) in connection with any outside work.

Sometimes, the public employer is concerned about the outside work affecting an employee's work performance. For example, outside employment may be prohibited as a form of discipline for poor performance, because of a poor performance evaluation, or while an employee is on a performance improvement plan. This is lawful if the public employer follows any negotiated disciplinary procedures. Continuing to perform the outside work, after being told not to, is also subject to disciplinary action.

If you are considering moonlighting, check your MOU, personnel rules, and policies first, to see if there is any language on outside employment. In most cases, such a policy exists. Moonlighting is typically allowed if it does not result in a potential conflict of interest with, or negatively affects, your current role. Keep in mind that your request to work for an outside employer may need to be approved by management in advance before you accept outside employment or take on the work. You will probably need to submit a form and describe in detail the work you will perform. You will likely need to limit your outside role to your off-duty hours and possibly meet other criteria. If your current job requires being on a standby crew or involves other mandated after-hours work, or you work in a 24/7 operation for which you may need to occasionally be available for scheduled shifts or callbacks outside your regular shift, your current public service job might prevent you from being able to accept most outside work.

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At **HELPPerks**, *we believe that shopping should be enjoyable, and we're dedicated to providing you with the best possible benefits. As a registered member, you can take advantage of these perks at no cost to you.*

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News Release - CPI Data

The U.S. Department of Labor, Bureau of Labor Statistics, publishes monthly consumer price index figures that look back over a rolling 12-month period to measure inflation.

2.7% - CPI for All Urban Consumers (CPI-U) Nationally (Nov)

3.0% - CPI-U for the West Region (from Nov)

3.6% - CPI-U for the Los Angeles Area (from Nov)

2.5% - CPI-U for San Francisco Bay Area (from Nov)

4.5% - CPI-U for the Riverside Area (from Nov)

4.0% - CPI-U for San Diego Area (from Nov)

Questions & Answers about Your Job

Each month we receive dozens of questions about your rights on the job.
The following are some GENERAL answers.
If you have a specific problem, talk to your professional staff.

Question: I took FMLA and was under the impression I could reserve my accrued leave for when I return. While out, the employer completed my time sheet. I received two paychecks and a payment from the employer's disability insurance plan. My accrued leave was also used. I asked HR to reinstate my accrued leave, and I will return the money and pay for my share of the health benefits out of pocket. Two weeks ago, I gave HR a check for one of the two pay periods and was told they would be in contact to not only rectify it but also provide me with an updated W-2. Today, I was told by the payroll manager that, per the employer's FMLA policy, I had to use my accrued leave. Can they require this? Any insight is appreciated.

Answer: Most employer policies require an employee to run their own leave accruals concurrently while on a qualifying leave of absence under the Federal Family Medical Leave Act ("FMLA") or California Family Rights Act ("CFRA"). This is generally permitted by both statutes.
If the employer says you must use your accrued leave, it is likely because your employer's FMLA policy requires it. Your professional staff can review the employer's policy to

be sure. The employer may have given you incorrect information initially and later realized your leave accruals should run concurrent with your qualifying absence, consistent with their FMLA policy.

The rules may be different if an employee is receiving disability payments during the FMLA leave of absence. For example, Federal regulation 29 C.F.R. §825.207(d) says: "Because leave pursuant to a disability benefit plan is not unpaid, the provision for substitution of the employee's accrued paid leave is inapplicable, and neither the employee nor the employer may require the substitution of paid leave. However, employers and employees may agree, where state law permits, to have paid leave supplement the disability plan benefits, such as in the case where a plan only provides replacement income for two-thirds of an employee's salary."

If you are getting disability payments from an insurance carrier, the plan likely covers two-thirds of your salary. Your leave accruals should only be used to cover the remaining one-third. The good news is that this means your leave accruals will last longer than if they were being used to cover 100% of the absences.

Under the FMLA and CFRA, the employer is obligated to maintain your medical insurance payments on the same terms as if you had not taken leave. So, if you are paying a portion of the premium, you will continue to see that deduction from your payroll checks that the employer uses your accrued leave for.

It is common for employees to want to maintain their accrued leave for when they return from a leave of absence. However, it is generally best to continue to receive regular payroll checks from the employer for as long as possible. Not only does this help cover necessary deductions like the employee share for health insurance premiums, it also will continue to allow you to earn service credit for your pension during the absence.

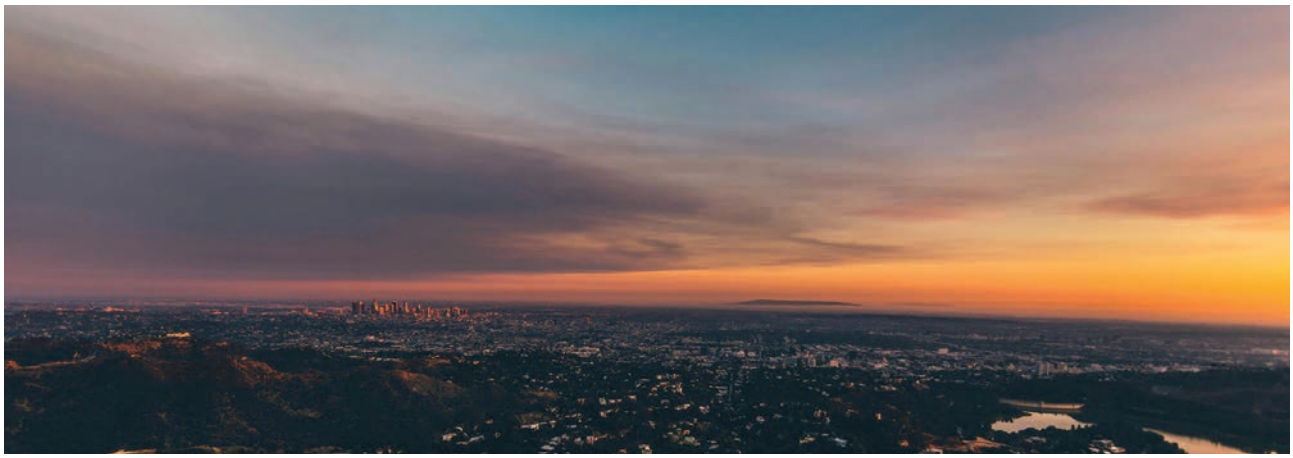
For these reasons, and more, it is common for employee organizations to agree to MOU language or policies that require the employee's leave accruals to supplement the disability payments. That may have occurred with your employer's FMLA policy. The subject is negotiable, so let your employee organization know if it is something you want to revisit during the next MOU negotiations.

However, while it is true that employers can elect to utilize the employees' accrued leave to run concurrently with their FMLA leave, under the regulations (29 C.F.R. §825.300(c)(1)(iii)), the employer must inform the employee, in writing, if accrued paid leave will be substituted. If the employer did not properly notify you that your accrued leave would be used during your FMLA leave, then the employer may have violated the FMLA's notice requirements. Failure to comply with FMLA's notice requirements may invalidate the required substitution of accrued leave and entitle the employee to statutory remedies, such as restoration of leave accruals.

Question: **Am I allowed to work overtime M-Th in exchange for getting off early on Friday, without the employer having to pay overtime? In this scenario, I am okay with working extra hours to get off early on Friday.**

Answer: If you want to get off work early on Friday, you need to get approval from your management. They may allow you to leave early by using your own paid leave time. It is possible they may even allow you to leave early, without using your own leave time. This might depend on operational needs as well as how early you want to leave. If you want to change your schedule for the week, you will also need to get management approval. This type of change may require at least 14-days' advance notice.

While management may adjust your schedule, they cannot make time that is compensable under Federal law at time-and-one-half pay compensable at straight time pay. Under the Fair Labor Standards Act ("FLSA"), non-exempt employees are entitled to overtime pay at time-and-one-half the regular rate for all hours worked over 40 in an FLSA



workweek.

If you are asking to take the hours you are scheduled to work on Friday and divide that up between Monday through Thursday, then the answer to your question depends on your regular work schedule and how the employer defines the FLSA workweek for that schedule.

For example, if you work a regular Monday through Friday 5/8 schedule (five eight-hour days each week), the answer is yes, subject of course to management approval. For employees on a 5/8 schedule, the employer typically sets the FLSA workweek from Sunday through Saturday. Management might approve you working overtime Monday through Thursday and leaving early on Friday. If the total number of hours you worked that week does not exceed 40, there is no overtime pay owed.

However, if you work a 9/80 schedule with your regular day off on alternating Fridays, the FLSA workweek is likely set from Friday at 12 noon to the following Friday at 11:59 am. This is to avoid building overtime into the schedule and having to pay overtime for the calendar weeks where you work 44 hours. The employer sets the FLSA workweek in this manner so that the employee works 40 hours each FLSA workweek (rather than an alternating 44 hours and 36 hours). That means your Friday shift is partly in one FLSA workweek and partly in another. What you propose could then result in the employer having to pay overtime pay under the FLSA for the first week because the 8 hours on Friday would now all be in the first week instead of splitting between the two. In other words, 4 hours would need to be paid at time-and-one-half pay for the first week.

It is possible under the FLSA for you to work 4 ten-hour days Monday through Thursday and come in late on Friday at 12 noon, without the employer having to pay overtime for that FLSA workweek. However, it is not possible under the FLSA for management to allow you to work the four hours in the morning on Friday and let you leave at 12 noon and still avoid having to pay overtime pay if you work any additional hours Monday through Thursday.

If you are an exempt employee under the FLSA (sometimes colloquially referred to as salaried and not hourly), what you suggest is merely up to management's discretion, consistent with any "flex time" language that might exist in the MOU or personnel policies or consistent with any established past practice. Exempt employees are not eligible for overtime pay. You can work additional hours earlier in the week and the employer would not have to pay overtime. Consult your flex-time policy to see if it allows for what you are suggesting. Keep in mind some flex time policies may have specific requirements, such as giving the employer reasonable advance notice, or that flexing must occur within the same pay period.

Question: **If you are allotted three vacation picks per year, can management limit the amount of time you can request per pick even if the employee has enough accrued time to cover the requested vacation?**

Answer: Generally, there are no restrictions on what an employee may request, but management does have discretion to deny specific requests within reason, such as ones where the requested duration is too long. Sometimes these types of limits are intended to ensure that everyone has an opportunity to take time off from work to rest and recover. This is more common in workgroups, like a police department, where the staffing requirements are 24/7. In that case, management should inform the employee why the request is being denied and allow the employee to submit a new request for a shorter duration that is more operationally feasible.

Typically, management can limit the use of vacation time. However, this depends on the language of the MOU, the employer's policies, and past practice. If the MOU has language to the contrary, then management must follow the MOU. However, many MOUs simply specify the annual vacation accrual rates and the maximum number of vacation hours that employees can accrue. They often do not address how long an employee can take off for vacation or how frequently they can take vacations.

Employer policies may be more detailed in this regard. For example, vacation policies may set forth the rules for taking vacations (such as a bidding system, like what it sounds like you have). Under a typical policy, management may consider things like operations, staffing, seniority, and how far in advance a request is made, when deciding how long of a request to approve.

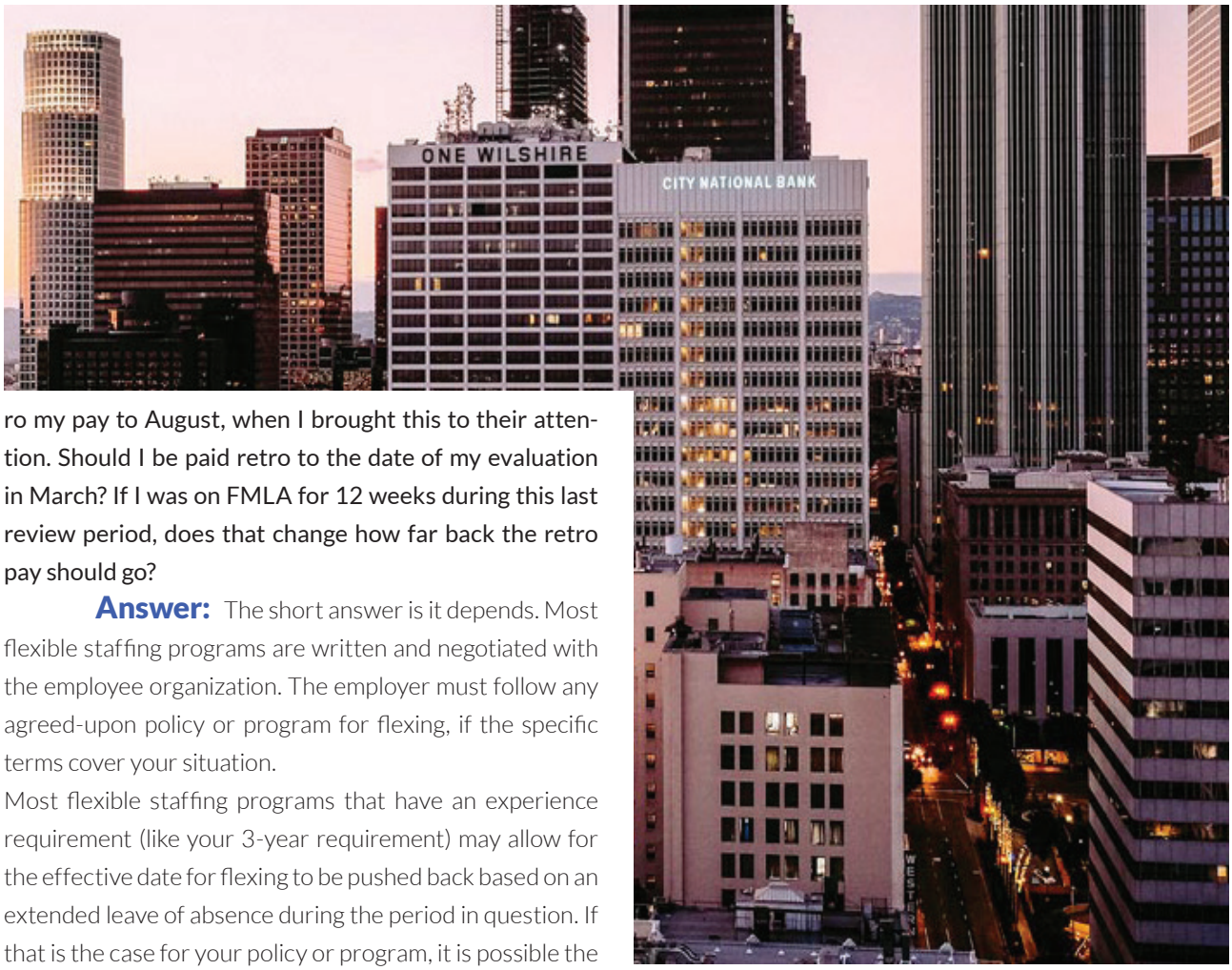
If the employer has a longstanding practice limiting the length of vacations, the employer can continue to enforce it until the employee organization is able to negotiate a different arrangement as part of the next MOU negotiations.

However, if the duration limitation is a new policy, management cannot implement it unilaterally. The employer must provide the employee organization with notice and an opportunity to meet and confer before it can be implemented. Sometimes management will announce a new policy or rule that affects terms and conditions of employment without notifying the employee organization. If that is the situation, let your employee organization know so they can request that management rescind the policy and meet and confer over the proposed policy or rule. This may require the employer to process vacation requests under the former policy or practice until the new one is implemented following good faith negotiations.

If management announces a new rule (e.g., no vacation requests longer than 2-weeks) without prior bargaining, the employee organization can challenge this. However, if management is not announcing a broader rule, and simply exercising discretion with specific requests on a case-by-case basis, it is much harder to challenge management's denial.

A good rule of thumb is that employees should be allowed to use their full annual accrual (e.g., 160 hours), though likely not all at once. However, if you request to use your entire accrual (e.g., 350 hours) in a single year, it is probably reasonable for management to say the request must be shortened. Requests for longer than two weeks at a time are more likely to be denied. Requests of two weeks or less generally should be approved, except for a very good reason.

Question: **I recently flexed up from a grade 1 level to a grade 2 level. I was hired in February 2022. Per my job description, I was eligible to flex up after three years of experience. I received my annual evaluation in March 2025 but was not flexed up at that time. I reached out to HR in August, who confirmed that I should have been flexed up. However, they are only going to ret-**



ro my pay to August, when I brought this to their attention. Should I be paid retro to the date of my evaluation in March? If I was on FMLA for 12 weeks during this last review period, does that change how far back the retro pay should go?

Answer: The short answer is it depends. Most flexible staffing programs are written and negotiated with the employee organization. The employer must follow any agreed-upon policy or program for flexing, if the specific terms cover your situation.

Most flexible staffing programs that have an experience requirement (like your 3-year requirement) may allow for the effective date for flexing to be pushed back based on an extended leave of absence during the period in question. If that is the case for your policy or program, it is possible the effective date could be pushed back 12 weeks (e.g., from March 2025 through approximately May 2025). The retro pay would then go back to June not August.

If the policy makes no allowance for extended leaves of absence, but requires flexing based on the evaluation date, then you may have grounds to insist on retro pay to March. On the other hand, if the policy provides for flexing at management's discretion, and it simply lists the factors for management to consider (like experience), then you might not have any grounds to insist on more back pay.

It is not clear why you waited to raise this issue until August, but it could be reasonable for the employer to insist on retro pay only back to the date you made it known to them. If you were to file a formal grievance, ordinarily the back pay remedy would typically only go back to the date the grievance was filed. So, if you have not grieved this yet, retro pay to August may be reasonable.

Consult with your professional staff about your specific flexible staffing program language and to see whether any grievance might result in retro pay prior to August.

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