



DEPARTMENT OF HUMAN RESOURCES

Biennial Performance
Audit for Family Medical
Leave Act and Americans
with Disabilities Act

Fiscal Years Ended June
30, 2021 and 2020

City Auditor, Josh Pasch
December 30, 2022



Contents

EXECUTIVE SUMMARY 1
BACKGROUND INFORMATION..... 3
OBJECTIVES, SCOPE, AND METHODOLOGY 5
SECTION I: CURRENT FINDINGS AND RECOMMENDATIONS..... 6
APPENDIX I: MANAGEMENT’S RESPONSE TO THE AUDIT REPORT - DHR..... 11
APPENDIX II: MANAGEMENT’S RESPONSE TO THE AUDIT REPORT – BPD 12
APPENDIX III: MANAGEMENT’S RESPONSE TO THE AUDIT REPORT – DOT 14
APPENDIX IV: MANAGEMENT’S RESPONSE TO THE AUDIT REPORT – DPW 15



Office of the Comptroller

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Honorable Bill Henry, Comptroller
and Other Members
of the Board of Estimates
City of Baltimore

EXECUTIVE SUMMARY

The Department of Audits conducted a *Biennial Performance Audit of the Department of Human Resources for Family Medical Leave Act and Americans with Disabilities Act for the Fiscal Years Ended June 30, 2021 and June 30, 2020*. The objectives of our performance audit were to evaluate whether:

- The Family Medical Leave Act (FMLA) and the Americans with Disabilities Act (ADA) requests are processed consistently across City of Baltimore (City) agencies; and
- City agencies are following the City's policies and procedures and federal regulations.

Definitions

1. The FMLA entitles eligible employees of covered employers to take unpaid, job - protected leave for specified family and medical reasons with continuation of group health insurance coverage under the same terms and conditions as if the employee had not taken leave.
2. The ADA is a civil rights law that protects people with disabilities from discrimination. The ADA guarantees people with disabilities the same opportunities as everyone else to do things like go to work, visit public libraries, and enjoy stores and restaurants in their communities.

Sources:

1. Department of Labor
2. Department of Justice - Civil Rights Division

To meet the audit objectives, we selected four key agencies: Baltimore Police Department (BPD), Department of Human Resources (DHR), Department of Public Works (DPW), and Department of Transportation (DOT) for review. Our audit concludes¹ that three (BPD, DOT, and DPW) of the four agencies are not consistently following the City policies and procedures and federal regulations for processing and authorizing FMLA and ADA requests, as well as return to work. Specifically, critical documentation for verification of FMLA and ADA requests are missing at those agencies resulting in not being compliant with the federal records retention criteria for both FMLA and ADA. Additionally, we observed that DPW FMLA files are not restricted to DPW Human Resources staff responsible for FMLA information. The FMLA files contain protected personal health information; as a result, the security risk of accessing the FMLA files by someone who do not have need-to-know business is increased.

¹ **Scope Limitation:** Auditors' assessment was not based on files independently obtained because auditors had limited access to FMLA and ADA documents due to Health Insurance Portability and Accountability Act (HIPAA) privacy concerns. Auditors: (1) were asked to provide a list of selected samples to agencies; and (2) were provided selected samples with certain information redacted.

Biennial Performance Audit Report on Department of Human Resources for Family Medical Leave Act and Americans with Disabilities Act

To improve the compliance with City's policies and procedures and federal regulations, we recommend the Police Commissioner and the Directors of DPW and DOT implement the recommendations included in this report. Management's responses are included in Appendices I to IV.

We wish to acknowledge BPD, DHR, DOT and DPW's cooperation extended to us during our audit.

Respectfully,



Josh Pasch, CPA
City Auditor, City of Baltimore
December 30, 2022

BACKGROUND INFORMATION

The DHR provides guidance to all City agency's HR regarding the implementation of: (1) federal rules and regulations, and (2) the City's Administrative Manual (AM), which is a citywide policy, for processing FMLA and ADA requests of employees. However, the processing, approval, and documentation of the requests are implemented and maintained at the agency level. Additionally, supporting documentation is stored at a secured location within the HR office at the agency.

I. Family Medical Leave Act

In accordance with the FMLA, leave is available to all eligible employees where such leave is used for a Family Medical Leave (FML) qualifying reason. To be eligible for FML, an employee must have: 1) been employed by the City for at least 12 months; and 2) worked at least 1,250 hours in the 12 months prior to the commencement of leave. An eligible employee may take up to 12 weeks of unpaid FML during a rolling twelve-month period for any of the following reasons:

- The serious health condition of the employee;
- The birth or care of an employee's newborn child;
- The adoption or placement of a child with an employee for foster care;
- The serious health condition of an employee's immediate family member (e.g., spouse, child, or parent); or
- A "qualifying exigency" in connection with a family member's active duty military service overseas or in support of a contingency operation (Qualifying Exigency Leave); and
- Military Caregiver – to care for a covered service member who is next of kin with a serious health condition or injury incurred in the line of duty while on active duty.

There are two types of FMLA leave:

- Continuous leave occurs when an employee will be out for a specified period due to the employee's health condition or a family member's serious health condition; and
- Intermittent leave occurs when the employee is out on an irregular schedule.

At the end of FML, the employee will be restored to the same position held prior to leave or a position with equivalent pay, status, benefits, and other employment terms, subject to certain exceptions. An employee returning to work following their own serious health condition (continuous leave) must provide a Fitness for Duty Certification of Health Care

Provider form completed by the health care provider to confirm the employee's ability to resume work and to perform all essential job functions. Employees may not resume work until they have returned the completed certification to the agency's HR. Each agency's HR shall notify employees of this requirement at the start of leave.

II. Reasonable Accommodation

In accordance with federal, state and local laws and AM-204-18, *Equal Employment Opportunity*, the City will provide reasonable accommodations to qualified disabled employees and applicants, unless doing so would pose an undue hardship or a direct threat to safety. The purpose of the law is to ensure people with disabilities have the same rights and opportunities as everyone else.

This policy is applicable to all employees involved in the City's operations including, but not limited to, full-time and part-time employees, temporary employees, probationary employees, seasonal employees, contractual employees, as well as elected officials and their appointed staff.

Accommodations are intended to allow the employee to successfully perform the duties of the position and aid in an employee's return to work (sometimes, but not always after returning from FML). Accommodations include items such as modification or adjustment to a position, an employment practice, the work schedule, or the work environment that makes it possible for a qualified individual with a disability to perform the essential functions of the position.

The employee requesting accommodation is expected to work cooperatively with the ADA Coordinator to obtain the necessary medical documentation in a timely manner and must authorize their health care provider to communicate this information to the City. Failure to provide necessary medical documentation and information, or the refusal to undergo a medical examination when requested, may result in the denial of the employee's accommodation request.

The employee should complete and return the completed Request for an ADA Accommodation / Modification Form to the Agency's ADA Coordinator. If the employee elects not to use Request for an ADA Accommodation / Modification Form, the employee has the option to request their medical provider submit written documentation which substantially provides the same information as requested on the form.

The supervisor will be asked to complete a Functional Capabilities Assessment Form clarifying the physical limitations of the employee's job. The supervisor should work with the ADA Coordinator to best determine reasonable accommodations and next steps.

OBJECTIVES, SCOPE, AND METHODOLOGY

We conducted our performance audit in accordance with *Generally Accepted Government Auditing Standards*. Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objectives. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objectives. The objectives of our audit were to evaluate whether: (1) the FMLA and the ADA requests are processed consistently across City agencies; and (2) City agencies are following the City's policies and procedures and federal regulations.

The scope of our audit is for the periods of FY 2021 and FY 2020. However, certain other matters, procedures, and transactions outside that period were reviewed to understand and verify information during the audit period. There is a **scope limitation** due to HIPAA privacy concerns. Auditors were not allowed to independently access FMLA and ADA files; instead, auditors: (1) were asked to provide a list of selected samples to agencies; and (2) were provided selected samples with certain information redacted. As a result, the files for which the audit conclusions are based were not independent.

To accomplish our objectives, we:

- Researched and reviewed the Code of Federal Regulations (Title 29, Part 825) and Baltimore City Administrative Manual associated with FMLA and ADA;
- Researched the Baltimore City Charter and federal laws relevant to HIPAA Privacy Law;
- Interviewed key individuals from BPD, DHR, DOT, and DPW to obtain an understanding of the policies and procedures and systems that govern the initialization, authorization and recording of leave requests;
- Identified the related risks and evaluated the design of certain internal controls, processes, and procedures over the authorization of FML and ADA requests and return to work;
- Judgmentally selected samples and reviewed supporting documentation to determine whether all required documents were reviewed, approved, secured, and maintained; and
- Conducted site visits at BPD, DHR, DOT and DPW to verify whether the employees' medical files are stored in a secured location.

SECTION I: CURRENT FINDINGS AND RECOMMENDATIONS

Finding I: Documentation of Compliance with FMLA and ADA Are Not Consistently Maintained.

Three out of four key agencies were not able to provide FMLA and ADA documentation for some of the samples selected for review (see Tables I and II Page 9) resulting in noncompliance with the federal records retention criteria for both FMLA and ADA.

I. FMLA

- The BPD was not able to provide Certifications of Healthcare Providers for two of eight selected employees.
- The DPW was not able to provide the Fit for Duty Certification for one of eight employees.

II. ADA

- The BPD was not able to provide any documentation for all eight employees selected for FY 2021. For eight employees selected for FY 2020, BPD was able to provide healthcare professionals' certifications, but not ADA Request Forms and Functional Capabilities Assessment Forms. The latter is the documentation to evidence supervisors' verification of job descriptions of the employees who requested ADA.
- The DOT had exceptions due to lack of reliable approval signatures. During the pandemic, DOT – HR did not have an application such as Nitro to electronically sign and approve ADA applications. The DOT at that time used Adobe, which did not include the signature function and only allowed DOT supervisors to type their names on Functional Capabilities Assessment Forms without signatures for four of eight employees selected for review (two for FY 2021 and two for FY 2020). The Department of Audits requested email communications between DOT – HR supervisors and applicants to evidence approval; however, the DOT – HR was not able to provide those emails due to emails not maintained for more than 90 days. Therefore, we were not able to verify the validity of the signatures and lack of signatures is exceptions.

According to:

I. FMLA

- 29 CFR Part 825, The Family and Medical Leave Act, Subpart E - Recordkeeping Requirements states that “FMLA provides that covered employers shall make, keep, and preserve records pertaining to their obligations under the Act **in accordance with the recordkeeping requirements of section 11(c) of the Fair Labor Standards Act (FLSA)** and in accordance with these regulations.”
- Records keeping under the FLSA states that “Each employer shall preserve for **at least three years** payroll records, collective bargaining agreements, sales and purchase records. Records on which wage computations are based should be retained for two years, i.e., timecards and piece work tickets, wage rate tables, work and time schedules, and records of additions to or deductions from wages. These records must be open for inspection by the Division's representatives, who may ask the employer to make extensions, computations, or transcriptions. The records may be kept at the place of employment or in a central records office.”

II. ADA

- § 1602.14 Preservation of records made or kept states that “**Any personnel or employment record made or kept by an employer** (including but not necessarily limited to requests for **reasonable accommodation**, application forms submitted by applicants and other records having to do with hiring, promotion, demotion, transfer, lay-off or termination, rates of pay or other terms of compensation, and selection for training or apprenticeship) **shall be preserved by the employer for a period of one year from the date of the making of the record or the personnel action involved, whichever occurs later.**”
- § 1602.12 Records to be made or kept states that “The Commission² has not adopted any requirement, generally applicable to employers, that records be made or kept. **It reserves the right to impose recordkeeping requirements upon individual employers or groups of employers subject to its jurisdiction whenever, in its judgment,** such records (a) are necessary for the effective operation of the EEO-1 reporting system³ or of any special or supplemental reporting system as described above; or (b) are further required to accomplish the purposes of title VII, the ADA, or GINA⁴. Such record-keeping requirements will be

² Equal Employment Opportunity (EEO) Commission

³ The EEO-1 Component 1 report is a mandatory annual data collection that requires all private sector employers with 100 or more employees, and federal contractors with 50 or more employees meeting certain criteria, to submit demographic workforce data, including data by race/ethnicity, sex and job categories. Source: EEO Commission

⁴ Genetic Information Nondiscrimination Act

adopted in accordance with the procedures referred to in section 709(c) of title VII, section 107 of the ADA, or section 207(a) of GINA, and otherwise prescribed by law.”

Recommendation I: We recommend the Police Commissioner and Directors of DOT and DPW follow federal regulations and maintain complete, reliable supporting documentation to evidence FMLA and ADA approval and return to work processes.

Table I

Summary of Documentation Review for FMLA Application, Approval, and Return to Work Processes from December 26, 2020 to November 15, 2022¹

Agency	Employees Tested (Number)	Exceptions (Number)	Exceptions (Percentage)
BPD	8	2	25
DHR	6	0	0
DOT	8	0	0
DPW	8	1	13
Totals	30	3	10

Note: ¹ The City implemented Workday Phase I for Absence Management, Time tracking, and Payroll processes in December 2020. As a result, we did not review the process before December 2020.

Table II

Summary of Documentation Review for ADA Application and Approval Process from July 1, 2019 to June 30, 2021 (FYs 2020 and 2021)

Agency	2021			2020		
	Employees Tested (Number)	Exceptions (Number)	Exceptions (Percentage)	Employees Tested (Number)	Exceptions (Number)	Exceptions (Percentage)
BPD	8	8	100	8	8	100
DHR ¹	0	0	0	0	0	0
DOT	5	2	40	3	2	67
DPW ²	8	0	0	0	0	0
Totals	21	10	48	11	10	91

Notes: ¹ The DHR had zero instances of ADA leave requests in both 2021 and 2020. The DHR attributed this to the nature of their work which is mainly desk jobs.

² The DPW had zero instances of ADA leave requests in 2020.

Finding II: DPW FMLA Files are not Restricted to DPW HR Staff Responsible for FMLA Information.

The DPW - HR locks file cabinets that keep ADA documents; however, they do not lock file cabinets that contain FMLA documents. The cabinets for FMLA documents are in the hallway within the DPW – HR Office (Office). The DPW – HR Office entrance is secured; therefore, the FMLA cabinets cannot be accessed by visitors. However, this method of securing the files would not apply to others with access to the Office (e.g., maintenance). Additionally, 13 of 15, or 87 percent, of DPW – HR personnel who do not have business purpose for FMLA information can access the FMLA files. The FMLA files contain confidential protected health information; as a result, the security risk of accessing the FMLA files by someone who do not have business purpose is increased.

According to:

- **29 CFR 826.500 (g)**, records and documents relating to certifications, re-certifications, or medical histories of employees or employees' family members, created for purposes of FMLA, shall be maintained as confidential medical records in separate files and records from the usual personnel files; and
- **The HIPAA Privacy Rule** establishes national standards to protect individuals' medical records and other individually identifiable health information (collectively defined as "protected health information"). The Rule requires appropriate safeguards to protect the privacy of health information and sets limits and conditions on the uses and disclosures that may be made of such information without an individual's authorization.

Recommendation II: We recommend the Director of DPW require DPW-HR personnel lock the file cabinets with FMLA files.

APPENDIX I: MANAGEMENT’S RESPONSE TO THE AUDIT REPORT - DHR

Date: January 10, 2023

To: Josh Pasch, City Auditor

Subject: Management’s Response to Audit Report:
Biennial Performance Audit Report on Department of Human Resources for Family Medical Leave Act and Americans with Disabilities Act for the Fiscal Years Ended June 30, 2021 and 2020

The FML and ADA processes for the City of Baltimore are not centralized within the DHR. In concert with the Law Department, DHR developed the ADA and FMLA policies that are contained within the City’s Administrative Manual. The DHR also provides guidance and best practices to agencies for each of these processes. However, it does not have oversight as to whether agencies are adhering to these best practices. Managers within each agency are responsible for confirming employees designate the leave accordingly within Workday. It is important to note that the FML process in Workday was designed by the Department of Finance, Bureau of Accounting and Payroll Services.

APPENDIX II: MANAGEMENT’S RESPONSE TO THE AUDIT REPORT – BPD

Date: January 12, 2023

To: Josh Pasch, City Auditor

Subject: Management’s Response to Audit Report:
Biennial Performance Audit Report on Department of Human Resources for Family Medical Leave Act and Americans with Disabilities Act for the Fiscal Years Ended June 30, 2021 and 2020

Our responses to the audit report finding and recommendation are as follows:

Recommendation I:

We recommend the Police Commissioner and Directors of DOT and DPW follow federal regulations and maintain complete, reliable supporting documentation to evidence FMLA and ADA approval and return to work processes.

Management Response/Corrective Action Plan:

Agree **Disagree**

In ensuring BPD HR implementation of the corrective management recommendation from our city’s auditors, we have implemented the changes as of January 10, 2023; moving forward all FMLA and ADA requests (also referred to as Reasonable Accommodations) inquiries will be in accordance to the federal / state / local guidelines. We will generate and create a report to track all inquiries, actions / decision made by the Dept. for FMLA request and provide such information is accessible within Workday for tracking purposes to the employee as well as HR professional staff within the agency for special request / follow-up inquiries. The BPD will make sure to communicate with the member of their eligibility for FMLA leave within five (5) business days of their leave request. HR will continue to provide the status letter indicating such eligibility and if found ineligible, it is BPD HR’s responsibility to provide at least one reason why they are not eligible (for example, member has not worked for the employer for a total of 12 months, etc.). The BPD will also create a guide document to BPD members on how to request for FMLA, as well as what are the guidelines to file a complaint if the member feels, the agency has not enough or has violated any code to adhere to the rules and regulations. Members must upload all supporting documentations along with their FMLA questionnaire / application to their Workday profile for HR to review / confirm receipt of items; HR will also upload all decision letters and / or supporting documentations (notices, schedule memos, etc.) onto the employee’s Workday record to demonstrate the track record / history pertaining to the request.

The process for ADA is for HR to partner with the EEO / Diversity offices to ensure the nature of the disability of the employee and gather information on the limitations that may affect the employee's ability to perform the essential job functions. HR along with the other internal office partners will ensure employees know their rights and work with other offices in order to adhere to the accommodation requested. HR will not track these inquiries via Workday as in the FMLA process - the Reasonable Accommodations (RA) inquiries will be tracked and placed in the current BPD HR's share-drive where HR Management and selected HR staff members will track and store supporting documentation and correspondence related to the RA per member. HR will seek guidance from IT, and Budget on cost for such resources in order to do all that is possible for the employee to feel comfortable in the workplace. HR staff are to also follow-up with the member, even after the change is approved and implemented, check in with the employee and manager regularly to see how the accommodation is working out. An accommodation check-in is to become part of the process, in which HR will be sure to inform the employee and supervisor they can bring any changes or issues regarding disability or accommodation to HR's attention at any time. HR will make sure to document all follow-up measures in the member's file in the share-drive which will be kept confidential.

HR staff will use the reports created for both FMLA and RA inquiries on a Calendar Year basis for tracking purposes as well use the information to create data reports (such as pie charts, graphs, pivot tables, etc.) to share with selected members of the BPD's Executive Team (Commissioner, Chief of Staff, Deputy Commissioner of Admin, etc.) in order to provide trends of what the Dept. is consistently receiving / approving.

Implementation Date: January 10, 2023

Responsible Personnel:

- Chrischelle Roman-Taylor, HR Business, BPD
- Karen Tyler, Deputy Director, HR Business, BPD

APPENDIX III: MANAGEMENT’S RESPONSE TO THE AUDIT REPORT – DOT

Date: January 11, 2023

To: Josh Pasch, City Auditor

Subject: Management’s Response to Audit Report:
Biennial Performance Audit Report on Department of Human Resources for Family Medical Leave Act and Americans with Disabilities Act for the Fiscal Years Ended June 30, 2021 and 2020

Our responses to the audit report finding and recommendation are as follows:

Recommendation I:

We recommend the Police Commissioner and Directors of DOT and DPW follow federal regulations and maintain complete, reliable supporting documentation to evidence FMLA and ADA approval and return to work processes.

Management Response/Corrective Action Plan:

Agree **Disagree**

As of June 2021, DOT held its final live training / Q & A session for the implementation of NitroPro for DOT staff. Staff members are currently equipped with using the NitroPro software to electronically sign documents. Additional trainings and reference guides are available for staff who need further assistance with NitroPro. To continue to be in compliance with 29 CFR Part 1602.14, DOT has immediately ensured that the agency is compliant with the record keeping set forth. The DOT will conduct documented periodic (quarterly – March, June, October and December) reviews throughout the calendar year to ensure proper documentation and compliance with record keeping requirements.

Implementation Dates:

- NitroPro software was implemented on June 06, 2021.
- The implementation date for the internal DOT audit for ADA cases will take place starting April 15, 2023, which will review ADA claims for January 2023 to March 2023. The internal audit review schedule will be as follows: (Jan-Mar) April 15; (Apr-Jun) July 15; (Jul-Sep) October 15; (Oct-Dec) January 15.

Responsible Personnel: Keina Overton, Equal Opportunity Officer, DOT

APPENDIX IV: MANAGEMENT’S RESPONSE TO THE AUDIT REPORT – DPW

Date: January 10, 2023

To: Josh Pasch, City Auditor

Subject: Management’s Response to Audit Report:
Biennial Performance Audit Report on Department of Human Resources
for the Fiscal Years Ended June 30, 2021 and 2020

Our responses to the audit report findings and recommendations are as follows:

Recommendation I:

We recommend the Police Commissioner and Directors of DOT and DPW follow federal regulations and maintain complete, reliable supporting documentation to evidence FMLA and ADA approval and return to work processes.

Management Response/Corrective Action Plan:

Agree Disagree

Per the 29 CFR Part 825, DPW-HR has immediately ensured that the agency is compliant with the recordkeeping requirements of section 11(c) of the Fair Labor Standards Act. DPW-HR will conduct documented quarterly audits in March, June, September and December every year, of all FMLA requests to ensure proper documentation and compliance with record keeping requirements.

Implementation Date: January 3, 2023

Responsible Personnel: Danielle Lamothe, Program Compliance Officer II

Recommendation II:

We recommend the Director of DPW require DPW-HR personnel lock the file cabinets with FMLA files.

Management Response/Corrective Action Plan:

Agree Disagree

Cabinets that contain the FMLA documents are now locked and access is restricted to the two DPW-HR staff listed below that are responsible for FMLA.

Implementation Date: January 3, 2023

Responsible Personnel:

- Danielle Lamothe, Program Compliance Officer II, DPW
- Denise Richards, Operations Assistant III, DPW