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Inspector General

**Office of the Inspector General**  
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August 1, 2018

Mr. Andy Byford  
President  
MTA New York City Transit  
2 Broadway, 20th Floor  
New York, NY 10004

**Re: Family Medical Leave Act Usage in  
NYC Transit Subways  
MTA/OIG #2018-25**

Dear Mr. Byford:

In 2017, the Office of the Metropolitan Transportation Authority (MTA) Inspector General (OIG) received a complaint alleging the flagrant misuse of the Family Medical Leave Act of 1993 (FMLA) by two signal maintainers employed by New York City Transit (NYC Transit).  
OIG investigators substantiated abuse of FMLA leave by the first signal maintainer in the complaint; accordingly, we recommended that NYC Transit impose discipline as it deems appropriate, up to and including termination (see MTA/OIG #2018-38).

While this investigation was proceeding, the OIG Audit Division reviewed the administration and monitoring of employees' FMLA leave usage by the NYC Transit Department of Subways (Subways). To help us ascertain the extent and sufficiency of this monitoring and administration, we reviewed Subways' applicable FMLA policies, procedures, guidelines, and practices. We also reviewed employees' FMLA request records maintained by the MTA Business Service Center (BSC) as well as records from Subways' two timekeeping systems for hourly and supervisory employees: the Unified Timekeeping System (UTS) for Service Delivery employees (e.g. conductors)<sup>1</sup> and the Automated Timekeeping System (ATS) for non-Service-Delivery employees (e.g., station cleaners). In short, our review raised concerns about employee usage of FMLA. Most notably, there were nearly 4,000 requests for FMLA leave in 2016-17, but NYC Transit had no controls to deter or even detect abuse of this benefit.

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<sup>1</sup> "Service Delivery" was formerly known as "Rapid Transit Operations (RTO).

## BACKGROUND

The FMLA<sup>2</sup> allows eligible employees of a covered employer (e.g., NYC Transit) to take job-protected, unpaid leave, or to substitute appropriate paid leave, for up to a total of 12 work weeks in any 12-month period as long it is for a qualified reason.<sup>3</sup> FMLA leave does not have to be continuous; in certain cases leave may be taken on an intermittent basis or the employee may work a part-time schedule.

The administration of FMLA is the responsibility of the Subways Operations Support – Administration group (OSA), which created the FMLA Unit to receive and process FMLA leave applications for the department.

Generally, an employee who wishes to use FMLA leave must provide 30 days advance notice, verbally or in writing of the need for such leave when that need is foreseeable. The employee is then required to submit an application to the FMLA Unit and if requested, must also submit a certification completed by a medical provider to NYC Transit’s Office of Health Services (OHS). When 30-day notice is not feasible, the employee is still allowed to charge FMLA leave while seeking approval for the leave. However, the employee must provide notice as soon as possible and must also comply with applicable “call-out” and collective bargaining agreement procedures, as well as with NYC Transit time and leave policies. Without FMLA approval, employees may be subject to discipline for frequent and sudden absences, especially when sick leave is used.

The application for leave is reviewed by FMLA Unit staff for completeness and to determine the employees’ eligibility (i.e., meeting the length of employment and hours of service requirements). Unit staff then forwards the application to the BSC, where staff log the application into the PeopleSoft system, open an FMLA case on the employee, and notify the employee as to whether he/she is eligible. At this point the requested leave is not yet determined to be FMLA-protected. That decision is made by OHS upon the receipt and review of the medical certification from the employee. If OHS staff determines that the leave is needed for an FMLA-qualifying reason, OHS staff will notify the BSC and the BSC staff in turn will provide written notification to the employee.

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<sup>2</sup> 29 CFR, Subtitle B, Chapter V, Subchapter C, Part 825.

<sup>3</sup> Reasons that generally qualify for leave under the FMLA include: pregnancy-related health conditions; parental leave after the birth of a child; the placement of a child with the employee for adoption or foster care; the need to care for a family member (child, spouse, or parent) with a serious health condition; the employee's need to care for his or her own serious health condition that makes the employee unable to perform the functions of his or her job. Extended leave time of up to 26 weeks is allowed for the need to care for a family member, either in active military service or a veteran, with a serious injury or illness, as well as any qualifying exigency arising because the employee's spouse, son, daughter, or parent is a military member on or about to be called to active duty.

When an employee is absent for any reason, he or she must call in to the assigned location in accordance with the procedures specified in their bargaining unit: Division of Car Equipment (DCE) employees are required to call their assigned shop “car desk” to report their absences; Station Environment Department (Stations) employees are to call Operations Supports and Assignment Center; Service Delivery employees call the Rail Control Center; and Maintenance of Way (MoW) employees call their assigned reporting field office. The persons that answer these calls only note the employee’s absence and the type of leave the employee reported, e.g., FMLA. They are not in a position to check if the employee received approval for FMLA or has a balance of FMLA-protected leave because as explained below, NYC Transit’s two primary timekeeping systems do not have the capacity to provide that information in real time.

### FINDINGS

While OIG investigators substantiated the complaint that one employee was taking more FMLA leave than was approved and doing so well beyond the approved time frame, our audit revealed that the underlying problems were more systemic. Indeed, our analysis of Subway employees’ 2016-17 FMLA requests and usage identified 90 Subways employees who did not use FMLA leave in the manner provided for by the FMLA:

- Usage in Excess of the Maximum 12 Work Weeks of FMLA Leave – 33 employees used more than the allowed 12 workweeks (60 workdays) of FMLA leave during a 12-month period. Usage for the 33 employees ranged from 65 days to 260 days.
- Use of FMLA Without Approval – 53 employees were found to have taken from 1 day to 48 days of claimed FMLA-protected leave without approval. Although an employee is allowed to invoke FMLA leave when calling in their absence without first obtaining an approval for it, the employee must subsequently submit an application and medical certification.
- Excess Use and No Approval – Four employees never requested approval, or requested approval but did not receive it, and also exceeded the maximum-allotment of 60 days had they been granted approval.

As noted, OSA created the FMLA Unit to receive and process, FMLA leave applications for the Department of Subways. Additionally, the NYC Transit Labor Relations Department guidelines on FMLA implementation place the responsibility on that unit for monitoring and tracking FMLA usage by Subways employees. The FMLA Unit is staffed by four individuals who must handle all sick leave substantiation and FMLA administration for the entire department—consisting of approximately 30,000 people. According to OSA, given these limited staffing resources, management places a higher priority on processing employees’ FMLA requests in timely fashion than on monitoring usage to identify abuse.

Most significantly, Subways' ability to monitor FMLA usage in real time is that the two primary timekeeping systems in that department, ATS and UTS, do not provide individualized information as to an employee's FMLA approval status, cumulative FMLA leave usage, and/or remaining FMLA leave balance on a real time basis. Specifically, while an employee's individual absences, including FMLA-protected ones, can be generated for any given period, the leave is shown as individual daily timekeeping entries. For a reviewer to monitor leave usage, the leave data must be classified and the usage hours summed by type to produce data that can be used to determine whether an employee's FMLA-protected leave has exceeded the allotment.

As recently as October 2014, the tracking of FMLA leave was the responsibility of the individual Subways' operating divisions (i.e., RTO, DCE, MoW, and Stations). Each division reported daily FMLA absences to the Department of Labor Relations. The Director of Labor Cost Control sent the list to OHS to determine whether the FMLA usage was consistent with the approved medical certification. For usage without approval, Labor Relations investigated and took disciplinary action, as appropriate. However, in order to do so, each division needed to create and maintain its own tracking database/worksheets separately from the timekeeping systems. This effort was discontinued since it required additional personnel, which Subways' management did not believe was an effective use of limited resources.

At Metro-North Railroad, Long Island Rail Road, and Bridges & Tunnels, the agency's timekeeping system prevents employees from claiming FMLA leave if they have not applied and/or received approval for FMLA or have used up their allotted leave time. However, because NYC Transit's UTS and ATS do not provide such information, the persons that answer the employee's call only note the employee's absence and the type of leave the employee reported, e.g., FMLA. At the FMLA Unit level, NYC Transit officials assert that the Unit's limited staffing resources noted above do not allow them to evaluate the veracity of employee claims on a daily basis. As a result, Subways allows employees to use FMLA leave without first confirming their eligibility. While this allowance is understandable in light of the limitations described, it unwittingly enables employee misconduct given that OSA historically has not made efforts to confirm, even after the fact, that employees who have taken FMLA have actually received the proper approval.

Specifically, since neither the FMLA Unit nor the divisional level call-out locations have the information to verify the validity of the employees' asserted FMLA leave, employees have the opportunity to abuse FMLA leave by taking—unchecked—unauthorized/excessive time-off on short notice. At the same time, these employees avoid the requirements and potential disciplinary consequences, including suspension or dismissal for time and attendance violations.

For example, we found that 10 of the 53 employees who used FMLA without approval either charged their absences to the FMLA sick leave code or the FMLA "sick day without pay" code. Their incentive for wrongfully invoking FMLA protection is that without such protection their

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use of sick leave would have to be substantiated with doctor notes or be subject to the Sick Counseling and Control Program which could result in disciplinary action for unsubstantiated sick leave or, even if substantiated, for attendance-policy violations. The remaining 43 employees used various paid and unpaid FMLA leave types, including vacation, personal, holiday, additional vacation allowance, and personal business (unpaid). Again their incentive for wrongfully claiming FMLA is that otherwise they may be denied the leave time, considered absent without leave (AWOL), or charged with chronic/excessive absenteeism. AWOL and chronic/excessive absenteeism are also time and leave violations subject to Subways' disciplinary actions.

OIG staff discussed with OSA management our concerns that because of a lack of oversight, the FMLA and its protections are being abused and improper FMLA usage has gone—and is going—undetected and undeterred. We shared our finding that three percent of the employees who requested FMLA approval in 2016 and 2017 (90 Subways employees) were claiming FMLA leave without approval and/or taking excess FMLA leave. In our view, FMLA usage can be cost-effectively tracked and an appropriate level of oversight can be provided to sufficiently identify and help deter instances of abuse. This tracking can be done by analyzing FMLA usage data stored in Subways' timekeeping systems and comparing that to FMLA approvals on a periodic basis.

## **RECOMMENDATIONS**

Subways Operations Support – Administration should:

1. Analyze FMLA usage data stored in Subways' timekeeping systems and compare that to FMLA approvals on a periodic basis (e.g., quarterly). Any questionable usage identified should be referred to Labor Relations for further review. FMLA leave taken without approval or beyond the approved parameters should be retroactively accounted for in the timekeeping system and subjected to appropriate discipline.
2. Report back to OIG at the end of 2018 as to whether periodic FMLA monitoring efforts are adequate to identify and take action against employees who abuse FMLA leave.
3. Take action, as appropriate, on the FMLA abuses found during this review.

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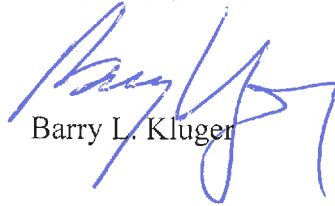
**Agency Response**

*NYC Transit's response to our preliminary report was received on July 18, 2018. Your letter indicated that the Department of Subways is taking action to address our findings and recommendations, including a review of the excess use of FMLA identified in this report. The Department of Subways will now review usage on an ongoing basis and adjust payroll entries as needed; implement improvements to the timekeeping system in order to readily identify employees with excess usage; review and adjust FMLA usage associated with application denials; and refer questionable usage to Labor Relations for further review and discipline as appropriate. Finally, the Department of Subways will provide OIG with update on the effectiveness of its FMLA monitoring efforts by the end of 2018.*

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We appreciate your attention to the issues we raised, as well as the courtesy and cooperation afforded to us at all times by your staff. Should you have any questions regarding this final report, please contact me or Executive Deputy Inspector General Elizabeth Keating at (212) 878-0022.

Very truly yours,



Barry L. Kluger

cc: Sarah Librera, Senior VP, Subways  
John Devine, Chief Administration Support Officer, Subways  
Kim Moore-Ward, VP Labor relations