

School Law

Alabama Association of
School Business Officials

February 2024

EMPLOYEE LEAVE LAWS

- Sick leave
- Personal leave
- Sick leave banks
- Catastrophic sick leave
- On-the-job injury
- Leave-of-absence
- Vacation leave
- Military leave
- Military leave differential pay

Sick Leave

- Full-time employees & adult bus drivers
- Earn one day per month of employment
- Unlimited accumulation of sick leave

Sick Leave

- Transfer of sick leave balance between Alabama public education institutions:
 - County and city boards of education,
 - Two-year postsecondary institutions,
 - Four-year colleges and universities,
 - and,
- Various other agencies but limited to only a few specified state agencies.

Sick Leave Definition

- The employee's absence from duty for
 - Personal illness
 - Incapacitating personal injury
 - Attending to an ill member of the **family**
 - Death in the **family**
 - Death, injury, or illness of another person who has unusually strong personal ties

Family Members

- **Illness** of a parent, spouse, child, **foster child currently in the care and custody of the employee**, brother or sister, or an individual with a close personal tie.
- **Death** of a parent, spouse, child, brother or sister, in-laws (father, mother, son, brother, daughter, sister), nephew, niece, uncle, aunt, grandparent or grandchild.

Sick Leave Legal Opinions

- Employee earns sick leave while on sick leave or other leave-with-pay.
- Sick leave may only be used for legal purposes. (Illness, injury, or death).
- Cannot be paid for unused sick leave.
- Sick leave cannot be transferred employees (except for catastrophic leave).

Sick Leave Legal Opinions

(continued)

- An employee that holds two different full-time jobs earns sick leave for each position.
- A doctor's excuse or other justification may only be required if there is probable cause to believe that sick leave is being abused or misused by the employee.

Personal Leave

- Any certificated employee.
- Support employees who work an average of at least 20 hours per week.
- At least 2 days with pay required.
- Up to 3 additional days:
 - Without pay
 - With pay
 - Partial pay (deduction for the cost of a substitute)

Personal Leave

- Unused days do not carry-over to the next year.
- An employee cannot be required to disclose their reasons for requesting personal leave.

Personal Leave

- Any employee has the option to convert unused personal leave days to sick leave at the end of the scholastic year if the unused days are funded (full pay or partial pay).
- A certificated employee has an additional option of being paid for unused personal leave days at the end of the scholastic year if the unused days are funded (full pay or partial pay).

Personal Leave Legal Opinions

- Personal leave days are considered funded even if the employee must pay for a substitute in order to receive the additional personal leave days.
- A certificated employee who chooses to be paid for unused personal leave days is to be reimbursed at the highest daily rate paid to substitute teachers.
- A board of education is not required to reimburse support employees for unused personal leave.

Personal Leave Legal Opinions (continued)

- Local boards of education do not have to grant the same number of personal leave days (beyond the 2 required) to support employees as they do to teachers.
- The cost of a substitute cannot be deducted from an employee converting unused personal leave to sick leave.

Sick Leave Bank

- A sick leave bank allows an employee to deposit (bank) some of their own sick leave for future use and borrow against some of their sick leave days to be earned in future employment with the school board.
- A participating sick leave bank member may borrow days from the sick leave bank when the member's non-banked sick leave days have been exhausted.
- The employee has to redeposit and restore the borrowed days to the sick leave bank.

Sick Leave Banks

- A local board of education will establish a sick leave bank plan upon request of 10% of the board's full-time employees.
- A secret ballot vote by employees will determine if the certificated employees and support employees have separate sick leave banks or one joint sick leave bank.

Sick Leave Banks

- Each sick leave bank will have a committee consisting of five employees.
- The sick leave bank committee will write the guidelines for the operation of the bank.
- The sick leave bank guidelines are to be approved by secret ballot vote of participating members.

Sick Leave Banks

- Sick leave bank committee
 - One member is appointed by the superintendent.
 - Four members are elected at the beginning of the school year to a one-year term by a secret ballot vote of the bank's members.
 - No member can serve on the committee for longer than 5 years.

Sick Leave Bank Guidelines

- Appropriate and beneficial guidelines in addition to those contained in the law, if they don't conflict with the law.
- Must contain a provision whether or not to allow employees, who have previously failed or refused to join the sick leave bank, with the option to join the sick leave bank upon the deposit of the required number of sick leave days.

Sick Leave Banks

- Forms and administrative procedures for the sick leave bank will be developed by the sick leave bank committee.
- Guidelines developed by committee must be approved by secret ballot vote of participating members.

Sick Leave Banks

- Sick leave bank guidelines must establish an equal number of sick leave days (not to exceed 5 days) for deposit by each participating member in order to become a member of the sick leave bank.
- Employee membership in the sick leave bank is voluntary.

Sick Leave Banks

- New employees are allowed to join the sick leave bank at the beginning of employment.
- If the new employee does not have the required number of sick leave days to join the bank, the appropriate number of sick leave days will be advanced to the new employee as the deposit to join the sick leave bank.

Sick Leave Banks

- The credit balance will be reduced by one day each month as the sick leave days are earned by the employee. After the credit balance is reduced to zero, sick leave days earned by the employee will be used to repay any outstanding loan to the sick leave bank.

Sick Leave Banks

Sick leave days withdrawn from the sick leave bank can only be used for the reasons allowed for sick leave.

Sick leave bank committee will investigate all alleged abuse of the sick leave bank.

Sick Leave Banks

An employee cannot owe more than 15 days to the sick leave bank, unless over 50% of the sick leave bank members vote to extend the limit.

Days are to be repaid to the sick leave bank monthly, as the sick leave day is earned is month by the employee.

Sick Leave Banks

- Sick leave bank balance on deposit:
 - Upon employee transfer to an eligible employer, the days are withdrawn and transferred with the employee.
 - Upon retirement, the days are withdrawn and made accessible for retirement credit.

Sick Leave Banks

If an employee who owes days to the sick leave bank resigns or is terminated, the value of each of the owed days will be deducted from the final paycheck at the employee's current daily rate of pay.

Sick Leave Bank Legal Opinions

- A member of a sick leave bank can give only the number of days to the sick leave bank allowed by law (not to exceed 5 days).
- If the final paycheck does not cover the value of the days owed to the sick leave bank when the employee leaves, the board must exercise due diligence and appropriate procedures to collect the debt.

Catastrophic Sick Leave

The sick leave bank committee will adopt guidelines for reverting unused donated days to the employees who donated the sick leave days.

Each sick leave bank committee is responsible for writing guidelines and administrative procedures for catastrophic sick leave. [*Should define "extended period of time".*]

Catastrophic Sick Leave

- Law covers sick leave bank members in:
 - All local boards of education
 - Two-year postsecondary institutions (*for now*)
 - DYS School District
 - Alabama Institute of Deaf and Blind
 - Alabama School of Fine Arts
 - Alabama High School of Math & Science
 - Alabama A&M University (*but no other universities*)



Catastrophic Sick Leave

An employee must be a member of a sick leave bank to donate or receive catastrophic sick leave days.

A donating employee does not have to be a member of the same sick leave bank as the recipient employee.

Catastrophic Sick Leave Defined

“Any illness, injury, or pregnancy or medical condition related to childbirth, **certified by a licensed physician which causes the employee to be absent from work for an extended period of time.**”

Catastrophic Sick Leave

- An employee may use catastrophic sick leave days for himself or herself or for the following covered persons:
 - Parent
 - Spouse
 - Child including a foster child currently in the care and custody of the employee
 - Brother or sister
 - Individual with a close personal tie

Catastrophic Sick Leave

- An employee must exhaust all sick and personal leave days before using catastrophic sick leave.
- An employee must borrow and utilize the maximum number of days from the sick leave bank before using catastrophic sick leave.

Catastrophic Sick Leave

Donated catastrophic sick leave may be used to repay days owed to the sick leave bank by the recipient employee.

Sick and personal leave days earned while the employee is utilizing catastrophic sick leave days must be exhausted before continuing to use catastrophic sick leave days.

Catastrophic Sick Leave

A member of a sick leave bank may donate a specific number of days (not to exceed 30 sick leave days) to a sick leave bank for a specific employee to use for a catastrophic illness.

The donating employee cannot be required to donate a minimum number of days.

Catastrophic Sick Leave

State laws do not contain a limitation on the number of catastrophic sick leave days that an employee can receive by donations from other sick leave bank members.

On-the-Job Injury

Full-time employees & adult bus drivers.

Each board of education will establish procedures and forms for notification of on-the-job injury.

Sick leave days will not be deducted for the days the employee is paid for an absence approved for on-the-job injury pay.

On-the-Job Injury Defined

- “Any accident or injury to the employee occurring during the performance of duties or when directed or requested by the employer to be on the property of the employer, which prevents the employee from working or returning to his or her job.” ***Section 16-1-18.1(a)(5)***

On-the-Job Injury

Within 24 hours after occurrence of the injury, the employee must make proper notification of the injury to the local superintendent of education (or school principal, if applicable) in accordance with the notification procedures of the local board of education.

On-the-Job Injury

In the event the employee is clinically unable to report the injury, the notification procedures shall permit the reporting of the injury by another person who is reasonably knowledgeable to make the notification of the injury.

On-the-Job Injury

Within 30 calendar days of notification of the injury, the local superintendent (or designee) will inform the injured employee about the board's approved procedures for on-the-job injuries and the employee's rights to request reimbursement from the State Board of Adjustment.

On-the-Job Injury

- The board policies may require medical certification from the employee's physician that the employee was injured and cannot return to work as a result of the injury.
- May also require the physician's statement that there is a reasonable expectation that the injured employee will be able to return to work.
- The superintendent may require a second opinion at the expense of the board.

On-the-Job Injury

- Once the superintendent determines that the employee has been injured on the job and cannot return to work as a result of the injury, the employee's salary and benefits will continue up to **90 working** days consistent with the employee's injury.
- The board may adopt a policy to extend the 90-day period.

On-the-Job Injury

- The employee may file for reimbursement with the State Board of Adjustment for unreimbursed medical expenses and costs incurred as a result of an on-the-job injury.
- Reimbursement to the employee shall be determined by the Board of Adjustment.

On-the-Job Injury

- Alabama State Board of Adjustment
www.bdadj.Alabama.gov
- Claims must be filed within one year from date of injury (two years for death).
- Claims for out-of-pocket medical expenses not paid by private insurance.
- Claims for lost wages and/or compensation for leave used.

On-the-Job Injury

- The school board may request state funds for reimbursement for the cost of substitutes for the employee injured on the job.
- The reimbursement is limited to 90 days for each approved on-the-job injury at the state-funded daily substitute rate.
- Reimbursement is contingent on annual legislative appropriations.

Leaves of Absences

- Full-time employees and adult bus drivers may be **paid** for *leaves of absences*.
 - For training.
 - When approved by the State Board of Education as beneficial to the state's educational objectives.
 - Employee absence for an unavoidable cause (other than sickness) while school is in session. (Limited to one week)

Leaves of Absences

- The board may grant a teacher an unpaid leave of absence for good cause for 1 year.
- The board may extend the unpaid leave of absence for a valid reason for 1 year.
- The unpaid leave of absence will not impair the continuing service status of the teacher.

Vacations

- The local board of education may adopt policies and procedures to provide **paid** vacations for full-time employees and adult bus drivers.

Military Leave

- State law provides for 2 types of paid military leave (in addition to *military leave differential pay*) — **federal military leave** and **state military leave**.
- The most common military leave taken by LEA employees is for training in the Alabama National Guard and the Reserves of the Armed Forces.
(Federal military leave)

Military Leave

- For **federal military leave**, employees of local boards of education are provided time away from work, at full pay, for no more than 168 hours (usually equivalent to 21 days) per calendar year.
- State law prohibits the board from paying the employee full pay for days exceeding 21 days of **federal military leave** per year.

Military Leave

- For **state military leave**, employees of local boards of education are provided time away from work, at full pay, for no more than 168 hours (usually equivalent to 21 days) at any one time.
- **State military leave** is occasionally used by the Governor to call up the National Guard for natural disasters.

Military Leave

- An employee may receive full pay for state and federal military leave in the same year.
- Employees on paid or unpaid military leave continue to accumulate service credit for any seniority, status, and rate of pay the employee would have obtained had the employee not taken military leave.

Military Leave

- The U. S. Congress provided clear protection for all members of the uniformed services, including National Guard and Reserve members, with the October 1994 passage of the Uniformed Services Employment and Reemployment Rights Act (**USERRA**).

Military Leave

- No law, policy, practice, etc. that would diminish the rights established in **USERRA** takes precedence over the provisions of **USERRA**.
- **USERRA** does not supersede, nullify, or diminish any law, policy, practice, agreement, or contract that provides greater rights or benefits to service members.

Military Leave Legal Opinions

- A local board of education may not:
 - Require the employee to schedule military leave so that it does not interfere with the school year or employee duties.
 - Restrict the taking of military leave for non-required duty or training.
 - Condition continued employment on the employee's foregoing military leave.

Military Leave Legal Opinions

- A local board of education cannot interfere with any employee's rights to join the reserves or guard, or interfere with the employee's membership in the reserves or guard.
- A local board of education may not deduct an amount equivalent to the compensation earned in the military during the time the employee is on military leave.

Military Leave Legal Opinions

- Military leave, paid or unpaid, counts as time spent on the job for any calculation, determination, promotion, or other decision that is based upon length of employment.

Military Leave Differential Pay

- State law provides for *military leave differential pay* for employees of local boards of education called into active service in the war on terrorism.
- The Alabama Adjutant General will determine if the active military service qualifies for *military leave differential pay*.

Military Leave Differential Pay

- An employee called into active service of the U. S. armed forces during the war on terrorism (which began September 11, 2001) is entitled to compensation from the local board of education if the basic pay for active military service is less than the salary the employee would receive if still working for the board.

Military Leave Differential Pay

- For purposing of calculating the *military leave differential pay*, the board salary includes supplements, pay raises, and salary schedule step increases the employee would receive if still working for the board.
- The employee is not due the *military leave differential pay* for any days that the employee receives full pay from the school board for accrued vacation leave or the 21-day annual military leave pay.

Military Leave Differential Pay

- *Military leave differential pay* is subject to state and federal tax withholdings but not employer or employee FICA or TRS matching.

Military Leave Differential Pay

- The employee does not earn sick leave or vacation leave for the days the employee receives the *military leave differential pay*.
- However, if the school board uses length of service to determine personal leave or vacation days, the time spent on active duty military service counts as service credit as if the employee is still on-the-job.

Military Leave Differential Pay

- The U. S. Congress provided clear protection for all members of the uniformed services, including National Guard and Reserve members, with the October 1994 passage of the Uniformed Services Employment and Reemployment Rights Act (**USERRA**).
- No law, policy, practice, etc. that would diminish the rights established in **USERRA** takes precedence over the provisions of **USERRA**.
- **USERRA** does not supersede, nullify, or diminish any law, policy, practice, agreement, or contract that provides greater rights or benefits to service members.

Military Leave Differential Pay

- Military pay in Act No. 2002-430 means basic pay and does not include special and incentive pays, allowances, or other fringe benefits.

Military Leave Differential Pay Legal Opinions

- Sick leave taken for authorized sick leave purposes before the employee's departure for active duty could be eligible for restoration pursuant to Act No. 2002-430.
- However, accrued sick leave cannot be used while the employee is on military leave.

Military Leave Differential Pay Legal Opinions

- Under federal law, it is illegal for an employer to require an employee to take vacation, annual, or similar paid leave for the performance of military duty.
- Annual (or vacation) leave taken voluntarily by the employee shall be restored. The restored leave can then be taken again but can not be restored again.

Jury Duty

- A full-time employee is entitled to the usual compensation for time spent –
 - Responding to summons for jury duty.
 - Participating in the jury selection process.
 - Actually serving on a jury.
- But not jury duty that occurs during time the employee is not scheduled to work.

Subpoenaed as Witness

- Employee is entitled to the usual pay when subpoenaed as a witness related to the employee's job.

Compensatory Time

- Boards may offer compensatory time in lieu of cash payments
- Comp time is NOT leave, but a form of compensation:
 - Entitled to use time as if using cash compensation
 - Must be able to use for personal use
 - Appointing authority may require use of comp time but cannot cause employee to forfeit annual leave at end of fiscal year
 - “Paid” at 1.5 times
 - Get 1.5 hours comp time for every hour of overtime

Comp Time and School Boards

- Common practice to have informal “comp time” plan
- Usually not comp time as referred to in FLSA
- Usually consists of trading days or hours – one for one
- Time records are informal and cannot cash out
- Informal comp time plans are fine *IF* employee does not work overtime
- Should not refer to as comp time and should not mix (maybe call flex time or just discretionary scheduling)
- Remember, cannot set off time across work weeks without paying overtime – perfectly fine to do it within work week

If You Want to Use Comp Time

- Agreement with employee *in advance* (before the overtime is worked)
- Can be policy
- Keep solid records
- Make sure calculated correctly – 1.5 hours for every overtime hour worked

CAN BE A GREAT TOOL IF MANAGED CORRECTLY

Family and Medical Leave Act (FMLA)

- Federal Law – passed by Congress
- Covers all public agencies and some private employers
- Provides leave for certain employees
- Amended by National Defense Authorization Act

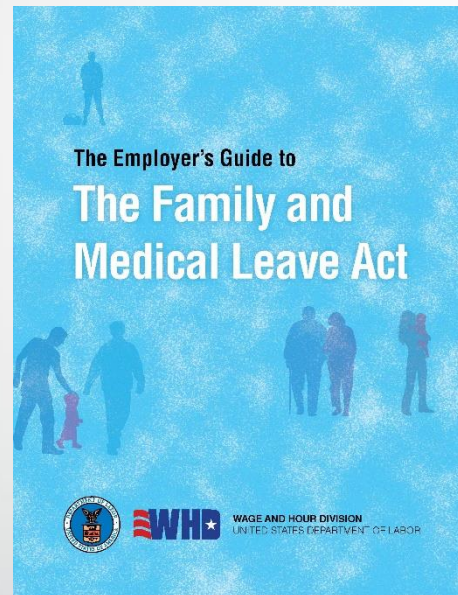
FMLA

Intent

- To balance the demands of the workplace with the needs of families
- To promote the stability and economic security of families
- To promote national interests in preserving family integrity
- To entitle employees to take reasonable leave for medical reasons or for family
- To provide that leave in a way that accommodates employees
- To provide that leave in accordance with equal protection
- To promote equal opportunity for men and women

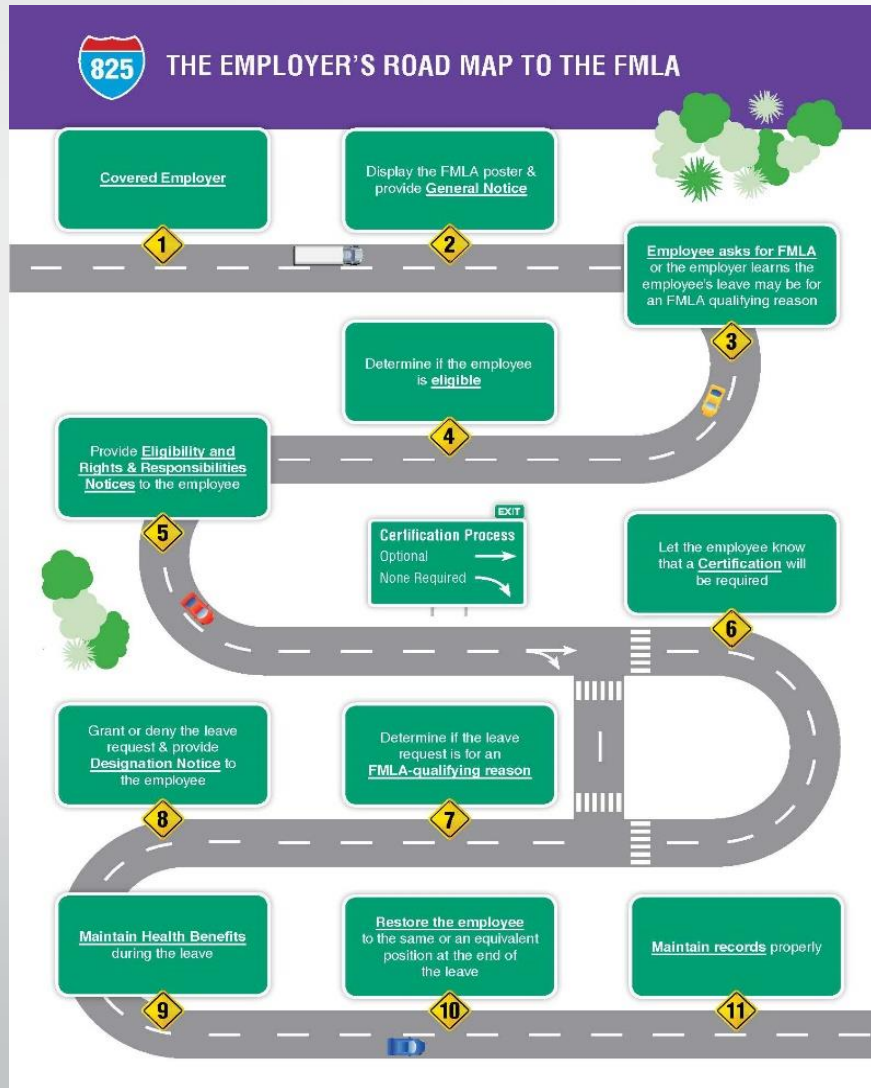
Enforcement and Guidance

- United States Department of Labor enforces
- In 2016, DOL issued comprehensive guidance in a user friendly format



- <https://www.dol.gov/whd/fmla/employerguide.pdf>

The DOL Road Map



Eligibility for FMLA

(1) The employee must have worked for the Board at least 12 months

AND

(2) Employee must have worked at least 1,250 hours during the 12 months prior to the start of the leave

12 Months With Employer

- Employee must have 12 months “history” with Board
- Often looked at in terms of weeks – 52 weeks
- Does not have to be 52 full weeks – instead, just have to work part of those weeks
- Test is whether employee was on payroll, even if not actively working
- Leave can count toward the 52 weeks

Hours Worked

Second Part of Eligibility Test

1,250 hours in 12 months is the eligibility threshold. How do you get to 1,250?

- In calculating whether an employee worked 1,250 hours, only count the hours actually worked
 - No credit for holidays, vacation, paid or unpaid leave
- Calculation method – Fair Labor Standards Act principles
- Count back from the date leave commences

Establishing the “Hours Worked”

- Have to keep accurate records – time sheets
- If Board does not have accurate records, burden is on Board to establish the employee did not meet the threshold
- Full-time teachers are deemed “to meet the 1,250 hour test,” unless the Board “clearly demonstrates” the employee did not work 1,250 hours

FMLA Leave

Does the Reason Qualify?

- Birth and care of newborn or adoption
- Serious health condition of employee
- Serious health condition of family member of employee

Birth and Care of Newborn

- Applies to mothers and fathers
- Applies to adoption and children in foster care
- Covers “placement” and application periods for adopted and foster children
- Entitlement ends after first year
- If both father and mother are employees, get combined leave of 12 weeks

Serious Health Condition

Illness, injury, impairment, or physical or mental condition that involves:

1. Inpatient care (overnight care) and follow up care
2. Continuing treatment by health care provider due to incapacity of more than three (3) consecutive days and any follow-up care that also involves:
 - (a) two or more visits to health care provider, or
 - (b) one visit to provider which results in a regimen of continuing treatment
3. Pregnancy
4. Incapacity due to a chronic , serious health condition, such as asthma, diabetes, epilepsy, etc.
5. Permanent or long-term incapacity for which treatment may not be effective
6. Absence to receive multiple treatments for a condition that would require more than 3 days of incapacity if left untreated (chemo, physical therapy, dialysis)

Serious Health Condition Regulatory Clarification

- “Continuing treatment” definition requires 3 consecutive days of incapacity AND either two follow up visits OR one follow up visit which results in a continuing regimen of care
 - Under the rule, the two follow up visits have to occur within 30 days, with the first visit within 7 days of first day of incapacity
 - If the “continuing regimen of care” applies, the first visit must have occurred within 7 days of first day of incapacity
- “Chronic health conditions” require at least two periodic visits to health care provider per year in order to trigger the Act

What Does All That Mean?

What Qualifies?

- Hospital stays
- Conditions which do not just come and go
- Pregnancy
- Terminal diseases, Alzheimer's, Parkinson's, Multiple Sclerosis, etc.
- Asthma, diabetes, epilepsy or other condition which may be controllable but does not go away
- Multiple treatments for the above treatments

What Doesn't Qualify?

- Routine physical exams, eye exams, dental exams
- A regimen of continuing treatment involving merely the taking of over-the-counter medications, bed rest, exercise, drinking fluids or other common treatment options
- Cosmetic treatments such as skin blemish treatments and plastic surgery (although complications from that may qualify)
- Common cold, flu, ear aches, upset stomach, minor ulcers, headaches, routine dental problems
- Absence due to substance abuse UNLESS it is treatment by a health care provider for that abuse

Doctor's Excuses

Can We Ask for Proof?

- Yes, employer can require certification related to serious medical conditions
- Employer has to give the employee at least 15 calendar days to get the certification

Certification - What is Sufficient?

Certification “shall be sufficient” if it states:

- The date the condition commenced
- Probable duration of condition
- “Appropriate” medical facts
- If care is for family member, statement that care is needed and estimate of time to provide care
- For serious health care of employee, statement of inability to perform job
- In case of intermittent leave, statement of medical necessity of the time and dates of future treatment
- In case of intermittent leave for family member, statement of necessity and schedule

Certification – What is Sufficient?

Some Changes in New Rule

- Limits those who can ask for certification to a health care provider, Human Resources professional, a leave administrator, or management official, but CANNOT be immediate supervisor
- May only ask for information on the certification form
- If certification is incomplete, specify what is missing in writing and give employee 7 days to cure the deficiency

[* Department of Labor has a form *]

Second Opinions

- Board may get a second opinion when it “has reason to doubt the validity of the certification”
- Board gets to choose the doctor
- Board has to pay for the doctor
- If Board’s doctor and employee’s doctor disagree, can get a tiebreaker opinion from a third doctor chosen by the Board and the employee
- Third opinion is final and must be paid for by the Board

Who Counts as a Health Care Provider?

- Licensed physicians
- Licensed podiatrists, dentist, psychologists, optometrists, and chiropractors (for limited purposes)
- Nurse practitioners, midwives, and clinical social workers
- Christian Science practitioners
- Any health care provider recognized by the Board or by PEEHIP
- Foreign providers (review rules carefully in that instance)

Immediate Family Member

- Can take leave to care for an immediate family member with a serious health condition
- Employer may request reasonable documentation concerning the family relationship

Who counts as a family member?


- Spouse: Husband or wife, as defined or recognized under state law for purposes of marriage – can include common law spouses
- Son or Daughter: Includes adopted children, stepchildren, child of person “in loco parentis” either under 18 or over 18 and “incapable of self care because of a mental or physical disability
- Parent: Biological parent or “in loco parentis”

(“in loco parentis” means those who brought up and raised the child; does not include parents “in law”)

Military Family Leave

Two Types

- Military Caregiver Leave
- Qualifying Exigency Leave



Military Family Leave Caregiver Leave

May take to care for a covered service member
with serious illness or injury

Serious Illness or Injury

Any injury or illness in the line of duty on active duty that may render the service member medically unfit or perform the duties of the member's office, grade or rank

Who can take the leave?

- Spouse, son, daughter, parent or next of kin
- Next of kin = nearest blood relative other than spouse, parent or child

Lists by priority

- (1) Blood relative with legal custody
- (2) Brothers and sisters
- (3) Grandparents
- (4) Aunts and uncles
- (5) First cousins

UNLESS, service member has designated someone else

Who can take the leave?

- Stepchildren and stepparents are included
 - Covers biological, adopted, foster children, stepchildren, legal wards or other *in loco parentis* relationships
- Age is not a factor
 - Covers whether above or below 18 years of age

Covered Service Member

- Current member of armed forces (including National Guard or Reserves)
- Who is undergoing medical treatment, recuperation therapy, is in outpatient status or on temporary disability retired list
- For serious injury or illness in line of duty on active duty

Leave Amount

- 26 weeks during “single 12 month period”
- 12 month period begins on 1st day of leave and ends 12 months later (regardless of way 12 weeks of FMLA is calculated)
- During this 12 month period, only 26 weeks of leave – includes FMLA leave (26 weeks combined)

Limitations

- Only get 26 weeks/12 months once per service member, per injury
- Entitled to same leave (26 weeks) for a different 12 month period and a different service member OR same service member with different injury
 - Example : Another injury after returning to duty, or another injury arising later from same incident

Certification

- May require health care provider to certify
- Has to be military provider, DOD Tricare Network provider, DOD non-network Tricare provider, or Veterans Affairs provider
- Follow FMLA procedures for authentication and clarification of certification

EXCEPT

- CANNOT require second or third opinions or request recertification

Military Family Leave Qualifying Exigency Leave

- Family member may take for a “Qualifying Exigency” arising out of deployment, active duty or a call to active duty of a service member in the National Guard or Reserves
- Regular service members are not included

Qualifying Exigency?

- Issues arising from short notice deployment (7 days or less of notice) for a period of 7 days
- Military events and related activities such as ceremonies, programs, events, support groups, etc.
- Childcare and related activities
- Making financial or legal arrangements
- Counseling sessions
- Leave to see service member on temporary leave
- Attending post-deployment activities
- Other

Leave Amount

- 12 work weeks during any 12 month period
- Works like standard FMLA leave
- Same 12 weeks for qualifying exigency leave and FMLA

Qualifying Exigency Leave

- Act itself delegates to the Secretary of Labor to define “qualifying exigency”
- Will be interpreted liberally
- May include providing childcare in emergency, going to meetings, etc., but not for routine events
- Includes a period of up to 90 days to be with a service member upon return from deployment

Certification for Qualifying Exigency Leave

Can ask for certification for qualifying exigency leave

- For a first request, Board may ask for active duty orders or like documents and dates of active service
- For each specific request, may ask for certification, including:
 - Facts supporting need for leave, including documents supporting
 - Beginning and ending dates
 - Whether leave will be intermittent or not
 - Frequency and duration of exigency
 - Contact information if exigency involves third party

[* Department of Labor has an available form *]

Taking FMLA

How Does it Arise?

1. Employee gets sick or hurt
2. Employee does not make it to work
3. Wants to use sick leave or OJI
4. Stays out for a considerable time
5. Runs out of sick days
6. Tries to join sick leave bank
7. Completely out of days – asks about FMLA leave
8. Coworkers report employee seen cutting grass or at another job
9. Board asks for certification
10. Doctor's letter is insufficient – not very specific
11. Board denies leave
12. Employee doesn't come to work
13. Employee is terminated



How to Make the FMLA Process Smooth (and Legal)

Make expectations clear
and be sensitive, thoughtful
and deliberate



Making Expectations Clear Employer Notice Obligations

New regulations combine all employer
notice sections into one section and
“simplifies” notice

Making Expectations Clear

Required Types of Employer Notice

- General FMLA Notice
- Eligibility Notice
- Rights and Responsibilities Notice
- Designation Notice

Making Expectations Clear

Notice of FMLA Rights

General FMLA Notice - Poster

- Post notice “explaining the Act’s provisions and providing information concerning filing complaints”
- Must be posted prominently
- Can use Department of Labor’s notice
- Can be electronic

Making Expectations Clear

General Notice of FMLA Rights

Written Guidance

- If have handbook or other written guidance on leave or benefits, have to include FMLA information
- If the Board does not have a handbook, policy or manual, still have to provide “written guidance” – may be distributed upon hiring
- Can use Department of Labor publications
- May be distributed electronically

Making Expectations Clear

Eligibility Notice

- Required when FMLA requested or when employer finds out leave may be FMLA qualifying
- Must inform of eligibility within 5 business days
- Don't have to do for subsequent requests in same 12 month period, if eligibility status is the same

Making Expectations Clear

Eligibility Notice - Contents

- Whether employee is eligible
- If not, the reason why not – number of months worked, number of hours worked, whether employee number is met
- Can be oral or in writing – **DO IT IN WRITING**

* May use Department of Labor Form *

Making Expectations Clear

Rights and Responsibilities Notice

- Must include with eligibility notice
- If leave has already begun, must be mailed to address of record

Making Expectations Clear

Rights and Responsibilities Notice - Contents

- Must be in language employee can read
- Must include
 - That leave will count against entitlement
 - Certification requirements and consequences of failing to submit
 - Substitution of paid leave provisions (whether required and conditions)
 - Any co-pay requirements for health insurance and consequences
 - “Key employee” provisions
 - Right to be restored to job
 - Potential liability for premiums if fail to return to work
 - Department of Labor has prototype notice
- Optional - may include information about periodic reporting and intent to return to work, but not required

Making Expectations Clear Rights and Responsibilities

- If information in Rights and Responsibilities notice changes, have to provide notice of changes
- “Employers are also expected to responsively answer questions from employees concerning their rights and responsibilities under the FMLA”

Making Expectations Clear Designation Notice

- Employer's responsibility to designate as FMLA – qualifying within 5 days of receiving enough information to determine if leave qualifies
- Only one notice required per reason per 12 months
- Must be written

* May use Department of Labor Form *

Making Expectations Clear

Designation Notice - Contents

- Whether FMLA qualifying
- Substitution of paid leave
- Fitness for duty/return to work requirements (including essential functions) unless in handbook – then can be oral notice
- Amount of leave counted against FMLA entitlement (if known)
 - If not known, at time of designation notice, required upon request of employee
 - May be communicated orally or in writing – can use pay stubs

Notice of FMLA Rights

- Cooperation required – employer expected to “responsively answer questions”
- Consequences of failure to follow notice provisions – cannot take action against employee for failure to comply with any provision required to be set forth in notice

The Flip Side . . .

- Employee also has a responsibility to provide notice
and
- The notice has to explain the reasons for the needed leave

Notice of Leave by Employee

Foreseeable Leave

- General Rule – Employee must provide 30 days notice if need for leave is foreseeable
- Notice does not have to specifically request FMLA leave, BUT has to be sufficient to apprise Board of need for “FMLA qualifying” leave
- If not clear, regulations place burden on employer to ask for more details so it can make the determination
- Can be verbal

Notice of Leave by Employee

Foreseeable Leave

- Scheduling procedures or intermittent leave -- should consult with employer so as not to “disrupt unduly” operations
- May require reasons for leave, anticipated duration and anticipated start
- Consequence : New regulations say leave may be “delayed or denied” if employee fails to follow notice requirements and no unusual circumstances justify the failure
- Regulations do not prescribe when may delay and when may deny-be careful!

Notice of Leave by Employee

Unforeseeable Leave

- General Rule – employee must provide notice “as soon as practicable” under the facts and circumstances of the individual case
- Employer policies generally establish what is practicable
- In person, telephone, telegraph, facsimile or electronically
- Can be given by employee or “spokesperson”

Notice of Leave by Employee Unforeseeable Leave

Contents of Notice

- Sufficient information to determine whether FMLA applies, including:
 - That condition makes unable to do job
 - Pregnant or hospitalized
 - Under continuing care of doctor
 - For military, employee is on active duty or call to active duty
 - Specific reasons under regulations
 - Anticipated duration of leave
 - If for care of family, that condition renders family member unable to care for self

Notice of Leave by Employee

Unforeseeable Leave

- First request need not mention FMLA
- After FMLA has been provided, employee must mention qualifying reason or FMLA – not enough just to call in “sick” without more information
- If employer cannot tell, employer shall ask for more information
- Failure to respond to employer request may result in denial of FMLA protection

Designation of Leave

- Once employee gives notice of need for leave, employer should respond promptly – make a decision and communicate it or ask for more information
- FMLA regulations require an employer to designate leave as “FMLA qualifying”

Penalty for Failure to Designate Leave New Regulations

When employee suffers individualized harm due to a failure to designate leave or provide notice, employer may be liable for interference with rights or other legal theories which are not specified

What To Do ?

Include provision in policy and written materials that paid or unpaid medical leave will count against FMLA leave and include statement in granting leave that it is FMLA qualifying

Payment for Leave

- FMLA leave is unpaid leave
- School boards have paid leave options for employees
 - Sick leave
 - Personal leave
 - On-the-job injury leave
 - Vacation leave (for some employees)
 - Unavoidable leave
 - Military leave
 - Sick leave bank
- Can require employees to use paid leave when taking leave under FMLA
- In that case, state and local level leave and FMLA leave will run concurrently

Benefits

- Even though FMLA provides for unpaid leave, have to continue benefits on same terms as before leave
- Most notable benefit – health insurance
- Same terms and conditions
 - Board funds its portion
 - If family coverage, employee has to pay his or her share
- Retirement plans, savings plans, elective plans

Special Concern - PEEHIP

- Most Board employees are not twelve-month employees – most work during school year
- Insurance with PEEHIP is for twelve-months
- Summer allocations are earned pursuant to 3/1 Rule
- PEEHIP manual has provisions on FMLA
 - Key Provision – Employees continue to earn Summer allocations under 3/1 Rule
 - Remember, these provisions do not modify FMLA -- do not use as a reference guide or statement of authority
- Do not use up allocation earned under 3/1 Rule during FMLA leave – these are applied at end of leave

Intermittent Leave

- FMLA does not require that leave be taken all at one time -- it may be taken “intermittently” under certain circumstances
 - For birth or adoption, only available, if agreed to
 - If due to serious health conditions of employee or family member, has to be a *medical need*
 - Medical need must be best *accommodated* through intermittent schedule

Intermittent Leave - Schools

- Special rules for schools – instructional personnel
- 20% rule – If the leave will cover more than 20% of the total number of days in the leave period, can require employee to:
 1. Take leave for particular periods, or
 2. Transfer the employee to a position where it is easier to accommodate intermittent leave

FMLA Leave – Schools

End of Academic Term Rules

- More than 5 weeks before end of term, may require employee to take leave through end of term, if:
 - A. Leave is more than 3 weeks or
 - B. Would return within 3 weeks of term end
- Less than 5 weeks before end of term, may require employee to take leave through end of term, if:
 - A. Leave is more than 2 weeks or
 - B. Would return within 2 weeks of term end
- Less than 3 weeks before end of term, may require employee to take leave through end of term, if leave is longer than 5 working days

Job Restoration

- Employee entitled to be returned to same or equivalent position upon return from FMLA
- Equivalent position = virtually identical in terms of pay, benefits and conditions, including privilege and status
 - If no longer qualified because missed a course, renew license, etc., have to give time

Equivalent Position Pay

- Entitled to cost of living and other unconditional pay raises
- Entitled to position with similar overtime

Fitness for Duty Certification

Serious Health Concerns

- Can adopt uniformly-applied policy for similarly situated employees to provide certification that they are able to resume work
 - Similarly situated = same occupation or same health condition
- Employer may require certification to specifically address employee's ability to perform essential functions of employee's job
 - In that case, have to provide a list of functions
- Can require certification for intermittent leave where reasonable job safety concerns exist (up to every 30 days)
- If requiring fitness duty or "return to work" certification, have to advise employee of requirement in designation notice

Equivalent Position Benefits

Benefits

- Must be resumed at same level as when leave started
- Can not require “requalification” or re-enrollment
- Not required to permit accrual of additional benefits (seniority, retirement, sick days) while on leave

Equivalent Position Terms and Conditions

- Must be reinstated to same or geographically proximate work site (unless employee requests or agrees to another)
- Same or equivalent work schedule
- Same or equivalent opportunity for bonuses, profit sharing and similar payments

* *

No greater right to job or benefits than if he or she had been continually employed

Retaliation / Interference With Rights

- Interference with rights
 - unlawful to “interfere with, restrain, or deny the exercise of or the attempt to exercise,” rights under FMLA
- Discrimination
 - cannot discharge or discriminate for asserting FMLA rights
 - cannot fire or discriminate for filing a charge or making complaints under FMLA, for participating in an investigation, or for testifying about FMLA rights
- Key provision of the Act
 - Can subject Board to damages, monetary losses, liquidated damages, equitable relief (which can include promotions and reinstatement) and fees and costs

FORMS

- Department of Labor General Notice “Poster” (Pub. 1420)
- Notice of Eligibility & Rights & Responsibilities (WH-381)
- Designation Notice (WH-382)
- Certification forms
 - Employee’s Serious Health Condition (WH-380-E)
 - Family Member’s Serious Health Condition (WH-380-F)
 - Serious Injury or Illness of Covered Service Member (WH-385)
 - Qualifying Exigency for Military Family Leave (WH-384)
- Frequently Asked Questions about Revisions from DOL
 - FMLA
 - Military Family Leave

Americans With Disabilities Act

- The ADA protects employees and prospective employees with disability from discrimination by employers based on their disabilities. All boards of education in Alabama are subject to the ADA since all boards have more than fifteen employees.
- The ADA prohibits employers from engaging in discriminatory and other unlawful practices in the hiring, managing and termination process of disabled individuals and imposes an affirmative obligation on employers, in some instances, to reasonably accommodate disabled applicants and employees.
- Employee must request the accommodation.
- To fall within the scope of the ADA, a person must have a disability and be a qualified employee or applicant.

Americans With Disabilities Act

- “Disability” is defined as follows:
 - a physical or mental impairment that substantially limits one or more major life activities;
 - a record of such impairment; or
 - being regarded as having an impairment.

In addition, the employee or applicant must be capable of performing the essential job functions with reasonable accommodations if necessary.

Americans With Disabilities Act

- Reasonable accommodation does not include
 - hiring additional employees;
 - creating a new job;
 - reallocating the “essential functions” of the job;
 - reallocating duties to other employees so they must work harder or longer than the impaired employee;
 - allowing indefinite light duty; and
 - allowing an indefinite leave of absence.

How it works.

- Most cases are “circumstantial” cases, which means that based on all the facts, it would seem that discrimination was the reason for an employment decision. In these cases, to establish a case, the Plaintiff must prove the following:
 - belong to a protected class
 - was qualified for the position they applied or held
 - they were subjected to an adverse job action
 - they were replaced by someone outside the protected group

How it works.

- The burden shifts to the defendant to articulate some legitimate non-discriminatory reason for the employment decision. If a legitimate, non-discriminatory reason is established by the employer, the burden shifts back to the employee to prove that the alleged legitimate reason is a front or pretext to hide discrimination.

Good Management is Essential

- Promotes consistency
- Consistency promotes fairness
- Minimizes subjectivity
- Subjectivity impedes fairness

But How?

- Start with the basics – framework for employment
- What do people do, what are they expected to do, when do they need to be there?

Schedules

- Typically left to local administrators
- Should have a document showing what schedules are
- Communicate the schedule to employees!!
- How do you deal with extracurricular activities?
- How much flexibility do you want to allow?
- Needs to be consistent and clear

You Can't Enforce What You Don't Explain!

- What work hours are
- How to account for being there
- That records have to show when at work
- What signing a time sheet/accounting for leave means
- How to address inaccuracies
- Leave issues
- Medical Issues

The Basics of Attendance

- Attendance is necessary and essential
- Being on time is necessary and essential
- Have to either be there or be on leave
- Leave can only be used for authorized reasons-needs to be certified
- Board needs to be notified when won't be there
- Relate all of this back to core educational function- Teaching and Learning

QUESTIONS... ?