DEALING WITH EMPLOYEE LEAVE & MEDICAL ISSUES

Presented by:

Melanie Charleston
mcharleston@wabsa.com

&

Haley Turner
hturner@wabsa.com

WALSH, ANDERSON, GALLEGOS, GREEN and TREVIÑO, P.C.

ATTORNEYS AT LAW
<table>
<thead>
<tr>
<th>TYPE</th>
<th>LENGTH</th>
<th>ELIGIBILITY</th>
<th>PAID</th>
<th>OTHER</th>
</tr>
</thead>
<tbody>
<tr>
<td>State Personal Leave</td>
<td>5 days / year</td>
<td>▪ All district employees;</td>
<td>Yes</td>
<td>▪ Employees cannot be required to earn state leave days before use;</td>
</tr>
<tr>
<td></td>
<td></td>
<td>▪ No restriction on reason for use</td>
<td></td>
<td>▪ Policy may not limit reasons for use;</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td>▪ Policy may not dictate order of use with other types of paid leave;</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td>▪ state and local.</td>
</tr>
<tr>
<td>State Sick Leave</td>
<td></td>
<td>▪ Accumulated prior to May 30, 1995;</td>
<td>Yes</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>▪ Use only for personal or immediate family illness, emergency or death.</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Local Paid Leave</td>
<td>Local policy</td>
<td>▪ Local policy</td>
<td>Yes</td>
<td>Local policy may require employees to earn local leave before use.</td>
</tr>
<tr>
<td>Assault Leave</td>
<td>Maximum of 2 years or # of days necessary to recuperate.</td>
<td>Yes</td>
<td>Must immediately place on paid leave pending investigation of claim and</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td>determination of eligibility.</td>
</tr>
<tr>
<td>Temporary Disability Leave</td>
<td>Maximum 180 days;</td>
<td>▪ Employee recuperating from physical injuries resulting from assault during</td>
<td>Yes</td>
<td>Medical certification required confirming:</td>
</tr>
<tr>
<td></td>
<td>Maximum length may be</td>
<td>employee’s duties.</td>
<td></td>
<td>▪ Inability to work;</td>
</tr>
<tr>
<td></td>
<td>set by local policy</td>
<td></td>
<td></td>
<td>▪ Date leave begins;</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td>▪ Date of return.</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td>ISD not required to maintain health premium unless TDL runs concurrently</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td>with F&amp;ML/other leave with continued benefits.</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td>Reinstatement rights</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td><strong>No termination or nonrenewal during leave.</strong></td>
</tr>
<tr>
<td>Family &amp; Medical Leave</td>
<td>12 weeks in 12 months</td>
<td>▪ Employed for at least 12 months;</td>
<td>No</td>
<td>▪ Notice requirements;</td>
</tr>
<tr>
<td></td>
<td></td>
<td>▪ Has worked at least 1,250 hours in previous 12 months;</td>
<td></td>
<td>▪ District may require medical certification;</td>
</tr>
<tr>
<td></td>
<td></td>
<td>▪ Has a “qualifying event” for which he/she needs Family &amp; Medical Leave.</td>
<td></td>
<td>▪ District pays its portion of health premiums;</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td>▪ Reinstatement rights</td>
</tr>
<tr>
<td>Catastrophic Leave Bank</td>
<td>Local policy</td>
<td>▪ Not required by law;</td>
<td>Yes</td>
<td>Restrictions and requirements determined by local policy</td>
</tr>
<tr>
<td>Workers’ Comp</td>
<td>Workers’ comp is NOT a</td>
<td>▪ Leave eligibility is not based on eligibility for workers’ compensation</td>
<td></td>
<td>ISD not required to maintain health premiums unless required by other</td>
</tr>
<tr>
<td></td>
<td>form of leave, nor does</td>
<td>benefits.</td>
<td></td>
<td>law (ex: F&amp;ML running concurrently).</td>
</tr>
<tr>
<td></td>
<td>it entitle an employee</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>to leave.</td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>
I. **TYPES OF LEAVE** - DEC Legal/Local, DECA Legal

A. **State Personal Leave**

The State has mandated a minimum of five days of paid leave per year for all school district employees, with no limit on accumulation. State personal leave is transferable between school districts. Districts may provide additional personal leave days by local policy.

Section 22.003(a) gives a board of trustees the authority to adopt a policy governing the use of personal leave, both state and local, but specifically prohibits such a policy from restricting the purpose for which the leave may be used or the order in which the leave may be used in relation to any other personal leave provided by a district. TEA has interpreted the statute to restrict a board’s policy making authority to reasonable restrictions on the use of the leave. TEA has also stated that a district may not restrict an employee’s entitlement to state personal leave by requiring that the employee earn the leave days before using them. All district employees are entitled to all state personal leave days at the beginning of the school year.

B. **State Sick Leave**

State paid leave accumulated prior to May 30, 1995 by school district employees. This leave can be used only for the employee’s personal or family illness, emergency, or death in the immediate family. State sick leave is transferable among districts.

C. **Local Leave**

School districts can provide more than the minimum amount of personal leave required by law, and many do, in what is commonly called “local leave.” All details and specifics regarding local leave are determined by the board of trustees. As opposed to state personal leave, the district can limit the reasons for which local leave may be taken, how and when.

D. **Assault Leave**

An employee who is physically assaulted during the performance of the employee’s regular duties, and sustains physical injuries as a result, is entitled to paid leave in addition to all other leave provided by law or the district. Psychological injuries are not covered. *Cavazos v. Raymondville ISD* (Comm’r Educ. 2009). The amount of leave provided is equal to the number of days necessary to recuperate from all physical injuries sustained as a result of the assault or a maximum of two years from the date of the assault. The Commissioner has stated that the number of days needed to recuperate is equal to “the number of days of leave necessary to recover health or strength from all physical injuries sustained as a result of the assault.” *Harper v. Houston ISD* (Comm’r Educ. 2009).

If an employee requests assault leave, the district must immediately place the employee on paid leave pending an investigation of the employee’s claim. If the investigation shows that (1) there is no injury which requires recuperation; or (2) an injury did occur but did not result from an
“assault” as defined in the Texas Penal Code, the district may change the assault leave status and charge the leave used by the employee thus far against the employee’s accrued personal leave or against the employee’s pay if insufficient accrued personal leave is available. An employee is physically assaulted if the person who injured the employee could be prosecuted for assault or, could not be prosecuted only because the person’s age or mental capacity makes the person nonresponsible for purposes of criminal liability.

If the investigation shows that there is an injury which entitles the employee to assault leave, the employee remains on paid leave for recuperation until released by his/her doctor to return to work. Days to recuperate would be needed if (1) the job could not be done because of the injury; (2) returning to work would worsen an injury; or (3) if additional days would facilitate the healing process. Harper v. Houston ISD (Comm’r Educ. 2009).

Because assault leave may result in a claim for workers’ compensation benefits and use of Family and Medical Leave, assault leave decisions can be tricky and should involve the district’s legal counsel.

E. Temporary Disability Leave (“TDL”)

This is a State mandated, unpaid leave available to a “full-time educator” whose medical condition interferes with the performance of the educator’s regular duties. This encompasses pregnancy and pregnancy-related conditions. An “educator” is defined as a person required to hold certification from SBEC, such as a principal, assistant principal, counselor, librarian, diagnostician, teacher, or classroom aide. However, some districts have extended TDL to all employees through local policy.

A board may establish a maximum length of TDL by local policy, which may not be less than 180 days. An employee must make a request for TDL to the superintendent, along with a doctor’s statement confirming the employee’s inability to work, the date the leave is to begin, and the probable date of return as certified by the employee’s doctor. Failure to provide such medical documentation, regardless of the employee’s eligibility, will deprive the employee of the protections of temporary disability leave.

1. Job Preservation during Temporary Disability Leave

The district cannot terminate or nonrenew an employee while s/he is on TDL. An employee returning to work from TDL is entitled to an assignment at the school where the employee was formerly assigned, subject to the availability of an appropriate position. If no appropriate position is available at the time of the employee’s return, the employee must be placed on active duty no later than the beginning of the next school year at the school where the employee was last assigned. However, a returning employee may be placed at a different school if the principal of that school voluntarily approves the assignment upon return from TDL.
The employee must give the superintendent notice of his or her “desire” to return to active duty at least 30 days before the expected date of return. The notice must be accompanied by a doctor’s statement certifying the employee’s fitness to resume regular duties.

2. **Not Required to Maintain Health Premium**

Because TDL is unpaid, districts are not required to contribute to the employee’s health insurance premium during leave. However, the employee may continue the group health care coverage by paying the monthly premium on their own. The district may be required to continue health premiums if another type of leave is running concurrently with TDL for which health coverage must be maintained, such as paid leave or Family & Medical Leave.

3. **Voluntary v. Involuntary TDL**

There are two types of TDL. **Voluntary TDL** must be requested by the employee along with submission of the medical and leave information previously discussed. The district is under no obligation to notify an employee about his or her possible eligibility for TDL (in contrast to the affirmative notice obligations required under the FMLA). **Involuntary TDL** must be authorized by the Board after consideration of a physician’s report and the Board’s determination that the educator’s condition interferes with the performance of regular duties. If the administration believes that an employee has such a condition and the employee has not voluntarily requested TDL, the administration may place the employee on paid administrative leave pending completion of a medical examination paid for by the district. During involuntary TDL procedures, the educator must be provided with an opportunity to present information relevant to his or her fitness to continue the performance of regular duties.

F. **Workers’ Compensation Benefits**

**REMEMBER, workers’ compensation benefits do not include leave,** only temporary income benefits. Employees who have filed a workers’ compensation claim or who are currently receiving workers’ compensation benefits are entitled to leave to the same extent as any other employee would be, without regard to any workers’ compensation issues. State law requires school districts to provide workers’ compensation benefits for their employees. Such benefits apply to any work-related illness or injury of any district employee and may involve medical treatment and/or partial income benefits. Employees are eligible for applicable benefits for up to a maximum of 401 weeks. An employee who is out on workers’ compensation is responsible for payment of health insurance premiums unless Family and Medical Leave is running (or another type of leave which requires the district to maintain health insurance premiums). If paid leave, such as assault leave, is used while workers’ compensation benefits are being received, the employee may not receive more in compensation from the collective types of leave in combination with workers’ compensation benefits, than the employee’s usual compensation.
A school district may not require an employee who has filed a workers’ compensation claim to use paid leave first, before using unpaid leave. An employee receiving workers’ compensation benefits may choose to receive partial income benefits and take unpaid leave instead of using paid leave. The employee’s election should be recorded by completion of a workers’ comp benefits election form.

Although most disputes over employee leave issues must be handled through the grievance process before being appealed to the Commissioner of Education and eventually civil court, a claim that the district retaliated against an employee based on his or her filing of a workers’ compensation claim is an exception to this general rule. An employee does not have to file a grievance alleging workers’ compensation retaliation before filing suit against the district in state court.

G. **Family and Medical Leave (F&ML)**

The Family and Medical Leave Act (FMLA) is a federal statute which provides employees with up to 12 weeks of unpaid, job-protected leave in a 12-month period, as that period is defined by local policy. The FMLA applies to employers with at least 50 employees within 75 miles of the employee’s work location; most Texas school districts are covered by the FMLA. In order to be eligible for F&ML, an employee must have at least 12 months of employment with the district, and at least 1,250 hours worked in the past 12 months. Employees can use their 12 weeks of F&ML for any combination of eligible reasons or for one single reason; employees can take one consecutive 12 week period of leave, or may split it up into chunks of weeks, days or hours. For the purpose of determining whether an employee has worked 1,250 hours, only hours actually worked are counted; any paid or unpaid leave is not included in the calculation.

1. **Employee Must Have a “Qualifying Reason” for F&ML**

**Leave for the birth and/or care of the employee’s newborn child:** Both mother and father are entitled to leave under this qualifying reason, both for the birth of the child and care after birth. Available F&ML under this qualifying reason expires 12 months after birth. Some qualifying reasons are related to pregnancy but covered by another provision: An expectant mother may take F&ML prior to the birth for incapacity due to pregnancy, even if she is not receiving treatment from a healthcare provider and/or the absence is brief (e.g., severe morning sickness which is a side effect of the pregnancy), prenatal care, or a serious health condition resulting from pregnancy. A husband is entitled to leave to care for his pregnant spouse who is incapacitated (ex: on bed rest), if needed to care for her during prenatal care, or following the birth if the spouse has a serious health condition.

A husband and wife who are both employees of the same district may be limited to a combined total of 12 weeks of leave taken for the birth of a child or to care for a newborn. If each spouse takes 6 weeks for the birth and care of the newborn, neither are entitled to any more F&ML for the care of the child, but each has 6 remaining weeks which may be used for any other qualifying reason.
Leave for placement of a child for adoption or foster care: An employee is entitled to F&ML for the placement of a child in their home for adoption or foster care. This also includes leave to take legal guardianship of a child. Leave may begin before placement if absence from work is required for the placement to proceed. Available F&ML leave under this qualifying reason expires 12 months from the date of placement. A husband and wife who are both employees of the same district may be limited to a combined total of 12 weeks of F&ML for this qualifying reason.

Leave to care for a spouse, son, daughter, or parent with a serious health condition: The required parent-child relationship for this qualifying reason includes biological, adoptive, step or foster parent, or any other relationship in which a person stood in the place of caregiver before the child reached 18 years of age. This does not include parents-in-law. An employee’s own child for whom they request leave must be 17 years of age or younger, unless the child is incapable of self-care because of a mental or physical disability. The child must require active assistance or supervision for daily self-care (e.g., grooming, hygiene, dressing, eating, cooking, cleaning, paying bills, etc.).

The care needed to be given to a family member under this qualifying reason includes care for basic medical, hygienic, or nutritional needs or safety, or transportation to the doctor. Care also includes psychological comfort and reassurance that would benefit a family member receiving in patient or home care. Care may also include making arrangements for changes in care. The employee doesn’t have to be the only family member or caregiver available to care for the person in order to qualify. An employee may take F&ML to care for a family member receiving treatment for substance abuse if the condition and treatment fit the definition of “serious health condition.”

Leave when the employee is unable to work because of a serious health condition: The employee must suffer from a serious health condition and must be unable to perform the functions of his or her position as a result. TASB Policy DECA (Legal) outlines the requirements of certification of an employee’s serious health condition.

Prior to returning to work, the employee should be required to provide a fitness for duty certification from the treating physician. Check your district’s DEC (Local) policy to determine what is required when an employee returns from F&ML. If the district will require the employee to provide a certification that s/he can perform all the essential functions of the position, it should provide the doctor with a list of the employee’s essential functions and/or a copy of the employee’s job description.

Qualifying Exigency Leave: Employee’s spouse, son, daughter, or parent is a member of the military, and is on active duty or has been called to active duty: This covers recent veterans with serious illnesses or injuries, and members of the regular Armed Forces, National Guard and Reserves deployed to a foreign country. There must also be a “qualifying exigency,” of which there are eight:
1. The military member is given notice seven or less days prior to deployment. Leave is limited to seven calendar days beginning from the date of notification.

2. To attend official programs/events sponsored by the military or other informational programs sponsored by the military or American Red Cross and related to the active duty of the military member.

3. Situations involving the military member’s child which arise as a result of the active duty status, including the need to arrange for alternative childcare, to enroll or transfer the child to a new school, or to attend meetings with school staff regarding the child.

4. To make or update the financial or legal arrangements to address the active duty status, or to act as the military member’s representative before government agencies regarding military service benefits while on active duty status and for 90 days afterwards.

5. To attend counseling, the need for which arises from the active duty status, for the employee, the military member or child of the military member.

6. To spend time with the military member who is on short-term, temporary, or rest and recuperation leave during deployment.

7. To attend arrival ceremonies, briefings, or other official events sponsored by the military for up to 90 days after termination of active duty status, or to address issues arising from the death of the military member while on active duty status.

8. To address other issues arising out of the military member’s active duty status as long as the employer and employee agree that the leave is a qualifying exigency, as well as to the timing and duration of the leave.

Military Caregiver Leave: Leave to care for employee’s spouse, son, daughter, parent, or next of kin who is a current member of the Armed Forces with a serious injury or illness: This covers recent veterans with serious illnesses or injuries, and members of the regular Armed Forces, National Guard and Reserves deployed to a foreign country, and entitles the employee to up to 26 workweeks of unpaid leave during a 12-month period in order to care for the service member. The 12-month period starts on the date the leave begins, regardless of whether board policy measures the 12-month period differently for other qualifying reasons. No more than 12 of the 26 work weeks may be used for other qualifying reasons. The military member must be on the temporary disability retired list for a serious injury or illness for which he or she is undergoing medical treatment, in outpatient status at a military treatment center, or otherwise on the temporary disability retired list. A “serious injury or illness” is incurred in the line of duty and may render him or her medically unfit to perform the duties of the office, grade or rank. This qualifying
reason also includes an employee who is the “next of kin” to a current service member – the nearest blood relative who is not a parent, child, or spouse.  

2. Availability of Intermittent or Reduced Schedule Leave

Intermittent leave: Leave taken in separate periods of time due to a single illness or injury, rather than leave taken for a continuous period of time. Periods of intermittent leave may range anywhere from one hour to several weeks or more, but always less than 12 weeks. For example, an employee may periodically take leave for several days at a time in order to receive chemotherapy treatment.

Reduced schedule leave: A temporary change in the employee’s schedule, usually involving reduction from a full-time to a part-time schedule. For example, an employee whose physician certifies that his condition limits him to a 5-hour work day, instead of his normal 8-hour day, could request F&ML leave in the form of a reduced schedule.

The general rule with regard to intermittent and reduced schedule F&ML is that the two types of leave are available for “medical necessity,” including planned and/or unanticipated medical treatment of the serious health condition, or for recovery from treatment or the condition itself. It also includes providing care or psychological comfort to a family member with a serious health condition. Leave taken by non-instructional district employees is covered by this general rule. Non-instructional employees include teacher assistants or aides who do not teach/instruct as part of the principal function, as well as custodians, bus drivers, maintenance employees, food service employees, counselors, curriculum specialists, psychologists and other non-instructional positions.

Special rules apply to instructional employees who request intermittent or reduced schedule leave. Instructional employees are those employees whose main function is the teaching and instruction of students, including teachers, coaches, driving instructors, and special education assistants, such as signers for the hearing impaired. See Questions F and F, for a more in-depth discussion of rules applying to instructional employees.

3. Requesting Medical Certification from Employee

Districts may require that the employee provide medical certification of a serious health condition from the employee’s healthcare provider. Medical certification can be required at several points in the F&ML process:

(1) when a request for foreseeable leave is made;

(2) within two business days after learning that an employee is on leave for a personal or family illness that qualifies as a serious health condition;

(3) at 30-day intervals when leave extends beyond 30 days; and
(4) when the employee returns to work.

Requests for medical certification should be made to the employee in writing – the district may include this requirement in its eligibility notice to the employee, or another form of written request – and should set a reasonable and specific date by which the employee must submit the requested certification. If an employee fails or refuses to provide the required/requested medical certification, the FMLA, including all employee protections and district obligations, is not triggered.

**Question: What if a teacher has responded properly to all of the district’s requests for medical certifications, and the high school principal sees her swing dancing at a local bar in spite of her broken leg? What can the district do?**

If a district has a legitimate reason to doubt the veracity of an employee’s medical certifications, it may require a second and third opinion of the employee’s condition from a health care provider of the district’s choosing. The district is required to cover the cost of the second and third opinions. The third opinion is final.

4. **Required Notices under the FMLA**

The FMLA obligates the employee to give timely notice of his or her need for F&ML, depending on whether the need is foreseeable or unforeseeable. Regardless of whether the leave requested is continuous, intermittent, or on a reduced schedule basis, the employee is only required to give notice once for each period of leave (for example, if employee plans to be absent 7 days over an 8-week period, only one notice is required). Employees must follow the districts normal procedures for requesting leave.

**Foreseeable leave:** The employee is required to provide the district with at least 30 days of advance notice, or notice as soon as practicable if the need for leave becomes foreseeable less than 30 days before the leave is to begin, which is generally the same day or the next business day.

**Unforeseeable leave:** The employee is required to provide the district with notice “as soon as practicable,” if the need to take leave is not foreseeable. This generally means at least verbal notice to the employer within one or two days of learning of the need.

The FMLA puts the obligation on employers to give employees specific notice regarding their rights and obligations, in addition to those general notices required to all employees – such as the posting in the faculty lounge or inclusion in the Employee Handbook. The three types of notice listed below must be provided to the employee within five business days of the request for leave or from the time the district becomes aware of the employee’s possible qualification for F&ML.
<table>
<thead>
<tr>
<th>Type of Notice</th>
<th>Requirements</th>
</tr>
</thead>
<tbody>
<tr>
<td>Eligibility Notice</td>
<td>Written notice of whether the employee may be eligible under the FMLA must be given within 5 business days of the date when the employee requests F&amp;ML or the district becomes aware that employee’s need for leave may be for an FMLA-qualifying reason. The notice must state whether or not the employee is “eligible” under the Act, and if not, must state the reason why.</td>
</tr>
</tbody>
</table>
| Rights & Responsibilities Notice | Each time eligibility notice is given, the district must give written notice laying out the rights and responsibilities of the employee, and explaining the consequences of failing to meet those responsibilities. The notice must include the following notices:  
  - The leave may be designated as F&ML and taken out of the employee’s 12-week allotment;  
  - Statement of any requirement to provide certification to the district, and consequences of failure to comply;  
  - Whether the district will require the use of paid leave during the F&ML (see DEC Local), and the employee’s right to choose this option if the district does not require it;  
  - Any requirement that the employee continue to make payments for current benefits and consequences of failure to do so;  
  - Employee’s right to maintenance of benefits during leave and restoration to equivalent position upon return;  
  - Employee’s potential liability for payment of health insurance premiums paid by the district during the leave if the employee fails to return after the leave period; and  
  - Any other duties or responsibilities. |
| Designation Notice             | The district is responsible for designating leave as FMLA-qualifying and giving notice to the employee of the designation or decision not to designate. This notice must be given within 5 business days after that time when the district has enough information to determine whether the requested leave is being taken for an FMLA-qualifying reason. The district must also inform the employee at this time if it requires the use of paid leave concurrent with F&ML (see DEC (Local)). |

**What consequences are tied to the employer notice requirements?** A district’s failure to comply with any of the notice requirements may constitute denial of an employee’s rights under the Act.

Although the employee is required to initiate F&ML by timely requesting leave for a qualifying event, the burden for determining whether the requested leave should be characterized as FMLA leave is on the district. Two of the biggest problems in the area of F&ML are (1) failing to identify the leave as qualifying under the FMLA, and (2) failing to notify the employee of that determination and the employee’s rights under the district’s legal and local policies. If the reason for an employee’s need for absence is known to the district and constitutes a “qualifying event,” then the district has an affirmative obligation under the FMLA to place the employee on F&ML, provide notification of the employee’s rights and obligations. The district should have procedures in place for reporting...
employee illness or absence to the appropriate persons who are responsible for making such decisions. If a supervisor knows that an employee is out due to a serious health condition but fails to report that to the proper central office administrator, then timely designation of F&ML may not be possible.

The Department of Labor (DOL), as the enforcer of the FMLA, has created forms for the three required employer notices discussed above. The DOL notice forms meet the minimum requirements of the FMLA and may be used as is or as a starting point for districts looking to create notice letters tailored to their own needs.

5. **Return to Work after F&ML**

Assuming an employee’s leave has been designated as F&ML, the district can require medical certification of the employee’s ability to resume work before the employee can return. Commonly called “fitness-for-duty” certification, most DEC (Local) policies include this as a prerequisite to an employee’s return to work after an absence due to the employee’s own medical condition. An employee’s failure to provide a required fitness-for-duty certification justifies denying his or her return to work until such certification is provided. However, the district may be obligated to allow an employee with a disability under the Americans with Disabilities Act (ADA) to return to duty if a reasonable accommodation exists which would enable him or her to perform the essential functions of their position.

Once the required medical certification has been provided, the employee is entitled to be restored to the position he or she held when the leave began or to an equivalent position with equal benefits, pay and other terms and conditions of employment. There are some circumstances where “key” employees may be denied such restoration. A “key” employee is a salaried FMLA-eligible employee who is among the highest paid ten percent of all of the district’s employees within 75 miles of the employee’s worksite.

6. **Leave at the End of the Semester**

As a rule, a school district may not require an employee to take more FMLA leave than the employee needs. The FMLA recognizes exceptions where instructional employees begin leave near the end of a semester. As set forth below, a district may in certain cases require the employee to continue his or her leave until the end of the semester. The school semester, or “academic term,” typically ends near the end of the calendar year and the end of spring each school year. In no case may a school have more than two academic terms or semesters each year for purposes of the FMLA.

If a district requires the employee to take leave through the end of the semester, the period of additional leave required by the district after the employee is fit to return to duty shall not be deducted from the employee’s 12 week allotment. Any additional leave required by the district during this period is not counted as F&ML; however, the employee is still entitled to the rights associated with F&ML. The district shall maintain the
employee’s group health insurance and restore the employee to the same or equivalent job, including other benefits, at the end of the leave. 29 U.S.C. 2618(d); 29 CFR 825.603.

Your options depend on when the leave is initiated in relation to the end of the semester...

MORE THAN FIVE WEEKS BEFORE THE END OF A SEMESTER
The district may require an instructional employee to continue taking leave until the end of the semester if:
1. The employee begins leave more than five weeks before the end of the semester;
2. The leave will last at least three weeks; and
3. The employee would return to work during the three-week period before the end of the semester.

DURING THE LAST FIVE WEEKS OF THE SEMESTER
The district may require an instructional employee to continue taking leave until the end of the semester if:
1. The employee begins leave during the last five weeks of the semester for any reason other than the employee’s own serious health condition or a qualifying exigency;
2. The leave will last more than two weeks; and
3. The employee would return to work during the two-week period before the end of the semester.

DURING THE LAST THREE WEEKS OF THE SEMESTER
The district may require an instructional employee to continue taking leave until the end of the semester if:
1. The employee begins leave during the three-week period before the end of the semester for any reason other than the employee’s own serious health condition or a qualifying exigency; and
2. The leave will last more than five working days. 29 CFR 825.602.

H. Bona Fide Leave-Sharing Arrangements

An employer may create a leave sharing program which permits employees to donate their available paid leave days to another employee directly or through a leave “bank.” These leave donation programs are commonly referred to as “catastrophic sick leave banks” or “sick leave pools.” These programs are intended to serve as safety nets, should an employee or an employee’s family member experience a serious illness or medical emergency after the exhaustion of all available paid leave; there are countless variations on eligibility, qualification and participation requirements. These programs can be beneficial to the district, decreasing the number of situations in which an employee exhausts all paid leave and is still unable to return to work.
This type of leave sharing program may have legal implications, depending on its structure. **State law** does not prohibit an employee from donating paid leave days to another employee, nor does it require a district to allow such a practice; in fact, state law makes no reference to donation or transfer of paid leave days between individuals.

**Federal law** also does not prohibit employee leave donation programs. However, these programs may have significant tax implications for the employees involved based on the employer’s policy which allows the donation. Any arrangement which involves the donation of paid leave between employees implicates federal income tax obligations and the Internal Revenue Service (IRS). Paid leave constitutes income that is subject to taxation when the employee is paid for the leave. Generally, an employee cannot avoid tax liabilities by assigning his or her income to another. Transferring paid leave days to another employee does not relieve the donor employee from the tax obligations associated with that compensation, even though it will not be received by the donor employee. However, certain situations have been excepted from this general rule, including bona fide employer-sponsored (medical) leave-sharing arrangements, *i.e.* leave donation programs based on medical need.

A leave donation policy may qualify for this exception—the amounts paid by the district to the receiving employee for the donated leave will be includable in the gross income of that employee, and will be considered “wages” for employment tax purposes. The employee donating the leave will not be considered to have realized any income or incurred any deductible expense or loss in relation to the donation. In assessing whether a leave donation policy qualifies for the exception, the IRS focuses on whether the employer’s policy is similar in structure to previous leave-sharing arrangements which have been approved for the exception. The following employer policy provisions have been generally approved by the IRS as qualifying for the exception:

- The donated leave is available to employees only for medical emergencies or conditions experienced by the employee or the employee’s family member;
- The employee must submit documentation requesting the leave and establishing a qualifying reason for the leave;
- Leave requests are subject to employer approval;
- The plan contains restrictions on the amount and type of paid leave that may be donated;
- Leave time is donated to a specific employee who is eligible to receive donated leave time;
- Leave time is donated to a leave bank which is available for use by any employee eligible to receive donated leave time;
- Once surrendered the donated leave cannot be returned to the donor.

The IRS has found that where a leave donation policy does not limit use of donated leave to medical emergencies, the exception does not apply. For example, a policy which allowed employees to receive donated leave days when facing catastrophic casualty loss that *may or may not* involve a personal or family medical emergency was found not to be within the scope of the exception.
The main thing to remember is that this type of leave, as with any type of leave, must be applied consistently and the district must be prepared to defend its decisions related to this type of leave against claims of disparate and discriminatory application.

II. ANALYZING LEAVE ISSUES

A. Is the Employee Eligible?

Because the various types of leave have different eligibility requirements, the first determination must be whether the employee is eligible for a specific type of leave. This may involve an analysis of (1) timelines set out in both the legal and local policies (i.e. number of months and hours of employment required for F&ML eligibility); (2) employee status (i.e. full-time, part-time, temporary, seasonal, or non-employee substitutes); (3) whether the stated reasons for leave meet the requirements set out in legal and local policies; and (4) whether the employee has satisfied any required notice and medical certification provisions required in the district’s legal and local policies.

B. How Many Types of Leave Apply and Do They Run Concurrently?

Many types of leave can overlap and an employee’s unique situation may mean they are eligible for more than one type of leave. For example, an employee injured during the course of performing his or her duties will be eligible for workers’ compensation benefits. That same employee may have a resulting “serious health condition” that qualifies them for F&ML. If the injury was caused by an assault, then assault leave may also apply. If the employee requests Temporary Disability Leave for extended recovery from the injury, the district will need to respond to that request as well. Many districts have local policies which require F&ML to run concurrently with all other applicable leave.

C. What are the Applicable Durations of the Various Leaves?

Each type of leave has a different minimum/maximum time period. Once you have determined the applicable types of leave, it is a good idea to chart the timelines for each type of leave in order to ensure that you know when each type of leave will be exhausted in the event the employee does not return to duty in the near future.

D. What Are the District’s Responsibilities Related to the Applicable Leaves?

Each type of leave involves specific responsibilities and obligations which the district must comply with. In the example in B above, the FMLA requires the district to place the eligible employee (suffering from a “serious health condition”) on leave and provide written notice to the employee of such placement, the employee’s rights and obligations while on F&ML, and the expiration date of the 12 weeks. Additionally, assuming the employee has requested Assault Leave, the district must immediately place the employee on paid Assault Leave and conduct an investigation to determine whether an assault occurred which caused the injury. Since it is likely that the employee also has requested workers’ compensation benefits, the district must make
sure the employee has the appropriate forms and that the district’s workers’ compensation carrier is promptly notified of the potential claim. Medical certification should be requested from the employee to substantiate the need for F&ML. Assuming the district has a concurrent use policy, determinations need to be made regarding how much the district will pay in Assault Leave benefits to offset the workers’ compensation benefits paid by the carrier.

This is just an example of the responsibilities which the district has for the various types of leave. Failure to properly analyze and meet the district’s responsibilities for all of the applicable types of leave can leave the district exposed to claims by the employee.

E. What Procedures Are in Place for Proper Monitoring and Disposition?

Once all of the initial decisions have been made, there must be a process for monitoring each leave situation. When are the medical re-certifications due? When is the employee’s deadline under each type of leave for notifying the district of return-to-work status? What notice must be sent to the employee regarding each applicable leave period and when is it due? Effective procedures and training in those procedures can go a long way toward avoiding problems with monitoring any disposition of leave situations.

F. What Impact Does the Leave Status Have on Employment Decisions?

Employee leave status does not exist in a vacuum. It must be considered whenever employment decisions are made regarding an affected employee, including decisions about performance evaluation, contract actions, reassignment of personnel, reductions in force, and employment termination or discharge. The type of leave affects employment options. For example, an employee who is on Temporary Disability Leave cannot be terminated or nonrenewed while on such leave. However, an employee’s request for Temporary Disability Leave does not absolutely insulate him or her from termination or nonrenewal. The district should always be aware of an employee’s leave status, either current or previous, when considering adverse employment action; consultation with the district’s legal counsel is advised in those circumstances.

G. Where Does the Americans with Disabilities Act (ADA) Fit In?

The main purpose of the ADA is to allow persons who have a disability that affects some major aspect of their life to be treated the same as other persons. To help accomplish this goal, the ADA requires employers to provide employees with disabilities a “reasonable accommodation” so that the person is able to perform the essential functions of the job. A “reasonable accommodation” is an accommodation that removes workplace barriers limiting the employee’s ability to perform job functions due to a disability.

Courts have held that additional leave time, above and beyond the leave afforded to the employee under the employer’s policy, may be considered a reasonable accommodation depending on the specific facts and circumstances of a situation. Leave as a reasonable accommodation often arises where there is no accommodation which would permit the employee to come to work and perform the job safely, and the employee has medical
documentation showing that additional time off from work will enable the employee to return to a normal work schedule at some date in the future. The reasonableness of a request will depend on the amount of additional leave requested, the amount of additional leave that has already been granted, and the employer’s ability to maintain operations in the employee’s absence.

**Case Summary #1**

- **Disability:** Diabetes which resulted in physical injury
- **Accommodation:** Additional leave after missing 40 of the preceding 77 work days.
- **Reasonable?** NO. The employee failed to show that more time off would allow her to perform the essential functions of the position. When leave is requested as a reasonable accommodation, the goal is to allow the employee to return to work at some future date, not merely to allow the employee to not come to work.
- *Brannon v. Luco Mop Co.*, 521 F.3d 843 (8th Cir. 2008).

**Requests for intermittent leave where FMLA not involved.** A request for intermittent leave as a reasonable accommodation may be reasonable where there is a substantial likelihood that the leave will assist the employee in returning to a normal working schedule. However, courts have held that the ADA doesn’t require the employer to accommodate permanent requests for intermittent leave by employees with chronic conditions. Permanent intermittent leave would essentially require the creation of a part-time position for the employee; the ADA does not require an employer to create a part-time job in order to accommodate an employee whose work requires full-time services.

**Additional requested leave & undue hardship.** Note that consideration is given to both the amount of leave the employee has already taken for the disability as well as the amount of additional leave requested in determining whether a requested accommodation is reasonable. Keep in mind that the goal of the requested leave should be to prepare the employee to return to work.

**Case Summary #2**

- **Disability:** Mental impairment
- **Accommodation:** Request for more leave while currently on 3-week leave.
- **Reasonable?** YES. The employer ignored its duty to accommodate the employee, even after receiving notice from the employee’s physician that the employee would need more time to adjust. Giving the employee three weeks of leave didn’t extinguish the employer’s duty to accommodate further.
- **Note:** The important thing to remember about this situation is that the employee had only taken a short amount of leave, requested another short amount of leave and provided the employer with a return date. The length of the leave and the information provided by the employee are important in deciding whether additional leave is reasonable.
- *Criado v. IBM Corp.*, 145 F.3d 437 (1st Cir. 1998).
Other Requests Found to Not be Reasonable by the Courts

- Request for 90 day extension to employee’s one year leave of absence;
- Request for 10 month extension to leave that had already lasted for one year;
- Request for two months leave after 10 month period of leave, without any showing that the employee would return to work at the end of the two months.

Indefinite leave is unreasonable. The duty to reasonably accommodate an employee’s disability does not require an employer to wait indefinitely for the employee’s medical conditions to be corrected. “The term reasonable accommodation refers to those accommodations which presently, or in the near future, enable the employee to perform the essential functions of his job.” *Cisneros v. Wilson*, 226 F.3d 1113 (10th Cir. 2000).

Leave requests deemed to be requests for indefinite leave. Requests which fail to specify the duration of the impairment, use language similar to “will return to work A.S.A.P.”, or include vague statements in a physician’s report that the employee’s injury is “not permanent”, may be deemed requests for an indefinite leave of absence.

**Case Summary #3**

**Disability:** Employee suffered from cluster headaches which caused him to miss a couple of months of work each time he experienced one.

**Accommodation:** Requested leave as the result of cluster headaches, and had already exhausted his allowed leave.

**Reasonable? NO.** The requested accommodation amounted to an indefinite leave of absence, where employee did not provide any prospective return date. Even though the previous leaves lasted only a few months, there was no indication from employee that this leave would be the same, and employer was not required to assume.

*Wood v. Green*, 323 F.3d 1309 (11th Cir. 2003).

A district’s obligation to consider or provide a reasonable accommodation does not require a formal request from the employee. If the school has reason to believe that an employee has a disability that is affecting their ability to perform the essential functions of the job (including attending work), it is the district’s obligation to initiate a conversation with the employee about his or her limitations and needs. This conversation is called the “interactive process,” and consists of an open discussion about the employee’s limitations resulting from the disability (which may require submission of medical documentation), and the reasonable accommodations which the school district may be able to provide.
Factors that may be used to determine whether requested leave is reasonable. An employer is required to provide a reasonable accommodation. Ultimately, the employer gets to decide what reasonable accommodation will be given to an employee. However, if there is only one reasonable accommodation available, the employer will be required to provide that accommodation. The following is a list of the factors that would be considered in determining whether the requested accommodation is “reasonable.”

- Size and resources of the employer;
- Expected duration of the employee’s impairment and proposed leave in relation to the employee’s duties;
- Number of employees performing the same job duties as the disabled employee;
- Whether the employer’s existing policies permit the employee to take the requested leave;
- Whether other employees could perform the disabled employee’s duties during leave;
- Whether the employer could reasonably replace the employee with temporary workers during leave;
- Whether employee has previously been on leave and for how long;
- On review of an employer’s decision to terminate, the court may also consider the timing of the termination in relation to how much leave was allowed and over what period of time.

Note that establishing “undue hardship” as a basis to deny a request for additional leave as a reasonable accommodation is difficult. A district faced with this issue or considering denial of a leave request should consult with legal counsel.

III. 10 DIFFICULT QUESTIONS THAT ARE MORE COMMON THAN YOU THINK

A. What can a district do if a teacher exhausts all available paid leave and unpaid leave and does not return to work?

This situation occurs more often than you may think. A teacher (or other contract employee) uses all 12 weeks of her F&ML during the first semester of the school year. Because the district’s policy requires that F&ML and paid leave be used concurrently, she also exhausts all of her state and local leave days. The teacher then requests and is granted Temporary Disability Leave, which she exhausts, and maybe even dips into the district’s Catastrophic Sick Leave bank. After all of this, she is left with no more leave available, her doctor will not certify her to return to work and cannot provide any guarantee that she will even be able to return for the next school year. Although the district is no longer paying health insurance premiums the teacher is still “on the books.”

By this time, the district may have obtained a long-term substitute for the teacher’s class. What action, if any, can the district take against the teacher’s employment?

Teachers, and most administrators, are employed under Chapter 21 contracts, as provided for in the Texas Education Code. If the teacher does not resign her position, the district has the option
to end the contract at the end of its term. If the teacher has a probationary contract, the district can “terminate” the contract at the end of its term, just as it would with any other probationary contract. If the teacher has a term contract, the district may nonrenew the contract at the end of its term. Most district nonrenewal policies [DFBB (Local)] include as a basis for nonrenewal:

“Disability, not otherwise protected by law that prevents the employee from performing the essential functions of the job.”

Districts considering nonrenewal of a teacher’s contract for this reason should contact their legal counsel in order to ensure that the employee’s disability is not otherwise protected by another state or federal law, such as the Americans with Disabilities Act.

Failure to return from leave may also constitute good cause for termination of a Chapter 21 contract during its term.

B. What is a neutral absence control policy and what are the benefits of having one?

A neutral absence control policy sets a limit on the amount of absences which an employee may have after exhaustion of all available leave. Once the employee exceeds that limit, s/he is subject to termination based only on the number of absences without leave. When an employee is on leave from work, or absent because of a disability or other physical, mental, emotional or medical condition, numerous laws, both state and federal, come into play (the FMLA, the Workers’ Compensation Act, the Temporary Disability Leave provisions of the Education Code, the Americans with Disabilities Act, etc.). Each of these laws confers upon an employee certain rights and protections, including the protection from employment action taken in retaliation for the exercise of those rights.

There are many legitimate reasons for wanting to terminate an employee, some related to the fact that he or she can no longer perform their job, and some completely unrelated. However, the timing of an employee’s termination in relation to the taking of F&ML puts the district at risk for a successful retaliation claim. The benefit of a neutral absence control policy is that its enforcement is just that – neutral, and not in any way based on the leave taken, the rights exercised, or claims filed. State and federal courts consistently recognize the enforcement of a neutral absence control policy as creating a presumption that the action taken by the employer was for a legitimate, nondiscriminatory reason, and not retaliation. However, merely having a policy is not enough. In order to reap the benefits of a neutral absence control policy, the policy must be consistently implemented and enforced, without regard for the employee against whom it is being enforced or the reason for the leave – it’s called a neutral policy for a reason!

C. When does the district have to make state paid leave days available to an employee?

TEA’s General Counsel has said that state paid leave days must be made available to employees at the beginning of the school year, without regard for whether the employee has earned the leave or not.
If a district offers local paid leave days, local policy may specify whether employees are required to earn those days before using them, and at what rate. This is permissible, as local leave days fall within the sole discretion of the district and are not prescribed by statute.

**D. Can an employee be disciplined while on leave?**

While on leave, an employee is still an employee of the district, and as such, is still subject to discipline. However, there are risks associated with initiating discipline of an employee while s/he is on leave.

If the disciplinary action is not initiated until the employee returns from leave, it may appear to be retaliation for taking leave, and the evidence of the misconduct or performance issue may no longer be accurate or available due to the time lapse. On the other hand, if investigation and disciplinary action is initiated during the leave, it may also appear to be motivated by the employee’s leave status, and the district may not be able to get the employee’s side of the story. The best approach may be to split the difference – give written notice to the employee that the district received information on [X date] about conduct which allegedly occurred on X date and that the matter is currently under investigation. When the employee returns from leave a conference should be held so s/he may answer the allegations. If appropriate, the district may then choose to issue a formal reprimand or take some other disciplinary measure.

**E. Could additional leave be considered a reasonable accommodation under the Americans with Disabilities Act?**

Maybe. The Americans with Disabilities Act (“ADA”) obligates an employer to provide a reasonable accommodation to an employee with a qualifying disability, which is intended to enable the disabled employee to perform his or her job at a level which will provide the same opportunities as those enjoyed by non-disabled employees. Although most accommodations are workplace accommodations, the granting of a request for additional leave may also be a reasonable accommodation which the district is required to offer. Though the discussion below uses the example of a contract employee, it is equally applicable to at-will employees in exempt and non-exempt positions.

*Request for Leave of a Definite Duration:* Suppose the employee from Question #A, suffering from a qualifying disability under the ADA, requests three additional weeks of unpaid leave, even though she has exhausted all leave available to her. She provides the district with a note from her physician which estimates that she will be fit-for-duty in exactly three weeks. Should the district grant this request? Maybe. The granting of a request for leave of a definite duration may be a reasonable accommodation – the employee and her physician have represented to the district that this accommodation will enable her to perform the essential functions of her job. The employee cannot currently attend work and perform her duties, so there is no other available reasonable accommodation which the district can offer. **Keep in mind that the goal of the requested leave should be to prepare the employee to return to work.** Each situation must be examined on a case-by-case basis when determining what is reasonable and what is required.
**Request for Indefinite Leave:** The duty to reasonably accommodate an employee’s disability does not require an employer to wait indefinitely for the employee’s medical condition to be corrected. If an employee cannot provide an approximate date of his or her return to duty, this may be a basis for the district to deny the requested additional leave, depending on all the relevant facts and circumstances. Also, requests which fail to specify the duration of the impairment, use language similar to “will return to work A.S.A.P.,” or include vague statements in a physician’s report that the employee’s injury is “not permanent”, may be deemed requests for an indefinite leave of absence.

**Request for Intermittent Leave if F&ML Exhausted:** If the employee made a request for intermittent or reduced schedule leave, this might be considered a reasonable accommodation if there is a substantial likelihood that the leave will assist her in returning to a normal working schedule. However, with chronic conditions that require permanent intermittent or reduced schedule leave, courts generally find that the ADA does not require the employer to accommodate such requests. Also, the ADA does not require an employer to create a part-time job in order to accommodate an employee in a full-time position.

**Enforcing a Neutral Absence Control Policy:** Although the importance of a neutral absence control policy is the district’s ability to apply it uniformly without regard for an individual employee’s circumstances, districts should provide for flexibility when it comes to extending leave as a reasonable accommodation for an ADA-disability. The enforcement of a neutral absence control policy is not a defense to an employee’s claim that the district failed to provide a reasonable accommodation as required by the ADA.

**Undue Hardship:** As with any accommodation requested by an employee, the district is not required to grant the request for leave if it would result in an undue hardship to the district. Both the amount of leave the employee has already taken for the disability, as well as, and in relation to, the amount of additional leave requested, are considered in determining whether a requested accommodation is reasonable. Under the facts of this hypothetical proving the potential for an undue hardship would be almost impossible. The employee has already been on leave for at least 5 months, and the district has not had any problem filling her position with a long-term substitute. Three more weeks of leave will not result in an undue hardship on the district. If a court were to review a district’s claim that requested leave would pose an undue hardship, the following factors would likely be taken into consideration:

- The size and resources of the district;
- The expected duration of the employee’s impairment and proposed leave in relation to the employee’s duties;
- The number of employees performing the same job duties as the disabled employee;
- Whether other employees could perform the disabled employee’s duties during leave;
- Whether the district could reasonably replace the employee with temporary workers during leave; and
- Whether the employee has previously been on leave and the duration of that leave.
Districts should consult their legal counsel before denying any requested accommodation.

F. **If an employee requests a 3-hour per day work schedule for a period of three months in order to recover from surgery, does the district have to grant this request?**

The FMLA entitles employees, in certain situations, to take leave sporadically, instead of over a continuous period of time. Intermittent and reduced schedule leave is available for “medical necessity,” including planned and/or unanticipated medical treatment of the health condition, or for recovery from treatment or the condition itself. It also includes providing care or psychological comfort to a family member undergoing such treatment.

An employee may take intermittent or reduced schedule leave when medically necessary to care for a parent, son, or daughter with a serious health condition, because of the employee’s own serious health condition, or to care for a service member with a serious injury or illness. These non-contiguous forms of leave may also be taken in order to care for a newborn or newly-placed adopted or foster care child, but only with the *district’s consent*. An employee or family member who is incapacitated or unable to perform the essential functions of his or her position because of a chronic condition, or the illness of a service member, may take intermittent or reduced schedule leave, regardless of whether he or she is receiving treatment.

If this employee has exhausted F&ML and requests intermittent or reduced schedule leave, this might be considered a reasonable accommodation if there is a substantial likelihood that the leave will assist the employee in returning to a normal working schedule.

G. **Can the district reassign the employee in Question F to another position during the three month period? Does the position have to be a teaching position?**

Depending on the extent of requested intermittent or reduced schedule leave, and whether the request is made by an instructional employee or non-instructional employee, the district may have the right to temporarily transfer the employee to a position which better accommodates frequent absences.

*Non-Instructional Employees*: Non-instructional employees include custodians, bus drivers, maintenance employees, food service employees, counselors, curriculum specialists, psychologists, teacher assistants or aides who do not teach/instruct as part of their principal function, etc. If a non-instructional employee requests intermittent or reduced schedule leave, the district may choose to temporarily transfer that employee to another position which is better suited to a part-time schedule. The duties of the temporary position do not have to be equivalent, but the pay and benefits must be equivalent. However, if the difference between the two positions is significant, or otherwise creates an undue hardship on the employee, a claim may be asserted that the district is attempting to discourage the taking of F&ML.

*Instructional Employees*: Instructional employees are those employees whose main function is the teaching and instruction of students, and includes teachers, athletic coaches, driving instructors, and special education assistants such as signers for the hearing impaired. As
opposed to non-instructional employees, a district may only consider temporary reassignment of an instructional employee if the employee would be on leave for more than 20% of his or her usual schedule.

If the employee needs intermittent or reduced schedule leave to care for a family member, service member, or the employee’s own condition, which is foreseeable based on planned medical treatment, and the employee would be on leave for more than 20% of the normal work schedule, the district may require the employee to choose between (1) taking leave for a continuous period of time, not to exceed that amount necessary for treatment, or (2) transferring temporarily to an alternative position that would better accommodate the shortened schedule/frequent absences. The district may require the employee to choose between these two options.

However, if an instructional employee fails to give the proper notice for foreseeable intermittent or reduced schedule F&ML, the district may make the decision for the employee. Employees must provide the district with at least 30-days advance notice of a foreseeable need to take F&ML leave, or notice as soon as practicable if the need becomes foreseeable less than 30 days before the leave is to begin (generally the same day or the next business day).

H. Does a pregnancy automatically qualify an employee for Family & Medical Leave?

Each situation must be examined to determine if the employee’s situation qualifies for F&ML. The qualifying reasons for F&ML related to pregnancy are as follows:

Before the birth of the child:

- Incapacity resulting from the pregnancy – If the employee’s condition renders her unable to work, she may be entitled to F&ML even if she is not receiving treatment from a health care provider, or the absence is brief (i.e., severe morning sickness which is a side effect of the pregnancy);
- Prenatal care – Leave in order to receive prenatal care will likely be taken as intermittent leave for the purpose of medical appointments scheduled during the work day;
- Serious health condition resulting from the pregnancy.

During the birth of the child:

- The employee may be entitled to F&ML for the birth of the child;

After the birth of the child:

- The employee may be entitled to F&ML in order to provide care for the child after birth;
- The employee may be entitled to F&ML as the result of her own serious health condition resulting from the pregnancy/birth.
The employee’s submitted medical certification will determine whether she qualifies for F&ML as the result of her pregnancy.

I. What does COBRA have to do with employee leave issues?

COBRA is not a form of leave, it is a federal law that requires employers to notify employees when qualifying events occur that may affect the employee’s insurance coverage. COBRA applies not only to terminations and other separations from employment, but can also apply to a reduction of work hours. Qualifying events under COBRA are certain events that would cause an individual to lose health coverage. A district must notify an employee of the date on which his or her health insurance will no longer be covered by the district. This notice should also include information about the availability of COBRA and the available methods of obtaining coverage.

J. Can an employee receive COBRA benefits while on F&ML?

The FMLA requires an employer to maintain coverage under any group health plan for an employee on F&ML under the same conditions that coverage would have been provided if the employee had continued working. Coverage provided by the district under the FMLA is not COBRA coverage, and F&ML is not a qualifying event which triggers any district responsibilities under COBRA. A COBRA qualifying event may occur, however, when a district’s obligation to maintain health benefits under the FMLA ceases, such as when an employee notifies the district of his or her intent not to return to work, or if the employee is unable to return to work at the exhaustion of F&ML. A district should make note of the prospective date on which the employee will exhaust his or her F&ML, as well as all remaining paid leave, in order to ensure that timely notice is given to the employee well in advance of that date.

NOTE: The information in this handout was created by Walsh, Anderson, Gallegos, Green & Treviño, P.C. It is intended to be used for general information only and is not to be considered specific legal advice. If specific legal advice is sought, consult an attorney.