

# A Practical Guide to Leaves and Returns

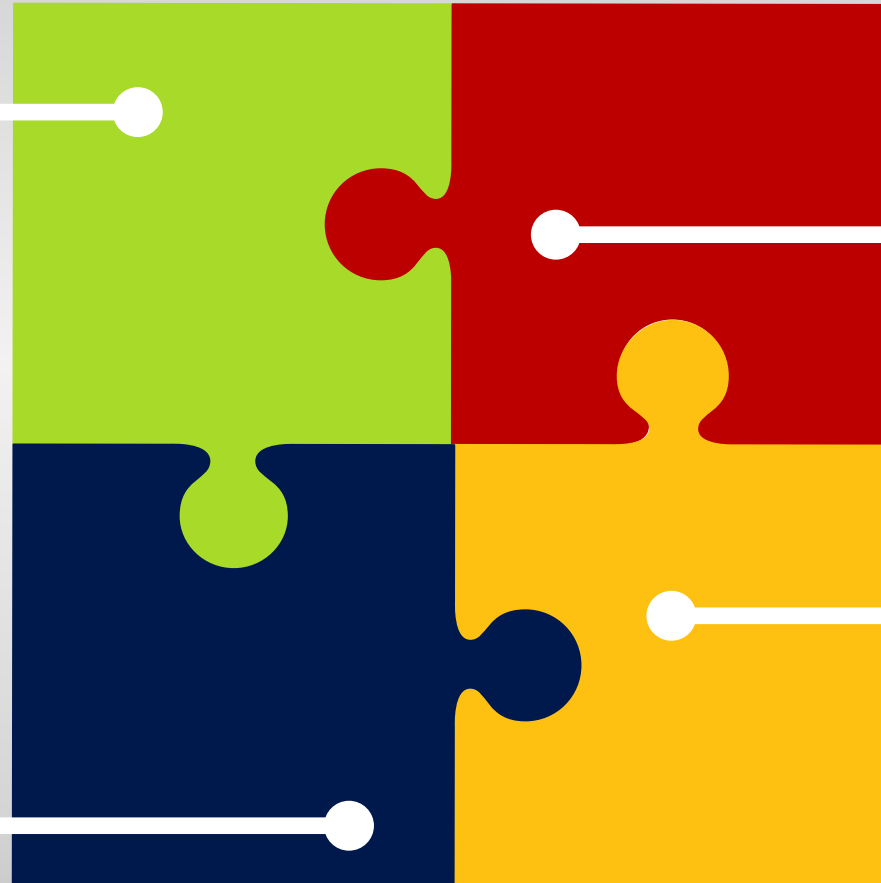
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# ***Caution!***

- Today we are necessarily speaking in generalities rather than specifics
- The information provided is not legal advice
- Information in this presentation may quickly become outdated
- Always research original sources of authority and update this information to ensure accuracy when dealing with a specific matter
- Do not act or rely upon the information contained in this presentation without seeking the advice of an attorney

# Review of Types of Employee Leave



## Federal Laws

FMLA  
ADA  
USERRA

## State Laws

Parental Leave Act  
18A-2-2a  
18A-4-10  
Paid Leave  
Workers Comp

## County Policies

Leave Banks  
Dock Days?

## County Practices

Dock Days?.

# When it comes to leave time, government employees are different . . .

- Compared to employees of private non-governmental businesses
- Leave rights – numerous for WV school employees
  - In addition to the statutory rights that employees of private companies have, government employees have numerous additional rights relating to leave
    - Federal and state statutes, state and county policies, and past practice of the individual school board (uniformity)
- Leave rights – can be combined in some instances

# Different Ways to Use Leave

- Sick Leave Banks, general (required)
- Sick Leave Banks, for care givers (optional)
- Leave Donation Programs (required)
- Surviving Spouse use of Deceased Spouse Accrued Leave (optional)

# Find the Right Answer

Multiple Choice

&

True - False

**The term “leave of absence,” as a legal term of art in WV, refers to a school employee’s board-authorized absence from work for which the employee is:**

- A. paid her regular salary
- B. not paid her regular salary
- C. either paid or not paid her regular salary, depending upon which she chooses
- D. either paid or not paid her regular salary, as determined by the employer



# Answer

B. Not paid her regular salary (without pay)

# Leave of Absence

- By definition under the school laws, an employee's leave of absence is unpaid.
- If, instead, an employee is paid by her school board for an absence, then the employee is not on a leave of absence.
- Review your county policies to be sure this is clear
  - Some board policies refer to any absence as a leave of absence

**The main federal law protecting civilian job rights and benefits for veterans and members of Reserve components who are absent from work serving our country is:**

- A. the United States Armed Forces Job Protection Act (USAFJPA,)
- B. the United States Soldiers and Sailors Employment Security Act (USSASESA)
- C. the United States Veteran and Reservist Leave Entitlement Program (USVRLEP)
- D. the Uniformed Services Employment and Reemployment Rights Act (USERRA)

# Answer

D. the Uniformed Services Employment and Reemployment Rights Act (USERRA)

# USERRA

- Passed by Congress in 1994, USERRA protects civilian job rights for veterans and Reservists. Among other things it establishes the cumulative length of time that a person may be absent from work for military duty and retain reemployment rights (five years, with some exceptions).

# **FMLA stands for**

- A. Family Medical Leave Act
- B. Federal Medical Leave Act
- C. Fair Medical Leave Act
- D. First Medical Leave Act

# Answer

A. Family Medical Leave Act



# According to Congress, the FMLA was adopted in order to address

- the increased number of women in the workforce
- the increase in single-parent households
- the fact that Americans were living longer and expected to care for older relatives

# Eligible employees (FMLA) may take up to 12 weeks of unpaid leave in any 12 month period for:

- A. birth and care of a new-born child
- B. placement of a child for adoption or foster care
- C. care for child, spouse or parent with a serious health condition
- D. employee's own serious health condition
- E. All of the above

# Answer

E. All of the above

# FMLA ELIGIBLE EMPLOYEE

To be eligible, the employee must have:

- worked at least 12 months for this employer (months need not be consecutive), and
- actually shown up and worked 1,250 hours for this employer during the 12-month period immediately preceding the request

[NOTE: hours not actually worked, including paid or unpaid leave, do not count toward the 1,250-hour requirement under FMLA]

# OTHER KEY PROVISIONS

- Eligible employees are entitled to reinstatement upon return to work
- Eligible employees are entitled to continue to receive health benefits as if the employee had continued to work

# In order to trigger FMLA leave rights, the employee must

- A. demand “FMLA leave”
- B. Fill out the FMLA Leave Request Form
- C. Just mention FMLA
- D. None of the above

# Answer

D. None of the above

Once the employee tells you that he needs leave for a serious health condition, or the serious health condition of his spouse, provide him **Form WH-380** right away!



# Which of the following is a serious health condition under the FMLA?

- A. Ear ache
- B. Migraines
- C. Flu
- D. Upset stomach

# Answer

B.           Migraines

# “SERIOUS HEALTH CONDITION” UNDER THE FMLA

- Defined as an illness, injury, impairment or physical or mental condition that involves either “inpatient care” or “continuing treatment by a health care provider.”
  - Inpatient care: overnight stay in hospital, hospice, or residential medical care facility; including any period of incapacity; or subsequent treatment
  - Continuing treatment: examinations to determine if a serious health condition exists and evaluations of that condition;
    - Not routine examines.

# “SERIOUS HEALTH CONDITION” UNDER THE FMLA

- The illness, injury, impairment or physical or mental condition must involve at least one of the following:
  - Any period of incapacity or treatment connected with inpatient care
  - A period of incapacity requiring absence from work and other daily activity for at least three calendar days\*
  - Any period of incapacity due to pregnancy or prenatal care
  - A period of incapacity due to a chronic serious health condition (e.g., asthma, diabetes, epilepsy, etc.)

# “SERIOUS HEALTH CONDITION” UNDER THE FMLA

- The illness, injury, impairment or physical or mental condition must involve at least one of the following:
  - A period of incapacity that is permanent or long-term due to a condition for which treatment may not be effective (e.g., Alzheimer’s, stroke, terminal disease, etc.)
  - Any **absences** to receive multiple treatments (plus recovery time) by a health care provider for a condition that *likely would* result in incapacity for three consecutive days if left untreated (e.g., chemo)

# “SERIOUS HEALTH CONDITION” UNDER THE FMLA

Not include:

- The common cold
  - Flu
  - Ear aches
  - Upset stomach
  - Minor ulcers
  - Headaches other than migraine
  - Routine dental problems
- unless** complications develop

# True - False

- An employee who is off work due to a work related injury and is receiving temporary total disability workers' compensation benefits is immune from any form of disciplinary action during the period within which such benefits are received.

# Answer

- False



# True - False

- An employee returning from a worker's compensation compensable injury has an absolute right to return to his or her same former position so long as he or she is able to perform the essential duties of the position with or without accommodation.

# Answer

- False

# True - False

- An employer must continue to pay its portion of health insurance premiums during time periods when an employee is not currently receiving temporary total disability benefits if the employee has an active protest challenging the decision to close the claim and the refusal to reinstate temporary total disability benefits?

# Answer

- False

# What would you do?

Custodian Bill, a 10-year employee, has a heart condition. It is not life-threatening yet. But Bill's doctor would like him to take at least one full year off work. The West Virginia Code specifically permits boards of education to grant such one-year medical leaves of absence.

- True or False?

# Answer

- False
- No provision of West Virginia school law specifically addresses *medical* leaves of absence, per se.
- But the law does allow school board to grant more generous leave benefits than the statutes require

# WV Code 18A-2-2a

- However, 18A-2-2a states the following:
  - “Any teacher who is returning from an approved leave of absence that extended for a period of one year or less shall be reemployed by the county board with the right to be restored to the same assignment of position or duties held prior to the approved leave of absence.”
  - The passage above addresses the treatment of an employee returning to work after a leave of absence was granted.
    - Not the reason it was granted

# WV Code 18A-2-2a(b)

- But, subsection (b) tells county boards that they must grant **requests** for leaves of absence if the leave is “for the purpose of pregnancy, childbirth or adoptive or infant bonding.”
- These are the only specific mandatory reasons for which leave must be granted upon request.



# What Would You Do?

The Board granted Bill a medical leave of absence for one year. After his one-year leave of absence, Custodian Bill is feeling much better and is ready to return to work. But, his wife is due to give birth to their son, Bill, Jr. any day now. Custodian Bill requests a one-year leave of absence to commence on his son's birthday.

The board of education should consider, but need not grant this request for another leave of absence.

- True or False?

# Answer

- False
- The county board shall approve such leave of absence for any teacher or service personnel who requests an extended leave of absence without pay for any period of time not exceeding one year for the purpose of pregnancy, childbirth or adoptive or infant bonding.
  - WV Code 18A-2-2a(b)
  - Question: does the board have to give Bill his old position back if he is gone for more than one year on a leave of absence?

# What Would You Do?

- Poor Custodian Bill. Upon the completion of his one-year leave of absence for infant bonding, his heart condition worsens. At this time, Bill cannot perform the essential functions of his job--with or without an accommodation. In fact, he can barely get out of bed at this time. Bill requests another one-year leave of absence for his serious medical condition. The personnel director points out to Bill that he has 135 paid sick leave days stored up, and that he really ought to use those instead of asking for another leave of absence.

The Board may require Bill to use his paid sick leave days prior to considering his most recent request for another medical leave of absence.

- True or False?

# Answer

- False.
- “An employee shall not be required to use accumulated annual leave or sick leave prior to taking an extended leave of absence.”
  - WV Code 18A-2-2a(b).
- The Board might deny his request, but it cannot require Bill to exhaust his paid time off prior to considering his request.

# What Would You Do?

## Two-part question

- The Board may **lawfully** deny Bill's request for a third leave of absence in connection with his worsening heart condition.
  - A) True.
  - B) False.
  - C) It depends. We must consult another source of law to answer this question.

# Answer

- C) It depends. We must consult another source of law to answer this question.

# What Would You Do?

## Second Part

- Choose the best answer. What other source of law should the Board consider before deciding whether or not it may **lawfully** deny Bill's request for a third leave of absence?
- A. Federal- United States Code
- B. County Board of Education policy manual
- C. State- WV Code
- D. State Board of Education policy manual



# Answer

## B. County Board of Education policy manual

- Many boards have Leave of Absence policies (some of them very old) that liberally grant leaves of absence and extensions for leaves of absence, and for all manner of reasons, or no reason at all.
- Know your county's Leave of Absence policy.
- And investigate how your board has treated similarly-situated employees in the past
  - Uniformity is required
  - Look out for discrimination/favoritism claims

# What to do when the employee wants to come back or requests further leave

- 1. Review the board's Leave of Absence policy and familiarize yourself with any notable exceptions that have been made (since when? In the last 5 years? In the last 40 years?)
  - Learn the details of why the exceptions were made, if possible.
  - Determine if this employee is similarly situated to the employee for whom an exception was previously made

# What to do

- 2. Get in touch with the employee on the leave of absence before the leave ends
  - Phone call? Email? Written Correspondence? In-person meeting?
    - Your preference?
  - Timing: 30 calendar days before the leave ends enough? 60 days?
  - Discuss their return-to-work plans. Will he/she be returning on schedule?
  - Get a definite return date and document it.
  - Determine now if you are likely to have some problems later.

# What to do

- 2. (cont'd)
  - Follow-up with a letter to the employee summarizing the substance of your discussion
  - Details, specifics

# What to do

- 3. If there is going to be a problem, get all the facts now.
  - Why isn't the employee going to come back on time?
    - Or is the employee indicating that he/she is unsure
      - Why is he/she unsure?
  - What is the employee planning to do?
    - Ask for an extension of the leave? For how long? And on what basis?
    - Return to work for one day, and then start calling in sick?
      - What can you do about this sort of behavior?
      - Will most employees give you notice of their intent to do this?

# What to do

- 4. Be honest and clear with the employee who is asking for more time
  - Tell them what you expect will happen based on your knowledge of the policy and prior exceptions made by the Board
    - Be open to information from the employee about other exceptions that were allegedly made in the past
  - Does your board hear all requests like these?
    - Or perhaps the item will not be placed upon Board's agenda without meeting some conditions (?)

# What to do

- 5. What if no extension will be granted?
  - Tell the employee what is expected of him/her
    - Return to work date
      - Classic responses
        - I can't physically do this job anymore
        - I am applying for disability
        - I might retire, I can't decide. Not sure I can afford to though.
      - A little less-common responses (but not much)
        - If Sally could do all the lifting, I could do the other parts of the job
        - If there is light duty work, I could do it
      - Truly rare
        - If given a reasonable accommodation, I could perform the essential functions of my job

# What to do

- 5. What if no extension will be granted?
  - “If given a reasonable accommodation, I could perform the essential functions of my job”
    - Interactive dialogue, accommodations
    - Very tough spot to be in, for everyone.
    - The employee who cannot perform the essential functions of the job, expects unreasonable accommodations, and cannot accept the difficult situation he/she is in.
    - Push comes to shove: termination for incompetence



# ADA – leave time as an accommodation

- In some situation, unpaid leave time can be considered a reasonable accommodation for a qualified employee with a disability
- Remember – not every employee who uses leave under the FMLA is a disabled person

# REMEMBER, EMPLOYEES CAN SUE!

- The FMLA provides the U.S. Department of Labor with authority to investigate and prosecute violations of the FMLA. If issues are not resolved at the administrative level, the DOL will pursue judicial remedies in federal court.
- The FMLA provides individuals with a private cause of action to sue for FMLA violations

# EMPLOYEES CAN SUE!

- West Virginia Human Rights Act provides a possible avenue of complaint
- Separate ADA Claims

# Working with Employees

- Employee has a physician statement indicating that he is under the doctor's care and will need to be off work for the next 3 weeks.
- Who accepts the employee's note in your county?
  - Principal
  - Secretary
  - Central Office Person
  - Other Supervisor
  - Personnel Director
- Who should accept the employee's note?

# Working with Employees

- What do we do with the employee's note?
  - Put it in school file
  - Send it to Central office
  - Send it to the Treasurer
  - Send it to the Personnel Director
- Why do we care?
  - Track remaining paid leave
  - Trigger notice of unpaid leave

# Watch Out For Policies

- FMLA Policy Language
- Parental Leave Policy Language
- Designate all PLA time off as FMLA time off
  - Require exhaustion of all paid leave before using leave rights under FMLA and PLA
  - Prohibit stacking of leave time where allowed by law

# Put the Employee on Notice

- the FMLA puts the onus on the employer to **designate** leave time as FMLA or non-FMLA and to notify the employee as such. (“In all circumstances, it is the employer’s responsibility to designate leave, paid or unpaid, as FMLA qualifying leave, and to give notice of the designation to the employee...”).

# Put the Employee on Notice

- Who provides the Notice?
  - Personnel Director
  - Designated FMLA Administrator
- What does the Notice say?
  - Form WH – 381, Notice of Eligibility and Rights & Responsibilities
- When is Certification needed?
  - Form WH -380-E: Certification of Health Care Provider for Employee's Serious Health Condition
- Contents of the Forms: Notice and Certification



# The Employee's Work Week

- Employees taking leave for the entire week in which a holiday occurs may be charged for an entire week of FMLA leave even if the employer's operations are closed for the holiday.
- However, if an employer closes for one or more weeks during the time an employee is scheduled to take FMLA, the week(s) the employer's activities have ceased do not count toward the employee's FMLA leave entitlement.
  - Summer break

# The Employee's Work Week

- Missed overtime may be counted toward FMLA if the employee would otherwise be required to report for duty but for the taking of FMLA leave.
- This can get complicated
- More likely to apply to intermittent leave

# After the Employee Gets Notice

- S/he takes Certification to treating physician
- To Whom should the employee return the Certification (Form WH-380-E)?
  - Supervisor
  - Personnel Director
  - Designated FMLA Administrator
- If your policy requires a physician's note (fitness for duty) prior to return to work for all employees, make sure to check the box!

# Employee Restrictions

- The employee's physician certification indicates that he needs some changes to his job duties or has some restrictions
- If the employee has a disability, then the Interactive Dialogue process must be initiated
- Who dialogues with the employee?
  - Personnel Director
  - Designated FMLA Administrator
  - Conference call from supervisor's office

# Accommodation

- Interactive dialogue does not require the employer to give the employee every accommodation he suggests
- Whether an accommodation is reasonable is determined on a case by case basis
- If no reasonable accommodation exists, employee stays on leave until all available leave is exhausted

# The Employee Won't Come Back

- The employee uses all paid leave and 12 weeks unpaid leave and is medically unable to return, now what?
  - ADA
  - No reasonable accommodations
  - Leave of Absence
  - Termination

# The Employee Won't Come Back or Talk

- The employee uses all paid leave and 12 weeks unpaid leave and just does not return (or is not entitled to 12 weeks), now what?
  - Letter with deadline
  - Leave of Absence
  - Termination
- The employee ignores all correspondence or he agrees to attend meetings but never shows up
  - Letter with deadline
  - Termination

# **Best Practices**

Helping Employees Get Back to Work



# Help Employees Get Back to Work

1. Adopt Lawful FMLA / Parental Leave Policy
2. Post FMLA Posters
3. Designate Lead Person to Handle FMLA Issues
4. Train Supervisors to Recognize and Refer FMLA Issues to the Lead FMLA Person
5. Use DOL Forms When Appropriate

# Help Employees Get Back to Work

6. Be Consistent
7. Don't React Negatively to Employees' Requests for Leave
8. Don't Offer Opinions Regarding Medical Condition or Assume an Employee is Disabled

**Your**

**Remaining**

**Questions**

