



Leaves and Absences Policy Considerations¹

College districts are afforded much flexibility in awarding employees leave. That said, in developing a leaves and absences policy, a college district is subject to certain legal and practical considerations. Those college districts that subscribe to local policy services through TASB Policy Service may contact the college district's policy consultant for sample policy DEC(LOCAL) language.

General Provisions

Definitions: The college district should define terminology relevant to its leave. For example, college districts often extend leave to *immediate family*. If so, the college district should include a definition to reflect local practice. Note that, for Family and Medical Leave Act (FMLA) purposes, *spouse*, *parent*, *child*, and *next of kin* are defined by statute and regulations. See TASB Policy DECA(LEGAL). Although the college district can expand these definitions to make FMLA leave available under more circumstances than those required by law, the college district cannot narrow the definitions in the law.

If the college district opts to implement leave donation programs, such as sick leave banks and sick leave pools, the college district should define *catastrophic illness or injury* to comply with IRS requirements for leave donation programs. The IRS requires that donated leave programs be limited to mental or physical conditions that necessitate a prolonged absence from work and could result in substantial loss of income because the employee has exhausted all available paid leave. Allowing leave for purposes other than catastrophic illness or injury could result in tax liability for the employee who donates the leave. Rev. Rul. 90-29; Private Letter Ruling 200720017 (2007). The college district may also choose to use this term for extended sick leave and similar programs.

Earning Local Leave: Local policy should address general parameters set out by the district for earning local leave. For example, the policy may establish that leave will not be earned if a person is on unpaid status. Details regarding accrual rates may then be established in administrative regulations.

Deductions for Being Absent Without Leave: The college district's local policy should include provisions on salary deductions if the college district will make deductions for leave an employee used but was not entitled to or had not earned.

¹ An electronic version of this document is available on TASB College eLaw at tasb.org/Services/Community-College-Services/Resources/TASB-College-eLaw/documents/leaves_absences_policy_considerations.pdf.

The college district should not approve an employee's use of paid leave in excess of days accumulated in prior years plus leave currently available. An employee who is off work for an unapproved absence or an absence beyond accumulated or available paid leave is absent without leave, and the college district may make deductions from an employee's pay for the absence.

If local paid leave is available at the beginning of the academic year, the college district policy should address what happens if an employee is not employed for the entire year and therefore is not entitled to a full year of leave benefits. The college district can prorate the employee's leave entitlement based on length of employment and can make salary deductions for state personal leave used beyond the employee's pro rata entitlement and for local leave the employee used but had not earned as of the date of separation.

The college district may also make salary deductions at the end of the year if an employee used more local leave than was earned. This could occur, for example, if an employee used all of the local leave at the beginning of the year and was then out on unpaid status for a portion of the year, thereby not earning the entire year's allotment of local leave.

Recording: A college district may require employees to use leave in half- and whole-day increments. However, this method may not be practical for non-instructional positions and raises legal concerns if the employee is taking intermittent FMLA leave or if the college district offsets leave against workers' compensation benefits. Regarding the FMLA, federal regulations prohibit an employer from recording intermittent leave in increments larger than one hour.

The college district should indicate how non-FMLA leave will be recorded—e.g., half-day increments for positions normally requiring a substitute, half-day increments for all employees, or one-hour increments for all employees. The college district must record leave in smaller increments if the employee is offsetting leave against workers' compensation benefits, and FMLA leave may not be recorded in increments larger than one hour. See PAID LEAVE OFFSET, below.

Order of Use: A college district may require an employee to use compensatory time, which is a form of compensation, not leave, before available leave.

If your college district has a leave reimbursement program, you should also consider the impact of the ORDER OF USE provisions on the program. See ANNUAL REIMBURSEMENT OF LEAVE and REIMBURSEMENT OF LEAVE UPON SEPARATION, below.

Concurrent Use of Leave: The local policy should explain what types of leave will run concurrently with other leaves, compensatory time, and workers' compensation benefits.

The college district may require an employee to use paid leave concurrently with unpaid leave, like FMLA leave. 29 U.S.C. § 2612(d); 29 C.F.R. § 825.207(a). This choice allows the college district some control over the total amount of time the employee may be absent from work. Without a concurrent-use requirement, the option to use or not use available paid leave rests with the employee. Therefore, we recommend that the local policy specify which leaves will run concurrently.

A college district may require an employee to use compensatory time concurrently with unpaid FMLA leave. 29 C.F.R. § 825.207(f). A college district may also run paid leave concurrently with a workers' compensation absence.

Medical Certification: The local policy should specify when and what type of medical certification is required to confirm the need for absence. For example, a college district should require medical certification if an employee is absent for several days due to illness or has a questionable pattern of absences. Medical certification is also appropriate for some types of FMLA leave. Medical certification should always be made by a health care provider, as that term is defined by the FMLA.

A frequent issue is whether the college district should continue to pay its share of employee insurance premiums while an employee is on leave. Most college districts discontinue their share during unpaid, non-FMLA leave.

Annual Reimbursement of Leave: A college district may choose to reimburse individual employee leave on an annual basis. If so, the college district should outline the general process, including which employees are eligible for reimbursement. The policy may include the rate at which leave will be reimbursed or may the board to set the rate periodically. Some boards will set the rate annually.

Reimbursement of Leave Upon Separation: College districts use reimbursement of leave provisions to reward employee tenure and encourage appropriate use of leave during employment. If the college district reimburses leave upon separation, it should state that only employees who voluntarily separate from employment and are not being discharged may qualify. The college district should also require employees to give advance written notice of resignation for the purpose of discouraging last-minute resignations. If the college district requires an employee to have a minimum number of years of service to be eligible, that provision may be incorporated into the text. A college district may also require an employee to have a minimum number of days of leave available, to reward appropriate use of leave.

The college district should ensure that any leave reimbursement program applies only prospectively. Retroactive leave reimbursement programs have been challenged as illegal grants of public funds. The Texas Constitution prohibits a public employer from increasing compensation and benefits for work already performed. Accordingly, the Texas Attorney General has concluded that reimbursement of unused leave is constitutional

only if the benefit applies to days of leave accrued *after* adoption of the program. Op. Tex. Att’y Gen. LO-98-099 (1998); *Lee v. El Paso Co.*, 965 S.W.2d 668 (Tex. App.—El Paso 1998, pet. denied). To avoid similar challenges, and for ease of administration, the college district should state that the reimbursement provisions apply beginning with the original effective date of the program. Alternatively, the college district could specify in the policy the date on which the reimbursement program first became effective.

Neutral Absence Control: A neutral absence control provision states that the college district automatically terminates an employee who has exhausted all leave. The college district does not look to the reason that the employee has used all the leave but instead automatically acts terminates an employee upon the exhaustion of all leave. The college district should adopt such a provision only after working with the college district’s attorney.

Local and Supplemental Leave

A college district may choose to implement a local or development leave program or a supplemental leave program, such as extended sick leave, a sick leave pool, or a sick leave bank.

Local Leave: If the college district provides local leave, such as sick leave, local leave, or bereavement leave, those details should be included in the leaves and absences policy. Specifically, provisions should address who receives local leave and how many local leave days are granted each year. The local leave policy should also address whether the employee is permitted to accumulate leave from year to year and the purposes for which local leave may be used.

Development Leave: A college district may choose to establish a faculty development leave program for the purpose of study, writing, research, field observations, or another appropriate purpose. The program must satisfy the requirements of Texas Education Code chapter 51, subchapter C, which details the choices that must be made by the board when designing the program. For example, the policy must address the application and approval process, the service requirements, the duration of the leave, compensation during the leave, and additional employment during the leave. Tex. Educ. Code §§ 51.101-.107. The college district may also grant development leave to qualified administrators in accordance with Texas Education Code section 51.948.

Extended Sick Leave: Extended sick leave is a leave safety net that college districts may use. College districts must select the categories of employees who are eligible for extended sick leave, set the maximum number of extended leave days an employee may use in an academic year, designate the purposes for which extended sick leave may be used, determine whether any time restrictions or delays will be imposed, and establish the rate of pay for extended sick leave.

Sick Leave Pool: College districts may use a sick leave pool as a leave safety net for an

employee who suffers from catastrophic illness or injury, or for a member of the employee's immediate family who suffers from a catastrophic illness or injury. A sick leave pool comes into being on an as-needed basis and ceases to exist when the employee no longer needs it or the pool is exhausted. The college district should address, through local policy or administrative regulations, critical issues such as procedures to request the sick leave pool, the maximum number of days individual employees may donate to the pool, the maximum number of days an eligible employee may receive from a sick leave pool, and the return of unused days to donors.

Sick Leave Bank: A sick leave bank serves the same purpose as a sick leave pool—both are leave safety nets for catastrophic illnesses—except a sick leave bank is a permanent leave fund. Employees contribute leave to the bank to become eligible members. The college district should address, through local policy or through administrative regulations, important issues such as the number of leave days required to become a member, procedures to request leave from the bank, the maximum number of days a member employee may receive from the bank, the committee or administrator authorized to consider bank requests, and criteria for granting requests, along with other issues.

Family and Medical Leave

As employers with at least 50 employees, all college districts are subject to the full requirements of the Family and Medical Leave Act (FMLA) and must comply with the general notice requirements. 29 U.S.C. §§ 2611(2), 2619; 29 C.F.R. §§ 825.102, .110, .300(a). See also TASB Policy DECA(LEGAL).

Twelve-Month Period: The college district should determine the 12-month period for purposes of family, medical, and qualifying exigency leaves. Eligible employees are permitted up to 12 weeks of leave in a 12-month period for a serious health condition, the birth or placement of a child, or a qualifying exigency. If the college district decides to revise policy to reflect a different 12-month period the college district must provide employees with 60 days' advance notice of the change and a transition period. U.S. Dep't of Labor, elaws—Family and Medical Leave Act Advisor, Selecting a 12-Month Leave Year, webapps.dol.gov/elaws/whd/fmla/14a.aspx.

Combined Leave for Spouses: The college district should decide whether to limit spouses to a combined total of 12 weeks of leave. The FMLA permits the college district to limit a married couple who works for the college district to a combined total of 12 weeks of family and medical leave (FML) for the birth, adoption, or placement of a child, or for the care of a parent with a serious health condition. The college district may not limit both spouses to a total of 12 weeks if leave is to care for a child with a serious health condition or for a qualifying exigency. If the purpose of the absence is for military caregiver leave, the college district may limit both spouses to a combined total of 26 weeks of leave. 29 U.S.C. § 2612(a), (f); 29 C.F.R. §§ 825.120(a)(3), .127(f), .200–.201.

Intermittent or Reduced Schedule Leave: The college district should decide whether to allow employees to use family leave intermittently or on a reduced schedule to care for a newborn child or for the placement of a child. The FMLA allows an employee, when medically necessary, to take FML on an intermittent basis for the serious health condition of the employee, spouse, parent, or child. Qualifying exigency leave may also be taken on an intermittent basis. The FMLA does not, however, give employees the right to take leave intermittently to care for a newborn child or for the placement of a child. Intermittent leave under these conditions is at the option of the college district. 29 U.S.C. § 2612(b); 29 C.F.R. § 825.202.

Certification of Leave: The college district should decide whether and when it will require certification of the need for leave. Before designating an absence as FML, the college district may require certification of the need for leave. For example, the college district may require medical certification if the leave relates to a serious health condition. Other certification provisions apply to absences due to the birth or placement of a child, qualifying exigencies, and military caregiver leave. 29 U.S.C. § 2613; 29 C.F.R. § 825.305(a), (d).

Fitness-For-Duty Certification: The college district should specify whether and when it will require return to work certification. The college district may not require an employee to provide a fitness-for-duty certification before resuming work unless the college district has a uniformly applied policy or practice of requiring such certifications. The college district may limit this requirement to certain job classifications and conditions, or it may have a broad policy, applicable to all employees. 29 C.F.R. § 825.312(a)–(b).

The college district must inform an employee of this requirement when it gives the employee an FML designation notice. If the college district will require that the certification specifically address the employee's ability to perform the essential functions of the employee's job, the college district must provide a list of essential job functions with the designation notice. 29 C.F.R. § 825.312(b), (d).

Failure to Return: The college district should state whether it intends to pursue benefits payments if an employee fails to return from leave. The FMLA permits the college district to seek reimbursement of health care premiums paid by the college district while the employee is on unpaid FML, if the employee is able but chooses not to return to work at the expiration of FML. 29 C.F.R. § 825.213.

Workers' Compensation

Workers' compensation is not a form of leave. It is an income replacement program. An employee may choose to use paid leave while absent as a result of a work-related injury or illness.

The college district may allow employees to use paid leave in fractional amounts to make up the difference between workers' compensation income benefits and pre-injury wages. This is referred to as "offsetting." If the college district chooses to allow offsetting, this decision must be reflected in local policy. Tex. Labor Code § 504.052; Tex. Att'y Gen. Op. No. JC-40 (1999).

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