however, the policy posted by the MDE is very different from the one available from MSBA. MSBA is hopeful of being able to collaborate with the MDE to move toward one policy again, but, until then, school districts will have to choose between the two policy approaches.

Please contact me with questions or concerns at cmiller@mnmsba.org or (800) 324-4459.

THE FOLLOWING TWO ARTICLES ARE TAKEN FROM *INQUIRY & ANALYSIS*, A PUBLICATION OF THE NATIONAL SCHOOL BOARDS ASSOCIATION (NSBA) FOR ITS "COUNCIL OF SCHOOL ATTORNEYS." THE ARTICLES ARE COPYRIGHTED AND PRINTED WITH PERMISSION FROM NSBA.

As regular readers of the MSBA Management Services Newsletter know, MSBA staff have been advising MSBA member school districts not to include "leave bank language" in their Master Agreements for years, and the following articles support that advice. Worth noting also is the fact that the public school districts in Minnesota are not the only ones having to deal with leave banks, and the information contained in the following articles should be carefully considered because it is equally applicable in Minnesota as it is in Missouri and Kentucky.

HOW HEALTHY IS YOUR SICK LEAVE POOL?

by Susan Goldammer, Missouri School Boards' Association, Columbia, Missouri

Sick leave pools and banks provide employees a type of short-term disability protection, theoretically without a monetary investment by the employee or the district. Although the private sector rarely provides this employee benefit, sick leave pools/banks are relatively common in the public sector and are, in some cases, allowed or even required by state statute.[1] However, due to collisions with a number of federal and state laws, many attorneys view sick leave pools/banks as a ripe source of litigation and liability. This article will help districts diagnose potential problems with sick leave pools/banks and discusses remedies.

What is a Sick Leave Pool?

Although there is no universal definition of a "sick leave pool," for the purposes of this article, it is an employee benefit where employees are allowed to donate paid leave days to a reserve for the use of all employees choosing to participate. Employees who are members of the pool may be granted paid lave days from the reserve in the event the employee is unable to work due to illness or injury and has used all of his or her accumulated paid leave days. Some sick leave pools allow for leave when a member of the employee's immediate family is ill or incapacitated as well. Sick leave banks are similar to sick leave pools except that employees granted leave from a bank are required to pay back the days taken, either by a withdrawal from salary or a donation of paid leave days when the employee accumulates more leave in the future.

Eligibility Issues

The largest concern by far is the potential for illegal discrimination when deciding whether an employee is eligible to draw leave from the pool/bank. To maintain the viability of the pool/bank, districts need to keep usage low. Districts attempt to do this by limiting the types of conditions that qualify for pool/bank days or by turning over the governance of the pools/banks to committees of employees who are members of the pool/bank, in hopes that those employees will discourage overuse or abuse of the pool/bank. However, the denial of leave from a sick leave pool/bank can be an adverse employment action,[2] which means that eligibility determinations can easily become the subject of a discrimination lawsuit.

Discrimination on the basis of a disability, in violation of the Americans with Disabilities Act (ADA) and Section 504 of the Rehabilitation Act of 1973, is a primary concern, particularly since these laws were recently amended to significantly broaden the definition of a "disability" to cover even more conditions.[3] Many pools/banks attempt to limit usage to "serious" or "catastrophic" conditions, without defining these terms, forcing those administering the program to decide which conditions qualify. Needless to say, such circumstances are breeding grounds for well-intentioned district staff to refuse this paid leave benefit to employees solely on the basis of their medical condition.

However, the ADA and Section 504 are not the only legal concerns. Many sick leave pools/banks explicitly prohibit employees from using pool/bank days for pregnancy-related absences, under the theory that pool/bank days should be reserved for extraordinary events and that pregnancies are so common they could easily bankrupt the reserve. These exclusions violate Title VII of the Civil Rights Act of 1964 (Title VII), as amended by the Pregnancy Discrimination Act of 1978, which states, "women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work . . . ."[4]

The method of pool/bank administration sometimes heightens the risk for discrimination as well. Many pools/banks are overseen by a committee made up of untrained, non-administrative employees who are members of the pool/bank. These committees review requests for leave and make eligibility

decisions. However, without legal guidance these committees could easily consider inappropriate factors when making a decision, such as the age, race, or gender of the employee, in violation of Title VII, Title IX of the Education Amendments of 1972, and the Age Discrimination in Employment Act.

Coordination with Workers' Compensation

Districts need to explicitly address in sick leave pool/bank policies whether employees are eligible when the illness or injury qualifies the employee for workers' compensation benefits. Allowing employees to collect both benefits could result in a windfall for the employee and a disincentive for the employee to return to work.[5] When making these decisions, districts should remember that workers' compensation awards are not taxable income, so even though the award may be less than the employee's gross wages, the net wages may not be very different.[6]

It is also a good idea to address situations where a workers' compensation award is being litigated. Ideally, the paid leave is conditionally provided, pending the result of the litigation. For example, in *Bailey v. Blumenthal*[7] the sick leave bank required employees involved in a contested workers' compensation claim to assign any award received to the bank.

Coordination with the Family and Medical Leave Act

Because sick leave pools/banks are typically activated within a few weeks of an employee's illness or injury, employees seeking additional paid leave may simultaneously qualify for protection under the Family and Medical Leave Act (FMLA). It is essential that the district's sick pool/bank policy coordinates with FMLA obligations.

Under the FMLA employees make take up to 12 weeks of unpaid leave in a 12-month period for a variety of reasons including because of his or her or an immediate family member's serious health condition. Before leave can be counted as FMLA leave, employers must notify the employee that the leave is designated and will be counted as FMLA leave. Unfortunately, the existence of additional paid leave under a sick leave pool/bank frequently results in delayed notification of leave being designated as FMLA. Many district administrators do not remember the FMLA – and the paperwork that goes with it – until after the employee has exhausted all paid leave options. Some administrators are also under the false assumption that the FMLA does not apply unless an employee explicitly requests it.[8] Needless to say, employees are more interested in paid leave options than unpaid FMLA leave and only consider FMLA entitlements after all paid leave resources are exhausted and the employee risks losing employment or health insurance benefits.

Although the employee is not typically harmed by this delay, the district may be. The district is subject to FMLA regulations – and at risk of an FMLA lawsuit – until the district has clearly designated and provided the employee his or her rights under the FMLA. After FMLA leave is exhausted, the district is free to rely on its own policies, not federal law, which means it benefits the employer to begin the FMLA clock ticking as soon as possible.

Further, if the district waits until all accumulated paid leave and pool/bank leave has been exhausted to designate leave as FMLA-qualifying, the district may have already given well over 12 weeks of paid leave to the employee. FMLA leave may be retroactively designated, but only in situations where the failure to timely designate "does not cause harm or injury to the employee."[9]

To avoid claims for additional leave and potential litigation over whether or not the employee suffered "harm," districts are better off starting the FMLA clock ticking at the beginning of the leave, as opposed to attempting to retroactively designate the leave. This means if a district has a sick leave pool/bank, administrators need additional training on identifying leaves that qualify for FMLA sooner and determining whether a pool/bank request qualifies as FMLA leave.

Collecting and Using Information

Many sick leave pool/bank policies require employees to disclose to the district information about the employee's illness or incapacity, some even going so far as to ask for medications the employee is taking, a list of the doctors the employee has seen, and medical files. Many of these pools/banks also require employees to agree to submit to an examination by a physician of the district's choosing or to sign a release so that the district can obtain even more information about the employee's medical problem. This proliferation of medical information is another source of potential liability.

FMLA

FMLA regulations are very specific as to the type of medical information that may be collected and prohibit employers from requesting more information than is allowed under the law to verify FMLA leave.[10] In addition, follow-up questions are prohibited except for purposes of clarification or authentication, and employers may only request a second opinion if the employer "has reason to doubt the validity of a medical certification."[11] Many sick leave pools/banks would clearly violate these standards in a situation where the employee is simultaneously eligible for FMLA protection and to apply for pool/bank days.

The good news is that the FMLA regulations do allow employers to request additional information if necessary for eligibility for paid leave in accordance with the district's policy – but only if the district "informs the employee that the additional information only needs to be provided in connection with" the

paid leave benefits – not for FMLA eligibility.[12] This means that district policies and forms should minimally clarify to employees that failure to provide medical information above and beyond what is allowed under the FMLA will not impact their FMLA rights. However, a wiser course of action, as discussed below, may be to piggyback sick leave pool/bank eligibility with the FMLA paperwork.

ADA

While districts may be able to escape liability under the FMLA, the ADA regulations also limit employer medical inquiries and examinations.[13] Although less specific than the FMLA regulations, Equal Employment Opportunity Commission (EEOC) guidance interpreting ADA regulations makes it clear that employers may only ask for documentation that is sufficient[14] to substantiate that a medical condition exists. Employers may only require an employee to see a physician of the employer's choice if the employee has provided insufficient documentation and has been given an opportunity to clarify the issue first.

Many sick leave pool/bank policies and related forms clearly violate this standard. Districts may want to simply rely on the FMLA process for both FMLA verification and sick leave pool/bank eligibility. This ensures compliance with both the FMLA and the ADA and minimizes paperwork for both the district and the employees, who in many cases are also eligible for FMLA protection.

GINA

Districts must ensure than any medical forms associated with sick leave pools/banks comply with the Genetic Information Nondiscrimination Act (GINA),[15] which prohibits employers from requesting genetic information from employees, with some exceptions. "Genetic information" includes family medical history as well as specific genetic tests. Although districts are typically not interested in this type of information, employees and their health care providers may inadvertently provide genetic information when filling out forms for FMLA and sick leave pool/bank eligibility. GINA regulations make it clear that employers will not be penalized if they inadvertently receive genetic information in the normal course of business in response to a lawful request for medical information.[16] Because the request for medical information must be "lawful," GINA is an additional incentive for the district to only collect medical information or require medical examinations in accordance with the FMLA and ADA regulations

To prevent inadvertent disclosures and to create a "safe harbor" for employers, the EEOC recommends that employers add specific language to medical forms to make it clear to the employee and the employee's physician that the district is not interested in genetic information.[17] All sick leave pool/bank medical forms should include the EEOC's suggested language.

Confidentiality of Information Collected

Once information is lawfully collected, there are legal concerns regarding which employees have access to the information. As stated previously, leaving eligibility decisions to committees is fraught with risk. Disclosing medical information to these groups may also violate the law. ADA regulations allow employers to make medical inquiries in some circumstances, but require that the information is kept confidential and is only provided, when appropriate, to supervisors and managers to facilitate accommodations, first aid and safety personnel if emergency treatment may be needed, and government officials investigating compliance with the law (the EEOC).[18] The FMLA and GINA regulations limit access to these same persons.[19] Unless these sick leave pool/bank committees rise to the level of supervisory staff, disclosure to these groups arguably violates the law.

Even if medical information is legally shared with committees administering sick leave pools/banks, it is not wise to do so. One of the many reasons medical information is kept confidential and separate from other information in personnel files is to eliminate the potential that employment decisions are made on the basis of this information. The more employees who have access to medical information, the easier it is for a disgruntled employee to claim that the medical information was inappropriately used and the more difficult for the district to prove otherwise.

Ending a Limitless Benefit

Some employees suffer from medical conditions from which they may never recover sufficiently to perform the essential functions of the job, and the availability of sick leave pool/bank days simply delays the inevitable termination date. These situations are complicated further when a sick leave pool/bank does not cap the number of days an employee may receive. Terminating an employee is always a litigation risk, but it becomes even more problematic when the district is forced to arbitrarily decide when benefits should end.

Ending the Pool/Bank

Many districts forget to address how to end or dissolve the pool/bank in the policy or collectively bargained agreement that created the benefit. Whether employees have a property right to the days contributed, or the monetary equivalent, is debatable. However, employees will certainly raise the issue if the pool/bank is ever dissolved or changed significantly.[20] To avoid future conflict, it is wise to add a

provision that explains how accumulated days will be distributed – or if they will be distributed – if the pool/bank ends.

Conclusion

Considering all the pitfalls discussed in this article, it is easy for attorneys to advise against sick leave pools/banks. But the political and practical reality is that many are already in existence and are difficult to end unless replaced with an equal – and likely costly – substitute. Therefore energy might be better spent on improving the existing pool/bank. The [suggestions] below [provide] a number of [ways] to accomplish this goal. Structuring sick leave banks to avoid the donor being taxed is another consideration; tax issues are discussed in the next article . . . .

Practical Solutions to Improve an Existing Sick Leave Pool/Bank

1. **Eliminate the committee or minimize its direct involvement.** Eligibility decisions should only be made by trained human resources staff, preferably in coordination with any FMLA paperwork. A committee of pool members may provide broad oversight of the policy and the number of days collected or remaining in the pool, but should not have access to the medical information of individual employees or involvement in the eligibility decisions.
2. **Exclude employees who qualify for workers' compensation benefits.** Also, explicitly address situations where these benefits are being litigated.
3. **Limit eligibility decisions to "serious health conditions" under the FMLA.** This further coordinates the pool/bank with the district's FMLA obligations and gives a relatively well-defined legal standard for eligibility that is already recognized under federal law.
4. **Require employees to take unpaid leave first.** The downside to relying on the FMLA definition of a "serious health condition" is that it is relatively easy for conditions to qualify for FMLA protection. Employees may abuse the pool/bank and ultimately bankrupt it. One solution is to require employees to not only exhaust their own paid leave, but also to take a week or more of unpaid leave before becoming eligible for pool/bank days. This discourages abuse and limits pool/bank days for longer-term illnesses without overtly discriminating based on the employee's medical condition.
5. **Rely on the FMLA eligibility forms.** By relying on the FMLA forms already in existence, the district prevents duplication of medical information, guards against excessive collection of medical information, and will likely provide more timely FMLA notice to employees.
6. **Add the EEOC-recommended language under the GINA regulations to all forms requesting medical information.**
7. **Cap the amount of leave one employee may utilize.** At some point in time, seriously ill or injured employees will need to transition to retirement, disability, or other social services. This cap can vary depending on an employee's years of service, but no sick leave pool/bank should offer limitless leave.
8. **Include a provision that addresses how the pool/bank will be dissolved if ever necessary.** Many districts now see the value of paid short-term disability insurance policies. Be prepared in case your district ever makes the transition.

[1]*See* Ala. Code 16-22-9 (2010) (must create sick leave bank if 10 percent of staff request); Alaska Stat. 14.14.105 (2010) (board may establish a sick leave bank); Ark. Code. Ann. 6-17-1208 (2010) and 6-17-1306 (2010) (district may establish a sick leave pool or bank); Fla. State. 1012.61 (2010) (district may establish a sick leave pool); Ga. Code Ann. 20-20850 (board may establish a sick leave bank or pool); Ky. Rev. Stat. Ann. 161.155 (2010) (board may create a sick leave bank); N.J. Stat. Ann. 18A: 30-10 (2011) (board may establish a sick leave bank if majority representatives of employees agree); N.C. Gen. Stat. 115C-336 (2010) (State Board of Education will adopt rules for the establishment of sick leave banks); Tenn. Code. Ann. 49-5-802-810 (2010) (Tennessee Teacher's Sick Leave Bank Act).

[2]*Castale v. Reo*, 522 F. Supp. 2d 420, 427 (N.D.N.Y. 2007); *Pfeiffer v. Lewis Cnty*. 308 F. Supp. 2d 88, 109 (N.D.N.Y. 2004).

[3]*See* ADA Amendments Act of 2008, P. L. 110-325, 122 Stat. 3553 (2008).

[4]42 U.S.C. 2000e(k.) For example, in *U.S. v. Board of Education of the Consolidated High School District 230*, 983 F.2d 790 (7th Cir. 1993), the court found the district's sick leave bank discriminatory on its face because it provided additional leave for "prolonged and extended catastrophic illness," but explicitly excluded pregnancy. The board had approved sick leave bank leave for a broad range of conditions such as cancer, gall bladder surgery, back strain, and a broken leg, but routinely denied claims for pregnancy-related absences.

[5]In *United Environmental Workers v. Buffalo Sewer Authority*, 115 A.D.2d 974 (N.Y. App. Div. 1985), the court upheld an arbitrator's award of sick leave bank days to an employee even though the employee collected workers' compensation benefits for those same days.

[6]*See* 26 U.S.C. 104(a)(1).

[7]No. CV020812552S, 2003 WI. 356777 (Conn. Super. Ct. Jan. 17, 2003).

[8]FMLA regulations make it clear that an employee "does not need to expressly assert rights under the Act or even mention the FMLA" to effectively provide notice to the district. 29 C.F.R. 825.301(b). The district has an affirmative obligation to designate leave taken as FMLA-qualifying and in situations where the employer does not know the reasons for the leave, the employer is required to ask more questions to determine if the FMLA is implicated. 29 C.F.R. 825.301(a).

[9]29. C.F.R. 825.301(d). According to the regulations, "harm" does not occur if the employee's serious health condition prevented the employee from returning to work, regardless of the designation. However, if the employee would have delayed a procedure or otherwise not taken leave had the employee known it would have reduced the FMLA entitlement for a later event, the employee may be able to show "harm." *See* 29 C.F.R. 825.301(3).

[10]*See* 29 C.F.R. 825.306(a). (b).

[11]29 C.F.R. 825.307(b).

[12]29 C.F.R. 825.306(c).

[13]*See* 42 U.S.C. 12112(d); 29 C.F.R. 1630.14(c).

[14]"Documentation is sufficient if it: (1) describes the nature, severity, and duration of the employee's impairment, the activity or activities that the impairment limits, and the extent to which the impairment limits the employee's ability to perform the activity or activities; and, (2) substantiates why the requested reasonable accommodation is needed." Equal Employment Opportunity Commission, Enforcement Guidance: Disability-Related Inquiries and Medical Examinations of Employees under the Americans with Disabilities Act (ADA), (last visited March 9, 2011) http://www.eeoc.gov/policy/docs/guidance-inquiries.html.

[15]42 U.S.C. 2000ff - 2000ff-11.

[16]29 C.F.R. 1635.8.

[17]"The Genetic Information Nondiscrimination Act of 2008 (GINA prohibits employers and other entities covered by GINA Title II from requesting or requiring genetic information of an individual or family member of the individual, except as specifically allowed by this law. To comply with this law, we are asking that you not provide any genetic information when responding to this request for medical information. 'Genetic information' as defined by GINA, includes an individual's family medical history, the results of an individual's or family member's genetic tests, the fact that an individual or an individual's family member sought or received genetic services, and genetic information of a fetus carried by an individual or an individual's family member or an embryo lawfully held by an individual or family member receiving assistive reproductive services." 29 C.F.R. 1635.8(b)(1)(i)(B).

[18]29 C.F.R. 1630.14.

[19]29 C.F.R. 825.500(g); 29 C.F.R. 1635.9(a)(2).

[20]*Chautauqua County Sheriff's Employee's Association v. Chautauqua Local 807*, 482 N.Y.S.2d 690 (N.Y. Sup. Ct. 1984) (when employees voted to be represented by a different union, court used equitable powers to order transfer of sick leave bank funds from the previous union to the new union).

"WHAT'S MINE IS YOURS": TAX CONSEQUENCES OF EMPLOYER-SPONSORED LEAVE-SHARING PLANS

by Josh Salsburey, Sturgill, Turner, Barker & Moloney, PLLC, Lexington, Kentucky

Beyond employee benefit and anti-discrimination laws, there is another area of potential liability that school districts must address when they establish a leave pool, leave bank, or other leave-sharing plan for their employees: taxes. It is no surprise to learn that donated leave time is taxable to *someone*. It may come as a surprise, however, to learn that, as a general rule, the Internal Revenue Service (IRS) considers the value of donated leave time to be "wages" and thus taxable income for *both* the donor *and* the recipient of such time. There are, however, a handful of specific exceptions to this rule that have been recognized by the IRS. Accordingly, in order to avoid unsavory audits or penalties for failing to make proper payroll withholdings, school districts must know the rules that govern what the IRS refers to as "employer-sponsored leave-sharing arrangements." This article addresses the basics of those rules as well as some other key considerations school districts should know.

Every Rule has its Exceptions

The general rule under federal tax law is that the assignment of a right to receive income is taxable to both the donor and the recipient.[1] In keeping with this rule, the IRS views donations of paid leave time from one employee to another as just such an assignment of income.[2] In other words, the IRS considers donated leave to be "wages" for both the donor employee and the recipient that are subject to applicable withholdings such as income tax, Social Security, Medicare, FUTA, and FICA, absent a specific exclusion in the Internal Revenue Code.[3] Nevertheless, the IRS does recognize a few specific exceptions to this rule under which donated leave is considered "wages" only for the recipient.

Medical Emergencies

Under this exception, the use of donated leave is used only for a medical condition of either the recipient or the recipient's family member that will require the prolonged absence of the recipient and result in a substantial loss of income to the recipient because the recipient will have exhausted all paid leave available apart from the leave-sharing plan.[4] The IRS has also recognized an employer-sponsored plan that defined "medical emergency" as a major illness or other medical condition, such as a heart attack or cancer, which requires a prolonged absence from work, including intermittent absences that are related to the same illness or condition.[5] Notably, the IRS has even indicated that a plan will still qualify for the "medical emergency" exception if it allows employees to use donated leave to cover extended time off following the death of a parent, spouse, or child.[6]

Major Disasters

Under this exception, donated leave is used only to cover time off needed by employees because they have been affected by a "major disaster" as declared by the President of the United States.[7]

Again, if a school district designs its leave-sharing plan to strictly limit the use of donated leave to conform to either or both of the exceptions discussed above, then the donated days will be considered wages and taxable income only in the hands of the recipient, rather than both the recipient and the donor.[8] Either way, the decision of whether to restrict the use of donated days to one of these exceptions will affect a school district's wage withholding practices and obligations. Thus, school districts must carefully and intentionally address the scope of permitted uses for donated days when establishing leave-sharing plans for their employees.

Other Considerations

Beyond the criteria for receiving donated leave, school districts must consider a number of other factors related to the taxation of leave-sharing plans.

First, sometimes school districts may not be able to design leave-sharing plans that qualify for one of the exceptions discussed above because state law may dictate terms and conditions for donation that are not limited to the scope of the exceptions recognized by the IRS.[9]

Second, school districts may need guidance on how to calculate the value of donated days for withholding purposes when the donor and recipient are paid at different rates. Fortunately, the IRS has provided such guidance in a Private Letter Ruling. According to the IRS, if a recipient employee receives paid leave hours from a donor employee with a different pay rate, the leave time is converted based on the recipient's pay rate so that the dollar value of the donated leave remains the same but the leave taken by the recipient is always paid at the recipient's regular rate of pay. Thus, the IRS has explained, if a donor is regularly paid at $15 per hour and donates eight hours of paid leave that is used by a recipient who is regularly paid at $10 per hour, the recipient will receive 12 hours of paid leave, paid at $10 per hour (eight hours x $15 equals a $120 value, and a $120 value divided by $10 per hour equals 12 hours).[10]

Third, donor employees cannot claim a deduction, expense, or charitable expense for the leave they donate.[11] Thus, unless a district's plan is designed to qualify for one of the exceptions discussed in this article, there may be little practical incentive for employees to participate in the plan.

Finally, simply limiting the use of donated leave to "medical emergencies" or "major disasters" may not be enough to ensure a leave-sharing plan qualifies for one of the exceptions discussed in this article. School districts should carefully review past IRS Revenue Rulings and Private Letter Rulings to examine the features of plans that have qualified (or not) for one of the exceptions discussed above.[12]

Conclusion

When establishing a leave bank, leave pool, or other leave-sharing plan, school districts cannot ignore the tax consequences that attach to donation of paid leave. To help ensure compliance with federal tax law and even to avoid unduly surprising well-intentioned donor employees, school districts should structure their leave-sharing plans to meet either or both of the exceptions discussed above.

[1]*See* I.R.S. Priv. Ltr. Rul. 152644-06 (Feb. 9, 2007); *Leave Donations May Be Taxable to Both Donor and Recipient*, Ideas and Trends (CCH Incorporated, Riverwoods, Ill.), Oct. 10, 2007, Issue No. 664 (cited herein as *"Leave Donations"*).

[2]*See* I.R.S. Priv. Ltr. Rul. 152644-06; *Leave Donations supra*, note 1.

[3]Rev. Rul. 90-29, 1990-15 I.R.B. 5; Priv. Ltr. Rul. 152644-06; *Leave Donations, supra* note 1; *The Tax Consequences of Employee Leave Donation Programs*. Wamer Norcross & Judd (June 2007), http://www.wnj.com/tax_consequences_of_employee_leave_donation_programs-June 2007 (cited herein as *"Tax Consequences"*).

[4]*See* Rev. Rul. 90-29.

[5]*See* I.R.S. Priv. Ltr. Rul. 152644.06.

[6]*See id*.

[7]*See id*.

[8]Failure to limit available uses under the plan to one or both of the exceptions discussed in this article could result in a determination that neither exception applies, regardless of a recipient's actual use of the

donated time. *See* I.R.S. Priv. Ltr. Rul. 152644-06; *Leave Donations, supra* note 1.

[9]*See, e.g.*, Ky. Rev. Stat. 161.155(7) and (8), providing that Kentucky school districts "may" adopt a plan for a sick leave "band" but also requiring school districts to establish a sick leave donation "program" that allows for donation under circumstances not necessarily limited to the exceptions discussed in this article.

[10]*See* I.R.S. Priv. Ltr. Rul. 152644-06.

[11]*See* Rev. Rul. 90-29; *Tax Consequences, supra* note 3.

[12]*See Tax Consequences, supra* note 3, for a good discussion of such features.