

Leaves and Absences

Starting Points

April 2009

Policy Service created this policy development toolkit in conjunction with TASB Legal Services and TASB HR Services and with input from the Texas Council of School Attorneys. The worksheet and explanatory materials will guide your district in reviewing and revising the district's leaves and absences policy, DEC(LOCAL).

Several factors influenced the development of the **Starting Points**. In 2008, the [National Defense Authorization Act of 2008](#) amended the [Family and Medical Leave Act \(FMLA\)](#) to permit an employee to take up to 12 weeks of FMLA leave because of a "qualifying exigency" caused by a spouse, child, or parent's active military duty or deployment. The Act also established servicemember family medical leave, which allows an employee to take leave to care for a servicemember who has incurred a serious injury or illness in the line of duty.

In early 2009, the Department of Labor released comprehensive new [FMLA regulations](#) addressing the new military leave provisions and many other aspects of the FMLA. The new regulations constitute a major overhaul of the previous federal rules. The impact of these new laws resulted in significant revisions to the structure of the leaves and absences material at Update 85. In general, the material previously at DEC(LEGAL) was split into three codes: DEC(LEGAL), Leaves and Absences; DECA(LEGAL), Family and Medical Leave; and DECB(LEGAL), Military Leave. All (LOCAL) provisions pertaining to your leaves and absences program will still be housed in one policy code, DEC(LOCAL).

The **Leaves and Absences Starting Points** incorporates changes from these new laws, as well as editorial amendments that make the policy easier to read and administer, derived from district suggestions over the years. In light of this changing background, the district should review its practices regarding leaves and absences to determine whether those choices are still appropriate, carefully considering the effect leave options might have on employee morale, student academic performance, and the district's budget.

Even if your district does not amend its existing practices regarding leaves and absences, it is crucial that you complete the worksheet so that your policy will reflect the changes in law.

Please Note: Because leave provisions are incorporated into employee contracts, TASB attorneys caution that a district should not reduce an employee's leave entitlement after the penalty-free resignation date (45 days before the first day of instruction). Please contact the district's attorney or TASB Legal Services if you have questions.

Recommended Local Policy Provisions

The issues outlined in each of the items below are addressed in the corresponding section and block of the policy development worksheet.

Worksheet
Cross-reference

Section I—Definitions and Administration

Block 1 **DEFINITIONS.** Since the Education Code grandfathers previously accumulated state sick leave—which must be used in accordance with the old statute—districts should retain the definitions of "immediate family" and "family emergency" for the use of old state sick leave.

Block 1

- **FAMILY.** This definition will apply to state sick leave accrued before 1995, state personal leave, and local leave. The district should modify the definition to reflect local practice. Please note that, for FMLA purposes, *spouse*, *parent*, *child*, and *next of kin* are defined by statute and regulations. See DECA(LEGAL). Although the district can expand these

definitions to make FMLA leave available under more circumstances than those required by law, the district cannot narrow the definitions in the law.

Block 1 ▪ **FAMILY EMERGENCY.** This term is defined for purposes of state sick leave accrued before 1995.

Block 1 ▪ **WORKDAY.** This term is defined for purposes of accrual, use, and recording of leave. The recommended definition is intended to reflect the requirement that all employees, including those who work only part-time (e.g., bus drivers) receive state personal leave as required by statute. For example, a bus driver who is regularly scheduled four hours per day is entitled to the equivalent of five four-hour workdays of state personal leave each year.

Block 2 ▪ **CATASTROPHIC ILLNESS OR INJURY.** This definition is provided for leave donation programs, such as sick leave banks and sick leave pools. The district may choose to use this term for extended sick leave and similar programs. **If the district does not have a leave donation or similar program, the district should omit this language.**

TASB attorneys recommend this definition of *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).

Blocks 3–4 **AVAILABILITY.** The local policy should specify when leave will be available for use. TEA takes the position that state personal leave must be available for use at the beginning of the school year: employees are not required to accrue state personal leave before they can use it. By local policy, the board may choose whether to advance *local* leave, or allow local leave to be used only as it is earned.

Block 5 **EARNING LEAVE.** Because paid leave is available at the beginning of the school year, the policy addresses what happens if an employee leaves the district before he or she has actually earned the leave used. We have removed the standard accrual rate from our recommended language so that districts can align accrual with local pay practices. Accrual rates should be established in administrative regulations.

Block 6 **RECORDING.** Most districts require employees to use leave in half- and whole-day increments. This practice stems from rules for the former state sick leave and is appropriate for instructional positions that require substitutes. 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 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 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. In any case, the 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.

Block 7

ORDER OF USE. The district may wish to establish in policy the order in which the different leave entitlements are used. We recommend that compensatory time be used before available leave. In addition, local policy might require:

- The use of local leave **before** state leave (either state sick leave accrued before 1995 or state personal leave), thereby protecting the employee's accumulated state leave that is transferable among districts.
- The use of state sick leave **before** state personal leave, thereby preserving the employee's personal leave, which can be used for more reasons than state sick leave.

If the district has extended sick leave, a sick leave pool, or a sick leave bank, be sure to include those in the worksheet list.

Blocks 8–9

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 district may require an employee to use paid leave concurrently with unpaid leave. This allows the 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.

The district may require an employee to use compensatory time concurrently with unpaid FMLA leave. Former FMLA rules prevented this practice. New FMLA rules allow the district or the employee to choose to run compensatory time concurrently with unpaid FMLA leave.

Included in the worksheet are the two most common ways districts run leave concurrently. In Alternative #1, temporary disability leave will run at the same time as all other leave and compensatory time. In Alternative #2, temporary disability leave does not begin to run until all paid leave and compensatory time is exhausted, which results in a longer period of time for which the employee may be absent from work.

Finally, the district may run certain leaves concurrently with a workers' compensation absence, including FMLA leave and temporary disability leave. The Education Code does not give districts a choice regarding concurrent use of assault leave, which necessarily runs concurrently.

Block 10

MEDICAL CERTIFICATION. The local policy should specify when and what type of medical certification is required to confirm the need for absence. We recommend that the district 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. In all cases, medical certification should be made by a health care provider, as that term is defined by the FMLA.

A frequent issue is whether the district should continue to pay its share of employee insurance premiums while an employee is on leave. Most districts discontinue their share during unpaid, non-FMLA leave, and this decision is addressed at CRD(LOCAL). A cross-reference is included at DEC(LOCAL) to provide guidance to leave administrators.

Section II—State Personal Leave

- Block 1 **STATE PERSONAL LEAVE.** Every district employee is entitled to five days of state personal leave per year. There is no limit on accumulation and state personal leave is transferable among districts. State law prohibits a board from restricting the purpose for which leave may be used. A board may, however, adopt a policy regulating the manner in which state personal leave is used. To ensure equitable administration of the program, we recommend that local policy differentiate between two basic uses of state personal leave:
- Blocks 1–2
- ***Non-discretionary:*** Non-discretionary use is leave for the employee’s own illness or for family illness, emergency, or death in the employee’s family (the reasons for which state sick leave may be used). Reasons for non-discretionary leave allow very little, if any, advance planning.
- Some districts also allow non-discretionary use for well-baby care within the first year after a child’s birth, adoption, or placement. Please indicate on the worksheet the district’s choice regarding this issue. If the district does designate this type of leave as non-discretionary, these absences will not be subject to local limits, such as restrictions on duration of leave.
- Block 3
- ***Discretionary:*** Discretionary use is leave that is taken at the employee’s discretion and that may usually be scheduled in advance. The board may establish criteria for the use of discretionary leave to minimize the impact on the educational program and other district operations, as discussed below.
- Blocks 3–4 **LIMITATIONS.** Local policy should address any limitations on use of discretionary leave. Limitations might include:
- Block 3
- ***REQUEST FOR LEAVE.*** Requiring advance notice of discretionary leave so principals and other supervisors may arrange for substitutes.
- Block 4
- ***DURATION OF LEAVE.*** Setting reasonable limits on the number of consecutive days of personal leave that may be taken for discretionary reasons. The commissioner has approved local policies that limit the use of discretionary leave to three or more consecutive days. **If the district does not limit the number of consecutive days of discretionary leave that an employee may take, the district should indicate on the worksheet that this provision needs to be deleted.**

Any local limitations should be reasonable. A board’s ability to regulate use of state personal leave is not unlimited. The commissioner has stated that a policy that makes it difficult or impossible for employees to use their yearly allotment of leave would not be a legitimate use of policy-making authority.

Section III—Local Leave

- Blocks 1–4 **LOCAL LEAVE.** If the district provides local leave in addition to state personal leave, those details should be included in the 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.

Should your district provide other leave benefits, such as extended sick leave, sick leave pools, or a sick leave bank, please refer to sample text provided on the Supplemental Worksheet.

Section IV—Family and Medical Leave

Blocks 1–4

FAMILY AND MEDICAL LEAVE. All public employers are subject to the Family and Medical Leave Act (FMLA), but only employees in districts with at least 50 employees may be eligible for FMLA benefits. A board in a district with less than 50 employees may choose to extend FMLA benefits to employees. Regardless of the eligibility status of the employee, *all* districts must comply with the general notice requirement in DECA(LEGAL).

[If your district has fewer than 50 employees and has not extended FMLA benefits to employees, proceed to TEMPORARY DISABILITY LEAVE in Section V of the worksheet.]

If the district has 50 or more employees or has less than 50 employees but extends FMLA benefits, the local policy should reflect the district’s decisions regarding the following:

- Block 1
 - ***TWELVE-MONTH PERIOD.*** The 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. Your district may choose to use the 12-month period reflected in current policy, or may choose another option listed on the worksheet. If the district decides to change to a different 12-month period, effective with this revised policy, the district must provide employees with 60 days’ advance notice of the change and a transition period.
- Block 2
 - ***COMBINED LEAVE FOR SPOUSES.*** The district should decide whether to limit spouses to a combined total of 12 weeks of leave. The FMLA permits the district to limit a married couple who works for the 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 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 district may limit both spouses to a combined total of 26 weeks of leave.
- Block 3
 - ***INTERMITTENT OR REDUCED SCHEDULE LEAVE.*** The 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 district.
- Block 4
 - ***CERTIFICATION OF LEAVE.*** The district should decide whether and when it will require certification of the need for leave. Before designating an absence as FML, the district may require certification of the need for leave. Language in the worksheet reflects this option. For example, the 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.

- Block 4
- ***FITNESS-FOR-DUTY CERTIFICATION.*** The district should specify whether and when it will require return to work certification. The district may not require an employee to provide a fitness-for-duty certification before resuming work unless the district has a uniformly applied policy or practice of requiring such certifications. The district may limit this requirement to certain job classifications and conditions, or it may have a broad policy, applicable to all employees. Included in the worksheet is recommended language for a uniform policy.

The district must inform an employee of this requirement when it gives the employee an FML designation notice. If the district will require that the certification specifically address the employee's ability to perform the essential functions of the employee's job, the district must provide a list of essential job functions with the designation notice.

- Block 4
- ***END OF SEMESTER LEAVE.*** The district should state whether it will exercise its options regarding end of semester leave. As a rule, the district may not require an employee to take more FML than the employee needs. The FMLA recognizes exceptions where instructional employees, such as teachers, take leave near the end of a semester. In certain cases, the district may require the teacher to take leave until the end of the semester. The worksheet language incorporates these exceptions.

- Block 4
- ***FAILURE TO RETURN.*** The district should state whether it intends to pursue benefits payments if an employee fails to return from leave. The FMLA permits the district to seek reimbursement of health care premiums paid by the 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. Language in the worksheet reflects this option.

Section V—Temporary Disability Leave

- Block 1
- TEMPORARY DISABILITY LEAVE.** A full-time educator is entitled to up to 180 calendar days of temporary disability leave (TDL). If your district extends TDL to employees whose positions do not require certification, the district should indicate those positions in local policy. If the district provides more than 180 calendar days of TDL, adjust the worksheet text accordingly.

Section VI—Workers' Compensation

- Blocks 1–2
- 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. However, an employee who uses paid leave may not receive workers' compensation wage benefits concurrently, except as described below.

- Block 2
- ***PAID LEAVE OFFSET.*** The 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 district chooses to allow offsetting, this decision must be reflected in local policy.

Section VII—Miscellaneous

- Block 1
- COURT APPEARANCES.** The district may not discharge, discipline, or penalize an employee who is absent to comply with a valid subpoena to appear in a civil, criminal, legislative, or administrative proceeding. As addressed in DEC(LEGAL), absences for jury duty are with no loss of pay or reduction in leave.

Supplemental Local Policy Provisions

Along with the policy text above, we have developed a supplemental worksheet of optional provisions pertaining to extended sick leave, sick leave pools, sick leave banks, annual reimbursement of leave, and reimbursement of leave upon separation. These provisions will not be appropriate for every district. Since many districts use one or more of these concepts, however, the enclosed samples may serve as the basis for policy text. Please consider these provisions carefully, complete only the portions of the worksheet that are applicable to your district, and review the provisions with the district's attorney.

Section VIII—Extended Sick Leave

Blocks 1–5

EXTENDED SICK LEAVE. Extended sick leave is a leave safety net that districts commonly use. The extended sick leave sample text presents the major choices for districts that offer this type of leave. 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 a school 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.

Section IX—Sick Leave Pool

Blocks 1–4

SICK LEAVE POOL. Many districts 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 sample text requires the superintendent or designee to address through 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.

Section X—Sick Leave Bank

Blocks 1–4

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 donate leave to the bank to become eligible members. Once again the sample text requires the superintendent or designee to address 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.

Section XI—Annual Reimbursement of Leave

Blocks 1–3

ANNUAL REIMBURSEMENT OF LEAVE. For districts that reimburse individual employee leave on an annual basis, we have created text that outlines the general process. The sample text identifies which employees are eligible for reimbursement, and whether state leave, local leave, or both are reimbursed. The sample policy text does not include the rate at which leave

will be reimbursed, instead requiring the board to set the rate periodically. Some boards will set the rate annually.

The board must decide whether to reimburse state leave, local leave, or both. In making this decision, the board should be aware of limits on reimbursement of state leave. First, TEA has taken the position that an employee may “repurchase” reimbursed state leave. Under this interpretation, an employee may access reimbursed leave if the employee pays the district back. Second, reimbursed state leave remains available to the employee outside of the district. Because state leave transfers to other Texas districts and education service centers, the employee may access reimbursed leave if the employee accepts employment with another district or with a service center. Local leave is not subject to these limits. Accordingly, employees do not have a right to repurchase or transfer reimbursed local leave.

Section XII—Reimbursement of Leave Upon Separation

Blocks 1–3

REIMBURSEMENT OF LEAVE UPON SEPARATION. Districts use reimbursement of leave provisions to reward employee tenure and encourage appropriate use of leave during employment. For a district that reimburses leave for an employee who is voluntarily separating from employment—i.e., the employee is not being discharged—we have developed text addressing the major issues. The sample text contains a notification provision that requires employees to give advance written notice of resignation for the purpose of discouraging last-minute resignations. If the district requires an employee to have a minimum number of years of service to be eligible, that provision may be incorporated into the text. Some districts also require an employee to have a minimum number of days of leave available, to reward appropriate use of leave. Once again, districts must decide whether state leave, local leave, or both will be reimbursed, and the board must periodically establish the rate at which leave will be reimbursed.

The 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 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 worksheet includes a provision clarifying that the reimbursement provisions apply beginning with the original effective date of the program. Alternatively, the district could specify in the policy the date on which the reimbursement program first became effective.

Section XIII—Neutral Absence Control Policy

Block 1

NEUTRAL ABSENCE CONTROL POLICY. A neutral absence control policy is simply one in which the district automatically terminates an employee who has exhausted all of his or her leave. The district does not look to the reason that the employee has used up all of his or her leave. It is a policy the district applies neutrally. Exhaustion of all leave automatically results in termination proceedings. Because we recommend the district adopt such a provision only after working with the district’s attorney, no sample text has been included in this worksheet.

If the district has a neutral absence provision in its current policy, please include that text in your worksheet. If the district is considering adopting such a provision, please consult the district's attorney.

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