

Solutions to five common problems involving unpaid leaves of absence

By the New York State
Association of School Attorneys

On any given workday, most school districts will have at least one employee out on an unpaid leave of absence under the federal Family and Medical Leave Act of 1993 (FMLA). Districts must review each request carefully to ensure compliance with not only FMLA, but also the Americans with Disabilities Act of 1990 as amended by the ADA Amendments Act of 2008 (collectively referred to as ADA). As if that were not daunting enough, districts must also be sure to comply with any applicable district policies, collective bargaining agreements and employment contract provisions regarding leave. Even small mistakes can have major legal and financial consequences for districts and employees alike. An organized approach may help to avoid the most common – and costly – errors. Here's how to solve five common problems.

1. Problem: Your district has outdated or inadequate FMLA documents.

Solution: Use model notices and forms.

Generally, FMLA requires school districts and other covered employers to grant up to 12 weeks of unpaid leave to eligible employees for certain medical or family-related reasons during a designated 12-month period. Employees are eligible if they have been employed for at least 12 months and have worked at least 1,250 hours within the 12 months immediately preceding commencement of leave.

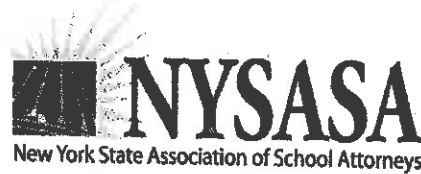
Employers must provide several notices to employees. For example, employees must display a general FMLA notice (an "FMLA poster"), notify employees of their FMLA rights (either in an employee handbook or other writing), notify requesting employees of whether they are eligible to request FMLA leave, and notify employees of whether their requested leave will be designated as FMLA leave. Be sure that your district's forms and notices are up-to-date. The U.S. Department of Labor has model forms to help districts provide all required notices, which are available at www.dol.gov/whd/forms.

Disabled employees who are not covered by FMLA leave or have exhausted their FMLA entitlement still may be entitled to reasonable accommodations, including unpaid leave, under ADA. The U.S. Equal Employment Opportunity Commission (EEOC) and Civil Rights Division of the U.S. Department of Justice have model notices and forms to help districts meet the ADA notice requirements, which include publicizing the designated ADA coordinator(s) and ADA grievance procedures. These models are available at www.eeoc.gov/employers and www.ada.gov/pccatoolkit/toolkitmain.htm. Have your school attorney review all ADA notices, policies, procedures and forms to ensure compliance with ADA.

2. Problem: Your district has inadequate information to respond to leave requests.

Solution: Require reasonable medical documentation.

Under both FMLA and ADA, employees' oral requests for leave and/or any other reasonable accommodations can never be ignored. In addition, employees need not mention FMLA or ADA by name. On balance, under both laws, the district may – and should – ask employees to submit their request in writing or complete a request form and provide appropriate medical documentation. A



model FMLA Medical Certification Form for both employees and qualifying family members is available from the U.S. Department of Labor at www.dol.gov/whd/forms.

In addition, the district may require that the need for FMLA leave be supported by a medical certification issued by a health care provider. An employee's failure to provide such information upon request may result in lawful denial of FMLA protection. If the district finds that the certification is deficient, the district must notify the employee and provide a reasonable amount of time to cure any deficiencies. When a district has reason to doubt the validity of the medical certification, the district may require a second or third medical opinion at district expense.

Similarly, under ADA, the district may ask employees to submit reasonable medical documentation of the alleged disability and functional limitations to determine whether the employee has a covered disability and whether any reasonable accommodations are required. The district may require only documentation that is needed to establish that the employee has a covered disability, and that the disability necessitates a reasonable accommodation.

The district may also require that the documentation regarding the alleged disability and functional limitations comes from an appropriate health care or rehabilitation professional. To determine whether an individual has a covered disability, all pertinent evidence – including any information as to whether the individual has or had a "serious health condition" under FMLA – should be considered.

The district should always meet with the employee to engage in an "interactive process" of discussing whether and how the alleged disability may require an accommodation. Records should memorialize this "interactive process," including the various accommodation options that were discussed. Such records may help the district withstand future litigation and perhaps avoid it altogether.

3. Problem: You are unsure as to whether your employee's medical issue is covered.

Solution: Know the definitions of a "serious health condition" and "disability."

Under FMLA, a "serious health condition" is "an illness, injury, impairment or physical or mental condition" that involves hospitalization or other inpatient care or continuing treatment by a health care provider. Common serious health conditions that qualify for FMLA leave include: pregnancy; inpatient care at a hospital; incapacity that renders the employee or family member unable to work or attend school for more than three consecutive days and have continuing medical treatment; and chronic conditions that cause occasional periods when the employee or family member is incapacitated and requires treatment by a health care provider at least twice a year.

Under ADA, the term "disability" means any of the following:

- A physical or mental impairment that substantially limits one or more of a person's major life activities (e.g., caring for one's self, performing manual tasks,

walking, seeing, hearing, speaking, breathing, learning, working, eating, sleeping, standing, lifting, bending, reading, concentrating, thinking, communicating and the operation of a "major bodily function" as defined by ADA).

- Having a "record" of a substantially limiting impairment.
- Being "regarded as" having an impairment.

Some "serious health conditions" under FMLA may also be "disabilities" under ADA (e.g., cancer or a serious stroke). Others may not, either because the serious health condition is not a physical impairment (e.g., pregnancy) or the physical impairment is not substantially limiting (e.g., a minor broken bone). When in doubt, consult your school attorney.

4. Problem: When a dispute arises, your district lacks documentation.

Solution: Create and retain careful records.

Districts must carefully maintain files of forms, correspondence and records (paper or electronic). Pertinent oral discussions must be memorialized.

Under FLMA, district records regarding employee leave, absences, hours worked, scheduling and requests for leave, including FMLA leave, must be retained for at least six years. Districts may wish to retain these records longer, (e.g., up to six years after employment ends), especially if such records were used in any disciplinary or other proceedings.

Under ADA, records must be retained for at least three years after any reasonable accommodations end. Districts may wish to retain ADA records longer in many cases, especially if such records were used in any employment-related actions.

5. Problem: Your employee has exhausted FMLA leave but cannot return to work.

Solution: Consider ADA and then consult your attorney.

When an employee has exhausted FMLA leave, he or she may be entitled to additional medical leave under ADA unless – or until – it imposes an undue hardship upon the district. To determine whether an undue hardship exists, consider the district's overall financial resources and ability to continue carrying out its educational mission, among other things. A request for medical leave as an ADA accommodation is more likely to be an undue hardship when the employee would be extremely difficult to replace or does complex work that would be extremely difficult to redistribute among other employees. Districts may consider the impact on its operations caused by the employee's initial 12-week absence together with the ADA undue hardship factors.

What if an employee is not eligible for – or has exhausted – FMLA leave and cannot return to work? When the employee is not entitled to additional leave under ADA, the district may – and should – explore its options of either imposing discipline for excessive absenteeism or terminating employment. Prior to doing so, review all relevant policies, procedures, employment contracts and past practices. As always, when in doubt, consult your school attorney.



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